Vanderbilt Law Review

Volume 57 | Issue 1 Article 5

1-2004

Public Confidence Laws Gone Awry: A Modern Circuit Split Reveals that Some Federal Courts Manipulate Standing Rules to Promulgate Severe First Amendment Restrictions on the Spouses and Children of Public Employees

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NOTES

Public Confidence Laws Gone Awry: A Modern Circuit Split Reveals that Some Federal Courts Manipulate Standing Rules to Promulgate Severe First Amendment Restrictions on the Spouses and Children of Public Employees

I. INTRODUCTION

Federal courts in the United States have consistently upheld the constitutional doctrine that "[t]he essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery."[1] Given the central role of government workers in maintaining that order, the First Amendment rights of public employees have been particularly susceptible to restriction.[2] For example, in 1940, Congress enacted the Hatch Act, which declared unlawful certain political activities of federal employees.[3] Specifically, section nine of the Act prohibited officers and employees in the executive branch from taking "any active part in political management or in political campaigns."[4] The theory behind restrictions such as those found in the Hatch Act relied on the state's compelling interest in encouraging government impartiality and the public perception of impartiality in government.[5] These restrictions, labeled "public confidence laws," prohibit not only financial political contributions, but also contributions of time and energy in an effort to influence an election.[6]

The idea that a politically active government staff threatens effective administration has filtered down to the state and local level since the passage of the Hatch Act. Currently, not only are federal employees subject to public confidence laws, but many state and even local employees have been prohibited from participating in politics.[7]

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1. United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 95 (1947).

2. *See, e.g.*, United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995) ("Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." (citing Snepp v. United States, 444 U.S. 507 (1980))).

3. Pub. L. No. 76-252, 53 Stat. 1147 (1939), extended to state employees by Puh. L. No. 76-753, 54 Stat. 767 (1940); *see also* 5 U.S.C. § 7323(a)(1) (2000) (prohibiting an employee of the federal government from using "his official authority or influence for the purpose of interfering with an election or affecting the result of an election").

4. Pub. L. No. 76-252, 53 Stat. 1147, 1148; Pub. L. No. 76-753, 54 Stat. 767, 771; *see also Mitchell*, 330 U.S. at 78 (quoting 18 U.S.C. § 61h (repealed)). The quoted language has been repealed.

5. *See* United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 557-66 (1973); *Mitchell*, 330 U.S. at 96-97 (quoting *Ex parte* Curtis, 106 U.S. 371, 373 (1882)); Horstkoetter v. Dep't of Pub. Safety, 159 F.3d 1265, 1273-74 (10th Cir. 1998).

6. *Mitchell*, 330 U.S. at 98.

7. *See* Broadrick v. Oklahoma, 413 U.S. 601, 606 (1973) (upholding state laws similar to the federal Hatch Act); Biggs v. Best, Best & Krieger, 189 F.3d 989, 991-92 (9th Cir. 1999) (rejecting a constitutional challenge to a city government's threat to fire a city lawyer if she and her family did not cease participation in local politics); *Horstkoetter*, 159 F.3d at 1265 (rejecting a constitutional challenge to an Oklahoma Highway Patrol policy prohibiting highway patrolmen

While the principles justifying public confidence laws may indeed have deep judicial and constitutional roots, these laws have expanded at an alarming rate. The level of restriction they currently impose cannot be supported by any constitutional theory.

The most disturbing element of modern public confidence laws is that courts have allowed them to extend so far as to prevent even spouses and family members of state and local employees from participating in politics.[8] For example, in *English v. Powell*, the United States Court of Appeals for the Fourth Circuit dismissed a First Amendment claim by a city employee's wife who argued that her constitutional rights were violated when the public agency employing her husband threatened to fire him if she did not cease complaining about the agency.[9] Similarly, both the Ninth and Tenth Circuits have recently dismissed claims in which the spouses and children of public employees contended that public confidence laws had been unconstitutionally extended to deprive them of their First Amendment rights to participate in local politics.[10]

Rather than expressly holding that public confidence laws can apply to spouses and children, the courts adopting the *English* approach have simply dismissed the suits claiming that the plaintiffs lacked standing.[11] These courts have held that the claims of the spouse and children of a public employee are merely derivative of the employee's claim and that the employee's family does not suffer the injury-in-fact required to bring a primary case before the court.[12] Because the doctrine allowing restriction of public employees' First

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from displaying political yard signs); Reeder v. Kan. City Bd. of Police Comm'rs, 733 F.2d 543, 547 (8th Cir. 1984) (upholding Missouri statute prohibiting members of the Kansas City Police Department from making any political campaign contributions); Wachsman v. City of Dallas, 704 F.2d 160, 160 (5th Cir. 1983) (upholding various provisions of the Dallas city charter which prevented city employees from making contributions to, or soliciting contributions for, city council candidates); Otten v. Schicker, 655 F.2d 142, 144 (8th Cir. 1981) (upholding a St. Louis Police Department local rule preventing officers from running or campaigning for public office); English v. Powell, 592 F.2d 727, 730 (4th Cir. 1979) (dismissing the claims of state alcohol board employees who argued the state could not prevent them from speaking out on a public issue); Perry v. St. Pierre, 518 F.2d 184, 186 (2d Cir. 1975) (upholding a provision in a city charter which made it unlawful for a city police officer to attempt to influence any voter).

8. *See, e.g.*, *Biggs*, 189 F.3d at 991-92; *English*, 592 F.2d at 730.

9. 592 F.2d at 730.

10. *See Biggs*, 189 F.3d at 998-99; *Horstkoetter*, 159 F.3d at 1265-66.

11. *See Biggs*, 189 F.3d at 998-99; *Horstkoetter*, 159 F.3d at 1265-66.

12. *Biggs*, 189 F.3d at 998; *Horstkoetter*, 159 F.3d at 1279; *see also English*, 592 F.2d at 730 ("It is a novel theory that a wife possesses such a proprietary interest in her husband's position that a decrease in his salary gives her an actionable claim. Plaintiffs admit that this theory is without precedent, and we decline to write new law . . . ."). *See generally* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citing the three elements required of a party to have standing in court).

Amendment rights prevents the employee from prevailing in court, the result of these decisions is that *no* party can challenge public confidence laws as they are applied to spouses and children. In light of the importance of the First Amendment to citizens of the United States, it is unacceptable that many courts have rendered the families of public employees helpless to challenge such blatant violations of their constitutional right to free speech.

The evolution of public confidence laws has not gone completely unchecked. Recently, the Eighth Circuit expressly rejected the holdings of *English* and its progeny, creating a circuit split regarding the standing of spouses of public employees to bring First Amendment challenges to public confidence laws. In *International Association of Firefighters v. City of Ferguson*, the Eighth Circuit held that the wife of a public employee could maintain a First Amendment challenge to a city charter provision that prevented her from participating in politics.[13]

Despite the Eighth Circuit's holding in *International Association of Firefighters*, however, many jurisdictions continue to adopt the approach that spouses of public employees lack standing.[14] By hiding behind standing rules, these courts are indirectly promulgating political participation laws that unlawfully apply to the families of public employees in the same way that they apply to the employee himself. Instead of continuing this practice, courts must recognize the judicially created exception to traditional standing rules that allows for parties in First Amendment cases to challenge a statute as overly broad on its face even in the absence of the requisite injury-in-fact to the plaintiff.[15] The Supreme Court should address the current split and establish a solution that forces courts to hear the First Amendment challenges posed by the families of public employees.

Part II of this Note analyzes the evolution of the judicial willingness to apply public confidence laws to the spouses and children of public employees. Part III details the current circuit split, placing special emphasis on the weaknesses of the *English* approach to standing. Parts IV and V propose that the circuit split be resolved by forcing courts to address the procedural propriety and substantive merit of facial overbreadth claims in the context of spousal challenges to public confidence laws. The critical First Amendment issues raised by the current circuit split highlight the need for a solution that

13. 283 F.3d 969, 976 (8th Cir. 2002).

