FIRST AMENDMENT ISSUE

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DISPLAYING THE TEN COMMANDMENTS ON PUBLIC PROPERTY: THE KENTUCKY EXPERIENCE: WASN'T IT WRITTEN IN STONE?

by Judge Gregory M. Bartlett

I. INTRODUCTION

Over 25 years ago, the Supreme Court of the United States held that a Kentucky law requiring the posting of the Ten Commandments on the walls of each elementary and secondary public school violated the Establishment Clause of the First Amendment to the U.S. Constitution. In Stone v. Graham,1 the Court declared that the Ten Commandments "are undeniably a sacred text in the Jewish and Christian faiths,"2 and that the Kentucky statute had no secular purpose.3 As a result, the Court found the law to be a violation of the first prong of the test announced in Lemon v. Kurtzman.4

Although the Stone decision continues to be the law of the land, in recent years there have been widespread efforts, including legislative proposals in Congress5 and in the state legislatures,6 seeking a way to have the Ten Commandments

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2 Id. at 41.
3 Id. (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).
4 Id. The Lemon test for deciding whether a state statute is constitutional under the Establishment Clause of the United States Constitution states: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally the statute must not foster 'an excessive government entanglement with religion.'" Lemon, 403 U.S. at 612-13.
5 See H.R. Res. 1501, 106th Cong. (1999). An amendment to the 1999 Juvenile Justice Reform Act was introduced into the U.S. House of Representatives entitled the Ten Commandments Defense Act. Id. This legislation, which was passed by the House but not considered by the Senate, would have recognized the power of the states, pursuant to the Tenth Amendment of the United States Constitution, to post the Commandments on all property owned by the states, or their subdivisions, including schools. Id. For a discussion of this legislative proposal and other efforts to display the Ten Commandments in public schools, see Robert G. Hensley, Jr., Comment, Written in Stone: Why Renewed Attempts to Post the Ten Commandments in Public Schools Will Likely Fail, 81 N.C. L. Rev. 801 (2003).
6 See generally Hensley, supra note 5, at 814-26 (discussing the efforts by state legislatures to post the Ten Commandments in state buildings). In Kentucky, the 2000 Kentucky General Assembly adopted a Joint Resolution permitting the posting of documents depicting the Ten Commandments in the classrooms of public schools and on other public property, when part of an historical display along with other historic documents described in K.R.S. § 158.195. See S.J. Res. 57, Gen. Assem., 2000 Reg. Sess. (Ky. 2000). K.R.S. § 158.195 provides for the reading and posting of texts and documents on American history and heritage in the public schools. KY. REV. STAT. ANN. § 158.195 (Banks-Baldwin 2003). The documents listed in the statute include: the national motto ("In God We Trust"), the national anthem, the Preamble to the Kentucky Constitution, the Mayflower...
displayed in schools and other public buildings. This movement gained public and political momentum in the aftermath of the shootings at several schools, most notably at Columbine High School in Littleton, Colorado. However, most courts, despite the sincere motives of the proponents, have ruled that the posting of the Commandments, whether in public schools or on courthouse lawns, is unconstitutional.8

This article will first revisit the language and holding of the decision in Stone v. Graham.9 Next, this article will examine several recent decisions of the federal courts in Kentucky that have addressed the public display of the Ten Commandments, including the latest pronouncement from the Sixth Circuit Court of Appeals.10 In reviewing these cases, the author will question the accuracy of
some of the historical premises and other facts upon which proponents, as well as some courts base their belief that displaying the Commandments on public property is constitutional. Finally, this article will assess the current state of the law, and the circumstances under which the Ten Commandments could be legally displayed.

II. STONE V. GRAHAM

A. The Decision of the Kentucky Supreme Court

In 1978, the Kentucky General Assembly enacted K.R.S. § 158.178, which required the Superintendent of Public Instruction to ensure that a “durable, permanent copy of the Ten Commandments be displayed on the wall of each public elementary and secondary classroom in the Commonwealth.” The funds to purchase the displays would come from voluntary contributions made to the State Treasurer. In order to provide an avowed secular purpose for this legislation, the Act required each display to note, in small print: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”

A group of citizens, which included individuals of various faiths, filed suit to enjoin the enforcement of this statute. Following a ruling by the trial court that the law was constitutional, the plaintiffs appealed to the Kentucky Court of Appeals which, in turn, transferred the case to the Kentucky Supreme Court. In an equally divided decision, the Kentucky Supreme Court upheld the statute. Writing for affirmance, Justice Clayton found it “perfectly acceptable” for the state to use the Ten Commandments, which he described as a code of conduct or “rules to promote moral and legal behavior among [the] youth.” Justice Clayton described the posting of the Ten Commandments as an objective presentation and part of a secular program of education. Citing language from the Supreme Court decision in Abington School District v. Schempp, he deemed it desirable to

11 KY. REV. STAT. ANN. § 158.178(1) (Banks-Baldwin 2003).
12 See id. § 158.178(3). It is not clear whether the provision requiring private funding of the displays was intended to avoid a constitutional challenge, or was merely a fiscal consideration. But see Stone v. Graham, 599 S.W.2d 157, 159 (Ky. 1980) (stating that the private scheme was enacted to avoid a constitutional challenge to the statute). After the Attorney General of Kentucky stated that the statute was constitutional in his opinion, the Kentucky Heritage Foundation raised over $150,000 to finance the purchase of framed copies of the Ten Commandments. Id. at 159. Query: If the purpose for posting the Ten Commandments is secular, i.e., to educate school children regarding the historical influence of the document on our society and laws, why would it be necessary to fund this educational program with private money?
13 KY. REV. STAT. ANN. § 158.178(2).
14 Stone, 599 S.W.2d at 157 (per curiam opinion).
15 Id.
16 See id.
17 Id. at 157-58.
18 Id. at 158.
expose students to "various" political, moral and religious doctrines. Justice Clayton did not, however, explain how the mandatory posting of only the Judeo-Christian code exposes students to "various" political, moral and religious doctrines.

Joining in the decision to affirm, Justice Stephenson opined that the wall separating church and state was in no danger from the enactment of K.R.S. § 158.178. He noted that no tax money was being spent, neither students nor faculty were required to do anything, and that the Commandments have historical as well as religious significance. Furthermore, Justice Stephenson, contrary to the dissenting opinion of Justice Lukowsky, found no violation of Section 5 of the Kentucky Constitution, which prohibits any preference to any religious denomination, sect, or creed. He observed, if the Ten Commandments could not be posted then the Preamble to the Kentucky Bill of Rights also could not be displayed since it made reference to "Almighty God." In short, Justice Stephenson found no constitutional infirmity in a law requiring the display of a document which is fundamental to some religions, but not to others.

Justice Lukowsky wrote an opinion in support of reversal, maintaining that the statute violated Section 5 of the Kentucky Bill of Rights, as well as the First Amendment to the Federal Constitution. The Kentucky Constitution prohibits the government from giving a preference to any religious denomination or particular creed. Justice Lukowsky wrote that K.R.S. § 158.178 gave preference to those religions that subscribe to the Ten Commandments -- Christians, Jews, and Muslims, to the exclusion of others such as Buddhists, Confucianists, Hindus, etc. Moreover, according to Lukowsky, in enacting the statute, the state was giving preference to different religious sects by selecting one interpretation of the Ten Commandments over another translation. Indeed, it was not evident which

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20 Stone, 599 S.W.2d at 158.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id. The Preamble to the Kentucky Constitution (1891) reads as follows: "We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution." KY. CONST. pmbl.
26 See Stone, 599 S.W. 2d at 161-6. The court wrote:

Just as the state may not give preference by law to any particular creed, neither may its subdivisions, the local school districts or classrooms. This does not, as some will undoubtedly suggest, prohibit the use of the Ten Commandments or other religious writings when germane to the secular classroom study of history, literature, philosophy, comparative religion, etc.

Id.
27 Id. at 159-62.
28 See KY. CONST. § 5. This Section reads in part: "No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity...." Id.
29 Stone, 599 S.W.2d at 161.
30 Id. at 160.
copy of the Commandments would be posted as the “official” version.31

In his opinion, Justice Lukowsky wrote that the Ten Commandments are a religious creed and the state exceeds its constitutional authority when it requires that children be exposed to the moral precepts of a creed.32 Distinguishing law and morals, he stated that government may have the duty to educate its citizens as to the minimum standards embodied in the criminal law, but may not prefer one religion or creed.33 Justice Lukowsky did concede that the Commandments and other religious writings could be used in the classroom as part of a secular study of history, literature, philosophy or comparative religion.34 However, he conceptualized the statute in question as the state delving into religious matters or religion attempting to use the state for evangelical aims.35 As a result, he would have declared the law to be a violation of the Kentucky Constitution.36

Justice Lukowsky also would have declared the Kentucky statute to be a violation of the First Amendment to the U.S. Constitution.37 In his opinion, the first three or four Commandments (depending on the translation selected) advance a religious creed, and plainly refute the stated secular purpose of the display.38 Indeed, he suggested that the statute violated all three prongs of the Lemon test by having no secular purpose, advancing religion, and fostering excessive entanglement of government with religion.39

B. The Decision of the United States Supreme Court

The United States Supreme Court granted certiorari and reversed the judgment of the Kentucky Supreme Court.40 The Supreme Court held that the Kentucky statute violated the Establishment Clause of the First Amendment because it lacked a secular legislative purpose.41 It is noteworthy that this decision, which addressed an issue of such importance and widespread interest, was set forth in a per curiam opinion, without the benefit of briefs on the merits or oral argument. Indeed, in his dissenting opinion, Justice Rehnquist expressed his displeasure with the manner in which this case was decided, describing it as “a cavalier summary reversal.”42 The fact that this decision was rendered summarily has been noted or argued in subsequent lower court decisions in an apparent attempt to minimize its precedential value.43 However, the holding of the case has never been

31 Id.
32 Id. at 161.
33 Id.
34 Id. at 160-61.
35 Stone, 599 S.W.2d at 161-62.
36 Id. at 162.
37 Id. at 162.
38 Id.
39 Id.
41 Id. (holding that the Kentucky statute violated the Establishment Clause of the First Amendment to the United States Constitution).
42 Id. at 47.
43 See ACLU v. McCreary County, 96 F. Supp. 2d 679, 686 n.7 (E.D. Ky. 2000) (stating the defendant’s argument that Stone v. Graham was not applicable because it was decided without the full benefit of briefing). See also Books v. City of Elkhart, 235 F.3d 292, 321 (7th Cir. 2000)
overturned. 44

In its opinion, the Court concluded that the Kentucky statute was unconstitutional since it had no secular legislative purpose as required by the first prong of the three-part test articulated in Lemon v. Kurtzman. 45 The Court rejected the “avowed” secular purpose of the statute, finding the pre-eminent purpose for posting the Ten Commandments to be plainly religious. 46 The Court characterized the Commandments as being “undeniably a sacred text in the Jewish and Christian faiths” 47 and stated that “no legislative recitation of a supposed secular purpose can blind us to that fact.” 48 The Court noted that the Commandments are not confined to secular matters, but also address the religious duties of believers, i.e., worshiping the Lord God alone; avoiding idolatry; not using the Lord’s name in vain; and observing the Sabbath. 49

The Court acknowledged that the Ten Commandments are not banned per se from schools, but could be part of a curriculum studying history, civilization, ethics or comparative religion. 50 However, the mere posting of the religious text served no educational function and would have the effect of inducing school children to read, meditate upon, and perhaps to venerate and obey the Commandments. 51 For this reason, the state law requiring posting violated the Establishment Clause. 52

The fact that no taxpayer funds would be expended in posting the Commandments did not save the legislation since the project was a mandate of the state to be implemented by the Superintendent of Public Instruction. 53 Finally, the Court attributed no significance to the fact that the religious texts were merely posted, rather than read aloud. 54 That this statute seemed to be only a minor encroachment on the First Amendment was no defense. 55

In his dissenting opinion, Justice Rehnquist first objected to the Court’s summary rejection of the state legislature’s asserted purpose for requiring the postings. 56 In doing so, Rehnquist cited a number of cases in which deference was accorded to such pronouncements. 57 Justice Rehnquist apparently considered it important that the Kentucky Legislature found the Commandments to have a significant impact on the development of secular legal codes of the Western

(Manion, J., dissenting) (relying on Stone to “support its conclusion that Elkhart’s decision to leave standing the Ten Commandments monument constitutes an unconstitutional establishment of religion ...”).

44 McCreary, 96 F. Supp. 2d at 686 n.7.
45 Stone, 449 U.S. at 40-41 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).
46 Id. at 41.
47 Id.
48 Id. at 41-2.
49 Id.
50 Id. at 42.
51 Stone, 449 U.S. at 42.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id. at 44 (stating that the summary rejection “is without precedent in Establishment Clause jurisprudence”).
57 Stone, 449 U.S. at 43-44.
World. Accordingly, in his opinion, a document of such secular significance should be placed before the students with an appropriate statement of the document’s secular import. In summary, Justice Rehnquist’s principal basis for allowing the posting of the Ten Commandments in schools or other public places is the purported secular importance of this religious text in the development of our legal system. However, he cited no authority for this historical proposition other than the finding made by the Kentucky General Assembly and a decision from the Tenth Circuit Court of Appeals. As will be discussed, proponents of posting the Commandments continue to assert that this clearly religious text has redeeming secular importance as being the foundation of American law, and some judges have accepted this theory as fact.

III. RECENT KENTUCKY DECISIONS

It should be no surprise that the jurisdiction from which the decision in Stone v. Graham arose continues to be a battleground in the controversy over attempts to post the Ten Commandments on public property. Several recent cases in the federal courts of Kentucky have again considered the constitutionality of such displays, and there has been vehement disagreement within the U.S. District Court for the Western District of Kentucky.

58 Id. at 45.
59 Id.
61 See Stone, 449 U.S. at 43-47 (Rehnquist, C.J., dissenting). Ironically, Chief Justice Rehnquist criticized the Court for having “no support beyond its own ipse dixit” in reaching the conclusion that the Kentucky statute had no secular purpose. Id. at 43. Yet, he declares as undeniable that the Ten Commandments have had a significant impact on the development of the secular legal codes of the Western World, citing for this proposition only the finding of state legislature and the opinions of the Seventh Circuit Court of Appeals. Id. Moreover, a review of Anderson v. Salt Lake City Corporation reveals that the Seventh Circuit had even less basis for asserting the influence of the Commandments on our legal system. See generally Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973) (holding that a monument of the Ten Commandments on the courthouse grounds was constitutional). In the Anderson opinion, the Court of Appeals for the Tenth Circuit simply noted that one of the plaintiffs, who was a lawyer, “admitted while testifying that, ‘... the Ten Commandments is an affirmation of at least a precedent legal code.’” Id. at 33.
62 In ACLU v. Mercer County, 219 F. Supp. 2d 777, 784 (E.D. Ky. 2002), Judge Forrester cited Chief Justice Rehnquist several times in support of this premise, and further stated that “any sober student of history knows: for good or bad, right or wrong, the Ten Commandments did have an influence upon the development of United States law.”
63 See, e.g., ACLU v. McCready County, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (finding that plaintiffs satisfied the preliminary injunction requirements of showing likelihood of success on merits of claim that a Ten Commandments display violated the Establishment Clause); ACLU v. McCready County, 145 F. Supp. 2d 845 (E.D. Ky. 2001) (determining that counties and district did not include the Ten Commandments with historical documents for secular purpose, as required under Establishment Clause, and that the display had the purpose of advancing religion, barred by Establishment Clause); ACLU v. Pulaski County, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (holding that plaintiffs established a strong likelihood of success on the merits of their claim that a display of the Ten Commandments and other documents containing references to God or the Bible violated the Establishment Clause); Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667 (E.D. Ky. 2000) (finding that plaintiffs established a strong likelihood of success on the merits of their claim that a
Courts as to whether the Commandments can be displayed in county courthouses within the Commonwealth. Two federal district judges have ruled that they cannot, yet another has found no constitutional violation under the specific facts of that case. More recently, the Sixth Circuit Court of Appeals has spoken on this subject, holding that a Kentucky legislative resolution, directing the placement upon the State Capitol grounds of a monument inscribed with the Ten Commandments, violated the Establishment Clause. A review of these decisions will reveal the critical factors considered by the courts in determining whether such displays are permissible.

A. ACLU v. McCreary County

In ACLU v. McCreary County, Judge Coffman of the U.S. District Court for the Eastern District of Kentucky held that a display of the Ten Commandments, among other documents, in the McCreary County Courthouse constituted a violation of the Establishment Clause, and granted a preliminary injunction ordering the County to remove the Ten Commandments display immediately. Judge Coffman found that the display ran afoul of both the first and second prong of the Lemon test. She concluded that it served no secular purpose, and was never intended to do so. She further found that the display communicated a governmental endorsement, not only of religion over non-religion, but of Christianity in particular.

The initial display in the McCreary County Courthouse consisted of only one

school district’s displays of the Ten Commandments and other documents containing references to God or the Bible violated the Establishment Clause; ACLU v. Grayson County, 2002 WL 1558688 (W.D. Ky. May 13, 2002) (granting plaintiff’s motion for preliminary injunction finding that there was a strong likelihood of success on the merits when the county placed a Ten Commandments display in the county courthouse); ACLU v. Mercer County, 219 F. Supp. 2d 777 (E.D. Ky. 2002) (finding that plaintiffs failed to establish a strong or substantial likelihood of success on the merits of their Establishment Clause challenge where there was a framed copy of the Ten Commandments in the county courthouse); Adland v. Russ, 307 F.3d 471 (6th Cir. 2002) (holding that a directive to place Ten Commandments display on state capitol grounds had a primarily religious rather than secular purpose and impermissibly endorsed religion, and therefore violated the Establishment Clause).

Judge Coffmann of the U.S. District Court for the Eastern District of Kentucky has denied the right to display the Commandments in McCreary, 145 F. Supp. 2d at 845, Harlan, 96 F. Supp. 2d at 667 and Pulaski, 96 F. Supp. 2d at 691. Judge McKinley of the U.S. District Court for the Western District of Kentucky has ruled likewise in Grayson, 2002 WL 1558688.


In June 2001, Judge Coffman rendered a second opinion in this litigation, granting a motion for supplemental preliminary injunction in favor of the plaintiffs against the defendant McCreary County. See ACLU v. McCreary County, 145 F. Supp. 2d 845 (E.D. Ky. 2001).

McCreary, 96 F. Supp. 2d at 691.

Id. at 685-87 (citing Wallace v. Jaffree, 472 U.S. 38, 56 (1985)).

.Id. at 687.

(Id. (citing ACLU v. Capitol Square Review and Advisory Bd., 210 F.3d 703 (6th Cir. 2000)).
framed copy of one version of the Ten Commandments. After suit was filed, the defendants amended the display to include several other documents, including an excerpt from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto “In God We Trust;” a page from the Congressional Record declaring 1983 to be the Year of the Bible and including a copy of the Ten Commandments; a proclamation by President Lincoln designating a National Day of Prayer and Humiliation; an excerpt from another speech by President Lincoln stating, “The Bible is the best God has ever given to man;” President Reagan’s proclamation that 1983 is the Year of the Bible; and the Mayflower Compact. The defendants admitted that these other documents were added in an attempt to bring the display within the parameters of the First Amendment. However, they also conceded that the exhibit, while supposedly intended to teach McCreary County residents about the religious history and foundation of the state, also purported to demonstrate “America’s Christian heritage.”

In response to Judge Coffman’s ruling, the McCreary County defendants erected yet another display containing the Ten Commandments. This exhibit entitled, “The Foundations of American Law and Government Display,” which has been used by other groups who have tried to post the Commandments in courthouses, included the full text of the Magna Carta; the Declaration of Independence; the Bill of Rights; the Star Spangled Banner; the Ten Commandments with a biblical citation; the Mayflower Compact; a picture of the Lady of Justice; the motto “In God We Trust;” and the Preamble to the Kentucky Constitution. This display also contained an explanation of each document’s historical and legal significance. The explanation accompanying the inclusion of the Ten Commandments stated that they “demonstrate that the Ten Commandments were part of the foundation of American Law and Government” and they provide “the moral background of the Declaration of Independence and the foundation of our legal tradition.”

As previously noted, the Kentucky General Assembly has stated its desire that these historical records should be displayed in order to illustrate the purported influence of the Bible and Ten Commandments on our institutions and law.

72 Id. at 684.
73 Id.
74 McCreary, 96 F. Supp. 2d at 684.
75 Id. at 686. It should be readily apparent that the purpose for displaying certain historical documents along with the Commandments is not just to teach American history, but to emphasize the religious, particularly the Christian, heritage of our country. This was evident in McCreary by the fact that, when they first added such documents to the solitary display of the Commandments, the defendants chose to include excerpts from some texts, but only those with references to God or the Bible. Id. at 684. Likewise, the posting of the Congressional Record is obviously a tactic to exhibit the Commandments, since the portion of the Record utilized contained a reprint of the Ten Commandments. Id.

78 McCreary, 145 F. Supp. 2d at 846-47.
79 Id.
80 Id. at 848. See also Mercer, 219 F. Supp. 2d at 779 (finding that plaintiffs failed to establish a strong or substantial likelihood of success on the merits of their Establishment Clause challenge where there was a framed copy of the Ten Commandments in the county courthouse); Grayson,
The plaintiffs in *McCreary* filed a motion with the court seeking a supplemental preliminary injunction banning the new display. Although the defendants removed the biblical citations, Judge Coffman again found the latest display to be unconstitutional, violating the first two prongs of the *Lemon* test. While acknowledging that, in religion cases, the courts must give some deference to the government's articulated purpose, Judge Coffman rejected the several avowed secular reasons given for posting the Commandments, and further found that the exhibit had the effect of advancing religion by conveying the message of the government's endorsement of the Commandments.

With specific regard to the first prong of the *Lemon* test, the defendants avowed that their purpose was to demonstrate that the Ten Commandments were part of the foundation of American Law and Government and provided the moral background of the Declaration of Independence and the foundation of our legal tradition. Nevertheless, Judge Coffman deemed these purposes to be facially invalid as religious in nature, citing the decision in *Stone* wherein the Supreme Court rejected the same avowed secular purpose. She also dismissed the defendants' alleged purpose to educate the citizens, noting the history of their attempts to post the Commandments. After evaluating the totality of the circumstances, Judge Coffman concluded that the defendants' purpose in posting the Ten Commandments was clearly religious in nature.

Judge Coffman further found that a reasonable observer of the display would likely interpret it as the county's endorsement of religion, and thus the display was also violative of the second prong of the *Lemon* test. In her view, the exhibit accentuated the religious nature of the Ten Commandments by placing them alongside the American historical documents. A reasonable observer would understand the religious code to be revered to the same degree as our nation's most cherished secular symbols and documents. As opposed to an "appropriate educational display," which might "try to include all the various moral, historical, and political influences on our legal system, the display in question conveyed a message of the county's endorsement of the Ten Commandments. In addition,
the fact that the display was located at the seat of government had the effect of advancing religion. Finally, given the history of this controversy, a reasonable observer would likely be apprised of the non-secular purpose of the display, which would increase the religious effect by conveying the message that the county was posting the Ten Commandments, not the “Foundations of American Law and Government.”

Although she found the county’s exhibit to be constitutionally infirm, Judge Coffman did express her opinion as to the manner in which the Ten Commandments could be properly used in the public arena. First, as recognized by the Supreme Court in *Stone*, religious documents and texts could be incorporated into an appropriate curriculum in the study of history, civilization, ethics or comparative religion. Another constitutional display of the Ten Commandments would be similar to the frieze in the United States Supreme Court courtroom, where Moses holding the tablets is depicted along with other great lawgivers.

B. *ACLU v. Grayson County*

In May of 2002, in the case of *ACLU v. Grayson County*, Judge McKinley of the U.S. District Court for the Western District of Kentucky granted a preliminary injunction and ordered the Grayson County Fiscal Court to remove a display containing the Ten Commandments from the Grayson County Courthouse. That display, entitled “Foundations of American Law and Government Display” was exactly the same as the exhibit posted by the defendants in the *McCreary* case. In granting the plaintiffs’ relief and ordering the removal of the Grayson County display, Judge McKinley found that the display violated the second, or “primary effect,” prong of the *Lemon* test. However, he further found that the plaintiffs had presented no evidence concerning the history of the display, which would indicate that the defendants’ purpose was religious in nature. As a result, he deferred to the government’s avowed purpose for the display based upon the record at the preliminary stage of litigation.

The Grayson County defendants maintained that, since the majority of the Ten Commandments were secular in nature, the display containing the Commandments was constitutionally acceptable. Judge McKinley dismissed this argument as being foreclosed by the Supreme Court in *Stone* wherein that Court declared the...
Ten Commandments to be undeniably a sacred text in the Jewish and Christian faiths, despite the fact that they do not confine themselves to arguably secular matters such as honoring one’s parents, killing, adultery, or stealing. Judge McKinley further rejected the County’s argument that the Ten Commandments had become part of the “fabric of our society” in the same manner as legislative prayers and the national motto “In God We Trust,” noting that the Commandments have not become “a ceremonial deism.”

Referring to the decision of Judge Coffman and the McCreary case, as well as recent decisions from the Seventh Circuit Court of Appeals, Judge McKinley concluded that the plaintiffs were likely to succeed on their argument that the display had the primary or principal affect of advancing or endorsing religion. He cited the finding of the McCreary case that the display of the Commandments alongside American historical documents accentuates the religious nature of the Decalogue, and that a reasonable observer would see this as the government’s endorsement of religion. Likewise, the monuments containing the text of the Ten Commandments in the Indiana cases carried the message of endorsement of religion by their location near the seat of government and by their use of patriotic symbols. As a result, Judge McKinley concluded that the Grayson County display violated the second prong of the Lemon test and thus, the Establishment Clause.

C. ACLU v. Mercer County

In the year following Judge McKinley’s ruling in the Grayson County case, the ACLU again filed suit to force Mercer County, Kentucky to remove the “Foundation of American Law and Government” display which hung in the county courthouse. This display was exactly the same, with the same explanatory comments, as in the McCreary and Grayson cases. The County’s stated purpose was that “all of the documents, including the Ten Commandments, have played a role in the formation of our system of law and government.” It also viewed the display as being consistent with the County’s tradition of celebrating history. The defendants also denied any intent to endorse or promote religion.

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107 Id. (citing Stone v. Graham, 449 U.S. 39, 41-42 (1980)).
108 Id. at *3 n.1 (citing ACLU v. Capitol Square Review and Advisory Bd., 243 F.3d 289, 300 (6th Cir. 2001)).
111 Id. at *4-5.
112 Id. at *5.
113 Id. at *6.
115 Id.
116 Id. at 779.
117 Id. at 780.
118 Id.
119 Id.
In *ACLU v. Mercer County, Kentucky*, Judge Forrester of the U.S. District Court for the Eastern District of Kentucky denied the plaintiffs' request for injunctive relief finding that they were not likely to succeed on the merits of their claim that the display violated the Establishment Clause. Contrary to his colleague, Judge Coffman, who found this same display to violate both the first and second prong of the Lemon test, and contrary to Judge McKinley who found the posting to violate the second prong of the test, Judge Forrester found no evidence of violation of either the secular purpose or primary effect elements of Lemon. However, Judge Forrester's analysis of each prong requires close and critical evaluation.

At the outset of his discussion of the case, Judge Forrester seemed to place an excessive and unwarranted burden upon the plaintiffs to prove that the government lacked a secular purpose in posting the Ten Commandments. He observed that the only burden on the government was to offer a valid secular purpose for the display, while the plaintiffs must show that the stated purpose was a "sham." He further stated that the plaintiffs must demonstrate that the purpose behind the display was "wholly" motivated by religious considerations. A review of the case law regarding the burden of proof in Establishment Clause cases reveals that plaintiffs do not have as great a burden as suggested by Judge Forrester. Indeed, in *Lynch v. Donnelly*, the case which he cites, Justice O'Connor noted that the purpose prong of the Lemon test is not satisfied by the mere existence of "some" secular purpose. Other cases, specifically involving the posting of the Ten Commandments, have stated that, given their plainly religious nature, the government bears the burden to identify a clear secular purpose for the display, or to demonstrate that it has taken steps to obviate its religious purpose. In *Mercer*, Judge Forrester placed the unsupported burden on the plaintiffs to prove that the purpose behind the County's display "was 'wholly' motivated by religious considerations." However, having established that it wanted to display a "plainly religious" text on public property, the burden of proof should have shifted to the County to identify a "clear secular purpose" for the posting. The Court is then charged with distinguishing a sham secular purpose

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120 *Mercer*, 219 F. Supp. 2d at 782.
121 Id. at 798.
124 *Mercer*, 219 F.2d at 788, 795.
125 Id. at 783. The court did dismiss the plaintiffs' cause of action, but denied the request for preliminary injunction, finding no likelihood of the plaintiffs being successful on the merits. Id. Nevertheless, the plaintiffs were given a reasonable time in which to conduct limited discovery in an attempt to prove that the County's stated secular purpose was a sham. Id. at 798.
126 Id. at 783, 798.
128 Id. at 690-91.
130 *Mercer*, 219 F.3d at 783.
131 *Rutherford*, 209 F. Supp. 2d at 806. See also *Books*, 235 F.3d at 303 (holding that after plainly religious text is established the burden shifts to the municipality).
from a sincere one. This is consistent with the Supreme Court's decision in Stone, wherein the Court rejected the “avowed” secular purpose offered by the state.

Judge Forrester’s analysis of the County’s stated secular purpose for the display under the first prong of the Lemon test is remarkable in that it contains a number of inaccuracies, and mis-statements or over-statements of cited authorities, such that a reasonably informed reader of the opinion might question whether the Court was seeking to justify its finding of a secular purpose for posting the Commandments. The judge repeatedly claimed, as a matter of undisputed fact, that the Ten Commandments had a significant impact on the development of the secular legal codes of the Western World, and did have an influence upon the development of United States law. However, to support the premise that the Ten Commandments have such significance in the development of our laws, Judge Forrester did not refer to learned, historical studies, but rather to the dissenting opinions of Justice Rehnquist in Wallace v. Jaffree and Stone v. Graham. Indeed, contrary to Judge Forrester’s assertion that “any sober student of history” knows that the Ten Commandments did influence the development of American law, there are numerous scholars who fervently challenge that proposition.

Likewise, the judge claimed that “numerous” other courts acknowledge the “secular nature” of the Ten Commandments. Yet a review of those three cases

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134 Id.
135 See Mercer, 219 F.3d at 785-88.
136 472 U.S. 38 (1985). In his dissenting opinion in this case, Justice Rehnquist observed that “it is impossible to build a sound constitutional doctrine upon a mistaken understanding of constitutional history…” Id. at 92 (Rehnquist, J., dissenting). He then proceeded to challenge the meaning and significance of Jefferson’s “wall of separation” metaphor. Id. Although his argument regarding the history of the Establishment Clause may be tenable, Justice Rehnquist provided no historical evidence of the influence of the Ten Commandments on the development of our laws. Id.
137 Stone, 449 U.S. at 45.
138 See Steven K. Green, The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law, 14 J.L. & RELIGION 525 (1999-2000). In this article the author quotes an 1850 New York court wherein it was stated, “The maxim that Christianity is part and parcel of the common law has been frequently repeated by judges and text writers, but few have chosen to examine its truth or attempt to explain its meaning.” Id. at 556. The court continued, “The truth of the maxim in [a] very partial and limited sense may be admitted. But if we attempt to extend its application, we shall find ourselves obliged to confess that it is unmeaning or untrue.” Id. at 555.

The author recounts how attempts by Massachusetts and other puritan colonies in the 17th century to base their legal system failed, and that the founders of our new nation were influenced by the Enlightenment and the belief in fundamental natural rights. Id. at 544-45. Indeed, he quotes Thomas Jefferson, in a letter to John Adams, in which the author of the Declaration of Independence attacked the maxim that Christianity was part of the common law, describing it as “pious fraud” perpetuated by “judicial forgery.” Id. at 547.

He concludes by saying, “The historical record fails to support claims of a direct relationship between the law and the Ten Commandments… At best, the most that could be said about the relationship of the Ten Commandments to the law is that the former has influenced legal notions of right and wrong.” Id. at 556.

139 See Mercer, 219 F.3d at 784 (citing Summon v. City of Ogdin, 152 F. Supp. 2d 1286 (Utah 2001)). See also Christian v. City of Grand Junction, No. 01-CV-685, 2001 WL 34047958 (D. Colo. June 27, 2001) (acknowledging the secular nature of the Ten Commandments); State v. Freedom From
reveals that the courts did not claim that the Commandments were “secular,” but merely that they were undeniably a part of “secular history.” That the Commandments are part of history is not in dispute. Every court which has written on this subject has accepted the fact that the Commandments are part of the history of the Western World. Following the Supreme Court’s statement in Stone, it must be conceded that they may be incorporated into a school curriculum studying our history, civilization, ethics and comparative religions. Other cases have noted the fact that Moses holding the tablets is depicted in a frieze on the wall of the Supreme Court courtroom, along with other great lawgivers. Nevertheless, that the Commandments are part of the secular history does not make them secular in nature. As the Supreme Court declared in Stone, “The Ten Commandments are undeniably a sacred text...and no legislative recitation of a secular purpose can blind us to that fact.”

Judge Forrester attempted to distinguish the decision of Judge Coffman in McCreary by stating that there were different factual circumstances in that case, even though the challenged displays were identical. In particular, he referred to the history of the litigation in McCreary, which established the clear religious intent on the part of the defendants in that case. Moreover, he cited the reasoning from the decision in ACLU v. Rutherford County, Tennessee, another case involving the exact same display, despite the fact that the court in Rutherford actually found that the county had no secular purpose for erecting the exhibit.

With regard to his analysis of the second or primary effect prong of the Lemon test, Judge Forrester simply disagreed with most other courts that have found the posting of the Commandments to be unconstitutional. In both the McCreary


140 See Mercer, 219 F.3d at 784.
142 Id.
143 See County of Allegheny v. ACLU, 492 U.S. 573, 652 (1989). See also Indiana Civil Liberties Union v. O’Bannon, 259 F.3d 766, 771 (7th Cir. 2001) (stating this fact); Books v. City of Elkhart, 235 F.3d 292, 302-03 (7th Cir. 2000) (stating this fact).
144 See Stone, 449 U.S. at 41.
145 See Mercer, 219 F.3d at 787.
146 Id.
147 Id. at 788 (citing ACLU v. Rutherford, 209 F. Supp. 2d 799 (M.D. Tenn. 2002)).
148 See Rutherford, 209 F. Supp. 2d at 809.
149 See Mercer, 219 F.3d at 791-92. Judge Forrester claims to adopt the reasoning of U.S. District Court Judge Eichols in the Rutherford case and of U.S. District Judge Sharp in the Books case. Id. However in a footnote to his opinion, Judge Forrester erroneously states that Judge Sharp, on remand, approved a proposed display of the Ten Commandments and historical documents on the courthouse lawn. Id. In truth, Judge Sharp refused to approve the city’s suggested remedy which would have kept the Eagles Ten Commandment monument on city property, but would have added to the display the Bill of Rights, the Preamble to the United States Constitution, the declaration of Independence, and the Magna Carta. Id. In an Order entered on April 17, 2002, Judge Sharp found that the proposed display would still be unconstitutional, citing the Seventh Circuit’s decision in O’Bannon. Id. He quoted language from O’Bannon that an observer may reasonably believe that the monument impermissibly links religion and law due to the proximity of the historical, government documents. Id.

Judge Sharp offered that the city could install other monuments memorializing historic sources of the law, including non-religious ones, such as in the frieze on the wall in the United States Supreme
and Grayson cases, the courts found that the displays conveyed a message of government endorsement of religion by linking the Ten Commandments with important patriotic and historical documents. Contrary to the opinions of the judges in those cases, Judge Forrester believed that a reasonable observer would not understand the display to have the effect of endorsement of the Ten Commandments by the local government. Rather than accentuating the religiosity of the Ten Commandments, the reasonable observer would recognize that all of the documents, including the Commandments, have been influential in the formation of the American system of government. Again, Judge Forrester assumed this influence to be an historical fact, and further assumed that reasonable observers of the display would be significantly schooled in that history. In support of this position, he maintained that the Commandments are an almost universal and instantly recognizable symbol of the rule of law.

Judge Forrester acknowledged that, in determining whether a particular display violates the Establishment Clause under Lemon, "context is everything," adding that Mercer County was not obligated to minimize the religious aspect of the Ten Commandments. Instead, it is the message of possible endorsement of religion that must be sufficiently minimized by the setting and context. In this case, Judge Forrester found that, in the context of the display of historical and patriotic documents, the presence of the Ten Commandments did not convey a message of government endorsement of religion. He further rejected the suggestion that the display should be more historically comprehensive and should include a cross-section of all historical influences on our laws.

Judge Forrester also dismissed the plaintiffs' argument that the display was unconstitutional in showing a denominational preference for a particular sectarian Court, or that the city could move the monument to private property. The city chose to remove the monument from the public grounds. On May 20, 2002, Judge Sharp dismissed the case with prejudice as being moot in light of the city's removal of the monument. See Books v. City of Elkhart, 79 F. Supp. 2d 979, (N.D. Ind. 1999).

See Mercer, 219 F.3d at 792-93.
Id.
Id. at 794. Judge Forrester erroneously states that the Ten Commandments are displayed in at least five places in the U.S. Supreme Court building. In fact, according to the Office of the Curator, the Commandments appear in only two places on the East Pediment and on the south wall frieze of the courtroom. In both instances, the tablets are being carried by Moses, who is depicted among such historic lawgivers as Hammurabi, Confucius, Solomon, Menes and others.

Mercer, 219 F.3d at 793.
Id. Judge Forrester compared the Ten Commandments to a creche or menorah in Lynch and Allegheny. Noting that six of the Ten Commandments have undisputed secular significance, he opined that a display of the Commandments alone would represent a lesser degree of endorsement of religion than a creche. This point seems irrelevant since the Supreme Court in Stone explicitly declared the Commandments to be religious despite their secular components. See Stone, 449 U.S. at 43.

Mercer, 219 F.3d at 794.
Id. at 795 n.8 ("Further, for this Court to require Mercer County to acknowledge the historical influence of particular code having dubious historical influence, relatively speaking, would be an intellectually dishonest way to comply with the endorsement test."). Evidently, Judge Forrester believes that the depiction of the great lawgivers on the Supreme Court building is of no historical significance since the influence of those individuals, other than Moses, is "dubious."
version of the Ten Commandments. In fact, there was no evidence presented as to which version of the Decalogue was displayed by the county. Nevertheless, Judge Forrester conceded that it would not be the proper business of the Court to involve itself in such theological issues as which denomination's version is posted. Although not addressed as an issue in that case, the discussion of a potential dispute over the various versions of the Commandments which could be posted raises the possibility of involvement of the third prong or entanglement prong of the Lemon test. For example, if proponents of a Ten Commandments display were unable to agree on whether to use the King James version, the Catholic version or the Jewish text, no government authority could intervene to settle the dispute. That would require the government to inject itself impermissibly into religious doctrinal disputes.

