
CONSTITUTIONAL LAW — FIRST AMENDMENT — FIFTH CIRCUIT CREATES CIRCUIT SPLIT BY FINDING A LEGISLATURE’S CENSURE CAN VIOLATE THE FIRST AMENDMENT. — *Wilson v. Houston Community College System*, 955 F.3d 490 (5th Cir. 2020).

The internal disciplinary practices of legislatures have a long history rooted in the Anglo-American tradition of legislative independence. One disciplinary measure is a reprimand, typically called a “censure,” which entails passing a resolution that publicly condemns a member’s conduct. Following the 2021 Capitol riots, the Virginia Senate censured state senator Amanda Chase for referring to the rioters as “patriots who love their country,” a move she argued violated the First Amendment.¹ Until recently, the state senator’s argument would have lacked support in case law, as courts had uniformly found that the First Amendment did not restrict legislatures’ authority to censure.² However, in *Wilson v. Houston Community College System*,³ the Fifth Circuit created a circuit split when it held that a legislative body’s censure of a member can give rise to an actionable First Amendment claim.⁴ Historical analysis of the common law disciplinary authority of legislatures and the authority’s relationship with legislative immunity lends context to the dispute. While it remains unclear when a legislature’s discipline violates the First Amendment, courts finding that censures of speech are unconstitutional would disrupt centuries of practice.

Under Texas law, the Houston Community College System (HCC) is a “governmental agency.”⁵ HCC’s board, comprised of publicly elected trustees, has statutory authority to govern through orders and resolutions as well as to adopt rules and bylaws “as it deems advisable.”⁶ After trustee David Wilson disagreed with the majority’s funding decisions, he publicly criticized his fellow trustees through automated phone calls, a website, and local radio,⁷ accusing them of failing to represent their constituencies.⁸ Adding to the tension, Wilson hired private investigators to surveil HCC and a fellow trustee at her residence.⁹ In response,

¹ Sarah Rankin & Denise Lavoie, *Virginia Sen. Amanda Chase Sues over Being Censured*, ASSOCIATED PRESS (Feb. 1, 2021), <https://apnews.com/article/censures-lawsuits-virginia-75977d7351bf4719e822b782d54ca17e> [https://perma.cc/B7HW-SKHB].

² See, e.g., *Phelan v. Laramie Cnty. Cmty. Coll. Bd.*, 235 F.3d 1243, 1247 (10th Cir. 2000); *Zilich v. Longo*, 34 F.3d 359, 363–64 (6th Cir. 1994); see also *Whitener v. McWatters*, 112 F.3d 740, 745 (4th Cir. 1997); cf. *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 546 (9th Cir. 2010) (relying on *Phelan* and *Zilich* to analyze another retaliatory measure).

³ 955 F.3d 490 (5th Cir. 2020), *reh’g en banc denied*, 966 F.3d 341 (5th Cir. 2020).

⁴ See *id.* at 499.

⁵ *Id.* at 493 n.1 (quoting TEX. LOC. GOV’T CODE ANN. § 271.003(4), (9) (West 2019)).

⁶ TEX. EDUC. CODE ANN. § 130.082(d)–(f) (West 2019).

⁷ *Wilson*, 955 F.3d at 493.

⁸ Appellant’s Brief at 13, *Wilson*, 955 F.3d 490 (5th Cir. 2020) (No. 19-20237).

⁹ *Wilson*, 955 F.3d at 493.

the Board censured Wilson, denouncing his recent behavior as against HCC's interests and violative of bylaws, including one about "respect for . . . collective decision-making."¹⁰ Wilson sued HCC under 42 U.S.C. § 1983, alleging that the censure violated his right to free speech.¹¹

