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FIRST AMENDMENT

In This Section:

Last Term:

Guy MITCHELL *et al.*
v.
Mary L. HELMS *et al.*

No. 98-1648

Supreme Court of the United States

Decided June 28, 2000

THE LOUISIANA CASE: JUSTICES APPROVE U.S. FINANCING OF RELIGIOUS SCHOOLS' EQUIPMENT

The New York Times

Thursday, June 29, 2000

Linda Greenhouse

Overturning two of its own precedents that had limited public aid to religious schools, the Supreme Court ruled today that a federal program that placed computers and other "instructional equipment" in parochial school classrooms did not violate the constitutional separation between church and state.

The 6-to-3 decision was not supported by a single majority opinion.

A far-reaching opinion by Justice Clarence Thomas that would have made "the principles of neutrality and private choice" the only touchstones for channeling aid to religious schools was supported by three other justices.

But Justice Thomas's opinion was qualified by Justice Sandra Day O'Connor's insistence in a concurring opinion that public aid may supplement, but must not supplant, money that a religious school could otherwise spend on its own programs.

Nonetheless, the decision appeared likely to provide momentum for the drive to legalize the use of vouchers for religious-school tuition and provide ammunition for the legal argument that as long as aid was distributed evenhandedly, it could not be said to be impermissibly favoring religious recipients.

"We see six potential votes for school choice," Clint Bolick, litigation director of the Institute for Justice, a leading advocacy group on the issue, said today. His count included Justice Stephen G. Breyer, who voted with Justice O'Connor, as well as the three who voted with Justice Thomas: Chief Justice William H. Rehnquist and Justices Antonin Scalia and Anthony M. Kennedy.

Nonetheless, although the voucher debate was obviously in the justices' minds, that outcome remained in the realm of potential, given Justice O'Connor's observation that in the case before the court today, no government funds "ever reach the coffers of a religious school."

The Rev. Barry Lynn, director of Americans United for the Separation of Church and State, said in an interview that "in the case of vouchers, the money goes directly to the

school's coffers" even though it first passed through the hands of parents. "The parents can do nothing with the voucher except spend it for tuition," Mr. Lynn said.

The Clinton administration supported the program that was upheld today and appealed a decision from a federal appeals court in New Orleans that declared it unconstitutional. Dating to 1965, the law, now known generally as Chapter 2, has evolved from providing video filmstrips and similar material to a vehicle for accomplishing the administration's goal of wiring every classroom in the country for Internet access.

Under the program, federal money flows through public school districts, which are obligated to buy the equipment and distribute it, technically as loans, to all schools within the district's geographic boundaries -- public, private and parochial -- based on their enrollment. Three taxpayers in Jefferson Parish, La., brought suit in 1985 to challenge the program's application to religious schools in the district on the ground that there was no way of preventing the schools from using the equipment in support of their religious mission.

The case had a tangled history, leading eventually to a 1998 ruling by the United States Court of Appeals for the Fifth Circuit, in New Orleans, that the program was unconstitutional under two Supreme Court precedents from the mid-1970's. Those decisions, Meek v. Pittenger and Wolman v. Walter, held that the government could provide textbooks but not other instructional materials to religious schools, the premise being that textbooks could be vetted in advance to make sure they did not advance the schools' religious mission.

The six justices who voted in the majority today to overturn the Fifth Circuit's decision all agreed that the earlier decisions should be overruled. Justice Thomas said the decisions were "irreconcilable" with other decisions in this area that came both before and after them, most recently the court's ruling three years ago in Agostini v. Felton. In that decision -- which also overturned a precedent -- the court held that it did not violate the Constitution for public schools to send teachers into parochial schools, under a federal program, to provide remedial classes.

As these decisions indicate, the court's jurisprudence on the subject of permissible public aid to religious schools has been in turmoil for years. The case today, Mitchell v. Helms, No. 98-1648, was the oldest on the court's docket, having been argued on Dec. 1, and the justices' failure to settle on a single majority opinion after seven months showed that the turmoil was likely to continue.

Reflecting on historical anti-Catholic sentiment in the late 1800's, Justice Thomas said that "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow." He said that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs," and that the cases that supported such exclusion, "born of bigotry, should be buried now."

He said that government programs should be upheld on "the principles of neutrality and private choice," meaning that if the government "offers aid on the same terms, without regard to religion," no impermissible religious purpose could be attributed to the government. That was especially true, he said, when individuals could make their own private choices on how to use the aid.

It was at this point that Justice O'Connor and Justice Breyer expressed their unease with what Justice O'Connor called the "logic" of Justice Thomas's opinion.

"The plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives," Justice O'Connor said.

In his dissenting opinion, Justice David H. Souter, joined by Justices John Paul Stevens and Ruth Bader Ginsburg, said Justice Thomas's opinion represented a fundamental break with the court's precedents. Justice Souter said Justice Thomas's opinion threatened the court's long-held distinction "between indirect aid that reaches religious schools only incidentally as a result of numerous individual choices and aid that is in reality directed to religious schools by the government or in practical terms selected by religious schools themselves."

Justice O'Connor, in her concurring opinion, explained her reasons for agreeing that the court should overturn the precedents that limited aid to providing textbooks.

"Technology's advance," she said, has made the distinction between textbooks and other materials "more suspect" than ever. "Computers are now as necessary as were schoolbooks 30 years ago, and they play a somewhat similar role in the educational process," she said.

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HIGH COURT OKS TAXPAYER AID FOR RELIGIOUS SCHOOLS
Jeff Plaintiffs Lose 15-Year Battle

The Times-Picayune

Thursday, June 29, 2000

Bruce Alpert and Mark Waller

In a major victory for religious schools, the U.S. Supreme Court on Wednesday ruled in a Jefferson Parish case that taxpayer money can be used to provide their students with computers and other instructional material.

The 6-3 ruling sent a mixed signal about how the court might react to cases litigating the politically charged issue of vouchers, taxpayer-financed tuition assistance for religious schools.

Four justices joined the majority opinion that seemed to argue in favor of almost any government aid to religious schools, as long as similar assistance is provided to non-religious schools. Two justices who helped form the six-vote majority in the Jefferson Parish case wrote in a separate opinion that they don't accept the "unprecedented breadth" of the opinion by their four colleagues.

"It means that the issue of vouchers hasn't been resolved by this ruling," said Thomas Berg of Samford University Law School in Birmingham, Ala.

But on the issue of computers and similar assistance to religious schools, the court issued a clear-cut victory for the schools and for the Clinton administration. President Clinton, through the Justice Department, intervened in the case, arguing that a negative ruling would have scuttled his plan to connect every school, public and private, to the Internet.

Religious use irrelevant

Writing for the majority, Justice Clarence Thomas said it does not matter, as the Jefferson Parish parents who challenged the aid had maintained, if the computers and equipment provided by taxpayer financing are put to religious use.

"So long as the governmental aid is not itself unsuitable for use in the public schools because of religious content, and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern," Thomas wrote.

The plaintiffs in the 15-year old case, Jefferson Parish parents Neva Helms and Marie Schneider, argued that computers could easily be used for religious purposes, unlike textbooks and buses, which the high court previously said were permissible for use by religious schools.

But Thomas said, "government-provided lecterns, chalk, crayons, pens, paper and paint brushes," also could be used for religious purposes, and that shouldn't be a problem.

"In fact, the risk of improper attribution is less when the aid lacks content, for there is no risk (as there is with books), of the government inadvertently providing improper content," Thomas wrote.

After getting news of the decision Wednesday, Helms said public schools will be damaged by a widening of opportunities for taxpayer money to go toward enhancements at religious schools.

"It breaks my heart for public schools," she said. "I think it's a nail in the coffin of public schools."

A matter of sharing

The decision resolves a lengthy legal fight that centered on the federal Elementary and Secondary Education Act of 1965, which gives public school districts money for special services and instructional equipment and requires them to share the equipment in a "secular, neutral and nonideological" manner with private schools.

Thomas said that in Jefferson Parish, about 46 private schools participate in the federal program, and receive about 30 percent of the federal aid under the education act allocated to the parish. Thirty-four of the schools are Roman Catholic, seven are affiliated with other religions, and five are not affiliated with a religion.

After a ruling by the 5th Circuit Court of Appeals that computers and similar equipment could not be provided to religious schools, seven parents of students at Jefferson Parish parochial schools appealed to the Supreme Court, prompting Wednesday's decision.

Helms, 57, said she fears the channeling of public money to private schools, which could enable religious schools to keep tuition down, could lead to public schools serving mostly as last resorts for disadvantaged, disenfranchised and disabled children.

"If you're not white and rich, you're going to be in a public school," she said.

Helms said she did not expect a sweeping victory, "especially since you have justices that are Catholic."

"But I feel honored that I got this far," she said. "I don't feel like we lost. People are more sensitive to church and state issues now. I made people aware."

Risk of secularization

Schneider, after hearing about the court's decision, said, "It's a disappointment, but not a surprise. I accept the decision because this is the Supreme Court and I have gone as far as I can. ... I have never regretted that I took the journey. I did it for public school children who I feel were discriminated against."

Schneider, 71, who describes herself as "thoroughly" Catholic, said she also is troubled by another aspect of public financial support for religious schools: "Seldom does government aid come without strings, regulations. And when more government aid comes to religious schools, religious schools become secularized."

"Religious schools think they've won, but in the long-run, they've really lost. I hope someone will pick up the torch from this old lady and fight for religious freedom."

Another appeal

Attorneys for the seven parents who intervened in the case on behalf of the public support for their schools said they celebrated Wednesday at the close of a "career case."

"This really preserves the status quo," said Patricia Dean of the Washington, D.C., law firm Arnold & Porter. "It lets the federal government continue to make education a priority."

"This decision is not hostile to people who choose to send their children to private or religious schools," Dean said. "It does away with the subtle hostility."