Finally, Judge Forrester minimizes the importance of the constitutional issue in this case by suggesting that it should be relegated to the political arena. He suggests that the plaintiffs should lobby their local governments for relief, stating that, "Whether the relative benefits of a display acknowledging the historical, secular influence of the Ten Commandments outweigh the sincere objections of citizens who are personally offended by such a display, in this context, is a matter entrusted to the judgment of local citizens and their elected representatives." This viewpoint ignores the fact that the plaintiffs are asserting a fundamental right guaranteed by the First Amendment and that such rights are not subject to popular vote.

D. Adland v. Russ

The question of whether the Ten Commandments may be displayed on public property in Kentucky has become more clear as a result of a recent decision from the Sixth Circuit Court of Appeals. In Adland v. Russ, the Court upheld the judgment of the United States District Court for the Eastern District of Kentucky which declared a Resolution of the Kentucky Senate to be in violation of the Establishment Clause of the First Amendment. The District Court had also enjoined the legislative directive which would have required the Commissioner of the Department for Facilities Management to relocate a monument inscribed with the Ten Commandments to a permanent site on the state capital grounds as part of an historical and cultural display. The Court of Appeals, with Chief Circuit Judge Martin writing the opinion, held that the legislature's directive regarding the placement of the monument lacked a secular purpose and impermissibly endorsed religion.
In April of 2000, Governor Patton signed into law Senate Joint Resolution No. 57, a Resolution "relating to the display of historic documents that include a depiction of the Ten Commandments." Section 2 of the Resolution authorized public school teachers to post the Ten Commandments in classrooms as part of historical displays. Section 8 directed the Department for Facilities Management to relocate the monument inscribed with the Commandments to a permanent site on the Capital grounds, near the Floral Clock, to be part of an historical and cultural display. The Legislature intended this display to be a reminder to Kentuckians of "the Biblical foundations of the laws of the Commonwealth."

This Resolution contains a preamble consisting of 17 separate "Whereas" clauses reciting the purpose of the enactment. Many of these clauses quote famous Americans professing their beliefs in the Bible, God, or Christianity. One included a passage from a Supreme Court decision dating back to 1892 which included the statement that "this is a Christian nation." Another clause asserts, albeit erroneously, that the Ten Commandments appear over the bench in the United States Supreme Court. The pervasive theme of this Resolution is the purported impact that the Bible and the Ten Commandments have had on our society and laws.

The monument in question had been presented to the Commonwealth by the Fraternal Order of Eagles in 1971 as part of a nationwide effort to expose the youth of our country to "the simple laws of God." This same monument, which has precipitated several other lawsuits challenging its placement on courthouse lawns, contains other symbols in addition to the full text of the Commandments, including two Stars of David; the Greek letters Chi and Rho; the "all-seeing" eye; tablets with Hebrew script; and an American flag. The monument also had a disclaimer stating that it had been presented to the Commonwealth by the Kentucky Fraternal Order of Eagles.

Although the Legislative Resolution did not provide specific details of the historical and cultural display of which the Commandments would be a part, in its brief to the Court, the Commonwealth indicated that various markers, signs and monuments would be included in the historical garden area surrounding the Kentucky Floral Clock. These markers would commemorate various events in Kentucky history, and would honor Kentuckians of varying degrees of fame. However, the Ten Commandments monument would be the largest object in the

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170 Adland, 307 F.3d at 474-77. See also supra note 6 and accompanying text.
171 Adland, 307 F.3d at 474-77.
172 Id.
173 Id.
174 Id.
175 Id.
178 Adland, 307 F.3d at 475.
179 Id. at 475-76.
180 Id. at 476.
181 Id. at 477.
182 Id.
display except for the Floral Clock.\textsuperscript{183}

In its analysis under the secular purpose prong of the \textit{Lemon} test, the court recognized that, although “a totally secular purpose” for government action is not required, it is clear that the “mere existence of some secular purpose” is not sufficient.\textsuperscript{184} In addition, while it must accord some deference to the Commonwealth’s avowed intention, the court must “distinguish a sham secular purpose from a sincere one.”\textsuperscript{185} After observing that the Supreme Court in \textit{Stone} had recognized the inherently religious nature of the Ten Commandments, the court proceeded to examine the Commonwealth’s avowed purpose for the placement of the monument.\textsuperscript{186} Since Section 8 of the Kentucky Resolution seeks “to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth,”\textsuperscript{187} the Court stated that it was compelled to conclude that this purpose, which is essentially the same as that expressed in \textit{Stone}, was insufficient to satisfy the secular purpose requirement.\textsuperscript{188}

Having determined that the language of Section 8, standing alone, failed to provide a secular purpose, the court then examined the context and content of the display.\textsuperscript{189} First, it noted that Section 8 codified only the influence of the Ten Commandments on the law of the Commonwealth.\textsuperscript{190} Unlike the frieze on the wall of the U.S. Supreme Court which depicts Moses carrying the Ten Commandments alongside other lawgivers, the Commonwealth focuses only on the “Biblical foundations” of the law.\textsuperscript{191} The court stated that it could not ignore the Commonwealth’s emphasis on a single religious influence to the exclusion of all other religious and secular influences.\textsuperscript{192} The court also commented on the overtly religious nature of the Preamble clauses in the Resolution, “extolling the virtues of religion, Christianity and the Bible.”\textsuperscript{193} Likewise, the court considered it legally significant that the Ten Commandments monument would physically dwarf all of the other markers.\textsuperscript{194} Finally, the court refused to defer to the state’s avowed secular, commenting on the fact that the state, which had litigated the \textit{Stone} case, failed to heed the Supreme Court’s suggestion to integrate the Commandments into a broader historical or cultural study.\textsuperscript{195} Instead, the state “put forth virtually the

\textsuperscript{183}Id.
\textsuperscript{184}Adland, 307 F.3d at 480.
\textsuperscript{185}Id.
\textsuperscript{186}Id.
\textsuperscript{188}Adland, 307 F.3d at 480-81.
\textsuperscript{189}Id. at 481.
\textsuperscript{190}Id.
\textsuperscript{191}Id. at 481.
\textsuperscript{192}Id. at 482.
\textsuperscript{193}Id. The court was not persuaded by the defendant’s argument that the preamble clauses were intended to illustrate the religious thoughts of our nation’s leaders and the Bible’s influence on law and public policy, and that they “achieve the Commonwealth’s secular goal by commemorating how the Bible and Ten Commandments influenced a nation.” Id. The court observed that this explanation was absent from the preamble, and noted that, even if such a disclaimer could be effective in reducing the religious meaning of the statements, the Commonwealth never offered this secular explanation until filing its brief. Id. The court questioned whether this disclaimer was merely to avoid Establishment Clause liability. Id.
\textsuperscript{194}Adland, 307 F.3d at 482.
\textsuperscript{195}Id. at 483-84.
same secular purpose...that the Court rejected in Stone.”\textsuperscript{196} Thus, the court found that Kentucky’s primary purpose in drafting Section 8 was religious rather than secular.\textsuperscript{197}

The court also concluded that the state violated the second prong of Lemon in that “the Ten Commandments monument impermissibly endorses religion.”\textsuperscript{198} As with the secular purpose analysis, the court looked to the content and context of the display to determine whether it has the actual effect of endorsing religion.\textsuperscript{199} As to content, the court observed that the Commandments are “inherently religious.”\textsuperscript{200} Since this religious document was to be prominently displayed on the grounds of the State Capitol, the seat of government, it sent the “unmistakable message that the Commonwealth of Kentucky endorses the religious message of the Ten Commandments.”\textsuperscript{201} Thus, the court’s next inquiry was whether the context of the display reduces or dilutes this endorsement.

Agreeing with the reasoning of the Seventh Circuit in Books v. City of Elkhart,\textsuperscript{202} the court found that placing patriotic symbols on the monument, such as the American eagle grasping the flag, “serves to link government and religion in an impermissible fashion.”\textsuperscript{203} Moreover, since the monument displaying the Commandments physically dominates the display and since there is no unifying historical or cultural theme, a reasonable observer’s attention would be drawn to the religious monument and the message it contains.\textsuperscript{204} Lastly, the court considered the fact that the display did not include a disclaimer.\textsuperscript{205} While stating that a simple recitation that a display is not for religious purpose cannot diminish the religious message, the court noted that there was no disclaimer incorporated into the Section 8 of the Resolution.\textsuperscript{206} In fact, the Resolution, which was required to be part of the display, espoused an avowed stated purpose expressly endorsing the Bible and Christianity.\textsuperscript{207}

Having found that neither the content nor the context of the display would reduce the religious message of the monument, the court held that the state could not comply with Section 8 of the Legislative Resolution without violating the Establishment Clause.\textsuperscript{208} The court described the effect of this endorsement as sending an ancillary message to those viewers of the display who do not subscribe to the teachings of the Bible that “they are outsiders, not full members of the political community” and that those who believe are “insiders, favored members of the political community.”\textsuperscript{209}

\textsuperscript{196} \textit{id.} at 484.
\textsuperscript{197} \textit{id.}
\textsuperscript{198} \textit{id.}
\textsuperscript{199} \textit{id.}
\textsuperscript{200} Adland, 307 F.3d at 488-89.
\textsuperscript{201} \textit{id.} at 486.
\textsuperscript{202} 235 F.3d 292, 307 (7th Cir. 2000).
\textsuperscript{203} Adland, 307 F.3d at 487.
\textsuperscript{204} \textit{id.} at 487-88.
\textsuperscript{205} \textit{id.} at 488.
\textsuperscript{206} \textit{id.} at 488-89.
\textsuperscript{207} \textit{id.} at 489.
\textsuperscript{208} \textit{id.}
\textsuperscript{209} Adland, 307 F.3d at 489. (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309-10 (2000)).
Although it found this particular proposal to be unconstitutional, the court emphasized its opinion by stating that decisions of the Supreme Court in *Stone*\(^{210}\) and *Allegheny*\(^{211}\) would allow the display of the Ten Commandments, perhaps even the monument in question, under the proper circumstances.\(^{212}\) To this end, the court commented on the fact that in the district court, the plaintiffs had proposed alternative displays which would have acknowledged various influences on our law by both secular and religious sources.\(^{213}\) The court expressed confidence that the parties could reach an agreement that would allow the monument to be displayed in a constitutionally permissible manner.\(^{214}\)

**IV. CAN THE TEN COMMANDMENTS BE DISPLAYED?**

Most courts have recognized that the Supreme Court in *Stone* sent a clear and direct message regarding the display of the Ten Commandments on public property - that the Commandments are "sacred text" and "no legislative recitation of a supposed secular purpose can blind us to that fact."\(^{215}\) The Court also found the "pre-eminent purpose" for posting them was "plainly religious."\(^{216}\) Although *Stone* involved a statute requiring the Commandments to be hung in public classrooms, that circumstance draws more scrutiny from the courts, but does not diminish the religious character of the document or indicate that the purpose of those who want to place this religious text in courthouses is more secular.

The Supreme Court was just as explicit in stating that religious materials, including the Bible, "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."\(^{217}\) Courts have often cited this particular declaration in countering the suggestion that the Constitution prohibits any public recognition of religion.\(^{218}\) Likewise, the frieze on the wall of the Supreme Court courtroom is shown as evidence of our acknowledgement that the text of the Commandments "has played a role in the secular development of our society" and "can be presented by the government as playing such a role in our civic order."\(^{219}\) Thus, there is no doubt that the state can display the Ten Commandments, if it does so with a secular purpose and in a proper context. The question remains whether the advocates of displaying the Commandments are truly willing to limit the use of this sacred text for secular purposes.

Conceding that there are ways that the Commandments can be displayed without violating the Constitution, some opponents have offered alternatives. In *Adland*, the plaintiffs suggested that the state could create a free speech area on the Capitol grounds where citizens could place exhibits offering differing opinions;

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\(^{212}\) *Adland*, 307 F.3d at 489.

\(^{213}\) Id.

\(^{214}\) Id.

\(^{215}\) *Stone*, 449 U.S. at 41.

\(^{216}\) Id.

\(^{217}\) Id. at 42.


\(^{219}\) *Books* v. *City of Elkhart*, 235 F.3d 292, 303 (7th Cir. 2000).
place the monument in a less prominent location; or create an historical display that would showcase the various influences on our law, both secular and religious. However, compromise settlements in these disputes will require the advocates of posting to alter their views or beliefs with regard to the place that the Ten Commandments should occupy in our society. For example, in Mercer, Judge Forrester was dismissive of the idea of a neutral display noting that to require the County "to acknowledge the historical influence of particular codes having dubious historical influence, relatively speaking, would be an intellectually dishonest way to comply with the endorsement." It is unlikely that parties will be able to agree upon an appropriate context in which this religious document may be displayed if advocates sincerely believe that the Ten Commandments, to the exclusion of all other religious and secular influences, had a significant role in the development of American law.

In K.R.S. § 158.178, the 1978 statute declared unconstitutional in Stone, the Kentucky Legislature declared that the Ten Commandments had been adopted "as the fundamental legal code of Western Civilization and the Common Law of the United States." In 2000, the Legislature adopted Senate Joint Resolution 57, relating to the display of historic documents that include a depiction of the Ten Commandments. That Resolution's avowed purpose for posting the Commandments in public school classrooms was to make citizens "more knowledgeable concerning...the formative influence of the Bible and the Ten Commandments on American leaders, institutions, and law." The purpose for placing the Ten Commandments monument on the Capitol grounds was "to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth." Although it found the latter was found to be lacking in secular purpose, the court in Adland chose not to "resolve disputes about whether the Commonwealth's legal system owes more to the Magna Carta or the Code of Hammurabi than the Ten Commandments." However, some courts have accepted, as an undisputed fact, the premise that the Commandments "have made a substantial contribution to our secular codes" and "in the development of our legal system."

While an in-depth study of the historical origins of American law is beyond the scope of this article, judges and students of the law need to be aware of the fact that there is scholarly research which refutes the claim that the Ten Commandments and the Bible provided the foundation of our legal system. Certainly the first European settlers were religious people, as most modern day Americans profess to be, but early Colonial experiments at using the Commandments as the law of society were abandoned. By the time of the birth of our nation, our political leaders

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222 KY. REV. STAT. ANN. § 158.178 (Michie 2002).
224 Id.
225 Id.
226 Adland, 307 F.3d at 481.
228 See Green, supra note 138. See also Robert S. Alley, Public Education and the Public Good, 4 Wm. & Mary Bill Rts. J. 277 (1995).
229 See Green, supra note 138, at 536-43.
were aware of the need to delineate the boundary of authority between civil
government and the various churches. Although some may argue the meaning
and importance of Jefferson’s “wall of separation” metaphor, no serious student of
history can maintain that the Declaration of Independence, the Constitution and the
Bill of Rights were inspired by, much less based upon, the Bible or the Ten
Commandments. It is one thing to acknowledge the religious, or even the
Christian, heritage of the founders of our country, but it is an entirely different and
inaccurate proposition to contend that our laws are traceable to one specific
religious document.

Of course, the historical accuracy of the claim that the Bible and the
Commandments have had a significant influence on the development of our secular
codes is not the critical issue in determining whether the Ten Commandments can
be part of a display on public property or in public classrooms. Courts must still
find that the government is acting with a secular purpose and that the effect of its
action is not to convey a message of the official endorsement of religion.

Nevertheless, avowed purposes which are unsubstantiated by historical facts, or
which are demonstrably motivated by religious considerations, are more likely to
be declared a “sham.” For example, in McCreary, the Court, in finding a secular
purpose for posting the Commandments, noted that the defendants conceded that
the display purported “to demonstrate America’s Christian heritage.” Likewise,
in Adland, the Court stated that it could not “ignore the Commonwealth’s adoption
of a view that emphasizes a single religious influence to the exclusion of all other
religious and secular influences.”

In light of the aforementioned recent decisions, particularly from the Sixth
Circuit in Adland and from the Seventh Circuit in Books and in O’Bannon, state or
local governments desiring to erect a display which would include a depiction of
the Ten Commandments should adopt a facially secular statement of purpose that
expresses a candid and justifiable reason for giving public recognition to this
“undeniably...sacred text.” In this regard, the courts should require the
government to come forward with proof that the avowed purpose is not a “sham.”
Such a purpose that would likely survive scrutiny by the courts would be to
acknowledge the role the Commandments have played in the secular development
of our society and civic order. The Ten Commandments would then have to be
exhibited in a context that would not convey the message to a reasonable observer
that the government was endorsing religion in general, or emphasizing the
influence of one religion to the exclusion of all other influences. To this end the
Commandments should be part of an historical display that includes the various
religious and secular sources that have contributed to our society and legal system.

The depiction of the “great lawgivers” on the walls of the U.S. Supreme Court is
one example which has been repeatedly mentioned in court decisions.

\[230\] Id. at 543-48.
\[231\] See Lemon v. Kurtzman, 403 U.S. 602 (1971); Lynch v. Donnelly, 465 U.S. 668 (1984); County
\[233\] Adland v. Russ, 307 F.3d 471, 482 (6th Cir. 2002).
V. CONCLUSION

Although they have been, for the most part, unsuccessful in the courts, proponents of displaying the Ten Commandments have not abandoned their quest. In the 2003 Regular Session of the Kentucky General Assembly a Resolution was introduced in the Senate urging the Kentucky Congressional delegation to enact legislation authorizing the Ten Commandments to be posted in public schools and authorizing prayer in public schools. No action was taken on that Resolution, but its contents are noteworthy as revealing the belief of at least some legislators that the Bible and the Ten Commandments should be integrated into public education. In the same session, both the Senate and the House adopted identical Resolutions, which were signed by Governor Patton, petitioning Congress to propose an Amendment to the U.S. Constitution allowing the free exercise of religion in public places. That Resolution declared that "the General Assembly finds the Ten Commandments to be the precedent legal code of the Commonwealth which has provided the foundation for many of the civil and criminal statutes enacted into law throughout the history of the Commonwealth," and proposed that the Constitution be amended specifically to allow "the reading or the posting of the Ten Commandments...in any public place, including a school...."234

Given the difficulty in passing a constitutional amendment, it is unlikely that the public display of the Commandments will become lawful by that process.

The advocates for posting the Ten Commandments have a somewhat better chance of success if they are able to be heard before the U.S. Supreme Court. In May 2001, the U.S. Supreme Court denied a petition for a writ of certiorari of the decision of the Seventh Circuit Court of Appeals in the Books case.235 In an unusual move, Chief Justice Rehnquist wrote an opinion, in which Justice Scalia and Justice Thomas joined, dissenting from the denial of certiorari.236 Justice Rehnquist opined that the decision in Stone was not controlling as to whether the defendant in Books237 had a secular purpose for erecting the monument containing the Commandments.238 He noted that Stone can be distinguished since that case involved posting of the document in public classrooms.239 He observed that, since it has been "particularly vigilant in monitoring compliance with the Establishment Clause in that context," the Court in Stone may have been reluctant to find a secular purpose for the display in that case.240 In Books, however, there was no concern with regard to the coercive power of the state over school children, as the monument was placed on the grounds of the municipal building.

Justice Rehnquist once again reiterated his understanding of the historical importance of the Ten Commandments relative to our laws, claiming as an undeniable fact that the Commandments "have made a substantial contribution to

234 Id.
236 Id. at 1059.
237 Id. at 1061.
238 Id.
239 Id.
240 Id.
our secular legal codes. 241 Believing that the monument in Books simply "reflects the Ten Commandments' role in the development of our legal system," rather than the city's preference for particular religions or religious in general, Justice Rehnquist would find the display to have a secular purpose and not to have the effect of conveying the message of endorsement of religion. 242

Similarly, on April 28, 2003, the U.S. Supreme Court denied a petition for a writ of certiorari of the decision of the Sixth Circuit Court of Appeals in the Adland case. 243 This opinion did not contain a decision but only a memorandum.

Since the concurrence of at least four Justices is necessary to grant a writ of certiorari, 244 it would appear that a change in the composition of the Supreme Court will have to occur before that body will again review the constitutionality of the public display of the Ten Commandments. Until then, the law remains written in Stone.

241 Books, 532 U.S. at 1061.
242 Id.
“CAN YOU SPARE A SQUARE?” DEFENDING FREE SPEECH ON CINCINNATI’S FOUNTAIN SQUARE

by Jarrod M. Mohler*

I. INTRODUCTION

The city of Cincinnati has often been called “Censornati” because of the numerous First Amendment controversies that have erupted there.1 On top of local law enforcement’s crusade against obscenity, the city often passes new laws that have the effect of restricting citizens’ freedom of speech. Luckily, as demonstrated below, the city has not been very successful in keeping these laws on the books.

Local law enforcement’s dogged pursuit of adult establishments and the city’s attempted enforcement of overbroad and untenable restrictions on free speech have made for some memorable, if somewhat embarrassing, legal battles.2 This article will focus on one front in this battle -- Cincinnati’s Fountain Square. Since 1990, Fountain Square has been the subject of three separate lawsuits involving a private group’s right to express themselves there, and a fourth suit is working its way through the federal system. Fountain Square has been repeatedly recognized as a traditional public forum for free speech by the courts.3 The question remains, then, why does the city keep trying to enact and enforce ordinances which unduly restrict the expression of protected speech on Fountain Square?4

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1 See Joel Stein, Larry Flynt, The Sequel, TIME MAGAZINE, April 20, 1998 64 (“The Ohio city, where Flynt was arrested on obscenity charges in 1977, is called Censornati by free-speech crusaders, and is one of the few smut-free zones in the country.”).


3 See Congregation Lubavitch v. Cincinnati, 997 F.2d 1160, 1161 (6th Cir. 1993) (hereinafter referred to as Lubavitch II) (citing Congregation Lubavitch v. Cincinnati, 923 F.2d 458, 461 (6th Cir. 1991) (hereinafter referred to as Lubavitch I)).

4 As one City Councilperson stated during a debate over one of the many attempts to keep unpopular groups off of Fountain Square, the city seems to be “cutting off [its] nose to spite [its] face.” See Lubavitch II, 997 F.2d at 1164.
II. A BRIEF HISTORY OF FOUNTAIN SQUARE

Fountain Square, a large open plaza surrounded by commercial buildings in the heart of downtown Cincinnati, is the city’s chief public place.\(^5\) Fountain Square is the city’s “hub, its heart, its symbol, the knot that ties the city together.”\(^6\) The site was first opened as the Fifth Street butcher’s market in 1827.\(^7\) The city appropriated the land on February 4, 1870 and, in an early display of the city’s intolerance for opposing views on the Square, tore down the existing market in 43 minutes that same day when the occupying tradesman refused to move.\(^8\)

The Tyler Davidson Fountain gives the Square its name and is perhaps the most recognized symbol of the city.\(^9\) The Fountain was commissioned by Henry Probasco, a prominent 19th century businessman, who sought to recognize his late brother-in-law and business partner Tyler Davidson with a public memorial.\(^10\) While traveling in Germany, Probasco was shown a design by the sculptor August von Kreling which depicted the tangible benefits of water.\(^11\) Probasco found the design appealing and, in May 1867, offered the Fountain to the city of Cincinnati as long as the city would maintain it.\(^12\) The city agreed, and in 1870 Ferdinand von Miller, a sculptor from von Kreling’s foundry, and his son cast the fountain in bronze from von Kreling’s design.\(^13\) The younger von Miller traveled to Cincinnati to supervise the Fountain’s installation, which proved a formidable task.\(^14\)

On October 6, 1871, Probasco officially presented the Tyler Davidson Fountain to the city.\(^15\) The Fountain is topped by the Genius of Water; from her outstretched hands cascade steady streams of water.\(^16\) The Genius of Water is surrounded by four groups depicting the benefits of water: a man seeking rain to save his burning house; a young woman offering water to an aging man; a farmer leading a plow; and a mother bathing her child.\(^17\) The Fountain shoots and gurgles water in many directions, and originally dispensed ice-cooled drinking water at its base for the benefit of all Cincinnatians.\(^18\)

The Tyler Davidson Fountain at once became the focal point of the city. For nearly one hundred years, the Fountain stood on the original Fountain Square, a rectangular plaza running down the middle of Fifth Street between Vine and

\(^{5}\) Id.
\(^{7}\) Id. at 17.
\(^{8}\) Id. See also WPA, Guide to Cincinnati, CINCINNATI: A GUIDE TO THE QUEEN CITY AND ITS NEIGHBORS 179 (1943).
\(^{9}\) Id.
\(^{10}\) See CLUBBE, supra note 6, at 12.
\(^{11}\) Id. at 11-13.
\(^{12}\) Id. at 13.
\(^{13}\) Id.
\(^{14}\) Id.
\(^{15}\) Id.
\(^{16}\) See CLUBBE, supra note 6, at 11.
\(^{17}\) Id. at 13.
\(^{18}\) Id.
Walnut Streets.\textsuperscript{19} Fountain Square was, and is, the place where the city comes to express themselves, be it through sorrow or joy. One description of the celebration during the end of the First World War demonstrates the Square’s historical prominence: “Fountain Square became a seething mass of milling humanity . . . . In the middle of the esplanade on Fountain Square, a coffin containing an effigy of the Kaiser (bespewed with decayed fruits and vegetables) was soaked with oil and transformed into a flaming funeral pyre.”\textsuperscript{20}

With the proliferation of cars downtown, the placement of Fountain Square between the two lanes of heavily-traveled Fifth Street made it more difficult to access the Square and the Fountain.\textsuperscript{21} In the late 1960s, Fountain Square was expanded to cover much of a city block between Fifth and Sixth Street, and the Fountain was moved several yards to the North.\textsuperscript{22} The current configuration of the Square is an open half-block plaza surrounded by large buildings, landscaped with trees and shrubs, and containing benches and tables and a platform stage area.\textsuperscript{23} The Square hosts a continuous array of planned and spontaneous events on an almost daily basis, including concerts, Cincinnati’s famous Oktoberfest celebration, and even speeches by presidential candidates.\textsuperscript{24} Commentators have called it “the most successful public square in America” and “the finest square in the country.”\textsuperscript{25}

Yet, and perhaps because of its prominence, Fountain Square is jealously guarded by the city, and coveted by the citizens of Cincinnati seeking to express themselves publicly. This tension has resulted in numerous and memorable court battles.

III. FOUNTAIN SQUARE LITIGATION

A. Congregation Lubavitch v. Cincinnati (Lubavitch I)

Beginning in 1987, Congregation Lubavitch, a Jewish religious group, began requesting permits from the city of Cincinnati to enable it to erect a menorah on Fountain Square during the eight days of Chanukah, the Jewish holiday.\textsuperscript{26} When it was denied a permit for the 1987 holiday, Lubavitch sought a preliminary injunction against the city, but the injunction was not granted.\textsuperscript{27} In 1988, another Lubavitch application to erect a menorah was formally denied by City Council, and in 1989, a third was informally denied.\textsuperscript{28} However, on November 7, 1990, Cincinnati City Council approved its own holiday display on Fountain Square.

\begin{itemize}
  \item \textsuperscript{19} Id. at 14.
  \item \textsuperscript{20} WPA, supra note 8, at 96.
  \item \textsuperscript{21} See CLUBBE, supra note 6, at 14.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id. See also Chabad of Southern Ohio & Congregation Lubavitch v. Cincinnati, 233 F. Supp. 2d 975 (S.D. Ohio 2002).
  \item \textsuperscript{24} See Bishop v. Reagan-Bush '84 Comm., 819 F.2d 289 (6th Cir. 1987).
  \item \textsuperscript{25} See CLUBBE, supra note 6, at 15.
  \item \textsuperscript{26} See Lubavitch I, 923 F.2d at 459.
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} Id.
\end{itemize}
called "‘Tis the Season" which included evergreen trees and other holiday decorations. The city contended that the display was entirely secular and that it would not permit religious symbols on the Square.

Instead of requesting a permit again for the 1990 season, Lubavitch filed a motion before the district court for a preliminary injunction that would require the city to allow it to place a menorah on Fountain Square during Chanukah. The district court granted Lubavitch’s motion on December 11, 1990. The city immediately sought a stay of the district court’s order with the Sixth Circuit Court of Appeals.

The court of appeals first noted that it evaluates motions to stay using four factors: “1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured without a stay; 3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and 4) where the public interest lies.” The court found that, regarding the second and third factors, “either party will suffer irreparable injury if we rule against it,” and, regarding the fourth factor, that the public interest merely lies “in a correct application of the relation between the first amendment’s guarantee of free speech and its bar to any law respecting the establishment of a religion.” Thus, the court focused its analysis on the first factor, the likelihood of success on the merits.

The court noted that the city chose to ban all religious symbols from Fountain Square. However, “[d]iscrimination against religious speech as such is content-based, and unconstitutional unless the City meets the standards appropriate to such a restriction.” Cincinnati could impose reasonable time, place, and manner restrictions on persons wishing to express themselves on the Square, but it cannot discriminate against religious speech alone. Crucially, the court found that Fountain Square, because of its historical prominence, “is undoubtedly a public ‘forum’” and likely a “traditional” public forum, and therefore any regulation of communicative activity must be content-neutral. “Regulations that exclude religious speech per se violate this principle and cannot be justified under applicable constitutional standards.” Thus, the court found that Lubavitch would likely succeed on the merits of its claims.

The court also addressed the city’s concerns regarding the endorsement of religion, finding that the placement of a menorah on Fountain Square does not carry with it the imprint of government endorsement like it would on the steps of

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29 Id.
30 Id.
31 Id.
32 See Lubavitch I, 923 F.2d at 459.
33 Id.
34 Id. at 460 (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).
35 Id.
36 Id.
37 Id.
38 See Lubavitch I, 923 F.2d at 460 (citing Widmar v. Vincent, 454 U.S. 263, 269-70 (1981)).
39 Id. (citing Widmar, 454 U.S. at 276).
40 Id. at 461 (citing Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)).
41 Id. at 462 (citing Widmar, 454 U.S. at 277).
City Hall, for example. In addition, the city was unable to persuade the court that problems could result from the maintenance of objects on the Square, noting that various large objects are erected on the Square from time to time.

In conclusion, the court of appeals found that the city had not met the required showing for granting a stay. However, the court noted that its decision was without prejudice to any ruling it could make after full briefing on the merits of the issue. The court never got the chance to make such ruling because, later that year it dismissed as moot the city’s appeal because the terms of the preliminary injunction had expired. Of course, this contentious issue was bound to arise again.

B. *Congregation Lubavitch v. Cincinnati (Lubavitch II)*

An apparent settlement agreement was reached between the parties that permitted Lubavitch to erect its menorah on Fountain Square during Chanukah in 1991, and the district court entered a conditional Order of Dismissal. However, in April 1992, the Cincinnati City Council passed an ordinance banning the use of Fountain Square by private groups during the hours of 10:00 p.m. and 6:00 a.m. City, county, state, and federal governments were expressly exempted from obeying the time restrictions contained in the ordinance. Shortly after the ordinance was passed, Lubavitch moved to reopen the case asserting that the ordinance was inconsistent with the settlement agreement. Lubavitch later sought permission to erect its menorah on Fountain Square during Chanukah that year, but their application was denied based on the strictures contained in the new ordinance.

The new ordinance was based to some extent on the entrance of a controversial new player, an organization known as the U.S. Knights of the Ku Klux Klan (KKK). In 1990 and 1991 the KKK requested a permit to erect a cross on Fountain Square “in the proximity of the Menorah for 10 days.” The city denied the KKK’s permit application in 1991 when representatives of the group stated that it would not honor the time constraints eventually adopted in the 1992 ordinance.

The district court first noted that Lubavitch’s menorah was 18 feet tall and required three hours and a crane to assemble it, and the same amount of time and

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42 Id. (citing Kaplan v. City of Burlington, 891 F.2d 1024 (2d Cir. 1989)).
43 Id.
44 See Lubavitch I, 923 F.2d at 463.
45 Id.
46 See Lubavitch, 941 F.2d 1209 (6th Cir. 1991) (per curiam).
48 Id.
49 Id. at 1354-55.
50 Id. at 1355.
51 Id.
52 Id. at 1355-56.
53 See Lubavitch, 807 F. Supp. at 1356.
54 Id.
machinery to disassemble it.\textsuperscript{55} Thus, it would be cost and time prohibitive to remove the menorah every night and erect it again every morning of Chanukah.\textsuperscript{56} The court found that while, at first blush, the ordinance appeared content-neutral, "in fact the ordinance is neutral in neither its application nor its intent,"\textsuperscript{57} stating that:

Hanukkah is an eight-day holiday. Requiring Plaintiffs to remove their Menorah for an eight hour period each night for eight nights, during which time three hours would be required to dismantle and three hours more to erect the display, can be construed only as a limitation on their exercise of free speech. In reality, the Menorah would be on Fountain Square for 22 hours of each day, with over 25 percent of that time devoted to the daily removal/reinstallation process. This practice would be expensive, time-consuming and pointless. Indeed, it is difficult to imagine a more chilling effect upon the exercise of these Plaintiffs’ First Amendment rights. By making the exercise of Plaintiffs’ rights highly impractical if not impossible, the ordinance would inhibit through practical considerations what it cannot permissibly ban outright.\textsuperscript{58}

In addition, the district court noted that the evidence indicated that the ordinance’s “effect on free speech rights was not accidental” because the city was careful to carve out exceptions to the ordinance for governmental bodies, which undercut any arguments the city offered regarding safety concerns on Fountain Square.\textsuperscript{59} "This Court therefore can only conclude that the restriction on private displays was motivated by the City’s articulated concern about Fountain Square’s use by controversial organizations such as the Ku Klux Klan."\textsuperscript{60} The court articulated its concern about a government deciding who may and may not express themselves on Fountain Square in a particularly excellent passage:

It should be observed that the first ten amendments to the United States Constitution are not known as the “Bill of Privileges.” They are not matters of grace and favor to be awarded or withheld on the whims of government. Rather, the document is known as the “Bill of Rights.” It enumerates basic underlying rights possessed by all citizens, that are superior to and apart from any level of government. These inherent rights may not be removed by any form of government. The introductory language of the First Amendment is instructive. The first five words state: “Congress shall make no law...” Can there be a clearer

\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 1356.
\textsuperscript{58} Id. (citation omitted).
\textsuperscript{59} Lubavitch, 807 F. Supp. at 1356.
\textsuperscript{60} Id. at 1357.
statement that these rights do exist, preexisted the Constitution of the United States, and may not be taken away.\textsuperscript{61}

The district court also took issue at an assertion by the city that it "owned" Fountain Square:

During the hearing, Defendant City of Cincinnati intimated that it "owns" Fountain Square. Nothing could be further from the truth. Fountain Square is not owned by the City Council of the City of Cincinnati nor by its administrative departments, nor indeed by "The City of Cincinnati" itself. Ownership of that public square always has rested in the citizens of Cincinnati, and subject to their right of use. Whether it is the Congregation Lubavitch that seeks to exercise symbolic free speech by the display of a Menorah or it is the Ku Klux Klan who wishes to spread its divisive message, the principle remains the same.\textsuperscript{62}

Thus, the district court concluded that the city's ordinance was clearly content-based and therefore could not survive constitutional scrutiny.\textsuperscript{63} The court issued a permanent injunction against the city enjoining them from enforcing the portion of the ordinance that distinguished between public and private displays between the hours of 10:00 p.m. and 6:00 a.m.\textsuperscript{64}

The Sixth Circuit Court of Appeals affirmed the district court's granting of the permanent injunction, though on Equal Protection grounds.\textsuperscript{65} Agreeing with the district court's determination that the ordinance was content based, the court found that a content-based restriction violates the Equal Protection Clause unless "finely tailored to governmental interests that are substantial."\textsuperscript{66} The city offered five interests to justify the ordinance: "avoiding the appearance of government endorsement of religion, controlling vandalism, containing costs, promoting aesthetics, and ensuring mobility of structures."\textsuperscript{67} The court succinctly stated that "[t]he city has failed completely to show how these interests are served by an ordinance that requires private groups to remove all structures at 10 p.m. and not re-erect them until 6 a.m. while permitting government and quasi-government sponsored structures to remain in place on Fountain Square for 24 hours each day."\textsuperscript{68}

\textsuperscript{61} Id. (emphasis in original).
\textsuperscript{62} Id. at 1358.
\textsuperscript{63} Id. at 1358.
\textsuperscript{64} Id.
\textsuperscript{65} See Lubavitch II, 997 F.2d 1160, 1165 (6th Cir. 1993) ("On several occasions when local or state laws have been attacked on both free speech and equal protection grounds the Supreme Court has based its decision on the Equal Protection Clause. See Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Carey v. Brown, 447 U.S. 455, 463 (1980). The present case involves the First Amendment—Equal Protection intersection," Mosley, 408 U.S. at 95 n.3, and we examine Lubavitch's equal protection arguments first.").
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
The court of appeals concluded that the city, through the ordinance, was simply attempting to "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." Having found that the ordinance violated the Equal Protection Clause, the court affirmed the district court without reaching Lubavitch's First Amendment arguments.

Having been defeated, on separate grounds twice in the court of appeals, one could have assumed that the city would not continue to try to restrict the expression of speech on Fountain Square. Yet, only five months after the Sixth Circuit's decision in Lubavitch II, the city was back in federal court defending another ordinance placing restrictions on the expression of speech on the Square.

C. Knight Riders of the Ku Klux Klan v. Cincinnati

In 1993, Cincinnati City Council temporarily abandoned its fight against Lubavitch and focused on keeping the Ku Klux Klan off of Fountain Square. City Council passed a new ordinance governing Fountain Square which stated in part that "[n]o person may communicate on Fountain Square any obscenity, defamation or 'fighting words,' including but not limited to a symbol, object, appellation, characterization, oral communication or graffiti, which injures a person or group of persons or is likely to cause an immediate act of violence by the listener or observer...."

The KKK filed an application with the city for a permit to erect a Christian Cross bearing the language "John 3:16" during Chanukah 1993. The city director of public works denied the KKK's application, and the city manager subsequently affirmed that decision on administrative appeal. The KKK then sought a preliminary injunction from the district court.

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69 Id. at 1167-68 (quoting Mosley, 408 U.S. at 96).
70 Id. at 1168.
71 See Knight Riders of the Ku Klux Klan v. Cincinnati, 847 F. Supp. 85, 86 (S.D. Ohio 1993) The court stated that:

Ordinance 345-1993 [prohibiting "fighting words" on the Square] is only the latest in a series of efforts by the City of Cincinnati to limit the use of Fountain Square in accordance with the opinions of City Council. Those efforts have been uniformly unsuccessful and expensive to the citizens, who must pay not only for the time and efforts expended by the Solicitor's Office of the City of Cincinnati, but also for the attorney fees awarded to those who have successfully resisted the City's efforts to restrict access to Fountain Square.