The Southern District of Texas dismissed the claim.¹² Judge Hoyt relied on the Tenth Circuit's decision in *Phelan v. Laramie County Community College Board*,¹³ which contained facts "analogous" to those at bar.¹⁴ In *Phelan*, a publicly elected trustee opposed majority initiatives in a manner that others found "inappropriate."¹⁵ The board censured the trustee, declaring that her conduct violated its ethics policy about respect for majority decisions.¹⁶ The *Phelan* court reasoned that because the censure did not interfere with the trustee's "opportunities to speak" or her ability to "perform[] her official duties," it did not constitute a "penalty" and merely amounted to the majority "voic[ing] its opinion."¹⁷ On those grounds, the *Phelan* court found that the censure did not infringe on First Amendment rights.¹⁸ Following *Phelan*, Judge Hoyt held that Wilson's free speech rights were not injured.¹⁹

The Fifth Circuit reversed and remanded. Writing for the panel, Judge Davis²⁰ first found that Wilson had standing since he had alleged that the censure retaliated against an exercise of free speech rights, causing him "mental anguish."²¹ Next, the panel determined that the censure, as alleged, was actionable.²² The panel declared that the district court "improperly endorsed" the Tenth Circuit's decision in *Phelan* by "ignoring" Fifth Circuit cases in which reprimands of "elected official's political speech" triggered First Amendment scrutiny.²³

The panel pointed to two Fifth Circuit cases in which a judicial ethics commission reprimanded elected judges for speech it feared could

¹⁰ Appellant's Brief, *supra* note 8, at 14; see *Wilson*, 955 F.3d at 493–94.

¹¹ *Wilson*, 955 F.3d at 494. HCC moved to dismiss, challenging Wilson's Article III standing and whether he had stated an actionable claim. *Id.*

¹² *Wilson v. Hous. Cnty. Coll. Sys.*, No. 18-CV-00744, 2019 WL 1317797, at *3–4 (S.D. Tex. Mar. 22, 2019).

¹³ 235 F.3d 1243 (10th Cir. 2000).

¹⁴ *Wilson*, 2019 WL 1317797, at *3 ("[T]he court's reasoning in *Phelan*, is instructive here.").

¹⁵ *Phelan*, 235 F.3d at 1246.

¹⁶ *Id.* at 1245–46.

¹⁷ *Id.* at 1248 (citing *Zilich v. Longo*, 34 F.3d 359, 364 (6th Cir. 1994)).

¹⁸ *Id.*

¹⁹ *Wilson*, 2019 WL 1317797, at *3–4. Judge Hoyt dismissed on the grounds that Wilson lacked standing. *Id.* It is worth noting that the *Phelan* court found the plaintiff's allegations were sufficient for standing but not sufficient to establish a First Amendment violation. *Phelan*, 235 F.3d at 1247 n.1.

²⁰ Judge Davis was joined by Judges Smith and Stewart.

²¹ *Wilson*, 955 F.3d at 495–96 ("[A] retaliatory action resulting in a chilling of free speech constitutes an injury in fact." *Id.* at 495 n.21).

²² *Id.* at 496, 499.

²³ *Id.* at 497. The panel emphasized the importance of elected officials speaking on matters of public concern. *Id.* (citing *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966)).

have impaired the public's perception of judicial impartiality.²⁴ The panel reasoned it "matters not" that those cases involved *judges* rather than *legislators*, because judges are still "political actors."²⁵ The precedent was viewed as establishing that "a reprimand against an elected official for speech addressing a matter of public concern" is actionable.²⁶ Here, the panel found that Wilson was censured in part for his criticisms on matters of public concern, and thus his claim was actionable.²⁷ In contrast to the *Phelan* court's position that a censure does not constitute a penalty, the panel viewed a formal reprimand as punitive "by its very nature," as it represents the culmination of a disciplinary process.²⁸

In addition, the panel rejected HCC's argument that the Board, as "a legislative body," had "a right to censure" Wilson without creating liability.²⁹ The panel acknowledged the doctrine of legislative immunity but noted it shields *legislators*, and Wilson sued HCC, a *local government body*, to which common law immunities do not apply.³⁰