The court is to decide today on whether it will take up an appeal by Helms and Schneider challenging another 5th Circuit ruling that special education assistance to parochial schools is permissible.

In his decision, Thomas, a Roman Catholic, wrote that "hostility to the Catholic Church and to Catholics in general" was at least in part behind historic opposition of aid to non-secular schools and represents "a shameful pedigree that we do not hesitate to disavow."

Thomas, in his opinion, appears to be advocating for sustaining much more than the computers and other equipment at issue in the Jefferson Parish case. Many legal experts read

his opinion, in which Chief Justice William Rehnquist and Justices Antonin Scalia and Anthony Kennedy concurred, as an endorsement of vouchers.

"If the religious, irreligious and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government," Thomas wrote.

The key player

But Berg, who writes regularly on church and state issues, said it is clear that Thomas doesn't yet have a fifth vote for his view, and that lower courts no doubt will heed the separate opinion written by Justice Sandra Day O'Connor on behalf of herself and Justice Stephen Breyer when considering voucher cases.

In her opinion, O'Connor calls the "expansive scope" of Thomas' ruling "troubling." O'Connor also makes pronouncements that will give both supporters and opponents of vouchers reason to be concerned.

For example, she says that she disagrees with Thomas that as long as the government is neutral in handing out aid, it can be used for religious purposes.

But she also states that it is important that aid be provided directly to the individual student who, in turn, "made the choice of where to put that aid to use," which proponents say is exactly the concept behind vouchers.

Robert O'Neil, a constitutional law professor at the University of Virginia, said that in future voucher cases O'Connor will be the key player, just as in previous questions of aid to religious schools.

"It will be pretty much a case of what (is permissible) will be what Justice O'Connor says it is," O'Neil said.

Justices David H. Souter, John Paul Stevens and Ruth Bader Ginsburg dissented from the majority decision in the Jefferson Parish case.

In his dissent, Souter said the majority is wrong to suggest that simply making aid available to religious and non-religious groups is enough to demonstrate that the Establishment Clause of the First Amendment to the Constitution is not being violated. The clause states: "Congress shall make no laws respecting an establishment of religion."

"If we looked no further than evenhandedness and failed to ask what activities the aid might support, or in fact did support, religious schools could be blessed with government funding as massive as expenditures made for the benefit of their public school counterparts," Souter wrote.

Diverse reactions

Reaction was mixed, reflecting the complexity and widely differing opinions over the meaning of the Establishment Clause.

Archbishop Francis Schulte, in a statement Wednesday, said he was "elated" by the court's opinion.

"This decision brightens our educational future," Schulte said. "I am thankful because the decision should support the extension of new educational technologies to all children regardless of the schools they attend. Educational aid to religious schools does not violate the Establishment Clause of the U.S. Constitution. It simply allows families to make the best educational choices for their children."

At St. Francis Xavier Cabrini School, a pre-kindergarten through eighth-grade school in New Orleans, principal Suzette Cochiara said the school receives computers through a state program and library books and films through the federal program that the Supreme Court affirmed.

Cochiara said the materials are marked with tags indicating they were paid for with public

money so teachers will not use them for religious instruction. "We don't want to endanger those funds," she said.

Rabbi David Saperstein, director of the Religious Action Center of Reform Judaism in Washington, D.C., said the decision represents a setback to those who believe that religious schools ought to be supported by parents who decide to send their children there, not by the taxpayers.

"We are disappointed to see today a brick knocked out of the wall of separation between church and state, but we remain grateful for the protection that wall continues to provide for religious liberty," said Saperstein, who believes there is still a majority of the high court opposed to vouchers.

But the Rev. Bob Schenck, president of the National Clergy Council, said the high court on Wednesday recognized that religious schools can make a positive contribution and that assistance from taxpayers doesn't represent government endorsement of any particular religion.

"For too long there has been a near-maniacal paranoia over the participation of religious groups in American public life," Shanks said. "The fact is that religious people and institutions are good for society and especially good for education, and the court has seen that truth today."

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Last Term:

BOY SCOUTS OF AMERICA and Monmouth Council, et al.
v.
James DALE

No. 99-699

Supreme Court of the United States

Decided June 28, 2000

BOY SCOUTS' BAN ON GAY LEADERS UPHELD BY COURT 5-4 RULING RESPECTS GROUP'S 'SINCERITY'

The Baltimore Sun

Thursday, June 29, 2000

Lyle Denniston

WASHINGTON - Allowing homosexuals to be shut out of one of America's most revered institutions, the Boy Scouts of America, a divided Supreme Court barred states yesterday from forcing Scout troops to accept gays as scoutmasters.

The mere presence of an openly gay person as an adult Scout leader, the court declared in its 5-4 ruling, would contradict the Scouts' own "sincere" belief that homosexuality is immoral and "unclean."

In the most significant gay rights case the court has considered in four years, the justices issued a fairly narrow decision confined to the Scouting policy against homosexuals.

Chief Justice William H. Rehnquist's spare, 19-page opinion for the majority said nothing specific about other state and local laws that seek to protect access for gays and lesbians to jobs, housing and other private opportunities.

But the opinion did include some language that seemed to question the use of state "public accommodation laws" to control access to private groups, instead of limiting those laws to guaranteeing access to such public places as restaurants and hotels.

Although the decision was confined to the Scouts' policy of excluding homosexuals from leadership posts, some of the language in the opinion was broad enough to permit the organization to keep out gay boys as members.

The 6.2-million member organization does not have separate bans on gay leaders and gay youth members. Its policy, quoted by the court yesterday, says simply: "We do not allow for the registration of avowed homosexuals as members or as leaders of the BSA."

Rehnquist's opinion contained no moral judgments against homosexuality and, in fact, said that "it appears that homosexuality has gained greater societal acceptance." And he was careful to note that the justices were not ruling on whether the Scouts' beliefs on the subject were right or wrong.

The ruling was a defeat for a former Eagle Scout in New Jersey, James Dale, who now lives in New York. He had fought in New Jersey courts to overturn his exclusion as an assistant scoutmaster, after the Scouting organization learned from a newspaper article that he was gay.

He won in the New Jersey Supreme Court, under a state public accommodations law. But the justices took away his victory.

Dale said he was "definitely saddened by the decision."

"People don't join the Boy Scouts because they're anti-gay," he said. "People join the Boy Scouts because they want acceptance, they want community."

A spokesman for the Scouts, Gregg Shields, commented: "We're very pleased. It's going to allow us to continue our mission of providing character-building programs for youth."

President Clinton, whose office makes him honorary president of the Scouts, repeated his opposition to discrimination against gays, but did not condemn the Scouts.

"They're a great group," he told reporters. "They do a lot of good. And I would hope that ... this is just one step along the way of a movement toward greater inclusion for our society, because I think that's the direction we ought to be going in."

Within the Scouting movement itself, there appears to be the some effort to get national leaders to reconsider the gay ban.

At least two regional Scout councils have called for a review.

In addition, some religious groups that sponsor Scout troops have said the policy should be changed.

The Girl Scouts do not ban lesbians from membership or adult leadership posts.

Matt Coles, director of the American Civil Liberties Union's project on lesbian and gay rights, called the ruling "damaging but limited."

"It will not reach very far beyond groups like the Boy Scouts," he said, adding: "Anti-gay groups did not get the 'free pass' they were looking for to dismantle civil rights laws that provide equal protection to lesbians and gay men."

'Important victory'

But Vincent P. McCarthy, a senior counsel for the American Center for Law and Justice, a conservative legal advocacy group, called the decision "an important victory, not only for the Boy Scouts but for all private organizations."

He said the court " reaffirmed the rights of private organizations to define their own criteria for leadership."

"The decision will have a dramatic impact on all private organizations as they define their own mission," he said.

Rehnquist's opinion was limited to the history of Dale's case, the background of the Scouting policy against gays and a recitation of a few basic principles about private groups' constitutional right to come together and share common views.

Showing strong respect for the organization, the chief justice did not question the Scouts' claim that they believe sincerely that "homosexual conduct is not morally straight" and their policy against promoting " homosexual conduct as a legitimate form of behavior."

It was not for the courts, Rehnquist said, to reject a group's "expressed values." He said the policy has been followed at least since 1978, before Dale became an assistant scoutmaster in a Matawan, N.J., troop.

If the Scouts now had to take Dale back as a leader, the opinion said, that "would, at the very least, force the organization to send a message, both to the youth members and the

world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."

Dissenting opinion

Justice John Paul Stevens, in a dissenting opinion, denounced the decision. Stevens said it was based not on any conclusion that Dale would himself advocate homosexuality within Scouting, but solely on his status as an avowed homosexual.

Joining Stevens in dissent were Justices Stephen G. Breyer, Ruth Bader Ginsburg and David H. Souter.

The dissenters lambasted the Scouts' policy, saying it was "the product of a habitual way of thinking about strangers."

Rehnquist's majority included Justices Anthony M. Kennedy, Sandra Day O'Connor, Antonin Scalia and Clarence Thomas.

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THE SUPREME COURT: THE NEW JERSEY CASE

Supreme Court Backs Boy Scouts In Ban of Gays From Membership

The New York Times

Thursday, June 29, 2000

Linda Greenhouse

The Supreme Court ruled today by a 5-to-4 vote that the Boy Scouts have a constitutional right to exclude gay members because opposition to homosexuality is part of the organization's "expressive message."

The decision overturned a ruling last year by the New Jersey Supreme Court that applied the state's law against discrimination in public accommodations to require a New Jersey troop to readmit a longtime member and assistant scoutmaster, James Dale, whom it had dismissed after learning he was gay.

Writing for the court today, Chief Justice William H. Rehnquist said that the court intended neither to approve nor disapprove the Boy Scouts' view of homosexuality, but that the First Amendment's protection for freedom of association meant that the state could not compel the 6.2-million member organization "to accept members where such acceptance would derogate from the organization's expressive message."

He said "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."