72 Id.
73 Id. at 86.
74 Id. "John 3:16" refers to a passage in the New Testament that reads "[F]or God so loved the world that he gave his only Son so that anyone who believes in Him shall not perish, but have everlasting life." John 3:16.
75 See Knight Riders, 847 F. Supp. at 86.
76 Id. at 85.
At this stage, the district court did not address the constitutionality of the ordinance but only whether application of the “fighting words” portion of the ordinance would allow the city to deny the KKK’s application for a permit for display on Fountain Square.\textsuperscript{77} The court noted that the “fighting words” exception to the First Amendment “is a very narrow one, and must be applied with great care.”\textsuperscript{78} The court declined to place the cross and the language depicted thereon within the fighting words exception: “Confronted with a silent cross bearing only a reference to a Bible verse that is not provocative, the Court must conclude that such symbol does not constitute fighting words, nor, in the words of Chaplinsky \textit{v. New Hampshire},\textsuperscript{79} is any reasonable onlooker likely to regard that cross as a direct personal insult or an invitation to exchange fisticuffs.”\textsuperscript{80} The court noted that “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”\textsuperscript{81} Therefore, the court issued a preliminary injunction requiring the city to issue a permit to the KKK for the erection of its cross on Fountain Square.\textsuperscript{82}

The district court, in a later decision, addressed the issues on the merits after the parties filed cross-motions for summary judgment.\textsuperscript{83} The KKK sought a permanent injunction enjoining enforcement of the ordinance against them and requiring the city to issue them permits on the same basis as other users of Fountain Square, and asked the court to invalidate the ordinance on its face and as applied.\textsuperscript{84} The city meanwhile sought summary judgment based on its argument that the KKK cross was sufficiently injurious and insightful to constitutionally allow the city to prohibit its placement on Fountain Square.\textsuperscript{85}

The district court began by reiterating its prior holding that the display of a cross bearing only the words “John 3:16” is protected under the First Amendment and not fighting words.\textsuperscript{86} Although 24 people were arrested trying to take down the KKK’s cross during its display in 1992, the reaction of these individuals had no bearing on the protected or unprotected nature of the display itself.\textsuperscript{87} The court stated:

\begin{quote}
It is apparently the City’s position that lawless acts require punishment not of the actors, but of the nonviolent victims. This is a proposition of law with which this Court is not familiar. The ultimate invalidity of the Defendant’s position may be demonstrated by postulating a situation where applications to place identical unidentified crosses on Fountain Square are made
\end{quote}
by the Klan and by a respected religious organization. It is apparently the position of the City of Cincinnati that it may issue a permit to one applicant and withhold a permit from the other. This position clearly contravenes well-established principles of First Amendment law.\(88\)

Next, regarding the KKK's challenge of the ordinance on its face because it constituted an unlawful prior restraint, the district court found that the ordinance conditioned approval of a permit based on affirmative action by the city, and the granting or denial of a permit is based solely on the content of the expression.\(89\) These traits are classic hallmarks of a prior restraint, so the city was required to overcome the presumption against validity of a prior restraint by demonstrating that the ordinance contains "narrow, objective and definite standards to guide the licensing authority . . ."\(90\) Moreover, the city was required to demonstrate that the ordinance contained the following procedural safeguards:

1. The burden of instituting judicial proceedings and of proving that the expression is unprotected must rest on the government;
2. A restraint prior to judicial review can be imposed only for a specified brief period of time and for the purpose of preserving the status quo; and
3. The system must contain an assurance of a prompt final judicial determination.\(91\)

The district court found that the city could not overcome the presumption against the constitutionality of a prior restraint system, and therefore the ordinance was void on its face.\(92\) Accordingly, the court issued a permanent injunction preventing the city from denying the KKK, and all other persons similarly situated, a permit to erect a cross on Fountain Square.\(93\)

The Sixth Circuit Court of Appeals again affirmed the district court's determination of a Fountain Square issue.\(94\) "Plaintiffs' cross does not fit within the Supreme Court's narrow definition of fighting words and thus may not be regulated as such by the city."\(95\) However, the court noted that City Council had subsequently amended the City Code to require prompt judicial review of an intended denial of a permit on the grounds that the communication was defamatory, obscene, or "fighting words."\(96\) Thus, the court of appeals vacated the portion of the district court's decision addressing the facial validity of the ordinance as moot.\(97\)

\(88\) Id.  
\(89\) See Knight Riders, 863 F. Supp. at 591.  
\(90\) Id. (quoting Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969)).  
\(91\) Id. (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1974)).  
\(92\) Id.  
\(93\) Id. at 592.  
\(94\) See Knight Riders of the Ku Klux Klan v. Cincinnati, 72 F.3d 43 (6th Cir. 1995).  
\(95\) Id. at 46.  
\(96\) Id. at 45 n.2.  
\(97\) Id. at 47.
During the last half of the 1990s, it was mostly quiet on Fountain Square. Lubavitch’s menorah and the KKK’s cross became traditional symbols of the holiday season for Cincinnatians, and for the most part the city quit tinkering with Fountain Square. However, the relative quiet was replaced by another round of legal battles when the 2002 holiday season approached.

D. Chabad of Southern Ohio & Congregation Lubavitch v. Cincinnati

In November 2001, Rabbi Sholom B. Kalmanson, the spiritual leader of Congregation Lubavitch and a plaintiff in Lubavitch’s Fountain Square litigation, applied for a permit to erect a Chanukah menorah on Cincinnati’s Fountain Square during the 2002 Chanukah celebration, while he simultaneously filed an application for the 2001 season. Motivating Rabbi Kalmanson’s early application was the city’s Director of Public Services’ representation that the city was granting permits on a “first come, first served” basis in an effort to curb the KKK’s ability to erect a cross on Fountain Square. The Director gave Rabbi Kalmanson verbal assurance that the 2002 permit application would be granted.

Chabad/Lubavitch erected a menorah on Fountain Square during the 2001 Chanukah celebration, the eleventh consecutive year that it had done so. However, Rabbi Kalmanson learned in June 2002 that his application for a permit to erect the menorah during the 2002 Chanukah celebration was denied based on the enactment of Ordinance No. 0122-2002, which became effective on May 16, 2002.

Ordinance No. 0122-2002 amended Cincinnati Municipal Code (CMC) sections 713-1 through 713-9 and 713-99. Newly amended CMC § 713-1 states that the City “shall exercise its right to exclusive use” of Fountain Square “during the last two weeks of November, the month of December, and the first week of January.” The Ordinance continues as follows:

The City has an inherent right to control its property, which includes a right to close a previously open forum. During times of exclusive use by the City of Cincinnati, the City will bear the ultimate responsibility for the content of the display or event. No other party, other than the City of Cincinnati, may make decisions with regard to any aspect of the event and/or display. No private participation with regard to any aspect of the event and/or display will be permitted at this time. However, the City may accept donations or funds from other entities for the event and/or display which is the subject of exclusive use. As a result

99 Id.
100 Id.
101 Id. at 979.
102 Id. at 978.
103 Id.
of the sole responsibility, ownership, management and control by the City of Cincinnati during times of exclusive use, it is recognized that the City is engaging in government speech.\footnote{104}

Following the denial of Chabad/Lubavitch’s permit application, Rabbi Kalmanson attempted to negotiate this matter with the city over many months but was rebuffed.\footnote{105} Having exhausted any possibility of resolving this dispute without litigation, Chabad/Lubavitch filed a verified complaint against the city and moved for injunctive relief the next day.\footnote{106} However, a week after Chabad/Lubavitch filed suit and several weeks after a number of permit applications had been submitted and rejected, the Cincinnati City Manager issued an internal memorandum regarding the holiday permit ban to the Director of Public Services and the Police Chief.\footnote{107} The memorandum, which was not publicly disseminated, stated that the holiday ban “merely imposes a restriction prohibiting the types of private displays or events that would normally be allowed on the Square following the issuance of a permit,” and is intended to permit “[a]ll other types of expression (i.e. carrying political signs, handing out leaflets).”\footnote{108}

The district court first noted that it would confine its analysis to Chabad/Lubavitch’s claim under the speech clause of the First Amendment.\footnote{109} The court began by recognizing the protected nature of Chabad/Lubavitch’s speech under the First Amendment, dismissing the city’s argument that there is no right to leave “private unattended structure[s]” on public property.\footnote{106} The court quoted a prior Fountain Square case that stated “[a]t this late date it cannot be argued that the display of such an object as a menorah or a cross is not ‘symbolic speech’ that is protected by the free speech provisions of the First Amendment.”\footnote{110} While that fact did not guarantee Chabad/Lubavitch access to

\footnote{106}Id. at 980.
\footnote{107}Id. (emphasis added).
\footnote{108}Id. at 981. The court stated that,

Plaintiffs make a total of four legal challenges to the City’s permit scheme regulating the use of Fountain Square during the holiday season. First, Plaintiffs argue that the City’s regulatory scheme is unconstitutional on its face because it bans speech protected by the First Amendment. Second, Plaintiffs contend that the City’s regulatory scheme violates the Free Exercise Clause of the First Amendment. Third, Plaintiffs assert that the City’s actions in prohibiting all holiday displays except its own violates the Establishment Clause of the First Amendment. Finally, the Chabad Plaintiffs argue that the City has retroactively applied its new regulatory scheme to the Chabad Plaintiffs’ permit request in violation of the Due Process Clause of the Fourteenth Amendment.

\footnote{109}Id.
\footnote{110}Lubavitch, 233 F. Supp. 2d at 981.
\footnote{111}Id. (quoting \textit{Lubavitch II}, 997 F.2d at 1164 (citing Texas v. Johnson, 491 U.S. 397, 404 (1989))).
all public forums at all times, the city had the burden of proving that the ordinance was a constitutionally acceptable restriction on Chabad/Lubavitch’s speech rights.\textsuperscript{112}

The district court noted that:

\[\text{[i]n a traditional public forum, a content-based regulation on private speech must be supported by a showing that the regulation ‘is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’}\textsuperscript{113}\] Furthermore, the government may enforce ‘regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.’\textsuperscript{114}

The court found that the ordinance, while content-neutral on its face, was \textit{de facto} content-based:

The Court heard evidence that a city official told Rabbi Kalmanson that the city would be issuing permits for the 2002 holiday season on a first come, first served basis in order to keep the Ku Klux Klan from erecting a cross on Fountain Square. Of course, a remark presumably made in the context of a prior regulation has limited value in determining the City’s intentions in enacting the instant regulation. However, Ordinance No. 0122-2002, which enacted the instant regulations, makes the City’s intentions explicit. The City granted itself ‘exclusive control’ over Fountain Square to ensure that any speech in that forum appeals to ‘the widest of audiences.’ By excluding from the public discourse on Fountain Square speech which would not appeal to ‘the widest of audiences,’ the City wishes to eliminate speech which might be controversial or offensive to those visiting downtown Cincinnati. Distinctions between speech that is ‘controversial’ and speech that is ‘acceptable,’ or between that which appeals to ‘the widest of audiences’ and that which appeals to only a few individuals, are distinctions based, at the very least, on content.\textsuperscript{115}

Finding the ordinance to constitute a content-based restriction on speech, the district court next addressed whether the scheme was narrowly tailored to

\begin{itemize}
  \item \textsuperscript{112} \textit{id.} at 983.
  \item \textsuperscript{113} \textit{id.} (quoting \textit{Perry}, 460 U.S. at 45).
  \item \textsuperscript{114} \textit{id.} (quoting \textit{Perry}, 460 U.S. at 45).
  \item \textsuperscript{115} \textit{id.} at 984 (citing United Food & Commercial Workers Union, Local 1099 \textit{v. Southwest Ohio Reg’l Transit Auth.}, 163 F.3d 341, 363 (6th Cir. 1998) (finding that the defendant violated the First Amendment by forbidding the placement of an advertisement on the side of a bus on the ground that the advertisement was too controversial and not aesthetically pleasing); \textit{Hopper v. City of Pasco}, 241 F.3d 1067, 1081 (9th Cir. 2001) (applying strict scrutiny to city policy of not allowing the display of controversial works of art in city hall), \textit{cert. denied}, 534 U.S. 951 (2001)).
\end{itemize}
achieve a compelling government interest. The ordinance set forth six supposed “significant governmental interests” that the city’s scheme was purportedly intended to advance:

(1) to better coordinate competing uses of Fountain Square;
(2) to ensure equal access to Fountain Square;
(3) to promote and develop tourism and recreation;
(4) to encourage, promote, stimulate, and assist in the development of the Cincinnati business economy;
(5) to maintain, develop, and increase employment opportunities for those who live, work, and may consider moving to Cincinnati and the Cincinnati region; and
(6) to pursue efforts to promote the expansion of the population residing within Cincinnati and to specifically encourage, stimulate, and develop an expanding downtown resident population.

The court flatly stated that “[t]hese six interests do not justify the seven-week ban on the issuance of permits.” The court went on to say “While many of these interests may be ‘significant,’ it is not clear that any of them rise to the level of compelling interests which can override Plaintiffs’ free speech rights.” Even if the interests cited by the city were compelling, “the seven-week ban is not narrowly tailored to achieve them.”

The district court went further, however, analyzing the permit scheme, in the alternative, as a content-neutral time, place, and manner restriction on speech, which must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication. The court found that the scheme did not meet the content neutral test either:

The City’s regulations fail on both counts. As a time, place, and manner restriction, the scheme must be narrowly tailored to serve the same interests asserted by the City and set forth above, be they compelling or significant. For the reasons previously stated, they are not.

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117 Id.
118 Id. at 985.
119 Id.
120 Id. The court stated that,

Of specific concern to the Court is the fact that the City has not shown why the last two weeks of November, the month of December, and the first week of January are sufficiently different from the other forty-five weeks of the year to justify a flat ban on all non-governmental use of Fountain Square for which one would normally require a permit.

121 Id. at 986.
Even if they were, the provision would still be unconstitutional. In order for a government regulation of speech in a traditional public forum to pass constitutional muster, it must also 'leave open ample alternative channels of communication.' Given the unique role of Fountain Square in the City of Cincinnati, the City's regulation does not do so. [Testimony at the preliminary injunction hearing reflected] the preeminent importance of Fountain Square to those who wish to speak to the largest audience possible. [One Plaintiff] believes that no other place in Cincinnati provides the opportunity to reach as many people as does Fountain Square. If limited to displaying a menorah in only one public place in Cincinnati, Rabbi Kalmanson would choose Fountain Square. He is not alone. When presidential candidates come to town, they hold their rallies in Fountain Square. Those who wish to engage in political protest...do so on Fountain Square.122

The district court found that the importance of Fountain Square increased during the holiday season, the time during which the city sought to close the forum to private speakers.123 "This is, of course, what makes the city's seven-week flat ban on private speech all the more offensive. The City has attempted to monopolize the most important forum in Cincinnati during the time of year when it is most visited."124

The district court concluded that there is simply no public forum in the city of Cincinnati "which compares to Fountain Square," and therefore found that Chabad/Lubavitch had "a strong likelihood of succeeding on the merits of their First Amendment claims."125 The court issued an order forbidding the city from enforcing the holiday restrictions contained in the ordinance and requiring the city to issue Chabad/Lubavitch a permit to erect its menorah and hold a candle lighting ceremony.126

The city filed a notice of appeal and a motion for expedited stay of the district court's decision pending appeal on November 27, 2002, which the Court of Appeals granted the same day.126 However, Chabad/Lubavitch filed a motion

122 See Lubavitch, 233 F. Supp. 2d at 986 (citations omitted).
123 Id.
124 Id.
125 Id. The court stated that,

The regulation before the Court today is a most outrageous intrusion on the rights guaranteed by the First Amendment. First, it denies private speakers access to what the City concedes is the 'widest of audiences.' Second, it replaces private speech with a City-sponsored display that 'promotes the City's specific governmental interests.' And third, it forbids those who might dissent from voicing their opposition on Fountain Square or any comparable forum.

Id. at 987.
126 Id. at 988.
127 See Chabad of Southern Ohio/Congregation Lubavitch v. Cincinnati, No. 02-4340 (6th Cir. Nov.
to vacate the Sixth Circuit's stay from Circuit Justice John Paul Stevens, who issued an order vacating the stay.\textsuperscript{128} Chabad/Lubavitch was again able to erect its menorah on Fountain Square during the Chanukah celebration.

The city filed an appeal of the district court's decision to grant Chabad/Lubavitch a preliminary injunction, and the parties currently await an oral argument date from the court. Hopefully, the Sixth Circuit will find in favor of the parties seeking to freely express themselves on Fountain Square as it has so many times in the past.

IV. CONCLUSION

The district court in the latest Fountain Square case stated that "the City of Cincinnati has a long history of unconstitutional attempts at regulating private speech on Fountain Square."\textsuperscript{129} The numerous passionately-fought struggles over free expression on the Square are one indication of the place the Square holds in the heart of every Cincinnatian. One must hope that some day the City of Cincinnati will recognize that a great public place is not only formed by the physical structure of the forum, but also depends on the freedoms promoted there.

\textsuperscript{27, 2002} (order granting preliminary injunction).


\textsuperscript{129} Lubavitch, 233 F. Supp. 2d at 987 (citing Knight Riders, 72 F.3d 43 (1995); Lubavitch II, 997 F.2d 1160; and Lubavitch I, 923 F.2d 458 (1991)).
CLOSE ENOUGH FOR GOVERNMENT WORK: AN EXAMINATION OF CONGRESSIONAL EFFORTS TO REDUCE THE GOVERNMENT'S BURDEN OF PROOF IN CHILD PORNOGRAPHY CASES

by John P. Feldmeier, J.D., Ph.D.*

"In the absence of congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse. The mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused."

PROTECT Act of 2003

"The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful . . . If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor."

Justice Anthony Kennedy

I. INTRODUCTION

For at least 25 years, it has been generally understood that the term "child pornography" applies only to sexually explicit material that depicts actual children, i.e., persons below 18 years of age. During much of this time, federal

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prosecutors seeking to obtain convictions in child pornography cases have been responsible for proving beyond a reasonable doubt that the indicted material depicts an actual underage person engaged in sexually explicit conduct.\(^5\)

During recent years, however, some members of Congress have registered concern that advances in computer technology are making it more difficult for federal prosecutors to meet this evidentiary burden of proof.\(^6\) Critics claim that new photographic and computer technologies make it possible to produce computer-generated depictions of children engaging in sexually explicit conduct that are virtually indistinguishable from unretouched photographs of actual minors engaging in such conduct.\(^7\) According to some members of Congress, the availability of “virtual child pornography” allows defendants to undermine the government’s case by claiming that the charged image may not be that of an actual child.\(^8\) Some predict that, if the government is forced to continue to prove beyond a reasonable doubt that indicted depictions are actual depictions of real children engaging in the sexual conduct, there will be reasonable doubt inherent in every child pornography prosecution.\(^9\)

To combat the so-called “virtual child pornography defense,” Congress initially sought to alter the government’s burden of proof in child pornography cases by allowing federal prosecutors to simply show that the targeted material depicted persons who “appeared to be” minors.\(^10\) But after this provision was ruled unconstitutional by the Supreme Court in Ashcroft v. The Free Speech
Congress has sought to revamp its legislative language by proposing that child pornography include material that contains images that are "indistinguishable from" those of actual minors. These legislative efforts do not require prosecutors to prove that the depicted person was an actual minor, but rather, allow them to simply prove that the images "appeared to be" or were "indistinguishable from" those of actual minors. Under these proposals, after this "close enough" standard is met, the defendant then has an opportunity to rebut the government's evidence through an affirmative defense by proving that the charged material did not, in fact, depict any actual minors. The result of these legislative efforts is that the government's burden of proving the actual age of persons depicted in material charged as child pornography is shifted to the criminally accused.

This article reviews congressional efforts to alter the burden of proof in federal child pornography cases by examining the "Child Pornography Prevention Act of 1996" (CPPA), portions of which were struck down by the United States Supreme Court in Free Speech, as well as the recently-enacted PROTECT Act, which attempts to remedy the unconstitutional portions of the CPPA and still provide a means for reducing and shifting a prosecutor's burden of proof in child pornography cases. The second section of this article summarizes congressional efforts to assist law enforcement in child pornography cases during the last 25 years. The third section reviews the failed CPPA, which marked the first attempt by Congress to reduce and shift the government's burden of proof in child pornography cases. The fourth section summarizes the Supreme Court's ruling in Free Speech, a decision that did not formally address the issue of shifting the burden of proof in child pornography cases, but nonetheless...

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12 Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT), Pub. L. No. 108-21, 117 Stat. 650, 678 (current version at 18 U.S.C. § 2252 A(c) (2000 & Supp. III 2003) (defining child pornography to include a visual depiction that "is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaged in sexually explicit conduct").
13 Id. (explaining that a defendant must show that: (1) "the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct"; and (2) "the alleged child pornography was not produced using any actual minor or minors." Id. See also 18 U.S.C. § 2551, 2252A(c) (1994 & Supp. V 1999) (requiring a person charged with producing or distributing alleged child pornography to demonstrate that: (1) the material was produced using an actual person; (2) the actual person was an adult; and (3) the person charged did not advertise or promote the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor) (emphasis added); 18 U.S.C. § 2252A(d) (requiring persons charged with possessing alleged child pornography to prove that: (1) there were three or fewer images; and (2) either the images were destroyed or reported and provided to law enforcement officers) (emphasis added).
offered pointed insights into how the justices might rule should this issue become a constitutional question before the Court. The final section provides an overview of the PROTECT Act, as it relates to child pornography provisions, and argues that this legislation is largely unconstitutional in light of the Supreme Court's decision in *Free Speech*. This article concludes that further legislative attempts to alter the burden of proof in child pornography cases are not only unjustified and unnecessary, given the government's overwhelming success in child pornography cases, but are also unconstitutional because they undermine the important principle of free speech and fundamental rights of due process held by the criminally accused.

II. CONGRESS AND CHILD PORNOGRAPHY LEGISLATION

Beginning in 1977, Congress passed several laws prohibiting the production and distribution of materials depicting children in a sexually explicit manner. Initially, these laws focused on whether material depicting children was obscene. During much of this time, legislative efforts to prohibit child pornography, and corresponding reviews of such efforts by the judiciary, have centered on the harm child pornography inflicts upon the children used in its production. Indeed, prior to 1996, the common purpose and effect of all child pornography legislation was to ensure that children were not used or otherwise exploited as the subjects of or participants in sexually explicit materials.

In 1982, the Supreme Court established the constitutional framework for preserving the rights of adults while fighting the real harm of child pornography. The Court held that sexually explicit material depicting actual children is unprotected by the First Amendment regardless of whether it is obscene, but that non-obscene simulations of child pornography that do not involve real children in making the images "retain[] First Amendment protection." This ruling was based on documented findings that minors can suffer serious harm by participating as *performers* in sexually explicit materials. The Court therefore made it clear that Congress can ban child pornography only to the extent that the proscribed material portrays sexually explicit conduct by actual children. In fact, the Court specifically authorized the use of young-looking adults in non-obscene, sexually explicit performances so that the literary, artistic, and scientific value of sexual depictions can be preserved under the First Amendment.

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21 *See* American Library Ass'n v. Barr, 956 F.2d 1178, 1181-85 (D.C. Cir. 1992) (providing a history of federal child-pornography legislation). *See also supra* note 3 and accompanying text.
22 *See supra* note 3 and accompanying text.
23 *See* S. REP. No. 358, at 29 (1996).
24 *See supra* note 3 and accompanying text.
26 *Id.* at 765.
27 *Id.* at 758-59 (emphasis added).
28 *Id.* at 764.
29 *Id.* at 765.
Within the constitutional framework of *Ferber*, Congress enacted several laws prohibiting the depiction of real children in sexually explicit materials and the harmful conduct of those seeking to sexually abuse children.\(^3\) Congress prohibited the distribution, possession, or sale of material depicting actual children engaged in sexual activity, regardless of whether the material was obscene.\(^3\) Congress further prohibited persons from knowingly mailing, transporting, or shipping child pornography in interstate commerce.\(^3\) Reproducing child pornography for distribution by any means, including the use of the computer also was outlawed.\(^3\) And Congress prohibited persons from using, enticing, or coercing a minor to engage in sexual conduct for the purpose of producing a visual depiction of the activity.\(^3\) This collection of legislation targeted materials that depicted actual children engaged in sexually explicit conduct.

The viability and prudence of limiting child pornography legislation to only those materials depicting actual children was reinforced in 1986 when the Attorney General’s Commission on Pornography released its Final Report on child pornography.\(^3\) This Report examined the effect of sexually explicit, “fictional” depictions of children and concluded that these depictions should not be considered “child pornography.”\(^3\) Consistent with *Ferber*,\(^3\) the Report cautioned that the term “child pornography” is “only appropriate as a description of material depicting real children.”\(^3\) By way of example, the Report concluded that a sexually explicit film adaptation of Vladimir Nabokov’s novel, *Lolita*, which uses an adult actress to play the part of a young girl, “could never be ‘child pornography’” because it does not depict an actual child engaged in sexual conduct.\(^3\)

Following the Final Report, Congress enacted further legislation in an effort to assist law enforcement officials in detecting whether the performers in sexually explicit materials were really children or just youthful-looking adults.\(^4\) These laws require the producers of sexually explicit materials to maintain records of performers’ names and birth dates.\(^4\) As with prior legislation, these record-keeping laws were designed to preclude actual minors from being depicted in a sexually explicit manner, while preserving the right of adults to read and view non-obscene, constitutionally protected materials.\(^4\)

\(^{35}\) ATT’Y GEN. COMM. ON PORNOGRAPHY, FINAL REPORT 405-18, 595-735 (1986) (hereinafter referred to as FINAL REPORT).
\(^{36}\) Id. at 596.
\(^{38}\) Id.
\(^{39}\) Id. at 598.
\(^{41}\) Id.
In or about 1995, Congress was presented with claims that the business of prosecuting child pornography cases was becoming more difficult for federal prosecutors.\footnote{See generally Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary, 104th Cong. (1996).} Law enforcement officials and child advocacy groups testified before Congress that new photographic and computer imaging technologies were making it possible for individuals to produce visual depictions of "virtual" children engaging in sexually explicit conduct that are virtually indistinguishable from unretouched photographic images of actual children engaging in sexually explicit conduct material that is outside the scope of current federal law.\footnote{According to the Senate Report supporting the CPPA: Computers can also be used to alter sexually explicit photographs, films and videos in such a way as to make it virtually impossible for prosecutors to identify individuals, or to prove that the offending material was produced using children. "Technology may have made it possible for criminals to escape responsibility for violating the existing law, even when the pictures are of real minor children being sexually abused or exploited. The day will soon arise, if not here already, that our inability to distinguish the real from the apparent ... child pornography will raise a reasonable doubt that a picture is really ... of a real child being molested and exploited .... If the government must continue to prove beyond a reasonable doubt that mailed photos, smuggled magazines or videos, traded pictures, and computer images being transmitted on the Internet, are indeed actual depictions of an actual minor engaging the sex portrayed, then there could be a built-in reasonable doubt argument in every child exploitation/pornography prosecution." This threat is already a reality for Federal law enforcement.} Congress was also informed that advancing technology could be used to alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for prosecutors to identify individuals, or to prove that the offending material was produced using actual children.\footnote{Id.} Congress was further warned that "[a]s the technology of computer-imaging progresses, it will become increasingly difficult, if not impossible for the Government to meet its burden of proving that a pornographic image is of a real child. Statutes prohibiting the possession of child pornography produced using actual children would be rendered unenforceable and pedophiles who possess pornographic depictions of actual children will go free from punishment."\footnote{Id. at 20.}

III. THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996

In a purported response to the registered concerns of law enforcement officials and child advocacy groups, Congress enacted the Child Pornography Prevention Act of 1996 (CPPA). The CPPA transformed the definition of "child pornography" by expanding the term to include sexually explicit depictions of...
fictional characters and youthful-looking persons over the age of 18.\footnote{See 18 U.S.C. § 2256(8) (1994 & Supp. V 1999). Specifically, the CPPA classified child pornography as: any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where -- (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.} Under the CPPA, child pornography was defined to include sexually-explicit material that: (1) depicts actual minors; (2) depicts persons who appear to be minors; (3) modifies or alters the image of an identifiable minor so that the minor appears to be engaging in sexually-explicit conduct; or (4) is advertised or described so as to convey the impression that it depicts a minor.\footnote{id.} Thus, in addition to banning visual depictions of real children who are actually involved in sexually-explicit conduct,\footnote{id.} the CPPA also prohibited visual depictions of adults who “appear to be” minors engaging in sexually-explicit conduct and material that, while not containing sexually-explicit depictions of identifiable minors, “conveys the impression” that it might have such depictions.\footnote{See 18 U.S.C. § 2256(2)(A)–(E) (2000 & Supp. III 2003) (defining “Sexually explicit conduct” as actual or simulated: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; (4) sadistic or masochistic abuse; or (5) lascivious exhibition of the genitals or pubic area of any person).\footnote{id.}}

The “appears to be” and “conveys the impression” provisions of the CPPA criminalized material that did not contain actual children or images of identifiable children, and thus, was not, in the traditional sense of the term, “child” pornography.\footnote{Id. (emphasis added).} The resulting effect, however, was that federal prosecutors were no longer required to prove beyond a reasonable doubt that the charged material depicted an actual child. Instead, under the CPPA’s expanded, yet relaxed, definition of child pornography, prosecutors only had to prove that the material contained a visual depiction that “appeared to be a minor” engaged in sexually explicit conduct or that the material was advertised in such a manner as to “convey the impression” that a minor was depicted as engaging in sexually explicit conduct.\footnote{See 18 U.S.C. § 2256(8)(B), (D) (1994 & Supp. V 1999).\footnote{id.}} In so doing, the CPPA eliminated a defendant’s ability to insert reasonable doubt by suggesting that the prosecution failed to meet its burden of proof because it failed to prove beyond a reasonable doubt that the images were not computer generated.
The CPPA included an affirmative defense, which required a defendant to prove that the material at issue did not depict an actual minor and that it was not advertised or promoted in such a manner as to suggest that an actual child was depicted.\textsuperscript{53} Under this defense, a person charged with producing or distributing alleged child pornography was required to demonstrate that: (1) the material was produced using an actual person; (2) the actual person was an adult; and (3) the person charged did not advertise or promote the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor.\textsuperscript{54} The defense required persons charged with possessing alleged child pornography to prove that: (1) there were three or fewer images; and (2) the images were either destroyed or reported and provided to law enforcement officers.\textsuperscript{55}

Overall, the resulting effect of the CPPA was that federal prosecutors were no longer required to prove that an actual child was depicted in order to secure convictions in child pornography cases; they merely had to demonstrate “virtual” child pornography. Criminal defendants, on the other hand, were given the burden of proving the non-minor status of those persons depicted if they wished to rebut the government’s “virtual” evidence.

\textbf{IV. ASHCROFT V. THE FREE SPEECH COALITION}

Fearing that the CPPA jeopardized the expressive activity of its members, the Free Speech Coalition\textsuperscript{56} and others filed a complaint challenging the Act in the United States District Court for the Northern District of California.\textsuperscript{57} The complaint asserted, \textit{inter alia}, that the “appears to be” and “conveys the impression” provisions of the CPPA: (1) prohibit the expression of Respondents in violation of the First Amendment; (2) contain overbroad and vague language in violation of the Fifth Amendment’s Due Process Clause; and (3) unduly chill the constitutionally-protected speech of the Free Speech Coalition in violation of the First Amendment.\textsuperscript{58} The Free Speech Coalition further asserted that the CPPA’s affirmative defense was insufficient in its scope, and unconstitutionally shifted the burden of proof to defendants in child pornography cases.\textsuperscript{59}

\textsuperscript{54} Id. § 2252A(c).
\textsuperscript{55} Id. § 2252A(d).
\textsuperscript{56} See generally Free Speech, 535 U.S. 234 (2002). The Free Speech Coalition is a California trade association that assists film makers, producers, distributors, wholesalers, retailers, and Internet providers located throughout the United States in the exercise of their First Amendment rights and in defense of those rights against censorship. \textit{Id.} at 243.
\textsuperscript{57} Id.
\textsuperscript{58} Id. \textit{See also} Brief for Respondent at 9, Free Speech, 535 U.S. 234 (2002) (No. 00-795). The Free Speech Coalition was not challenging 18 U.S.C. § 2256(8)(A), which prohibited materials depicting actual children engaging in sexually explicit conduct or 18 U.S.C. § 2256(8)(C), which prohibited computerized “morphing” of identifiable children, an activity whereby images of real and identifiable children are altered by a computer so that the children are depicted in sexually explicit conduct. \textit{Id.} Respondents believed that, because these materials contain sexual depictions of real and identifiable children, or at least parts thereof, it is possible that such images could harm the children depicted. \textit{Id.}
\textsuperscript{59} Plaintiffs’ Memorandum Opposing Defendants’ Motion for Summary Judgment at 7-9, Free
On August 12, 1997, following cross motions for summary judgment filed by the parties, the district court issued an order and judgment upholding the constitutionality of the CPPA. The district court ruled that the CPPA was a content-neutral law that properly regulated the time, place, and manner of speech. The court reasoned that "[g]iven the nature of the evils that anti-child [sic] pornography laws are intended to prevent, the CPPA can easily be deemed a content-neutral regulation." The court further found that the CPPA's affirmative defense narrowed the scope and meaning of the statute, thereby providing a sufficient remedy to any overbreadth and vagueness concerns. The district court did not address the Free Speech Coalition's argument that the affirmative defense unconstitutionally shifted the burden of proof in child pornography cases.

The Free Speech Coalition appealed to the Ninth Circuit Court of Appeals, where the lower court's ruling was reversed. The Ninth Circuit found that the CPPA was a content-specific ban on protected speech and that Congress had not provided a compelling governmental interest. The court further found the “appears to be a minor” and “conveys the impression” provisions void for vagueness because the two phrases were “highly subjective” and “provide no measure to guide an ordinarily intelligent person about prohibited conduct and any such person could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution.” In addition, the court deemed the two challenged phrases to be unconstitutionally overbroad because they were “insufficiently related to the interest in prohibiting pornography actually involving minors to justify its infringement of protected speech.”

The majority opinion, however, did not address the Free Speech Coalition's constitutional challenge to the affirmative defense. In a dissenting opinion, Judge Ferguson found that the affirmative defense provided sufficient protection to the Free Speech Coalition from culpability under the CPPA, but he failed to respond to the Coalition's constitutional challenge to the defense.

After granting the government's petition for a writ of certiorari, the United States Supreme Court affirmed the Ninth Circuit's decision, declaring the CPPA's “appears to be” and “conveys the impression” provisions to be unconstitutional. In a majority opinion written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsberg, and Breyer, the Court reaffirmed that non-
obscene sexual expression that does not portray actual children is protected by the First Amendment.\textsuperscript{71} The majority further emphasized that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."\textsuperscript{72} The Court emphasized that "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for the impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."\textsuperscript{73} Finally, the Court stressed that protected speech (including sexual expression between adults) cannot be banned as a means to ban unprotected speech because "[p]rotected speech does not become unprotected merely because it resembles the latter."\textsuperscript{74}

The majority also offered a limited assessment of the CPPA's affirmative defense, finding that "[t]he Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful."\textsuperscript{75} The majority opinion cited the practical problems associated with a criminal defendant attempting to satisfy this defense:

An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.\textsuperscript{76}

Despite identifying several constitutional pitfalls associated with the affirmative defense, the majority opinion stopped short of declaring the provision unconstitutional, finding that, even if constitutional, the defense was so insufficient in its protective scope that it could not remedy the overbreadth problems of the statute.\textsuperscript{77}

In a concurring opinion, Justice Thomas agreed with the majority opinion's assessment of the affirmative defense, but did not rule out the possibility of future justification for such a change in child pornography legislation.\textsuperscript{78} Justice

\textsuperscript{71} Id. at 250.
\textsuperscript{72} Id. at 252 (citing Reno v. ACLU, 521 U.S. 844, 875 (1997)).
\textsuperscript{73} Free Speech, 535 U.S. at 253.
\textsuperscript{74} Id. at 255.
\textsuperscript{75} Id. at 255-56.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 256.
\textsuperscript{78} Id. at 259-60 (Thomas, J., concurring).
Thomas stated that "at this time" the government cannot show a compelling need for shifting the burden in child pornography cases, considering that the government did not cite to a single case where the "virtual child pornography" defense was actually successful. But Thomas cautioned that technological advances may eventually make this defense far more successful. According to Thomas, "[i]n the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction." Thomas then offered his interpretation of the majority's opinion regarding the affirmative defense, stating, "[t]he Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality ...." He ended his opinion by noting that he "would not prejudge, however, whether a more complete affirmative defense is the only way to narrowly tailor a criminal statute that prohibits the possession and dissemination of virtual child pornography."

Justice O'Connor wrote a separate opinion in which she concurred with the majority's judgment that the "conveys the impression" provision was unconstitutional, but dissented with respect to the "appears to be" provision, finding it to be constitutional except in cases where it is applied to youthful looking adults. Although not specifically addressing the constitutionality of the affirmative defense, O'Connor recognized that, while currently there may not be any cases in which a defendant has successfully raised the "virtual child pornography" defense, the Government's concern is "reasonable" and Congress need not wait for harm to occur before legislating against it.

Chief Justice Rehnquist was joined in a separate opinion by Justice Scalia in which he registered concern that the CPPA not be applied to materials with literary or artistic value or depictions of youthful looking adults engaged in "mere suggestions of sexual activity." Rehnquist agreed with Part II of Justice O'Connor's opinion, which found a compelling governmental interest in combating "rapidly advancing technology" in child pornography cases. Rehnquist, however, urged that a more limiting construction be applied to the CPPA to avoid its unconstitutionality. Rehnquist claimed that a narrow reading of "sexually explicit conduct" would prevent the CPPA from being applied to materials that depict actors engaged in "sexually suggestive conduct." But Rehnquist's opinion did not directly address the constitutional viability of shifting the burden of proof to defendants in child pornography cases.