Subsequently, the Fifth Circuit denied a petition to rehear the case en banc with a divided 8–8 vote.³¹ Dissenting, Judge Jones³² asserted that the decision was at odds with sister circuits whose "application of true First Amendment principles put [the panel's] to shame."³³ She argued a censure without a tangible penalty is simply an "expression"³⁴ that cannot "compel" or "suppress" speech.³⁵ Judge Jones also claimed that the panel erred in relying on precedent involving judges, as judges' and legislators' public roles are fundamentally different.³⁶ She suggested that the decision "threatens to destabilize legislative debate" and that these political disputes would lack "manageable legal standards."³⁷

²⁴ See *id.* at 497–98. In *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990), the Fifth Circuit applied the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), for public employees; in *Jenevein v. Willing*, 493 F.3d 551 (5th Cir. 2007), the Fifth Circuit opted for strict scrutiny, reasoning that the *Pickering* test did not apply to *elected officials*. See *Wilson*, 955 F.3d at 497–98.

²⁵ *Wilson*, 955 F.3d at 499 (quoting *Jenevein*, 493 F.3d at 560).

²⁶ *Id.* at 498.

²⁷ *Id.* at 498–99.

²⁸ *Id.* at 498 (quoting *Colson v. Grohman*, 174 F.3d 498, 512 n.7 (5th Cir. 1999)).

²⁹ *Id.* at 499.

³⁰ *Id.* at 500; see also *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 701 (1978). HCC cited two cases not reliant on immunity, but the panel distinguished their facts. *Wilson*, 955 F.3d at 499–500.

³¹ *Wilson v. Hous. Cnty. Coll. Sys.*, 966 F.3d 341, 341 (5th Cir. 2020) (denying petition for rehearing en banc).

³² Judge Jones was joined by Judges Willett, Ho, Duncan, and Oldham.

³³ *Wilson*, 966 F.3d at 342–43 (Jones, J., dissenting from the denial of rehearing en banc) (explaining and endorsing the Tenth Circuit's *Phelan* decision and the Sixth Circuit's *Zilich* decision).

³⁴ *Id.* at 343 (quoting *Zilich v. Longo*, 34 F.3d 359, 363–64 (6th Cir. 1994)).

³⁵ *Id.* at 342 (quoting *Phelan v. Laramie Cnty. Cnty. Coll. Bd.*, 235 F.3d 1243, 1247 (10th Cir. 2000)).

³⁶ *Id.* at 344. She suggested legislators' discipline ultimately "resides in the ballot box." *Id.*

³⁷ *Id.* at 342. Judge Ho also filed a dissent in which he declared that "[t]he First Amendment guarantees freedom of speech, not freedom from speech," implying he viewed censures as a form of speech. *Id.* at 345 (Ho, J., dissenting from the denial of rehearing en banc).

In *Wilson*, the Fifth Circuit created a circuit split when it held that a legislative body's censure can give rise to an actionable First Amendment claim under § 1983.³⁸ The precedent creates uncertainty about longstanding practices that are prevalent in local government and raises questions about the underlying constitutionality of incidents at higher levels of government,³⁹ like the censure of a state senator for calling the Capitol rioters "patriots." Historical analysis of the practice at issue in *Wilson* contextualizes these disputes and may help inform their proper resolution. Precedent on legislative immunity with respect to § 1983 serves as a framework to analyze legislative discipline. The analysis suggests that legislatures' disciplinary authority may be recognized in the federal common law as a corollary to legislative immunity. The common law authority exists in federal, state, and local governments, like HCC. While it remains unclear how to determine when legislative discipline violates free speech rights, it would disturb practices predating the Founding if courts find it is unconstitutional to censure speech.