The four dissenters did not object to the general principle that an organization cannot be forced to adopt or incorporate an unwanted message -- a principle the court applied unanimously five years ago in upholding the right of the Boston St. Patrick's Day parade organizers to exclude a group that sought to march under a banner of Irish gay pride.

But the dissenters objected strenuously to that principle's application in this case, because they said the majority had done little more than accept at face value the Boy Scouts' assertion of the central importance of their opposition to homosexuality. But except in briefs filed in cases defending their membership policy, the Boy Scouts had never made the "clear, unequivocal statement necessary to prevail" on a claim that homosexuality was fundamentally incompatible with the organization's mission, the dissenters said.

Chief Justice Rehnquist's majority opinion was joined by Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas. Justice John Paul Stevens filed the main dissenting opinion, joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer and David H. Souter, who also filed a dissenting opinion.

In permitting the Boy Scouts' First Amendment interests to trump New Jersey's antidiscrimination law, the majority relied heavily on its 1995 St. Patrick's Day parade case, in which the gay marchers had claimed the protection of a Massachusetts civil rights law. That decision and the ruling today indicated that the court would continue to weigh on a case-by-case basis the competing claims of a private group's right to exclude unwanted participation and a public policy against discrimination.

The majority today drew a distinction between this decision and a trio of Supreme Court rulings from the 1980's rejecting the arguments of all-male organizations, including the Rotary Club, that they had a First Amendment right to exclude women.

The court held in those cases that because the exclusion of women was not part of the shared goal or expressive message of those organizations, the application of state civil rights laws to require the admission of women did not place an unconstitutional burden on the members' right of association.

While none of the court's free association cases have dealt with exclusion by private organizations on the basis of race, that analysis would presumably permit a white supremacy group to exclude blacks if racial exclusion was an inherent part of the group's identity and message.

In his opinion, Boy Scouts of America v. Dale, No. 99-699, the chief justice quoted from various Boy Scouts publications and explanations of the policy, noting that though the terms "morally straight" and "clean" in the Scout Oath and Law "are by no means self-defining," Scout officials interpreted them as statements of opposition to homosexuality.

Ruth Harlow, deputy legal director of the Lambda Legal Defense Fund in New York, said today that the Boy Scouts had won only a "hollow, Pyrrhic victory" because to win the case, it had to demonstrate to the court's satisfaction the centrality of its opposition to homosexuality. "The Boy Scouts have fought long and hard for something that has marginalized their institution," she said.

Evan Wolfson, another lawyer with the Lambda organization, who represented Mr. Dale before the court, said the decision "requires you to declare yourself an institution with an anti-gay message, and we don't think there are many organizations in this day and age willing to declare themselves as that."

In his dissenting opinion, Justice Stevens noted several newspaper articles from the last few weeks that described a gay pride day at the Central Intelligence Agency, a New England boarding school's acceptance of openly gay couples as dormitory parents and the extension of benefits to gay partners by the major automobile makers. "The past month alone has witnessed some remarkable changes in attitudes about homosexuals," he said.

Chief Justice Rehnquist responded: "Indeed, it appears that homosexuality has gained greater societal acceptance. But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views."

In a statement on its Web site, the Boy Scouts said that as a private organization, the Scouts "must have the right to establish its own standards of membership if it is to continue to instill the values of the Scout oath and law in boys." The statement continued: "Thanks to our legal victories, our standards of membership have been sustained. We believe an avowed homosexual is not a role model for the values espoused in the Scout oath and law."

Drawing on the distinctions between this case and the earlier rulings on all-male clubs, the chief justice said that, to claim the First Amendment's protection, "a group must engage in some form of expression, whether it be public or private."

Justice Stevens said in dissent that the majority's distinction was unpersuasive because just as the all-male clubs had not made the exclusion of women a central goal, "there is no shared goal or collective effort to foster a belief about homosexuality" in the Boy Scouts, "let alone one that is significantly burdened by admitting homosexuals."

Justice Stevens said: "The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone -- unlike any other individual's -- should be

singled out for special First Amendment treatment."

The civic and cultural standing of the Boy Scouts, the "sincerity" of which the majority opinion noted in several places, may have had more to do with the outcome of the case than Mr. Dale's sexual orientation.

The case attracted dozens of briefs, a number depicting this legal battle -- which the Boy Scouts have been waging in courts around the country for 20 years -- as the cutting edge of the current culture wars.

Mr. Dale was an Eagle Scout and popular member and then assistant leader of the troop he had joined at the age of 8 when, 12 years later, he was ejected after his picture appeared in a New Jersey newspaper article about a gay student conference at Rutgers, where he was co-president of the gay and lesbian students' organization. He brought suit under a New Jersey law that prohibits discrimination in places of public accommodation.

Because the New Jersey Supreme Court found as a matter of state law that the Boy Scouts fit the definition of a public accommodation, rather than a purely private organization, that aspect of the case was not open to the justices' re-examination.

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Last Term:

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN System, et al.
v.
Scott Harold SOUTHWORTH, et al.

No. 98-1189

Supreme Court of the United States

Decided March 22, 2000

JUSTICES OK POLITICAL USES OF STUDENT FEES

Supreme Court: Panel Rejects Suit Brought by Conservatives Unhappy About Paying for Liberal Causes

Los Angeles Times

Thursday, March 23, 2000

David G. Savage

State colleges and universities can force their students to subsidize activist groups on campus, even when these organizations push political causes that offend some students, the Supreme Court ruled Wednesday.

In a 9-0 decision, the court rejected free-speech claims by young conservatives at the University of Wisconsin at Madison who objected to supporting left-wing groups there.

They relied on the 1st Amendment principle that no one should be forced to endorse ideas or contribute to political causes they oppose.

However, the justices said that the dissident students are not required to endorse any ideas or groups. Instead, they are forced to pay an activity fee that creates a pool of money that in turn supports campus groups.

All student organizations can seek school funding, without regard to their political or ideological views, the justices noted. This system is "viewpoint neutral," they said, and that is sufficient to protect the rights of all.

Wednesday's ruling preserves a funding system that has grown at most large universities over the last two decades. Campus groups have flourished with the support of student fees. University officials say that the mix of active organizations enriches life on campus.

Many organizations offer support to groups of students. For example, the Madison campus has a women's center and a lesbian, gay, and bisexual center with offices in the Student Union.

But other groups are formed around causes such as environmentalism or socialism. They

are explicitly ideological and, in some instances, engage in lobbying and political activity.

Across the country, conservative students have complained loudly about these left-leaning activist groups. They have charged that the vast majority of student funds goes to groups that espouse liberal views.

In 1996, when the University of Wisconsin was sued for its funding policy, the student activity fee was $ 331. Wisconsin PIRG, a liberal public interest group, received $ 50,000 in student funding that year. The conservative Federalist Society received a $ 300 grant to defray travel costs for speakers.

University officials said that this imbalance--if it is one--reflects the views and interests of the students. They form the groups. They are free to seek the subsidies. And a student board--Associated Students of Madison--allocates the funds.

The court did not examine how the funding system worked at Madison, accepting that funding decisions were made without regard to political views.

In the lower courts, conservative advocates had won cases concerning involuntary funding of groups or activities.

In 1993, the California Supreme Court ruled that dissident students were entitled to seek refunds for the part of their fees that subsidized political groups. However, the amount of any refund is typically small.

Earlier, the high court had ruled that dissident schoolteachers could not be forced to pay union dues that in turn are used for political activity. In 1990, the justices said the same about dissident lawyers in California who objected to paying for lobbying by the state bar.

Relying on those precedents, a federal judge and the U.S. Court of Appeals in Chicago sided with the three conservative law students who sued the University of Wisconsin.

But the justices reversed the ruling (Board of Regents vs. Southworth, 98-1189).

"The 1st Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral," said Justice Anthony M. Kennedy for the court.

Unlike a labor union, where the members' dues support a single viewpoint, a student's fees support a variety of views, Kennedy explained.

Jordan Lorence, a Fairfax, Va., lawyer who represented the plaintiffs, said he was surprised and disappointed by the outcome.

The funding system "is not about promoting diversity," he said. "It actually reinforces the majority point of view on campus."

Gay and lesbian students say they were the targets of the conservative legal attacks.

"This was part of a well-funded, aggressive campaign to 'defund the left,' " said Matt Coles, director of the Lesbian and Gay Rights Project for the American Civil Liberties Union. "These conservative students were not being compelled to support any particular viewpoint. They were supporting a forum for students that is open to all."

Wednesday's decision marks the second time this year that the conservative-leaning Supreme Court has rejected a free-speech claim brought by conservatives.

In January, the justices upheld official contribution limits for political candidates, rejecting a free-speech claim championed by the Republican National Committee. The decision revived a $ 1,000 state limit for candidates in Missouri; the six-vote majority included Chief Justice William H. Rehnquist and Justice Sandra Day O'Connor.

In both cases, Rehnquist and O'Connor sided with the states--as they usually do--rather

than take up the free-speech claim brought by conservatives.

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NO STUDENT VETO FOR CAMPUS FEES

The New York Times

Thursday, March 23, 2000

Linda Greenhouse

The Supreme Court ruled today that public universities can collect student activity fees even from students who object to particular activities, as long as the groups given the money are chosen without regard to their views.

The 9-to-0 decision, in a case from the University of Wisconsin, was a surprisingly broad and decisive victory for universities on an ideologically charged issue that has roiled higher education.

Groups of students, usually identifying themselves as conservatives, have claimed a constitutional right to keep their money from supporting gay rights, women's rights, the environment and other causes.

Three law students at Wisconsin's Madison campus brought the suit and won a ruling from the federal appeals court in Chicago that the mandatory fees were a form of compelled speech that violated their First Amendment rights.

The suit was financed by the Alliance Defense Fund, an organization based in Scottsdale, Ariz., that advises conservative students on strategies for "defunding the left."

