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## A Troubling Collision: Overbroad Coercion Statutes and Unchecked State Prosecutors

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## **A TROUBLING COLLISION: OVERBROAD COERCION STATUTES AND UNCHECKED STATE PROSECUTORS**

### ABSTRACT

*Overbroad laws trespass on First Amendment rights of expression. Overbroad coercion statutes, which prohibit communication limiting a listener's legitimate options, exist in a variety of states and municipalities. By failing to narrowly prohibit unlawful coercive speech, these overbroad statutes criminalize a broad range of protected First Amendment speech. These statutes can be particularly problematic for political actors because they can criminalize political bargains and discussion characteristic of the American political system.*

*As the crime control model has grown, state prosecutors' charging power and discretion have vastly increased. Prosecutors face few meaningful checks on their behavior from other branches of government, but they can use overbroad coercion statutes to bring felony charges against—and therefore exert significant leverage over—political opponents. Using the Governor James R. “Rick” Perry indictment as a case study, this Comment explores the danger posed to legislators, executives, and judges by unconstitutionally overbroad coercion statutes in the hands of unchecked prosecutors.*

*This Comment argues for a judicial and legislative response to this problem and explains why legislators and judges should have a strong interest in invalidating and narrowing these overbroad coercion statutes. Ultimately, this Comment proposes a framework through which judges should invalidate these statutes and describes why legislators have a duty both to the Constitution and to themselves to proactively narrow these statutes to avoid overbreadth.*

## INTRODUCTION

An overbroad law is one that infringes on individuals' rights to engage in protected First Amendment expression.<sup>1</sup> State statutes prohibiting coercive speech are an important example of the type of law the overbreadth doctrine targets. Although coercion statutes are designed to prohibit communication that "actually reduces a listener's legitimate options,"<sup>2</sup> many state coercion statutes also criminalize a substantial amount of protected "everyday" communication.<sup>3</sup> These overbroad coercion statutes can criminalize a broad range of speech and political discourse.<sup>4</sup>

Narrowing overbroad coercion statutes is necessary in large part because of the growth of prosecutorial power over the last few decades.<sup>5</sup> In fact, prosecutors enjoy virtually unchecked charging power and discretion,<sup>6</sup> and overbroad laws provide temptation for prosecutors to target opposing politicians for prosecution.<sup>7</sup> The American governmental atmosphere is filled

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<sup>1</sup> Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 859 (1970) ("Overbreadth may be conceptualized as legislative failure to focus explicitly and narrowly on social harms which are the valid concern of government and are the justification for interfering with expressive activities."); see *United States v. Robel*, 389 U.S. 258, 262, 268 (1967).

<sup>2</sup> Comment, *Coercion, Blackmail, and the Limits of Protected Speech*, 131 U. PA. L. REV. 1469, 1472–73 (1983) (defining the type of "dangerous" coercive speech that should be criminally prosecuted; prosecution would be justified, for example, where "a gangster . . . threatened to break a tavern owner's legs unless he voted for a certain political candidate. The threat forces the tavern owner to choose between two things—the right to be free from physical assault and the right to vote according to individual conscience—when the tavern owner has a legitimate claim to both things").

<sup>3</sup> See, e.g., OR. REV. STAT. ANN. § 163.275 (1980), *invalidated by* *State v. Robertson*, 649 P.2d 569, 580 (Or. 1982), *superseded by statute*, OR. REV. STAT. ANN. § 163.275 (West 1985) ("A person commits the crime of coercion when he compels or induces another person to engage in conduct from which he has a legal right to abstain, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will . . . (c) engage in other conduct constituting a crime. . . (e) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt, or ridicule. . . [or] (h) Use or abuse his position as a public servant by performing some act within . . . his official duties . . . in such a manner as to affect some person adversely.").

<sup>4</sup> See, e.g., *Robertson*, 649 P.2d at 580; *State v. Hanson*, 793 S.W.2d 270, 273 (Tex. App. 1990). Statutes can be so broad that they criminalize ordinary political expression such as exchanging votes for a bill, or exacting a promise to support certain legislation. *Robertson*, 649 P.2d at 580.

<sup>5</sup> See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 870–71, 873 (2009).

<sup>6</sup> See, e.g., Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1156, 1161, 1168 (2004).

<sup>7</sup> See *id.* at 1159 n.13 (suggesting that there are reasons to believe prosecutors are abusing their power because of the "lesson[s] of history; arbitrary power is rarely exercised benignly"); see also John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. MICH. J. L. REFORM 1, 1 (2010).

with political bargains, even “threats” of sorts—“If you vote for this federal bill, I’ll vote against this state law that you like”—and other similar phrases.<sup>8</sup> An overbroad coercion statute can criminalize this type of everyday political language<sup>9</sup> and therefore poses an enticing opportunity for prosecutors to investigate, indict, and punish political opponents.

The presence of overbroad coercion statutes in the hands of unchecked prosecutors thus signals a troubling imbalance of powers: while prosecutors experience few meaningful checks from legislators and executives, the threat of indictment for making a political threat may be one of the most powerful forms of leverage that prosecutors can exert on these individuals.

This problem is exemplified by the August 2014 indictment<sup>10</sup> of former Texas Governor James R. “Rick” Perry.<sup>11</sup> The second count of Perry’s indictment criminalized his threat to veto a spending bill in the event that Travis County District Attorney Rosemary Lehmberg refused to resign after her arrest for Driving While Intoxicated (DWI).<sup>12</sup> Because of its severe overbreadth problem, Texas’s coercion statute technically criminalizes Perry’s act of making a political threat to exercise his veto power, and Lehmberg’s unit chose to begin an investigation against Perry under that statute’s authority.<sup>13</sup> Granted, the Texas Court of Appeals recognized the problem and invalidated the indictment,<sup>14</sup> but the court could have created a more substantial precedent, and the decision hardly solves the larger problem of prosecutors potentially

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(“The problem of a fluid rather than a fixed line for criminality is that prosecutorial discretion becomes central to the application of the state’s imposition of criminal sanctions.”).

<sup>8</sup> Brief of Constitutional and Criminal Law Experts as Amici Curiae in Support of the Application for a Writ of Habeas Corpus at 14, *Ex parte* James Richard “Rick” Perry, 2015 WL 4514696 (Tex. Ct. App. Aug. 12, 2015) (No. 03-15-00063-CR), 2015 WL 1839270, at \*22 [hereinafter Expert Amicus Brief].

<sup>9</sup> See, e.g., OR. REV. STAT. ANN. 163.275 (1980), *invalidated by* State v. Robertson, 649 P.2d 569, 580 (Or. 1982), *superseded by statute*, OR. REV. STAT. ANN. § 163.275 (West 1985); State v. Robertson, 649 P.2d 569, 580 (Or. 1982).

<sup>10</sup> *Timeline: The Rick Perry Indictment*, TEX. TRIB. (last visited Nov. 7, 2015), <http://www.texastribune.org/timeline/perry-indictment/>.

<sup>11</sup> Governor Perry stepped down from his position as Governor of Texas in January 2015. Manny Fernandez, *Texas’ New Governor Echoes the Plans of Perry*, N.Y. TIMES (Jan. 20, 2015), <http://www.nytimes.com/2015/01/21/us/politics/new-texas-governor-greg-abbott-expected-to-continue-on-perrys-path.html>. Greg Abbott is currently Texas’s governor. *Id.* However, Governor Perry chose not to run for re-election in 2013, over a year before his indictment. Aaron Blake, *Rick Perry Won’t Seek Reelection*, WASH. POST (July 8, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/08/rick-perry-wont-seek-reelection/>.

<sup>12</sup> See, e.g., Expert Amicus Brief, *supra* note 8, at 3.

<sup>13</sup> See *Timeline: The Rick Perry Indictment*, *supra* note 10.

<sup>14</sup> See *Ex parte* James Richard “Rick” Perry, No. 03-15-00063-CR, 2015 WL 4514696, at \*31 (Tex. Ct. App. July 24, 2015); Patrick Svitek, *State Attorney Set to Appeal Decision That Favored Perry*, TEX. TRIB. (Aug. 12, 2015), <https://www.texastribune.org/2015/08/12/state-planning-challenge-pro-perry-decision/>.

using overbroad statutes as a tool to punish and control political opponents. This Comment posits a method for other government actors to prevent these kinds of unduly strategic prosecutions in the future.

This Comment proposes that because trying to curb prosecutorial charging power is in many ways an exercise in futility, this problem should be handled in two ways. First, defense attorneys should raise and courts should consider overbreadth challenges in every coercion prosecution. If the statutes are overbroad, state court judges should invalidate the statutes through an overbreadth analysis modeled on the Oregon Supreme Court's decision in *State v. Robertson* and its subsequent jurisprudence.<sup>15</sup> Second, in the event that coercion charges have not yet been filed, legislatures should proactively evaluate their states' coercion statutes for overbreadth problems and tailor them where necessary.

This Comment proceeds in four parts. First, Part I provides a background on the Supreme Court overbreadth doctrine and then explains state implementation of the overbreadth doctrine in the context of coercion statutes, using the Oregon approach defined in *State v. Robertson* as a springboard.<sup>16</sup> Second, Part II explains the recent growth of prosecutorial power and discusses legislative, executive, and judicial strategies for curtailing that power. Then, Part III uses the Governor Perry indictment as a case study to show the dangerous collision of overbroad coercion statutes and prosecutorial power. Finally, Part IV proposes the adoption of the *Robertson* framework by state judiciaries and advocates for legislative narrowing of state coercion statutes.

## I. BACKGROUND: OVERBREADTH ANALYSIS AND COERCION STATUTES

This first section in this Part discusses the development of the Supreme Court's overbreadth doctrine and explains how the Court analyzes overbroad statutes. The second section of this Part examines the nature of state coercion statutes and discusses *State v. Robertson*,<sup>17</sup> a particularly useful state supreme court decision that, this Comment argues, created an ideal framework for analyzing overbroad state coercion statutes.

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<sup>15</sup> See *State v. Stoneman*, 920 P.2d 535 (Or. 1996); *State v. Plowman*, 838 P.2d 558 (Or. 1992) (en banc); *State v. Robertson*, 649 P.2d 569 (Or. 1982).

<sup>16</sup> 649 P.2d at 587–88.

<sup>17</sup> See *id.*

### A. Supreme Court Overbreadth Analysis

This section explains the development of the overbreadth doctrine by the Supreme Court over the course of the twentieth century. It shows how the doctrine originally developed, explains the difference between the overbreadth doctrine and the alternate as-applied method for constitutional challenges, and addresses the Court's continuing developments of the doctrine.

Until the mid-twentieth century, the Supreme Court used an as-applied balancing test to evaluate overbroad laws.<sup>18</sup> In that approach, the Court judged the constitutionality of a law based on whether the law specifically infringed upon the rights of the particular individual bringing the action.<sup>19</sup> This as-applied method balances the importance of the legislative policy advanced by the law against the specific expression in which the individual bringing the suit had tried to engage.<sup>20</sup> If the Court finds that the law overreached by prohibiting the particular expression at issue, the as-applied method “allows the law to operate where it might do so constitutionally,” while also “vindicat[ing] a claimant who shows that his own conduct is within the [F]irst [A]mendment.”<sup>21</sup>

As the twentieth century progressed, the Court began to develop a new position on overbroad statutes, a position known as the overbreadth doctrine.<sup>22</sup> The modern overbreadth doctrine originated in *Thornhill v. Alabama*, where the Supreme Court held that a statute that broadly swept over and thus prohibited protected communications was facially invalid.<sup>23</sup> The Court further developed the overbreadth doctrine in *United States v. Robel*, rejecting the prior as-applied balancing approach in favor of facial challenges, holding that “when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a ‘less drastic’ impact on the continued vitality of First Amendment freedoms.”<sup>24</sup> Although the Court explained that it

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<sup>18</sup> See Note, *supra* note 1, at 844.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*; see also *Kuntz v. New York*, 340 U.S. 290, 304 (1951) (Jackson, J., dissenting).

<sup>21</sup> Note, *supra* note 1, at 844.

<sup>22</sup> See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 602 (1973); Note, *supra* note 1, at 846.

<sup>23</sup> Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863 (1991); see *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940) (“We hold that the danger . . . is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in [the challenged statute].”).

<sup>24</sup> 389 U.S. 258, 268 (1966); see also Note, *supra* note 1, at 845 (noting the overbreadth doctrine “may condemn a statute which comprehends a range of applications against privileged activity even though the interests it promotes outweigh the infringement of [F]irst [A]mendment liberties”).

measured the validity of the challenged statute's goals against First Amendment protections, it explicitly stated that it had "in no way 'balanced' those respective interests."<sup>25</sup>

Professor Lewis D. Sargentich's leading piece on the overbreadth doctrine highlights the Court's standard and process for engaging in overbreadth analyses.<sup>26</sup> First, for the Court to even undertake an overbreadth analysis, the type of expression or conduct affected by the challenged law must be so substantially involved in First Amendment interests that a legislative failure to narrowly focus the law would result in a chilling effect.<sup>27</sup> Next, Sargentich explained, the Court must assess the statute's "area of impact" to determine whether the conduct affected by the law is to a "substantial extent . . . the kind of expressive and associational behavior which at least has a colorable claim" to First Amendment protection.<sup>28</sup> Finally, if the law is unconstitutionally overbroad, the Court may attempt to save it by creating a *per se* rule of privilege, "carv[ing] away a class of applications that represents substantially all of a law's impermissible coverage."<sup>29</sup> In the doctrine's earlier years, the Court almost always chose to facially invalidate challenged statutes instead of carving out these narrow rules.<sup>30</sup> Although recently the Court has retreated slightly from its original proclivity toward facial invalidation,<sup>31</sup> Professor Matthew D. Adler has argued that "many, perhaps even most of the Court's

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<sup>25</sup> *Robel*, 389 U.S. at 268 n.20.

<sup>26</sup> *See Note, supra* note 1, at 859.

<sup>27</sup> *Id.*; *see infra* note 39 and accompanying text (explaining the "chilling effect").

<sup>28</sup> Note, *supra* note 1, at 860.

<sup>29</sup> *Id.* at 885; *see also* *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) ("The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a *limiting construction* or *partial invalidation* so narrows it as to remove the seeming threat . . . to constitutionally protected expression." (emphasis added)).