14. *See, e.g.*, *Biggs*, 189 F.3d at 989; *English*, 592 F.2d at 730.

15. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).

provides a forum for the First Amendment claims of public employees' families.

II. PUBLIC CONFIDENCE LAWS APPLIED TO THE SPOUSES AND CHILDREN OF PUBLIC EMPLOYEES

A. Pre-Hatch Act Decisions

Even prior to the Hatch Act, the United States Supreme Court upheld provisions that prohibited public officials from engaging in certain political activities, usually providing financial support to campaigns.[16] The benchmark case in this area, *Ex parte Curtis*, upheld congressional use of power to forbid certain federal employees from giving money to or receiving money from other government employees for political purposes.[17] The conclusion that this type of regulation was constitutional subsequently became so well established that by 1930, Supreme Court opinions were dismissing First Amendment challenges to such restrictions with remarkably brief deliberation.[18]

The reach of restrictions on public employees eventually extended well beyond financial limits, particularly following the passage of the Hatch Act in 1940. In *United Public Workers of America v. Mitchell*, the Supreme Court reviewed the provisions of the Hatch Act that prohibited officers and employees in the executive branch from taking "any active part in political management or in political campaigns."[19] The Court found that such restrictions were "not dissimilar in purpose from the statutes against political contributions of money" and held that restrictions on expenditures of energy in politics were also constitutional.[20] The Court relied on the fact that Congress's great political experience enabled it to reasonably determine which restrictions were needed to promote efficiency in government.[21] Despite the fact that the employee in question in *Mitchell* was merely a roller in the nation's mint, the Court found that the restrictions could constitutionally apply to him because Congress

16. *See, e.g.*, *Ex parte* Curtis, 106 U.S. 371, 371 (1882).

17. *Id.*; *see also* United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 96 (1947).

18. *Mitchell*, 330 U.S. at 98 (noting that by the time of *United States v. Wurzbach*, 280 U.S. 396 (1930), "[t]he argument of unconstitutionality because of interference with the political rights of a citizen . . . was dismissed in a sentence").

19. *Id.* at 78. The quoted language was part of the original Hatch Act, *see* Pub. L. No. 76-753, 54 Stat. 767, 771 (1940) (now repealed); Pub. L. No. 76-252, 53 Stat. 1147, 1148 (1939).

20. *Mitchell*, 330 U.S. at 98-99.

21. *Id.*

was concerned with the *cumulative* effect on employee morale and the need to apply restrictions "without discrimination to all employees whether industrial or administrative."[22]

Although the majority in *Mitchell* found the regulations in question constitutional, Justice Black's dissent suggests that opponents of such restrictions were growing uneasy about the potential reach of public confidence laws.[23] Citing the notion that the First Amendment is the "bulwark of our free political institutions," Justice Black acknowledged that "the families of public employees [are] stripped of their freedom of political action."[24] Justice Black argued that such laws could be drawn more narrowly to punish only those who fueled corruption.[25] His dissent demonstrates that the injustice of extending public confidence laws to the families of government employees was a concern as early as 1947.[26]

B. Judicial Resistance After the Hatch Act

Despite the insightful warnings issued by Justice Black in *Mitchell*, courts that subsequently addressed the issue of broad public confidence laws continued to uphold their constitutionality.[27] Throughout the mid-twentieth century, courts consistently held that, while guaranteed freedoms extend to government employees as they do other citizens, these freedoms are not absolute when balanced against the need to protect a democratic society from the supposed evil of political partisanship by classified public employees.[28] These courts found that the underlying goals of the restrictions served as sufficient justification for the burdens on free speech.[29] Specifically, courts held that government employees' First Amendment rights may be limited as a means of (1) assuring such employees that their job security does not depend upon displaying political affiliation or deferring to the wishes of certain political figures; (2) promoting efficiency among public employees and the impartial execution of the laws; (3)

22. *Id.* at 101-02 (quoting section nine of the Hatch Act).

23. *Id.* at 108 (Black, J., dissenting).

24. *Id.* at 108, 110.

25. *Id.* at 113.

26. *Id.*

27. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 601 (1973); United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 548 (1973); *Mitchell*, 330 U.S. at 75.

28. *Mitchell*, 330 U.S. at 95-96 ("[T]his Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government."). *See generally Broadrick*, 413 U.S. 601; *Letter Carriers*, 413 U.S. 548.

29. *Broadrick*, 413 U.S. 601; *Letter Carriers*, 413 U.S. 548; *Mitchell*, 330 U.S. at 95-96.

maintaining discipline and preventing corruption in the public service; and (4) encouragement of impartiality and the public perception of impartiality.[30]

Deference to the congressional goals of public confidence laws reflected the majority position for decades following the enactment of the Hatch Act, although some judicial resistance to the broad reach of such restrictions emerged in the 1960s and early 1970s.[31] Strong dissents were issued in two significant Supreme Court cases upholding public confidence laws. Additionally, in two other cases, the Court absolved specific public employees from punishment even though each employee made public statements deemed "political."[32] The crux of this disagreement was embodied in the majority and dissenting opinions in *Broadrick v. Oklahoma*, with the latter arguing for narrower restrictions on government employees' political activity.[33]

In *Broadrick v. Oklahoma*, the Supreme Court addressed First Amendment challenges that three employees of the Oklahoma Corporation Commission brought against a state public confidence provision.[34] After the three employees actively participated in the re-election campaign of their superior, the state's Personnel Board charged them with violating provisions that prohibited employees from receiving money for political purposes or belonging to political parties.[35] The Court held that the restrictions at issue were constitutional as applied to the employees of the Corporation Commission, reasoning that the Oklahoma law "regulates a substantial spectrum of conduct that is as manifestly subject to state regulation as the public peace or criminal trespass."[36]

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30. *Letter Carriers*, 413 U.S. at 557-66; *Mitchell*, 330 U.S. at 97 (quoting *Ex parte* Curtis, 106 U.S. 371, 373 (1882)); Horstkoetter v. Dep't of Pub. Safety, 159 F.3d 1265, 1273-74 (10th Cir. 1998).

31. *See, e.g.*, *Broadrick*, 413 U.S. at 618-21 (Douglas, J., dissenting); *id.* at 621-33 (Brennan, J., dissenting); *Letter Carriers*, 413 U.S. at 596-600 (Douglas, J., dissenting); *see also* Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968) (holding that a teacher was unconstitutionally discharged for sending a letter to a newspaper the criticized school authorities); Wood v. Georgia, 370 U.S. 375 (1962) (relieving a sheriff from a contempt conviction for making a public statement in connection with a current political controversy).

32. *Pickering*, 391 U.S. at 573 (holding that a teacher was unconstitutionally discharged for sending a letter to a newspaper the criticized school authorities); *Wood*, 370 U.S. at 375 (relieving a sheriff from a contempt conviction for making a public statement in connection with a current political controversy).

33. *Broadrick*, 413 U.S. 601.

34. *Id.* at 602.

35. *Id.* at 601, 605-06.

36. *Id.* at 616.

Justice Douglas voiced a strong dissent; as did Justice Brennan, joined by Justices Stewart and Marshall.[37] Douglas's dissent noted that public employees, both federal and state, number over thirteen million and cover an extremely broad range of occupations.[38] He argued that prohibiting the political activity of these individuals was irrational not only because it eliminated the basic freedoms of such a large class, but also because it created "faceless, nameless bureaucrats who are inert in their localities and submissive to some master's voice."[39] This argument constituted a direct attack on the majority's proposition that government functioned better when its employees avoided political action. Douglas' dissent further posited that sweeping restrictive legislation was not the answer to gaining public confidence in government.[40]

C. *Standing After the* Broadrick *Decision*

Unlike prior cases involving public confidence laws, the *Broadrick* case presented a novel twist that forced the Court to address the issue of standing. In addition to asserting that reelection activities could not be regulated, the *Broadrick* claimants maintained that the statute should be struck down as unconstitutionally overbroad on its face because it purported to regulate protected as well as unprotected conduct.[41] However, because the *Broadrick* claimants had not in fact engaged in the allegedly protected conduct, which included the displaying of political buttons and bumper stickers, the Court dismissed these overbreadth claims on standing grounds.[42]

In dismissing the overbreadth claims, the *Broadrick* majority relied upon traditional rules of constitutional adjudication. These rules mandate that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."[43] Nevertheless, the Court

37. *Id.* at 618-21 (Douglas, J., dissenting); *id.* at 621-33 (Brennan, J., dissenting).