The Supreme Court's recognition of legislative immunity in federal common law provides a framework to analyze its corollary: legislative discipline. In 1871, Congress passed a law now codified as § 1983, which, by the letter, created unfettered liability for state actors' constitutional violations.⁴⁰ However, the Court has "construed" § 1983 "in the light of common-law principles that were well settled at the time of its enactment."⁴¹ Thus, in *Tenney v. Brandhove*,⁴² when state legislators were sued under § 1983, the Court applied legislative immunity (or privilege),⁴³ which provides legislators *absolute* immunity for conduct "in the sphere of legitimate legislative activity."⁴⁴ The Court reviewed legislative immunity's origins in Parliament, its adoption in the colonies, how it was important enough to be widely enshrined in constitutions, and its centrality to legislative independence.⁴⁵ The Court declared that given "presuppositions of our political history," legislative immunity "clear[ly]" applied.⁴⁶ The Court later affirmed that local legislators, like HCC's trustees, enjoy legislative immunity.⁴⁷

³⁸ HCC petitioned the Supreme Court for review, framing the principles expressed by Judge Jones and the *Phelan* court in the government speech doctrine. Petition for Writ of Certiorari at 26–30, *Wilson v. Hous. Cnty. Coll. Sys.*, 955 F.3d 490 (5th Cir. 2020) (No. 20-804); see also HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 27 (2019).

³⁹ In theory, the reasoning in *Wilson* may apply to state and federal governments, but factors like sovereign immunity and the political question doctrine may limit adjudication.

⁴⁰ 42 U.S.C. § 1983 ("Every person who, under color of . . . any State . . . shall be liable . . .").

⁴¹ *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997).

⁴² 341 U.S. 367 (1951). At the time *Tenney* was decided, § 1983 was titled differently.

⁴³ *Id.* at 371.

⁴⁴ *Id.* at 376.

⁴⁵ *Id.* at 371–76.

⁴⁶ *Id.* at 372; see *id.* at 376.

⁴⁷ *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (citing *Tenney*, 341 U.S. at 376).

Following the considerations in *Tenney*, legislative discipline, a corollary to immunity, may be recognized in the federal common law. By the seventeenth century, Parliament's struggles for independence resulted in legislative privilege, which shielded Parliament from interference and liability from the King and the judiciary.⁴⁸ With immunity from *external* interference, *internal* discipline grew important to operate effectively, and the traditional measures included censure, imprisonment, and expulsion.⁴⁹ Modeled after Parliament, colonial legislatures inherited legislative immunity, and “[t]he power to discipline [members] was more or less assumed as *a part of* [legislative] privilege.”⁵⁰ Punishing rule-breaking was viewed as “necessary” to make “all the other rules effective.”⁵¹ With great discretion, legislatures also punished nonlegislative conduct deemed harmful to the body’s institutional integrity.⁵²

Legislative discipline’s near-ubiquity in constitutions indicates that it has been important and widely understood. The federal Constitution authorizes each house to “punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.”⁵³ Rather than presenting new substantive ideas, the terms resembled state constitutions enacted *before* the Philadelphia Convention.⁵⁴ Since then, forty-six states have enshrined disciplinary provisions with common features.⁵⁵ Local government charters, too, have provided disciplinary provisions substantially similar to that of the federal Constitution.⁵⁶

Despite these enumerations, legislative discipline remained common law. Near the Founding, the power was viewed as inherent to *all* public bodies, even “[t]he humblest assembly,” as it kept rules from becoming “nugatory.”⁵⁷ Accordingly, legislatures disciplined beyond their enumerated powers with judicial endorsement.⁵⁸ Today, common law discipline

⁴⁸ Léon R. Yankwich, *The Immunity of Congressional Speech — Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960, 963–64 (1951); *see also Tenney*, 341 U.S. at 372.

⁴⁹ See THOMAS ERSKINE MAY, A TREATISE UPON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 43, 49 (London, Charles Knight & Co. Ludgate-Street 1844).

⁵⁰ MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 184 (1943) (emphasis added); *see also id.* at 12.

⁵¹ *Id.* at 184. Punishments included censure, fines, and imprisonment. *Id.*

⁵² *See JACK MASKELL, CONG. RSCH. SERV., 93-875, EXPULSION AND CENSURE ACTIONS TAKEN BY THE FULL SENATE AGAINST MEMBERS 1 & n.1, 4, 24 (2008).*

⁵³ U.S. CONST. art. I, § 5, cl. 2.