<sup>30</sup> *See* David M. Prentiss, Comment, *The First Amendment Overbreadth Doctrine and the Nature of the Judicial Review Power*, 25 NEW ENG. L. REV. 989, 1001 (1991) ("The overbreadth doctrine was frequently used by courts during the 1960s . . . . [At that time], the Court wielded the overbreadth doctrine like a quick sword to guard against what the Court considered to be government attempts to violate the freedom of speech."); *see also* Note, *supra* note 1, at 884 (identifying only two laws for which the Court ever created a *per se* rule to ameliorate overbreadth before 1970: state laws protecting an individual's interests in his personal reputation from defamation and federal laws suppressing obscenity (first citing *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen.*, 383 U.S. 413, 418 (1966); then citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964); and then citing *Roth v. United States*, 354 U.S. 476 (1957))).

<sup>31</sup> *See* Prentiss, *supra* note 30, at 1004 (explaining the Court's higher standard for facial invalidation articulated in *Broadrick*: "The Court concluded that even when a statute was overbroad and therefore had some potential chilling effect . . . there came a point when the chilling effect could not justify invalidating the statute on its face[:] . . . when the overbreadth was less than 'substantial'").

constitutional decisions sustaining rights-claims against conduct-regulating rules are [still] facial invalidations.”<sup>32</sup>

Sargentich has suggested that the optimal solution to remedy overbroad statutes is for the judiciary to return the challenged statute to the legislature for re-drafting because, while the courts may interpret the law, the power of statutory construction rests solely in the legislatures’ hands.<sup>33</sup> By re-writing the statutory text *sua sponte*, courts run the risk of violating “a clear legislative intent.”<sup>34</sup>

Although the as-applied method for challenging overbroad laws is still accepted and available for use in constitutional challenges,<sup>35</sup> the Court’s facial overbreadth doctrine focuses on the need for sweeping reform.<sup>36</sup> The doctrine suggests that the importance of prohibiting overbroad statutes goes beyond simply curing individual constitutional violations.<sup>37</sup> Hence, an individual challenging an overbroad statute can “prevail, regardless of the character of his own activity, by showing that the challenged law comprehends a range of applications against protected conduct.”<sup>38</sup> The element of “setting up” another’s rights through a facial challenge prevents a “chilling effect” on speech.<sup>39</sup> An overbroad statute not only chills free expression because people

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<sup>32</sup> Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 128 n.425 (1998).

<sup>33</sup> See Note, *supra* note 1, at 893, 898.

<sup>34</sup> *Id.* at 893.

<sup>35</sup> See *id.* at 911; see also *State v. Rangel*, 977 P.2d 379, 386–87 (Or. 1999) (explaining that the defendant could still attempt an as-applied challenge to a law that failed the overbreadth doctrine).

<sup>36</sup> See Note, *supra* note 1, at 846.

<sup>37</sup> See *id.* at 856–57.

<sup>38</sup> *Id.* at 856. The Court explained standing for overbreadth challenges in *Broadrick*:

[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—“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.” Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial . . . assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

*Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (citations omitted) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

<sup>39</sup> See Note, *supra* note 1, at 848; see also David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 55 (2006) (“In an overbreadth case . . . the claimant is permitted to raise a claim of facial invalidity largely because of a judicial concern that the challenged statute would otherwise chill the protected expression of parties other than the claimant. Thus, in effect, the overbreadth claimant vindicates the constitutional rights of third parties not before the Court.”).

fear prosecution, but it also disincentivizes others from challenging the statute; facial invalidation remedies this concern.<sup>40</sup>

However, because the facial overbreadth doctrine often invalidates entire statutes instead of carving out narrow as-applied exceptions,<sup>41</sup> the doctrine must be considered “strong medicine.”<sup>42</sup> The Court in *Broadrick v. Oklahoma* explained that “overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.”<sup>43</sup> Likewise, the Court warned of the difficulty of determining the precise scope of a statute when drafting it,<sup>44</sup> if courts were to strike down every law that created even a single impermissible infringement on protected speech, such action would severely affect the balance of power between the legislature and the judiciary.<sup>45</sup> When such “strong medicine” is necessary, however, the facial overbreadth doctrine allows courts to broadly invalidate statutes that infringe on First Amendment freedoms, as opposed to the as-applied method of providing only individualized relief for a defendant who suffered from the statute’s specific overreach.<sup>46</sup>

### *B. State Coercion Statutes & the Robertson Overbreadth Analysis*

Multiple state coercion statutes prohibit a “broad range”<sup>47</sup> of protected speech under the First Amendment (and its state constitutional equivalents).<sup>48</sup> Because these statutes’ overbroad language potentially criminalizes a substantial amount of communication, the statutes provide prime examples of

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<sup>40</sup> See Note, *supra* note 1, at 854–55 (explaining that because the as-applied method requires individuals to “test” the constitutional issue by engaging in the prohibited speech, facing prosecution, and then appealing their cases to receive overbreadth review from a higher court, they were discouraged from challenging overbroad statutes).

<sup>41</sup> See, e.g., *supra* note 32 and accompanying text.

<sup>42</sup> *Broadrick*, 413 U.S. at 613.

<sup>43</sup> *Id.* at 615.

<sup>44</sup> See *id.*; see also *Grayned v. City of Rockford*, 408 U.S. 104, 114–15 (1972) (“The crucial question [in an overbreadth inquiry], then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.”).

<sup>45</sup> See Doug Linder, *The Doctrines of Substantial Overbreadth and Vagueness*, EXPLORING CONST. CONFLICTS (Nov. 7, 2014), <http://law2.umkc.edu/faculty/projects/frtrial/conlaw/overbreadth.html>.

<sup>46</sup> Note, *supra* note 1, at 870–71 (“In sum, piecemeal excision [under the as-applied test] is not responsive to the policy which chiefly supports the overbreadth doctrine: the need for judicial alacrity in dissipating the chilling effect of overbroad statutes.”).

<sup>47</sup> See, e.g., *United States v. Robel*, 389 U.S. 258, 265–66 (1967) (invalidating a statute prohibiting a “broad range of associational activities”).

<sup>48</sup> See, e.g., OR. REV. STAT. ANN. § 163.275 (1980), *invalidated by State v. Robertson*, 649 P.2d 569, 580 (Or. 1982), *superseded by statute*, OR. REV. STAT. ANN. § 163.275 (West 1985).

targets for judicial oversight.<sup>49</sup> When state legislatures pass these statutes, the duty falls to state courts to protect the rights to free speech and expression outlined in the First Amendment and in state constitutions.<sup>50</sup>

However, the duty of state courts to perform narrowing inquiries under the overbreadth doctrine is relatively new.<sup>51</sup> Although there have been some state court decisions that have narrowed and invalidated overbroad coercion statutes,<sup>52</sup> state courts, with the exception of Oregon,<sup>53</sup> have yet to meaningfully explore the overbreadth problems posed by many of these statutes on a broad scale.<sup>54</sup>

### *I. Coercion Statutes & Scholarly Criticism*

In recent years, some scholars have noticed the inherent danger posed by far-reaching and ambiguous criminal coercion statutes.<sup>55</sup> For example, one

<sup>49</sup> See Note, *supra* note 1, at 860; see, e.g., OR. REV. STAT. ANN. § 163.275 (1980), *invalidated* by State v. Robertson, 649 P.2d 569, 580 (Or. 1982), *superseded by statute*, OR. REV. STAT. ANN. 163.275 (West 1985); TEX. PENAL CODE ANN. §§ 1.07(a)(9), 36.03(a) (West 2011).

<sup>50</sup> See, e.g., OR. CONST. art. I, § 8; TEX. CONST. art. I, § 8; see also *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“[W]e . . . assume that freedom of speech . . . which [is] protected by the First Amendment from abridgement by Congress—[is] among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

<sup>51</sup> See Jack Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 808–09 (2000) (explaining that until the 1970s, state constitutional jurisprudence commonly followed federal jurisprudence). However, in the 1970s, states began to be “openly reactive to federal constitutional jurisprudence,” especially in more liberal states opposed to “what they perceived as unacceptably conservative federal constitutional decisions.” *Id.* at 809–11.

<sup>52</sup> See Christopher P. Lu, Recent Developments, *The Role of State Courts in Narrowing Overbroad Speech Laws After Osborne v. Ohio*, 28 HARV. J. ON LEGIS. 253, 254–55 (1990) (explaining that the decision in *Osborne v. Ohio*, 495 U.S. 103 (1990), was “an implicit invitation to state courts to engage in substantial narrowing of overbroad speech laws”).

<sup>53</sup> See *State v. Robertson*, 649 P.2d 569, 571 (Or. 1982); see also Landau, *supra* note 51, at 843 (describing *Robertson* and noting that “the Oregon Supreme Court articulated, in an entirely novel fashion, the scope of the protection that article I, section 8 affords against overbroad enactments”).

<sup>54</sup> That said, a few courts have evaluated coercion statutes’ overbreadth and constitutionality after *Robertson*. See *State v. Steiger*, 781 P.2d 616, 619 (Ariz. Ct. App. 1989); *Whimbush v. People*, 869 P.2d 1245, 1247 (Colo. 1994) (en banc); *Feinberg v. Butler*, No. 25255, 2004 WL 1822869, at \*1, \*4, \*6 (Haw. Ct. App. Aug. 12, 2004) (unpublished disposition); *People v. Feldman*, 791 N.Y.S.2d 361, 381, 383 n.15 (N.Y. Sup. Ct. 2005); *State v. Hanson*, 793 S.W.2d 270, 271 (Tex. App. 1990); *City of Seattle v. Ivan*, 856 P.2d 1116, 1118 (Wash. Ct. App. 1993).

<sup>55</sup> See, e.g., James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 679 (1984); Kate L. Rakoczy, Comment, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech*, 56 AM. U. L. REV. 1621, 1624 (2007) (“There is no easy way to judge the legality of . . . [certain protests] . . . because courts and the [NLRB] have consistently failed to articulate the key elements of coercion.”); Comment, *supra* note 2, at 1473–74.

student commentator argued that “[c]oercive speech analysis . . . does not justify . . . criminal coercion statutes to the extent that they proscribe threats to commit an act that is neither a crime nor a tort.”<sup>56</sup> Professors Paul H. Robinson and Jane A. Grall noted that a New Jersey criminal coercion statute lacked precise definitions, leaving the statute to only “hint at . . . specific culpability requirements,” without fully outlining them, which the authors believe would “no doubt generate unnecessary litigation.”<sup>57</sup> Significantly, even the breadth of the Model Penal Code’s (MPC) criminal coercion statute has been criticized.<sup>58</sup> For states that have adopted this provision of the MPC, this statute could lead to future coercion-statute challenges.

Oregon led the states in addressing a criminal coercion statute’s overbreadth in 1982.<sup>59</sup> In *State v. Robertson*,<sup>60</sup> the Oregon Supreme Court considered a state coercion statute that criminalized “compel[ing] or induc[ing] another person to engage in conduct from which he has the legal right to abstain by causing him to fear the disclosure of discreditable assertions about some person.”<sup>61</sup> At the time, *Robertson* was revolutionary because the Oregon Supreme Court was the first state court to extensively analyze “how definitions of criminal coercion can touch protected speech.”<sup>62</sup> The *Robertson* court declared the state coercion statute unconstitutionally overbroad and invalidated the statute.<sup>63</sup> Perhaps the most significant takeaway from the *Robertson* opinion was articulated almost twenty years later in *State v. Ciancanelli*: “[L]aws must focus on proscribing the pursuit or accomplishment of forbidden results *rather than* on the suppression of speech or writing.”<sup>64</sup>

The *Robertson* court asserted that overbroad statutes arise when legislatures “reach[] into constitutionally protected ground.”<sup>65</sup> Mirroring elements of the

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<sup>56</sup> Comment, *supra* note 2, at 1473–74 (footnote omitted).

<sup>57</sup> Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 706 n.112 (1983).

<sup>58</sup> Lindgren, *supra* note 55, at 709 n.207.

<sup>59</sup> See *State v. Robertson*, 649 P.2d 569, 571 (Or. 1982).

<sup>60</sup> *Id.* (challenge came under OR. REV. STAT. ANN. § 163.275 (1980)).

<sup>61</sup> *Id.* (paraphrasing the challenged statute OR. REV. STAT. ANN. § 163.275) (1980).

<sup>62</sup> Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081, 1081 (1984) (“Before *Robertson*, most courts had paid little attention to free speech problems with such statutes, assuming that criminal coercion is not expression that is constitutionally protected.”).

<sup>63</sup> *Robertson*, 649 P.2d at 589–90.

<sup>64</sup> 121 P.3d 613, 621 (Or. 2005) (emphasis added) (citing *Robertson*, 649 P.2d at 579).

<sup>65</sup> *Robertson*, 649 P.2d at 575 (quoting *State v. Blocker*, 630 P.2d 824, 827 (1981)). The court in *Robertson* defined overbreadth in detail and explained why an overbreadth challenge differs from a vagueness challenge:

Supreme Court’s overbreadth doctrine, the *Robertson* court explained that its goal in performing the overbreadth analysis was to determine whether the challenged statute “appears to reach privileged communication or whether it can be interpreted to avoid such ‘overbreadth.’”<sup>66</sup>

The court then designed a multi-step analysis to determine whether a challenged statute is, in fact, overbroad, and whether it can be judicially “saved.”<sup>67</sup> This *Robertson* analysis has become a focal point of the Oregonian overbreadth analysis.<sup>68</sup> Cases post-*Robertson* have slightly modified and clarified the original framework.<sup>69</sup> This Comment relies on that revised *Robertson* framework.

## 2. Steps in the Robertson Framework

In a current *Robertson* analysis, a court basically follows three steps to determine a statute’s fate.<sup>70</sup> First, the court places the statute into one of three categories to determine whether it targets the actual content of speech, or, instead, the *effects* of speech.<sup>71</sup> If it targets the content of speech, a separate analysis is performed.<sup>72</sup> However, if it does not, the analysis continues to step two, where the court must determine whether the law “exceed[s] constitutional boundaries, purporting to reach conduct protected by . . . Article I, section 8.”<sup>73</sup>

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An “overbroad” law . . . is not vague, or need not be. Its vice is not failure to communicate . . . For a law is overbroad to the extent that it announces a prohibition that reaches conduct which may be not prohibited. A legislature can make a law as “broad” and inclusive as it chooses unless it reaches into constitutionally protected ground.

*Id.* at 575.

<sup>66</sup> *Id.* at 579. Privileged communication refers to that protected by OR. CONST. art. I, § 8 (codifying the freedom of speech in the Oregon Bill of Rights).

<sup>67</sup> *Id.* at 587–88.

<sup>68</sup> See, e.g., Rex Armstrong, *State Court Federalism*, 30 VAL. U. L. REV. 493, 500 (1996).