38. *Id.* at 620 (Douglas, J., dissenting) ("These people are scrubwomen, janitors, typists, file clerks, chauffeurs, messengers, nurses, orderlies, policemen and policewomen, night watchmen, telephone and elevator operators, as well as those doing some kind of administrative, executive, or judicial work.").

39. *Id.* at 621.

40. *See id.*

41. *Id.* at 610.

42. *Id.*

43. *Id.* The Court also cited the doctrine that "constitutional rights are personal and may not be asserted vicariously." *Id.* (citing McGowan v. Maryland, 366 U.S. 420, 429-30 (1961)). Furthermore, the Court alluded to the proposition that courts in the United States are not

conceded that exceptions to this rule exist. These exceptions are particularly prevalent in the area of the First Amendment, where traditional standing rules permit "'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'"[44] Such "facial overbreadth" claims have been allowed in light of the conclusion that the possible harm to society in permitting some unprotected speech is outweighed by the possibility that the protected speech of others may be muted and their grievances left unheard because of the inhibitory effects of overly broad statutes.[45]

Statutes found to be overly broad cannot be enforced unless and until a limiting provision or partial invalidation narrows the statute to remove the threat to constitutionally protected rights.[46] Because such a result is, as the *Broadrick* Court noted, "strong medicine" that is rarely employed, the majority promulgated a strict standard for when a statute can be found overly broad.[47] The Court required that the overbreadth of the statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[48] As a result, the *Broadrick* Court held that the statute could not be discarded altogether simply because "some persons' arguably protected conduct may or may not be caught or chilled . . . ."[49] In short, the majority dismissed the facial overbreadth claim because the Oklahoma statute was not substantially overbroad enough to outweigh the traditional standing rules requiring the party bringing the action to be actually affected by a statutory provision.[50]

"roving commissions assigned to pass judgment on the validity of the Nation's laws," and therefore require a particular case of rights infringement in order to act. *Id.* at 610-11 (citing Younger v. Harris, 401 U.S. 37, 52 (1971)).

44. *Id.* at 612 (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)). This exception addresses the "chilling effect" that some statutes may have on First Amendment rights, whereby a statute's very existence "may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.*

45. *Id.* Additional examples of facial overbreadth cases involving statutes that sought to regulate speech include *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cohen v. California*, 403 U.S. 15 (1971); and *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Additional examples of facial overbreadth cases involving statutes that sought to regulate expressive conduct include *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Cameron v. Johnson*, 390 U.S. 611 (1968); *Zwickler v. Koota*, 389 U.S. 241 (1967); and *Thornhill v. Alabama*, 310 U.S. 88 (1940).

46. *Broadrick*, 413 U.S. at 613.

47. *Id.*

48. *Id.* at 615.

49. *Id.* at 618.

50. *Id.* at 615-17.

Justice Brennan's dissent in *Broadrick* directly criticized the majority's explanation of the facial overbreadth doctrine.[51] Citing the majority's proposition that traditional standing rules sometimes permit attacks on overly broad statutes even when a person's rights are not directly regulated, the dissent contended that the case at hand warranted such an attack.[52] Justice Brennan rejected the majority's reliance on standing in light of the "supremely precious" position of the First Amendment in the United States and the fact that "[t]he threat of sanctions [on political expression] may deter [its] exercise almost as potently as the actual application of sanctions."[53]

III. *BROADRICK* SETS THE STAGE FOR A MODERN CIRCUIT SPLIT

Although the *Broadrick* Court dismissed the plaintiffs' challenges to the Oklahoma statute on the grounds that the facts did not warrant the application of the facial overbreadth doctrine, the case nonetheless partially validated the plaintiffs' claim. That the opinion went to great lengths in rejecting the doctrine demonstrated the Court's realization that public confidence laws often come dangerously close to violating the Constitution.[54] Furthermore, the fact that the case sparked such a strong and emotionally charged dissent supported by three Justices (as well as Justice Douglas's separate dissent) indicated that the winds of change were blowing forcefully regarding judicial acceptance of the constitutionality of public confidence laws.[55]

Despite the outcome of the *Broadrick* case, the debate over standing challenges in public confidence laws was just beginning, and the issue would be brought before the courts several times in the decades that followed. These later cases would spark an entirely new discourse on the proper scope of public confidence laws by questioning the application of such laws to the families of public employees.

A. English v. Powell

Just six years after the Supreme Court battled over standing issues and the facial overbreadth doctrine in *Broadrick*, a similar

51. *Id.* at 621-33 (Brennan, J., dissenting).

52. *Id.* at 629 (quoting Gooding v. Wilson, 405 U.S. 518, 521 (1972) and Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)).

53. *Id.*

54. *See id.* at 618 ("Appellants further point to the Board's interpretive rules purporting to restrict such allegedly protected activities as the wearing of political buttons or the use of bumper stickers. It may be that such restrictions are impermissible and that § 818 may be susceptible of some other improper applications.").

55. *Id.* at 621-33 (Brennan, J., dissenting); *id.* at 618-21 (Douglas, J., dissenting).

constitutional question emerged in the Fourth Circuit. In *English v. Powell*, employees of a county Alcoholic Beverage Board brought an action claiming the Board had violated their First Amendment rights.[56] Unlike *Broadrick*, the claim in *English* did not challenge a particular statute. Instead, it asserted an unconstitutional restriction stemming from the Board's alleged prohibition of vocal employee criticism and membership in employee associations.[57] Specifically, the employees claimed that they were told they would be fired unless they ceased speaking out against Board management and terminated their memberships in the Alcohol Board Employee Association.[58] The Fourth Circuit dismissed the employees' claims, however, holding that the employees had not proven that the Board had infringed upon their First Amendment rights.[59]

While the Court had little trouble dismissing the claims of the employees, it was also forced to address a more complicated claim. Vera Shands, the wife of a Board employee, asserted that the Board had infringed *her* First Amendment rights, thereby raising a novel argument that would launch an entirely new line of cases involving First Amendment rights.[60]

Ms. Shands based this argument on *Bigelow v. Virginia,* a Supreme Court case addressing the statutory overbreadth issues raised in *Broadrick*.[61] The *Bigelow* Court held that a party has standing to challenge a statute on the grounds that it is too broad on its face to be constitutional provided that the challenging party has asserted more than "[a]llegations of a subjective 'chill'" and has claimed a specific, objective, present harm or a threat of specific future harm.[62] Maintaining that the effect of the Board's actions was comparable to the effect of an overbroad restrictive statute, Ms. Shands argued for standing under the *Bigelow* standard.[63] She contended not only that the threats made to her husband subjectively chilled her First Amendment rights, but also that her husband's demotion objectively harmed her because she was forced to take a job to supplement the family income.[64] The Fourth Circuit, however, found these claims too indirect and too speculative to support Ms.