⁵⁴ *See, e.g.*, MD. CONST. of 1776, art. XII; N.H. CONST. of 1784 pt. II, art. XXII.

⁵⁵ 6 NAT’L CONF. OF STATE LEGISLATURES, INSIDE THE LEGISLATIVE PROCESS 4–5 (1996). For instance, thirty-seven states use the term “disorderly.” *Id.* at 2.

⁵⁶ Compare, *e.g.*, N.Y. CITY CHARTER § 45 (2004), with U.S. CONST. art. I, § 5, cl. 2.

⁵⁷ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 835, at 298 (Boston, Hilliard, Gray & Co. 1833); *see Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230 (1821) (noting the power belongs to the “deliberative assemblies of the Union”); *Hiss v. Bartlett*, 69 Mass. (3 Gray) 468, 475 (1855) (noting the power belongs to “every . . . deliberative body”).

⁵⁸ *See Anderson*, 19 U.S. (6 Wheat.) at 233 (suggesting that confining the authority to enumerations “[n]ever occur[ed] to any one” at the Convention); *Hiss*, 69 Mass. (3 Gray) at 475.

prevails, as state legislatures expel in the few states that never enumerated a disciplinary provision, citing an “inherent authority” to “discipline.”⁵⁹

The common law authority exists in local governments, like HCC. When the Supreme Court affirmed local legislators enjoy legislative immunity in § 1983 actions, the Court consulted treatises and state supreme court decisions before and after § 1983’s enactment in 1871.⁶⁰ Likewise, when discussing local legislatures’ expulsions of officeholders — a more severe measure than censure — before 1871, a state supreme court declared an “inherent” authority was “well settled,”⁶¹ and after, numerous state supreme courts affirmed the power.⁶² Meanwhile, the *same* treatises the Court cited on local legislative immunity endorse disciplinary authority.⁶³ The view was disseminated in more treatises and leading American parliamentary guides.⁶⁴

Like legislative immunity, legislatures’ disciplinary authority may be recognized in the federal common law in § 1983 actions. Matching Tenney’s analysis, legislative discipline originated in Parliament, was adopted in the colonies, remained common law but was important enough to be widely enshrined in constitutions, and effectuates legislative independence by enforcing rules and protecting institutional integrity. Moreover, the Court’s recognition of legislative immunity practically compels recognition of the corollary: if legislators are free from *external* interference, *internal* discipline is implied. This concept has been ingrained in “presuppositions of our political history” ever since “[t]he power to discipline [members] was more or less assumed as a part of [legislative] privilege” in the colonies. The link has stood the test of time: a concept that *discipline* occurs when *privilege* is breached has persisted in Parliament’s practice, drafts from the Philadelphia Convention, state constitutions, federal and state supreme court opinions, and the House of Representatives’ punishments.⁶⁵

⁵⁹ H.R. Res. 2, Gen. Assemb., Extra Sess. (N.C. 2008); *compare id.*, with N.C. CONST.

⁶⁰ See *Bogan v. Scott-Harris*, 523 U.S. 44, 49–51 (1998).

⁶¹ State *ex rel.* Tyrell v. Common Council of Jersey City, 25 N.J.L. 536, 539 (1856).

⁶² See, e.g., *Mayor of Savannah v. Grayson*, 30 S.E. 693, 696 (Ga. 1898) (“a necessary incident”); State *ex rel.* *McMahon v. City Council of New Orleans*, 32 So. 22, 25 (La. 1902) (“the incidental power”); *Hawkins v. Common Council*, 158 N.W. 953, 956 (Mich. 1916) (“an inherent incident”).

⁶³ See *Bogan*, 523 U.S. at 49, 51; 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 242, at 269 (Boston, Little, Brown, & Co. 1881); FLOYD R. MECHAM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 652, at 435 (Chicago, Callaghan & Co. 1890) (analogizing local bodies’ disciplinary authority to that of the houses of Congress).