<sup>69</sup> The creation of categories, for example, was a significant clarifying change to *Robertson*. See *State v. Babson* 326 P.3d 559, 566 (Or. 2014) (en banc); *State v. Plowman*, 838 P.2d 558, 562–63 (Or. 1992) (en banc), *cert. denied*, 508 U.S. 974 (1993). Additionally, subsequent decisions have modified the historical exception portion of *Robertson*. See, e.g., *State v. Stoneman*, 920 P.2d 535, 539–40 (Or. 1996); *infra* notes 229–30 and accompanying text.

<sup>70</sup> See *Plowman*, 838 P.2d at 564.

<sup>71</sup> See *infra* note 75.

<sup>72</sup> See *Babson*, 326 P.3d at 567 (“A law that is ‘written in terms directed to the substance of any ‘opinion’ or any ‘subject’ of communication’ is unconstitutional unless the restriction is wholly confined within an historical exception.”).

<sup>73</sup> *Id.* at 570 (quoting *State v. Robertson*, 649 P.2d 569, 575 (Or. 1982)).

Finally, if a court finds the challenged statute to be overbroad, it must “determine whether it can be interpreted to avoid such overbreadth.”<sup>74</sup>

Each step of the analysis requires a court’s interpretation. In the first step of a *Robertson* analysis, a court first places the potentially overbroad statute into one of three categories: (1) statutes directed to the substance of an opinion or subject communication; (2) statutes focusing on the forbidden effects of speech; and (3) statutes focusing on the forbidden effects of acts that do not target expression.<sup>75</sup>

If the statute is directed toward the substance of protected speech,<sup>76</sup> for example by prohibiting the expressing of an opinion, it fits within category one.<sup>77</sup> After making that finding, a court conducts a historical exception analysis.<sup>78</sup> This analysis is part of *Robertson*’s first step, and only applies to statutes that fall into this first category.<sup>79</sup> The historical exception test provides that when a law is directed toward “the substance of any opinion or any subject of communication,” it is facially unconstitutional “unless the scope of the restraint is wholly confined within some historical exception that was well-established” when either the First Amendment or the 1859 Oregon Constitution was written.<sup>80</sup> The *Robertson* opinion listed numerous crimes as

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<sup>74</sup> *Id.*

<sup>75</sup> Although the *Robertson* court did not explicitly define these categories, the analysis has been clarified and developed by the Oregon Supreme Court in the years following the decision to incorporate this categorical approach. See *Babson*, 326 P.3d at 566; *Plowman*, 838 P.2d at 562–63; see also Michael West, High Court Study, *Arrested Development: An Analysis of the Oregon Supreme Court’s Free Speech Jurisprudence in the Post-Linde Years*, 63 ALB. L. REV. 1237, 1252–53 (2000) (explaining the requirements for each of the three categories). “[W]hen presented with a statute challenged as ‘overbroad,’ or infringing upon a constitutionally protected speech, a court is to first carefully assess the true nature of the measure.” *Id.* at 1252.

<sup>76</sup> See *State v. Robertson*, 649 P.2d 569, 576 (Or. 1982) (explaining that a statute legislates against speech when “the constitutional guarantee invoked against the statute forbade its very enactment as drafted”). The Oregon Court also explained that because the free speech provision of the Oregon Constitution prohibits passing a law “restraining the free expression of opinion,” a law “written in terms directed to the substance of any ‘opinion’” would fall into category one. See *id.* (emphasis added) (citing *Wheeler v. Green*, 593 P.2d 777 (Or. 1979)).

<sup>77</sup> See *Babson*, 326 P.3d at 566.

<sup>78</sup> See West, *supra* note 75, at 1252; William R. Long, Note, *Requiem for Robertson: The Life and Death of a Free-Speech Framework in Oregon*, 34 WILLAMETTE L. REV. 101, 109 (1998) (relying on the original formulation of *Robertson*, as opposed to how it has evolved today, which treats the historical exception analysis as part of step one).

<sup>79</sup> See West, *supra* note 75, at 1252; Long, *supra* note 78, at 109.

<sup>80</sup> William R. Long, *Free Speech in Oregon: A Framework Under Fire*, OR. ST. B. BULL. (Oct. 2003), <https://www.osbar.org/publications/bulletin/03oct/free.html> (citing *Robertson*, 649 P.2d at 576); see *Robertson*, 649 P.2d at 576; West, *supra* note 75, at 1252; Long, *supra* note 78, at 109 (“Under the ‘historical exception,’ a law that is directed to the substance of any opinion or subject of communication is

examples of such historical exceptions: “perjury, forgery, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud.”<sup>81</sup> If the law does not fit into one of these historical exceptions and facially targets protected speech, it is *per se* unconstitutional.<sup>82</sup>

If the court determines in step one that a statute does not prohibit content, the court will place it into the second or third category.<sup>83</sup> These categories focus on statutes targeting forbidden effects of speech and conduct, as opposed to statutes prohibiting the actual content of words or actions.<sup>84</sup> The second category focuses on the operational capacity of language; it is not the content of the language that the challenged statute criminalizes, but instead the effect that language has on another individual.<sup>85</sup> The language criminalized in the second category is that which operationalizes the speaker’s criminal intent, whereas statutes in the first category prohibit the content of the actual speech.<sup>86</sup> For example, the challenged statute in *Robertson* criminalized the act of expressing words that would result in another person feeling threatened—that is, it criminalized the *effect* of that speech, not the *content*.<sup>87</sup>

Finally, the third category encompasses statutes that prohibit the effect that certain conduct, such as a gesture, has on others.<sup>88</sup> Unlike a statute in category two, a category three statute is one in which the “proscribed means of

unconstitutional, unless the law existed at the time of the First Amendment (1791) and at the time of the Oregon Constitution (1859), and was not eliminated by either.”)

<sup>81</sup> See *Robertson*, 649 P.2d at 576.

<sup>82</sup> See *id.* (“If a law concerning free speech on its face violates [the prohibition of enacting laws restraining the free expression of opinion], it is unconstitutional” (quoting *State v. Spencer*, 611 P.2d 1147, 1148 (Or. 1980))). See generally *Powell’s Books, Inc. v. Kroger*, 622 F.3d 1202, 1211 n.12 (9th Cir. 2010) (explaining how the first prong of *Robertson* (effects versus content inquiry plus historical inquiry) operates: “If the law targets content, it is unconstitutional unless the restraint is confined within some historical exception”).

<sup>83</sup> See *State v. Plowman*, 838 P.2d 558, 562–63 (Or. 1992) (en banc) (“Laws . . . which focus on forbidden results[] can be divided further into two categories.”).

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *Robertson*, 649 P.2d at 579.

<sup>88</sup> See *Plowman*, 838 P.2d at 563 (noting it applies to a “[a] person accused of causing such [forbidden] effects by language or gestures . . .” (alterations in original) (quoting *Robertson*, 649 P.2d at 579)). Category three encompasses laws that prohibit actions that would not constitute expressive conduct under the First Amendment. See *Robertson*, 649 P.2d at 579 n.11 (using Supreme Court precedent, *United States v. O’Brien*, 391 U.S. 367 (1968), involving a “prosecution for destroying a draft registration certificate burned in political protest,” as an example of a law that prohibited forbidden effects but did not implicate free speech claims).

causing . . . [forbidden] effects” in the statute does *not* include protected expression.<sup>89</sup>

After completing this first step of its analysis, the court proceeds to the second stage: for category one statutes surviving a historical analysis or those in the second or third category, it conducts an “overbreadth and narrowing inquiry.”<sup>90</sup> This inquiry mirrors the Supreme Court’s overbreadth doctrine by determining whether the statute broadly infringes upon “constitutionally permissible limits.”<sup>91</sup>

In this second stage of its analysis of the statute used to prosecute the defendant in *Robertson*, the court determined that by prohibiting the act of making a threat, the challenged statute forbade an effect of speech<sup>92</sup> (thus placing it in category two), and then analyzed whether the statute infringed significantly upon privileged communication.<sup>93</sup> The court found that the Oregon coercion statute “require[d] neither the conduct demanded of the victim nor the action threatened in case of refusal to be wrongful.”<sup>94</sup> Most of the “threatened consequences,” the court noted, were legal.<sup>95</sup> Additionally, the “target” of the coercion statute, “effective use of fear to induce compliance with a demand,” was not illegal in itself.<sup>96</sup> The court explained that the law

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<sup>89</sup> *State v. Babson*, 326 P. 3d 559, 566 (Or. 2014) (en banc) (“If the law focuses on forbidden effects, and ‘the proscribed means [of causing those effects] include speech or writing,’ . . . then the law is analyzed under the second *Robertson* category. . . . If, on the other hand, the law focuses only on forbidden effects, then the law is in the third *Robertson* category. . . .” (alterations in original)). Laws in the third category do not touch protected First Amendment expression, so they are evaluated under an as-applied approach. *Id.*; see *Robertson*, 649 P.2d at 579 (“If that statute had been directed only against causing the forbidden effects, a person accused of causing such effects by language or gestures would be left to assert . . . that the statute could not constitutionally be applied to his particular words or other expression, not that it was drawn and enacted contrary to article I, section 8.” (discussing *State v. Spencer*, 611 P.2d 1149, 1147 (Or. 1980))).

<sup>90</sup> See Long, *supra* note 78, at 109–10. If a statute passes the first category’s historical exception analysis or falls into categories two or three, the court has not declared the statute overbroad on its face—there is a chance that the statute could be constitutional, whether on its face or through judicial narrowing, so the court then completes an overbreadth analysis to determine if the statute is overbroad, and if so, whether it can be saved. See *id.*

<sup>91</sup> See *Robertson*, 649 P.2d at 577; Long, *supra* note 78, at 119 n.55 (explaining development of the Supreme Court’s overbreadth doctrine).

<sup>92</sup> *Robertson*, 649 P.2d at 579 (“the effect of frightening another person into a nonobligatory and undesired course of conduct”). The court also distinguished the “threat” in *Robertson* versus the provision in a previous case where the law specifically prohibited disorderly conduct “speech”: “[the coercion statute] is not a law whose enactment was for this reason alone wholly withdrawn from legislative authority.” *Id.* at 577–79.

<sup>93</sup> See *id.* at 580–81; West, *supra* note 75, at 1252–53.

<sup>94</sup> See *Robertson*, 649 P.2d at 579.

<sup>95</sup> See *id.* (“Only one item among the threatened consequences listed in ORS 163.275(1) assumes illegality . . .”).

<sup>96</sup> *Id.* at 580.

was therefore vastly overbroad, noting many hypothetical forms of communication that the statute would prohibit.<sup>97</sup>

Finally, a court performing a *Robertson* analysis must determine whether it is possible to judicially narrow the statute to save it from invalidation.<sup>98</sup> In *Robertson*, the court explained that because the statute was so broad and inclusive, it touched privileged expression in a variety of public and private settings.<sup>99</sup> The court found the statute to be so vastly overbroad that the legislative intent was unclear.<sup>100</sup> It therefore determined that judicial narrowing could not save the statute.<sup>101</sup> Its analysis complete, the *Robertson* court invalidated the statute, sending a mandate to the Oregon legislature to narrow the statute.<sup>102</sup>

### 3. *Robertson's Development and Multi-State Adoption*

In the years since *Robertson*, the most practical and significant principles of the decision have persevered in Oregon overbreadth analyses and still provide helpful guidance. For example, in 2014, the Oregon Supreme Court utilized a *Robertson* analysis to address a free expression challenge in *State v. Babson*.<sup>103</sup> Furthermore, despite critics' laments that the *Robertson* framework has strayed

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<sup>97</sup> *Id.* (listing examples of conduct that the statute would prohibit, including one man threatening to tell another's wife about his affair if he did not stop sleeping with the first man's wife; a person threatening to disclose an airline pilot's secret illness if he did not get medical attention; or a person threatening to share a politician's embarrassing past if he did not quit his campaign). The *Robertson* court relied on the lower court's dissent for some of the listed hypothetical situations. See *State v. Robertson*, 635 P.2d 1057, 1062 (Or. Ct. App. 1981) (Warden, J., dissenting).

<sup>98</sup> *Robertson*, 649 P.2d at 589–590.

<sup>99</sup> *Id.* at 589 (explaining that the statute infringed upon speech in politics, journalism, academic life, and between families). The *Robertson* court followed the Supreme Court's overbreadth analysis for this step of its framework. See Note, *supra* note 1, at 882–83.

<sup>100</sup> Greenawalt, *supra* note 62, at 1089 (explaining that the *Robertson* court determined that in order to save the statute, it would have to write in specific expansions, which would not only “trespass on . . . legislative function[s],” but would also create an impermissibly vague statute).

<sup>101</sup> See *Robertson*, 649 P.2d at 590 (“We cannot substitute a wider set of exclusions for those knowingly chosen by the drafters of ORS 163.275, even assuming that such wider exclusions rather than narrower and more precise affirmative coverage are the means to confine the statute within constitutional bounds.”).

<sup>102</sup> See *Planned Parenthood v. Am. Coal. of Life Activists*, 945 F. Supp. 1355, 1381 (D. Or. 1996) (“Subsequent to *Robertson* . . . the Oregon Legislature redrafted the statute in order to correct its overbreadth. . . . [T]he current, redrafted version . . . passes constitutional muster provided that the ‘fear’ which is ‘instilled’ in the other person is objectively reasonable, the physical injury that is feared is objectively reasonable, and the ‘some person’ to whom injury is threatened is some specific person.”).

<sup>103</sup> 326 P.3d 559, 566, 567 (Or. 2014) (en banc).

too far from its original articulation,<sup>104</sup> this Comment argues that the changes implemented by Oregon courts over the years have actually clarified and helped to preserve *Robertson* through the development of categories and the narrowing of the historical exception.<sup>105</sup> Such contributions have proven advantageous for evaluating state overbreadth claims.<sup>106</sup> While the framework applied in *Robertson* has developed and changed over the past three decades, it still serves as a guiding principle for Oregonian constitutional interpretation.<sup>107</sup> Perhaps, more importantly, its message has echoed across the country in the decades since its inception.<sup>108</sup>

Although the historical exception analysis test from category one has not been adopted by other jurisdictions, other elements of *Robertson* have proven useful to sister states.<sup>109</sup> State courts have frequently focused on the second step of *Robertson*: the constitutional overbreadth analysis.<sup>110</sup>

In its opinion addressing the constitutionality of a Seattle city coercion ordinance, the Washington Court of Appeals quoted *Robertson*, emphasizing that the overbreadth of the statute could potentially criminalize political, journalistic, academic, and familiar speech.<sup>111</sup> Drawing from *Robertson*'s explanation on the same subject, the court declined to construe the statute in a way that would implicitly read a criminal intent requirement into the statute, and instead determined that the statute was too broad to be judicially "saved."<sup>112</sup> A Hawaii court made a similar decision in *Feinberg v. Butler*, adopting *Robertson*'s interpretation of the Supreme Court's overbreadth

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<sup>104</sup> West, *supra* note 75, at 1283 ("The *Robertson* framework . . . was recast and arguably stripped of much of its promise."); Long, *supra* note 78, at 123 (arguing that the *Plowman* decision "completely abandoned" the "traditional *Robertson* concern with patient comparative historical investigation into statutes"); Long, *supra* note 80 (arguing that decisions such as *Stoneman* caused "cracks in the *Robertson* framework").