79 Free Speech, 535 U.S. at 259 (Thomas, J., concurring).
80 Id.
81 Id.
82 Id.
83 Id.
84 Id. at 261 (O'Connor, J., concurring in part and dissenting in part).
86 Id. at 269 (Rehnquist, J., dissenting).
87 Id. at 267.
88 Id. at 268.
89 Id. at 269-70.
90 Id. 268-70.
In the end, although the Court did not formally decide whether the CPPA’s alteration of the burden of proof in child pornography cases was itself constitutional, at least five justices appeared highly skeptical that such an evidentiary shift would ever pass constitutional muster.\(^{91}\) And while a sixth justice, Justice Thomas, indicated that there may come a time when the CPPA’s affirmative defense may be justified by a compelling governmental interest, he too questioned whether this defense was the only way to more narrowly tailor criminal statutes relating the child pornography defenses.\(^{92}\) Justice O’Connor, as joined by Chief Justice Rehnquist and Justice Scalia, on the other hand, appeared to be ready to accept that shifting the burden of proving a depicted person’s age to the defendant was entirely justified “given the rapid pace of advances in computer-graphics technology.”\(^{93}\)

V. THE CONSTITUTIONAL DEFICIENCIES OF THE PROTECT ACT\(^{94}\) OF 2003

Soon after the Supreme Court issued its *Free Speech*\(^ {95}\) opinion in April 2002, members of both chambers of Congress introduced bills purportedly drafted to remedy the constitutional flaws of the CPPA’s\(^ {96}\) “appears to be” and “conveys the impression” provisions, while still maintaining the basic evidentiary burden shifting structure that existed under the invalidated statute.\(^ {97}\) Ostensibly receiving encouragement from the opinions by Justices O’Connor and Thomas in *Free Speech*,\(^ {98}\) legislators set out to eliminate the need for prosecutors to prove that an actual minor appeared in materials charged as child pornography, while allowing defendants the opportunity to prove the depicted person’s age through an affirmative defense.\(^ {99}\) Although the specific language and titles of the bills varied, the basic strategy underlying congressional attempts to shift the burden of proof was the same: (1) to provide an expanded, yet relaxed, definition of child pornography that will allow prosecutors to avoid the burden of proving that


\(^{92}\) Id. at 259.

\(^{93}\) Id. at 264.


persons depicted in sexually explicit material are actual children, and (2) to
provide defendants with an affirmative defense that will allow them to disprove
the government's "close enough" evidence by showing that the persons depicted
are not real minors. As with the CPPA, legislators claimed that this burden
shifting was necessary because prosecutors had found it increasingly difficult to
meet their burden of proving that a sexually explicit image is that of a real
child.

On April 30, 2003, President Bush signed the PROTECT Act. But despite
the artful attempts by Congress to preserve the CPPA's basic burden shifting
structure, PROTECT is largely deficient and will likely be subject to the same
fate as the CPPA. This is true for three fundamental reasons. First, PROTECT's
redefinition of child pornography to include images that do not depict real
children ignores the Supreme Court's firmly-established precedent that child
pornography is limited to the depictions of actual -- as opposed to virtual --
children. Second, PROTECT is not supported by a compelling governmental
interest necessary to justify its watered-down definition of child pornography and
its shifting of the burden of proof to defendants. Although some prosecutors
claim that it is more difficult to prosecute child pornography cases due to the
availability of the "virtual child" defense, they cannot cite to a single case where
a defendant was acquitted based on this defense. Third, PROTECT's
affirmative defense is insufficient in its scope because it fails to protect
"fictional" depictions, including computer-generated images, of non-children.
And finally, PROTECT's measures to shift the burden of proof regarding a
depicted person's age violate basic principles of due process that protect the
criminaly accused against conviction "except upon proof beyond a reasonable
doubt of every fact necessary to constitute the crime with which he is
charged."

In short, although PROTECT marks the latest attempt by Congress to reduce
and shift the government's burden of proof in child pornography cases, it
contains the same basic flawed provisions as those found in the other similar
legislative proposals.

100 See congressional bills cited supra note 97.
difficulty in prosecuting child pornography cases after the Ninth Circuit's decision in Ashcroft v.
The Free Speech Coalition, 535 U.S. 234 (2002)).
102 Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003
103 See Free Speech, 535 U.S. 234, 259 (Thomas, J., concurring).
104 See In re Winship, 397 U.S. 358, 364 (1970) (holding prosecution must prove every element of
an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by
creating a presumption). See also Patterson v. New York, 432 U.S. 197, 215 (1977) (holding a
defendant's due process rights are violated when a presumption requires him to prove that he acted
in the heat of passion upon sudden provocation).
105 See, e.g., Child Obscenity and Pornography Prevention Act of 2003 (COPPA), H.R. 1161,
108th Cong. (2003); Prosecutorial Remedies and Other Tools to end the Exploitation of Children
2002, H.R. 4623, 107th Cong. (2002); Prosecutorial Remedies and Tools Against the Exploitation
A. **PROTECT's Expanded Definitions of Child Pornography.**

In attempting to address the purported technological challenges faced by federal prosecutors in child pornography cases, PROTECT reduces the government's burden of proof in these cases by carving out two new expansive definitions of child pornography.\(^{106}\) Both of these definitions allow the prosecutor to avoid the burden of proving that the person depicted in the charged materials is an actual child.\(^{107}\)

First, under revisions to 18 U.S.C. § 2256(8)(B), PROTECT expands the definition of child pornography to include a visual depiction that "is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaged in sexually explicit conduct."\(^{108}\) This definition essentially allows law enforcement to prosecute materials that do not depict any actual children but that nevertheless contain images which closely resemble actual children. This "close enough" category, is often referred to as "virtual child pornography," and would likely encompass materials that depict youthful-looking adults and computer-generated images that do not depict any actual children.\(^{109}\)

Second, under amendments to 18 U.S.C. § 1466A, PROTECT bans a new category of child pornography entitled "Obscene Child Pornography," which includes "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting" that depicts an actual minor or image that "appears to be of a minor" engaging in "graphic"\(^{110}\) sexual activity and "lacks serious literary, artistic, political, or scientific value."\(^{111}\) This provision relieves prosecutors of the burden of showing that the person depicted in a charged material is an actual child.\(^{112}\) In fact, under section 1466(A)(c), PROTECT specifically provides that a prosecutor is not required to show as a requisite element that the "minor depicted actually exist."\(^{113}\) In so doing, PROTECT bans as "obscene child pornography."
pornography” materials in which no actual minor is depicted and where only the third prong of the three-pronged Miller test is met.\(^{114}\)

By eliminating the need for prosecutors to prove that an actual child is depicted in material charged as child pornography, PROTECT faces several serious constitutional challenges. The phrases “indistinguishable from . . . a minor,” as contained in 18 U.S.C. § 2256(8)(1)(B), and “appear[s] to be, of a minor,” as found in 18 U.S.C. § 1466A(a)(2) and (b)(2), ensnare sexually explicit depictions of youthful-looking adults and computer-generated images of non-children. As such, these provisions suffer from the same overbreadth problems as the “appears to be” and “conveys impression” provisions of the CPPA, given that both provisions ban images that do not depict real children.\(^{115}\) Indeed, PROTECT’s “indistinguishable” and “appears to be” provisions directly contravene the Supreme Court’s holdings in Ferber and Free Speech, which respectively establish and reinforce that the government’s interest in regulating and defining child pornography, as compelling as it may be, is “limited to works that visually depict sexual conduct by children below a specified age.”\(^{116}\) The Court has specifically endorsed the use of non-children in non-obscene, sexually explicit performances so that the literary, artistic, and scientific value of sexual depictions can be preserved under the First Amendment.\(^{117}\) Accordingly, the Court has made it clear that Congress can ban child pornography as a category of speech only to the extent that the proscribed material portrays sexually explicit conduct by actual children.\(^{118}\)

The Court has also emphasized that “[t]he Government may not suppress lawful speech as the means to suppress unlawful speech[]” and that “[p]rotected speech does not become unprotected merely because it resembles the latter.”\(^{119}\) Despite this clear admonition, this is precisely what PROTECT does by banning sexually explicit depictions of non-children that are “indistinguishable” from real children or that “appear to be” real children.

In Free Speech, the Supreme Court considered the government’s claims that a watered-down definition of child pornography was necessary because “computer imaging makes it very difficult for it to prosecute those who reproduce pornography by using real children.”\(^{120}\) The Court, however, rejected this argument, ruling that it “turn[ed] the First Amendment upside down” because it amounts to an argument that “protected speech may be banned as a

\(^{114}\) See Miller, 413 U.S. at 15. Under Miller, an obscenity conviction requires the trier of fact to find that: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

\(^{115}\) See Free Speech, 535 U.S. at 248-57.


\(^{117}\) Ferber, 458 U.S. at 764.

\(^{118}\) Id.

\(^{119}\) Free Speech, 535 U.S. at 255.

\(^{120}\) Id. at 254.
means to ban unprotected speech." The Court continued, stating, "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech [and thus] protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." In short, because a non-obscene image that is "indistinguishable" from that of a minor or that "appears to be" a real minor does not depict an actual child, it does not fall outside the protection of the First Amendment.

B. The Alleged Prosecutorial Need For Shifting The Burden of Proof.

The purported justification for the "indistinguishable" and "appears to be" provisions is to afford prosecutors the ability to combat the potential defense that the charged material depicts "virtual children," including youthful-looking adults and computer-generated images. As with the CPPA, Congress is again claiming that federal prosecutors have struggled to secure convictions in child pornography cases because it is difficult for them to meet their evidentiary burden of showing that the person depicted in sexually explicit materials is an actual child. The government speculates that, if prosecutors continue to struggle to meet their burden of proof, child pornographers might be able to avoid conviction. These claims, however, are grossly exaggerated.

First, it should be noted that, of the 2091 child pornography cases initiated by the government between 1992 and 2000, only 10 defendants, regardless of the defense strategy they employed, were acquitted. This amounts to a remarkably low acquittal rate of only 0.4 percent. Even more telling is that none of these acquittals are reported as being based on the so-called "virtual child" defense. The legislative findings supporting the CPPA did not offer a single child pornography case where the government was unable to satisfy its burden of proof at trial because the accused raised a "virtual child" defense. Moreover, during the course of the Free Speech litigation from 1997 to 2002, the government cited four additional cases, which were not included in the legislative findings, where defendants had purportedly argued that "the pictures they were accused of possessing were not of real...

121 Id. at 255.
122 Id.
123 Id. at 250-51.
125 Id.
126 See, e.g., supra note 105 and accompanying text.
128 Id.
129 Id.
131 See Kimbrough, 69 F.3d at 723.
children." But the government failed to show that the defendants escaped conviction in any of these cases.

The legislative findings supporting PROTECT claim that criminal defendants in child pornography cases have raised the “virtual child” defense in nearly every case following the Supreme Court’s decision in Free Speech. The findings further claim that “[s]ome of these defense efforts have already been successful,” but Congress cites no specific cases in support of this conclusion. During hearings held on PROTECT legislation, a government witness cited three cases in which he claimed that the “virtual child” defense resulted in “several adverse judgments” following the Free Speech decision. But a closer look at these cases reveals that the “virtual child” defense has not been as successful as the government claims.

In the first case, United States v. Sims, the defendant was originally convicted by a jury of four counts of offenses relating to the sexual exploitation of minors. During trial, the government argued that it was not required to prove that the visual depiction at issue in Count IV was that of a real minor, and the trial court agreed. As a result, the government did not present any evidence at trial that any of the charged images involved the use of actual children engaged in sexually explicit conduct. Later, after the Supreme Court announced Free Speech, the trial court granted the defendant’s motion for judgment of acquittal ruling that the government had the burden of proving that an actual child was depicted. The trial court, however, noted that “the government could have taken a more cautionary approach and presented evidence to prove the use of actual children, but it made the strategic decision not to do so.” Thus, contrary to the government’s claims, Sims does not support the proposition that the “virtual child” defense has been successful. The jury in Sims did not buy the defendant’s arguments even in the absence of the

135 Id.
137 220 F. Supp. 2d 1222 (D.N.M. 2002).
138 Id. at 1224.
139 Id. at 1227.
140 Id. at 1228.
141 Id. at 1227.
142 Id.
government offering any proof to the contrary.\footnote{\textit{Sims}, 220 F. Supp. 2d at 1227.} The acquittal in \textit{Sims} was the product of the government’s ill-conceived and neglectful strategy, not the defendant’s skillful use of the “virtual child” defense.\footnote{\textit{Id.} at 1226-29.}

Second, the government cites \textit{United States v. Bunnell},\footnote{No. 02-13-B-S, 2002 U.S. Dist. LEXIS 9090, at *1 (D. Me. May 10, 2002).} claiming that the defendant’s motion to withdraw his guilty plea was granted after \textit{Free Speech}.\footnote{\textit{See Child Obscenity and Pornography Prevention Act of 2003: Hearing on H.R. 1104 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Judiciary Comm., 108th Cong. (2003) (testimony by Associate Deputy Attorney General Daniel P. Collins).} This claim, however, is not supported by the record in the case.\footnote{\textit{Bunnell}, 2002 U.S. Dist. LEXIS 9090, at *1.} First, the defendant in \textit{Bunnell} never went to trial, and thus, the “virtual child” defense was never presented, successfully or otherwise, to a jury.\footnote{See Criminal Docket for U.S. Dist. Ct., D. Me., No. 1:02-CR-13-GZA-ALL.} In addition, although the defendant filed a pretrial motion to dismiss the indictment based, in part, on constitutional grounds consistent with those raised in \textit{Free Speech}, this motion was denied by the district court.\footnote{No. 01-Cr. 1114, 2003 U.S. Dist. LEXIS 6005, at *1 (S.D.N.Y. April 14, 2003).} The government ultimately moved to dismiss the indictment on its own motion, but there is no evidence that this motion had anything to do with the “virtual child” defense.\footnote{\textit{See Child Obscenity and Pornography Prevention Act of 2003: Hearing on H.R. 1104 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Judiciary Comm., 108th Cong. (2003) (testimony by Associate Deputy Attorney General Daniel P. Collins).} The bottom line is that the “virtual child” defense did not result in an adverse judgment against the government in \textit{Bunnell}, as the government now claims.

Finally, the government cites \textit{United States v. Reilly},\footnote{Reilly, 2003 U.S. Dist. LEXIS 6005, at *1.} as evidence that a defendant was permitted to withdraw his guilty plea after the Supreme Court’s decision in \textit{Free Speech}.\footnote{\textit{Id.} at *2.} While it is true that the district court permitted the defendant to withdraw his guilty plea after \textit{Free Speech}, the court’s decision was not based on any assertion of the “virtual child” defense.\footnote{See Criminal Docket for U.S. Dist. Ct., S.D.N.Y., No. 01CR-1114-RPP.} Rather, the court found that the defendant’s plea allocution was deficient because it was based on his “mistaken premise” that the government could prove its case without proving that the defendant had knowledge that the charged material depicted actual children.\footnote{\textit{Id.} at *2.} As of the writing of this article, the defendant has not been acquitted, and his case is still pending before the district court.\footnote{See Criminal Docket for U.S. Dist. Ct., D. Me., No. 1:02-CR-13-GZA-ALL.}

Thus, based on a more detailed review of the government-cited cases, the government still cannot cite to a single case where a defendant was acquitted by jury based on a successful presentation of the “virtual child” defense. As a result, factually speaking, the government’s claim of difficulty in securing convictions in child pornography cases due to the availability of the “virtual child” defense is far from compelling. Under these circumstances, PROTECT’s
"indistinguishable" and "appears to be" provisions are likely to be deemed unnecessary and unconstitutionally overbroad.

C. PROTECT's Affirmative Defenses


PROTECT attempts to limit the overbreadth problems associated with the "indistinguishable" language of Section 2256(8)(B) by providing an affirmative defense to those charged with child pornography offenses involving images that are indistinguishable from that of a real minor. After the government has met its reduced burden of proving the depiction of an "indistinguishable" child, as opposed to a real child, this "defense" allows a defendant to show either that the charged material: (1) was produced by depicting an actual person or persons and that each person was an adult when the material was produced, or (2) was not produced using any actual minor or minors. Defendants intending to assert this defense must also provide the prosecutor with timely notice of this intent as well as a summary of the evidence supporting this defense.

In essence, under Section 2252A(c)(1), all federal prosecutors must do in child pornography cases is prove that the charged material contains an image that is "indistinguishable" from that of a minor engaged in sexually explicit conduct. Once this is done, the burden of proof shifts to the defendant who is then responsible for proving that the image is not of an actual child.

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156 See 18 U.S.C. § 2252A(c) (2000 & Supp. III 2003). 18 U.S.C. § 2256(8)(B) defines child pornography to include a visual depiction that "is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaged in sexually explicit conduct."

157 Id. § 2252A(c)(1)(A), (B).

158 Id. § 2252A(c)(2).

159 Id. Section 2252A(c)(2) provides:

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

Id.

160 Id. § 2256(8)(1)(B).

161 Id. § 2252A(c).
As with the CPPA’s affirmative defense, PROTECT’s affirmative defense under Section 2252A(c) “raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful.”

Constitutional due process principles “protect[] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” Accordingly, the prosecution must prove every element of an offense beyond a reasonable doubt and may not shift the burden of proof to the defendant by creating a presumption. The use of presumptions has been found to violate the Due Process Clause where the government is relieved of its burden of persuasion on an element of an offense.

Contrary to due process requirements, Section 2252A(c), in a similar vein to its CPPA predecessor, creates a presumption that, if images in sexually explicit materials are “indistinguishable from” or “appear to be” actual minors, they are, in fact, actual minors. Under the “indistinguishable” provision, this presumption, coupled with the affirmative defense provided in PROTECT’s Section 2252A(c)(1), shifts the burden of proof to defendants in child pornography cases to prove that the person depicted was not a minor and relieves the government of its burden of proof on an essential element of the offense.

Even assuming arguendo that law enforcement officials have had to work a little harder to detect images of actual children in computerized pornography, that does not justify lightening the workload of prosecutors by shifting the burden of proof to defendants in child pornography cases. Indeed, the Due Process Clause forbids it.

The reality is that defendants in child pornography cases cannot be required to prove the government’s case. The affirmative defense under Section 2252A(c), coupled with PROTECT’s relaxed definition of child pornography, creates a presumption under the law that unconstitutionally relieves the government of its burden of proof on an essential element of the offense. If the government makes the allegation that a child was depicted in sexually explicit materials, it must prove every element of the offense beyond a reasonable doubt.

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164 See Sandstrom v. Montana, 442 U.S. 510, 525 (1979) (holding a jury instruction that had the effect of shifting the burden of proof to the defendant regarding his state of mind violated Due Process Clause). See also Patterson v. New York, 432 U.S. 197, 215 (1977) (finding defendant’s due process rights were violated when a presumption requires him to prove that he acted in the heat of passion upon sudden provocation).
167 See United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (holding that the prosecution is required to prove defendant knew material was produced with the use of a minor).
169 See Mullany v. Wilbur, 421 U.S. 684 (1975) (holding due process requires exacting standards when the defendant, rather than the prosecution, has the burden of persuasion).
conduct, it is the government who should prove that the "child" was in fact a child.

Section 2252A(c)'s affirmative defense further ignores the reality that most defendants lack the resources or the ability to prove that a "fictional" character is not a real minor. If the government, with its seemingly infinite resources, is purportedly having trouble proving that a depiction is that of a real minor, then how can criminal defendants, many of whom are indigent, be expected to do so? As the Supreme Court recognized, "if the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor." And in the context of a criminal trial, it is patently unfair, unreasonable, and unconstitutional to afford the government a "close-enough" standard in child pornography cases, while requiring defendants to demonstrate with precision the non-minor status of the person depicted. This turns the most basic premise of our criminal justice system -- that a person is innocent until proven guilty -- on its head.

Section 2252A(c)'s affirmative defense also offers little protection to consumers and distributors who are not involved in the production of sexually explicit materials, and thus, have little or no way of knowing whether persons depicted in the materials are minors or, in some cases, real persons. This problem is compounded by the fact that PROTECT applies to all materials currently available and makes no concessions for the time period in which the material was produced. Thus, if individuals or retailers are prosecuted for possessing or distributing materials produced in the 1970s, prior to the enactment of federal record-keeping laws, which were not instituted until 1988, it would be nearly impossible for most defendants to prove that the persons depicted in the materials were adults at the time the materials were produced.

Finally, it is important to note that the government's current burden of proof in child pornography cases is not as challenging as the government claims. The government is not "required to negate what is merely unsupported speculation." Rather, "[p]roof beyond a reasonable doubt does not require the government to produce evidence which rules out every conceivable way the pictures could have been made without using real children." Courts have also recognized that uncorroborated speculation that technology exists to produce pornographic pictures without the use of real children is not a sufficient basis for rejecting a lower court's determination not to admit defendant's evidence.

173 See id.
174 Id. at 255.
176 Id. § 2257.
177 See United States v. Vig, 167 F.3d 443, 450 (8th Cir. 1999), cert. denied, 528 U.S. 859 (1999) (rejecting defendant's claim that, because the only evidence the government presented to show that the images were of real children were the images themselves, the government failed to meet its burden of proof).
178 Id.
179 See United States v. Nolan, 818 F.2d 1015, 1020 (1st Cir. 1987).
Again, the factual reality is that only 0.4 percent of all defendants in federal child pornography cases were acquitted between 1992 and 2002. And in none of these cases was the so-called "virtual child" defense proven to be successful.

Simply put, in addition to the fact that Section 2252A(c)'s affirmative defense provision allows prosecutors to deny defendants the due process of law by unconstitutionally shifting the burden of proof in child pornography cases, the available data on the success rate of the "virtual child" defense indicates that such a shift is unnecessary for prosecutors to continue their remarkable rate of success in such cases.


PROTECT also provides an affirmative defense to those persons charged with possessing "obscene child pornography" under 18 U.S.C. § 1466A(b). In cases involving the "appears to be" language of section 1466A(b)(2), after the government has proven that the charged images depict persons who appear to be minors and lack "serious literary, artistic, political, or scientific value," defendants may then assert an affirmative defense by demonstrating that they: (1) possessed fewer than three visual depictions; and (2) "promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any such visual depiction" either (a) "took reasonable steps to destroy each such visual depiction;" or (b) "reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction." The scope and substance of this defense, however, leave much to be desired.

First, the plain language of the affirmative defense does not apply to persons charged under section 1466A(a)(2) -- knowingly producing, distributing, receiving, or possessing with intent to distribute a visual depiction that appears to be of an actual child and that lacks serious literary, artistic, political, or scientific value. It only applies to persons charged with possessing such materials. As such, persons who are charged with producing, distributing, receiving, or possessing with intent to distribute under section 1466A(a)(2) are offered no affirmative defense whatsoever despite the fact that their materials, by definition under sections 1466A(a)(2)(B) and (b)(2)(B), are not obscene and do not depict any actual children. Under these circumstances, the affirmative defense is "incomplete and insufficient, even on its own terms."

181 Id.
183 Id.
184 Id. This Section provides that the affirmative defense only applies to "a charge of violating subsection (b)." Id.
185 Id.
186 The reader should note that Sections 1466A(a)(2)(B) and (b)(2)(B) only require that the third prong of the Miller test be satisfied. The government does not need to prove that: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a prurient interest, or that (2) the work depicts or describes, in a patently offensive way,
Second, Section 1466A(e) does not provide defendants with an opportunity to rebut the government-favored presumption contained in sections 1466A(a)(2)(A) and (b)(2)(A), which presumes that, if an image appears to be of a minor, it is in fact a real minor.\(^\text{188}\) Rather, Section 1466A(e) simply provides an escape hatch for a select group of individuals who possess no more than two proscribed images and who took “proper” steps to dispose of these images.\(^\text{189}\) As such, Section 1466A(e) causes the “appears to be” presumption to become irrefutable. Even if defendants can prove that the “appears to be” images did not, in actuality, depict any real minors, they nonetheless face conviction under Sections 1466A(a)(2)(A) and (b)(2)(A), provided the government can prove that the charged material depicts graphic sexual activity and lacks serious literary, artistic, political, or scientific value.\(^\text{190}\) This directly contravenes the Supreme Court’s ruling in *Free Speech*, which found the CPPA’s affirmative defense to be defective because it “allow[ed] persons to be convicted in some instances where they can prove children were not exploited in the production.”\(^\text{191}\) As a result, Section 1466A(e)’s affirmative defense suffers from similar, although more severe, due process and First Amendment problems as those associated with the affirmative defense under both the CPPA and PROTECT’s Section 2252A(c).

Finally, although Section 1466A(e) provides a limited defense to an isolated group of individuals, it fails to provide any protection to the expression depicted in the targeted materials. Even those persons who possess two or fewer images under Section 1466A(b)(2)(A) must destroy or voluntarily forfeit these images in order to avoid conviction.\(^\text{192}\) PROTECT ignores the fact that the materials banned under Sections 1466A(a)(2) and (b)(2) -- images that appear to be of minors and that lack serious literary, artistic, political, or scientific value -- are presumptively-protected constitutional expression because, again, by definition, they consist of non-obscene depictions of non-children.\(^\text{193}\) Thus, by failing to provide any protection for the expression itself, Section 1466A(e)’s affirmative defense constitutes an inadequate remedy to an overly broad ban on constitutionally-protected speech.\(^\text{194}\)
VI. CONCLUSION

For more than two decades, the Supreme Court has consistently recognized that, in order to sustain a conviction for a child pornography offense, the government must prove beyond a reasonable doubt that the charged material depicts an actual child engaged in sexually explicit conduct. In reviewing Congress' initial effort to reduce and shift this burden of proof for federal prosecutors under the CPPA, at least five Supreme Court justices registered considerable doubt as to whether such a shift and reduction would be constitutional. In light of this cautionary constitutional assessment, and given the paucity of evidence supporting the alleged need for alterations to the evidentiary burden in child pornography cases, it appears that Congress has failed to heed the high court's decision in *Free Speech* and ignored fundamental principles regarding the burden of proof in criminal cases. The PROTECT Act's "close enough" definitions of child pornography not only run afoul of First Amendment and due process requirements under the Constitution, they also undermine and insult the men and women serving as federal prosecutors who are more than capable of securing child pornography convictions without the assistance of dumbed-down evidentiary standards.

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196 See *Free Speech*, 535 U.S. at 234.
JAMES V. MEOW MEDIA, INC.: WHEN LIFE IMITATING ART GOES AWRY, SHOULD WE SILENCE ITS EXPRESSION?

by Stephen G. Nesbitt*

I. INTRODUCTION

It is a Tuesday morning in early November. All across the country, children will be arriving at school for a routine day of classes. A routine day, that is, except for a small junior high school in the Midwest. What will start out like any other school day will shortly become a day that will forever mark the lives of its students and teachers. On this day, the students will fill the hallways of the school, lined with lockers, to retrieve their books. One thirteen-year-old student, however, will not be removing books from his locker. Instead, he will be removing three pistols and one shotgun. Without a word, he will begin to open fire into the dense crowd of students. He will methodically aim and shoot at any person he sees in front of him. After the crowd has managed to scatter and the smoke has cleared, five students and one teacher will be found dead in the hallway and a dozen others will be wounded.1

What would cause this student, or anyone, to commit such a senseless and cold-blooded act? In the investigation that followed, authorities found various movies and video games containing violent content in the shooter’s possession.2 The young boy’s computer was also seized and investigators discovered that he had visited numerous pornographic websites, containing various sexually suggestive material.3 The shooter himself admitted that his actions were particularly inspired by a school-shooting scene that he had watched in a movie.4

Incredibly, scenarios similar to this one have been played out several times in real life.5 A number of the victims have sought redress from the creators and disseminators of such violent fare based on the theory that their material facilitated the subsequent criminal behavior.6 The First Amendment,7 however,

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1 This hypothetical situation is loosely based on the facts of an actual case. See James v. Meow Media, Inc., 300 F.3d 683, 687 (6th Cir. 2002).

2 Id. at 687-88.

3 Id. at 688.

4 Id.


typically blocks the victims' attempts at recovery in civil lawsuits. Such is the case in *James v. Meow Media, Inc.*, where considerations of the speech protections afforded under the First Amendment led the Sixth Circuit Court of Appeals to determine that the media defendants were not liable to the victims for damages.

This note examines the conflict that arises when the public's safety interests are pitted against the free speech guarantee of the First Amendment and what, if any, solutions exist to resolve this conflict. Part II discusses the judicial background of this controversy with a review of the milestone cases in this area. Part III reviews the facts, the procedural history as well as the holding and rationale of *James v. Meow Media, Inc.* Part IV analyzes the contribution of the decision of the Sixth Circuit Court of Appeals to this controversy as well as other solutions that have been introduced. This note argues any attempts to protect victims or potential victims from acts of violence should avoid infringements on the First Amendment wherever possible, and if the conflict cannot be avoided, the measures taken by our courts and legislatures should be conservative in order to preserve the sanctity of expressive speech.

## II. BACKGROUND

### A. Previous Claims of Harmful Speech Disseminated From Media Defendants

Lawsuits that have charged the creators and disseminators of violent media content with liability are based on a variety of theories from tort law. For example, some complaints have charged the media defendants with negligence, negligence, products liability and aiding and abetting criminal activity on the part of the defendant.

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7 U.S. CONST. amend. I.
8 See Malloy, supra note 6, at 81-82.
9 300 F.3d 683 (6th Cir. 2002).
10 U.S. CONST. amend. I. The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Id. (emphasis added).
11 *James*, 300 F.3d at 701.
12 The First Amendment is incorporated by the Due Process clause of the Fourteenth Amendment and thus applies to the individual states. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925). For the purposes of this note, any reference to the First Amendment includes the Fourteenth Amendment as well.
14 *James II*, 300 F.3d at 695-99.
15 See generally Whittier, supra note 5 (discussing suits that have alleged negligence, products liability and aiding and abetting criminal activity on the part of the defendant).
while others bring claims of products liability. Still other cases allege intentional misconduct. The main theme of these suits seems to be that the viewer's or consumer's criminal or self-destructive behavior was somehow linked to the media representations.

The nature of the communications involved in these suits against media defendants can be broken down into four categories: instruction cases, encouragement cases, inspiration cases and facilitation cases. The plaintiffs claim that the media defendants were negligent in failing to use ordinary care to prevent the content of their message from inciting, encouraging or instructing the viewer or listener to act in a way that causes injury to themselves or to third parties. Similarly, claims of products liability have been asserted against a book publisher, a motion picture producer and a board game manufacturer on the theory that these creators failed to give a warning about the incorrect information or violent content in their products and that failure to warn

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17 See, e.g., James II, 300 F.3d at 687 (alleging that video game cartridges, movie cassettes and internet transmissions were products and the violent content of the movie, games and internet sites of the defendants were product defects).
18 See, e.g., Rice v. Paladin Enter., Inc., 128 F.3d 233, 242-43 (4th Cir. 1997) (charging the defendant with the tort of aiding and abetting in the commission of a contract murder by virtue of providing the contract killer with instructions on how to perpetrate the crime in its hitman instruction book).
20 Whittier, supra note 5. Instruction cases involve speech intended to offer instruction, but causes harm because the activity was dangerous or the instructions were incorrect. Id. at 12.
21 Encouragement cases involve speech that incites a person to act upon its message and thereafter injury is caused because of that person's actions. Id.
22 Inspiration cases involve speech that does not actively encourage but rather inspires a person to imitate a violent or dangerous act or the speech causes a psychological change in the person, which leads them to violence or injury. Id.
23 Facilitation cases involve violence against others, which is facilitated by the information in the speech. Id. at 13.
24 See Zamora v. Columbia Broad. Sys., 480 F. Supp. 199, 200 (S.D. Fla. 1979) (charging the three major television networks with breaching the duty to plaintiff viewer by failing to use ordinary care to prevent the viewer from being "impermissibly stimulated, incited and instigated" to duplicate the atrocities he viewed on television).
26 See Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1034 (9th Cir. 1991) (charging the defendant publisher for the plaintiffs' critical illnesses when they relied on incorrect information found in the publisher's Encyclopedia of Mushrooms).
27 See Winter, supra note 19, at 986.
28 See Winter, 938 F.2d at 1034 (claiming that the incorrect information in the defendant's book was a product, which was subject to strict liability under products liability law).
29 Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1068 (Mass. 1989) (charging the defendant for failing to warn movie exhibitors and public authorities to take safety precautions with regard to film-related violence stemming from their movie and as a result, the plaintiff was stabbed by a patron who was returning from the theater).
30 Watters v. TSR, Inc., 904 F.2d 378, 382 (6th Cir. 1990) (charging the defendant for failing to warn that "Dungeons & Dragons" board game players would become more susceptible to suicide).
was a cause of the subsequent injuries to the plaintiffs.\textsuperscript{31}

Overwhelmingly, these causes of action have failed because courts simply could not find a duty for media defendants to foresee and prevent the harms that were allegedly caused by their materials.\textsuperscript{32} With regard to products liability claims, courts "separate the sense in which the tangible containers of those ideas are products from their communicative element for purposes of strict liability."\textsuperscript{33} The prevalent concern underlying the decisions of courts faced with applying tort liability to media defendants is the First Amendment.\textsuperscript{34}

B. \textit{The Role of the First Amendment\textsuperscript{35} in Determining a Plaintiff's Right to Recover for Speech Causing Harm}

When addressing free speech issues of the First Amendment\textsuperscript{36} in cases where liability is sought to be imposed on the defendant's ideas and messages, courts usually apply the rigid incitement standard set forth in \textit{Brandenburg v. Ohio}\textsuperscript{37} and bar recovery.\textsuperscript{38} In \textit{Brandenburg}, the defendant was a Ku Klux Klan leader who was convicted under the Ohio Criminal Syndicalism Statute for advocating, inter alia, terrorism and violence against groups of minorities.\textsuperscript{39} The Supreme Court of the United States reversed the conviction, stating that the Ohio statute was unconstitutional because it failed to distinguish between speech that advocated violence, which was protected under the First Amendment,\textsuperscript{40} and speech that "prepar[ed] a group for violent action and steeling it to such action," which did not have such protections.\textsuperscript{41} In order to make such a distinction, the Court set out a test which stated that any speech is unprotected if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce

\begin{itemize}
  \item \textsuperscript{31} \textit{Id.} at 379 (charging that defendant "violated a duty to warn that the [board] game could cause psychological harm in fragile-minded children ... "). \textit{See also} Yakubowicz, 536 N.E.2d at 1068 (charging that the defendant failed to warn exhibitors and public authorities of the danger of violence caused by its movie).
  \item \textsuperscript{32} \textit{See}, e.g., \textit{James II}, 300 F.3d 683, 700 (6th Cir. 2002) (stating that "we have determined that the defendants did not owe a duty to protect the decedents"). \textit{See also} Zamora v. Columbia Broad. Sys., 480 F. Supp. 199, 202 (S.D. Fla. 1979) (dismissing the complaint, saying "[a] recognition of the "cause" claimed by the plaintiffs would provide no recognizable standard for the television industry to follow").
  \item \textsuperscript{33} \textit{James II}, 300 F.3d at 701. \textit{See also} Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1036 (9th Cir. 1991) (finding that a "How to Use" book is pure thought and expression, not a physical product).
  \item \textsuperscript{34} \textit{See} Malloy, \textit{supra} note 6, at 81-83 (noting that even speech that advocates or assists criminal behavior is protected under the First Amendment).
  \item \textsuperscript{35} One of the purposes of this note is to discuss the role of the First Amendment in defining the legal duties of the media defendants. Therefore, this note will not further examine the other causes of action claimed by plaintiffs.
  \item \textsuperscript{36} U.S. CONST. amend. I.
  \item \textsuperscript{37} 395 U.S. 444 (1969).
  \item \textsuperscript{38} \textit{See} Brill, \textit{supra} note 19, at 987. \textit{See also} Malloy, \textit{supra} note 6, at 84 (discussing the use of the \textit{Brandenburg} test to protect harm-causing speech from civil liability); Jonathan Seiden, Comment, \textit{Screaming for a Solution: Regulating Hollywood Violence; An Analysis of Legal and Legislative Remedies}, 3 U. PA. J. CONST. L. 1010, 1022-23 (2001) (discussing the \textit{Brandenburg} test and its ramifications on tort liability in mimicry cases).
  \item \textsuperscript{39} \textit{See} \textit{Brandenburg}, 395 U.S. at 444-45.
  \item \textsuperscript{40} U.S. CONST. amend. I.
  \item \textsuperscript{41} \textit{See} \textit{Brandenburg}, 395 U.S. at 448.
such action.” This test therefore has three parts to it: (1) the speech “directs” or intends to cause persons to perform illegal acts; (2) the lawless acts must be “imminent,” and (3) the speech must be “likely” to cause the lawless acts.

Courts have applied this test to lawsuits alleging that the media defendant’s materials caused the plaintiff to injure himself and others, and have generally held that such speech is constitutionally protected. For example, the court in *Yakubowicz v. Paramount Pictures Corp.* held that the defendant’s film, while it contained violent scenes, did not “exhort, urge, entreat, solicit or overtly advocate or encourage unlawful or violent activity on the part of the viewers.” Likewise, in *McCollum v. CBS, Inc.*, the court found that the lyrics and music of Ozzy Osbourne were not “directed and intended toward the goal of bringing about the imminent suicide of listeners” and they were not “likely to produce such a result.”

However, in recent years courts have appeared willing to find that at least some speech may be unprotected under the *Brandenburg* test in two cases. In the principal case, *Rice v. Paladin Enterprises, Inc.*, the Fourth Circuit Court of Appeals held that the publisher of an instruction book for would-be assassins was not insulated from tort liability by the First Amendment where the “speaker—individual or media—acts with the purpose of assisting in the commission of crime . . . where not only the speaker’s dissemination or marketing strategy, but the nature of the speech itself, strongly suggests that the audience both targeted and actually reached is . . . very narrowly confined . . . .” This decision was followed shortly by *Byers v. Edmondson*. In that case, the plaintiffs sued the

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42 Id. at 447.
43 See *James II*, 300 F.3d 683, 698-99 (6th Cir. 2002).
44 See *Malloy*, supra note 6, at 85.
46 Id. at 1071. It is interesting to note that this language used by the court in *Yakubowicz* can be misleading because the mere exhortation or encouragement of unlawful or violent activity is not enough under the *Brandenburg* standard, which requires that the speaker’s message must not only be directed to inciting and producing lawless violence, but the incitement of violence must be “imminent” and the message must be “likely to . . . produce such action.” See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (first and second emphasis added).
48 Id. at 193 (stating that “[a]part from the ‘unintelligible’ lyrics quoted above from ‘Suicide Solution,’ to which John [the decedent] admittedly was not even listening at the time of his death, there is nothing in any of Osbourne’s songs which could be characterized as a command to an immediate suicidal act”).
49 *Brandenburg*, 395 U.S. at 447.
50 See *Seiden*, supra note 38, at 1026.
51 128 F.3d 233 (4th Cir. 1997).
52 U.S. CONST. amend. I.
53 *Rice*, 128 F.3d at 248. See also *Seiden*, supra note 38, at 1027 (discussing the nuances of the *Rice* decision and how that decision fit into the line of adjudications concerning copycat cases). But see Bruce W. Sanford & Bruce D. Brown, *Hit Man’s Miss Hit*, 27 N. KY. L. REV. 69, 78-79 (2000) (criticizing the court in *Rice* for finding intent on the part of the publisher to incite its readers to commit contract killings). A valid point is made that literature is subject to each reader’s conclusion as to what the author intended and by asserting its conclusion of the author’s intent, the *Rice* court precluded other readers the opportunity to draw their own conclusions. *Id.* at 80.
54 712 So. 2d 681 (La. Ct. App. 1998). See also *Seiden*, supra note 38, at 1026 (discussing how the *Byers* decision strengthens the assertion that courts have not been as quick in dismissing mimicry
director and producers of the film "Natural Born Killers,"\textsuperscript{55} claiming that the defendants knew, intended, or should have known the film would cause or incite persons to copy the murders glorified on screen.\textsuperscript{56} The court refused to dismiss the cause of action, stating that the "plaintiffs' allegations of intent [on the part of the defendants] state a cause of action" but "we do not address the issue of whether the [media] defendants may later invoke the protection of the First Amendment guarantee of free speech to bar [plaintiffs'] claim after discovery has taken place."\textsuperscript{57}

In light of this First Amendment controversy, scholars and other interested parties have explored less stringent standards for holding media defendants liable for the alleged results of their messages.\textsuperscript{58} Conversely, other observers have argued that any such liability amounts to censorship and an erosion of free speech.\textsuperscript{59}

As part of its decision to affirm the dismissal of the case, the Sixth Circuit Court of Appeals in \textit{James v. Meow Media, Inc.},\textsuperscript{60} utilized the \textit{Brandenburg}\textsuperscript{61} test in assessing whether the materials created by the defendants were constitutionally protected.\textsuperscript{62} The court held that the "violent material in the video games and 'The Basketball Diaries'\textsuperscript{63} falls well short of"\textsuperscript{64} the requirement that the speech be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."\textsuperscript{65} And so the debate goes on...