56. English v. Powell, 592 F.2d 727, 729-30 (4th Cir. 1979).
57. *Id.* at 731.
58. *Id.* at 727-28.
59. *Id.* at 732, 734.
60. *Id.* at 730.
61. *Id.*; *see* Bigelow v. Virginia, 421 U.S. 809 (1975).
62. *Bigelow*, 421 U.S. at 816-17.
63. *English*, 592 F.2d at 730.
64. *Id.*

Shands' standing as a plaintiff in a lawsuit challenging the propriety of her husband's demotion.[65] The court supported its conclusion by stating that "[i]t is a novel theory that a wife possesses such a proprietary interest in her husband's position that a decrease in his salary gives her an actionable claim."[66]

B. Horstkoetter v. Department of Public Safety

After the Fourth Circuit rejected Ms. Shands' novel standing arguments in the *English* case, the issue did not arise again to a significant degree for nearly two decades. In *Horstkoetter v. Department of Public Safety*, however, a claim similar to that of Ms. Shands was brought before the Tenth Circuit.[67] Although the court ultimately sustained the *English* holding, the court was noticeably more receptive to the First Amendment challenge posed. While the Fourth Circuit had been reluctant to write new law on the issue of spousal standing in 1979,[68] the *Horstkoetter* court at least recognized the problems posed by extending public confidence provisions to the families of public employees.[69] Nonetheless, the court dismissed the spousal claim on standing grounds.[70]

In *Horstkoetter*, the Oklahoma Highway Patrol had ordered two highway patrol troopers to remove political signs from their residences pursuant to a departmental public confidence policy prohibiting the troopers from wearing partisan political buttons or displaying signs at their homes.[71] Although the two troopers initially refused, claiming that the signs belonged to their wives, the Highway Patrol Supervisors responded that it did not matter to whom the signs belonged and that the officers could be suspended or even fired if the signs were not taken down.[72] After the troopers relayed the threat to their wives, the signs were removed.[73]

After the signs were removed, Paula Horstkoetter, the wife of one of the troopers, sent a letter to the head of Oklahoma's Department of Public Safety expressing her dissatisfaction with the

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65. *Id.*

66. *Id.*

67. 159 F.3d 1265, 1265 (10th Cir. 1998).

68. *English*, 592 F.2d at 730.

69. *Horstkoetter*, 159 F.3d at 1279-80. The court noted that the statute at issue did not authorize direct punishment of spouses. *Id.* at 1279.

70. *Id.*

71. *Id.* at 1269.

72. *Id.*

73. *Id.*

resolution of the situation.[74] The Department stated that it supported the resolution of the matter, citing the Department policy and alluding to an Oklahoma statute that made it a crime for members of the Highway Patrol to take part in, or make any contribution to, any campaign for public office.[75] The Horstkoetters and the Deans, another family ordered to remove political signs, then filed suit, claiming the policy was unconstitutional both on its face and as applied to them.[76] Although both families joined together to make a single challenge to the statute, the claims of the troopers themselves were quite different than the claims of their wives, given that the statute technically applied only to the troopers themselves. This led the court to address the claims of Ms. Horstkoetter and Ms. Dean separately from the claims of their husbands.[77]

The analysis of the wives' claims hinged upon basic standing rules stating that Article III of the Constitution requires that federal

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74. *Id.*

75. *Id.* at 1269-70.

76. *Id.* at 1270.

77. *See id.* at 1271-80. Although not specifically relevant to this Note, the court's resolution of the troopers' claims warrants a comment, as it raised an interesting issue regarding the traditional cballenges to public confidence laws. Based on a critical distinction between property solely owned by the trooper and property that was jointly owned, the Tenth Circuit held that if a trooper has sole ownership of the property upon which the sign was placed, he has the lawful right to remove the sign, and his refusal to do so would violate the state's public confidence policy. *Id.* at 1275. However, if another party, such as his spouse, had an ownership interest in the residential property, the trooper would not have the lawful right to remove the sign, and could not, therefore, be in violation of the policy by refusing to do so. *Id.* at 1275-76. In short, the court held that tbe state could not "require a trooper to do what property law does not allow him to do." *Id.* at 1276. Because the Horstkoetters owned their residence together as joint tenants, the court held that the Oklahoma Highway Patrol could not constitutionally extend its policy so far as to require Mr. Horstkoetter to remove his wife's signs. *Id.* Nonetheless, his claims for prospective relief were dismissed because bis retirement before the trial had rendered the issue moot. *Id.* at 1277. The court also dismissed Mr. Horstkoetter's claims for damages because they were barred by the doctrine of qualified immunity. *Id.* Mootness rules are explained and elaborated upon in the following cases: *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."); *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) (holding that claims for prospective relief will be mooted if an event occurs while a case is pending that heals the injury); *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996) ("When a party seeks only equitable relief . . . past exposure to alleged illegal conduct does not establish present live controversy if unaccompanied by any continuing present effects."). Qualified immunity is explained in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that qualified immunity is a doctrine which shields government officials performing discretionary functions from individual civil liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known").

courts hear only actual "Cases" or "Controversies."[78] The case or controversy requirement has three crucial elements.[79]

> First, the plaintiff must have suffered an "injury in fact" that is "concrete" rather than "conjectural or hypothetical." Second, the plaintiff must show that there is a "causal connection between the injury and the conduct complained of." Finally, the plaintiff must show that it is "likely" and not merely "speculative" that the injury complained of will be "redressed by a favorable decision."[80]

Impliedly conceding that the claims of Ms. Horstkoetter and Ms. Dean would satisfy the second and third requirements for standing if the first requirement were met, the Oklahoma Highway Patrol contended only that the wives had suffered no injury-in-fact.[81] The wives claimed that they were injured by having to remove signs from their private residences in order to spare their husbands' jobs.[82] Addressing the injury-in-fact issue, the court held that because Ms. Horstkoetter and Ms. Dean were never in danger of being *directly punished* under the Department's public confidence policy, they had standing only to raise the same claims as their husbands.[83] Moreover, despite the State's suggestion to Ms. Horstkoetter that *her* property was subject to the Department's policy just as her husband's property was, the court found that "the only penalties that can be inflicted upon anyone for violations . . . [are] employment sanctions or criminal penalties against the troopers themselves."[84] The State therefore could not have fined the wives, taken disciplinary action against them, or physically removed the signs from their respective residences.[85] Because there was no way that the wives could have been directly

78. *Horstkoetter*, 159 F.3d at 1279; *see* U.S. CONST. art. III, § 2.

79. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); *Horstkoetter*, 159 F.3d at 1279.

80. *Horstkoetter*, 159 F.3d at 1279 (citation omitted).

81. *See id.* This aspect of the Highway Patrol's argument is important because as a result, the court's opinion focused only on the injury-in-fact requirement. Similarly, each of the subsequent public confidence cases cited in this note also focuses squarely on the first requirement, failing to discuss the remaining two. *See* Int'l Ass'n of Firefighters v. City of Ferguson, 283 F.3d 969, 975 (8th Cir. 2002); Biggs v. Best, Best & Krieger, 189 F.3d 989, 998 (9th Cir. 1999). While this author cannot speak for the courts deciding these cases, it is likely that, like the Highway Patrol in *Horstkoetter*, the parties impliedly conceded that if there were indeed an injury-in-fact, the second and third requirements would also be satisfied. In terms of the second requirement, there is at the very least a causal connection between the restriction of First Amendment rights and the statute that imposed those restrictions. In terms of the third requirement, it is more than likely that striking down the restrictive statute at issue would eliminate the very First Amendment restriction provoking complaint.

82. *Horstkoetter*, 159 F.3d at 1279.

83. *Id.*

84. *Id.*

85. *Id.*

injured by any application of the policy, the court found that they did not have standing to mount a separate First Amendment challenge.[86]

The *Horstkoetter* court's acknowledgement that the state could not directly punish Ms. Horstkoetter or Ms. Dean under the statute revealed a flaw in its conclusion that public confidence laws could be constitutionally applied to the spouses of public employees.[87] If the statute could not authorize punishment of the wives, how could it still prevent them from participating in the prohibited acts, which it effectively did? Furthermore, the court's strict adherence to traditional rules exposed another weakness in its opinion. The court's crucial assumption that the wives' claims were speculative or incidental would seem to warrant some further explanation.[88] However, the *Horstkoetter* court failed to provide such an explanation. In so doing, the court made an error similar to that of its counterpart in *English*, ignoring the judicially accepted exception to standing rules that allows parties to challenge a First Amendment restriction as unconstitutionally broad on its face.[89]

In light of these flaws in the *Horstkoetter* opinion, the case provided reason for guarded optimism on the part of spouses seeking to challenge public confidence laws.[90] Although the outcome was not necessarily favorable to Ms. Dean and Ms. Horstkoetter, it indicated that courts were perhaps no longer dismissing spousal challenges based on the cursory examination of traditional standing rules demonstrated in *English*. Thus, *Horstkoetter* in a sense opened the door for spouses in similar situations to bring First Amendment claims in the hope of exploiting the opinion's weaknesses and forcing courts to cease hiding behind standing rules.