<sup>105</sup> State v. Stoneman, 920 P.2d 535, 540–41 (Or. 1996); State v. Plowman, 838 P.2d 558, 562–63 (Or. 1992) (en banc); cf. Long, *supra* note 78, at 133–36 (explaining that the decisions in the 1990s made the historical analysis too rigid, and now, "trying to find a historical exception has become an exercise in trying to find an exact historical prototype").

<sup>106</sup> Contra Long, *supra* note 78, at 123. See generally Babson, 326 P.3d at 566 (using a revised *Robertson* framework); Stoneman, 920 P.2d at 540–41 (explaining how to use a revised historical analysis).

<sup>107</sup> See, e.g., Babson, 326 P.3d at 566.

<sup>108</sup> E.g., State v. Steiger, 781 P.2d 616, 621 (Ariz. Ct. App. 1989); Whimbush v. People, 869 P.2d 1245, 1248 (Colo. 1994) (en banc); Feinberg v. Butler, No. 25255, 2004 WL 1822869, at \*5 (Haw. Ct. App. Aug. 12, 2004) (unpublished disposition); People v. Feldman, 791 N.Y.S.2d 361, 383 n.15 (N.Y. Sup. Ct. 2005); City of Seattle v. Ivan, 856 P.2d 1116, 1120–21 (Wash. Ct. App. 1993).

<sup>109</sup> See *supra* note 108.

<sup>110</sup> E.g., Ivan, 856 P.2d at 1120.

<sup>111</sup> *Id.* at 1120–21 (citing State v. Robertson, 649 P.2d 569, 589 (Or. 1982)).

<sup>112</sup> *Id.* at 1121, 1123.

doctrine.<sup>113</sup> Explaining that the challenged law was not sufficiently narrow so as to avoid infringing upon a substantial range of protected expression, the court invalidated the statute in question.<sup>114</sup>

The Colorado Supreme Court adopted Oregon’s categorical approach (*Robertson* step one) to evaluate whether the challenged statute targeted the content (category one) or the operationalizing of protected expression (category two).<sup>115</sup> In *Whimbush v. People*, the court held that verbal “threats to take or initiate even unlawful violent action are not beyond [F]irst [A]mendment protection by their content alone, divorced from any imminent realization.”<sup>116</sup> The Colorado court further explained that even a “specific intent” requirement read into the statute could not save it, because the statute would still criminalize a “substantial amount of protected activity.”<sup>117</sup>

*Robertson* has served as a viable and effective framework for state overbreadth challenges, having guided both Oregonian courts<sup>118</sup> and those in other states for decades.<sup>119</sup> In spite of modern re-interpretations and implementations of *Robertson*, its holding and foundational framework continue to stand for and support the Oregon court’s belief that legislators, in drafting statutes, should “focus on ‘the harms they seek to prevent rather than simply attempting to prohibit certain kinds of speech.’”<sup>120</sup>

## II. THE GROWTH OF PROSECUTORIAL CHARGING POWER

Overbroad coercion statutes on their own pose a significant danger to protected communication,<sup>121</sup> but they become particularly problematic when combined with unbridled prosecutorial charging power. Because these statutes

<sup>113</sup> 2004 WL 1822869, at \*5 (“[I]f the statutory language chosen by the legislature is broad enough to reach constitutionally protected speech, the statute may be invalidated as overbroad.”).

<sup>114</sup> *Id.* at \*6 (noting the statute “does not require that the prohibited disparaging allegations actually cause any harm”). The statute’s “language reaches beyond unprotected speech . . . to prohibit constitutionally protected speech.” *Id.*

<sup>115</sup> *Whimbush v. People*, 869 P.2d 1245, 1250 (Colo. 1994) (en banc).

<sup>116</sup> *Id.* (quoting *State v. Robertson*, 649 P.2d 569, 580–81 (Or. 1982)).

<sup>117</sup> *Id.* at 1248 (discussing COLO. REV. STAT. ANN. § 18-3-207(1) (West 1986)).

<sup>118</sup> *E.g.*, *State v. Babson*, 326 P.3d 559, 566 (Or. 2014) (en banc); *State v. Ciancanelli*, 121 P.3d 613, 621 (Or. 2005).

<sup>119</sup> *E.g.*, *State v. Steiger*, 781 P.2d 616, 621 (Ariz. Ct. App. 1989); *Whimbush v. People*, 869 P.2d 1245, 1248 (Colo. 1994) (en banc); *Feinberg v. Butler*, No. 25255, 2004 WL 1822869, at \*5 (Haw. Ct. App. Aug. 12, 2004) (unpublished disposition); *People v. Feldman*, 791 N.Y.S.2d 361, 383 n.15 (N.Y. Sup. Ct. 2005); *City of Seattle v. Ivan*, 856 P.2d 1116, 1120 (Wash. Ct. App. 1993).

<sup>120</sup> West, *supra* note 75, at 1238 (quoting Long, *supra* note 78, at 105).

<sup>121</sup> Note, *supra* note 1, at 858–59.

are so broad that they can criminalize a wide range of communication and activity, prosecutors with unlimited discretion can pick and choose whom to indict for alleged violations.<sup>122</sup> The recent growth of prosecutorial charging power has sparked a wave of criticism by legal academia, and in the last twenty years there has been a proliferation of scholarship focused on this concern.<sup>123</sup> This Part first examines the difficulty faced by other branches of government in attempting to control prosecutors or to limit their power to bring charges against individuals. It then demonstrates how prosecutors are able to use overbroad statutes as a strategic tool to indict politicians and government actors without fearing the possibility of a “check” from other branches of government.

The growth of prosecutorial power in the United States in the last quarter-century, in the opinion of Professor Bennett Gershman, has been the result of the “transition from a due process-oriented criminal justice model to a model that has placed increasing emphasis on crime control.”<sup>124</sup> Alternately, Federal Judge Gerard E. Lynch argued that the expansion of prosecutorial power is a result of rising costs and inefficiency in the judicial system.<sup>125</sup> Whatever the reason for the growth in power over the years, prosecutors now perhaps have more “unreviewable power and discretion” than any other government official in America.<sup>126</sup>

#### *A. The Bases of Strength for Prosecutorial Power & Discretion*

Charging decisions constitute a particularly significant element of prosecutorial power.<sup>127</sup> Prosecutors have discretion to determine whether to bring charges against a defendant and what those charges will be.<sup>128</sup> These charges then determine “the extent of the suspect’s contact with the criminal

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<sup>122</sup> See *infra* notes 139–41 and accompanying text (discussing prosecutorial charging immunity).

<sup>123</sup> E.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992); Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023 (2006); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

<sup>124</sup> Gershman, *supra* note 123, at 393.

<sup>125</sup> Lynch, *supra* note 123, at 2142.

<sup>126</sup> Bibas, *supra* note 123, at 960 (“Legislators are checked by other legislators, the executive’s veto, judicial review, and voters. Governors and the President are limited by legislation, . . . judicial review, and voters. Judges face appellate review . . . Administrative agencies are constrained by judicial review.”).

<sup>127</sup> James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1524–25 (1981).

<sup>128</sup> *Id.* at 1525.

justice system,” and what kind of bargain the prosecutor can later offer that defendant.<sup>129</sup>

### 1. *The Importance of the Charging Power*

Professor Rachel Barkow addressed the power inherent in prosecutorial charging decisions.<sup>130</sup> She argued that broad statutes give prosecutors a sense of legislative power through charging decisions because

Congress *won't* make law with sufficient specificity to resolve important issues of policy, and judges *can't* . . . remedy this inattention with lawmaking of their own. This lawmaking gap is . . . filled by . . . Attorneys . . . who *do* effectively make law by adapting [broad or vague] statutes to advance their own political interests.<sup>131</sup>

Moreover, when a prosecutor charges a defendant, he or she then holds a significant amount of leverage over that defendant.<sup>132</sup> The Supreme Court implicitly championed that charging leverage, and in doing so, ushered in a new era of prosecutorial power with its 1978 decision in *Bordenkircher v. Hayes*.<sup>133</sup> In *Bordenkircher*, the Court explained that plea bargaining derives from “‘the mutuality of advantage’ to defendants and prosecutors.”<sup>134</sup> Unfortunately, however, this approach to plea bargaining may have been overly optimistic; some scholars have suggested that *Bordenkircher* actually stands for the legalization of prosecutorial threats through plea bargains.<sup>135</sup> Essentially, *Bordenkircher* has allowed prosecutors to legally threaten to add charges and to give harsher treatment to a defendant who refuses to plea, thereby rendering plea offers “almost irresistible” to most defendants.<sup>136</sup>

<sup>129</sup> *Id.* at 1525–26.

<sup>130</sup> Barkow, *supra* note 123, at 871 & n.9.

<sup>131</sup> *Id.* (quoting Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61 LAW & CONTEMP. PROBS. 47, 49 (1998)); *see also* Joan Erskine, *If It Quacks Like a Duck: Recharacterizing Domestic Violence as Criminal Coercion*, 65 BROOK. L. REV. 1207, 1220, 1232 (1999) (arguing that broad coercion statutes could allow prosecutors to use felony charges of coercion to transform misdemeanor domestic violence prosecutions into felonies and therefore gain more significant domestic violence sentences in order to enhance punishment for domestic violence assailants).

<sup>132</sup> *See* Barkow, *supra* note 123, at 881; Vorenberg, *supra* note 127, at 1525.

<sup>133</sup> 434 U.S. 357 (1978); *see* Barkow, *supra* note 123, at 879.

<sup>134</sup> *Bordenkircher*, 434 U.S. at 363 (quoting *Brady v. United States*, 397 U.S. 742, 752 (1970)).

<sup>135</sup> *See, e.g.*, Klein, *supra* note 123, at 2036–37 (“Prosecutors can threaten to add additional felony charges if a defendant refuses to plea, so long as this threat is made during . . . plea negotiations.”).

<sup>136</sup> Vorenberg, *supra* note 127, at 1535; *see also* Barkow, *supra* note 123, at 879 (“After *Bordenkircher*, ‘[p]rosecutors have a strong incentive to threaten charges that are excessive.’” (alteration in original) (quoting William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* 26 (Harvard Law Sch. Pub. Law Working Paper No. 120, 2005))); Klein, *supra* note 123, at 2036 (“[T]he Court

## 2. *Lack of Checks on Prosecutors*

Not only are prosecutors legally imbued with this significant charging power, but they also face few meaningful checks from agencies, judges, legislatures, or even the public.<sup>137</sup> Prosecutors are not forced to participate in the same type of public disclosure mandated for legislatures and agencies.<sup>138</sup> Their charging decisions are also protected by judicially crafted prosecutorial immunity.<sup>139</sup> Adopted from the common law by the Court in *Imbler v. Pachtman*, prosecutorial immunity was designed to serve the public interest by preserving prosecutors' independence.<sup>140</sup> Addressing policy concerns underlying the development of this immunity, the Court maintained that forcing prosecutors to face harassment or legal repercussions from their charging decisions would "prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."<sup>141</sup>

Prosecutors generally face few meaningful judicial checks on their charging choices.<sup>142</sup> In fact, where judicial standards governing prosecutors do exist, they are rarely utilized to control charging decisions.<sup>143</sup> In *Berger v. United States*, the Supreme Court explained that while a prosecutor may

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has consistently refused to place any meaningful constitutional limits on the threats a prosecutor can make to compel a plea deal.").

<sup>137</sup> Bibas, *supra* note 123, at 959, 961; Vorenberg, *supra* note 127, at 1554–55.

<sup>138</sup> Bibas, *supra* note 123, at 961; Vorenberg, *supra* note 127, at 1554–55. Although district attorneys are in some ways accountable because they are elected officials, assistant district attorneys do not have this responsibility. Additionally, even though district attorneys are elected officials, they are not subject to the same types of disclosure requirements as, for instance, legislators. Bibas, *supra* note 123, at 961.

<sup>139</sup> See Gershman, *supra* note 123, at 406.

<sup>140</sup> 424 U.S. 409, 427 (1976); Bibas, *supra* note 123, at 974.

<sup>141</sup> *Imbler*, 424 U.S. at 427–28. The Court made this decision fully realizing that "genuinely wronged defendant[s]" would be without redress, but in balancing the defendant's position versus the government's interest in an independent prosecutor, it held in favor of prosecutorial immunity. *Id.*

<sup>142</sup> Along with the equal protection analysis described in the following paragraph, there are also some court-crafted limits on "prosecutorial vindictiveness." Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 746–47 (1996) ("Only in very limited circumstances, such as race discrimination or vindictiveness, will the court overturn a prosecutor's charging decision." (footnotes omitted)). Vindictiveness is "a term of art used to denote constitutionally prohibited retaliatory uses of the state's power to enhance the defendant's punishment." Barbara A. Schwartz, *The Limits of Prosecutorial Vindictiveness*, 69 IOWA L. REV. 127, 128 (1983). However, vindictiveness claims in the charging and pleading stage only arise when a defendant "first exercises or threatens to exercise a procedural right." Murray R. Garnick, Note, *Two Models of Prosecutorial Vindictiveness*, 17 GA. L. REV. 467, 475 (1983). This Comment focuses on prosecutorial discretion to bring initial charges against a defendant in a politically motivated prosecution, and vindictiveness is not an applicable control for prosecutorial charging decisions in this context.

<sup>143</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935); Vorenberg, *supra* note 127, at 1539.