As it made its way through the courts, the Wisconsin case became a rallying point for conservative groups long resentful of the dominance of liberal discourse on many campuses, as well as a source of concern for university administrators. The American Council on Education, representing 1,800 public and private colleges and universities, filed a brief supporting the University of Wisconsin with the court.

In his opinion for the court today overturning the appellate ruling, Justice Anthony M. Kennedy wrote that while the students did have First Amendment interests at stake, "recognition must be given as well to the important and substantial purposes of the university, which seek to facilitate a wide range of speech."

"The speech the university seeks to encourage in the program before us is distinguished not by discernible limits but by its vast, unexplored bounds," he wrote, adding:

"The university may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social and political subjects in their extracurricular campus life outside the lecture hall. If the university reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends."

The decision directly covers only public colleges and universities, since the Constitution applies only to government behavior. But the court's statement might well guide the resolution of similar debates over mandatory student fees that have arisen on private campuses.

Katharine Lyall, president of the University of Wisconsin system, called the ruling "a landmark decision for higher education in this century." In an interview, Ms. Lyall said that the decision's importance lay in its "ringing endorsement of the idea that universities are special places for the free exchange of ideas, no matter how controversial."

Justice Kennedy's opinion in the case, Board of Regents v. Southworth, No. 98-1189, was joined by Chief Justice William H. Rehnquist and by Justices Sandra Day O'Connor, Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg.

Justice David H. Souter filed a separate concurring opinion that was also signed by Justices John Paul Stevens and Stephen G. Breyer. They said that because both sides in the case, which was decided in the lower courts without a trial, had stipulated to the "viewpoint neutrality" of the process for allocating the activity fees to student groups, the court should simply have found the process constitutional without having to "impose a cast-iron viewpoint-neutrality requirement" as part of the First Amendment analysis.

The concurring opinion also cautioned that the requirement of neutrality did not apply to a university's own speech, as exemplified by curriculum choices. "The university need not provide junior years abroad in North Korea as well as France," Justice Souter wrote.

Only a small part of the fee was at issue in the case. The bulk of the fee, which amounts to several hundred dollars a year, goes to the student health service, intramural sports, and other noncontroversial uses.

About 20 percent of the total is distributed among roughly 200 student groups; as Justice Kennedy noted, they range from the Future Financial Gurus of America to the International Socialist Organization.

Groups that meet general guidelines seek and receive reimbursement for expenses like printing, postage and the use of university facilities, with partisan political, religious or lobbying activities ineligible for reimbursement. Financing decisions are subject to review by the university's chancellor and regents.

The court today found fault with one minor aspect of the Wisconsin system: an alternative method of obtaining financing, or of stripping an organization of its financing, through a student referendum.

Justice Kennedy found this process constitutionally troublesome because it provided insufficient protection for minority viewpoints.

"The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views," he wrote.

With all justices agreeing on this point, the court told the appeals court to examine the referendum issue.

Matthew Coles, director of the lesbian and gay rights project of the American Civil Liberties Union, which filed a brief in the case, said the ruling ensures that "the existence of student organizations will not be subject to majority whim."

Mr. Coles said gay rights groups were almost always the targets of students who sought to withhold part of their activity fees. In this case, the plaintiffs objected to an abortion rights program presented by the Campus Women's Center, a gay film festival and a conference sponsored by two gay rights groups.

In ruling for the objecting students, both the Federal District Court in Madison and the United States Court of Appeals for the Seventh Circuit based their analysis on Supreme Court precedents holding that lawyers who are required to pay bar dues and nonunion workers who must pay agency fees in lieu of union dues have a constitutional right to withhold their money from political activities to which they object and that are not "germane" to the bar association's or union's mission.

But Justice Kennedy said today that those precedents were not applicable because "to insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue."

He added: "It is not for the court to say what is or is not germane to the ideas to be pursued in an institution of higher learning."

Rather, Justice Kennedy said, the case was governed by a 1995 decision holding that a public university did not violate the separation of church and state by using student fees to support a student religious publication on the same basis as any other student publication. Justice Kennedy wrote that opinion, Rosenberger v. University of Virginia.

In a concurring opinion in the 1995 case, Justice O'Connor raised the question of whether objecting students might have a constitutional right to withhold part of their fees, a question she evidently found to have been answered in the negative today.

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Last Term:

SANTA FE INDEPENDENT SCHOOL DISTRICT
v.
Jane DOE, *et al.*

No. 99-62

Supreme Court of the United States

Decided June 19, 2000

THE SUPREME COURT: THE RELIGION ISSUE
Student Prayers Must Be be Private, Court Reaffirms

The New York Times

Tuesday, June 20, 2000

Linda Greenhouse

Strongly reaffirming its earlier decisions against officially sponsored prayer in public schools, the Supreme Court ruled today that prayers led by students at high school football games are no exception: as officially sanctioned acts at events that students feel great social pressure to attend, they are unconstitutional.

The 6-to-3 majority opinion by Justice John Paul Stevens said that even when attendance was voluntary and when the decision to pray was made by students, "the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." ***

The case came from a small school district in South Texas, typical of communities across the South where the practice of prayer at graduations, assemblies and athletic contests has persisted as officials have tried to navigate the obstacle course created by Supreme Court and lower court decisions.

In this case, the United States Court of Appeals for the Fifth Circuit, in New Orleans, had ruled that students could offer prayers at graduations -- where members of the clergy cannot, under a 1992 Supreme Court decision -- but not in the "far less solemn and extraordinary" setting of a football game.

The decision today did not explicitly address graduation ceremonies, but the majority's analysis cast serious doubt on the increasingly popular practice of student-led graduation prayers. The justices have been asked to hear a challenge to an Alabama law, upheld last year by a federal appeals court, that permits "student-initiated voluntary prayer" at graduations as well as other events.

While the decision today was not a surprise, given the justices' evident skepticism about the Santa Fe Independent School District's prayer policy when the case was argued in March, it was nonetheless notable in several respects. One was the majority's firm

rejection of the school district's central argument in defense of its policy: the prayers were private student speech that could not be attributed to the school district itself and could not be considered an unconstitutional "establishment" of religion in violation of the First Amendment.

Indeed, the district had argued, to hold that students could not express their religious views would create a separate First Amendment problem, amounting to the censorship of religious speech in a public forum.

But this was not private speech, and a football game was not a public forum for unbridled free expression, Justice Stevens said. "These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events," he said, adding that any member of the audience would perceive the student prayer as stamped with the school's "seal of approval."

Justice Stevens added: "Contrary to the district's repeated assertions that it has adopted a 'hands-off' approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion."

He noted that in contrast to a public forum, in which contrasting views are welcome, the Santa Fe policy "allows only one student, the same student for the entire season, to give the invocation." He said the policy clearly indicated, without saying so explicitly, that what was expected was a religious message, "suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited."

In an acerbic dissenting opinion, Chief Justice William H. Rehnquist said the majority opinion "bristles with hostility to all things religious in public life."

Chief Justice Rehnquist said that "neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause," at least as understood by George Washington, who proclaimed a day of "public thanksgiving and prayer" at the request of "the very Congress which passed the Bill of Rights."

The chief justice said the majority was adopting so rigid a view of church-state separation that "under the Court's logic, a public school that sponsors the singing of the national anthem before football games violates the Establishment Clause" because the concluding verse contains the phrase "And this be our motto: 'In God is our trust.' "

Justices Antonin Scalia and Clarence Thomas joined the chief justice's dissenting opinion. The majority opinion was joined by Justices Sandra Day O'Connor, Anthony M. Kennedy, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.

Justice Stevens appeared to go out of his way to refute the dissenters' accusation that the majority was hostile to religion. "By no means," he said, did the Constitution "impose a prohibition on all religious activity in our public schools" or stop "any public school student from voluntarily praying at any time before, during, or after the school day." He added: "But the religious liberty protected by the Constitution is abridged when the state affirmatively sponsors the particular practice of prayer."

The case, Santa Fe Independent School District v. Doe, No. 99-62, began in 1995 when two families, one Mormon and the other Catholic, sued to stop a variety of religious practices in the 4,000-student district near Galveston, Tex. Permitted by the Federal District Court to proceed anonymously because of the possibility of harassment, the plaintiffs won an initial ruling that prompted several

changes in the school district's policy as the litigation continued.

The dissenting justices objected today that the majority lacked a basis for striking down the policy, which had never taken effect, on its face, but should let it take effect and see if any problems developed. But the majority declared firmly that there was no need to wait. In fact, Justice Stevens said, the election system itself was part of the constitutional problem "because it establishes an improper majoritarian election on religion" and "encourages divisiveness along religious lines."

Also notable was the majority's rejection of the school district's effort to describe the policy as a "content-neutral" effort to provide a solemn atmosphere at football games. "We refuse to turn a blind eye to the context in which this policy arises," Justice Stevens said, "and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer."

Gov. George W. Bush of Texas, who signed the state's brief in support of the school district, called the ruling "disappointing." In a statement put out by his office in Austin, Mr. Bush said: "I support the constitutionally guaranteed right of all students to express their faith freely and participate in voluntary, student-led prayer."

Julie Underwood, general counsel of the National School Boards Association, praised the decision and said she would advise school districts that they should now regard student-led graduation prayers as unconstitutional as well. "This decision emphasizes that we don't have prayer at school sponsored events, period," she said in an interview, adding: "Children shouldn't made to feel excluded or coerced."

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SCHOOL PRAYER REJECTED

High Court Bans Student-Led Acts

USA Today

Tuesday, June 20, 2000

Joan Biskupic

WASHINGTON -- The Supreme Court on Monday delivered its strongest rejection of prayer in public schools in nearly a decade, forbidding invocations at school activities even when students organize them. The 6-3 ruling involved prayer at football games in Texas, but likely will prevent such rituals at graduations and other school events.

Ruling that pre-kickoff prayers violate the First Amendment's separation of church and state, the court provided an unusually direct condemnation of school-sanctioned prayer. "School sponsorship of a religious message is impermissible because it (tells) members of the audience who are non-adherents that they are outsiders," Justice John Paul Stevens wrote.