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86. *Id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. It is notable that based upon the court's analysis of property law, the *Horstkoetter* case provided further reason for guarded optimism in certain situations not specifically at issue in this Note, which involve joint ownership of property between hushand and wife. *See supra* note 77. In light of the court's distinction regarding the joint ownership of property, the *Horstkoetter* case suggested that if Mr. Horstkoetter's retirement had not rendered the case moot, he and his wife would likely have succeeded in their claims. Thus, *Horstkoetter* opened the door for future claims hy spouses of public employees who had a property interest in their residences and had been prohibited from erecting political signs there.

C. Biggs v. Best, Best & Krieger

Although the *Horstkoetter* case appeared to create a small window of opportunity for spousal challenges to public confidence laws, the Ninth Circuit closed this window with its opinion in *Biggs v. Best, Best & Krieger*.[91] Julie Biggs was an associate in a private law firm that performed work for the city of Redlands, California.[92] In October of 1991, a partner in the firm allegedly told Ms. Biggs that she should limit her husband's involvement in Redlands politics because it could jeopardize the firm's contract with the city.[93] Mr. Biggs had sent a letter to a local newspaper that endorsed a particular candidate for Redlands City Council, and he had allegedly distributed petitions to recall the city's mayor.[94] Ms. Biggs had allegedly supported her husband's activity as had the Biggs's daughter.[95] As these activities continued, Julie Biggs's position with the firm deteriorated and she was told she would no longer make partner.[96] The Biggs then filed suit against the City of Redlands and two city councilmen who had allegedly threatened to terminate the city's relationship with the firm if Ms. Biggs and her family continued their involvement in local politics.[97] One week after these suits were filed, Ms. Biggs's firm terminated her "because of the ethical conflicts created by her suit and the firm's duties to its client, [the City of] Redlands."[98]

The Biggs's claim alleged, inter alia, that the council defendants had violated the family's First Amendment rights by threatening to fire Ms. Biggs's firm for her family's political activities.[99] In resolving the dispute, the Ninth Circuit relied heavily on *Branti v. Finkel* and *Elrod v. Burns*.[100] In both cases, the Supreme Court held that a government employee generally cannot be

91. 189 F.3d 989, 998 (9th Cir. 1999).

92. *Id.* at 991.

93. *Id.* at 992.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* The suit was brought pursuant to 42 U.S.C. § 1983, which provides that any person may bring a claim against a government official who acts under color of state law to deprive that person of constitutional rights. Because the suit was brought against two public officials, the court began its analysis by examining the qualified immunity doctrine, which shields such officials from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *Biggs*, 189 F.3d at 993-94..

100. Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

terminated because of his political associations unless the employee has a policy-making or confidential position in which political considerations are requirements for effective job performance.[101] The *Biggs* court came to "the inevitable conclusion that Julie Biggs did in fact occupy a policymaking position with respect to the City of Redlands."[102] As a result, the court held that the policy-making nature of Ms. Biggs's position precluded her First Amendment claim.[103]

Although the court dismissed Julie Biggs's claim, her husband and daughter argued that their actions were separate from those of Ms. Biggs.[104] However, citing *Horstkoetter* and *English*, the Ninth Circuit ruled that the claims of Ms. Biggs's family were merely *derivative* of Ms. Biggs's claim.[105] Therefore, as in *Horstkoetter*, the court found that the family's claims were subject to the same standards as Julie Biggs's claims.[106] Because the council defendants were entitled to qualified immunity from Julie Biggs's claims, they were also entitled to qualified immunity from the claims of her family.[107]

While the weaknesses of the *Horstkoetter* opinion seemingly opened the door for spouses to successfully challenge public confidence laws, the *Biggs* case suggested that the issue was a lost cause. First, by failing to invoke *Horstkoetter*'s conclusion that public confidence statutes could not authorize punishment of spouses, the Ninth Circuit impliedly denied such a challenge.[108] Moreover, like the *Horstkoetter* court, the *Biggs* court failed to convincingly explain why the claims of Ms. Biggs's husband and daughter were derivative.[109] Despite acknowledging that the loss of Ms. Biggs's salary was indeed an injury to her husband and daughter and that the loss was "not insubstantial," the court nevertheless concluded that the injury did

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101. *Branti*, 445 U.S. at 518; *Elrod*, 427 U.S. at 372-73.

102. *Biggs*, 189 F.3d at 995 (citing Gordon v. County of Rockland, 110 F.3d 886, 890-91 (2d Cir. 1997) and Williams v. City of River Rouge, 909 F.2d 151, 155 (6th Cir. 1990)). Citing the tests established in prior cases with similar facts, the *Biggs* court found that Julie Biggs occupied a policy-making position because she participated in Redlands City Council meetings and performed other activities for the city, which required her to apply a personal analysis to value-laden, politically controversial matters. *See id.* at 995-96 (citing Ness v. Marshall, 660 F.2d 517, 520, 522 (3d Cir. 1981) and Newcomb v. Brennan, 558 F.2d 825, 830 (7th Cir. 1977)).

103. *Id.* at 997.

104. *Id.* at 998.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *See id.* at 998-99 ("[T]his type of injury is sufficiently substantial to permit Jerry and Holly Biggs to raise only the same claims as Julie Biggs.").

not warrant independent standing.[110] Most importantly, the court's reliance on *English* and *Horstkoetter* rendered it unable to recognize that a facial overbreadth challenge was also available to the Biggs. Because such a challenge would not have required an injury-in-fact, the Biggs may have succeeded with it. However, by again characterizing spousal challenges to public confidence laws as mere derivatives, the *Biggs* decision ignored this option and dealt a major blow to spouses seeking to bring similar First Amendment claims.

D. International Association of Firefighters v. City of Ferguson

Despite the apparent judicial antipathy toward utilizing standing rules to allow spousal challenges to public confidence laws, a recent Eighth Circuit decision did just that.[111] In *International Association of Firefighters v. City of Ferguson*, the court expressly rejected the approaches taken in *English*, *Horstkoetter*, and *Biggs*, holding that a spouse of a public employee had independent standing to challenge a particular public confidence law.[112] The case centered on a provision in the charter of the city of Ferguson, Missouri, which stated that no person holding an administrative position with the city could "engage, directly or indirectly, in sponsoring, electioneering or contributing money or other things of value for any person who is a candidate for mayor or council."[113] Lloyd Thompson, a local firefighter and city employee, and his wife brought suit against the city, claiming the charter provision violated their First Amendment rights.[114] The district court granted summary judgment in favor of the city on all claims brought by the Thompsons.[115] The Eighth Circuit abruptly affirmed the district court's decision with respect to Mr. Thompson's claim, but determined that the crucial issue on appeal centered upon the applicability of the charter provision to Mr. Thompson's wife, Alma Mendez-Thompson.[116]

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110. *Id.* at 998.

111. Int'l Ass'n of Firefighters v. City of Ferguson, 283 F.3d 969, 975 (8th Cir. 2002).

112. *Id.*

113. *Id.* at 971.

114. *Id.*

115. *Id.* The district court granted summary judgment to the city defendants on the grounds that the provision was "'necessary to protect against the erosion of public confidence in the impartiality of the provision of Government services, in preserving the fairness of City elections, and in preserving the efficiency of the operations of the City.'" *Id.* at 972 (quoting Int'l Ass'n of Firefighters v. City of Ferguson, No. 4:00CV00241, 2001 U.S. Dist. LEXIS 23869, at *62 (E.D. Mo. April 17, 2001)).