“prosecute with earnestness and vigor,” he or she “is not at liberty to strike foul [blows].”<sup>144</sup> He or she may not, the Court explained, use “improper methods calculated to produce a wrongful conviction.”<sup>145</sup> While this limitation seems like a reasonable and appropriate guideline for prosecutors, it is worth noting that the leading case on invalidating an indictment under an equal protection analysis was decided in 1886 in *Yick Wo v. Hopkins*.<sup>146</sup> *Yick Wo* prohibits prosecutors from prosecuting individuals based solely on a “constitutionally impermissible criterion” such as “race, sex, or exercise of [F]irst [A]mendment rights,”<sup>147</sup> but this case was the “first and last time the . . . Court struck down a prosecution for the invalid selection of a target.”<sup>148</sup> Additionally, although criminal prosecution based on a prosecutor’s improper motives is illegal, it is almost impossible to prove a prosecutor’s state of mind in bringing charges.<sup>149</sup>

*B. Current Solutions to Prosecutorial Power, and Why They Are Largely Ineffective*

Academics have posed possible solutions to the problem of excessive prosecutorial power, but none are particularly effective in practice. For example, legislatures might exert checks on prosecutors from above, perhaps by creating a law directly limiting prosecutorial power in plea bargaining, implementing sentencing commissions, or narrowing sentencing ranges to “reallocate powers now monopolized by prosecutors.”<sup>150</sup> This strict legislative control, is impractical, however, because legislatures have “strong incentives” to remain on the same “side” as prosecutors by maximizing convictions and minimizing costs in the criminal system.<sup>151</sup> Legislatures “do not want to be accused of reducing the number of crimes on the books.”<sup>152</sup> This natural alliance between the legislative and executive branches (prosecutors represent

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<sup>144</sup> 295 U.S. at 88.

<sup>145</sup> *Id.*

<sup>146</sup> Vorenberg, *supra* note 127, at 1539 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

<sup>147</sup> *Id.* at 1540.

<sup>148</sup> *Id.*

<sup>149</sup> *See id.* at 1542 (“Rarely will a prosecutor explicitly signal improper motives.”).

<sup>150</sup> *Id.* at 1568 (suggesting a “reassertion of legislative authority over policymaking on crime and punishment”).

<sup>151</sup> Bibas, *supra* note 123, at 966; *see also* Dripps, *supra* note 6, at 1166.

<sup>152</sup> Bibas, *supra* note 123, at 967.

“the State”) makes it unlikely that legislatures will choose to cut prosecutorial power through direct overhead regulation.<sup>153</sup>

Judicial oversight is perhaps equally ineffective for controlling prosecutorial charging decisions.<sup>154</sup> Multiple authors have argued that judicial deference to legislatures also prevents judiciaries from controlling prosecutors.<sup>155</sup> Legislatures “tend to overcriminalize,” for example by creating multiple laws that prohibit the same behavior.<sup>156</sup> Judges, in turn, defer to penal codes,<sup>157</sup> implicitly giving prosecutors the power to indiscriminately enforce them. Moreover, due to legislative over-criminalization, “justifications for punishment are so conflicting and indeterminate” that a “clever prosecutor” could easily argue for a variety of possible charges or dispositions “within a very broad ballpark.”<sup>158</sup>

Other academics writing on this topic have suggested that state prosecution offices should self-regulate through such means as internal hiring guidelines, increased education for new attorneys, and increased power from the lead attorneys in an office.<sup>159</sup> However, these policies would not serve as binding law on prosecutors,<sup>160</sup> and currently existing policies are often too general to significantly limit prosecutors’ actions.<sup>161</sup> More significantly, these proposals are limited by human nature; although self-imposed limits are an optimistic goal, “people rarely give up power voluntarily, and thus the capacity of self-regulation . . . is limited.”<sup>162</sup>

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<sup>153</sup> Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128–29 (2008) (“[L]egislators . . . have never answered the calls for external regulation of the prosecutor’s office, and the political dynamics of American criminal justice make it very unlikely that they will do so in the future.”).

<sup>154</sup> See, e.g., *id.* at 128 (“[S]cholars have called for judges to review prosecutorial charging . . . decisions, in the hope that judges can limit and legitimize the choices that prosecutors make. The judicial-oversight project, however, has failed.”).

<sup>155</sup> See, e.g., Roy B. Flemming, *The Political Styles and Organizational Strategies of American Prosecutors: Examples from Nine Courthouse Communities*, 12 LAW & POL’Y 25, 26 (1990); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 522 (2000).

<sup>156</sup> Luna, *supra* note 155, at 522.

<sup>157</sup> *Id.* (“The problem for police and prosecutors, then, is how to enforce a repetitive, unwieldy, and sometimes unjustifiable list of prohibited conduct.”).

<sup>158</sup> Bibas, *supra* note 123, at 974.

<sup>159</sup> See, e.g., Bibas, *supra* note 123, at 1016; Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1466 (2010); Miller & Wright, *supra* note 153, at 161.

<sup>160</sup> Luna & Wade, *supra* note 159, at 1419.

<sup>161</sup> *Id.*

<sup>162</sup> Vorenberg, *supra* note 127, at 1545.

“Experience . . . is telling: It has proven almost impossible to convince judges or legislatures to create meaningful limits on [prosecutorial discretion].”<sup>163</sup> External controls on prosecutors have not proven to be feasible options for controlling prosecutorial charging decisions.<sup>164</sup> Internal controls are equally problematic—prosecution offices vary greatly across the country, and prosecutors are unlikely to place vast and meaningful limits on their own power.<sup>165</sup> Therefore, given that prosecutors cannot be well controlled through direct external or internal limits, this Comment argues that indirectly imposed controls appear to be the best option. By narrowing the scope of statutes and invalidating overbroad statutes, legislatures and judges can indirectly curb prosecutors’ charging powers.

### III. CASE STUDY: INDICTMENT OF FORMER TEXAS GOVERNOR RICK PERRY

In their overbreadth, coercion statutes provide a powerful tool for prosecutors to use against political enemies without restraint. Professor James Vorenberg, in his article on prosecutorial discretion, argued that “prosecutorial decisions are susceptible to political influences.”<sup>166</sup> Overbroad state coercion statutes give prosecutors the ability to indict almost anyone for engaging in many different forms of communication that ordinarily should qualify as protected speech.

The August 2014 indictment of Governor Perry<sup>167</sup> exemplifies the particular danger posed by the combination of overbroad coercion statutes and prosecutorial charging discretion. This section presents the Governor Perry case study as a means of demonstrating how prosecutors can use overbroad coercion statutes against politicians.

The saga began with the April 12, 2013 arrest of Travis County District Attorney, Democrat Rosemary Lehmborg.<sup>168</sup> Ms. Lehmborg was arrested for DWI.<sup>169</sup> She had a blood alcohol content of 0.23%, nearly three times the legal

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<sup>163</sup> Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 53 (2002); see also Barkow, *supra* note 123, at 869, 913 n.220.

<sup>164</sup> See *supra* notes 155–58 and accompanying text.

<sup>165</sup> Barkow, *supra* note 123, at 883.

<sup>166</sup> Vorenberg, *supra* note 127, at 1558 (“One must worry that political influences will enter into the decisions prosecutors make and that they may deal harshly or gently with particular individuals for political reasons.”).

<sup>167</sup> *Timeline: The Rick Perry Indictment*, *supra* note 10.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

limit, and acted belligerently toward officers and jail personnel.<sup>170</sup> Although she pled guilty to the charge and served a forty-five day jail sentence, she did not resign from her position despite Governor Perry's requests.<sup>171</sup>

Since 1982, the Travis County District Attorney's Office (generally a Democratically controlled office) has received significant state funding to manage the "Public Integrity Unit" (PIU), a prosecution unit designed to investigate and prosecute corruption by political officials across the state.<sup>172</sup> In June 2013, Governor Perry threatened Ms. Lehmborg that he would veto over eight million dollars apportioned by the legislature for the PIU if she did not resign.<sup>173</sup> Ms. Lehmborg still refused to resign, however, and Perry used his line-item veto to prevent the designated appropriation from going to the PIU.<sup>174</sup> Although his veto did not completely terminate the PIU's existence, the unit was forced to lay off, reassign, or give early retirement to twenty individuals.<sup>175</sup> Therefore, the veto strictly limited the PIU's ability to investigate and prosecute new cases.<sup>176</sup>

Perry was in no way secretive about his intention to veto the bill, or his reasons for eventually doing so.<sup>177</sup> In his official statement after issuing the veto in June 2013, he declared that he could not "in good conscience support continued State funding for an office with statewide jurisdiction at a time when

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<sup>170</sup> Mark Pulliam, *The Rick Perry Indictment Is Textbook Malicious Prosecution*, FEDERALIST (Aug. 18, 2014), <http://thefederalist.com/2014/08/18/the-rick-perry-indictment-is-textbook-malicious-prosecution/>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* This unit is headed by the Travis County DA. *Id.*

<sup>173</sup> Olivia Nuzzi, *What the Hell Just Happened in Texas, and Why Was Rick Perry Just Indicted?*, DAILY BEAST (Aug. 15, 2014, 10:05 PM), <http://www.thedailybeast.com/articles/2014/08/15/what-the-hell-just-happened-in-texas-and-why-was-rick-perry-just-indicted.html>.

<sup>174</sup> OFFICE OF THE GOVERNOR RICK PERRY, PROCLAMATION BY THE GOVERNOR OF THE STATE OF TEXAS (2013), <http://www.lrl.state.tx.us/scanned/vetoes/83/sb1.pdf> (outlining the Line-Item Vetoes in S.B. No. 1, Art. IV, D.1.4). The implications of this veto on Texas's political climate were significant: most elected politicians in Texas are Republicans, and therefore most of the investigations done by the Democrat-controlled PIU would no longer be possible. Nuzzi, *supra* note 173 ("One of the few positions in control of a Democrat under Perry's watch would've vanished—a big deal, given the power of the Public Integrity Unit.").

<sup>175</sup> Patrick Caldwell, *Rick Perry Was Just Indicted in Texas. Here's Why*, MOTHER JONES (Aug. 15, 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/04/rick-perry-texas-grand-jury-investigation-public-integrity>.

<sup>176</sup> *Id.*

<sup>177</sup> Suzanne Garment, *Perry's Indictment: Crime and Punishment, Texas-Style*, REUTERS (Aug. 27, 2014), <http://blogs.reuters.com/great-debate/2014/08/27/perrys-indictment-crime-and-punishment-texas-style/>.

the person charged with ultimate responsibility of that unit [Lehmberg] has lost the public's confidence."<sup>178</sup>

Days after Perry's veto, a liberal Texas group, Texans for Public Justice, filed a formal complaint against Perry for threatening to veto funding for the PIU and for abusing the powers of his office by exercising that veto.<sup>179</sup> The Travis County District Attorney's Office (under Lehmberg) originally started the investigation against Perry, but it recused itself in August 2013 and appointed former federal prosecutor Michael McCrum as a special prosecutor.<sup>180</sup> A year later, Perry was indicted by a Travis County Grand Jury on two felony counts: abuse of official power and coercion of a public servant.<sup>181</sup>

The indictments were met with a major media response.<sup>182</sup> Conservatives<sup>183</sup> and some liberals<sup>184</sup> rushed to Perry's defense, including one author who accused the prosecutors of using a "frivolous indictment . . . as a political

<sup>178</sup> OFFICE OF THE GOVERNOR RICK PERRY, *supra* note 174; *see also* Garment, *supra* note 177 ("It must have seemed like a safe move for Perry to demand Lehmberg's resignation: surely the public would recoil from seeing Lehmberg's misbehavior in the pixelly flesh.")

<sup>179</sup> *Timeline: The Rick Perry Indictment*, *supra* note 10. This Comment addresses the second accusation in the indictment: *threatening* to veto funding.

<sup>180</sup> *Id.*

<sup>181</sup> *E.g.*, Pulliam, *supra* note 170; *Timeline: The Rick Perry Indictment*, *supra* note 10. It is worth noting that these are extremely powerful and substantial charges, especially when combined. If convicted on both charges, Perry could have technically faced over ninety-nine years in jail. The second count of the indictment, and the subject of this Comment, is charged under TEX. PENAL CODE ANN. § 36.03. Under that statute, Perry's actions constitute a "felony of the third degree" because the "threatened action," (making the veto), was a first-degree felony according to the first count of the indictment. TEX. PENAL CODE ANN. §§ 36.03, 39.02(c)(7) (West 2011). That first-degree felony carries with it a potential punishment of "not more than 99 years or less than 5 years" of imprisonment. TEX. PENAL CODE ANN. § 12.32 (West 2011). Had only the second count of the indictment gone forward, Perry would have still potentially faced up to ten years in jail. TEX. PENAL CODE ANN. § 12.34 (West 2011) ("An individual adjudged guilty of a felony of the third degree shall be punished by imprisonment . . . for any term of not more than ten years or less than two years."). As a comparison, a violent domestic assault involving strangulation or choking of a victim is *also* a "felony of the third degree," and would therefore carry the same potential punishment. TEX. PENAL CODE ANN. § 22.01(b)(2)(B) (West 2011).

<sup>182</sup> *E.g.*, Pat Nolan, *Rick Perry's Indictment Should Scare All Americans*, AM. SPECTATOR (Sept. 5, 2014), <http://spectator.org/articles/60347/rick-perrys-indictment-should-scare-all-americans>; Eric Pianin, *Trumped Up or Not, Rick Perry's Indictment Could Derail Him*, FISCAL TIMES (Aug. 26, 2014), <http://www.thefiscaltimes.com/Articles/2014/08/26/Trumped-or-Not-Rick-Perry-s-Indictment-Could-Derail-Him>; Paul J. Weber & Will Weissert, *Rick Perry Indicted!*, SALON (Aug. 15, 2014, 7:30 PM), [http://www.salon.com/2014/08/15/rick\\_perry\\_indicted/](http://www.salon.com/2014/08/15/rick_perry_indicted/).

<sup>183</sup> *E.g.*, Pulliam, *supra* note 170.