Just as the debate over school prayer has split parts of the USA, the decision in a Texas case divided the court. Chief Justice William Rehnquist, writing the dissent for himself, Antonin Scalia and Clarence Thomas, said the majority opinion "bristles with hostility to all things religious in public life."

The court's ruling generated particularly emotional reactions in the South, where pre-game prayers are as much a tradition as the coin toss. Civil libertarians declared victory and praised the court for citing school officials' behind-the-scenes involvement in prayers.

But church groups and others who believe that students should be able to publicly express their faith say the court is out of step with most Americans, who in polls have supported classroom prayers. Prayer supporters hope the ruling will renew interest in a constitutional amendment to allow school prayer and highlight the importance of the next president's appointments to the court.

Texas Gov. George W. Bush, the likely GOP presidential nominee, called the ruling "disappointing" and said he backs the "right of all students to participate in voluntary, student-led prayer." Vice President Gore, the likely Democratic nominee, declined to comment.

The case began when two families, Catholic and Mormon, sued the Santa Fe (Texas) school district, claiming that officials were engaging in Christian proselytizing in an array of school activities. The justices focused their inquiry on a district policy allowing students to vote on whether they want a pre-game message, religious or secular, to promote sportsmanship.

In 1992, the court rejected administrator-arranged prayers at public school graduations. On Monday, justices turned back the notion that similar prayers are any more acceptable if led by students.

The prayers "are authorized by a government policy and take place on government property at government-sponsored" events, wrote Stevens, joined by Sandra Day O'Connor, Anthony Kennedy, David Souter, Ruth Bader Ginsburg and Stephen Breyer.

Major rulings on prayer in schools. Action by the Supreme Court:

1962-Rules against a New York law that required students to recite a state-written prayer each day.

1980-Strikes down a Kentucky law that ordered schools to post the Ten Commandments.

1985-Rejects an Alabama law that allowed a moment of silence for prayer each day.

1990-Rules that student religious groups could meet in Nebraska highschools.

1992-Rules against prayers organized by administrators at graduations in Rhode Island.

Monday-Rejects student-led prayers at football games in Texas. Ruling may apply to graduation ceremonies.

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Last Term:

Leila Jeanne HILL, Audrey Himmelmann, and Everitt W. Simpson, Jr.
v.
COLORADO *et al.*

No. 98-1856

Supreme Court of the United States

Decided June 28, 2000

TWO VICTORIES FOR ABORTION RIGHTS: JUSTICES UPHOLD COLORADO 'BUBBLE,' REJECT NEBRASKA LATE-TERM BAN

The Denver Post

Thursday, June 29, 2000

Bill McAllister

WASHINGTON - A sharply divided U.S. Supreme Court gave abortion-rights advocates two major victories Wednesday as it upheld a Colorado law restricting protests outside medical clinics and rejected a Nebraska law banning controversial late-term abortions.

Declaring that individuals have 'a right to be let alone,' the high court upheld Colorado's so-called 'bubble law' by a 6-3 vote. The 1993 law creates an 8-foot zone, or bubble, around individuals entering medical facilities and bars protesters from entering those bubbles.

By a 5-4 vote, the court threw out the Nebraska law that banned what opponents call 'partial-birth' abortions. The ruling, the latest decision reaffirming the court's landmark 1973 abortion ruling, declared that Nebraska had placed 'an undue burden' on a woman's right to seek an abortion.

Both decisions, coming on the final day of the court's current term, provoked sharply worded decisions and bitter dissents. 'Does the deck seem stacked?' complained Justice Antonin Scalia, the court's most passionate abortion foe. 'You bet.'

The court's six-member majority rejected Scalia's arguments and praised the Colorado legislature for drafting a law that doesn't mention abortion but does place restrictions on individuals. The bubble law establishes a 100-foot zone in front of medical facilities and prohibits protesters from walking within 8 feet of people there.

Chief Justice William Rehnquist and Justices John Paul Stevens, Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg and Stephen Breyer voted to uphold the bubble law. Scalia and Justices Clarence Thomas and Anthony Kennedy dissented.

Writing for the majority, Stevens rejected the arguments of the three Colorado women who called themselves 'sidewalk counselors' and claimed their free speech rights under the

First Amendment were jeopardized by the 1993 state law.

'Under this statute, absolutely no channel of communication is foreclosed,' Stevens countered. 'No speaker is silenced. And no message is prohibited

'This statute simply empowers private citizens entering a health care facility with the ability to prevent a speaker, who is within 8 feet and advancing, from communicating a message they do not wish to hear.'

The majority held that is acceptable and cited as support the 'right to be let alone' that the late Justice Louis Brandeis, 'one of our wisest justices,' articulated in a 1928 dissent. Stevens did, however, acknowledge that the Colorado law 'will sometimes inhibit a demonstrator whose approach, in fact, would have proved harmless. But the statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment.'

Abortion-rights advocates expressed delight with the two rulings, but anti-abortion groups were furious. 'It's incredibly disappointing,' said Jeannie Hill of Wheat Ridge, one of the three Colorado anti-abortion activists. 'We're very surprised by the Supreme Court. This was our last recourse. Now we have to be under threat of arrest everywhere we go.'

The law makes intrusion on the 'bubble' a Class 3 misdemeanor punishable by a $ 750 fine and up to six months in jail.

Attorney Jay Sekulow, who had argued Hill's case before the court on behalf of the conservative American Center for Law and Justice, called the ruling 'both troubling and damaging.' He said it 'restricts constitutional rights, suppresses freedom and underscores the fact that sadly there is an abortion speech exception to the First Amendment.'

Officials on both sides said the narrow ruling in the Nebraska case ensures that abortion will be an issue in the coming presidential race. President Clinton seemed to agree, telling a news conference that the next president will have two to four seats on the court to fill.

That leaves the future of abortion rights 'very much in the balance,' he said.

Some top congressional Republican supported that idea. 'More than anything, this decision demonstrates the urgent need to put a president in the White House who will insist on appointing members of the judiciary who do not view the Constitution as a launch pad for contrived legal theories,' said Rep. Tom DeLay, R-Texas, an abortion opponent.

Vice President Al Gore, the presumptive Democratic nominee for president, declined through a spokesman to comment on the Colorado ruling. His campaign did issue a statement on the Nebraska case, noting that Texas Gov. George W. Bush, the certain GOP presidential nominee, had said he would name justices like Scalia and Clarence Thomas, who dissented in both cases.

The Colorado ruling was a personal triumph for Rep. Diana DeGette, D-Colo., who drafted the law while in the state legislature. 'We scored a tremendous victory for patients' rights today,' she said in a statement. 'The court affirmed what Colorado has long embraced - that our citizens have a right to medical treatment without the fear of being harassed or intimidated.'

Eighteen states had joined the case in support of the Colorado law. DeGette and Jim Henderson, another lawyer for the American Center for Law and Justice, predicted that a number of governments will now enact laws based on the Colorado statute.

Henderson said Massachusetts, Phoenix and Santa Barbara, Calif., which have been considering similar laws, are likely to be among the first.

'John Paul Stevens has put a pillow on the First Amendment and has killed it,' Henderson

said, noting that the liberal American Civil Liberties Union and labor's AFL-CIO had joined in the fight against the Colorado law on the basis of free speech.

In a strong dissent in the Colorado case, Scalia ridiculed the majority opinion as 'one of many aggressively pro-abortion novelties announced by the court in recent years.' He accused the majority of pushing aside 'whatever doctrines of constitutional law stand in the way,' of abortion.

The court's majority opinion noted that none of the three Colorado women who brought the case were abusive or confrontational in their protests. But Stevens pointed out that wasn't always the case. He said protests described to the state legislature as it considered the bill were often highly emotional and 'there was also evidence that emotional confrontations may adversely affect a patient's medical care.'

Three Colorado courts considered the women's complaints, and all the courts rejected them, including the Colorado Supreme Court.

In the Nebraska case, Justice Stephen Breyer offered a detailed, clinical description of the late-term abortion procedures that millions of Americans consider murder. While Americans hold 'virtually irreconcilable points of view' over abortion, Breyer said the court majority remains committed to protect a 'woman's right to choose' that it first proclaimed 27 years ago in Roe vs. Wade.

'Our cases have repeatedly invalidated statutes that in the process of regulating the methods of abortion, impose significant health risks,' he wrote. By detailing what types of abortion are proper, Nebraska has effectively placed the health of some women at risk, he said.

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ABORTION WAR OF WORDS GOES ON AT DENVER CLINIC

Protesters Continue Action at Facility on Vine Street

Denver Rocky Mountain News

Thursday, June 29, 2000

Lisa Levitt Ryckman

Jo Scott brought her ladder so she could look over the fence and into the clinic parking lot.

Corine Miller brought the extra-large soft-drink cup she uses as a megaphone. Delores Chavez and Margaret Roush brought their daughters.

They all came armed with hand-lettered signs, gruesome photos, righteous indignation and a heartfelt message: Abortion is murder.

The war of words went on Wednesday at Planned Parenthood's Vine Street clinic even though a battle had been lost.

The U.S. Supreme Court had issued a ruling that upheld Colorado's "bubble" law, which requires Scott, Miller and their fellow protesters to stay eight feet from anyone entering the clinic.

During arguments before the justices in January, one of the three Colorado challengers, Leila Jeanne Hill, stood outside the Supreme Court building with a postcard displaying a smiley face and the statement "I think we're going to have our First Amendment rights back this summer."

There were no smiley faces on Vine Street Wednesday.

"This country thrives on unrighteous laws," Scott said. "Abortion's legal, and they're going to do everything they can to make killing children easy."

The ruling surprised none of these sidewalk soldiers.

"We knew that it would happen," Scott said. "But it won't stop us. We're very creative, resourceful people. We'll find a way around it."