116. *Id.* at 971.

Before Ms. Mendez-Thompson moved to Missouri, she had participated in politics in New York, specifically in a campaign for a local councilwoman.[117] Ms. Mendez-Thompson had hoped to participate in similar activities in Ferguson politics.[118] However, after learning of the city charter's public confidence provision, Ms, Mendez-Thompson feared that her political participation might jeopardize her husband's position.[119] She then sent a letter to the city inquiring if her husband would be disciplined if she ran for office, electioneered, or contributed money to a candidate for local office.[120] Although the city never answered her letter, Ms. Mendez-Thompson nonetheless felt afraid to participate in politics.[121] She therefore brought her own challenge to the charter provision, asserting that the city threatened to interpret it in such a way as to injure her First Amendment rights.[122]

Although the district court concluded that Ms. Mendez-Thompson lacked standing to challenge the provision because she was not an employee of the city, this finding was reversed on appeal. The Eighth Circuit found that because the city "seemed to claim" that it could discipline her husband on account of her activities, Ms. Mendez-Thompson's challenge in fact asserted her own rights.[123] The court held that Ms. Mendez-Thompson had "her own rights to participate in political activities, and if her husband were disciplined or lost his job, the economic adverse effect on her would be clear, especially, perhaps, in view of the fact that they ha[d] a joint bank account."[124] So, Ms. Mendez-Thompson had suffered an injury-in-fact.

In support of its decision, the Eighth Circuit cited the general rules of standing in federal courts, noting that the standing doctrine embraces prudential as well as constitutional concerns.[125] First, the court addressed the prudential concern that the complaint must fall

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117. *Id.* at 972.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* Ms. Mendez-Thompson's argument was bolstered by the fact that the City mayor gave a deposition under oath, stating that if an employee's spouse or children placed a yard sign in front of their home, the employee would be considered to be "indirectly" engaging in political activity, in violation of the charter. *Id.* Similarly, the mayor maintained tbat a political contribution made from a couple's joint bank account would presumably be subject to the same logic. *Id.*

123. *Id.* at 973.

124. *Id.*

125. *Id.* (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 471-72 (1982)).

within the zone of interests protected by the law invoked.[126] The court held that Ms. Mendez-Thompson's complaint clearly fell within this zone because her right to political activity was "at the very heart of the interests protected by the First Amendment."[127] Next, the court recognized the concern that a plaintiff ordinarily "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[128] Because Ms. Mendez-Thompson had interests in her own political activity, as well as in her personal and economic status, the court found that she was not merely resting her claim on the rights of her husband.[129] Finally, the court addressed the standing concern that a suit "must present more than 'abstract questions of wide public significance which amount to generalized grievances'" that are most appropriately addressed by the legislature.[130] The court held that Ms. Mendez-Thompson had also cleared this hurdle because, although public issues were at stake, her particular constitutional rights had been restricted as well.[131]

Drawing on its conclusion that Ms. Mendez-Thompson's First Amendment rights had been restricted, the Eighth Circuit expressed its disagreement with opinions such as *English*, *Horstkoetter*, and *Biggs*.[132] The court concluded that these decisions were erroneous because the spousal injury in question in all cases, while indirect, was "nonetheless real and tangible."[133] While Ms. Mendez-Thompson may not have had a proprietary interest in her husband's job, the court held that she may have had "a legal interest in the income that derives from that job."[134] The loss of his job could therefore have had a "catastrophic" effect on Ms. Mendez-Thompson's life and economic status, an injury sufficient for the court to grant her independent standing.[135]

Although the ultimate result of *International Association of Firefighters* was favorable to spouses seeking to challenge public confidence laws, the court, like those in the *English* line of cases, still did not address the possibility of a facial overbreadth claim. In addressing the city's contention that the uncertainty of injury to Ms.

126. *Id.* (citing Allen v. Wright, 468 U.S. 737, 751 (1984)).
127. *Id.*
128. *Id.* (citing Warth v. Seldin, 422 U.S. 490, 499 (1975)).
129. *Id.* at 973-74.
130. *Id.* at 974 (quoting *Valley Forge*, 454 U.S. at 475).
131. *Id.*
132. *Id.* at 974-75.
133. *Id.* at 975.
134. *Id.*
135. *Id.*

Mendez-Thompson deprived her of standing, the court began down the road of a facial overbreadth inquiry, concluding that "certainty of injury is not necessary, at least in the First Amendment context."[136] The court also noted that Ms. Mendez-Thompson should not be required to undertake the prohibited activity and risk the consequences in order to test the validity of the charter provision, but it did so without specific reference to *Broadrick* or any other case addressing the facial overbreadth exception.[137] While the court's decision in favor of Ms. Mendez-Thompson rendered an overbreadth inquiry unnecessary, such an inquiry would have provided even stronger support for the decision.

IV. A JUDICIALLY SOUND SOLUTION TO PREVENT THE UNCONSTITUTIONAL REPERCUSSIONS OF PUBLIC CONFIDENCE LAWS

The conflicting holdings of the Fourth, Tenth, Ninth, and Eighth Circuits regarding the standing qualifications of spouses challenging public confidence laws highlight the need for the Supreme Court to resolve this issue, particularly if the Court is to adhere to the notion that the First Amendment is the "bulwark of our free political institutions."[138] The result of the *International Association of Firefighters* case suggests that courts are beginning to recognize that *English* and its progeny have failed by utilizing the standing doctrine to dismiss spousal challenges to public confidence laws. The shortcoming of *International Association of Firefighters*, however, is that the Eighth Circuit used the same standing analysis as the *English* line of cases, simply reaching a different, defensible, yet not sufficiently differentiated conclusion.[139] While that conclusion may be correct, the Eighth Circuit in effect simply disagreed with the other circuits without providing sufficient analysis of why its decision was superior.[140]

What the Eighth Circuit failed to recognize was that its decision had a deeper constitutional base than the opinions in *English*, *Horstkoette,r* and *Biggs*. The court could have avoided a simple disagreement with the other circuits and promulgated a more legally sound opinion by incorporating key elements from prior Supreme Court opinions. First, the court did not sufficiently address the judicial requirement, introduced in *Mitchell* and strengthened in

136. *Id.*

137. *Id.*

138. United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 110 (1947).

139. *Int'l Ass'n of Firefighters*, 283 F.3d at 974-75.

140. *See id.* at 975.

Broadrick, that statutes limiting First Amendment rights must be narrowly drawn.[141] More importantly, the Eighth Circuit seemingly overlooked the *Broadrick* Court's treatment of the key exception to traditional standing laws that allows for statutory facial overbreadth challenges.[142]

The Eighth Circuit was not alone in overlooking these themes; the *English*, *Horstkoetter* and *Biggs* opinions also neglected to include them in their analyses.[143] Nonetheless, if the Eighth Circuit had looked outside the box rather than allowing the *English* line of cases to dictate the rules of the debate, its ultimate conclusion could have been compelling enough for adoption by the Supreme Court. By deciding the case strictly on traditional standing grounds rather than challenging the *English*, *Horstkoetter*, and *Biggs* courts to recognize the facial overbreadth exception, the Eighth Circuit missed an opportunity to force the *English* supporters to reevaluate their position from a new perspective. The *International Association of Fircfighters* opinion, therefore, is subject to simple disagreement from *English* supporters as to the proper definition of injury-in-fact. However, simply incorporating the aforementioned themes from *Broadrick* and *Mitchell* into the *International Association of Firefighters* holding would create an effective, judicially sound solution to the circuit split that could withstand scrutiny from supporters of *English* and its progeny.

A. Facial Overbreadth Challenges Can Be Brought by Persons Not Directly Injured by The Legislation

Although the majority opinion in *Broadrick v. Oklahoma* ultimately upheld the public confidence statute at issue, an analysis of the case reveals a crucial exception to standing rules that the opinions comprising the current circuit split fail to address.[144] As evidenced by cases such as *Horstkoetter* and *Biggs*, traditional standing rules hold that courts will not hear a statutory challenge unless the statute in question directly applies to the person bringing the challenge.[145] However, in the First Amendment arena, the Supreme Court has recognized an exception to this rule that in certain circumstances

141. *See Mitchell*, 330 U.S. at 105 (Black, J., dissenting); *see also* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

142. *Broadrick*, 413 U.S. at 611-12.