III. \textit{JAMES V. MEOW MEDIA, INC.}

A. The Facts

On the morning of December 1, 1997, fourteen-year old Michael Carneal, took six guns to Heath High School in McCracken County, Kentucky.\textsuperscript{66} Carneal waited for a voluntary student prayer session to end before he shot three students to death and wounded five others.\textsuperscript{67}

In the investigations that followed the massacre, authorities learned that

\textsuperscript{55} \textit{NATURAL BORN KILLERS} (Warner Brothers Pictures 1994).
\textsuperscript{56} \textit{Byers}, 712 So. 2d at 685.
\textsuperscript{57} \textit{Id.} at 691.
\textsuperscript{58} See generally \textit{Brill}, supra note 19 (analyzing a negligence standard for liability and concluding that this lower standard would pose a threat to free speech, particularly to unpopular opinions or ideas).
\textsuperscript{59} See generally \textit{Sanford & Brown}, supra note 53 (criticizing the \textit{Rice} decision for imposing liability on a publisher after the court inserted its own conclusion of the publisher's intended message over the privilege of all readers to draw their own conclusions).
\textsuperscript{60} \textit{James II}, 300 F.3d 683 (6th Cir. 2002).
\textsuperscript{62} \textit{James II}, 300 F.3d at 698.
\textsuperscript{63} \textit{THE BASKETBALL DIARIES} (Island Pictures 1995).
\textsuperscript{64} \textit{James II}, 300 F.3d at 698.
\textsuperscript{65} \textit{Brandenburg}, 395 U.S. at 447.
\textsuperscript{66} See \textit{James I}, 90 F. Supp. 2d 798, 800 (W.D. Ky. 2000).
\textsuperscript{67} \textit{Id.}
Carneal was an avid computer user and visited Internet sites containing sexually suggestive and violent material. Carneal also possessed several interactive computer games, which involved the player shooting virtual opponents. Investigators further discovered that Carneal owned the movie, “The Basketball Diaries,” which contained a scene where the high school student protagonist dreams of shooting his teacher and classmates. A psychiatrist for adolescents later concluded that consumption of violent media content influenced Carneal’s actions. She testified that exposure to violence taught Carneal that violence was an appropriate way to resolve conflict.

The plaintiffs in the suit were the parents of the three deceased teens. They filed an action in the United States District Court for the Western District of Kentucky and named as defendants the companies that produced the video games, Internet sites and the movie that Carneal had consumed. Their claims for recovery were based on various theories of negligence and products liability. Among the allegations, the plaintiffs claimed (1) that the Defendants knew or should have known that copycat violence would result from exposure to their materials; (2) that the Defendants knew or should have known that there was an unreasonable risk of influencing minors who were exposed to their materials; and (3) that the Defendants failed to exercise reasonable care to warn consumers about the facts which made their products dangerous.

The United States District Court for the Western District of Kentucky granted the defendants’ motion to dismiss the plaintiffs’ case in James, primarily because the injuries that resulted from the shooting were an unforeseeable result of viewing the defendants’ materials and therefore, the defendants did not owe a duty of care or a duty to warn the plaintiffs.

The court in James refused to base their decision on constitutional grounds because it found that Kentucky law was adequate to resolve the issues before it. However, the court indicated in dictum that it would have found the First Amendment to be a bar to the plaintiffs’ claims, stating the imposition of liability on the defendants “would have a devastatingly broad chilling effect on expression of all forms.”

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68 Id.
69 Id. at 800-01.
70 THE BASKETBALL DIARIES (Island Pictures 1995).
71 See James I, 90 F. Supp. 2d at 800.
72 Id.
73 Id.
74 Id.
75 See James I, 90 F. Supp. 2d at 801.
76 Id. at 801-02.
77 Id. at 819.
78 Id. at 803.
79 Id.
80 Id.
81 Id. at 818.
82 U.S. CONST. amend. I.
83 James I, 90 F. Supp. 2d at 819. The district court noted that just because some people perform atrocities because of the ideas they read, hear, or observe, courts cannot hold the originators of those ideas responsible for others’ acts because “[t]o do so would be to allow the freaks and misfits
B. The Decision of the Sixth Circuit Court of Appeals

In James II, the United States Court of Appeals for the Sixth Circuit also found the defendants owed no duty of care to the plaintiffs because Carneal’s reaction to the defendants’ materials was considered unforeseeable. With regard to the plaintiffs’ claims of products liability, the court held “[t]he video game cartridges, movie cassette, and internet transmissions [were] not sufficiently ‘tangible’ to constitute products in the sense of their communicative content.”

In affirming the dismissal of the plaintiffs’ claims in James I, the Sixth Circuit Court of Appeals did consider First Amendment issues. While the court stopped short of resolving First Amendment concerns, it considered them an additional policy reason for not imposing a duty of care on the movie producers, video game manufacturers and Internet content providers toward the shooting victims. The Sixth Circuit indicated its reluctance to evaluate and regulate speech and suggested that such responsibilities were more properly within the province of the legislative and executive branches of state and federal governments.

Additionally, the court rejected the argument that the violent material in the video games and “The Basketball Diaries” was obscene and, a fortiori, the material did not warrant First Amendment protection. The basis for the court’s rejection was that obscenity jurisdiction applied only to material of a sexual nature and not to excessively violent depictions. The court pointed out that the obscenity doctrine is used to place limits on the extent to which a community’s sensibilities can be shocked by speech and not to protect against behavior that the speech creates.

In so finding, the court did recognize that the materials of the Internet defendants were arguably the type of speech that was excluded from protection by traditional obscenity jurisprudence. The Sixth Circuit Court of Appeals, however, was of the opinion that the obscenity argument was moot because Carneal’s exposure to the sexual content of the defendants’ Internet sites was not a likely cause of his violent actions.

of society to declare what the rest of the country can and cannot read, watch, and hear.” Id.
84 James II, Inc., 300 F.3d 683 (6th Cir. 2002).
85 Id. at 693.
86 Id. at 701.
88 James II, 300 F.3d at 695.
89 Id. at 699.
90 Id. at 697 (stating that the court could not adequately exercise its responsibilities to “evaluate regulations of protected speech . . . that [were] imposed pursuant to a trial for tort liability”).
91 Id.
92 Id.
93 Id. at 698.
94 See James II, 300 F.3d 683, 697-98 (6th Cir. 2002).
95 Id. (noting that Carneal did not try to sexually abuse his victims, only kill them).
Finally, the Sixth Circuit used the Brandenburg\textsuperscript{96} test to determine if the speech of the defendants could incite others to violence and consequently lose its First Amendment protection.\textsuperscript{97} The first prong of the test, requiring intent, was not satisfied because the defendants did not intend to produce violent actions by their consumers.\textsuperscript{98} Likewise, the second prong requiring "imminent lawless action"\textsuperscript{99} was not met because Carneal's violent reaction allegedly resulted only after persistent exposure to the defendants' materials and not as an immediate consequence.\textsuperscript{100} Furthermore, the plaintiffs did not establish the last prong of the test as the court found that Carneal's actions were not foreseeable and therefore, the speech of the defendants was not "likely" to incite violence.\textsuperscript{101}

IV. ANALYSIS

The decision in James II,\textsuperscript{102} to find the defendants not liable for Michael Carneal's actions based on tort law alone\textsuperscript{103} was the correct decision. The court's reluctance to decide the case squarely on the First Amendment issues is understandable considering the controversy surrounding the implications of weighing constitutional rights against legal duties.\textsuperscript{104} Nevertheless, the Sixth Circuit Court of Appeals could not resist the temptation discuss this hot button topic at length.\textsuperscript{105} The Sixth Circuit maintained a conservative approach in its First Amendment analysis by faithfully adhering to precedent.\textsuperscript{106} It cemented the principles expounded in Brandenburg\textsuperscript{107} that speech which advocates violent or criminal activity remains protected unless it can be shown that the speech is "directed to inciting ... imminent lawless action" and the speech "is likely to produce such action."\textsuperscript{108} This author believes the Sixth Circuit Court of Appeals made the correct decision

\textsuperscript{97} See James II, 300 F.3d at 698-99.
\textsuperscript{98} Id. at 698.
\textsuperscript{99} Brandenburg, 395 U.S. at 447.
\textsuperscript{100} James II, 300 F.3d at 698.
\textsuperscript{101} Id. at 699.
\textsuperscript{102} Id. at 699.
\textsuperscript{103} James II, 300 F.3d at 683.
\textsuperscript{104} See id. at 699.
\textsuperscript{105} Id. at 695 (noting that "attaching tort liability to the effect that such ideas have on a criminal actor would raise significant constitutional problems under the First Amendment that ought to be avoided"). The Sixth Circuit was responding to an argument that the defendants' movies, video games and internet materials served as tools for Carneal's criminal actions. Id. at 687. The court noted its concern regarding the attachment of tort liability to the defendants' materials based on the supposed effect that the ideas contained in the materials affected Carneal's behavior. Id. at 695.
\textsuperscript{106} Id. at 695-99. The Sixth Circuit observed that the plaintiffs' claims were not based on the actual cassettes or cartridges distributed by the defendants; instead, the plaintiffs' claims sought to attach liability to the ideas that were communicated to Carneal through those products. Id. at 695. Upon separating the expressive content from the defendants' products, the court's analysis of the plaintiffs' claims shifted to the issue of whether the defendants' expressive content could be constitutionally protected. Id. at 695-96.
\textsuperscript{107} Id. at 698-99.
in utilizing the Brandenburg test in its First Amendment analysis. The Brandenburg test operates to protect free speech by creating a high standard for imputing liability on speech that purports to create illegal activity. This is appropriate since various other factors contribute to an audience’s reaction, making the causal connection too attenuated between the alleged speech in question and the subsequent illegal activity.

The court implied the most appropriate way to simultaneously protect speech and the victims of speech that incites imminent lawless action is to allow the legislature to proscribe measures for demarcating the types of speech to be regulated. This author suggests the court’s solution of legislative involvement may be just as inadequate in managing the concerns of the First Amendment and the safety of the public.

A. The Sixth Circuit Properly Handled the Issues of the First Amendment

The Sixth Circuit Court of Appeals in James wisely confined the discussion of the First Amendment to address only the plaintiffs’ specific allegations. For instance, the court did not purport to give a broad extension of protected speech for video games in general, but rather, the court held video games were protected in the particular manner in which the plaintiffs sought to regulate them through tort liability. Additionally, the Sixth Circuit emphasized the focus of the plaintiffs’ attempt to sanction the defendants’ materials was only concerned with the protection of impressionable children. By placing such restraints on the scope of their discussion, the court effectively limited its findings to the present case and avoided straying into an overly broad assertion of what type of speech the First Amendment should protect.

109 Id.
110 Id.
111 Id.
112 See James II, 300 F.3d 683, 693 (6th Cir. 2002) (acknowledging that “Carneal’s reaction to the games and movies at issue . . . was simply too idiosyncratic to expect the defendants to have anticipated it”).
113 Id. at 696-97. The Sixth Circuit noted that legislatures were “democratically elected,” their regulations were the product of “reasoned deliberation” and their regulations were “outlined in advance” so that speakers were aware of what protective measures they were required to take. Id.
114 James II, 300 F.3d at 683.
115 U.S. CONST. amend I.
116 See James II, 300 F.3d at 695-99. For example, in holding that the First Amendment protects video games in the sense that they communicated a disregard for human life to Carneal, the Sixth Circuit expressed that its decision in this case “should not be interpreted as a broad holding on the protected status of video games, but as a recognition of the particular manner in which [plaintiff] seeks to regulate them through tort liability.” Id. at 696.
117 Id. at 696.
118 Id. The Sixth Circuit observed that the plaintiffs were not merely seeking to hold the defendants liable for the distribution of their materials to just anyone, they were seeking to penalize the defendants for distributing their materials to young, impressionable children – and specifically to Carneal. Id. The court acknowledged that attempts to regulate speech must be “narrowly tailored to [protect] minors from speech that may improperly influence them and not effect an ‘unnecessarily broad suppression of speech’ appropriate for adults.” Id. (citation omitted).
119 U.S. CONST. amend I.
Continuing with the motif of conservatism, the Sixth Circuit diligently followed relevant precedent in reaching its conclusions. It applied the rigid test in *Brandenburg* to determine whether the materials of the defendants incited Michael Carneal to walk into his school and shoot his schoolmates. The use of the *Brandenburg* test was proper in this case because the test gave the Sixth Circuit Court of Appeals a framework for discussing the concerns of freedom of speech as they applied to the liability sought to be imposed on the defendants, and at the same time, the use of the test ensured that the court did not create or confuse standards for governing the content of speech.

Utilizing the test, the Sixth Circuit first found that the defendants did not "intend" for the violent materials in their products to produce violent actions by consumers and thus did not meet the first prong of the test. The court cited *Hess v. Indiana*, a case in which the speaker was an anti-war demonstrator who was convicted for allegedly stirring the protesters into violence while the sheriff and his deputies attempted to clear the street. The Supreme Court of the United States overturned the conviction, stating evidence was required that the speaker "intended" his words to produce violent conduct under the *Brandenburg* incitement test. In following this line of reasoning, the Sixth Circuit appears to be correct in its conclusion when one considers that the plaintiffs in *James I*, never even alleged that the defendants intentionally sought to create violent reactions from their audiences.

Next, the Sixth Circuit found the threat of someone such as Carneal reacting to the violent conduct in the defendants' media was not "imminent" as was required by the *Brandenburg* test. The rationale for this conclusion was that Carneal's reaction to the defendants' materials resulted from the gradual exposure to the defendants' media and this "glacial process of personality development is far from the temporal imminence . . . required to satisfy the *Brandenburg* test." In support of this proposition, the court referenced

120 *James II*, 300 F.3d at 695-99. See also *supra* note 101 and accompanying text.
121 *James II*, 300 F.3d at 698-99.
123 See *James II*, 300 F.3d at 698-99.
124 See *Brandenburg*, 395 U.S. at 447.
125 See Brill, *supra* note 19, at 1024.
126 See *James II*, 300 F.3d at 698.
128 Id. at 107-09 (finding that the defendant's words "We'll take the fucking street later (or again)" could not be punished as having a "tendency to lead to violence" with no evidence that the speech actually intended to produce imminent lawless violence, and therefore it came within the constitutional guarantees of freedom of speech).
129 Id. at 108.
131 *James II*, 300 F.3d at 683.
132 Id. at 688. The plaintiffs alleged only that the defendants were negligent in the distribution of their materials and no claim was made stating that the defendants purposely distributed their materials with the intention of creating violent reactions from their audiences. *Id.*
133 Id. at 698.
135 See *James II*, 300 F.3d at 698.
Ashcroft v. Free Speech Coalition, another United States Supreme Court case following Brandenburg, in which the Court found "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and the imminent illegal conduct." Here, the Sixth Circuit accurately points out a major flaw in the plaintiffs' complaint: it simply ignores other factors that could have caused Carneal to go through with the shooting. In the interest of judicial policy, based in part on the protection of the free speech guarantees of the First Amendment, the court found that Carneal's violent actions were not a reasonably foreseeable result of the defendants' distribution of games, movies and Internet materials.

The Sixth Circuit Court of Appeals reiterated this point when it analyzed the last prong of the test, stating "it is a long leap from the proposition that Carneal's actions were foreseeable to the Brandenburg requirement that the violent content was 'likely' to cause Carneal to behave this way."

The plaintiffs in James attempted to introduce a less stringent standard than the Brandenburg test because they believed the Brandenburg test applied to speech that incited imminent violence, not to speech that merely depicted violence. In fact, other observers have explored different, less rigid standards than the Brandenburg test, such as the negligence standard that is often utilized in cases of defamation. The Sixth Circuit Court of Appeals, however, declined to entertain a different standard and instead elected to follow precedent. Although the court did not opine why the Brandenburg test was

137 Brandenburg, 395 U.S. at 447.
139 See James II, 300 F.3d at 693. The flaw in the plaintiffs' claims is illustrated by the lack of foreseeability that results from predicting that the games, movies and internet sites of the defendants alone or in any combination would incite a young person to violence. Id.
140 U.S. CONST. amend. I.
141 The Sixth Circuit explained that determining the foreseeability of the events resulting from a defendant's conduct is based upon judicial policy. See James II, 300 F.3d at 693. The court went on to find that the First Amendment concerns involving the attachment of tort liability to expression was one policy reason for finding Carneal's reaction to the defendants' materials as being unforeseeable. Id. at 695.
142 Id. at 699.
143 James II, 300 F.3d at 683.
145 Id. at 447.
146 See James II, 300 F.3d at 699. The plaintiffs argued that the Brandenburg test applied "only to political discourse advocating imminent violence" and not to mere "depictions of violence." Id. Following this line of reasoning, the plaintiffs suggested "that the suppression of expression that is not advocacy [of imminent violence], but does tend to inspire violence in its viewers or consumers, is governed by a less stringent standard." Id.
147 Brandenburg, 395 U.S. at 447.
148 See Brill, supra note 19, at 988 (discussing the standard of libel against private parties, which often carries a culpability level of negligence as an alternative to the intent standard set forth in Brandenburg).
149 See James II, 300 F.3d at 699.
exclusively used in cases of expressive speech, there have been several compelling reasons why standards of negligence are not used in cases that are akin to *James II*.\(^{151}\) One reason is that speech in defamation cases involves verifiably false speech which is deemed less valuable for First Amendment purposes, whereas speech that results in mimicry resembles expression of opinion or moral argument, which is considered more valuable under free speech principles.\(^{152}\) This is because opinions and arguments rest on the ideas of their creators.\(^{153}\) Another reason for not using a less stringent standard is to protect the media from excessive liability.\(^{154}\) A major problem resulting from the imputation of liability is the difficulty of predicting which acts of speech will subject the speaker to liability.\(^{155}\) In order to protect themselves, the media would have to engage in substantial self-censorship, this in turn would result in a chilling effect upon speech.\(^{156}\) For reasons like the aforementioned, it seems the Sixth Circuit was correct in maintaining the intent standard that is inherent in the *Brandenburg*\(^{157}\) test and applying it to the speech of the defendants in *James II*,\(^{158}\) which allegedly influenced the violent acts of Michael Carneal.\(^{159}\)

In the big picture, *James II*\(^{160}\) did not significantly contribute to the development of the jurisprudence of *Brandenburg*,\(^{161}\) but this case serves as a good illustration of why the regulation of speech should not be left up to the courts alone.\(^{162}\)

B. *Finding an Appropriate Solution to Govern Speech that Allegedly Causes Violent Action.*

The final two issues that must be addressed in this discussion are (1) determining who or what should be entrusted with finding a solution to resolve the controversy of harm causing speech and (2) more importantly, determining how the problem should be approached.\(^{163}\) The Sixth Circuit, in its opinion in

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\(^{150}\) *Brandenburg*, 395 U.S. at 447.

\(^{151}\) See Brill, *supra* note 19, at 1025 (discussing the differences of the speech involved in libel and negligence actions and why these differences counsel different constitutional standards).

\(^{152}\) *Id.* at 1025-26 (Brandes, J., concurring) (pointing out that one of the goals of the First Amendment is to "discover[ ] and spread . . . political truth . . .") (quoting Whitney v. California, 274 U.S. 357, 375 (1927)).

\(^{153}\) *Id.* at 1025-26 (noting that the Supreme Court stated "there is no such thing as a false idea" (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974))).

\(^{154}\) *Id.* at 1038-39.

\(^{155}\) *Id.* at 1038.

\(^{156}\) *Id.* at 1039 (stating that speakers wishing to avoid liability "participate less fully in cultural discourse that is important to maintaining civil society").


\(^{158}\) *James II*, 300 F.3d 683 (6th Cir. 2002).

\(^{159}\) *Id.* at 699. The court expressed its intent to follow other federal courts that have "demanded that all expression, advocacy or not, meet the *Brandenburg* test before its regulation for its tendency to incite violence is permitted." *Id.*

\(^{160}\) *Id.*

\(^{161}\) *Brandenburg*, 395 U.S. at 444.

\(^{162}\) See Brill, *supra* note 19, at 1038-39 (theorizing that imposing tort liability on media defendants for acts of third parties could result in self-censorship and thereby impinge on free speech rights).

\(^{163}\) See generally Clay Calvert, *Violence, Video Games, and a Voice of Reason: Judge Posner to the*
James II,\textsuperscript{164} acknowledged the inadequacy of the courts as a forum for devising appropriate limitations on speech.\textsuperscript{165} The court felt that legislative or regulatory guidance was necessary because unlike judicial opinions, regulations are “the product of the reasoned deliberation of democratically elected legislative bodies, or at least regulatory agencies exercising authority delegated by such bodies.”\textsuperscript{166} In other words, the limitations that are placed on speech should be introduced by the entities that represent the people.\textsuperscript{167} In the absence of legislative or regulatory guidance, courts are relegated to imposing liability on speech only when there exists a clear intent by the speaker to incite imminent lawless activity and the speech is likely to accomplish such a purpose.\textsuperscript{168}

While legislative bodies may be more competent and democratic than courts for proscribing limitations on speech, their attempts at regulating the content of speech have met First Amendment resistance as well.\textsuperscript{169} Courts and observers alike have challenged the various speech limiting statutes for two common

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\textit{Defense of Kids' Culture and the First Amendment}, 39 \textsc{San Diego L. Rev.} 1 (2002) (noting that current research into violence by children shows that a child is more likely to exhibit aggressive behavior when he is a product of several interacting predisposition factors, such as genetic, perinatal, physiological, familial, and learning factors that enhance violent reactions).

\textsuperscript{164} James II, 300 F.3d at 683.

\textsuperscript{165} Id. at 697. The court emphasized this point by stating “[w]e cannot adequately exercise our responsibilities to evaluate regulations of protected speech . . . that are imposed pursuant to a trial for tort liability. Crucial to the safeguard of strict scrutiny is that we have a clear limitation, articulated in the legislative statute or an administrative regulation, to evaluate.” \textit{Id}.

\textsuperscript{166} Id. at 696-97.

\textsuperscript{167} Id.

\textsuperscript{168} See \textit{Brandenburg v. Ohio}, 395 U.S. 444, 447 (1969). \textit{See also} \textit{Rice v. Paladin Enter., Inc.}, 128 F.3d 233, 243 (4th Cir. 1997) (holding that the defendant’s hitman manual was created for the specific purpose of assisting and encouraging the commission of a contract murder and the defendant was therefore not shielded from liability by the First Amendment); Byers v. Edmondson, 712 So. 2d 681, 687 (La. Ct. App. 1998) (refusing to uphold a dismissal of plaintiffs’ cause of action against the producers of the film “Natural Born Killers” because the plaintiffs alleged that the producers intended to cause its viewers to imitate the violent imagery and if this could be proven, the imposition of a duty would be warranted). \textit{But see} Sanford & Brown, supra note 53, at 78 (stating that “[a]rrming a judge or a jury with a divining rod is not the way to detect the ‘true’ intent of an author or film director”).

\textsuperscript{169} For example, some courts have struck down or enjoined the enforcement of legislation aimed at limiting harm-causing speech. \textit{See generally} American Booksellers Ass’n. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (striking down an Indianapolis ordinance that banned pornography, which the ordinance defined as “graphic, sexually explicit subordination of women,” yet did not prohibit depictions of women in sexual encounters “premised on equality” no matter how sexually explicit). \textit{See also} Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) (striking down a portion of a federal law that banned “virtual” child pornography). The Court ruled in \textit{Free Speech} to sever three unconstitutional provisions of The Child Pornography Prevention Act, which banned virtual child pornography. \textit{Id}. This was warranted because among other things

The Government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor’s unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.

\textit{Id}.
ailments: the statutes are overbroad and the statutes are founded upon faulty rationale.170

Statutes have been considered overbroad when an attempt to regulate a class of speech extends further than is necessary to protect the government’s interests171 or when there exists an attempt to place a given subject matter, such as violence, within the ambit of obscene material,172 a class of speech that does not receive First Amendment protection.173

When a statute is alleged to extend speech regulation farther than necessary, courts apply a strict scrutiny standard to content-based laws and find such laws unconstitutional when they are not “narrowly tailored to promote a compelling Government interest.”174 For example, in Reno v. American Civil Liberties Union,175 a federal statute drafted to prevent minors from being exposed to inappropriate or offensive internet materials was found to be unconstitutionally overbroad, because even though the statute intended to promote a government interest, it “unnecessarily” suppressed speech appropriate for adults.176

With regard to regulating violent materials under obscenity legislation, legislatures fail to observe that the rationale for proscribing obscenity is that such speech is offensive to the audience because the speech “violates community norms concerning the ‘depiction[ ] of sexual or sex-related activity.’”177 The concerns for regulating violent materials, however, do not focus on the offense to the audience, but rather the focus is on the harm to the audience or those who come into contact with an audience member.178 It is this difference of protected interests that compels courts to refuse the expansion of obscene speech to

170 See, e.g., Sanford & Brown, supra note 53, at 74-77 (discussing how inconclusive social science research and mere legislative surmises can lead to laws that endanger free speech); American Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 574, 580 (7th Cir. 2001) (rejecting a city’s attempt to extend obscenity, a class of speech that is unprotected by the First Amendment, to include violent depictions – particularly those depictions contained in video games, which were the subject of an ordinance restricting the access of minors to violent video games), cert. denied, 534 U.S. 994 (2001).


172 See, e.g., Kendrick, 244 F.3d at 574 (enjoining the enforcement of an ordinance that attempted to extend obscenity to include violent depictions); Eclipse Enter., Inc. v. Gulotta, 134 F.3d 63, 67-68 (2d Cir. 1997) (affirming the unconstitutionality of an ordinance that prohibited the sale to minors of trading cards depicting heinous crimes or criminals because among other things, the ordinance was not “narrowly tailored” because the county was attempting to include violent material within the standard for obscenity).

173 Miller v. California, 413 U.S. 15, 23-24 (1973) (holding that obscenity is not protected by the First Amendment and the permissible scope of state statutes that are designed to regulate obscene materials are limited to those materials which depict or describe offensive sexual conduct and “do not have serious literary, artistic, political, or scientific value”).

174 See Playboy Entm’t Group, Inc., 529 U.S. at 813.


176 Id. at 874-75.

177 See Calvert, supra note 160, at 13 (discussing the differences in the rationale of obscenity jurisprudence and regulations regarding violent materials (analyzing American Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572, 574 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001))).

178 Id.
JAMES V. MEOW MEDIA, INC.

encompass violent imagery. Therefore, law-making bodies that attempt to classify violent materials as obscene will see their laws challenged as being invalid for placing overly broad limitations on speech.

Yet another ailment is the flawed rationale of speech-limiting statutes which arises when the legislature bases a statute on inconclusive social science experiments or relies on unfounded community prejudices. Courts have been especially troubled by the use of social science experiments that purport to produce evidence of the harm created by violent media content because these experiments or studies have not shown that viewing violence has actually caused someone to commit a violent act. Exacerbating this flaw is the use of unfounded community prejudices that lack any authoritative or evidentiary support. Courts presented with such evidence find these reasons fail to overcome the high burden of proving that the speech-restricting law protects a compelling public interest and moreover, that the law is narrowly tailored to preserve that public interest.

In light of the shortcomings that affect speech-restricting statutes, other options have been suggested that present a different means to the same end of protecting the public from harm-causing speech. For instance, one observer supported the idea that the entertainment industry itself could monitor its own products and cooperate with the government. The drawback to the entertainment industry or any entity that engages in self-censorship is the risk of the chilling effect such censorship would have on speech. If the responsibility

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179 id.
180 id. at 12-13.
181 See Sanford & Brown, supra note 53, at 74-77 (discussing cases where lawmakers have relied on inconclusive social science research or community sentiments to determine what constitutes "bad speech").
182 See Kendrick, 244 F.3d at 578-79 (finding that the social science experiments offered into evidence failed to show that video games actually caused someone to commit a violent act and the experiments do not suggest that the "interactive character of the games, as opposed to the violence of the images in them . . . is the cause of the aggressive feelings"). See also Eclipse Enter., Inc. v. Gulotta, 134 F.3d 63, 68 (2d Cir. 1997) (finding the absence of any social science study or actual occurrences "where crime trading cards were determined to be a factor in juvenile violence").
183 See Kendrick, 244 F.3d at 579 (finding that the city's claim of harm from violent video games was "at best wildly speculative" and "[t]he ordinance curtails freedom of expression significantly . . . without any offsetting justification . . ."). See also Sanford & Brown, supra note 53, at 76 (discussing the dangers of citizens pushing their local supervisors to pass laws to rid their communities of speech with which they disagree).
184 See, e.g., Gulotta, 134 F.3d at 67-68 (finding "[n]o support in the record... for the conclusion that a prohibition on the sale of crime trading cards is a necessary or effective way to serve the compelling state interests . . . of protecting the psychological well-being of minors and preventing juvenile crime"); Kendrick, 244 F.3d at 579 (finding no evidence was presented to justify the curtailment of freedom of expression).
185 See, e.g., Seiden, supra note 38, at 1035-36 (suggesting federal legislation or media self-regulation of violent movies, music, and games); Calvert, supra note 160, at 27-30 (suggesting local ordinances and school policies be instituted prohibiting violence and "bullying" by children or students).
186 See Seiden, supra note 38, at 1036-37 (recommending that the entertainment industry appoint independent monitors for their self-regulation programs).
187 See Brill, supra note 19, at 1038-41 (discussing the effects of media self-censorship, particularly in light of the unpredictability of an audience's response to the speaker's message).
were placed on speakers to draw limits on speech in order to protect people from harm-causing speech, the speaker would naturally be liable for harm caused by his speech.\footnote{Id.} A chilling effect is created because the speaker is paralyzed in a sense by the unpredictability of determining which acts of speech will cause an audience member to respond with violence.\footnote{Id.} These consequences allude to the conclusion that First Amendment concerns will not be adequately satisfied with the proposed self-censorship solution.\footnote{Id. at 1041. ("The fact that speakers will be unable to foresee when their speech will subject them to liability raises serious First Amendment concerns.").}

The difficulty of balancing the freedom of speech with the concerns of public safety and criminal activity can be daunting, as one can observe from the discussion thus far, but other solutions have been proposed that aim at decreasing violence, particularly youth violence, that do not raise the familiar concerns of the First Amendment.\footnote{Id. at 27-30 (discussing other contributing factors to violence that could be addressed which do not concern the First Amendment).} Instead of endeavoring to limit access to video games or Internet sites, lawmakers could focus on other factors that contribute to aggressive or violent behavior.\footnote{Id. at 27-28 (discussing several variables that possibly influence participation in youth violence).} Some of the possible factors that could be addressed are "bullying behavior in schools, alcohol abuse, the deterioration of public education and the lack of economic opportunity in impoverished areas."\footnote{Id. at 28 n.173 (citation omitted) (stating that no studies have researched the relationship between being bullied and the risk of being involved in more serious violence such as school shootings).} It must be conceded, however, that these factors are similar to media violence in that there is no direct link between any one factor and subsequent acts of violence.\footnote{Id. at 29. See also Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) (finding a school district’s anti-harassment policy unconstitutionally overbroad because it limited speech well beyond the school district’s legitimate interests).} Additionally, the factor of bullying may be just as difficult to regulate as media violence since there are similar First Amendment concerns that are attendant when legislatures seek to limit what may amount to an expressive activity.\footnote{See Calvert, supra note 160, at 27.} The key to the utility of addressing contributing factors to violence that do not relate to issues of free speech, notwithstanding the shortcomings mentioned, is that these factors avoid speech issues entirely.\footnote{See supra text accompanying notes 166-81.}

Upon exploring the solutions to the problem of harm-causing speech in the forms of legislative regulation,\footnote{See supra text accompanying notes 182-86.} self-censorship\footnote{See supra text accompanying notes 187-92.} and regulation of factors which do not bear First Amendment concerns,\footnote{See Calvert, supra note 160, at 27.} this author suggests that First Amendment concerns should be avoided where possible and if courts or legislatures are faced with impairing the freedom to express a particular class of speech, they should adopt a conservative approach and guard against any undue restrictions that may result.
Lawmakers who are concerned with the increased violence in schools should avoid First Amendment controversies that invalidate their laws by thinking outside of the box and shifting their focus to curing other factors of violence such as drug and alcohol abuse or the declining quality of public schools. Inevitably though, legislatures will attempt to limit certain types of speech that are perceived to cause harm to the public and be required to balance the speech interests of the First Amendment against the interests of the public in safety and crime prevention. Lawmakers that endeavor to craft limitations on speech should be cognizant of the pitfalls created by relying on inconclusive social science experiments or mere societal assumptions. Likewise, lawmakers should draft legislation limiting violent content very narrowly in order to target only those types of speech that have no expressive content, or speech that can be shown to have the sole purpose of inciting its audience to perpetrate violent acts. Lawmakers who fail to take these precautions will likely see their laws deemed unconstitutional.

Courts, for their part, should follow the approach taken by the Sixth Circuit Court of Appeals in James II and attempt to resolve tort claims against the media on the principles of tort law alone and thereby avoid the precarious position of balancing constitutional rights and legal duties. If a court must decide between the interests of free speech and a victim's right to recover from harm-causing speech, the court should follow the Brandenburg test to ensure that speech alleged to have caused harm remains protected unless it can be shown that the speaker actually intended to incite imminent lawless activity and that his speech was likely to be successful in pursuit of that purpose. Although the Brandenburg test is conservative and narrow in its scope, the test is effective in protecting speech that would otherwise be quashed by majoritarian biases that tend to support only popular views or expressions while suppressing unconventional messages. At the same time, the culpability requirement of the

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200 See Calvert, supra note 160, at 27-28. The inherent problem that exists is that high profile school shootings and journalistic coverage have given the public strong perceptions that violent media content is blameworthy in influencing youth violence and this heavy scrutiny has prompted lawmakers to react with remedial legislation. Id. at 24.

201 U.S. CONST. amend I.

202 See Calvert, supra note 160, at 30. (“We clearly are not through with legislative efforts to regulate media products... in this country.”).

203 See supra notes 178-81 and accompanying text.

204 See American Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 579-80 (7th Cir. 2001) (suggesting that a more narrowly drawn ordinance that banned video games with no story line or which convincingly simulated real death and mutilation might survive a constitutional challenge).


206 See supra notes 167-70, 179-81 and accompanying text.

207 James II, 300 F.3d 683 (6th Cir. 2002).

208 Id. at 695.

209 Brandenburg, 395 U.S. at 447.

210 Id.

211 Id.

212 See Brill, supra note 19, at 1029-31. The risk of silencing unpopular opinions by majority biases arises when the act of expression is alleged to have created imitative harms. Id. at 1029. A jury that is charged with evaluating the speech on a lesser standard than the Brandenburg standard would employ a risk-utility analysis to the value of the speech and the danger of its harmful
test gives speakers a good measure of predictability as to when their message will subject them to liability, and this predictability is crucial to the prevention of chilling the freedom of speech.  

V. CONCLUSION

In *James II*, the Sixth Circuit correctly handled the First Amendment controversy presented before it. The court adjudicated the plaintiffs' tort claims on the basis of tort law and ultimately avoided attaching tort liability to "the ideas and images conveyed by the video games, the movie, and the internet sites" of the defendants, which would certainly have raised serious First Amendment concerns. Furthermore, the Sixth Circuit's discussion of the issues of free speech as they applied to the particular facts of *James II* was appropriately conservative. The court's adherence to the *Brandenburg* test sets a good example to future courts of how to handle conflicts between the interests of free speech and enabling victims of harm-causing speech to recover for the injuries suffered.

While this case demonstrated a proper approach to resolving First Amendment concerns arising from the attachment of civil liability to forms of expression, *James II* also illustrated the inadequacy of courts in making determinations of proscribable speech. Even legislatures, bodies of democratically elected officials charged with representing their constituents' best interests, have struggled to find an effective solution toward curbing the harms of media violence in a manner that falls within constitutionally acceptable grounds. If *James II* has taught us anything, it is that a solution to this problem must somehow avoid an encroachment on the freedom of speech. If a clash between the interests of our right to safety and our First Amendment right proves inevitable, any proscription of speech must be well reasoned and narrowly tailored to address the compelling governmental interest.

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213 *Id.* at 1031.
214 *Id.* at 1044.
215 *300 F.3d* 683 (6th Cir. 2002).
216 *Id.* at 699.
217 *Id.* at 687.
219 *300 F.3d* 683 (6th Cir. 2002).
220 *Id.* at 697.
221 *See supra* notes 167-69, 173, 175-77 and accompanying text.
222 *300 F.3d* 683 (6th Cir. 2002).
223 *See Brill, supra* note 19, at 1044.
BRANCH MINISTRIES, INC. V. ROSSOTTI: FIRST AMENDMENT CONSIDERATIONS TO LOSS OF TAX EXEMPTION

by Deborah J. Zimmerman*

I. INTRODUCTION

Reverend Wilson, a Baptist minister, sat down to write his Sunday sermon on a warm night in early September. School had recently started, and Reverend Wilson’s three children attended the local public school in the suburbs of a large Southern city. He had just returned from a PTA meeting attended by many members of his congregation. Parents had engaged in a heated debate over proposed new reading texts for the elementary school for next year. Some of the topics discussed in these texts concerned abortion, homosexuality, condom use, and other moral issues that Reverend Wilson opposed because he believed that their sinful nature had a negative impact on young children.

Ron Jenkins, one of the candidates for the school board in the November elections, spoke strongly in favor of these new texts, claiming that even young children need to learn tolerance and multiculturalism. Just as vehement in opposition was Maryanne Hanson, another candidate for the school board. Although she was not a member of the Baptist church, Reverend Wilson knew her through PTA activities and was impressed by her Christian beliefs and lifestyle. Most importantly, although parents could give their opinions about text selection, it was the school board that actually approved books for purchase. Thus inspired, Reverend Wilson began to write his sermon.