On those rare occasions when clients approach the clinic on foot, Scott said she and other protesters can still get close enough to make eye contact and deliver their message. But most of the time, women arrive by car and are whisked into the parking lot, where off-duty police officers and volunteer escorts await them.

When that happens, Scott climbs her ladder so she can shout over the canvas-lined fence that separates the lot from the street. "This is not an option! This is murder!"

But that's as close as she gets.

"It's a curb to the in-your-face tactics that were so common before the passage of the bubble law," said Ellen Brilliant, Planned Parenthood spokeswoman. "When there's a safe space created, it decreases the potential for violence."

The bubble law hasn't been enforced, mostly because it's up to the woman and her family to press charges. The penalty for violating the law is up to six months in jail and a $750 fine. But the protesters, who have been arrested for littering, loitering and disturbing the peace, aren't worried.

"It's business as usual, either way," Miller said.

For more than three years, the Littleton woman has been coming to the clinic to

perform a piece of street theater that she believes has changed women's minds.

"I do a 'voice of the unborn child,' " Miller said. "It's an emotional plea from the baby to its mother for its life. You want to hear it?"

She pointed her makeshift megaphone at the clinic wall.

"Mommy! Mommy!" Miller wailed between sobs. "I love you, Mommy! I love you, Mommy! Take me home now! I don't want to die! Look me in the eyes, Mommy! Look me in the eyes now and tell me why, why are you doing this to me? Why? Why?

"My last words to you Mommy: I love you, Mommy! Remember me, Mommy! My life is in your hands - or my blood is ON YOUR HANDS!"

But inside the Vine Street clinic, concrete walls muffled her words, and music and daytime television drowned them out.

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Last Term:

Jeremiah W. (Jay) NIXON, Attorney General of Missouri, et al., Petitioners
v.
SHRINK Missouri Government PAC et al.

No. 98-963

Supreme Court of the United States

Decided June 28, 2000

CAMPAIGN GIFT LIMITS REAFFIRMED; COURT UPHOLDS POWER TO CURB DONATIONS

The Baltimore Sun

Tuesday, January 25, 2000

Lyle Denniston

WASHINGTON -- The Supreme Court surprisingly reaffirmed yesterday sweeping power for the federal and state governments to curb donations to political candidates.

After a long trend of giving the political financing system greater freedom from regulation, the court did a considerable turnabout, revitalizing a 24-year-old decision that supports strict limits on contributions to candidates.

The justices, dividing 6-3, upheld a 1994 Missouri law that sets a limit of $1,075 on contributions to statewide candidates, slightly higher than the $1,000 limit that Congress imposed in 1976 for federal campaign donations.

The court indicated that there would probably be no constitutional problem if the figure was set lower. Such low ceilings, donors and candidates argue, do not keep pace with inflation and the rising costs of campaigning.

The high court made clear that Congress and state legislatures need not show evidence that money corrupts elections in order to exercise their power to reduce the influence of large donors.

Noting a broad threat of "politicians too compliant with the wishes of large contributors," Justice David H. Souter wrote for the majority: "The cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.

"The dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible."

The decision emboldened those who want to tighten public controls on political financing. Sen. Russell D. Feingold, a Wisconsin Democrat and a leader of the congressional bloc that has failed to pass federal legislation limiting donations, said in a statement that the

court's ruling "has greatly advanced our efforts to reform our elections."

Republicans who have led the fight against new limits on campaign contributions have argued that such limits, if passed by Congress, would be struck down by the Supreme Court. The court's decision yesterday appears to seriously undercut that argument. Feingold suggested that the decision "put to rest any doubts about the constitutionality" of limits on campaign donations.

Cleta D. Mitchell, a Washington attorney and leading opponent of campaign finance restrictions, portrayed the Supreme Court ruling as narrow. The ruling, she said, was little more than a restatement of part of a 1976 decision upholding Congress' power to limit contributions to candidates. She noted that the justices said nothing about another part of that decision that struck down efforts to limit candidates' own spending.

But Mitchell expressed concern about how advocates of campaign finance limits would read the ruling. "The 'reformers' are never finished reforming and regulating," she said.

Although the majority did not say so in specific words, the ruling appeared to clear the way constitutionally for legislatures to restrict "soft money" -- the unlimited, unregulated contributions to political parties that help their candidates, even though the money does not go directly into the candidates' campaign coffers.

Soft money is a leading source of campaign financing and is the chief target of those who want to reduce the effect of big donations on politics.

Yesterday's case, Nixon vs. Shrink Missouri Government PAC, had appeared to be a difficult test for the court on constitutional issues surrounding campaign finance. Yet the majority decided it with apparent ease and, in fact, treated the result as almost self-evident.

Missouri's Legislature, Souter wrote, had ample reason to believe that large contributions were having a corrupting influence on elected state officials, or at least giving voters the impression that money could corrupt. The court refused to require any minimum threshold of proof of corruption before campaign donations could be curbed.

In addition, the court seemed to relax its understanding of what could constitute corruption in politics. Previously, it had appeared to support limits on campaign donations primarily when politicians performed explicit favors in return for donations. That requirement of "quid pro quo" evidence was dropped yesterday.

The ruling exposed a deep split between the majority and the dissenters on the constitutionality of campaign finance limits. Justice Clarence Thomas, in a biting dissenting opinion, wrote: "The majority today, rather than going out of its way to protect political speech, goes out of its way to avoid protecting it."

Thomas argued that the majority had relied on a view of political corruption that did not amount to anything like corruption.

Thomas and Justices Anthony M. Kennedy and Antonin Scalia argued that the Supreme Court should reconsider its 1976 ruling in the case of Buckley vs. Valeo, the court's most important constitutional ruling on campaign finance. Yet, the majority appeared to have strengthened that ruling's support of campaign finance curbs.

The three justices dissented, arguing that the Missouri campaign donation limits -- ranging from $250 to $1,075 per donor for statewide candidates -- violate the First Amendment because they severely restrict protected political expression by donors and the candidates they favor.

Justice Stephen G. Breyer supported Souter's majority opinion, but said he, too, would favor reconsidering the 1976 ruling if that decision came to be understood to deprive

legislatures of wide authority to restrict campaign spending and contributions. Justice Ruth Bader Ginsburg supported Breyer's separate opinion.

Joining the Souter majority, besides Breyer and Ginsburg, were Chief Justice William H. Rehnquist and Justices Sandra Day O'Connor and John Paul Stevens.

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COURT SEES CONTRIBUTION LIMITS AS WAY TO PREVENT CORRUPTION

New Jersey Law Journal

January 31, 2000

Tony Mauro

In a 6-3 decision last Monday, the Supreme Court upheld Missouri's caps on campaign contributions, potentially clearing the way for limits lower than the $1,000 federal threshold.

After years of doubt over the current Court's take on campaign finance reform and the First Amendment, the ruling in Nixon v. Shrink Missouri Government PAC underlines the Court's support for limits on contributions as a way to prevent corruption in government. And the justices agreed that the 1976 ruling in Buckley v. Valeo did not require states to come up with extensive "empirical evidence" of actual corruption to justify limiting contributions.

"There is little reason to doubt that sometimes large campaign contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters," wrote Justice David Souter for the majority.

"The Court's opinion is a victory for democracy," President
Bill Clinton said in a statement Monday. "Today's decision sets the stage for further reform."

Souter announced the ruling to a nearly empty courtroom. Only four of the nine justices were on the bench, and only a handful of spectators in the Court, on a day when access to the building was limited in anticipation of anti-abortion rallies outside. Justice Clarence Thomas was absent because of the sudden death of his brother on Sunday, Court officials said.

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In the Nixon campaign reform case, Justice John Paul Stevens in a concurring opinion reiterated the view in Buckley that limits on contributions to candidates are less constitutionally suspect than direct limits on speech. "Money is property; it is not speech. ... The right to use one's money to hire gladiators, or to fund 'speech by proxy,' certainly merits significant constitutional protection," Stevens wrote.

"These property rights, however, are not entitled to the same protection as the right to say what one pleases."

That somewhat relaxed view of the hurdles states must overcome to pass campaign contribution limits will give "states a real boost of confidence that their limits will be upheld," says Deborah Goldberg of the Brennan Center for Justice, which has argued in favor of limiting both contributions and spending. "This strengthens the side of Buckley that upholds contribution limits."

Rehnquist, O'Connor Join Majority

Goldberg also pointed to the fact that the majority included Chief Justice William Rehnquist and Justice Sandra Day O'Connor, who had shown some signs of wavering on Buckley in recent decisions. The other justices in the majority were Ruth Bader Ginsburg and Stephen Breyer.

"Today's opinion stops the backsliding that lower courts have done over the past 10 years and returns us to where we were with the Buckley v. Valeo decision," said Derek Gressman of U.S.Public Interest Research Group.

Souter's opinion could be used to justify contribution limits even lower than the $1,000 limit embodied in federal law and the $1,075 in the Missouri law under challenge. He said there was no evidence that the Missouri limit created a "system of suppressed political advocacy." In examining future limits, Souter said the test should be "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."

Bobby Burchfield of Covington & Burling said Souter's formulation won't help lower courts decide "what factors can be used in deciding what level is acceptable." Burchfield, who wrote a brief against the limits for Sen. Mitch McConnell, R-Ky., said the ruling "doesn't change the landscape much."

Certainly the decision Monday does not disturb the other half of Buckley -- the Court's judgment that while limits on contributions to candidates are OK, limits on spending by candidates violate their free speech rights. A concurrence by Justice Breyer and joined by Justice Ginsburg suggests that Buckley leaves legislators "broad authority" to regulate soft money and enact other reforms such as reduced-price time for candidates on broadcast media. He also said post-Buckley experiences might call for a reconsideration of Buckley, at lease insofar as "making less absolute the contribution/expenditure line."

But dissents in the case make it clear that a solid bloc of three justices -- Anthony Kennedy, Clarence Thomas, and Antonin Scalia -- still see significant threats to the First Amendment in current limits on campaign money.