⁶⁴ See, e.g., LUTHER STEARNS CUSHING, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA 269 (Boston, Little, Brown & Co. 1856); HENRY M. ROBERT, POCKET MANUEL OF RULES OF ORDER FOR DELIBERATIVE ASSEMBLIES § 66 (Chicago, S.C. Griggs & Co. 1876) (“inherent right to . . . punish”); ALICE STURGIS, STANDARD CODE OF PARLIAMENTARY PROCEDURE 213 (3d ed. 1988).

⁶⁵ See, e.g., N.H. CONST. pt. II, art. XXI; *Kilbourn v. Thompson*, 103 U.S. 168, 196 (1880); *Hiss v. Bartlett*, 69 Mass. (3 Gray) 468, 474 (1855); 155 CONG. REC. H9529 (daily ed. Sept. 15, 2009); H.

Recognition of legislative discipline and its relationship to legislative immunity contextualizes disputes like *Wilson*. Wilson enjoyed legislative privilege and its rare *absolute* immunity,⁶⁶ to “protect the integrity of the legislative process by insuring independence.”⁶⁷ He brought a lawsuit concerning the corollary to that freedom: the body’s discipline. In essence, Wilson sought for judicial interference with a piece of a larger structure of legislative independence — a structure that courts have treated delicately, hence, the legislative immunity doctrine. This concept may amplify prudential concerns. However, by law, legislatures cannot “ignore constitutional restraints.”⁶⁸ Thus, if a court finds discipline is unconstitutional, a local government, like HCC, may be liable.

It is unclear how to evaluate when legislative discipline violates the First Amendment, given the peculiar doctrinal and prudential considerations. Courts that are reluctant to disturb legislatures’ established practices or adjudicate disputes of a political nature⁶⁹ may rest their decisions on historical analysis. Under such an approach, censures for speech may be presumptively constitutional, as they have occurred since before the Founding.⁷⁰ Parliament and colonial legislatures frequently punished speech.⁷¹ Then, the House of Representatives censured speech considered disrespectful or violative of rules throughout the nineteenth century and into the twentieth century,⁷² for instance, after a member called an act a “monstrosity.”⁷³ The House claimed its standards were “universal[]” for “all deliberative bodies.”⁷⁴ Even recently, the House reprimanded a member for proclaiming “You lie” during an address from President Obama on health care.⁷⁵ Mean-

JOURNAL, 4th Cong., 1st Sess. 405 (1796); 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 334 (1911); MAY, *supra* note 49, at 59–60.

⁶⁶ Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 TOURO L. REV. 473, 473 (2014) (explaining that *qualified* immunity is the “norm”).

⁶⁷ Miles-Un-Ltd. v. Town of New Shoreham, 917 F. Supp. 91, 98 (D.N.H. 1996) (quoting United States v. Brewster, 408 U.S. 501, 507 (1972)); see also Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

⁶⁸ United States v. Ballin, 144 U.S. 1, 5 (1892).

⁶⁹ See Tenney, 341 U.S. at 378 (“Courts are not the place for such controversies.”).

⁷⁰ Cf. Nevada Comm’n on Ethics v. Carrigan, 564 U.S. 117, 122–25 (2011).

⁷¹ See CLARKE, *supra* note 50, at 180; Dorian Bowman & Judith Farris Bowman, *Article I, Section 5: Congress’ Power to Expel — An Exercise in Self-Restraint*, 29 SYRACUSE L. REV. 1071, 1078, 1084 (1978) (noting expulsions for uncivilly “expressing unpopular opinions,” *id.* at 1078).

⁷² See, e.g., 2 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 1248, at 799–801 (1907) (noting a member was censured for implying another had ulterior motives); *id.* § 1305, at 867 (noting a member was censured for accusing another of lying); *id.* § 1259, at 810–12; Robert D. Stevens, *But Is the Record Complete? A Case of Censorship of the Congressional Record*, 9 GOV’T PUBL’NS REV. 75, 76–79 (1982).