<sup>184</sup> *See, e.g.*, Editorial, *Is Gov. Rick Perry's Bad Judgment Really a Crime?*, N.Y. TIMES (Aug. 18, 2014), <http://www.nytimes.com/2014/08/19/opinion/is-gov-perrys-bad-judgment-really-a-crime.html>; *see also* Colin Campbell, *Even Liberals Think the Indictment of Rick Perry Looks Weak*, BUSINESS INSIDER (Aug. 16, 2014, 9:12 AM), <http://www.businessinsider.com/liberals-criticize-rick-perry-indictment-2014-8>.

weapon.”<sup>185</sup> Another complained that “prosecutors have too much imagination,”<sup>186</sup> described Perry as a victim of vicious prosecution, and warned, “If a popular sitting governor can be indicted on such a flimsy basis, then every one of us is vulnerable.”<sup>187</sup> Perry ultimately pled not guilty, but his first set of motions to dismiss the case (based on claims about the swearing in of the special prosecutor and the filing of certain paperwork) was denied on November 18, 2014.<sup>188</sup>

In the context of this Comment,<sup>189</sup> the second charge, coercion of a public official under Texas Penal Code § 36.03,<sup>190</sup> is particularly troubling because it shows how a prosecutor can begin an investigation under an overbroad coercion statute. The Texas Court of Appeals previously grappled with an indictment under an earlier incantation of this statute in *State v. Hanson*.<sup>191</sup> In *Hanson*, the court found the 1989 version of Texas Penal Code § 36.03 unconstitutionally vague and therefore invalid.<sup>192</sup> The court quashed the indictments based on vagueness, but chose not to rule on overbreadth.<sup>193</sup>

While *Hanson* was being litigated, the Texas legislature amended the language of the statute to change the definition of coercion under § 36.01(1)(F)—now codified under § 1.07(9)—to “a threat, however communicated . . . to *unlawfully* take or withhold action as a public servant, or to cause a public servant to *unlawfully* take or withhold action.”<sup>194</sup> Four years after the *Hanson* decision, however, the Texas legislature re-amended the

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<sup>185</sup> Pulliam, *supra* note 170.

<sup>186</sup> Nolan, *supra* note 182.

<sup>187</sup> *Id.*

<sup>188</sup> E.g., Sara Fischer, *Judge Rules He Won't Dismiss Rick Perry Case over Paperwork Technicality*, CNN (Nov. 19, 2014, 2:22 PM), <http://www.cnn.com/2014/11/18/politics/rick-perry-case-texas/>.

<sup>189</sup> At the time of writing, the Court of Appeals had yet to hand down the decision on the second count of the indictment. *Ex parte* James Richard “Rick” Perry, No. 03-15-00063-CR, 2015 WL 4514696 (Tex. Ct. App. July 24, 2015) Although the Court of Appeals predictably ruled by adopting similar reasoning and the overall conclusion that this Comment suggests, this Comment advocates a nationwide adoption of modified *Robertson* in ruling on overbroad coercion statutes. Additionally, this Comment later argues for a legislative approach, in the alternative to a judicial ruling, on these overbroad coercion statutes.

<sup>190</sup> TEX. PENAL CODE ANN. § 36.03 (West 2011).

<sup>191</sup> *State v. Hanson*, 793 S.W.2d 270 (Tex. App. 1990). In *Hanson*, a judge was charged under an earlier version of the statute under which Perry is charged for allegedly threatening to terminate the funding for salaries of a deputy district court and an assistant district attorney in an attempt to coerce another judge into firing the county auditor and the attorney into revoking an individual’s probation. *Id.* at 271.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 273.

<sup>194</sup> *Id.* (emphasis added). Compare TEX. PENAL CODE ANN. § 1.07(9) (West 2011), with TEX. PENAL CODE ANN. § 36.01(1)(F) (Vernon Supp. 1990).

statute to remove the word “unlawfully.”<sup>195</sup> The legislature’s deliberate removal of “unlawfully” “implicitly mak[es] it clear . . . that threats of lawful action as a public servant would indeed be a crime,” therefore leaving “the statute . . . unconstitutionally overbroad.”<sup>196</sup> That § 1.07(9) definition is currently used in § 36.03(a)(1), which prohibits coercion of a public servant.<sup>197</sup> It was under this revised overbroad statute that Governor Perry was charged.<sup>198</sup>

Therefore, under § 36.03 and § 1.07(9), it was the *threat* of the veto, rather than the tangible act of vetoing the bill, that constituted Perry’s felonious action for this particular charge.<sup>199</sup> One former federal prosecutor, speaking with CNN, illustrated the seemingly paradoxical nature of this charge: “[H]ow can it be a crime to threaten to use a power that is entirely within the powers of your office?”<sup>200</sup>

The Court of Appeals recognized the problematic nature the second count of Perry’s indictment when it dismissed that count on July 24, 2015.<sup>201</sup> The court found the coercion statute facially unconstitutional because it was unconstitutionally overbroad.<sup>202</sup> The court recognized the problem of potentially limitless applications of this statute,<sup>203</sup> including potential threats to

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<sup>195</sup> Eugene Volokh, *Is the Indictment of Texas Gov. Rick Perry Inconsistent with a Texas Court of Appeals Precedent (as to the ‘Coercion’ Count)?*, WASH. POST: VOLOKH CONSPIRACY (Aug. 16, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/16/is-the-indictment-of-texas-gov-rick-perry-inconsistent-with-a-texas-court-of-appeals-precedent-as-to-the-coercion-count/>.

<sup>196</sup> *Id.*; see TEX. PENAL CODE ANN. § 1.07(9) (West 2011).

<sup>197</sup> TEX. PENAL CODE ANN. § 36.03(a)(1) (West 2011) (“A person commits an offense if by means of coercion he: (1) influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty . . .”).

<sup>198</sup> See Volokh, *supra* note 195.

<sup>199</sup> See Drew Griffin, Scott Bronstein, & Mary Kay Mallonee, *4 Reasons Why Rick Perry’s Exercise of Power Got Him in Trouble*, CNN (Sept. 2, 2014, 10:46 AM), <http://www.cnn.com/2014/09/02/politics/rick-perry-indictment/>.

<sup>200</sup> *Id.* (quoting former federal prosecutor Jeffrey Toobin).

<sup>201</sup> *Ex parte* James Richard “Rick” Perry, No. 03-15-00063-CR, 2015 WL 4514696, at \*42 (Tex. Ct. App. July 24, 2015).

<sup>202</sup> See *id.* at \*3, \*42.

<sup>203</sup> *Id.* at \*26 (Perry gave examples of “a ‘virtually endless’ array of threats that are in the nature of ‘ordinary give and take’ between and among . . . public servants . . .”).

the judiciary's independence.<sup>204</sup> In its order, the court cited the earlier *Hanson* decision and upheld that decision's ruling on First Amendment speech.<sup>205</sup>

Before the Court of Appeals issued its order referencing *Hanson*, Professor Eugene Volokh suggested that the court's earlier failure to rule on overbreadth in *Hanson* had come back to haunt Governor Perry: even before the legislature's multiple revisions and the *Hanson* decision, § 36.03 was likely unconstitutionally overbroad.<sup>206</sup> Had the *Hanson* court proceeded with an overbreadth analysis, the legislature might have received the message about the importance of narrowing overbroad coercion statutes—the statute would have been invalidated, and the legislature therefore forced to revise it. Instead, the Court of Appeals was forced to consider a similar issue to make a similar ruling to once again protect First Amendment speech.<sup>207</sup> Of course, the legislature could have still returned the statute to its prior overbroad state, thereby creating the statute under which Governor Perry was charged.<sup>208</sup> However, going forward, the Governor Perry prosecution should show state legislators across the country why they must create and maintain narrow coercion statutes in their own states to protect not only Constitutional guarantees, but also their own careers.<sup>209</sup>

This Comment should in no way be read as a defense of Governor Perry; it is instead meant to serve as an advisory about the collision of two growing legal problems. Though the Governor Perry prosecution has been accused of being a Democrat-led political crusade,<sup>210</sup> it arguably damages the Democratic Party's ability to function in a red state<sup>211</sup> more than it could ever potentially help it.<sup>212</sup> The indictment was brought under an unconstitutional statute, and

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<sup>204</sup> *Id.* (“[I]t has occurred to the members of this panel that unless appellate court justices can shoehorn themselves into subsection (c)’s exception, section 36.03(a)(1) would seemingly put at risk that time-honored practice whereby one justice will seek changes to another justice’s draft majority opinion by threatening to write a dissent exposing flaws in the other’s legal reasoning.”).

<sup>205</sup> *Id.* at \*37 (“[T]he foundation for these holdings was the same conclusion we reach here—section 36.03(a)(1) . . . impinges upon speech that the First Amendment protects.”).

<sup>206</sup> Volokh, *supra* note 195; see TEX. PENAL CODE ANN. § 36.03 (Vernon Supp. 1990).

<sup>207</sup> *Ex parte James Richard “Rick” Perry*, 2015 WL 4514696, at \*37.

<sup>208</sup> See *supra* notes 194–96 and accompanying text.

<sup>209</sup> See *infra* notes 277–86 and accompanying text.

<sup>210</sup> See *Texas Chainsaw Prosecution: Criminalizing Politics Hits a New Low with the Rick Perry Indictment*, WALL ST. J. (Aug. 18, 2014, 2:42 PM), <http://online.wsj.com/articles/texas-chainsaw-prosecution-1408318131>.

<sup>211</sup> See, e.g., *2014 Texas Elections Overview*, POLITICO (Dec. 17, 2014, 2:31 PM), <http://www.politico.com/2014-election/results/texas/>.

<sup>212</sup> Michael Lind, *Rick Perry’s Indictment Is Bad for Democrats: A Texas Perspective*, SALON (Aug. 18, 2014, 10:31 AM), [http://www.salon.com/2014/08/18/rick\\_perrys\\_indictment\\_is\\_bad\\_for\\_democrats\\_a\\_texas\\_](http://www.salon.com/2014/08/18/rick_perrys_indictment_is_bad_for_democrats_a_texas_)

however one may feel about Governor Perry's political viewpoints, this prosecution violated his right to protected speech. The statute itself is inherently problematic, and the Court of Appeals made the appropriate choice to invalidate it.<sup>213</sup>

#### IV. ARGUMENT: WHY AND HOW TEXAS AND OTHER STATES SHOULD INVALIDATE AND PREVENT OVERBROAD STATE COERCION STATUTES

As the Governor Perry indictment demonstrates, overbroad coercion statutes pose a particular danger to political speech and bargaining. The Texas Court of Appeals seized the opportunity to correct the legislature's errors through judicial invalidation of the statute, and in doing so, deprived state prosecutors of some of their unchecked power. However, the court explicitly focused on federal law, and declined to set state court precedent for addressing overbroad speech-based statutes to be adopted by other states in the future.<sup>214</sup> This Part proposes a better judicial and legislative solution for Texas based on Oregon's *Robertson* analysis. It argues that this framework should have been used to evaluate Governor Perry's case, and then explains how this solution can be implemented by legislatures and judiciaries in other states to prevent future collisions between overbroad coercion statutes and unchecked state prosecutors.

##### *A. A Proposed Solution: Applying a Modified Robertson Analysis to the Perry Indictment*

State judiciaries should not give prosecutors the opportunity to bring charges under coercion statutes as overbroad as Texas Penal Code § 36.03. Although the Texas Court of Appeals correctly ruled on the overbreadth issue in the Perry indictment, this section proposes a more thorough solution to the Governor Perry problem and statutes similar to the one applied in his case—a solution that is capable of establishing concrete precedent. It then calls legislatures to action to avoid these types of overbreadth challenges in the future. It applies a modified *Robertson*-style overbreadth framework to the Perry indictment with a specific emphasis on how to treat the historical

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perspective/ (“Now the indictment of Texas Governor Rick Perry allows Republicans to change the narrative . . . to ‘Look how liberal prosecutors are trying to bring down every Republican governor who is a potential president!’”).

<sup>213</sup> *Ex parte* James Richard “Rick” Perry, No. 03-15-00063-CR, 2015 WL 4514696, at \*37 (Tex. Ct. App. July 24, 2015).

<sup>214</sup> *Id.* at 33.

exception, and explains how other states' judiciaries can perform similar analyses to invalidate overbroad coercion statutes.

Oregon courts use *Robertson* to address all types of First Amendment claims.<sup>215</sup> To argue that other states should universally adopt this approach for any First Amendment challenge, however, would be unrealistic.<sup>216</sup> Oregon has only been able to maintain the framework as applied to any First Amendment challenge though decades of careful and persistent judicial opinions, and, arguably, by the consistent placement of Democratic and left-leaning individuals on the Oregon Supreme Court.<sup>217</sup> *Robertson* dramatically increased Oregon's First Amendment freedoms, as illustrated, for instance, by an assertion that "[t]he Oregon Supreme Court has come closer to putting into practice . . . the absolutist view of the First Amendment [free speech protections] than any other institution in American life."<sup>218</sup> This left-leaning approach<sup>219</sup> likely would have no place in many conservative states, including Governor Perry's state of Texas.<sup>220</sup>

Therefore, broad adoption of *Robertson* by state courts should be limited to analyzing coercion statutes only. The Supreme Court overbreadth doctrine, though influencing and guiding the *Robertson* framework, does not give the same level of specificity, categorization, and clarity to state coercion statute overbreadth analysis.<sup>221</sup> *Robertson's* use of categories,<sup>222</sup> for instance, offers clearer guidance than the Supreme Court's threshold requirement that the challenged law be "substantially involved" in First Amendment interests, such

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<sup>215</sup> West, *supra* note 75, at 1239 ("[T]he *Robertson* 'framework' provides the methodology by which the court assesses questions implicating article I, section 8 of the Oregon Constitution, the state's free speech clause.").

<sup>216</sup> See *infra* notes 217–20.

<sup>217</sup> West, *supra* note 75, at 1241; see, e.g., Long, *supra* note 78, at 114 ("The clearest decisions that establish and refine the *Robertson* framework are *Garcias*, *Moyle*, and *State v. Henry*." (first citing *State v. Henry*, 732 P.2d 9 (Or. 1987); then citing *State v. Moyle*, 705 P.2d 740 (Or. 1985); and then citing *State v. Garcias*, 679 P.2d 1354 (Or. 1984))).

<sup>218</sup> West, *supra* note 75, at 1239 (alterations in original).

<sup>219</sup> See *infra* note 220 (providing an example of a conservative state refusing to embrace a broad interpretation of free speech).

<sup>220</sup> See *Cam I, Inc. v. Louisville/Jefferson Cty. Metro Gov't*, 2007 Ky. App. LEXIS 370, at \*17–18 (Ky. Ct. App. Oct. 5, 2007), *rev'd*, *Cam I, Inc. v. Louisville/Jefferson Cty. Metro Gov't*, 2008 Ky. LEXIS 86 (Ky. Apr. 16, 2008) ("Historically, it is apparent that Kentucky does not openly embrace forms of expression that some other states do. Although Appellants attempt to persuade the Court that Kentucky, like other states, has a long history of openly embracing any and all expression without restriction . . . [this] theory is not legally sound.").

<sup>221</sup> See *supra* Part I.A.