143. *See* Biggs v. Best, Best & Krieger, 189 F.3d 989 (9th Cir. 1999); Horstkoetter v. Dep't of Pub. Safety, 159 F.3d 1265 (10th Cir. 1998); English v. Powell, 592 F.2d 727 (4th Cir. 1979).

144. 413 U.S. at 611-12.

145. *See Biggs*, 189 F.3d at 997-99; *Horstkoetter*, 159 F.3d at 1278-80.

allows claimants to attack a statute as invalid and overbroad on its face.[146] The *Broadrick* Court explained:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. . . . Litigants, therefore, are permitted to challenge a statute [on its face] not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.[147]

Therefore, the standing requirement that a litigant suffer a direct injury-in-fact is relaxed in certain situations involving the constitutionality of statutes restricting expression under the First Amendment.

Although the *Broadrick* Court recognized this exception, it concluded that the exception was only to be applied in rare situations when the overbreadth of the statute was "real" and "substantial."[148] The court concluded that, while public confidence laws "may deter speech to some unknown extent, there comes a point where that effect . . . cannot, with confidence, justify invalidating a statute on its face . . . ."[149] Following this reasoning, the Court refused to invalidate the statute in question because its alleged overbreadth was not sufficiently real or substantial.[150] The majority also noted that it is a "matter of no little difficulty" to determine when a statute should be found invalid on its face and that the issue must be addressed on a case by case basis.[151]

The Supreme Court's analysis in *Broadrick* reveals one of the major flaws of the modern circuit court opinions addressing spousal challenges to public confidence laws. Put simply, the *English*, *Horstkoetter*, *Biggs* and even *International Association of Firefighters* courts seem to have forgotten about the facial overbreadth exception to traditional standing rules upon which the *Broadrick* opinion focused. None of the four cases that comprise the current circuit split entertained the notion of a facial overbreadth challenge. Instead, the cases hinge upon what is and what is not an injury-in-fact, deciding if spousal claims are mere "derivatives" of the claims brought by the actual employees.[152]

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146. *See, e.g.*, *Broadrick*, 413 U.S. at 611-12.

147. *Id.* (citation omitted).

148. *Id.* at 615.

149. *Id.*

150. *Id.* at 615-16.

151. *Id.* at 615.

152. *See supra* notes 11-12 and accompanying text.

The fact that the current circuit split involves First Amendment restrictions that were originally intended to maintain confidence in public employees but have now expanded to restrict even the families of those employees suggests that these cases present exactly the situations that the *Broadrick* Court envisioned when formulating the facial overbreadth exception.[153] However, while the *Broadrick* Court advocated a case-by-case approach to the overbreadth issue, the four modern public confidence laws cases have effectively precluded such an analysis by avoiding facial overbreadth challenges altogether.[154]

While it must be noted that the failure of modern courts to entertain facial overbreadth claims could be the result of insufficient pleadings by the plaintiffs in each case, for the benefit of future litigants courts should at least note the availability of such claims when addressing injury-in-fact challenges. Each of the four modern cases, however, relied solely upon the form of the challenges brought before them.[155] In order to prevent the alarming First Amendment violations spawned by such a narrow approach, courts must acknowledge that facial overbreadth claims are indeed a legitimate and proper procedural avenue for spouses attempting to protect their constitutional rights regardless of whether the substantive merits of the case ultimately warrant redress.

B. Justice Black's Warning

Not only are facial overbreadth challenges a proper procedural avenue for spouses challenging public confidence laws, they also have considerable substantive merit in the spousal context. Although the majority in the *Mitchell* case ultimately rejected a challenge to a public confidence statute, Justice Black's dissenting opinion recognized that the scope of public confidence laws was expanding to an alarming and unconstitutional degree.[156] Black chastised the majority for relying too heavily on precedent such as *Ex parte Curtis* in order to extend the reach of public confidence laws far beyond the permissible limits of the Constitution.[157]

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153. *Broadrick*, 413 U.S. at 611-12.

154. *See id.*; *supra* notes 11-12 and accompanying text.

155. *See supra* notes 11-12 and accompanying text.

156. United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 105-07 (1947) (Black, J., dissenting) ("No one of all these millions of citizens [i.e., government employees] can . . . [have an] effective part in campaigns that may bring about changes in their lives, their fortunes, and their happiness.").

157. *Id.* at 112 ("[T]he *Curtis* decision seems implicitly to have rested on the assumption that many political activities of government employees, beyond merely voting and speaking secretly,

Whereas *Ex parte Curtis* had only validated public confidence laws to the extent that they limited employees' rights to collect money for politics, the *Mitchell* majority upheld the constitutionality of a statute that banned nearly all political activity other than the right to vote.[158] Warning against such expansion, Justice Black observed that far-reaching legislation was being upheld based on unnecessarily broad, if not altogether erroneous, readings of precedent.[159] In short, the judicial interpretation of public confidence laws no longer reflected the legislative goal of merely insulating public employees from political influence.[160]

Responding to the perceived danger of unconstitutionally broad prohibitions, Justice Black argued that public confidence in government could be effectively maintained through less restrictive means.[161] Black advocated the penalizing of corrupt individuals rather than the use of broad, prospective legislation.[162] Conceding that some persons in powerful positions could perhaps improperly influence politics, his dissent maintained that laws should punish only those public officials who engage in corrupt practices rather than precluding a large number of people, most of whom have the best of intentions, from exercising their rights.[163] Recognizing the constitutional impropriety of such sweeping prohibitions, he concluded that "punish[ing] millions of employees . . . in order to remove temptation from a proportionately small number of [corrupt] public officials" seemed an unnecessarily extreme measure.[164]

The *Broadrick* Court echoed Justice Black's fears when it held that a statute must be *narrowly* drawn to fit a legislative goal when it restricts First Amendment rights.[165] Nonetheless, the *Broadrick* majority concluded that the statute at issue in the case was sufficiently narrow.[166] Justice Brennan's dissent, however, took up where Justice Black's dissent in *Mitchell* left off, urging the court to

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would not, and could not under the Constitution, be impaired by the legislation there at issue." (citing *Ex parte* Curtis, 106 U.S. 373, 375 (1882))).

158. *Id.*

159. *Id.* at 108.

160. *Id.* at 113 ("Therefore, it is possible that other groups may later be compelled to sacrifice their right to participate in political activities for the protection of the purity of the Government of which they are a part.").

161. *Id.* at 114.

162. *Id.*

163. *Id.*

164. *Id.*

165. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); *see also Mitchell*, 330 U.S. at 114 (Black, J., dissenting).

166. *Broadrick*, 413 U.S. at 615-16.

take a harder look at broad legislation that limited First Amendment rights.[167] Brennan pointed to prior cases in which the court had explicitly held that a statute must be held invalid on its face when it broadly authorizes the punishment of constitutionally protected conduct.[168] Justice Brennan concluded that in failing to properly distinguish these prior cases, the *Broadrick* majority implicitly overruled its prior holding.[169]

By failing to reach the merits of facial overbreadth claims, modern courts have fallen into the very trap that the dissents in *Mitchell* and *Broadrick* warned against.[170] The courts comprising the current split have seemingly overread precedent to imply that public confidence laws are narrow enough to avoid facial overbreadth challenges.[171] As a result, these courts have improperly focused their inquiries on whether or not the statutes inflict a direct harm upon spouses that is sufficient to warrant independent standing.[172] In short, the strict reliance of these courts on the substance of traditional injury-in-fact standing has prevented them from addressing the substantive merits of the facial overbreadth challenges.