⁷³ HINDS, *supra* note 72, § 1247, at 798–99.

⁷⁴ H. JOURNAL, 40th Cong., 2d Sess. 195 (1868).

⁷⁵ Carl Hulse, *House Rebukes Wilson for Shouting “You Lie,”* N.Y. TIMES (Sept. 15, 2009), <https://www.nytimes.com/2009/09/16/us/politics/16wilson.html> [https://perma.cc/Q7JN-2FT4].

while, state legislatures have censured members for discussing abortion insensitively on public media⁷⁶ and, now, for referring to the Capitol rioters as “patriots.” Accounting for local legislatures, currently, a censure of speech occurs in the nation around every two days.⁷⁷ Overall, historical practice can likely support a finding that censures of speech are constitutional.⁷⁸

Still, the judiciary has changed tack in recognizing free speech protections before.⁷⁹ If courts do not defer to historical practice, by default, these censures may be subject to strict scrutiny,⁸⁰ the standard the *Wilson* panel suggested would be appropriate in dicta.⁸¹ Remember, however, the First Amendment is famously committed to “uninhibited, robust, and wide-open” debate⁸² and protects even heinous expression, like Nazi demonstrations.⁸³ As such, it may be unclear how a judicial test could soundly differentiate between Wilson disrespectfully discussing funding decisions and legislators, for instance, calling an act a “monstrosity,” referring to rioters as “patriots,” speaking about abortion insensitively, or proclaiming that President Obama lied about health care. Without suitable standards for the political context, applying judicial tests may severely disturb a longstanding practice of legislatures.

The circuit split created by *Wilson* is fascinating and challenging. Courts’ duty to uphold the Constitution is pitted against a presumption in Anglo-American government that courts do not disrupt legislatures’ well-established internal practices.⁸⁴ In the absence of a Supreme Court ruling, lower courts may find it appropriate to contextualize these disputes and their implications before reaching decisions. These age-old fact patterns are unlikely to disappear. After all, politicians engage in an array of antics that legislative bodies may wish to condemn, as Wilson’s censurable behavior outside of this lawsuit exemplifies.⁸⁵

⁷⁶ See AJ Willingham, *Alaska Rep Censured for Implying Some Women Get Abortions for Free Travel*, CNN (May 11, 2017, 3:03 PM), <https://www.cnn.com/2017/05/11/politics/alaska-censure-david-eastman-abortion-trnd/index.html> [https://perma.cc/CG4F-SW7N].

⁷⁷ Petition for Writ of Certiorari, *supra* note 38, at 19–20, 25.

⁷⁸ Unlike the censure in *Wilson* for non-legislative speech, congressional censures for speech have addressed speech in the chambers or congressional publications, *see* sources cited *supra* note 72. Even if this distinction were relevant, other legislatures have censured for non-legislative speech throughout history, *see, e.g.*, Bowman & Bowman, *supra* note 71, 1084 n.71; Willingham, *supra* note 76, and the House has readily considered censuring for non-legislative speech without questioning the legality of doing so, *see* HINDS, *supra* note 72, § 1245, at 797–98.

⁷⁹ See, *e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943).

⁸⁰ See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

⁸¹ See *Wilson*, 955 F.3d at 498 & n.51; *see also supra* note 24.

⁸² N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

⁸³ Collin v. Smith, 578 F.2d 1197, 1201 (7th Cir. 1978) (withholding “moral judgment”).

⁸⁴ Cf. Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (suggesting it may be unconstitutional for federal law to abridge state legislators’ “traditional sphere”).

⁸⁵ See Susan Milligan, *Election by Deception: A White Houston Man Won a Seat on the City’s Community College Board by Pretending to Be Black*, U.S. NEWS & WORLD REP. (Nov. 12, 2013), <https://www.usnews.com/opinion/blogs/susan-milligan/2013/11/12/houston-resident-gains-seat-on-community-college-board-by-pretending-to-be-black> [https://perma.cc/LM6T-YDLW].