<sup>222</sup> See *supra* notes 69–75 and accompanying text.

that overbreadth would result in a “chilling effect.”<sup>223</sup> The *Robertson* categorical approach specifically evaluates the exact language of a law in question instead of looking at the broader questions of law posed by the Supreme Court.<sup>224</sup> It asks how the language operates and forces courts to closely analyze the text of a law to determine that law’s scope and potential application.

Additionally, the Supreme Court evaluates overbreadth using the “area of impact” test to determine how substantial the challenged conduct’s claim is to First Amendment protection.<sup>225</sup> Although *Robertson* rests on essentially the same principle, it once again offers more specific guidance for state courts; *Robertson*’s overbreadth inquiry focuses on the precise threats and consequences in a statute and offers specific hypothetical scenarios to illustrate the types of protected speech a statute technically prohibits.<sup>226</sup>

*Robertson* also presents a framework *designed* to evaluate an overbroad coercion statute, something that the Supreme Court’s analyses cannot specifically offer.<sup>227</sup> The *Robertson* framework was developed from a challenge to an overbroad coercion statute, and the decision forced the legislature to re-write that statute to render it constitutionally acceptable. *Robertson*’s analysis is clear, specific, and so far has been easily transmitted to other states.<sup>228</sup>

### *1. Implementing Robertson’s Historical Analysis Nationwide*

Of course, any argument in favor of a *Robertson* analysis does raise concerns surrounding its controversial historical exception test. This historical exception has proven inherently inflexible and rigid even for Oregon courts to implement,<sup>229</sup> and therefore, it is best that other states do not adopt it into their constitutional jurisprudence. Additionally, it is unlikely that all states would

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<sup>223</sup> Note, *supra* note 1, at 859.

<sup>224</sup> See *supra* notes 69–75 and accompanying text.

<sup>225</sup> Note, *supra* note 1, at 860.

<sup>226</sup> See *supra* notes 94–97 and accompanying text.

<sup>227</sup> See, e.g., *Plowman v. Oregon*, 508 U.S. 974 (1993) (denying certiorari to an Oregon case evaluating the constitutionality of a coercion statute).

<sup>228</sup> E.g., *Whimbush v. People*, 869 P.2d 1245, 1248 (Colo. 1994) (en banc); *Feinberg v. Butler*, No. 25255, 2004 WL 1822869, at \*5 (Haw. Ct. App. Aug. 12, 2004) (unpublished disposition); *City of Seattle v. Ivan*, 856 P.2d 1116, 1120 (Wash. Ct. App. 1993).

<sup>229</sup> Long, *supra* note 78, at 112–18.

accept the historical exception analysis's inherently liberal and expansive free speech perspective.<sup>230</sup>

Despite the historical exception's removal from this Comment's proposed framework, the *Robertson* analysis as applied in other states should retain the *Robertson* categories.<sup>231</sup> First of all, as the Colorado Supreme Court found in *Whimbush*,<sup>232</sup> courts are likely to determine that coercion statutes fall into the second *Robertson* category because they operationalize the speech articulated in the statute.<sup>233</sup> As in *Robertson*, the words in coercion statutes create a threat, and the creation and articulation of that threat is the prohibited behavior.<sup>234</sup> It is not the *content* of those words that is prohibited, but rather the *act* of articulating words meant to instill fear in the listener that coercion statutes proscribe (category two).<sup>235</sup>

That said, because coercion statutes are so focused on individuals' speech, some courts may find challenged coercion statutes fit better into category one (statutes outlawing content, not effects of content).<sup>236</sup> Should that occur, states could rely on guidance from *State v. Stoneman*,<sup>237</sup> an Oregon Supreme Court case that vastly re-defined the *Robertson* category one analysis.

In *Stoneman*, courts were faced with a "criminal statute directed at the producers, purveyors, and purchasers of visual reproductions of children engaged in sexually explicit conduct."<sup>238</sup> The statute prohibited the distribution, manufacture, and possession of pornography that depicted actual

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<sup>230</sup> See West, *supra* note 75, at 1241 ("[A]ppointments tend to reflect the political philosophy of the appointing governor. All of Oregon's governors since 1986 have been Democrats. Each of the five justices appointed since then have also been registered Democrats." (footnote omitted)); see also *Cam I, Inc. v. Louisville/Jefferson Cty. Metro Gov't*, 2007 Ky. App. LEXIS 370, at \*17–18 (Ky. Ct. App. Oct. 5, 2007), *rev'd*, *Cam I, Inc. v. Louisville/Jefferson Cty. Metro Gov't*, 2008 Ky. LEXIS 86 (Ky. Apr. 16, 2008); Armstrong, *supra* note 68, at 501. See generally Long, *supra* note 80 (arguing for the maintenance of the historical exception because "we are probably not yet ready to dispense with the message that *Robertson* still sends us: we Oregonians are a unique and exceptional people").

<sup>231</sup> See *Plowman*, 838 P.2d at 562–63.

<sup>232</sup> *Whimbush*, 869 P.2d at 1250.

<sup>233</sup> See *Plowman*, 838 P.2d at 563.

<sup>234</sup> See *State v. Robertson*, 649 P.2d 569, 578 (Or. 1982); *supra* text accompanying note 87.

<sup>235</sup> See *Robertson*, 649 P.2d at 578.

<sup>236</sup> See *supra* note 76 and accompanying text.

<sup>237</sup> 920 P.2d 535 (Or. 1996).

<sup>238</sup> *Id.* at 537.

underage children engaged in real sexual acts.<sup>239</sup> The court refused to extend the broad First Amendment exception to protect this “communication.”<sup>240</sup>

The court held that although the statute prohibited the sexualized visual materials of children and therefore *appeared* to fit in category one, it actually belonged in category two because the statute “was concerned with harm to children,” and therefore focused on the effects of the communication, rather than the content.<sup>241</sup> The *Stoneman* decision emphasized the importance of a statute’s *context*: “a statute cannot be read in a vacuum,” and therefore “[a]n examination of the context of a statute, as well as of its wording, is necessary to an understanding of the policy that the legislative choice embodies.”<sup>242</sup> Therefore, should a court analyzing a coercion statute be tempted instead to focus on the content of a threat itself and thus consider placing the statute in category one, the contextual analysis argument in *Stoneman* should steer the statute into category two.<sup>243</sup>

## 2. *The Court of Appeals’ Decision in Light of Robertson*

Governor Perry’s defense team prudently raised a facial overbreadth challenge to Texas Penal Code § 1.07(9)—defining coercion—and § 36.03—the statute under which Governor Perry is charged—in a pretrial habeas motion.<sup>244</sup> The Court of Appeals responded to this challenge and correctly decided to invalidate the statute.<sup>245</sup> The Court of Appeals agreed that the statute was not “narrowly drawn” to achieve state objectives, and that the statute extended far beyond constitutionally permissible applications.<sup>246</sup> Similar to the court in *Robertson*, the Texas Court of Appeals recognized that overbroad coercion statutes could criminalize threats that “are considered to be a commonplace and accepted—if not also constitutionally protected—component of the day-to-day debate, bargaining, and give-and-take that is characteristic of American governmental and political processes.”<sup>247</sup>

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<sup>239</sup> *Id.* at 537–38 (challenging OR. STAT. ANN. § 163.680 (1987) (repealed 1995)).

<sup>240</sup> *Id.* at 539.

<sup>241</sup> *Id.* at 541 (“With respect to this second category, we think it is clear that [the statute] was concerned with harm to children.”).

<sup>242</sup> *Id.* (“[I]t is that aspect of the films and photographs described . . . , *i.e.*, *their relationship to harm to children*, rather than their communicative substance, that sets them apart.”).

<sup>243</sup> *See id.*

<sup>244</sup> TEX. PENAL CODE ANN. §§ 1.07(9), 36.03(a)(1) (West 2011); *Ex parte* James Richard “Rick” Perry, No. 03-15-00063-CR, 2015 WL 4514696, at \*1–2 (Tex. Ct. App. July 24, 2015).

<sup>245</sup> *Ex parte James Richard “Rick” Perry*, 2015 WL 4514696, at \*42.

<sup>246</sup> *Id.* at \*35, 38.

<sup>247</sup> *Id.* at \*24.

What is missing from the Court of Appeals' order, however, is a state-centric analysis that could be used to guide other states toward invalidating overbroad coercion statutes—this order instead shies away from establishing state law precedent. The Court of Appeals chose to focus exclusively on federal First Amendment law, instead of evaluating and ruling based on the Texas equivalent to the First Amendment (unlike the *Robertson* court did with Oregon law).<sup>248</sup> The Court of Appeals squandered a significant opportunity to guide state precedent on overbroad coercion statutes. It even implied the necessity for this precedent near the end of its opinion:

Our reasoning . . . is also consistent with decisions from other jurisdictions that have recognized threats to be protected by the First Amendment . . . . Some of these courts have invalidated . . . prohibitions against threats on overbreadth grounds. Still others have resorted to narrowing constructions of threat prohibitions . . . .<sup>249</sup>

As the court recognized, states differ in their individual treatment of coercion statutes. Had the Texas Court of Appeals instead chosen to create a framework under which state coercion statutes could be evaluated, it could have set a guiding precedent for other states to follow when invalidating overbroad coercion statutes. This solution would show state legislatures that drafting overbroad coercion statutes will result in a predictable outcome: judicial invalidation.

Instead of following the Texas Court of Appeals path and looking only to federal law, a court handling this matter should evaluate the law under *Robertson*. It should first examine the language of the statute and determine its target. In this particular statute, the language targets the action of making the threat. Section 1.07(9)(F) of the Texas Penal Code (previously § 36.01(f)) defines coercion as “a threat, however communicated . . . to take or withhold action as a public servant, or to cause a public servant to take or withhold action,”<sup>250</sup> and that definition is used in § 36.03(a)(1), which prohibits coercion of a public servant.<sup>251</sup>

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<sup>248</sup> *Id.* at \*14 (“[W]e will focus our analysis entirely on the First Amendment protection and jurisprudence.”).

<sup>249</sup> *Id.* at \*37.

<sup>250</sup> TEX. PENAL CODE ANN. § 1.07(9)(F) (West 2011).

<sup>251</sup> *Id.* § 36.03(a)(1) (“A person commits an offense if by means of coercion he: (1) influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty . . . .”).

Section 36.03(c) actually creates an exception to § 36.03(a)(1), exempting a political actor from prosecution under § 36.03 where “the person who . . . [speaks coercively] . . . is a member of the governing body . . . and that the . . . [coercive action] is an official action taken by” that government actor.<sup>252</sup> Section 36.03(c), however, cannot protect Governor Perry’s threat, because while making the veto itself may constitute an official action, the *act of threatening* to use one’s official power (vetoing a law) is *not* an official action.<sup>253</sup> Therefore, because the statute targets the act of making a threat, as opposed to targeting official action or the content of the threat itself, § 36.03 would fall into the second *Robertson* category, and a court would proceed to step two.

Under step two of a *Robertson* analysis, a presiding court should find the statute overbroad because it encompasses a broad range of protected speech.<sup>254</sup> Similar to the challenged statute in *Robertson*, neither § 1.07(9) nor § 36.03 require the conduct threatened to be wrongful.<sup>255</sup> The Texas statute encompasses a vast array of constitutionally protected activity within its scope, and therefore criminalizes many types of ordinary political communication.<sup>256</sup> Additionally, the Texas Court of Appeals in *Hanson* explicitly stated that “coercion of a lawful act by a threat of lawful action is protected free expression.”<sup>257</sup> As they currently stand, § 1.07(9) and § 36.03 infringe upon that definition of protected free expression. Therefore, the statute should be found unconstitutionally overbroad.

Had the Texas Court of Appeals decided to follow *Robertson*, it would then have proceeded to step three, and (as it did do correctly in its July 2015 order), invalidated and returned the statute to the Texas legislature.<sup>258</sup> The legislature made its intent evident by altering the statute multiple times, but that intent

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<sup>252</sup> *Id.* § 36.03(c) (West 2011).

<sup>253</sup> *Id.*; Volokh, *supra* note 195 (explaining that § 36.03 “appears to apply just to actions, not to the influencing person’s threats of action; indeed, the premise of the Perry prosecution must be that a mere threat of a veto isn’t an ‘official action’”).

<sup>254</sup> *See* TEX. PENAL CODE ANN. §§ 1.07(9), 36.03(a)(1) (West 2011).

<sup>255</sup> *State v. Robertson*, 649 P.2d 569, 579 (Or. 1982); *see* TEX. PENAL CODE ANN. §§ 1.07(9), 36.03(a)(1) (West 2011).

<sup>256</sup> Expert Amicus Brief, *supra* note 8, at 14 (explaining that the prosecution’s view of the statute “would make it illegal for[] a legislator to tell the Governor, ‘if you appoint John Smith to this position, I won’t vote for this law you want me to support’ [or] for a Governor to tell a legislator, ‘if you don’t amend this bill in a particular way, I’ll veto it’”).

<sup>257</sup> *State v. Hanson*, 793 S.W.2d 270, 272–73 (Tex. App. 1990) (citing *Wurtz v. Risley*, 719 F.2d 1438, 1441 (9th Cir. 1983)); *see also* Volokh, *supra* note 195.

<sup>258</sup> *See State v. Robertson*, 649 P.2d 569, 590 (Or. 1982).

created an unconstitutionally overbroad statute.<sup>259</sup> Therefore, a presiding judge could not revise the statute to render it constitutional without “trespassing” on the obvious legislative intent.<sup>260</sup> That court should thus return the statute to the legislature with an express command to narrow its language by, for instance, adding the word “unlawful” to avoid overbreadth.<sup>261</sup>

### *B. Limiting and Narrowing Coercion Statutes in Other States*

As shown, a *Robertson* analysis would have been the best option for the Texas Court of Appeals to address the state’s coercion statute’s overbreadth. However, overbroad coercion statutes currently exist in other states, and unchecked state prosecutorial power is a nationwide problem. Therefore, defendants, judges, and legislators in other states will likely face future challenges because of these issues. This section argues why and how these individuals should act proactively against overbroad coercion statutes.

Governor Perry’s defense team was right to raise an overbreadth challenge to his indictment. Similarly, future defendants indicted under overbroad coercion statutes across the country have a duty to themselves and, frankly, to their states’ constitutions, to bring such challenges. State courts should then evaluate these assertions under a *Robertson*-style analysis.<sup>262</sup> If the defendants raise these challenges, and judiciaries respond with *Robertson*-style analyses, these statutes can be invalidated and narrowed—no longer posing a political temptation to unchecked prosecutors.

The best approach for states who do not face current legal challenges to their coercion statutes would be for their own legislatures to act proactively to narrow their individual state’s coercion statute. The Texas House of

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<sup>259</sup> Volokh, *supra* note 195; see TEX. PENAL CODE ANN. §§ 1.07(9), 36.03 (West 2011).