Dissenters See Indifference

In a strongly worded dissent, Kennedy said the majority was "almost indifferent" to the consequences of the decision on "the speech upon which democracy depends." He adds that "Buckley has not worked," citing the growing use of 'soft money,' which is unregulated because it does not go directly to candidates. "The Court has forced a substantial amount of speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits.

He called Buckley a "halfway house" that ought to be eliminated. But Kennedy, while urging that Buckley be overruled, stopped short of saying that all forms of campaign money limits would be unconstitutional. He said he would invite Congress to devise a new system that takes First Amendment concerns into account.

Thomas went further, however, in a dissent joined by Scalia. By embracing the Buckley framework, the majority has managed again to "balance away First Amendment freedoms," Thomas wrote. He urged the use of "strict scrutiny" to evaluate the Missouri law, a standard under which the state limits would be "patently unconstitutional," as would any other limit on spending or contributions. Thomas asserted that "contributions to political campaigns generate essential political speech," and as such cannot be limited.

Bribery laws are adequate to attack the evils legislators are trying to end with campaign finance laws, Thomas says. "States are free to enact laws that directly punish those engaged in corruption, but they are not free to enact generalized laws that suppress a tremendous amount of speech along with the targeted corruption," Thomas wrote.

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BARTNICKI v. VOPPER
&
UNITED STATES v. VOPPER

The First Amendment v. The Right to Privacy

Meredith Lugo*

Is an individual's right to privacy imperiled when he or she talks on a cellular phone? Does the press have an unassailable right under the First Amendment to publish truthful information, even if such information was illegally obtained? The Supreme Court in *Bartnicki v. Vopper* will answer these questions in deciding the constitutionality of provisions of the Federal Wiretapping Act which create both civil and criminal causes of action against anyone who intentionally uses or discloses the contents of any communication which he knows or has reason to know was illegally intercepted, even if he is not responsible for such interception.

The communication at issue in the case is a telephone conversation between high-ranking members of a local teacher's union regarding heated ongoing contract negotiations. During the course of the conversation one of the parties threatened to "blow off [the school board members'] front porches." This conversation was recorded by an unknown person who left the tape in the mailbox of one of the defendants, who presided over an organization opposed to the demands of the teacher's union. He in turn gave the tape to the defendant radio host who repeatedly played it on-air. The two union members filed suit in federal court under both the Federal and Pennsylvania Wiretapping Acts, and the federal government intervened to defend the constitutionality of that portion of the federal statute that imposed liability on those who broadcast illegally obtained communications.

Guided throughout by a recognition of Supreme Court precedent which has generally weighed freedom of the press above an individual's right to privacy, a panel majority of the United States Courts of Appeals for the Third Circuit held these provisions of the state and federal statutes unconstitutional. The majority opinion, written by Judge Dolores Sloviter, began with a consideration of the "level of scrutiny" to be applied and determined that intermediate scrutiny was appropriate, accepting the government's argument that both the state and federal statutes were content-neutral. To survive intermediate scrutiny a regulation must be narrowly tailored to serve a significant government interest. While conceding the validity of the overall purpose of protecting privacy, the majority rejected the proffered justifications for the specific provisions at issue in this case. Since none of the defendants sued by Bartnicki were responsible for the interception of the call, the desire to deny the wrongdoer the fruits of his labor was inapplicable. The majority further concluded that the government contention that the provisions, by eliminating the demand for intercepted materials by third parties, had a deterrent effect on the act of interception was without merit, a mere unsupported hypothesis.

The dissent argued that the regulations survived intermediate scrutiny and were therefore constitutional. Judge Louis Pollak found a direct connection between the provisions creating a cause of action for disclosure and the prevention of the interception itself. He argued that in order to effectively

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protect privacy not just the initial trespass but also the subsequent disclosure or use of the intercepted material must be prohibited and punishable. In support of his argument he pointed out that of the states which have wiretapping statutes, half include similar provisions. However, as the majority rightly countered, this merely means that half of them do not.

Further complicating matters for the Court is a previous seemingly contrary decision by the D.C. Circuit. In *Boehner v. McDermott* (1999) Congressman John Boehner (R-Ohio) sued Congressman James McDermott (D-Washington) under the same federal statutory provision for turning over a tape of a confidential telephone conversation between members of the Republican Party leadership, including Newt Gingrich, concerning his investigation by the House Ethics Committee and involving conduct which may have violated the terms of his agreement with the committtee, to various newspapers. The court held the provision did not abridge McDermott's freedom of speech. *Boehner*, however, can easily be distinguished from *Bartnicki*: the D.C. Circuit was careful to point out that the newspapers which published articles relying on the tape were not defendants in the suit, and the court suggested that McDermott may have had some culpability in the original illegal transaction.

Bartnicki will provide the Supreme Court with its latest opportunity to attempt to strike the delicate balance that must be maintained in our society between freedom of the press and the individual right to privacy in one's own conversations.

99-1687 Bartnicki v. Vopper

Ruling below (3d Cir., 200 F.3d 109, 68 U.S.L.W. 1397):

Civil liability provisions of federal wiretap statute, 18 U.S.C. §2511(1)(c), and Pennsylvania Wiretapping and Electronic Surveillance Control Act, which bar intentional disclosure of contents of wire, oral, or electronic communication by one who has reason to know that information was obtained through interception in violation of statute, violate First Amendment as applied to individual who furnished, and media defendants who published, tape recording of intercepted conversation of public significance but had no role in its interception.

Question presented: Do federal and Pennsylvania wiretapping statutes violate First Amendment insofar as they prohibit disclosure or other use of unlawfully intercepted electronic communication by person who was not involved in interception itself, but who knows or has reason to know that communication was unlawfully intercepted?

99-1728 United States v. Vopper

Ruling below (*Bartnicki v. Vopper*, 3d Cir., 200 F.3d 109, 68 U.S.L.W. 1397):

Civil liability provision of federal wiretap statute, 18 U.S.C. §2511(1)(c), which bars intentional disclosure of contents of wire, oral, or electronic communication by one who has reason to know that information was obtained through interception in violation of statute, violates First Amendment as applied to individual who furnished, and media defendants who published, tape recording of intercepted conversation of public significance but had no role in its interception.

Question presented: Does imposition of civil liability under 18 U.S.C. §2511(1)(c) and (d) for using or disclosing contents of illegally intercepted communications, when defendant knows or has reason to know that interception was unlawful but is not alleged to have participated in or encouraged it, violate First Amendment?

Gloria BARTNICKI, et al.
v.
Frederick W. VOPPER, et al., Appellants

UNITED STATES OF AMERICA, Intervenor

United States Court of Appeals
for the Third Circuit

Decided December 27, 1999

SLOVITER, Circuit Judge:

At issue is whether the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants, two radio stations, their reporter, and the individual who furnished the tape recording, played no direct or indirect role in the interception.

I.

BACKGROUND

A.

From the beginning of 1992 until the beginning of 1994, Wyoming Valley West School District was in contract negotiations with the Wyoming Valley West School District Teachers' Union (the "Teachers' Union") over the terms of the teachers' new contract. The negotiations, which were markedly contentious, generated significant public interest and were frequently covered by the news media.

Plaintiffs Gloria Bartnicki and Anthony F. Kane, Jr., as well as defendant Jack Yocum, all were heavily involved in the negotiating process. Bartnicki was the chief negotiator on behalf of the Teachers' Union. Kane, a teacher at Wyoming Valley West High School, served as president of the local union. Yocum served as president of the Wyoming Valley West Taxpayers' Association, an organization formed by local citizens for the sole purpose of opposing the Teachers' Union's proposals.

In May of 1993, Bartnicki, using her cellular phone, had a conversation with Kane. They discussed whether the teachers would obtain a three-percent raise, as suggested by the Wyoming Valley West School Board, or a six-percent raise, as suggested by the Teachers' Union. In the course of their phone conversation, Kane stated:

If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys . . . . Really, uh, really and truthfully, because this is, you know, this is bad news (undecipherable) The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three percent. What they should have said, 'we'll meet and discuss this.' You don't discuss the items in public.

*** Bartnicki responded, "No," and, Kane continued, "You don't discuss this in public . . . . Particularly with the press." ***

This conversation, including the statements quoted above, was intercepted and recorded by an unknown person, and the tape left in Yocum's mailbox. Yocum retrieved the tape, listened to it, and recognized the voices of

Bartnicki and Kane. He then gave a copy of the tape to Fred Williams, also known as Frederick W. Vopper, of WILK Radio and Rob Neyhard of WARM Radio, both local radio stations. Williams repeatedly played part of the tape on the air as part of the Fred Williams Show, a radio news/public affairs talk show which is broadcast simultaneously over WILK Radio and WGBI-AM. The tape was also aired on some local television stations and written transcripts were published in some newspapers.

B.

Bartnicki and Kane sued Yocum, Williams, WILK Radio, and WGBI Radio (hereafter "media defendants") under both federal and state law. They based their federal claims on Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 28 U.S.C. § 2510 et seq., and their state claims on the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5701 et seq. As relief, Bartnicki and Kane sought (1) actual damages in excess of $ 50,000, (2) statutory damages under 18 U.S.C. § 2520(c)(2), (3) liquidated damages under 18 Pa. Cons. Stat. § 5725(a)(1), (4) punitive damages, and (5) attorneys' fees and costs.

Bartnicki, Kane, and the defendants each moved for summary judgment. The District Court denied these motions on June 14, 1996 and denied defendants' motion to reconsider on November 8, 1996, specifically holding that imposing liability on the defendants would not violate the First Amendment.

The District Court subsequently certified two questions as controlling questions of law: "(1) whether the imposition of liability on the media Defendants under the [wiretapping statutes] solely for broadcasting the newsworthy tape on the Defendant Fred Williams' radio news/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of the Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid [wiretapping statutes] on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment." *** Williams, WILK Radio, and WGBI Radio subsequently petitioned for permission to appeal. Yocum filed an answer to the petition in which he joined the media defendants' request that we hear this appeal. We granted the petition by order dated February 26, 1998. The Pennsylvania State Education Association submitted a brief as amicus curiae in support of the appellees, and the United States has intervened as of right pursuant to 28 U.S.C. § 2403.