If modern courts had engaged in analysis of the merits of facial overbreadth challenges, they likely would have determined that the application of public confidence statutes to spouses renders them facially overbroad. Given that the *Mitchell* and *Broadrick* cases involved challenges to restrictive statutes *by public employees themselves*, the concerns expressed by Justices Black and Brennan carry even greater significance when such laws are applied to the *spouses* of those public officials.[173] Because the legislative goal of public confidence laws is to immunize government employees from political influence, it is difficult to imagine that such statutes are narrowly drawn when their prohibitions extend to individuals who do not work for the government. If it is at least questionable that public confidence laws can prevent all government employees from engaging in nearly all political activity, it follows that the laws lose their legitimacy altogether when they apply to the families of those employees.

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167. *Id.* at 622 (Brennan, J., dissenting).

168. *Id.* at 632 (citing Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)).

169. *Id.*

170. *Id.* at 622; *Mitchell*, 330 U.S. at 110 (Black, J., dissenting).

171. *See supra* notes 11-12 and accompanying text.

172. *See supra* notes 11-12 and accompanying text.

173. *See generally Broadrick*, 413 U.S. at 621-33 (Brennan, J., dissenting); *Mitchell*, 330 U.S. at 105-15 (Black, J., dissenting).

Again, it must be noted that the failure of the courts to address the substance of facial overbreadth challenges to public confidence laws could stem from poor pleading by the plaintiffs. However, in light of the importance of First Amendment rights in American democracy, courts should not look to the form or procedure of these spousal challenges as an excuse to dismiss them. A workable solution to the modern circuit split must not only allow courts to address facial overbreadth claims as a procedural matter; it must also force courts to recognize the substantive validity of such claims.

V. CONCLUSION

Public confidence laws, when properly constructed, can serve a legitimate social function. There is great merit in the argument that the political process functions more efficiently, and the public is more confident in that process, when government employees are insulated from political pressures.[174] Therefore, courts evaluating narrow restrictions on public employees have generally been correct in upholding them as a means to promote a legitimate legislative goal.[175] This legitimate goal cannot be justified, however, once those laws extend to the spouses of public employees. Given that these spouses do not work for the government, they have, at most, an attenuated connection to the political systems in which the other spouse is employed. Nonetheless, courts have often applied public confidence laws to the families of public employees, thereby allowing a severe restriction on their First Amendment rights.[176]

Spouses of public employees seeking to challenge the extension of public confidence laws have generally met staunch opposition from courts. Frequently, courts hearing spouses' claims have utilized traditional standing doctrine to dispose of the claims.[177] In light of the fact that traditional standing rules require that a plaintiff suffer a direct injury-in-fact in order to bring a claim, most modern circuit courts have ruled that spousal challenges to public confidence laws are too indirect to warrant independent standing.[178] Consequently, these courts have analyzed spousal challenges as mere derivatives of the claims of the actual employee, holding that because the employee

174. *See supra* note 5 and accompanying text.

175. *Id.*

176. *See supra* notes 8-10 and accompanying text.

177. *See supra* notes 11-12 and accompanying text.

178. *See supra* notes 11-12 and accompanying text.

could be constitutionally barred from certain activity, his or her spouse could as well.[179]

In direct opposition to the prevailing approach, the Eighth Circuit recently held that a spouse challenging public confidence laws has independent standing because such laws impose a direct injury on the spouse.[180] While this decision properly reflects the notion that spouses of government employees should not be held to the same standards as the actual employees, it is fundamentally flawed because it merely utilizes the same approach as the courts before it to reach the opposite result.[181] If an opinion is to significantly alter the scope of modern public confidence jurisprudence, that opinion must achieve something more than mere disagreement with precedent. Instead, it must force proponents of the prevailing *English* approach to recognize the facial overbreadth exception as a legitimate procedural tool, and to address the substantive requirement that First Amendment restrictions be narrowly drawn.

The foundation of the alternate approach proposed by this Note is currently available to courts. In fact, it has developed over time through the cases leading up to the current circuit split. Seminal Supreme Court public confidence cases, such as *Broadrick* and *Mitchell,* consistently recognized that courts addressing certain First Amendment claims were not bound to adhere strictly to traditional injury-in-fact standing requirements.[182] Instead, plaintiffs arguing that their First Amendment rights are indirectly chilled by a particular statute may challenge that statute on the grounds that it is too broad on its face to comport with the Constitution.[183]

Spousal challenges to public confidence laws appear to represent precisely the types of claims that the Court envisioned when it created this exception to traditional standing rules.[184] In short, they are First Amendment claims that seek to prevent a broad statute from attaining an unconstitutional scope.[185] Nonetheless, the courts that have addressed these spousal challenges have seemingly overlooked

179. *See supra* notes 11-12 and accompanying text.

180. Int'l Ass'n of Firefighters v. City of Ferguson, 283 F.3d 969, 975 (8th Cir. 2002).

181. *Compare Int'l Ass'n of Firefighters,* 283 F.3d at 975, *with* Biggs v. Best, Best & Krieger, 189 F.3d 989, 998-99 (9th Cir. 1999), Horstkoetter v. Dep't of Pub. Safety, 159 F.3d 1265, 1279 (10th Cir. 1998), *and* English v. Powell, 592 F.2d 727, 730 (4th Cir. 1979).

182. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 112 (1947) (Black, J., dissenting).

183. *Broadrick,* 413 U.S. at 612.

184. *See supra* notes 170-172 and accompanying text.

185. *See supra* notes 170-172 and accompanying text.

the facial overbreadth exception, choosing instead to strictly read traditional standing doctrine to require a direct injury-in-fact.[186]

While the courts' failure to address the facial overbreadth issue may be a product of poor pleadings that failed to adequately raise the claim, poor pleadings alone should not dictate the terms of the debate involving such a crucial First Amendment matter. Given that the First Amendment is the "bulwark of our free political institutions," courts should not rely so strictly on the form of pleadings.[187] Nonetheless, even *International Association of Firefighters*, the lone case that did grant standing to spouses, failed to address the notion of a facial overbreadth challenge.[188] Instead, it simply disagreed with the prevailing jurisprudence of *English*, *Horstkoetter* and *Biggs* while utilizing the same traditional standing analysis that those cases employed.[189] That these courts were able to come to the opposite conclusion using the same analysis demonstrates that the *International Association of Firefighters* opinion alone constitutes an insufficient resolution to the circuit split.

Despite the weaknesses of the *International Association of Firefighters* holding itself, the opinion could serve as a stepping stone toward a solution to the current circuit split.[190] By incorporating some of the crucial principles from cases such as *Broadrick* and *Mitchell* into the *International Association of Firefighters* holding, the Supreme Court could formulate a new public confidence jurisprudence that protects the constitutional rights of the spouses of public employees.

First, adopting the concept from *Broadrick* that the facial overbreadth exception is a legitimate procedural approach to First Amendment claims would force courts to at least entertain facial overbreadth challenges in this context.[191] Second, acknowledging Justice Black's fear that public confidence statutes have become too broad to meet a legitimate legislative goal would facilitate judicial recognition that facial overbreadth challenges have substantive merit as well as procedural merit.[192] Finally, applying the above principles to the Eighth Circuit's conclusion that the injury to spouses in this context is indeed substantial would satisfy the *Broadrick* Court's requirement that facial overbreadth challenges prove that the

186. *See supra* notes 170-172 and accompanying text.
187. *Mitchell*, 330 U.S. at 110 (Black, J., dissenting).
188. *See supra* note 13 and accompanying text.
189. *See supra* notes 180 and accompanying text.
190. *See supra* note 143 and accompanying text.
191. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973).
192. *Mitchell*, 330 U.S. at 112 (Black, J., dissenting).

overbreadth was real and tangible.[193] In sum, the solution proposed above should lead courts to find that public confidence laws are facially overbroad and unconstitutional as applied to spouses of government employees.

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193. *Broadrick*, 413 U.S. at 615; Int'l Ass'n of Firefighters v. City of Ferguson, 283 F.3d 969, 975 (8th Cir. 2002).