<sup>260</sup> Greenawalt, *supra* note 62, at 1089 (explaining that the *Robertson* court determined that to save the statute, it would have to write in specific expansions, which would not only “trespass on the legislative function” but also create an impermissibly vague statute).

<sup>261</sup> *Robertson*, 649 P.2d at 590; see *supra* note 62 and accompanying text.

<sup>262</sup> This argument raises the risk of being criticized for promoting judicial activism. However, this criticism would be unwarranted for two reasons: (1) state legislatures failed to narrow these statutes, thus prompting judiciary action, and (2) courts have an established history of protecting First Amendment expression. David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 139 (2001) (“[A]bdication of judicial duty to enforce the First Amendment should be at least as objectionable and scary to legal commentators as judicial activism. . . . [J]udges have a constitutional duty to enforce . . . rights to free speech, free exercise, and free association . . . .”); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1737–38 (1991) (“The rules of law governing what is and is not ‘speech,’ and what speech is protected, have been generated by the Court itself.”).

Representatives, for example, includes a Criminal Jurisprudence Committee, whose responsibilities include revising and amending the Texas Penal Code.<sup>263</sup> That committee should have acted proactively to limit the unconstitutionally overbroad coercion statute.

The Perry prosecution should indicate to legislators the breadth of prosecutorial charging power against members of the government. If prosecutors can bring a felony coercion charge against a controversial, but arguably popular, three-term governor, such charges could be similarly levied against other officials free from challenges or oversight.

### CONCLUSION

There seems to be no indication that the crime control model currently dominating American criminal procedure is on its way out of vogue.<sup>264</sup> Prosecutors continue to enjoy unchecked power in bringing charges against individuals—presenting a serious concern for legislators, governors, and judges<sup>265</sup> in states with overbroad coercion statutes. If prosecutors are able to bring charges against their political opponents under these overbroad coercion statutes, they could easily distort what is already a skewed balance of power in their favor. Prosecutors face few meaningful checks from legislators,<sup>266</sup> judges,<sup>267</sup> or executives,<sup>268</sup> yet, as this Comment has argued, the threat of indictment for making a political threat may be one of the most powerful forms of leverage that prosecutors can legally exert on these individuals. Additionally, should the indictment go forward, prosecutors will be entitled to the use of even more coercive leverage through plea bargaining, as earlier discussed.<sup>269</sup>

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<sup>263</sup> TEX. LEGIS. COUNCIL, TEXAS HOUSE RULES: 84TH LEGISLATURE 25 (Jan. 15, 2015), [http://www.house.state.tx.us/\\_media/pdf/hrrules.pdf](http://www.house.state.tx.us/_media/pdf/hrrules.pdf) (“The committee shall have seven members, with jurisdiction over all matters pertaining to: (1) criminal law, prohibitions, standards, and penalties . . . [and] (4) revision or amendment of the Penal Code . . .”).

<sup>264</sup> See, e.g., Gershman, *supra* note 123, at 393.

<sup>265</sup> See, e.g., *State v. Hanson*, 793 S.W.2d 270, 271 (Tex. App. 1990); see also *Ex parte James Richard “Rick” Perry*, No. 03-15-00063-CR, 2015 WL 4514696, at \*26 (Tex. Ct. App. July 24, 2015) (“[I]t has occurred to the members of this panel that . . . section 36.03(a)(1) [(Texas’s coercion statute)] would seemingly put at risk that time-honored practice whereby one justice will seek changes to another justice’s draft majority opinion by threatening to write a dissent exposing flaws in the other’s legal reasoning.”).

<sup>266</sup> See *supra* notes 151–53 and accompanying text.

<sup>267</sup> See *supra* notes 154–58 and accompanying text.

<sup>268</sup> See *infra* note 280 and accompanying text.

<sup>269</sup> See *supra* note 135.

Prosecutors have already begun to use charging discretion and power to gain control over corporations through threats of prosecution.<sup>270</sup> Federal prosecutors use deferred prosecution agreements in which they decide to suspend charges against a corporation so long as that company complies with the terms of the government's agreement.<sup>271</sup> Because corporations will face charges if they do not cooperate precisely with prosecutors' demands, prosecutors can prevent them from engaging in certain legal lines of business, force them to change business practices, and control hiring and firing decisions.<sup>272</sup> As prosecutorial power has expanded in the last decade and a half, the number of these deferred prosecution agreements has skyrocketed.<sup>273</sup>

Similarly, overbroad coercion statutes offer prosecutors an opportunity to exercise control over political actors.<sup>274</sup> Agreements in politics are frequently based on the exertion of political leverage, and—for better or for worse—these agreements are an inherent part of the country's political atmosphere.<sup>275</sup> It is not impossible to imagine that prosecutors could one day use the threat of prosecution against adverse political party members to force certain behavior, as they already have against corporate entities through deferred prosecution agreements.<sup>276</sup>

Although state legislatures may not previously have had the incentive to limit prosecutorial power,<sup>277</sup> the Perry prosecution as well as the growth of prosecutorial regulation of corporations should provide them with sufficient motivation. Legislators must take note that Governor Perry, the Republican chief executive of a conservative state<sup>278</sup> and a one-time presidential candidate,<sup>279</sup> could not force a Democratic District Attorney in one county of

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<sup>270</sup> See, e.g., Noah A. Gold, *Corporate Criminal Liability: Cooperate, and You Won't Be Indicted*, 8 GEO. J.L. & PUB. POL'Y 147, 156 (2010) ("The strikingly broad rule for corporate criminal liability, together with the 'inherent vulnerability of corporations' to market pressures, gives prosecutors tremendous leverage over corporations employing individuals suspected of criminal wrongdoing.")

<sup>271</sup> *Id.* at 157.

<sup>272</sup> Rachel E. Barkow, *Criminal Law as Regulation*, 8 N.Y.U. J.L. & LIBERTY 316, 326 (2014).

<sup>273</sup> *Id.* at 325 (explaining that in the last thirteen years, 250 deferred prosecution agreements have been negotiated whereas only eleven were negotiated between 1993 and 2001).

<sup>274</sup> See *supra* Part II.A.

<sup>275</sup> See *supra* note 4 and accompanying text.

<sup>276</sup> See *supra* note 273 and accompanying text.

<sup>277</sup> See Bibas, *supra* note 123, at 967.

<sup>278</sup> See, e.g., *Meet Rick Perry*, PERRY FOR PRESIDENT, [www.rickperry.org/about/](http://www.rickperry.org/about/) (last visited Oct. 6, 2015) ("As the . . . longest-serving governor of the Lone Star State, he championed conservative principles that helped Texas become America's economic engine.")

<sup>279</sup> See, e.g., Kenneth P. Vogel, *Rick Perry Ramps Up for 2016*, POLITICO (Nov. 28, 2014, 6:51 PM), <http://www.politico.com/story/2014/11/rick-perry-2016-campaign-113210.html>.

his state to resign her position, yet her office could level felony charges against him for his attempt to force her resignation.<sup>280</sup> Like corporate actors, legislators and other politicians are “*uniquely vulnerable*”<sup>281</sup> to prosecution because of their status as public actors, and the possible resulting consequences because of their careers and future political ambitions.<sup>282</sup> Although the indictment did not directly derail Governor Perry’s presidential campaign, it is worth noting that he suspended his campaign in September 2015, a little more than a year after the indictment.<sup>283</sup>

It is telling that the Texas Court of Appeals implicitly recognized the potential for abuse inherent to overbroad coercion statutes.<sup>284</sup> The court quoted the Supreme Court in its decision to invalidate the statute, stating, “We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”<sup>285</sup> It is significant that the Court of Appeals chose to invalidate the overbroad statute, but it nevertheless failed to seize an opportunity to meaningfully address the dangerous collision between unchecked state prosecutors and overbroad state coercion statutes. In the atmosphere of nearly unlimited prosecutorial charging discretion, setting a strong state court precedent limiting coercion statutes could in turn limit state prosecutorial power throughout the county.

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<sup>280</sup> See Griffin et al., *supra* note 199 (“Lehmborg pleaded guilty to DWI, served nearly three weeks in jail, went to rehab and then went back to her job as the district attorney, able to ignore the calls for her to step down. The felony charges against Perry are much more serious and would not allow him such latitude were he to be found guilty. . . . [T]he maximum sentence for both [charges amounts to] more than 100 years in prison.”).

<sup>281</sup> See Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1885 (2005) (explaining that corporations are willing to participate in and cooperate with this regulation-through-prosecution because of their “unique vulnerability to adverse publicity and collateral consequences”).

<sup>282</sup> See, e.g., Errol Louis, *Does Rick Perry’s Indictment Disqualify Him for 2016?*, CNN (Oct. 31, 2014, 1:00 PM), <http://www.cnn.com/2014/08/18/opinion/louis-rick-perry-indictment/> (“[Perry’s] indictment may scare away some potential supporters, making it harder for him to line up donations and early political support in this crucial pre-election season. And a conviction—highly unlikely but possible—would surely end Perry’s presidential hopes.”); see also Forrest Burnson, “*Indicted but Not Convicted*” *Is a Form of Punishment*, TEX. TRIB. (July 30, 2010), <http://www.texastribune.org/2010/07/30/indicted-but-not-convicted-is-a-form-of-punishment/> (explaining that in the vast amount of time it takes to pursue cases, “the public is left to decide the immediate fate of an indicted-but-not-convicted elected official, whose career can be destroyed by a state of limbo”).

<sup>283</sup> Theodore Schleifer, *Rick Perry Drops Out of Presidential Race*, CNN (Sept. 11, 2015, 9:47 PM), <http://www.cnn.com/2015/09/11/politics/rick-perry-2016-campaign-suspended/> (noting that among other campaign woes, “Back in Texas, he remained under indictment on an abuse-of-power charge”).

<sup>284</sup> *Ex parte* James Richard “Rick” Perry, No. 03-15-00063-CR, 2015 WL 4514696, at \*31 (Tex. Ct. App. July 24, 2015).

<sup>285</sup> *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 480 (2010)).

As the Texas Court of Appeals seemed to recognize, legislators and judges have a vested interest in supporting the type of speech that goes hand-in-hand with “politics as usual.”<sup>286</sup> Overbroad laws potentially limit American political discourse, suggested Professor John L. Diamond: “If criminal prosecution is politically motivated and existing statutory crime can be molded to cover behavior that is not clearly treated or perceived as criminal, the freedom of the political process itself can be placed in jeopardy.”<sup>287</sup> Where prosecutors can “stretch” statutes to cover actions that are “indistinguishable from generally practiced behavior,”<sup>288</sup> criminal prosecution becomes a very real possibility for any government or political actor (as well as the ordinary citizen).

Legislators need not place direct legislative limitations on prosecutors. Instead, before the challenges reach the courts, legislators have a duty to themselves, to their constituents, and to their fellow politicians to proactively narrow overbroad coercion statutes to prohibit only wrongful conduct outlined in specific, clear language that does not touch protected First Amendment communication.<sup>289</sup>

Although prosecutors may object to this solution and be reluctant to part with their charging power under overbroad coercion statutes, this solution will benefit them in the long term. This Comment assumes that most prosecutors do not acquire their positions in order to punish their political opponents; instead, such prosecutors probably hope to enforce just and constitutionally appropriate laws, and to make wise charging decisions. However, even a few prosecutors who use their power to pursue politically motivated indictments can tarnish the reputations of others and cast doubt on their charging decisions.<sup>290</sup> As commentator Sandra Caron George explained, many prosecutors “have been accused of using their broad discretion to achieve political goals or advance their own political ambitions.”<sup>291</sup> The Governor Perry indictment resulted in a sweeping condemnation of the Travis County office and democratically leaning prosecutors,<sup>292</sup> and could very well damage Democratic interests in the

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<sup>286</sup> See *id.* at 58; see also *State v. Hanson*, 793 S.W.2d 270, 273 (Tex. App. 1990).

<sup>287</sup> Diamond, *supra* note 7, at 2. Though Diamond focuses his article on bribery statutes, his argument can be applied to overbroad coercion statutes.

<sup>288</sup> *Id.* at 30.

<sup>289</sup> See, e.g., *Planned Parenthood v. Am. Coal. of Life Activists*, 945 F. Supp. 1355, 1381 (D. Or. 1996); *supra* note 102.

<sup>290</sup> See, e.g., *infra* notes 292–94 and accompanying text.

<sup>291</sup> Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to Do With It?*, 18 GEO. J. LEGAL ETHICS 739, 740 (2005).

<sup>292</sup> See, e.g., Pulliam, *supra* note 170; *Texas Chainsaw Prosecution*, *supra* note 210.

upcoming years.<sup>293</sup> Similarly, just a few years ago, a prosecution against former Senator John Edwards drew claims from the left of a politically motivated, Republican-biased prosecution.<sup>294</sup> Prosecutors have a strong incentive to appear “rigorously detached”<sup>295</sup> from politics; in remaining “detached,” they can retain the public trust in an age of hyper-partisanship and inspire confidence in the nation’s judicial system.

In conclusion, overbroad coercion statutes are not only unconstitutional, but they also are potentially harmful to members of the judicial, legislative, and executive branches, including prosecutors. By limiting overbroad coercion statutes through judicial decisions following the *Robertson* framework and through legislative action, courts and legislatures can limit unchecked prosecutorial power, prevent some political prosecutions, and set state law precedent ensuring the protection of political discourse across the nation.

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<sup>293</sup> Lind, *supra* note 212.

<sup>294</sup> See, e.g., Josh Gerstein, *John Edwards’s Lawyers: Prosecution Is Political*, POLITICO: UNDER THE RADAR (Sept. 6, 2011, 11:10 PM), [http://www.politico.com/blogs/joshgerstein/0911/John\\_Edwardss\\_lawyers\\_prosecution\\_is\\_political.html](http://www.politico.com/blogs/joshgerstein/0911/John_Edwardss_lawyers_prosecution_is_political.html); Amanda Marcotte, Opinion, *John Edwards’ Shameful Prosecution*, GUARDIAN (Apr. 24, 2012, 11:41 PM), <http://www.theguardian.com/commentisfree/cifamerica/2012/apr/24/john-edwards-shameful-prosecution>.

<sup>295</sup> Scott Horton, *When Is a Prosecution Political?*, HARPER’S MAG.: BROWSINGS (Feb. 7, 2008, 8:17 AM), <http://harpers.org/blog/2008/02/when-is-a-prosecution-political>.

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