I come to you this morning with an important mission for our church. I know that many of you have children in the local school district, and are concerned that secular and sinful influences in the public schools may corrupt their innocent minds. I saw many of you attending last week’s PTA meeting, and you are aware of the filthy material that is included in the proposed elementary textbooks for next year. If we wish to save our children, keep their minds pure, and ensure their salvation, we must make sure that these books never reach the classroom. To this end, we must support Maryanne Hanson in her bid for school board in the November elections. Not only should we vote for this fine Christian woman, but I call upon everyone to come to the church on Tuesday evenings at seven o’clock to organize and assist in her campaign.

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1 This hypothetical is loosely based on factual situations Branch Ministries used to argue that it was selectively prosecuted for engaging in political campaigning. See Branch Ministries, Inc. v. Rossotti, 40 F. Supp. 2d 15, 21-22 (D.D.C. 1999) [hereinafter Branch Ministries 1].
Reverend Wilson may not know that if he delivers this sermon on Sunday he may violate section 501(c)(3) of the Internal Revenue Code (I.R.C.), and in his current agitated state he may not care – until he finds out that these acts could cause the church to lose its tax-exempt status. I.R.C. § 501(c)(3) lists not only types of organizations that are exempt from paying income tax, but also imposes conditions on entities in order to keep their exemptions. One activity the statute specifically states that organizations may not engage in is participating or intervening in any political campaign for any candidate for public office.

Although the Internal Revenue Code provisions prohibiting tax-exempt organizations from participating in political activity have been in effect since 1954, the Internal Revenue Service (IRS) has only revoked the tax-exempt status of one church for violating the political campaigning prohibition. In 2000, the Court of Appeals of the District of Columbia affirmed the trial court’s grant of summary judgment for the IRS in an action to revoke the tax-exempt status of Branch Ministries, Inc. for placing political newspaper advertisements prior to the 1992 presidential election. The church argued that the limitations on political activities violated its right to freely exercise its religion under the First Amendment to the Constitution, but the court of appeals found that the church failed to prove that such conditions substantially burdened their religious beliefs or practice. Similarly, the court dismissed the church’s claim that the revocation interfered with their First Amendment right to free speech.

This casenote discusses the implications of First Amendment guarantees of freedom of speech and free exercise of religion on tax-exempt religious, charitable, or educational organizations. Part II discusses the background of I.R.C. § 501(c)(3) and past cases where the IRS has applied it to revoke tax-exempt status of religious organizations, including cases of private inurement, influencing legislation, and engaging in political campaign activities. Part III

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5 Id.
7 See Branch Ministries I, 40 F. Supp. 2d. 15, 22-23 (D.D.C. 1999). Although the IRS claimed it had revoked the tax-exempt status of two other churches, the plaintiff church distinguished them because one was a “religious radio program” and the other was a religious “group,” not a church. Id.
8 See Branch Ministries, Inc. v. Rossotti, 211 F.3d 137, 145 (D.C. Cir. 2000) [hereinafter Branch Ministries II].
9 See Ablin, supra note 3, at 558.
10 See Branch Ministries II, 211 F.3d at 142.
11 Id. at 144.
12 U.S. CONST. amend. I. The Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Id.
discusses the facts, holding, and rationale of Branch Ministries, focusing on why the Court of Appeals of the District of Columbia upheld the revocation of the church’s tax exemption for its political activities. Part IV analyzes the three problems with the court of appeals decision and suggests three possible solutions to this dilemma. Part V concludes with a discussion of why Congress should consider amending I.R.C. § 501(c)(3).

II. BACKGROUND

To understand the Branch Ministries case, it is important to understand the law regarding the tax-exempt status of charitable institutions. A close examination is needed not only of the current statutory language, but also the history behind legislative changes to the statute. Additionally, prior cases decided by various courts are important in understanding how judicial interpretation of the statute constrained this court’s reasoning. Therefore, this section first discusses the statute; second, provides an overview of the legislative changes; and third, shows how courts have interpreted all three activities that could lead to revocation of an organization’s tax exempt status. Particular emphasis is placed on the First Amendment arguments of the organizations.

A. The Statute

Congress created an exemption from taxation for religious, charitable, educational, and scientific organizations when it created the first income tax statutes in 1913. Over the years, Congress adopted changes to the exemption, producing the current I.R.C. § 501. Most important to churches and other charitable organizations is § 501(c)(3), which lists three activities that could lead to termination of the organization’s tax-exempt status. This code section grants tax exemptions to:

Corporations, and any community chest, fund, or foundation,

13 Branch Ministries II, 211 F.3d 137 (D.C. Cir. 2000).
14 Id.
15 See, e.g., Church of Ethereal Joy v. Commissioner, 83 T.C. 20 (1984) (interpreting § 501(c)(3) to determine if any benefits of the religious entity inured to the individual taxpayer); Christian Echoes Nat’l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972) (interpreting § 501(c)(3) as giving religious groups a choice between engaging in political activities and paying taxes or refraining from such activities and retaining their tax exemption).
18 See Dessingue, supra note 16, at 906.
19 See Ablin, supra note 3, at 547. However, a Congressional report implied that it expected the IRS to use the revocation of a church’s tax exemption as a last resort, and instead only place an excise tax on prohibited expenditures. See Daniel L. Simmons, An Essay on Federal Income Taxation and Campaign Finance Reform, 54 FLA. L. REv. 1, 52-53 (2002).
organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.\footnote{20}

The statute includes three activities which could lead to revocation of tax-exempt status: (1) if any net earnings inure to the benefit of an individual or shareholder; (2) if a substantial part of the organization’s activity is attempting to influence legislation; or (3) if the organization participates in political campaigning.\footnote{21} The third restriction is the one at issue in the \textit{Branch Ministries} case.\footnote{22}

\textbf{B. Legislative Changes to the Statute}

When the statute was first written, the only activity that would revoke an organization’s tax exemption was if income from the entity inured to the benefit of individuals.\footnote{23} The lobbying restriction was added in 1934 by a floor amendment offered by Senator David Reed of Pennsylvania.\footnote{24} Reed explained that he asked for the amendment in order to protect the interests of the contributors who may not approve of their money being used for lobbying activities by the charitable organization.\footnote{25} He admitted, however, that his amendment went further than the Senate Finance Committee wanted to go to protect contributors’ money.\footnote{26}

In 1954, then-Senator Lyndon Johnson of Texas offered a floor amendment to the bill adding the political campaigning constraint to the Internal Revenue Code.\footnote{27} Johnson harbored no animosity against churches or religious groups who participated in the political process.\footnote{28} In fact, Johnson himself used churches to

\begin{thebibliography}{99}
\bibitem{20} I.R.C. § 501(c)(3) (2002).
\bibitem{21} See Ablin, \textit{supra} note 3, at 547-48.
\bibitem{22} See \textit{Branch Ministries II}, 211 F.3d 137, 139 (D.C. Cir. 2000).
\bibitem{23} See Johnson, \textit{supra} note 17, at 880.
\bibitem{24} Id.
\bibitem{25} Id. at 894 n.104.
\bibitem{26} Id.
\bibitem{27} See O’Daniel, \textit{supra} note 6, at 740.
\bibitem{28} Id. at 768.
\end{thebibliography}
support his campaigns. Instead, his private papers indicate he was incensed over nonprofit groups using tax-exempt money to send political literature favoring his opponents. Dudley Dougherty, Johnson's opponent in the 1954 primary, was praised in literature published by two conservative national organizations: (1) Facts Forum and (2) the Committee for Constitutional Government (CCG). However, these organizations earned their tax exemptions as educational institutions, not churches.

Johnson asked Senator John McCormack, the House Democratic Whip, to find out from the IRS commissioner if the Service could do anything about the activities of these groups. A few weeks later, Commissioner T. Coleman Andrews reported that there was very little that could be done under the current prohibitions, which only restricted these groups from influencing legislation.

On July 2, 1954, Johnson offered the amendment to add participation in political campaigns as a third activity that could cause a nonprofit organization to lose its tax exemption. Significantly, neither the Reed nor the Johnson amendments were subjected to congressional hearings because both were offered as floor amendments. This is crucial, because it means that Congress never thoroughly considered the implications of these amendments on nonprofit organizations' First Amendment rights of free exercise of religion and free speech.

C. Adjudications of Restricted Activities Under the Statute

1. Private Inurement

The Internal Revenue Service has litigated other cases over § 501(c)(3), finding that the benefits of the entity inured to private individuals. One of the Service's longest battles was with the Church of Scientology. The Church of Scientology was incorporated as a nonprofit corporation in California in 1954,

29 See Johnson, supra note 17, at 881.
30 See O'Daniel, supra note 6, at 754-58.
31 Id. at 753.
32 Id. at 743, 757.
33 Id. at 763-64.
34 Id. at 764-65.
35 Id. at 740.
36 See Johnson, supra note 17, at 880.
37 Id.
38 See Church of Ethereal Joy v. Commissioner, 83 T.C. 20 (1984) (denying tax exemption because the church operated for the private benefit of the three members of the church board of directors). See also Universal Life Church, Inc. v. Commissioner, 83 T.C. 292 (1984) (finding the church held no regular worship services, had no place of worship, conducted no religious activities, and all members of the church were one family, so it was not entitled to tax exemption); Universal Church of Jesus Christ, Inc. v. Commissioner, T.C.M. (P-H) 1988-65 (1988) (finding that an individual claiming to be an ordained minister established a small church of twenty-two members, but ran a variety of small businesses through the church as separate church departments; IRS denied tax exemption).
and the IRS officially recognized its tax-exempt status in 1957.\textsuperscript{40} The IRS revoked Scientology's tax-exempt status in 1967 because an audit showed that the Scientologists were in business for profit, and some of its earnings inured to private individuals.\textsuperscript{41} However, the Scientologists did not file income tax returns after receiving this letter as required by law, but instead filed only information returns for tax years 1970 through 1972.\textsuperscript{42} The IRS therefore calculated a tax deficiency and imposed penalties on the Scientologists for late filing.\textsuperscript{43}

The Scientologists filed suit in the United States Tax Court in 1978, challenging the IRS assessment.\textsuperscript{44} The Tax Court upheld substantially all the determinations made by the IRS Commissioner, including the penalties.\textsuperscript{45} The Tax Court found that the Scientologists were not entitled to tax-exempt status because their motivation was to make a profit through “fixed donations” for spiritual “auditing” services,\textsuperscript{46} and sales of literature, recordings, and “E-meters” to assess a person’s “spiritual awareness.”\textsuperscript{47} The IRS also produced evidence that “[o]ne of the policy directives of [Scientology] was to ‘MAKE MONEY.’”\textsuperscript{48}

Additionally, the Tax Court found that substantial sums of the Scientologists’ money inured to the founder of the church, L. Ron Hubbard, Hubbard’s family, and OT\textsc{c}, a private non-charitable organization controlled by Scientology officials.\textsuperscript{49} In 1966, Hubbard resigned from his official post as head of the Church of Scientology.\textsuperscript{50} However, he retained significant control over the organization’s policy and finances.\textsuperscript{51} Hubbard and his wife, Mary Sue, were signatories on several Scientology bank accounts, and Hubbard was sole trustee of a large church trust.\textsuperscript{52} Hubbard and his wife also received salaries from the church, as well as ten percent of all royalties from sales of Scientology books, tapes, and E-meters.\textsuperscript{53} Additionally, Hubbard received direct payments from Scientology organizations worldwide equal to ten percent of their net income as compensation for his work in originating the religion.\textsuperscript{54}

Based on this information, the Tax Court revoked Scientology’s tax exemption because the substantial sums Hubbard and his wife received and the Hubbards’ control over significant financial assets of the church constituted inurement of financial benefit to individuals.\textsuperscript{55} On appeal, the Scientologists claimed the IRS violated the church’s right to free exercise of religion under the

\textsuperscript{40} See Church of Scientology of Cal. v. Commissioner, 823 F.2d 1310, 1312 (9th Cir. 1987).
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} See Church of Scientology, 823 F.2d at 1313.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 1314.
\textsuperscript{49} Id. at 1312-13.
\textsuperscript{50} Id. at 1314.
\textsuperscript{51} Id.
\textsuperscript{52} See Church of Scientology, 823 F.2d at 1314.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 1317-19.
First Amendment, citing a pattern of harassment back to the 1950s.\(^{56}\) The Ninth Circuit Court of Appeals rejected this claim, finding that the IRS had legitimate reasons for its audit of Scientology.\(^{57}\) The Ninth Circuit upheld the Tax Court’s ruling, finding that the Hubbards personally received significant financial benefits from the church.\(^{58}\) Since the Tax Court properly revoked Scientology’s tax exemption based on personal inurement, the Ninth Circuit declined to examine whether the organization operated as a for-profit enterprise.\(^{59}\)

2. Influencing Legislation

Courts have also had opportunities to interpret the meaning of the second restricted activity, that of influencing legislation.\(^{60}\) In Taxation With Representation of Washington v. Regan,\(^{61}\) a nonprofit educational organization challenged the lobbying restrictions of I.R.C. § 501(c)(3).\(^{62}\) The organization Taxation With Representation (TWR) posed two arguments against the restriction.\(^{63}\) First, the group claimed that this restriction violated their First Amendment right to free speech.\(^{64}\) Second, TWR claimed that the government violated their Equal Protection rights under the Fifth Amendment\(^{65}\) by preventing TWR and other charitable groups from lobbying, yet allowing veterans groups to lobby for legislation and retain their tax-exempt status.\(^{66}\) It is important to note that veterans groups are not covered by these restrictions because their tax-exempt status is conferred under another section of the tax code.\(^{67}\)

The D.C. Circuit Court reversed the trial court’s summary judgment in favor of the Secretary of the Treasury.\(^{68}\) The court determined that the First Amendment does not compel the government to subsidize an organization’s

56 Id. at 1320.
57 Id.
58 See Church of Scientology, 823 F.2d at 1322.
59 Id. at 1315.
60 See, e.g., Taxation With Representation of Wash. v. Regan, 676 F.2d 715 (D.C. Cir. 1982) [hereinafter Taxation I].
61 Id.
62 Id. at 716-17.
63 Id. at 717.
64 Id. at 716-17.
65 U.S. Const. amend. V. The Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

66 See Taxation I, 676 F.2d at 717.
68 See Taxation I, 676 F.2d at 717.
freedom of speech, and therefore agreed with the trial court's grant of summary judgment on this issue. However, the circuit court found merit to TWR's equal protection claim that veterans groups received more favorable treatment under § 501(c)(19), and remanded the case back to the trial court to determine the appropriate cure for such unequal treatment.

The United States Supreme Court reversed. The Court agreed with the First Amendment analysis, stating "Congress has merely refused to pay for the lobbying out of public monies. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right." However, the Court disagreed with the equal protection analysis, declaring that Congress does have the authority to determine whether or not a given class of organizations may retain their tax-exempt status if they lobby in favor or opposition to legislation.

Interestingly, a challenge to the Catholic Church's tax-exempt status was never adjudicated. In this case, a large number of pro-choice individuals and organizations challenged the Church's tax exemption because it engaged in political lobbying to support pro-life legislation. These parties sought an injunction against the IRS "to enforce the strictures of § 501(c)(3) against the Catholic Church." The plaintiffs claimed they had standing to bring suit under three separate theories, but the Second Circuit Court of Appeals found that none of the named plaintiffs had standing to bring the suit under any of the theories. Although the plaintiffs argued that they had standing under the Establishment Clause, the court could not find an injury or disadvantage to these particular plaintiffs based merely on the Catholic Church's retention of its tax-exempt status. The court, quoting Valley Forge Christian College v. Americans United

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69 Id. at 724.
70 Id. at 726.
71 Id. at 741-42.
72 Id. at 745.
74 Id. at 545.
75 Id. at 550.
76 See In re United States Catholic Conference, 885 F.2d 1020, 1031 (2d Cir. 1989).
77 Id. at 1022.
78 Id.
79 Id. at 1024. The plaintiffs claimed (and were denied) standing as clergy, as taxpayers, and as voters. Id. Although the plaintiffs did not argue the theory, the court also considered (and rejected) a claim of standing based on "competitive advocacy." Id. at 1028-31. By this the court meant that in the political arena, the Catholic Church has an advantage over the plaintiffs because it has the ability to use tax-exempt funds to campaign against abortion, while the plaintiffs, who observe the restrictions of I.R.C. § 501(c)(3), must use taxed dollars in their lobbying efforts. See id. at 1029.
80 Id. at 1031.
81 U.S. Const. amend. I (providing "Congress shall make no law respecting an establishment of religion . . . "). See also Catholic Conference, 885 F.2d at 1024-27 (claiming the government defendants did not apply the tax code equally between the Catholic Church and the plaintiffs and thus, the government was effectively giving a subsidy to the Catholic Church, which amounted to an unconstitutional establishment of religion).
82 See Catholic Conference, 885 F.2d at 1029.
for Separation of Church and State," stated "[a] mere claim that the Government has violated the Establishment Clause does not provide [these plaintiffs] a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." The court therefore dismissed the case on the Catholic Church's motion for summary judgment.

3. Participation in Political Campaigns: Two Prior Cases

There has been less litigation on the prohibition against political campaigning than any of the other restrictions named in I.R.C. § 501(c)(3). The IRS revoked the tax exemption of Christian Echoes National Ministry in 1964, claiming it had not operated exclusively for religious, educational, or charitable purposes, and because it had both engaged in activities aimed at influencing legislation and intervened in political campaigns. The organization's main activities were broadcasting religious radio and television programs, authoring religious publications, and promoting the religious and spiritual welfare of the community, state, and nation.

The IRS became concerned when it discovered that much of Christian Echoes' literature espoused not only Christian beliefs, but also conservative political ideology. The president of the corporation, Dr. Billy James Hargis, was an ordained minister, and his preaching and the articles he wrote or approved for Christian Echoes often had political overtones. Dr. Hargis exhorted followers to work in precinct politics to effect local change, contact their representatives in Washington to encourage elected officials to pass or defeat specified legislation, and work for conservative government policies. The IRS found that these lobbying and campaigning activities were not incidental to the organization, but were instead "substantial and continuous." In court, Christian Echoes argued that the Service's interpretation of §501(c)(3) violated the free exercise clause of the First Amendment. The Tenth Circuit Court of Appeals disagreed, reminding the taxpayer that the tax

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84 Catholic Conference, 885 F.2d at 1026.
85 Id. at 1031.
88 Id. at 853.
89 Id. at 852.
90 Id. There is evidence that the Kennedy administration pressured the IRS into investigating and revoking Christian Echoes' tax exemption because Dr. Hargis criticized many of the administration's policies, and urged voters to elect conservative candidates, including Senator Barry Goldwater (who was then running for president against Kennedy). See Scott W. Putney, The IRC's Prohibition of Political Campaigning by Churches and the Establishment Clause, 64 FLA. B.J. 27, 28 (1990).
91 See Christian Echoes, 470 F.2d at 855.
92 Id.
93 Id.
94 Id. at 856.
95 Id.
exemption is a privilege or an act of legislative grace, not a right. The court opined that revocation of Christian Echoes' tax exemption did not deprive the group of its right to free speech or free exercise, but rather provided them with a choice: either engage in political activities and pay taxes, or refrain from political activities and retain the tax exemption. The court therefore upheld the retroactive revocation of Christian Echoes' tax exemption.

In a similar situation, the IRS revoked the tax exemption of The Way International for its activities in a political campaign. Although The Way initially brought suit in federal court to challenge this determination, the group entered into a settlement with the IRS. The Way conceded their taxable status for tax years before 1983, but regained their tax exemption for tax years after September 1, 1983.

III. BRANCH MINISTRIES, INC. V. ROSSOTTI

A. The Facts

Branch Ministries, Inc., a tax-exempt religious group doing business as the Church at Pierce Creek, was concerned about the outcome of the 1992 presidential election. The Church, located in Binghamton, New York, was disturbed by the character and political ideology of then-Governor Bill Clinton, so it placed advertisements in both the Washington Times and USA Today newspapers four days before the November election. The headline read "Christians Beware" and listed Governor Clinton's positions on abortion, homosexuality, and distribution of condoms to teenagers in public schools. The ad concluded with the question "[h]ow then can we vote for Bill Clinton?" In fine print at the bottom of the advertisement was the following notice:

This advertisement was co-sponsored by the Church at Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted. Make donations to: The Church at Pierce Creek [mailing address].

These advertisements were mentioned at least twice in articles from the New

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96 Id. at 857.
97 See Christian Echoes, 470 F.2d at 857.
98 Id. at 858.
100 Id.
101 Id.
102 Branch Ministries II, 211 F.3d 137 (D.C. Cir. 2000).
103 Branch Ministries I, 40 F. Supp. 2d at 17.
104 See Branch Ministries II, 211 F.3d at 140.
105 Id.
106 See Branch Ministries I, 40 F. Supp. 2d at 17.
107 Branch Ministries II, 211 F.3d at 140.
York Times, and produced hundreds of contributions from individuals across the country.\(^{108}\)

The ads also drew the attention of the Internal Revenue Service.\(^{109}\) The Regional Commissioner notified the Church that he had authorized an inquiry into its possible violations of the Internal Revenue Code.\(^{110}\) The Church denied any wrongdoing and refused to provide the requested information to the IRS.\(^{111}\) The IRS began an examination of the Church, and after two meetings between the parties, the Service revoked the Church’s tax exemption on January 19, 1995.\(^{112}\) Three months later the Church filed suit, which suspended the revocation until the district court entered judgment in the case.\(^{113}\)

The district court rejected the Church’s claims of unconstitutional discrimination based on selective prosecution, free exercise, equal protection, and free speech grounds.\(^{114}\) The court found that the Church failed to provide evidence that it had been stripped of its tax exemption while other churches (with different political views) engaged in political campaigning without loss of tax-exempt status.\(^{115}\)

B. **Holding and Rationale of Branch Ministries, Inc. v. Rossotti\(^{116}\)**

On appeal, the Church first argued that the IRS could not revoke its tax exemption under § 501(c)(3) unless the IRS first determined that the organization was not a bona fide church.\(^{117}\) The Church claimed that the Church Audit Procedures Act\(^{118}\) prohibited the IRS from revoking an organization’s tax exemption unless the IRS finds that the church is a sham.\(^{119}\) The court of appeals rejected this argument, stating that the evidence showed the Church violated the requirements of § 501(c)(3), which required specified tax-exempt entities to refrain from all political campaigning activities.\(^{120}\) It did not restrict loss of tax exemptions to organizations which were not churches.\(^{121}\)

Second, the Church claimed that revocation of its tax exemption violated its right to freely exercise its religion.\(^{122}\) The Church pointed to both the First Amendment Establishment Clause\(^{123}\) and provisions in the Religious Freedom Restoration Act\(^{124}\) to show it could no longer meet its mission of spiritual

\(^{108}\) See id.
\(^{109}\) Id.
\(^{110}\) Id.
\(^{111}\) Id.
\(^{112}\) Id.
\(^{113}\) See Branch Ministries II, 211 F.3d at 140.
\(^{115}\) Id. at 21-22.
\(^{116}\) See Branch Ministries II, 211 F.3d at 137.
\(^{117}\) Id. at 141.
\(^{119}\) See Branch Ministries II, 211 F.3d at 141.
\(^{120}\) Id. at 141-42.
\(^{121}\) Id. at 141.
\(^{122}\) Id. at 142.
\(^{123}\) U.S. CONST. amend I.
guidance without its tax exemption. The court of appeals reminded the Church that it had to show that the government's actions placed "a substantial burden on the observation of a central religious belief or practice." The court noted that the Church never claimed that a withdrawal from political activities would violate core religious beliefs.

However, the Church argued that a loss of the tax exemption would threaten its existence, and therefore its religious mission. The court stated that this argument assumed that withdrawal of the Church's tax exemption was in itself an unconstitutional burden on the free exercise right. The court found that this produced such a burden only if the denial of the exemption is conditioned upon conduct "proscribed by a religious faith" or "mandated by religious belief." The Church argued that the prohibition in § 501(c)(3) operated as an unconstitutional coercion, requiring an adherent to the faith to modify his actions and violate his beliefs. However, the court pointed out that there are alternate, albeit complicated, steps to legally carry out the Church's political activities. The Church could form a related civic organization under § 501(c)(4), which in turn could form a political action committee (PAC) under § 501(h). The court of appeals therefore determined that the Church failed to demonstrate that the requirements of I.R.C. § 501(c)(3) substantially burdened its free exercise of religion.

Third, the Church claimed that the IRS violated its free speech rights under the First Amendment by "engaging in viewpoint discrimination." However, the court dismissed this argument, stating the restrictions imposed by the Internal Revenue Code were not discriminatory because they were viewpoint neutral. The statute forbids religious organizations from engaging in political activity in favor of any candidate or party.

The fourth argument made by the Church was that they were selectively targeted to lose their tax exemption because of the Service's political bias against their religious beliefs, and this discrimination was an unconstitutional violation of their equal protection rights. The court determined that the Church had to show that the IRS did not prosecute other similarly situated organizations of different religious or political beliefs for the same behavior. The Church

125 See Branch Ministries II, 211 F.3d at 142.
126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
131 See Branch Ministries II, 211 F.3d at 142.
132 Id. at 143.
133 Id.
134 Id. at 144.
135 U.S. CONST. amend. I.
136 See Branch Ministries II, 211 F.3d at 144.
137 Id.
138 Id.
139 Id.
140 Id.
provided examples of political candidates such as Bill Clinton, Mario Cuomo, Rudolph Giuliani, and Jesse Jackson, all who frequently delivered campaign speeches to church congregations from church pulpits. The court rejected this argument because the Church did not prove that it was “similarly situated” to any of those other churches, since none of the other situations involved groups placing political advertisements in newspapers and requesting donations to cover the costs of the ads.

IV. ANALYSIS

Although the outcome of Branch Ministries was technically correct based on the current wording of § 501(c)(3), the statute suffers from three problems that lead to questions as to its constitutionality under the First Amendment. First, a complete prohibition on political speech by churches may violate constitutional free speech guarantees. Second, it is virtually impossible to completely separate religious from political expression, impinging on the free exercise right. Third, although the statute provides a way for churches to engage in political expression, this structure may prove unduly burdensome on protected free exercise rights.

A. The Violation of Free Speech Guarantees for Churches

A review of cases heard by courts regarding religion and political speech may cause people to think that most Americans do not believe in God and prefer churches to avoid political speech. However, the Supreme Court has recognized that Americans are generally “a religious people whose institutions presuppose a Supreme Being.” In fact, a 1996 study by the Pew Research

Center for People and the Press discovered that the majority of Americans believe that "churches should speak out on social and political issues." This is in contrast to public opinion in the 1960s, when there was a greater belief in separation between church and state. Although the First Amendment prohibits the government from establishing a religion and from interfering with free exercise of religion, the First Amendment does not limit the ability of religious groups or entities from attempting to influence the government.

Religious and political discourse is the center of the First Amendment right to free speech. Examples from the Framers of the Constitution show a preference for protecting religious speech, even in political contexts. For instance, although a religious group attacked Thomas Jefferson in a pamphlet during his presidential campaign, he did not decry this as unwarranted interference in political campaigning. Similarly, James Madison declared, "[t]here is not a shadow of a right in the general [federal] government to intermeddle with religion . . . . This subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it." Additionally, the federal government has never before attempted to punish churches for political activism, including churches' involvement in political issues such as slavery, prohibition, and civil rights.

It is surprising then, in view of the great deference to freedom of speech for churches allowed in the constitution and verified separately by the Framers, that the constitutionality of § 501(c)(3) has rarely been questioned. Even Branch Ministries advanced only a limited free speech claim, instead focusing on the free exercise portion of their First Amendment argument. Indeed, the D.C. Circuit

Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

Id. at 219.

See id.

Id. at 225.

U.S. Const. amend. 1.

See Voyles, supra note 149, at 225-26 (noting the long tradition of churches' participation in political issues such as promoting laws against gambling, prostitution, and child labor, and endorsing women's suffrage, civil rights, labor unionization, and welfare laws).

See Johnson, supra note 17, at 876. The Supreme Court in Roth v. United States, 354 U.S. 476, 484 (1957), stated that the First Amendment grants the most protection to political expression in order to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

See Voyles, supra note 149, at 229-30 (describing Jefferson's belief that the Constitution placed exercise of religious freedoms beyond the powers of the Federal government).

Id. at 227-28.

Id. at 229.

Id.

See Johnson, supra note 17, at 882. See also Lee, supra note 146, at 416 (noting that the constant activities of religious organizations raised public awareness, and brought about the end of slavery and the passage of Civil Rights legislation).

See Chisolm, supra note 144, at 319 (noting that in many of the cases litigated over § 501(c)(3), the defendants did not even make an argument that this provision violated the constitutional guarantee of free speech, preferring to focus on allegations that it violated free exercise of religion).

See Branch Ministries II, 211 F.3d 137, 144 (D.C. Cir. 2000). Similarly, in Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 852 (10th Cir. 1972), a religious group operating a Christian radio broadcast only made a limited claim that § 501(c)(3) violated its right to free speech. See Chisolm, supra note 144, at 319.
Court merely pointed out to the Church that there was no “viewpoint discrimination” because the statute prohibited intervention in all campaigns, regardless of the candidate’s views on the issues.\textsuperscript{163} This analysis missed the point, because the true issue was whether the statute imposed an unconstitutional condition on the church by preventing the church from exercising its right to engage in free speech, even on political issues, in order to retain its tax exemption.\textsuperscript{164} Indeed, the Supreme Court opined that the First Amendment protects political speech most broadly in order “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”\textsuperscript{165} Churches that engage in political speech should not be an exception to this rule.\textsuperscript{166}

B. Religious Expression vs. Political Expression

Congress originally granted churches tax exemptions based on the general belief that churches were essential in providing charitable relief to the poor.\textsuperscript{167} The reasoning was simple: if churches were exempt from taxes, they would have more money to provide services to the indigent.\textsuperscript{168} Congress, therefore, did not base the exemption out of respect for religious organizations, but rather because of the social utility of exempting charities.\textsuperscript{169} Although churches are no longer the sole source of aid to the poor, the tax exemption remains.\textsuperscript{170}

The economic impact of a tax exemption is the same as if the government provided a cash subsidy in the amount of the entity’s tax liability.\textsuperscript{171} Additionally, churches and other charitable organizations receive tax-deductible donations from individuals, which economically are equivalent to “matching grants.”\textsuperscript{172} In prohibiting political campaign activities by organizations listed in § 501(c)(3), the law prevents taxpayers from indirectly supporting the political views of a small group of people.\textsuperscript{173} Thus, the government’s purpose for placing these restrictions on § 501(c)(3) organizations is to protect a person’s right not to

\begin{itemize}
  \item \textsuperscript{163} See Branch Ministries II, 211 F.3d at 144.
  \item \textsuperscript{164} See Chisolm, supra note 144, at 320.
  \item \textsuperscript{165} See Voyles, supra note 149, at 232 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
  \item \textsuperscript{166} Id.
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} \textit{Id.}
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{171} See Michael Yaffa, The Revocation of Tax Exemptions and Tax Deductions for Donations to 501(c)(3) Organizations on Statutory and Constitutional Grounds, 30 UCLA L. REV. 156, 179 (1982).
  \item \textsuperscript{172} \textit{Id.} at 179-80. \textit{See also Taxation II, 461 U.S. 540, 544 (1983) (noting “[b]oth tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system.”).}
  \item \textsuperscript{173} See Johnson, supra note 17, at 890 (observing that if a church uses tax-exempt funds to promote a political position, all taxpayers would subsidize the views expressed by the religious organization because individuals would have to pay more in taxes in order to bring in the same amount of revenue, instead of the church paying tax on its income).
\end{itemize}
pay for political views with which they disagree. The prohibition on churches’ involvement in political activities therefore has a valid purpose. It is understandable that the government would not want tax-exempt churches to use tax-deductible donations to pay for political campaigning purposes.

The Church at Pierce Creek argued that the IRS violated its right to freely exercise its religion under both the First Amendment and the Religious Freedom Restoration Act. The D.C. Circuit Court dismissed these contentions with a meager discussion of whether the Church’s free exercise right had been substantially burdened. The court determined that the applicable rule was whether the governmental action “placed a substantial burden on the observation of a central religious belief or practice.” The court missed the issue by observing that “the Church does not maintain that a withdrawal from electoral politics would violate its beliefs.” The proper issue in this case was whether these moral concerns were central to their religious beliefs. Although the newspaper ad was political in nature because of its implications to the presidential campaign, the issues leading to this conclusion were of a decidedly moral character: abortion, homosexuality, and premarital sex. The court blithely dismissed the free exercise argument, rather than discussing the issue and providing guidance as to where religious beliefs end and where politics begin.

Religion and political activism have long been firmly entwined. Churches have played central roles in such political struggles as slavery, prohibition, and civil rights. As a current example, a number of political watchdog groups have accused the Catholic Church of violating § 501(c)(3) over its political activities regarding abortion, but the Church does not consider abortion to be a political

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174 Id. at 890-91.
175 See Clarke et al., supra note 143, at 567.
176 See Ablin, supra note 3, at 566. When Congress amended I.R.C. § 501(c)(3) in 1987 to add the phrase “in opposition to,” it stated that the reason for having the prohibition on political campaigning was to keep the U.S. Treasury Department neutral in politics. See Putney, supra note 90, at 28.
177 See Branch Ministries II, 211 F.3d 137, 142 (D.C. Cir. 2000).
178 Id. See also Taxation II, 461 U.S. 540, 549 (1983) (noting “[w]e have held in several contexts that a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe [on that] right . . .”).
179 See Branch Ministries II, 211 F.3d at 142.
180 Id.
181 See Lee, supra note 146, at 401.
183 See Clarke et al., supra note 143, at 564 (observing that the D.C. Circuit Court dismissed the free exercise claim by noting that the church’s withdrawal from involvement in “electoral politics” would not violate its central religious beliefs or practices).
184 See Johnson, supra note 17, at 882. People who hold strong convictions will act upon those convictions, and religious convictions are often the most strongly held type of beliefs. See Lee, supra note 146, at 397. Sometimes those actions intersect with politics. Id. at 407. However, if a law penalizes a person for acting on core religious convictions, the law should be found unconstitutional unless it is the least restrictive means of furthering the governmental interest. Id. at 409.
185 See Johnson, supra note 17, at 882.
issue.\textsuperscript{187} The Church has opposed the practice on moral grounds for nearly two thousand years.\textsuperscript{188} In the near future, churches and religious groups are likely to play important societal roles in moral and political issues such as capital punishment,\textsuperscript{189} pornography,\textsuperscript{190} and rejecting the “Culture of Death.”\textsuperscript{191}

Arguably, it should be the province of individual churches to determine what constitutes religious, as opposed to political speech.\textsuperscript{192} This belief was articulated by a minister in Congressional hearings when he said “[t]he First Amendment . . . should not permit the state to tell the church when it is being ‘religious’ and when it is not. The church must be permitted to define its own goals in society in terms of the imperatives of its religious faith.”\textsuperscript{193} Justice Souter agreed with this position in a graduation-prayer case before the Supreme Court when he said “I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible” than “comparative theology.”\textsuperscript{194} It may be that religion’s obligation “to speak truth to power”\textsuperscript{195} may be more valuable to society than being a source for charitable or benevolent aid.\textsuperscript{196}

C. The Statute Places a Burden on Free Exercise

Because of the prevalence of political activism by churches, courts have devised several tests to determine if legislation unduly burdens the free exercise of religion.\textsuperscript{197} The most notable is a three-part test to determine the

\begin{footnotesize}
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  \item[187] Id. at 170.
  \item[188] See Putney, supra note 90, at 30.
  \item[189] See Johnson, supra note 17, at 882.
  \item[190] See Lee, supra note 146, at 411.
  \item[192] In his Encyclical Letter, \textit{Evangelium Vitae}, the Pope calls on members of the Church to work to change these attitudes in a variety of ways, including through “social activity and commitment in the political field.” Id.
  \item[193] See Garnett, supra note 148, at 777-77. Some religious groups believe that the tenets of their faith mandate an involvement in politics. See Clarke et al., supra note 143, at 564-65. But see Lee, supra note 146, at 399 (noting that Americans United for Separation of Church and State threatened to file a complaint with the IRS if the Catholic Church published voter guides to inform people on each candidate’s stand on issues of interest to the faith).
  \item[194] See Garnett, supra note 148, at 777. This principle applies to other laws besides tax statutes. See, e.g., Sherbert v. Verner, 374 U.S. 398, 399 (1963) (finding that a South Carolina unemployment law violated a woman’s religious freedoms by denying her unemployment benefits even though her religion forbid her to work on the Sabbath and she consequently refused work at several establishments that offered her jobs).
  \item[195] See Garnett, supra note 148, at 795 (quoting Lee v. Weisman, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring)).
  \item[196] See Lee, supra note 146, at 408.
  \item[197] See Garnett, supra note 148, at 779.
\end{itemize}
\end{footnotesize}
constitutionality of a law under the Establishment Clause, known as the Lemon test. Under this test, the court must first determine if the statute has a secular purpose. Second, the principal effect of the statute must be one that neither promotes nor hinders religion. Third, the statute must not foster “excessive government entanglement with religion.” In general, if the law fails any one of the three prongs of this test, a court may consider it unconstitutional.

Although § 501(c)(3) passes the first prong of this test, it arguably fails the second and third prongs. Applying the first prong, the statute has the valid secular purpose of preventing churches from obtaining a tax benefit to promote a political agenda that individual taxpayers may oppose. However, the statute may hinder religious expression under the second prong of the test, because when it forbids political campaigning, it may impermissibly restrict the moral issues churches may discuss if the issues impact a political campaign. The D.C. Circuit Court did not directly apply the Lemon test; instead, it avoided this question by determining that the issue was whether the church’s religious beliefs included a requirement that the church engage in electoral politics, ignoring the moral implications. The D.C. Circuit Court reminded the Church at Pierce Creek that although it could not create its own political action committee (PAC), the church could first form an entity under § 501(c)(4), which then in turn could form a third entity to operate as a PAC and engage in political campaigning. The court neglected the question of whether this requirement to form three separate entities in order to exercise the Church’s First Amendment rights was an impermissible hindrance on religious expression by itself.

Employing the third prong of the Lemon test, the statute fosters an excessive entanglement with religion by allowing the Internal Revenue Service and courts to determine what constitutes political, as opposed to religious, expression. The IRS recently issued a publication reiterating the complete ban on political campaign activity and providing guidance in the form of hypothetical situations to show the types of activities that might result in a church losing its tax exempt status. However, if Congress requires the IRS to monitor compliance with

198 U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”).
200 See Putney, supra note 90, at 28.
201 Id.
202 Id.
203 Id.
204 See Clarke et al., supra note 143, at 565.
205 Id. at 567.
206 See Johnson, supra note 17, at 890.
207 See Clarke et al., supra note 143, at 564.
208 See Branch Ministries II, 211 F.3d 137, 142 (D.C. Cir. 2000).
209 Id. at 143.
210 See Clarke et al., supra note 143, at 565.
211 See Garnett, supra note 148, at 775-76 (noting that § 501(c)(3) allows the government to tell churches that expressions of their faith and evangelistic call are actually “propaganda” or political “campaigning”).
212 I.R.S. Tax Guide for Churches and Religious Organizations, Pub. 1828, No. 21096G (July 2002). According to the examples in this publication, Reverend Wilson in the hypothetical posed
§501(c)(3), that practice conjures up the unwelcome specter of undercover IRS agents attending church services and evaluating church political activities on a regular basis.\(^{213}\) If this scenario occurs, "the cure . . . [will be] worse than the disease."\(^{214}\)

Within the last decade, the Supreme Court justices have attempted to formulate other standards to assess the constitutionality of statutes, and the Lemon test has fallen into disfavor.\(^{215}\) Justice O'Connor now favors the endorsement standard, which would invalidate a statute if it entailed endorsement or disapproval of religion in the eyes of an objective observer.\(^{216}\) Under this test, § 501(c)(3) could be interpreted as disapproving of religion because it prevents churches from expressing their opinions regarding moral issues because these issues may also have political implications.\(^{217}\)

Other justices have supported a coercion test, although there are two different suggested standards for this test.\(^{218}\) Under the first interpretation, a coercive statute would require individuals to participate in religious exercises or force them to support religious organizations.\(^{219}\) The second interpretation would entail finding evidence of psychological coercion, such as peer pressure, to participate in religious activities in schools or the workplace.\(^{220}\) Recent decisions by the Supreme Court appear to use a flexible approach, assessing constitutionality by whichever test or tests are appropriate in a given case.\(^{221}\) The coercion test is more difficult to apply to § 501(c)(3), because the statute does not apply psychological coercion, nor does it force any person or group to engage in religious activity.\(^{222}\) However, because the code forbids all political campaigning at the beginning of this case note did engage in prohibited campaigning activities, and his church could lose its tax exempt status if the IRS found out about his actions and decided to pursue the issue. See id.\(^{213}\) See Lee, supra note 146, at 404.\(^{214}\) See McCarthy, supra note 197, at 128-29.\(^{215}\) See Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). In a case over whether a city's Christmas crèche display was unconstitutional, Justice O'Connor suggested that the true analysis should be whether the display constituted the city's endorsement of Christianity over other religions. Id.\(^{216}\) See Clarke et al., supra note 143, at 564-65.\(^{217}\) See McCarthy, supra note 197, at 129-30.\(^{218}\) County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 659 (1989) (Kennedy, White & Scalia, JJ., concurring in part and dissenting in part). Justice Kennedy argued that a decision over the constitutionality of a county's crèche and menorah holiday display should be decided based on whether or not the government furthered religious interests through coercion. Id.\(^{219}\) See Lee v. Weisman, 505 U.S. 577, 592-93 (1992). Justice Kennedy's majority opinion in this public school graduation prayer case indicated that coercion by the government occurred because of peer pressure from other students to participate in prayer at the ceremony. Id.\(^{220}\) See McCarthy, supra note 197, at 130. See also Lynch v. Donnelly, 465 U.S. 668, 678-79 (1984) (discussing some of the factors the court considered when deciding an Establishment Clause case, then stating, "[i]n each case, the inquiry calls for line drawing; no fixed, per se rule can be framed."). Cf. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ( likening the Lemon test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ").\(^{221}\) See Donnelly, 465 U.S. at 678-79 (discussing the court's unwillingness to be restricted to one test for determining the constitutionality of statutes and indicating different analyses may be relevant to different cases).
by churches at the risk of losing a valuable tax exemption, the statute may coerce churches into abandoning their right to take a firm public stand on issues with both moral and political implications.\footnote{See Lee, supra note 146, at 409.}

If a court determines that a statute has placed a substantial burden on religion, the next inquiry is whether “it is in furtherance of a compelling government interest” that justifies the burden.\footnote{See Thomas C. Berg, What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act, 39 VILL. L. REV. 1, 18 (1994) (quoting 42 U.S.C. § 2000bb-(2)(a)(1) (1994)).} If so, the statute must be “the least restrictive means of furthering that . . . interest.”\footnote{Id.} In light of the requirement that churches must form two additional entities in order to carry out political activity, § 501(c)(3) may not be the least restrictive method available to further governmental interest.\footnote{See Clarke et al., supra note 143, at 565. Compare Jason M. Sneed, Note, Regaining Their Political Voices: The Religious Freedom Restoration Act’s Promise of Delivering Churches from the Section 501(c)(3) Restrictions on Lobbying and Campaigning, 13 J.L. & POL. 493, 507 (1997) (suggesting less restrictive means of limiting political speech by churches as (1) regulating political expenditures only when they relate to a clearly identified candidate, (2) not allowing religious speech by a member of the congregation to be imputed to the church itself, and (3) allowing churches to keep separate political funds that are not tax exempt nor funded with deductible donations), with Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (upholding the revocation of a religious university’s tax-exempt status because of a school policy forbidding interracial dating, finding that the revocation was the least restrictive means of enforcing the compelling governmental interest in “eradicating racial discrimination in education . . . “).}

D. Suggested Solutions to the First Amendment Concerns

There are at least three suggested options that limit, but do not prohibit, church campaign activities.\footnote{See Ablin, supra note 3, at 583.} First, the IRS could apply federal election disclosure rules, which allow some political activity as long as it does not explicitly endorse or oppose a candidate.\footnote{Id. at 583-84. Federal election disclosure rules do not require organizations to disclose how much money the group spent on political advertising unless the advertisement specifically said “Vote for (name of candidate).” Id.} Second, the IRS could allow some church participation in political campaigns, as long as the campaign activity did not comprise a “substantial part” of the church’s activities.\footnote{Id. at 584.} Third, a proposal by Representatives Philip Crane of Illinois and Charles Rangel of New York, would amend § 501(c)(3) to allow churches to spend up to five percent of their gross income on political campaign activities.\footnote{Id. at 585.} It is interesting to note that the House of Representatives rejected a bill in October 2002 that would have removed all campaign restrictions in § 501(c)(3) for all named entities.\footnote{See Walter Jones, House Refuses to Ease Tax Rules on Religious Leaders and Politics; Religious Groups Lose Tax-Exempt Status if They Engage in Political Work, ST. LOUIS POST-DISPATCH, Oct. 3, 2002, at A9, available at 2002 WL 2588605.}
1. Federal Disclosure Rules: Issues, Not Candidates

Federal Election Commission (FEC) rules govern political campaign financial disclosures, and organizations that “speak out” on behalf of a “clearly identified” candidate must disclose the amounts spent on such advocacy.232 In a recent case, the Fourth Circuit found that a Christian advocacy group that ran a television ad indirectly criticizing Bill Clinton’s “pro-homosexual agenda” did not violate campaign disclosure rules.234 Because the group did not explicitly say such things as “don’t vote for Clinton,” the Court decided not to burden the group’s First Amendment rights unless there was “express advocacy.”235 Therefore, the group was not required to report those expenditures to the FEC.236

However, this court was applying federal election rules, not the Internal Revenue Code.237 Had this organization been a tax-exempt church, it probably would have lost its tax exemption.238 If Congress amended § 501(c)(3) to allow named entities to engage in this type of indirect political expression, churches would have an outlet for their political speech as long as they did not specifically endorse a candidate.239 Under these rules and the Fourth Circuit’s “express advocacy” standard, Branch Ministries might have been allowed to run their ads which indirectly asked “[h]ow then can we vote for Bill Clinton?”240

Now return to Reverend Wilson’s situation from the introductory hypothetical in this note.241 Even under the relaxed express advocacy standard, Reverend Wilson’s sermon and the organized campaign assistance from the church would still violate an amended § 501(c)(3), because these acts would constitute express advocacy for Maryanne Hanson by overtly urging the election of a specific candidate.242 However, under this standard, the church could publish leaflets or other materials discussing the moral issues raised by the selection of school textbooks, and do a comparison of the candidates showing where each stood on these issues.243 As long as none of these materials directly endorsed Ms. Hanson, the prohibition of “express advocacy” would allow these church activities.244 Churches, however, may oppose this standard precisely because they could not specifically endorse or oppose any specific candidates.245

Others might disapprove of this standard because it allows churches too

232 See Ablin, supra note 3, at 583.
234 See Ablin, supra note 3, at 583.
235 See Federal Election Comm’n, 110 F.3d at 1064.
236 Id.
237 See Ablin, supra note 3, at 583-84.
238 Id.
239 Id.
241 See infra pp. 1-2.
242 See Ablin, supra note 3, at 578-79.
243 Id. at 584.
244 Id.
245 See Chisolm, supra note 144, at 318 (suggesting that charitable organizations are not likely to engage in any activity short of express advocacy because they would not receive contributions or “foundation support”).
much involvement in political campaigning. The separation of church and state is a valid reason for maintaining the current ban on church campaign activities. Allowing churches to maintain tax exemptions, yet expend untaxed dollars to promote political agendas may be seen as governmental sponsorship of religious activity. This argument may not hold up if challenged in court, because property tax exemptions were given to churches even in the early history of the United States, and were not opposed by Framers such as Thomas Jefferson and James Madison.

2. Campaigning that is not a “Substantial Part” of Church Activities

A second proposed amendment to § 501(c)(3) would allow churches to engage in political campaigning as long as such campaigning did not comprise a “substantial part” of church activities. Section 501(c)(3) already includes the “substantial part” language in its limitations on lobbying. The difficulty here is in defining “substantial part.” However, § 501(h) provides some guidance as to what is considered a “substantial part.” It refers to I.R.C. § 4911, which imposes an excise tax on excess expenditures by tax exempt groups to influence legislation. Under § 4911(c), the maximum amount an eligible entity may spend on lobbying is twenty percent of the amount the organization spends on tax-exempt purposes.

A simple amendment by Congress to include churches as qualified entities under § 501(h) would allow the IRS to apply these existing limitations to determine if a church engaged in substantial campaigning activities. More importantly, the church would only be required to pay an excise tax on expenditures over this amount, instead of losing its tax exemption if it violated

246 See Ablin, supra note 3, at 584.
247 See Christian Echoes Nat'l Ministry v. United States, 470 F.2d 849, 857 (10th Cir. 1973). This court concluded that I.R.C. § 501(c)(3) was constitutionally valid and First Amendment freedoms could only be restrained when the government was protecting “an overwhelming and compelling Governmental interest: That of guarantying that the wall separating church and state remain high and firm.” Id.
248 See Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970). The Court noted that the Framers of the Constitution viewed establishment of a religion as “sponsorship, financial support, and active involvement of the sovereign in religious activity.” Id. (emphasis added).
249 Id. at 684-85.
250 See Ablin, supra note 3, at 584.
251 I.R.C. § 501(c)(3) (2002). The specific language allows the tax exemption as long as “no substantial part of the [entity’s] activities of which is carrying on propaganda, or otherwise attempting, to influence legislation...” Id.
252 See Ablin, supra note 3, at 584.
253 I.R.C. § 501(h) (2002). This section provides: “In the case of an organization to which this subsection applies, exemption from taxation under subsection (a) shall be denied because a substantial part of the activities of such organization consists of carrying on propaganda, or otherwise attempting, to influence legislation...” Id.
254 I.R.C. § 4911(a) (2002). The excise tax is equal to twenty-five percent of the excess amounts spent by an organization under the § 501(h) election. Id.
255 Id. The percentage ratchets down incrementally as the exempt purpose expenditures of the entity increase, with a maximum lobbying nontaxable amount of $1 million. Id.
these guidelines. This statutory amendment could provide a simple solution that would not require additional IRS regulations.

Applying this standard to Reverend Wilson and his church, the sermon and proposed campaign activities would not violate the restrictions in § 4911 unless the expenditures for Ms. Hanson’s campaign exceeded twenty percent of the church’s total spending on tax-exempt purposes, assuming the church’s total budget was less than $500,000. It is unlikely that a small, independent congregation would spend $100,000 or more on political campaign activities, so Reverend Wilson’s church should be able to retain its tax exemption under this proposal.

However, if Congress had really wanted churches to have the ability to engage in some campaign activities, it would have done so when it passed § 501(h) by including churches as qualified organizations. Separation of church and state and the policy of not having taxpayers subsidize political expression by churches are two reasons Congress would not want to extend the “substantial part” exception to churches. However, not all churches share the same views, and allowing all churches to engage in some political activities virtually ensures that an individual’s own beliefs will be espoused by some church.

3. Crane-Rangel: The Five Percent Solution

The final suggested solution is similar to a 1996 proposal by Representatives Philip Crane of Illinois and Charles Rangel of New York to amend § 501(c)(3) to allow churches to spend up to five percent of their gross revenues on electioneering. Their proposal only included churches, not other charitable organizations covered under § 501(c)(3). This proposal would allow churches to engage in some political activities without jeopardizing their tax-exempt

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257 See Kim Bouchillon, Guiding Lobbying Charities Into a Safe Harbor: Final Section 501(H) and 4911 Regulations Set Limits for Tax-Exempt Organizations, 61 Miss. L.J. 157, 163 (1991) (pointing out that under the Internal Revenue Code, organizations covered by § 501(h) and related § 4911 that violate the expenditure limits only need pay a twenty-five percent excise tax on excess expenditures, rather than lose their tax exemption).

258 See I.R.C. § 4911(c)(2) (2002). This section contains income limitations and changes in expenditure percentages for political activities. Id.

259 See Simmons, supra note 19, at 111 (noting that the Senate Finance Committee discussion of § 501(c)(3) organizations expressed an expectation that these entities would form campaign advocacy groups under I.R.C. § 527, which would allow the groups to avoid financial disclosure rules as long as they maintained a segregated fund for these activities).

260 See McCarthy, supra note 197, at 126.

261 See Johnson, supra note 17, at 890. In 1987, when amendments were proposed to § 501(c)(3), the House Ways and Means Committee issued a report to Congress stating that the “prohibition on political campaign activities ... by charities reflects a Congressional policy that the U.S. Treasury should be neutral in political affairs.” See Voyles, supra note 149, at 235.

262 See Johnson, supra note 17, at 892-93 (noting that there are more than 50,000 organizations qualified as tax-exempt under § 501(c)(3), and these organizations are not “politically homogeneous,” representing the vast spectrum of ideas and beliefs from conservative to liberal).

263 See Ablin, supra note 3, at 585. The Crane-Rangel bill failed to garner sufficient support to pass the legislation, and was defeated. See Dessingue, supra note 16, at 927-28.

264 See Ablin, supra note 3, at 585.
This appears to be the most reasonable and workable of the proposals, because it permits churches to engage in moral discussions of political issues by creating a bright-line de minimis exception for all churches. Additionally, it would be easy for the church to prove that its expenditures did not exceed the five percent threshold, simply by requiring churches to file the Form 990 that other charitable organizations use to report their lobbying and political activity expenditures. Under this proposal, most churches would be able to publicly address moral issues without worrying about the political implications. The only additional burden on a church would be the filing of an annual information report to the IRS showing that their expenditures were less than the limits, which seems a better match to the “least restrictive means” requirement.

Under this proposal, Reverend Wilson and his church could engage in a variety of campaign activities on behalf of Ms. Hanson, as long as the church’s expenditures did not exceed five percent of its gross income for the year. It would be unlikely that a small, individual church could afford to spend much money on such a campaign. Perhaps they would be more inclined to engage in less costly campaign activities such as door-to-door literature distribution or assisting in telephone campaigns rather than spending money on advertising.

On the other hand, for large, well-organized churches, such as the Catholic Church, the five percent limitation would still allow the church to spend a significant sum on political issues such as abortion without fear of defending itself against a lawsuit or IRS probe. Politically active churches that currently openly defy regulations and churches that take great pains to avoid violations of §501(c)(3) would both benefit from such changes.

There will always be some persons or groups that would oppose this legislation for many of the reasons already mentioned: separation of church and state, not wanting to subsidize churches’ political ideology, and Congress’ current opposition to allowing churches to get involved in political campaigns.

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265 Id.
266 Id. at 586.
267 See Simmons, supra note 19, at 69.
268 See Capetanakis, supra note 186, at 193 (suggesting guidelines on the appropriate level of lobbying activities would allow tax-exempt organizations to be confident that their particular activities would not threaten their tax-exempt status).
269 See Berg, supra note 224, at 18.
270 See Ablin, supra note 3, at 585.
271 See generally id. at 585-86 (pointing out that churches would be permitted to electioneer in any manner of their choosing, so long as they do not spend more than five percent of their gross revenues on lobbying and political activities).
272 Id.
273 See Capetanakis, supra note 186, at 193.
274 See Johnson, supra note 17, at 885-86. See also Dessingue, supra note 16, at 928-29 (noting the occurrence of violations of § 501 (c)(3) due to its perceived nonenforcement while other churches avoid legitimate involvement in policy issues for fear of IRS reprisals).
275 See Dessingue, supra note 16, at 916.
276 See Chisolm, supra note 144, at 323.
277 See Dessingue, supra note 16, at 927-28. Dessingue also theorizes that allowing churches to engage in partisan political campaigning may cause churches to compromise their beliefs and thereby lose their independence and integrity. Id. at 925-26.
However, as discussed above, the current law may violate both the free speech and free exercise clauses of the First Amendment by unduly burdening churches' ability to speak on moral issues when they implicate political campaign activities. This clearly defined, bright-line proposal would give churches back these freedoms without unduly burdening society with unlimited tax benefits to religious groups.

V. CONCLUSION

Although a tax exemption is a "privilege," Congress does have precedents for allowing some groups, such as veterans organizations, to engage in political campaigns and lobbying activities while maintaining their tax exemptions. Congress should to take a close look at § 501(c)(3), as this provision may allow the government to do indirectly what it cannot do directly – place restrictions on First Amendment freedoms by imposing unconstitutional conditions on the receipt of tax benefits. Churches and religious organizations, such as in Branch Ministries, should be allowed to engage in a de minimis amount of political activity without penalty, because the high cost of any violation is a complete loss of the organization's tax exemption.

Out of the three suggested solutions, the easiest and most reasonable proposal seems to be allowing churches a maximum expenditure of five percent of their gross income on campaign activities. Many churches would probably not spend much money on electioneering, but if a moral issue with political implications arises, churches should have the option to take part in the political discourse. No solution is perfect, and there are valid reasons not to grant churches the right to engage in any amount of political activity. However, the freedom of churches to speak on political, as well as moral issues, and exercise the freedom to witness this aspect of their faith, are compelling arguments supported by Constitutional rights.

Free exercise of religion and freedom of speech were such important values to the Founding Fathers that they were included in the First Amendment. Although Congress has wide latitude to grant tax exemptions and place conditions upon receipt of tax benefits, the thing Congress cannot do is condition

278 See Chisolm, supra note 144, at 320 (discussing the concern regarding the subsidization of political advocacy by taxpayers who disagree with a tax-exempt organization's view and finding such a concern to be a justifiable reason for regulating the political advocacy of such groups).
279 See Johnson, supra note 17, at 890.
280 See Putney, supra note 90, at 28.
282 See Chisolm, supra note 144, at 321.
283 Branch Ministries II, 211 F.3d 137 (D.C. Cir. 2000).
284 See Dessingue, supra note 16, at 916 (noting that the "wall of separation" between church and state is often used as a reason to prohibit church political involvement). See also Chisolm, supra note 144, at 323 (stating that in Cammarano v. United States, 358 U.S. 498, 513 (1959), the Supreme Court denied a business deduction for lobbying expenses because individuals should bear these expenses themselves, and not expect other taxpayers to subsidize their free speech rights).
285 See Voyles, supra note 149, at 230-32.
286 U.S. CONST. amend I.
receipt of a tax benefit on an organization’s willingness to give up constitutionally guaranteed freedoms. Enactment of any one of these three proposals would allow churches to fully exercise their rights under the First Amendment.

See McCarthy, supra note 197, at 128-30 (discussing various tests aimed at determining and preventing laws which abridge the Establishment Clause).
CANDIDATES' SPEECH IN JUDICIAL ELECTIONS ACCORDING TO REPUBLICAN PARTY OF MINNESOTA V. WHITE: IS THERE A BETTER WAY?

by Rainbow Forbes*

I. INTRODUCTION

Imagine you are a prominent attorney that has decided to run for judicial office. After filing the necessary papers, you are declared a candidate for your state’s next judicial election. Interested in your position on key legal issues, a local reporter calls to ask for a comment on a hot political topic that is expected to come before the very bench of which you are striving to become a member. Knowing this will be an essential element in voters’ selection of their candidate, you give your political opinion. Unknown to you is your state’s Code of Judicial Conduct, which reads “a candidate for a judicial office, including an incumbent judge: shall not . . . announce his or her views on disputed legal or political issues.”1 As a lawyer, you are subject to disbarment, suspension, and probation for violation of this “announce clause.”2 Essentially, you are banned from giving your legal view on an issue while running for judicial office even though you could have stated your opinion before becoming a candidate and after you have attained that judicial office.3

If your state happened to be Minnesota, this very Code of Judicial Conduct governed judicial elections.4 The United States District Court for the District of Minnesota upheld this canon and declared it did not violate a judicial candidate’s First Amendment rights to free speech.5 The Eighth Circuit Court of Appeals affirmed this decision by applying the strict-scrutiny test and holding that two interests are sufficiently compelling to justify the announce clause: 1) preserving the impartiality of the state judiciary and 2) preserving the appearance of the impartiality of the state judiciary.6 Certiorari was granted by the Supreme Court, and in June, the Court held in a five-to-four decision that Minnesota’s Code of Judicial Conduct violated an individual’s First Amendment rights by prohibiting a judicial candidate from speaking on legal and political issues that could come

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1 See MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000). This canon is based on the MINN. CODE OF JUDICIAL CONDUCT. Id.

2 See MINN. RULES OF PROF'L CONDUCT 8.4(a). See also MINN. RULES ON LAWYERS PROF'L RESPONSIBILITY 8-14, 15(a) (2002). This punishment is based on Minnesota’s Rules of Professional Conduct. Id.

3 See Republican Party of Minn. v. White, 122 S. Ct. 2528, 2537 (2002). This case has not yet been published in the official U.S. Court Reporter; however, it will be published at 536 U.S. 765.


5 See Republican Party of Minn. v. Kelly 63 F. Supp. 2d 967, 986 (D. Minn. 1998). Hereinafter referred to as Kelly I.

6 See Republican Party of Minn. v. Kelly, 247 F.3d 854, 867 (8th Cir. 2001). Hereinafter referred to as Kelly II.
before them while in office.\textsuperscript{7}

This note examines the standard of judicial speech that is allowed to protect the impartiality of a state judiciary. Section II surveys the First Amendment and the history of the state judicial elections focusing on various states’ judicial canons that govern a candidate’s speech. This section will also include the specific facts of \textit{Republican Party of Minnesota v. White}.\textsuperscript{8} Section III will state and explain the Supreme Court’s majority opinion as well as the concurring and dissenting opinions that follow it. Section IV gives an analysis of the Court’s opinion and proposes that states should adopt an appointive system similar to the one in federal courts to avoid freedom of speech issues in judicial elections while protecting the impartiality of a state judiciary. Section V concludes this note.

II. BACKGROUND

A. Judicial Elections – Past and Present

Currently, thirty-nine states use a judicial election system for their appellate courts, general jurisdiction trial courts, or both.\textsuperscript{9} However, this has not always been the case; initially states did not use popular elections to select judges.\textsuperscript{10} Georgia, in 1812, instituted a process that other states adopted during Jacksonian democracy to increase public control of office and by the Civil War most states had moved to such a system.\textsuperscript{11} During these elections, there were no restrictions on judicial candidates’ speech and most elections were partisan.\textsuperscript{12} Due to party affiliations, elected judicial officials began to be considered corrupt and the process started to lose support.\textsuperscript{13}

To restore respect for the judiciary, several states adopted the Missouri Plan in which a nonpartisan nominating commission gives an elected official a list of nominees, then that official appoints a judge who later runs in an unopposed retention election.\textsuperscript{14} Today, fifteen states use this method of judicial election for at least some offices.\textsuperscript{15}

Popular election is still used by thirty-one states to select part of their

\textsuperscript{7} See \textit{White}, 122 S. Ct. at 2528-42.
\textsuperscript{8} \textit{Id} at 2528-59.
\textsuperscript{9} \textit{Id} at 2543 (O’Connor, J., concurring) (citing AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2002)).
\textsuperscript{10} \textit{Id}. (citing Steven P. Croley, \textit{The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law}, 62 U. CHI. L. REV. 689, 716 (1995)).
\textsuperscript{12} \textit{Id}. (citing Berkson, supra note 11, at 176-77). See also MARVIN COMISKY & PHILLIP PATTERSON, \textit{THE JUDICIARY – SELECTION, COMPENSATION, ETHICS, & DISCIPLINE} 4, 7 (1987) (explaining the movement toward nonpartisan elections).
\textsuperscript{13} See \textit{White}, 122 S. Ct. at 2543 (O’Connor, J., concurring) (citing Croley, supra note 10, at 723).
\textsuperscript{14} \textit{Id}. (citing Croley, \textit{supra} note 10, at 724).
\textsuperscript{15} \textit{Id}. at 2543-44 (citing Croley, \textit{supra} note 10, at 725-26 and AMERICAN JUDICATURE SOCIETY, \textit{supra} note 9).
judiciary with re-elections used afterwards. The use of partisan and nonpartisan elections is closely divided in these states. Other states that do not employ such a system rely on the federal example where the executive branch nominates an individual and the legislature confirms that person.

Minnesota, since its initial Constitution, has elected all of its state judges by popular election, and furthermore, in 1912, such elections were deemed nonpartisan.

B. Codes of Judicial Conduct

In 1924, the American Bar Association (ABA) established the first Code of Judicial Conduct which contained an early version of the "announce clause" that read: "[a] candidate for judicial position . . . should not announce in advance his conclusions of law on disputed issues to secure class support." Originally, the canon did not gain widespread support, and as of today there is not total acceptance throughout the United States. The ABA Canons were adopted by forty-three states.

Over the years there have been two major revisions in the ABA Canons. The first occurred in 1972 when the ABA instituted the Model Code of Judicial Conduct. Minnesota’s adoption of the announce clause was based on Canon 7B(1)(c) that stated “a candidate for a judicial office, including an incumbent judge,” shall not “announce his or her views on disputed legal or political issues.” Consequences for judges upon violation of this clause include removal, censure, civil penalties, and suspension without pay, while lawyers who violate the clause may be suspended, disbarred, or put on probation. After a challenge over whether the 1972 ABA Model Canon 7B(1)(c) violated the First Amendment, the ABA in 1990 replaced the clause with Canon 5(A)(3)(d)(ii), the

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16 Id. at 2544 (citing Croley, supra note 10, at 725-26 and AMERICAN JUDICATURE SOCIETY, supra note 9).
17 Id.
18 Id. (citing Croley, supra note 10, at 725).
19 Id. (citing White, 122 S. Ct. at 2531 (citing MINN. CONST. Art. VI § 7)).
20 Id. (citing Act of June 19, 1912, ch. 2, 1912 Minn. Laws Spec. Sess. 4-6).
21 Id. at 2540 (quoting ABA CANON OF JUDICIAL ETHICS 30 (1924)).
22 Id. at 2540-41 (citing AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2002) (stating the majority of states have adopted either the announce clause or its 1990 ABA successor)).
24 See ABA MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972). See also ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990) (changing the canon to the “commitments clause” which prevents a candidate from making “statements that commit or appear to commit the candidate with respect to the cases, controversies or issues that are likely to come before the court”).
25 See MODEL CODE OF JUDICIAL CONDUCT Canon 7B(1)(c) (1972).
26 See White, 122 S. Ct. at 2531 (citing MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).
27 Id. (citing MINN. RULES OF BOARD ON JUDICIAL STANDARDS 4(a)(6), 11(d) (2002)).
"commitments clause," which forbids a judicial candidate from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Even though Minnesota has revised its Code of Judicial Conduct in accordance with the other 1990 ABA Canons, Minnesota refused to adopt the language in regard to the announce clause.

C. The First Amendment and Previous Announce Clause Cases

The First Amendment as quoted from the United States Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." This Amendment has come in direct conflict with states’ Judicial Codes of Conduct that contain an announce clause restricting a candidate's speech. The constitutionality of the clause has been challenged in both state and federal courts.

In Stretton v. Disciplinary Board of Supreme Court of Pennsylvania, the United States Third Circuit Court of Appeals upheld Pennsylvania's Code of Judicial Conduct. The Court of Appeals adopted a narrow construction of the announce clause so that it would be tailored to fit the state's interest in promoting judicial integrity under the strict scrutiny test. The same rationale emphasizing a narrow construction was used to hold canons in Ohio and Washington constitutional.

In contrast, other courts began to question the limits of the announce clause.

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31 U.S. Const. amend. I.
32 See Stretton v. Disciplinary Bd. of Sup. Ct. of Pa., 944 F.2d 137, 138 (3d Cir. 1991). See also Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993) (holding the announce clause was unconstitutional because it was vague and overly broad); J.C.I.D. v. R.J.C.R., 803 S.W.2d 953, 957 (Ky. 1990) (deciding that Kentucky’s announce canon violates free speech rights of judicial candidates); In re Kaiser, 759 P.2d 392, 400 (Wash. 1988) (finding the canon constitutional under a narrow construction).
33 See cases cited supra note 32.
34 See Stretton, 944 F.2d at 137.
35 Id. at 138.
36 Id. at 144.
38 See In re Kaiser, 759 P.2d at 400.
39 See supra notes 37-38.
The Seventh Circuit Court of Appeals was faced with the constitutionality of the Illinois rule that prohibited candidates from announcing their views on disputed legal and political issues. The Seventh Circuit Court of Appeals, unlike the Third Circuit Court of Appeals, did not limit the clause and instead held it vague and overly broad in violation of the First Amendment. Various federal courts in Alabama, Georgia, Arkansas, and Florida refused to enforce announce clauses also finding them unconstitutional. Moreover, state courts in Michigan, Alabama, and Kentucky ruled the announce clause a violation of the First Amendment. Contrasting interpretations in federal and state courts made the constitutionality of the announce clause a ripe issue for the Supreme Court.

D. Facts of Republican Party of Minnesota v. White

George Wersal became a candidate for associate justice of the Minnesota Supreme Court in 1996. He, along with his wife and committee members, announced his membership in the Republican Party and his favor of a strict construction of the Constitution at Party gatherings. Furthermore, he passed out literature criticizing certain Minnesota Supreme Court decisions involving crime, welfare, and abortion during his campaign. Also, Wersal tried to solicit an endorsement from the Republican Party. The Minnesota Lawyers Professional Responsibility Board received a complaint about Wersal to its agency that investigates and prosecutes ethical violations of lawyer candidates for judicial office. Alleged violations included his attendance at Republican gatherings, his campaign committee’s solicitation of partisan support, and his campaign materials that criticized Minnesota’s Supreme Court decisions. Dismissing the complaint, the agency questioned whether the announce clause would be constitutional).

41 See Buckley, 997 F.2d at 225 (quoting Ill. S. Ct. R. 67 (B)(1)(c)).
43 See Buckley, 997 F.2d at 231.
44 See Pittman, 117 F. Supp. 2d at 1316.
48 See supra notes 44-47.
52 See supra notes 49-51.
53 See, e.g., Republican Party of Minn. v. White, 122 S. Ct. 2528, 2531 (2002) (stating that the Supreme Court granted certiorari in order to decide whether or not Minnesota’s announce clause was constitutional, thereby recognizing the issue as being ripe for the Court’s review).
54 Id. at 2528.
55 See id. at 2531.
56 See Kelly II, 247 F.3d 854, 858 (8th Cir. 2001).
57 Id.
58 Id.
59 See White, 122 S. Ct. at 2531.
60 See Kelly II, 247 F.3d at 858.
Wersal decided to withdraw from the election over such concerns.\textsuperscript{61} In 1998 another position became available on the Minnesota Supreme Court, and Wersal decided to make a second attempt at the office.\textsuperscript{62} Fearing a reoccurrence of similar problems, he asked for an advisory opinion from the Lawyers Board questioning whether they were going to enforce the announce clause.\textsuperscript{63} The Board stated that they could not rule on the issue because Wersal had not included a list of announcements that he wished to make; however, they did express their doubts as to the constitutionality of the announce clause.\textsuperscript{64}

Wersal filed suit in federal district court in Minnesota asking for an injunction against the enforcement of the announce clause and a declaration that it violated the First Amendment.\textsuperscript{65} He claimed that he was forced not to answer questions by the press and public out of concern for violating this clause.\textsuperscript{66} Furthermore, the Republican Party stated they were unable to learn of Wersal’s views and support him in the election.\textsuperscript{67} The district court of Minnesota held the announce clause was not a violation of the First Amendment under a narrow interpretation that limited it to comments on issues likely to come before the candidate’s court.\textsuperscript{68} The district court felt the clause was tailored to serve a state’s interest in restriction of judicial candidates’ speech to maintain the integrity of the judiciary, and it was not overly vague.\textsuperscript{69} In a two-to-one vote, the Eighth Circuit Court of Appeals upheld the district court’s opinion based on a similar rationale.\textsuperscript{70} The Supreme Court granted certiorari to issue a final ruling on whether the announce clause violated a judicial candidate’s First Amendment rights.\textsuperscript{71}

III. COURT’S REASONING

A. Majority Opinion by Justice Scalia\textsuperscript{72}

Justice Scalia, writing for the majority, began his analysis by establishing a clear meaning of the announce clause and the scope in which the Court planned to rule on its constitutionality.\textsuperscript{73} After addressing various limitations on the

\textsuperscript{61} See White, 122 S. Ct. at 2531.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 2531-32.
\textsuperscript{64} Id. at 2532.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} See White, 122 S. Ct. at 2532.
\textsuperscript{68} Id.
\textsuperscript{69} See Kelly I, 63 F. Supp. 2d 967, 983-86 (D. Minn. 1998).
\textsuperscript{70} Id.
\textsuperscript{71} See Kelly II, 247 F.3d 854, 867 (8th Cir. 2001).
\textsuperscript{72} See White, 122 S. Ct. at 2528.
\textsuperscript{73} Id. at 2531. Justice Scalia wrote the opinion for the Court in which Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Thomas joined. Id. at 2530. Justices O’Connor and Kennedy filed concurring opinions. Id. at 2530.
\textsuperscript{74} Id. at 2532.
clause, the Supreme Court interpreted the announce clause to prohibit a judicial candidate from giving his personal opinion on any legal question that may come before his court except for stating his views on past decisions as long as he does not say he will contradict stare decisis. The majority acknowledges the announce clause's inevitable association with the "pledges and promises clause" which prohibits a candidate from promising to perform a certain way once elected. However, the Court refused to rule on this issue, limiting the question of constitutionality to the announce clause.

In the next section, the majority accepted the Eighth Circuit Court of Appeals' statement in regard to the announce clause, which said the clause "prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms' - speech about the qualifications of candidates for public office." The Court agreed with the Eighth Circuit Court of Appeals in applying the strict scrutiny test in which it has to be proven that the announce clause is 1) narrowly tailored to serve 2) a compelling state interest to be constitutional. The majority looked to the Eighth Circuit Court of Appeals' holding which established two interests that justified the announce clause: 1) preserving the impartiality of the state judiciary and 2) preserving the appearance of the impartiality of the state judiciary. Justice Scalia expressed his concerns about determining the constitutionality of the announce clause without a clear definition of impartiality which had not been defined by either side or the lower courts.

The Court developed three possible meanings for impartiality. The first definition listed was the general meaning, "the lack of bias for or against either party to the proceeding" which guaranteed equal application of the law. Under this definition, the announce clause was not narrowly tailored because instead of restricting speech against parties, it restricted speech on issues.

Thus, the majority turned to a second possible meaning for impartiality, "lack of preconception in favor or against a particular legal view." This definition differed from the former in that it focused on parties receiving an equal opportunity to be heard and to persuade the court in their favor. The majority felt this definition of impartiality did not meet the requirement of a compelling state interest. They expanded this idea by stating the lack of a judge's predisposition on an issue is not essential for equal justice, and furthermore it
would be difficult to find any judicial candidate that did not have personal views on the law.\textsuperscript{88} Instead, the Court held that it is more desirable to have judges that have views on legal issues because this is expected over a legal career and such views do not demonstrate a bias.\textsuperscript{89} The majority stated that pretending these views do not exist to promote this meaning of impartiality cannot be a compelling state interest.\textsuperscript{90}

Finally, the Court entered its last definition for impartiality, open-mindedness.\textsuperscript{91} This interpretation of the word was concerned with a judge’s ability to listen and fairly evaluate arguments that might oppose his preconceived views.\textsuperscript{92} The Court did not address the issue of whether this type of impartiality was a compelling state interest because they did not think Minnesota’s Supreme Court adopted the announce clause for this purpose.\textsuperscript{93} The majority dismissed the respondent’s arguments that open-mindedness helps a judge to escape pressure to decide cases in support of his previous statements.\textsuperscript{94} Judges commit themselves to legal issues before being elected either through judicial campaigning or expressing opinions while on the bench, in a class, in a book, or in a speech.\textsuperscript{95} All of these are in conflict with the idea of open-mindedness as impartiality.\textsuperscript{96} Furthermore, they went on to evaluate open-mindedness in the context of judicial elections.\textsuperscript{97} The Court reasoned that since an individual can announce his view up until he is a candidate and after being elected to the bench, but not during the campaign, the announce clause is “woefully underinclusive” as a way to accomplish open-mindedness.\textsuperscript{98}

The majority then addressed the two dissenting opinions that challenge this definition of impartiality.\textsuperscript{99} The Court disregarded Justice Stevens’ concern that statements could threaten open-mindedness because candidates once elected would not want to contradict them.\textsuperscript{100} In doing so, the majority felt this might be applicable to campaign promises and pledges but not to statements on legal and political positions which is the focus of the announce clause.\textsuperscript{101} Next, the majority responded to Justice Ginsburg’s dissent that focused on open-mindedness in terms of judicial elections and her contention that due process would be denied if a judge heard a case that involved an issue about which he had made statements.\textsuperscript{102} The majority replied to the first argument pointing out the First Amendment does not provide less protection during an election, and Justice Ginsburg exaggerated the distinction between judicial and legislative

\textsuperscript{88} See White, 122 S. Ct. at 2536.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 2536-37.
\textsuperscript{95} Id. at 2537.
\textsuperscript{96} See White, 122 S. Ct. at 2537.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 2537-40.
\textsuperscript{100} Id. at 2537.
\textsuperscript{101} Id.
\textsuperscript{102} See White, 122 S. Ct. at 2538-39.
In dismissing her second contention, the Court consulted a historical prospective which showed that judges have been faced with the possibility of failing at re-election if one of their decisions was unpopular with the people, and there has been a coexistence of due process with judicial elections throughout this time. Thus, none of the varying definitions of impartiality comply with the strict scrutiny test.

The Court moved on to evaluate the Eighth Circuit Court of Appeals’ reliance on the tradition of prohibiting individual candidates’ speech during the last half of the twentieth century. The Court admitted that “a universal and long established” tradition of prohibiting certain conduct creates a “strong presumption” that the prohibition is constitutional.... The majority did not believe such a practice was long or universal. They emphasized the diversity in state judicial election processes, the revisions in the ABA’s version of the announce clause, and the lack of universal acceptance of the clause. Therefore, the Court determined such reasoning by the Court of Appeals was misplaced. In conclusion, the Supreme Court held that “[t]he Minnesota Supreme Court’s canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violated the First Amendment.”

B. Justice O’Connor’s Concurring Opinion

Justice O’Connor wrote separately to express her concerns about judicial elections. She felt that the very practice of electing judges undermines the compelling governmental interest in an impartial judiciary. She feared that a judge could not escape the reality that unpopular decisions would result in the possibility of not being re-elected. Also, she was concerned about the impact of campaigning on judicial elections and the likelihood that candidates would feel indebted to their contributors.

However, she acknowledged the fact that numerous states still use judicial elections and proceeded to provide an overview of different processes throughout the states. She concluded by claiming that Minnesota has brought this problem of judicial bias on itself through voluntarily...
electing judges and should not now be allowed to restrict their speech in order to promote impartiality.\textsuperscript{118}

C. \textit{Justice Kennedy's Concurring Opinion}\textsuperscript{119}

Justice Kennedy wrote separately to express his view that "content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests."\textsuperscript{120} He stated the announce clause did not fall within previous exceptions that the Court has allowed, and thus the government could not control such speech.\textsuperscript{121}

He went on to acknowledge that Minnesota chose a judicial election system and after later concerns decided to impose restrictions on candidates' speech; impermissibly choosing to elect judges under democracy and then limiting their speech.\textsuperscript{122}

Finally, he shared his concern that the Court should not criticize Minnesota for its choice to elect judges rather than appoint them as a way to establish its judiciary.\textsuperscript{123} Also, the Court should not misconstrue the issue to read whether a state may restrict the speech of judges.\textsuperscript{124} Instead, it should only focus on judicial candidates, and the announce clause was unconstitutional since Minnesota chose to limit speech based on content.\textsuperscript{125}

D. \textit{Justice Stevens's Dissenting Opinion}\textsuperscript{126}

Justice Stevens, in a dissenting opinion with which Justices Souter, Ginsburg, and Breyer joined, expressed his concern with the Court's reasoning.\textsuperscript{127} He stated that the Court's rationale was based upon two serious flaws: 1) "an inaccurate appraisal of the importance of judicial independence and impartiality," and 2) "an assumption that judicial candidates should have the same freedom 'to express themselves on matters of current public importance' as do other elected officials."\textsuperscript{128}

He supported these contentions with the distinction between elected judges and members of the legislature contending that the former has a different level of trust associated with their office.\textsuperscript{129} Moreover, he felt that since judges have to make rulings to uphold the law that might conflict with their opinions, personal

\textsuperscript{118} Id. at 2544.
\textsuperscript{119} Id. (Kennedy, J., concurring).
\textsuperscript{120} See \textit{White}, 122 S. Ct. at 2544 (Kennedy, J., concurring).
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 2545.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 2546.
\textsuperscript{125} Id. at 2544-46.
\textsuperscript{126} See \textit{White}, 122 S. Ct. at 2546 (Stevens, J., dissenting). This opinion was joined by Justices Souter, Ginsburg, and Breyer. \textit{Id}.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 2547.
statements give little credibility as to how they will perform as a judge. Furthermore, judges, either elected or appointed, do not have a constituency. Instead, they are obligated to uphold the law. Thus, when candidates announce their views on an issue they are asking the people to vote for them because they believe in that issue, and a state has a compelling interest to prevent such statements.

Justice Stevens then challenged the Court's determination that impartiality, in both its most narrow and broad sense, is not a compelling interest. He wrote that the narrow definition of impartiality served the state interest in keeping the appearance and actuality of impartiality of its judiciary. In the broad sense, statements by judicial candidates give the idea that rules and criteria for judicial office are similar to other political offices and therefore, these are as destructive to open-mindedness as a candidate's article advocating an issue would be. Also, open-mindedness is reduced in a judicial election process that focuses not on a candidate's qualifications, but instead on his personal views. Thus, the Court was misguided as to their interpretation of the announce clause.

E. Justice Ginsburg's Dissenting Opinion

Justice Ginsburg, in a dissent in which Justices Souter, Stevens, and Breyer joined, wrote to express the important distinction between judges and other elected representatives. In Part I of her opinion she criticized the majority's opinion that because a state has chosen to elect its judges, it cannot then impose restrictions on candidates' speech. The reasoning for the Court's argument was based on legislative elections. She then distinguished political candidates from judicial candidates and contended the two are not similar. In concluding this section, she asserted that Minnesota was able to provide a judicial election process that was distinct from legislative elections because it provided the electorate choose judges, protecting the integrity of the judiciary.

In Part II, Justice Ginsburg asserted that the majority misinterpreted the announce clause. First, the Court disregarded limits on the clause; Justice Ginsburg saw the proper interpretation as preventing a candidate from publicly...
stating how he/she would decide a certain issue.\textsuperscript{146} She cited the second mistake as the extent of the scope in regard to discussion of previous judicial rulings.\textsuperscript{147} According to her, Minnesota’s clause “does not prohibit candidates from discussing appellate court decisions.”\textsuperscript{148} Her interpretation of the clause restricted candidates from announcing how they would rule on a judicial issue without its proper context before the court.\textsuperscript{149} She ended this section by applying these views to the facts of the case.\textsuperscript{150}

In her third and final section, Justice Ginsburg expressed her view that the constitutionality of the announce clause cannot be determined without examination of another Minnesota canon that prevents candidates from “making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”\textsuperscript{151} The majority did not consider this the main issue and refused to address it in its opinion.\textsuperscript{152} Part A of this section acknowledged that both sides agree that a state can prevent judicial candidates from pledging or promising to decide an issue in a certain way.\textsuperscript{153} This stems from an individual’s right to an impartial trial protected by the Due Process Clause in the Fourteenth Amendment.\textsuperscript{154} She then listed numerous cases that uphold this idea.\textsuperscript{155} Three supporting arguments can be derived from these cases.\textsuperscript{156} First, due process is violated when a judge has a personal interest in a particular judicial issue before his/her court.\textsuperscript{157} Second, such a violation need not be direct and can be the mere possibility that re-election is dependent on a judge’s rulings.\textsuperscript{158} The test is whether an average man as a judge would be tempted.\textsuperscript{159} Third, due process can be violated by the probability of bias and not actual bias.\textsuperscript{160} These arguments, along with maintaining the electorate’s belief in the integrity and impartiality of the court, are compelling state interests that uphold the constitutionality of the promises and pledges clause.\textsuperscript{161} In Part B, Justice Ginsburg expressed her view that such compelling state interests are intertwined with the announce clause and help accomplish the promises and pledges canon.\textsuperscript{162} Without the announce clause, the promise and pledge canon

\textsuperscript{146} Id. at 2553.
\textsuperscript{147} Id.
\textsuperscript{148} Id. (citing Kelly II, 247 F.3d 854, 882 (8th Cir. 2001)).
\textsuperscript{149} See White, 122 S. Ct. at 2553 (Ginsburg, J., dissenting).
\textsuperscript{150} Id. at 2554.
\textsuperscript{151} Id. (citing MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 2555 (citing U.S. CONST. amend. XIV).
\textsuperscript{155} See White, 122 S. Ct. at 2555-56 (Ginsburg, J., dissenting).
\textsuperscript{156} Id. (citing Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980)). See also In re Murchison, 349 U.S. 133, 136 (1995) (holding that preventing even the probability of unfairness is valid); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (deciding due process was violated where a judge has personal interest in the outcome of the case); Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (ruling a mayor who occupied two positions, one partisan and one judicial, violated due process).
\textsuperscript{157} Id. at 2556.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 2554 (citing Ward, 409 U.S. at 60 (quoting Tumey, 273 U.S. at 532)).
\textsuperscript{160} Id.
\textsuperscript{161} See White, 122 S. Ct. at 2557 (Ginsburg, J., dissenting).
\textsuperscript{162} Id. at 2558.
would have no force and could be easily avoided. Thus, the announce clause is constitutional for the same reasons. Minnesota has long tried to balance an elected judiciary with judicial integrity and the announce clause is a necessary part of this balance.

IV. ANALYSIS

The Supreme Court should have narrowly tailored the announce clause by limiting the restriction to a candidate’s speech on issues that are likely to come before the bench as did both the district court and Eighth Circuit Court of Appeals. This narrow interpretation meets the First Amendment’s strict scrutiny test that requires there be a compelling state interest that is narrowly tailored. The interest is the appearance and actual impartiality of the judiciary as well as its independence, and these interests are narrowly tailored because they are limited only to judicial candidates’ speech on issues that are likely to come before the court. The Supreme Court not only holds Minnesota’s announce clause based on the 1972 version of the ABA’s code of Judicial Conduct unconstitutional, but in effect by not adopting a narrow construction, it also implies the 1990 ABA Model Code of Judicial Conduct’s commitment clause is unconstitutional. Thus, the Court leaves no real standard for judicial speech presently and opens the pledges and promises canon to constitutional attack.

163 Id.
164 Id. at 2259.
165 Id.
166 See Kelly I, 63 F. Supp. 2d 967, 986 (D. Minn. 1998).
167 See Kelly II, 247 F.3d 854, 867 (8th Cir. 2001).
169 See White, 122 S. Ct. at 2550-52 (Ginsburg, J., dissenting). See also Stretton v. Disciplinary Bd. of Sup. Ct. of Pa., 944 F.2d 137, 142 (3d Cir. 1991) (stating judicial impartiality and its appearance is a compelling state interest); Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 231 (7th Cir. 1993) (holding impartial justice is enough for restricting freedom of speech); Cox v. Louisiana, 379 U.S. 559, 565 (1965) (deciding a state can protect its judicial process from being misjudged in the minds of the public).
170 See Kelly I, 63 F. Supp. 2d at 986.
171 See White, 122 S. Ct. at 2542.
172 See Brief of Amicus Curiae The Am. Bar Ass’n at 4-5, White, 122 S. Ct. at 2528 (No. 01-521) (advocating that the Court uphold the narrow construction of the announce clause as constitutional because it corresponds to the present ABA “commitments clause,” ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990)).
173 Id. See also Terry Carter, Limit on Judicial Speech Thrown Out, 1 A.B.A. J. E-REPORT 25 (2002) (responding to the Supreme Court’s recent decision to hold the announce clause unconstitutional).
A. Announce Clause v. Strict Scrutiny Test\textsuperscript{174}

The Supreme Court agreed with the Eighth Circuit Court of Appeals that "the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms' — speech about the qualifications of candidates for public office."\textsuperscript{175} Both courts applied the strict scrutiny test, examining if the clause is 1) narrowly tailored to serve 2) a compelling state interest.\textsuperscript{176} Furthermore, the Court acknowledged for the announce clause to be narrowly tailored it must not "unnecessarily circumscribe protected expression."\textsuperscript{177}

1. Compelling State Interests

The Supreme Court misread the Eighth Circuit Court of Appeals' compelling state interests.\textsuperscript{178} The majority said the Eighth Circuit Court of Appeals listed two compelling interests to justify the announce clause which were 1) preserving the impartiality of the state judiciary and 2) preserving the appearance of the impartiality of the state judiciary.\textsuperscript{179} However, the Court of Appeals stated that the government has an interest in an independent and impartial judiciary which is matched by preserving public confidence in that independence and impartiality.\textsuperscript{180}

a. Independence in the Judiciary

The Supreme Court all but ignored a state’s compelling interest in an independent judiciary.\textsuperscript{181} The Minnesota Supreme Court, addressing Minnesota’s judicial selection process, made this statement:

The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: to create and maintain an independent judiciary as free from political, economic, and social pressure as possible so judges can decide cases without those influences.\textsuperscript{182}

In pursuing an independent judiciary, Minnesota is recognizing that there is a

\textsuperscript{175} See White, 122 S. Ct. at 2534 (quoting Kelly II, 247 F.3d 854, 863 (8th Cir. 2001)).
\textsuperscript{176} Id. (citing Kelly II, 247 F.3d at 864).
\textsuperscript{177} Id. at 2535 (quoting Brown v. Hartlage, 456 U.S. 45, 54 (1982)).
\textsuperscript{178} See Cox v. Louisiana, 379 U.S. 559, 565 (1965) (deciding a state can protect its judicial process from being misjudged in the minds of the public).
\textsuperscript{179} See White, 122 S. Ct. at 2535 (citing Kelly II, 247 F.3d at 867).
\textsuperscript{180} See Kelly II, 247 F.3d at 867 (citing Cox, 379 U.S. at 565).
\textsuperscript{181} See White, 122 S. Ct. at 2528-42.
\textsuperscript{182} See Peterson v. Stafford, 490 N.W.2d 419, 420 (Minn. 1992).
distinction between judges and other legislative and executive elected officials.\(^{183}\) In her dissent, Justice Ginsburg addressed this issue.\(^{184}\) She conceded that other elected officials serve in representative capacities, and they are obligated to advance the interests of their constituencies.\(^{185}\) Thus, there is a need for them to inform the public about their views on issues.\(^{186}\) However, judges are not representative political actors, and they do not serve a constituency, but instead the law.\(^{187}\) Other courts have also observed this fact; "[j]udges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."\(^{188}\) Furthermore, "states need not treat candidates for judicial office the same as candidates for other elective offices" because "the judicial office is different in key respects from other offices."\(^{189}\) Justice Stevens, also in his dissenting opinion, expounded on this idea, stating that judges have an office of trust that is different from that of policy-making officials.\(^{190}\) Moreover, he said, "issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity."\(^{191}\) Thus, it is a well-established fact that the judiciary is fundamentally different from other branches of government,\(^{192}\) and the state has a compelling interest in protecting this difference by maintaining judicial independence.\(^{193}\)

b. The Appearance and Actual Judicial Impartiality

Various courts have accepted an impartial judiciary and its appearance as a compelling state interest.\(^{194}\) One court stated, "the principle of impartial justice under law is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process."\(^{195}\) Another court held, "[t]here can be no question . . . that a state has a compelling interest in the integrity of its judiciary... If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery."\(^{196}\) The majority spent much of their time and effort trying to determine the proper definition for impartiality before they could determine if it was a compelling state

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\(^{183}\) See White, 122 S. Ct. at 2550-52 (Ginsburg, J., dissenting).
\(^{184}\) Id.
\(^{185}\) Id. at 2551.
\(^{186}\) Id.
\(^{187}\) Id.
\(^{188}\) See Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 228 (7th Cir. 1993).
\(^{189}\) See American Civil Liberties Union of Fla., Inc. v. Florida Bar, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990).
\(^{190}\) See White, 122 S. Ct. at 2546-47 (Stevens, J., dissenting).
\(^{191}\) Id. at 2547.
\(^{192}\) See supra notes 182-90.
\(^{193}\) See supra notes 181-90.
\(^{194}\) See Stretton v. Disciplinary Bd. of Sup. Ct. of Pa., 944 F.2d 137, 142 (3d Cir. 1991). See also Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 231 (7th Cir. 1993) (holding impartial justice is enough for restricting freedom of speech); Cox v. Louisiana, 379 U.S. 559, 565 (1965) (holding a state can protect its judicial process from being misjudged in the minds of the public).
\(^{195}\) See Buckley, 997 F.2d at 231.
\(^{196}\) See Kelly II, 247 F.3d 854, 864-65 (8th Cir. 2001) (citing Stretton, 944 F.2d at 142).
interest.\textsuperscript{197} The first definition was concerned with the equal application of law.\textsuperscript{198} The Court agreed with Justice Stevens' dissenting opinion that the clause does serve "the State's interest in maintaining both the appearance of this form of impartiality and its actuality."\textsuperscript{199} However, the concern here was that impartiality under this definition was not narrowly tailored to serve this interest.\textsuperscript{200} The district court\textsuperscript{201} and Eighth Circuit Court of Appeals\textsuperscript{202} recognized this fact also and upheld the language with a narrow interpretation saving its constitutionality.\textsuperscript{203} This note proposes that the Supreme Court should have done the same.

As for the majority's second definition, impartiality was interpreted to be a litigant's chance to persuade the court on legal issues in his favor.\textsuperscript{204} The Court focused here on the idea that it is impossible to find a judge who does not have preconceptions about the law,\textsuperscript{205} and therefore, it is not a compelling state interest to uphold a definition of impartiality that can never be attained.\textsuperscript{206} In examining this definition, the Court did not consider a litigant's constitutional rights under the Due Process Clause of the Fourteenth Amendment,\textsuperscript{207} which guarantees an unbiased tribunal.\textsuperscript{208} Every state has a compelling interest in protecting its citizens' constitutional rights.\textsuperscript{209}

The Court's third definition of impartiality is open-mindedness;\textsuperscript{210} however, the Court did not feel the need to pursue the definition because they did not feel Minnesota adopted the clause for this reason.\textsuperscript{211} Justice Stevens, in his dissent, realized that campaign statements are a real threat to open-mindedness because once elected, judges will be reluctant to contradict them for fear of not being re-elected.\textsuperscript{212} The majority acknowledges that this is a plausible argument, but they only limit it to campaign promises that are covered by the pledges and promises canon which was not an issue before the Court.\textsuperscript{213} However, as Justice Ginsburg points out in her dissent, the two canons are so interrelated that without the announce clause the pledges and promises clause would be "feeble, an arid form, a matter of no real importance."\textsuperscript{214} Furthermore, it could be easily circumvented.\textsuperscript{215} Compelling state interests applicable to the pledges and

\textsuperscript{197} See Republican Party of Minn. v. White, 122 S. Ct. 2528, 2534-40 (2002).
\textsuperscript{198} Id. at 2535.
\textsuperscript{199} Id. at 2535-36 n.7.
\textsuperscript{200} Id.
\textsuperscript{201} See Kelly I, 63 F. Supp. 2d 967, 986 (D. Minn. 1998).
\textsuperscript{202} See Kelly II, 247 F.3d 854, 867 (8th Cir. 2001).
\textsuperscript{203} See supra notes 200-02.
\textsuperscript{204} See White, 122 S. Ct. at 2536.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} U.S. CONST. amend. XIV.
\textsuperscript{208} See White, 122 S. Ct. at 2536.
\textsuperscript{209} Id. at 2555-56 (Ginsburg, J., dissenting).
\textsuperscript{210} Id. at 2536.
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 2548 (Stevens, J., dissenting).
\textsuperscript{213} Id. at 2537.
\textsuperscript{214} See White, 122 S. Ct. at 2558 (Ginsburg, J., dissenting).
\textsuperscript{215} Id.
promise clause can be transferred to the announce clause for the same reasons.\textsuperscript{216} Thus, in asserting there is no compelling state interest in judicial impartiality to uphold the announce clause, the Court refused a narrow construction after admitting to an interest,\textsuperscript{217} ignored due process rights under the second definition,\textsuperscript{218} and finally, took the announce clause out of context with the pledges and promises canon.\textsuperscript{219} All of these arguments lead to the opposite conclusion that there are compelling state interests to uphold the announce clause.\textsuperscript{220}

2. Narrowly Tailored

The Supreme Court, in reference to its first definition of impartiality, agreed that there was a state interest in maintaining both the actuality and appearance of this form of impartiality, but concluded that the announce clause was "barely tailored to serve that interest."\textsuperscript{221} However, the Court passed at the chance to narrowly construct the clause to meet this interest.\textsuperscript{222} Both the district court\textsuperscript{223} and Eighth Circuit Court of Appeals\textsuperscript{224} saw it as their duty to impose a narrow interpretation.

In support for a narrow interpretation, the district court quoted, "[w]hen determining a facial challenge to a statute, the Court must uphold it if the statute's language is readily susceptible to a narrowing construction that would make it constitutional."\textsuperscript{226} Furthermore, the "elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."\textsuperscript{227} The district court allowed the announce clause but limited it to only disputed legal issues that are likely to come before the candidate if he is elected judge.\textsuperscript{228} Such an interpretation eliminates the pressure on a candidate once in office to decide cases in accordance with comments he has previously made.\textsuperscript{229} This construction upholds the state's compelling interest in preserving the appearance and actual impartiality of its judiciary.\textsuperscript{230} Critics of such a narrow interpretation and the majority claim that this construction is

\textsuperscript{216} Id. at 2558-59.
\textsuperscript{217} Id. at 2535-36 n.7.
\textsuperscript{218} Id. at 2536.
\textsuperscript{219} Id. at 2537.
\textsuperscript{220} See generally Cox v. Louisiana, 379 U.S. 559, 565 (1965) (deciding a state can protect its judicial process from being misjudged in the minds of the public).
\textsuperscript{221} See White, 122 S. Ct. at 2535-36 n.7.
\textsuperscript{222} Id.
\textsuperscript{223} See Kelly I, 63 F. Supp. 2d 967, 986 (D. Minn. 1998).
\textsuperscript{224} See Kelly II, 247 F.3d 854, 867 (8th Cir. 2001).
\textsuperscript{225} See supra notes 223-24.
\textsuperscript{226} See Kelly I, 63 F. Supp. 2d at 985 (citing Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988)).
\textsuperscript{227} Id. (citing Stretton v. Disciplinary Bd. of Sup. Ct. of Pa., 944 F.2d 137, 144 (3d Cir. 1991) (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988))).
\textsuperscript{228} Id. at 986.
\textsuperscript{229} See Kelly II, 247 F.3d at 878.
\textsuperscript{230} See Kelly I, 63 F. Supp. 2d at 985.
virtually the same ban on campaign speech. However, this is not the case; as the Eighth Circuit Court of Appeals recognizes, candidates can still discuss their character, fitness, integrity, background, education, legal experience, work habits, and abilities as well as general case law and their judicial philosophy. To allow a candidate to discuss more only confuses the electorate. Since a candidate is bound by the law, his personal views add little to his ability as a judge. The Supreme Court, in error, failed to recognize valid compelling state interests and passed on its duty to narrowly construct the announce clause so that it would be constitutional.

B. Implied Rejection of the 1990 ABA Commitment Clause

In 1990, the ABA reformed the announce clause to the “commitments clause” which prohibits a judicial candidate from giving “statements that commit the candidate or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.” Numerous states revised their judicial canons in accordance with the commitments clause. The 1990 version of the clause is strikingly similar to the district court and Eighth Circuit Court of Appeals’ narrow construction of the announce clause that Minnesota subsequently adopted. In fact, it can be argued that it covers the same exact scope. The narrow construction by the Eighth Circuit Court of Appeals “prohibits candidates only from publicly making known how they would decide issues likely to come before them as judges.” The Supreme Court did not agree or disagree to the similarities but instead stated they did not know if the two were interpreted the same. Essentially, both prevent judicial candidates from seeking political support based on their comments or apparent comments on how they would decide cases.

\[231\] See Republican Party of Minn. v. White, 122 S. Ct. 2528, 2533 (2002). See also Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 229 (7th Cir. 1993) (“There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.”).

\[232\] See Kelly II, 247 F.3d at 882.

\[233\] See White, 122 S. Ct. at 2547 (Stevens, J., dissenting).

\[234\] Id.

\[235\] See Kelly II, 247 F.3d at 867 (holding Minnesota’s announce canon constitutional). See also Kelly I, 63 F. Supp. 2d at 986 (holding Minnesota’s announce canon constitutional); In re Kaiser, 759 P.2d 392, 400 (Wash. 1988) (finding announce canon constitutional under a narrow construction).


\[237\] See Kelly II, 247 F.3d at 880 n.21.

\[238\] See Brief of Amicus Curiae The Am. Bar Ass’n at 4-5, White, 122 S. Ct. at 2528 (No. 01-521) (advocating that the Court uphold the narrow construction of the announce clause as constitutional because it corresponds to the present ABA “commitments clause,” ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990)).

\[239\] Id.

\[240\] See Kelly II, 247 F.3d at 882.

\[241\] See White, 122 S. Ct. at 2534 n.5.

\[242\] See Brief of Amicus Curiae The Am. Bar Ass’n at 4-5, White, 122 S. Ct. at 2528 (No. 01-521) (advocating that the Court uphold the narrow construction of the announce clause as constitutional because it corresponds to the present ABA “commitments clause,” ABA MODEL CODE OF JUDICIAL.
The Supreme Court refused to adopt the Eighth Circuit Court of Appeals’ narrow construction that limited judicial campaign speech for fear it infringed on a candidate’s First Amendment guarantee of freedom of speech. Since the 1990 commitment clause covers the same scope of speech, it can be assumed that when the Court is presented with the question of its constitutionality, the commitment clause will also be in violation of the First Amendment. This leaves not only the states with canon’s such as Minnesota’s announce clause, but also states with the 1990 commitment clause, to wonder where will they draw the line on campaign speech. The Supreme Court has virtually eliminated any bright line test and left no guidance in its place.

C. Pledges and Promises Clause – Open for Attack?

The Supreme Court refused to address the constitutionality of the pledges and promises clause because it was not an issue before the Court. However, the majority failed to realize how interdependent the two are in achieving an independent and impartial judiciary. As Justice Ginsburg observed in her dissent, without the announce clause, the pledges and promises clause can easily be avoided. She used the Court’s example that a candidate under the pledges and promises clause cannot say, “[i]f elected, I will vote to uphold the legislature’s power to prohibit same-sex marriages.” However, now that there is no announce clause, the candidate can say, “I think it is constitutional for the legislature to prohibit same-sex marriages.” Does the “promissory” opposed to the “non-promissory” statement bind a candidate to a pledged issue?

These two clauses are so interrelated that one is necessary to promote the other, and arguments in support of the constitutionality for one can be imputed to the other. As examined in the Court’s third definition of impartiality, open-mindedness, the compelling state interests of protecting a litigant’s due process rights and preserving the public’s confidence in the integrity and impartiality of its judiciary under the pledges and promises clause can be applied to the

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243 See White, 122 S. Ct at 2528-42.
244 See Brief of Amicus Curiae The Am. Bar Ass’n at 4-5, White, 122 S. Ct at 2528 (No. 01-521) (advocating that the Court uphold the narrow construction of the announce clause as constitutional because it corresponds to the present ABA “commitments clause,” ABA MODEL CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(ii) (1990)). See also Carter, supra note 173 (responding to the Supreme Court’s recent decision to hold the announce clause unconstitutional).
245 See Carter, supra note 173 (responding to the Supreme Court’s recent decision to hold the announce clause unconstitutional).
246 Id.
247 See White, 122 S. Ct. at 2532.
248 Id. at 2554-55 (Ginsburg, J., dissenting).
249 Id. at 2558.
250 Id.
251 Id.
252 Id.
253 See White, 122 S. Ct at 2554 (Ginsburg, J., dissenting).
254 Id. at 2558-59.
255 Id. at 2537.
announce clause.\textsuperscript{256} Therefore, in reverse, it can be argued that since the Supreme Court did not think the announce clause was narrowly tailored to serve a valid, compelling state interest\textsuperscript{257} that the pledges and promises clause would also fail the strict scrutiny test.\textsuperscript{258} Justice Kennedy goes one step further in his concurrence and asserts that content-based speech restrictions that do not fall into one of the traditional exceptions should automatically be invalidated without looking to the strict scrutiny test.\textsuperscript{259} It can be argued that the pledges and promises clause does not fall within any of these exceptions and would be unconstitutional on that basis alone.\textsuperscript{260} "This opens a Pandora's box and eliminates the bright line we had as to what could and couldn't be said in state judicial elections," says ABA President Robert E. Hirshon, "ultimately, I think its going to lead to a lot of unnecessary litigation."\textsuperscript{261} Furthermore, the ABA feels that lawyers on both sides agree that without the announce clause, the limits of the pledges and promises clause will be tested.\textsuperscript{262}

Where does that leave limits on speech by judicial candidates? What is now allowable, and how far do existing unchallenged canons extend? The Supreme Court has left states to wonder in the dark until they choose to address such issues.\textsuperscript{263}

D. From the Announce Clause to an Appointive System

Since numerous states now are faced with the task of revising their judicial canons so that they may be in accord with the Court's ambiguous ruling, a move from judicial elections to an appointment system might be in store.\textsuperscript{264} This casenote is not the first nor will it be the last to make such a suggestion.\textsuperscript{265} However, in light of Republican Party of Minnesota v. White,\textsuperscript{266} now seems like the appropriate time for such a switch since an appointive system would cure many of the disputed issues.\textsuperscript{267}

\textsuperscript{256} Id. at 2558-59 (Ginsburg, J., dissenting).
\textsuperscript{257} Id. at 2534-42.
\textsuperscript{258} See Carter, supra note 173 (responding to the Supreme Court's recent decision to hold the announce clause unconstitutional).
\textsuperscript{259} See White, 122 S. Ct. at 2544 (Kennedy, J., concurring).
\textsuperscript{260} See Carter, supra note 173 (responding to the Supreme Court's recent decision to hold the announce clause unconstitutional).
\textsuperscript{261} Id.
\textsuperscript{262} Id.
\textsuperscript{263} Id.
\textsuperscript{265} See id.
\textsuperscript{266} 122 S. Ct. 2528 (2002).
\textsuperscript{267} See Behrens, supra note 264, at 273 (advocating for an appointive judicial selection process either by pure appointive system or through merit selection).
1. An Appointive System Proposal

An appointive system virtually eliminates the need for restriction on candidates' speech; under an appointive method similar to the federal system, the governor would nominate a candidate for a particular bench position then that state's Congress would approve or deny the nomination.\(^\text{268}\) A candidate for the judiciary would not have to worry whether or not he was in compliance with a presently unestablished speech limitation.\(^\text{269}\) There would be no real need for the candidate to announce his views on particular issues because candidates would not be responsible to a constituency.\(^\text{270}\)

The second rationale for adopting such a method is judicial independence.\(^\text{271}\) The district court\(^\text{272}\) and Eighth Circuit Court of Appeals\(^\text{273}\) both addressed the interest a state has in maintaining an independent judiciary.\(^\text{274}\) Both dissenting opinions expressed the difference between judges and other elected officials.\(^\text{275}\) Judges do not represent a constituency, their obligation is to the law.\(^\text{276}\) Judicial elections potentially confuse voters and give the impression that the judiciary is similar to the legislative and executive branches.\(^\text{277}\) An appointive system removes this confusion by basing the decision on a candidate's qualifications and not on their statements.\(^\text{278}\) Such a method clearly establishes that a judge's primary goal is to uphold the law, not please the people.\(^\text{279}\)

Furthermore, an appointive system promotes judicial impartiality, which is another state interest.\(^\text{280}\) In judicial elections, there is an increasing flow of money and party support.\(^\text{281}\) If judges take money from the very attorneys that appear before them, judicial impartiality is seriously threatened.\(^\text{282}\) This same

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\(^\text{268}\) Id. at 304-05 n.169.

\(^\text{269}\) Id. at 273.

\(^\text{270}\) See generally White, 122 S. Ct. at 2551 (Ginsburg, J., dissenting) (arguing that judges are not political actors and do not serve a constituency).

\(^\text{271}\) See Kelly II, 247 F.3d 854, 867 (8th Cir. 2001).

\(^\text{272}\) See Kelly I, 63 F. Supp. 2d 967, 984 (D. Minn. 1998).

\(^\text{273}\) See Kelly II, 247 F.3d at 867.

\(^\text{274}\) See supra notes 271-72.

\(^\text{275}\) See White, 122 S. Ct. at 2547 (Stevens, J., dissenting). See also White, 122 S. Ct. at 2550 (Ginsburg, J., dissenting).

\(^\text{276}\) See White, 122 S. Ct. at 2547 (Stevens, J., dissenting). See also White, 122 S. Ct. at 2550 (Ginsburg, J., dissenting).

\(^\text{277}\) Id. at 2547 (Stevens, J., dissenting).

\(^\text{278}\) See Behrens, supra note 264, at 304-05.

\(^\text{279}\) See generally White, 122 S. Ct. at 2547-50 (Stevens, J., and Ginsburg, J., dissenting) (advocating that judges are not obligated to a constituency).

\(^\text{280}\) See Stretton v. Disciplinary Bd. of Sup. Ct. of Pa., 944 F.2d 137, 142 (3d Cir. 1991). See also Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 231 (7th Cir. 1993) (holding impartial justice is enough for restricting freedom of speech); Cox v. Louisiana, 379 U.S. 559, 565 (1965) (holding a state can protect its judicial process from being misjudged in the minds of the public).

\(^\text{281}\) See White, 122 S. Ct. at 2542-44 (O'Connor, J., concurring). See also Paul D. DeMuniz, Politicizing State Judicial Elections: A Threat to Judicial Independence, 38 WILLAMETTE L. REV. 367 (2002) (expressing the concerns that judicial elections have threatened independence and the appearance of impartiality in the judiciary in Oregon); Randal T. Shepard, Judicial Independence and the Problem of Elections: "We Have Met the Enemy and He Is Us," 20 QUINNIPIAC L. REV. 753 (2001) (stating judicial independence in its very essence is threatened by judicial elections).

\(^\text{282}\) White, 122 S. Ct. at 2542-44 (O'Connor, J., concurring); See also Behrens, supra note 264 at
argument can be applied to support from parties.\textsuperscript{283} Justice O'Connor examined these concerns in her concurring opinion.\textsuperscript{284} The public will lose faith in the judiciary's impartiality,\textsuperscript{285} "Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe."\textsuperscript{286} A proper appointive system would eliminate obligations to supporters or parties because they would not affect a candidate's ability to receive a position on the bench.\textsuperscript{287}

2. Application of the Appointive System Proposal

If you recall the lawyer from the hypothetical,\textsuperscript{288} having given his opinion on a hot political topic that could have come before the court, he was subject to disbarment, suspension, and probation.\textsuperscript{289} The lawyer is placed in a no win situation because either he talks and faces the penalties or he loses a key opportunity to get his name out to the public which is essential to campaigning.\textsuperscript{290} Moreover, his statements will only cloud the public's view of the judiciary and move focus away from his qualifications.\textsuperscript{291}

However, if this attorney lived in a state that adopted an appointive system, he would not be faced with any of these problems.\textsuperscript{292} If he had qualifications that made him an admirable candidate to the bench, the governor would nominate him to a certain position.\textsuperscript{293} The state Congress, either by the House of Representatives, Senate, or combination of the two, would affirm or deny his nomination.\textsuperscript{294} At any point during, before, or after this process, he could announce his views on certain legal or political issues.\textsuperscript{295} It would make no

\begin{footnotesize}
\begin{enumerate}
\item See Behrens, \textit{supra} note 264, at 279-81.
\item See \textit{White}, 122 S. Ct. at 2542-44 (O'Connor, J., concurring).
\item \textit{White}, 122 S. Ct. at 2557 (Ginsburg, J., dissenting).
\item See Behrens, \textit{supra} note 264, at 279-81.
\item \textit{See supra} p. 1.
\item See \textit{Minn. Rule of Prof'L Conduct} 8.4(a). See also \textit{Minn. Rules on Lawyers Prof'L Responsibility} 8-14, 15(a) (2002). This punishment is based on Minnesota's Rules of Professional Conduct. \textit{Id.}
\item See Behrens, \textit{supra} note 264, at 277.
\item See \textit{generally White}, 122 S. Ct. at 2547 (Stevens, J., dissenting) (advancing the opinion that the public will confuse judicial elections with legislative elections).
\item See Behrens, \textit{supra} note 264, at 304.
\item \textit{Id.} at 300 (explaining a pure appointive judicial selection process).
\item \textit{Id.}
\item See \textit{generally id.} at 304 (stating that appointive systems are not subject to the problems inherent to an elected judiciary).
\end{enumerate}
\end{footnotesize}
difference because he is not campaigning for an office. Since he would never know when a nomination might be given by the governor, it is unlikely that his speech directed at the public would involve any campaign attempts because he does not have to rely on a constituency for election. Under an appointive system, there is more of an emphasis on a candidate's qualifications and the concerns of freedom of speech verses states' interests in an independent and impartial judiciary are eliminated.

 Granted, even appointive systems such as the federal one have flaws, but many of these could be removed with proper restrictions on the appointment process. The lawyer's state should adopt an appointive system that involves gubernatorial nomination with congressional approval. There should be staggered appointments so that no governor could appoint an entire bench. Various term limits with longer terms appropriate to higher state courts would also be beneficial. Furthermore, there should be judicial accountability through an impeachment process and a system to fill judicial vacancies by departing judges that maintain their specific term.

 If states would move to appointive systems with some of these suggested restrictions, there would be no First Amendment challenges on judicial candidate's speech, and states could still promote their interests in an independent and impartial judiciary. All of the questions left by the Court's opinion in Republican Party of Minnesota v. White could be resolved.

 V. CONCLUSION

 Candidates' speech in judicial elections can be a serious threat to the appearance and actual impartiality of an independent judiciary. The Supreme Court, by refusing to adopt a narrow construction of the announce clause and holding it unconstitutional, demonstrates its ability to refuse responsibility to construe a statute narrowly to maintain its constitutionality. Not only does this

296 Id.
297 Id.
298 See generally Behrens, supra note 264, at 304 (stating that appointive systems are not subject to the problems inherent to an elected judiciary).
299 See id. at 306.
300 Id.
301 Id. at 304.
302 Id. at 306.
303 Id.
304 See Behrens, supra note 264, at 306.
305 See generally id. at 304 (stating that appointive systems are not subject to the problems inherent to an elected judiciary).
306 Id.
308 See supra p. 17-19. See also Buckley v. Illinois Judicial Inquiry Bd., 997 F.2d 224, 231 (7th Cir. 1993) (holding impartial justice is enough for restricting freedom of speech).
309 See White, 122 S. Ct. at 2528-42.
310 See Carter, supra note 173 (responding to the Supreme Court's recent decision to hold the announce clause unconstitutional).
dangerously allow candidates' comments, it also removes any bright line test and opens the door for a constitutional attack on the promises and pledges canon.

The proposed move to an appointive system eliminates any concerns about a candidate's speech by placing more focus on a candidate's qualifications. Likewise, this system protects a state's interest in keeping an independent and impartial judiciary. An appointive system has survived effectively for years in the federal courts, and the same success would be expected in state courts as well.

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311 Id.
312 Id.
313 See generally Behrens, supra note 264, at 304 (stating that appointive systems are not subject to the problems inherent to an elected judiciary).
314 See id. at 304.
315 Id. at 300.
316 See generally id. at 273 (advocating implementation of an appointive system to state court judiciaries).