***

D.

The Federal Omnibus Crime Control and Safe Streets Act of 1968 (the "Federal Wiretapping Act") provides in relevant part:

(1) Except as otherwise specifically provided in this chapter any person who --

. . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . .

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511. It continues:

(a) In general. -- Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in the violation such relief as may be appropriate.

18 U.S.C. § 2520. The Federal Wiretapping Act thus creates civil and criminal causes of action against those who intentionally use or disclose to another the contents of a wire, oral, or electronic communication, knowing or having reason to know that the information was obtained in violation of the statute.

The Pennsylvania Wiretapping and Electronic Surveillance Control Act (the "Pennsylvania Wiretapping Act") is similar. ***

***

Both Acts also explicitly authorize the recovery of civil relief.

***

DISCUSSION

A.

As the District Court acknowledged and the parties do not dispute, the media defendants neither intercepted nor taped the conversation between Bartnicki and Kane. Indeed, the record does not disclose how or by whom the conversation was intercepted. The media defendants argued before the District Court that these facts preclude a court from finding them liable under the Wiretapping Acts. The District Court disagreed. It concluded that, "a violation of these acts can occur by the mere finding that a defendant had a reason to believe that the communication that he disclosed or used was obtained through the use of an illegal interception." *** It further opined that such an interpretation of the statute "adheres to the purpose of the act which was to protect wire and oral communications and an individual's privacy interest in such." *** The District Court concluded that genuine disputes of material fact remain regarding (1) whether the Bartnicki-Kane conversation was illegally intercepted, and if so (2) whether any or all of the defendants knew or had reason to know that that conversation was illegally intercepted. *** The parties do not challenge these holdings on appeal.

Hence, this case does not involve the prohibitions of the Wiretapping Acts against the actual interception of wire communications. Nor does it involve any application of the Acts' criminal provisions. Rather, this case focuses exclusively on the portions of the Wiretapping Acts that create causes of action for civil damages against those who use or disclose intercepted communications and who had reason to know that the information was received through an illegal interception.

***

C.

In order to determine whether the provisions for civil sanctions from the Wiretapping Acts may constitutionally be applied to penalize defendants' disclosure, we must first decide what degree of First Amendment scrutiny should be applied.

The United States argues that the Federal Wiretapping Act is subject to intermediate rather than strict scrutiny. It bases this contention on two subsidiary assertions: (1) that these are "general laws that impose[ ] only incidental burdens on expression" and (2) that "to the extent that Title III restricts speech in particular cases, it does so in an entirely content-neutral fashion." *** It states that "[a] statute satisfies intermediate scrutiny, if it

furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on speech is not unnecessarily great." *** We assume that the United States' arguments apply equally to the Pennsylvania Wiretapping Act, which is substantially similar to the Federal Wiretapping Act.

We first consider the United States' argument that the disclosure provisions of the Wiretapping Acts merit only intermediate scrutiny because they impose only incidental burdens on expression.

***

[T]he United States apparently suggests that defendant's actions in disclosing the contents of the Bartnicki-Kane conversation are properly considered "expressive conduct" rather than speech. If this is the thrust of the government's citations, it is not persuasive. The acts on which Bartnicki and Kane base their complaint are Yocum's "intentionally disclos[ing a] tape to several individuals and media sources" *** and the media defendants' "intentionally disclos[ing] and publish[ing] to the public the entire contents of the private telephone conversation between Bartnicki and Kane." *** If the acts of "disclosing" and "publishing" information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.

***

The United States nonetheless insists that intermediate scrutiny is appropriate because the statute, read as a whole, primarily prohibits conduct rather than speech. ***

The government cites no support for the surprising proposition that a statute that governs both pure speech and conduct merits less First Amendment scrutiny than one that regulates speech alone. We are convinced that this proposition does not accurately state First Amendment law. ***

***

The United States' second argument -- that intermediate scrutiny applies because the Acts are content-neutral -- is more persuasive.

When the state uses a "content-based" regulation to restrict free expression, particularly political speech, that regulation is subject to "the most exacting scrutiny." ***

By contrast, when the state places a reasonable "content-neutral" restriction on speech, such as a time, place and manner regulation, that regulation need not meet the same high degree of scrutiny. "Content-neutral" restrictions are valid under the First Amendment provided that they "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information." ***

***

The Senate Report describes the purposes of the Federal Wiretapping Act as: "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *** Congress thus focused on privacy in adopting 18 U.S.C. § 2511, the provision that prohibits the interception of wire, oral, or electronic communications, as well as the use or disclosure of the contents of illegally intercepted communications. Congress did not, however, define the privacy interest that it intended the Act to protect.

As commonly understood, the right to privacy encompasses both the right "to be free from unreasonable intrusions upon [one's] seclusion" and the right to be free from "unreasonable publicity concerning [one's] private life." ***

***

We do not decide whether the Wiretapping Acts would indeed be properly categorized as content-based if justified on the basis of a need to prevent the disclosure of private facts because the United States for the most part eschews reliance on that justification in explaining the purpose of those acts. Instead, the United States argues that "the fundamental purpose of Title III is to maintain the confidentiality of wire, electronic, and oral communications." *** It reasons that "prohibiting the use of illegally intercepted communication . . . 'strengthens subsection (1)(a),' the provision that imposes the underlying ban on unauthorized interception, 'by denying the wrongdoer the fruits of his labor' and by eliminating the demand for those fruits by third parties." *** We are satisfied that this latter justification does not rely on the communicative impact of speech and, therefore, that the Acts are properly treated as content-neutral.

D.

Accordingly, we adopt the government's position that we should apply intermediate scrutiny in our analysis of the issue before us. In doing so, we must first fix upon an acceptable definition of the term "intermediate scrutiny." *** Intermediate scrutiny is used by the Court in a wide variety of cases calling for some balancing. ***

***

The test usually applied in First Amendment cases to content-neutral regulation requires an examination of whether the regulation is "narrowly tailored to serve a significant governmental interest" and "leaves open ample alternative channels for communication." *** There is a considerable number of First Amendment cases in which the Supreme Court, applying intermediate scrutiny, has found that the regulation at issue, albeit designed to advance legitimate state interests, failed to withstand that scrutiny. ***

***

With the Supreme Court precedent as a guide, we examine whether the government has shown that its proffered interest is sufficiently furthered by application to these defendants of the damages provisions of the Wiretapping Acts to justify the impingement on the protected First Amendment interests at stake.

As noted above, the United States contends that the Wiretapping Acts serve the government's interest in protecting privacy by helping "maintain the confidentiality of wire, electronic, and oral communications." *** Undoubtedly, this is a significant state interest. We do not understand the defendants to deny that there is an important governmental interest served by the Wiretapping Acts. However, the government recognizes that not all of the provisions of the Wiretapping Acts are being challenged. In fact, only a portion of those Acts are at issue here -- the provisions imposing damages and counsel fees for the use and disclosure of intercepted material on those who played no part in the interception.

The United States asserts that these provisions protect the confidentiality of communications in two ways: (1) "by denying the wrongdoer the fruits of his labor" and (2) "by eliminating the demand for those fruits by third parties." *** In this case, however, there is no question of "denying the wrongdoer the fruits of his labor." The record is devoid of any allegation that the defendants encouraged or participated in the interception in a way that would justify characterizing them as "wrongdoers." Thus, the application of these provisions to penalize an individual or radio stations who did participate in the interception and thereafter disclosed the intercepted material is not before us.

We therefore focus on the United States' second contention -- that the provisions promote privacy by eliminating the demand for intercepted materials on the part of third parties. The connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial

interception is indirect at best. The United States has offered nothing other than its ipse dixit in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation. Nor has the United States offered any basis for us to conclude that these provisions have deterred any other would-be interceptors. *** Given the indirectness of the manner in which the United States claims the provisions serve its interest, we are not prepared to accept the United States' unsupported allegation that the statute is likely to produce the hypothesized effect. *See Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 *** ("The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined."). Faced with nothing "more than assertion and conjecture," it would be a long stretch indeed to conclude that the imposition of damages on defendants who were unconnected with the interception even "peripherally promoted" the effort to deter interception. *See Village of Schaumburg,* 444 U.S. at 636.

When the state seeks to effectuate legitimate state interests, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. ***

[T]he Wiretapping Acts already provide for punishment of the offender, i.e., the individual who intercepted the wire communication and who used or disclosed it. *** Those who indirectly participated in the interception, either by aiding or abetting, would also fall within the sanctions provided by the statute. Therefore, the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants.

We are also concerned that the provisions will deter significantly more speech than is necessary to serve the government's asserted interest. It is likely that in many instances these provisions will deter the media from publishing even material that may lawfully be disclosed under the Wiretapping Acts.

Reporters often will not know the precise origins of information they receive from witnesses and other sources, nor whether the information stems from a lawful source. Moreover, defendants argue that they cannot be held liable for use and publication of information that had previously been disclosed. Assuming this is so, reporters may have difficulty discerning whether material they are considering publishing has previously been disclosed to the public. Such uncertainty could lead a cautious reporter not to disclose information of public concern for fear of violating the Wiretapping Acts.

Bartnicki and Kane recognize that the Supreme Court has frequently expressed concern about the "timidity and self-censorship" that may result from permitting the media to be punished for publishing certain truthful information. *** The public interest and newsworthiness of the conversation broadcast and disclosed by the defendants are patent. In the conversation, the president of a union engaged in spirited negotiations with the School Board suggested "blowing off [the] front porches" of the School Board members. Nothing in the context suggests that this was said in anything other than a serious vein. Certainly, even if no later acts were taken to follow through on the statement, and hence no crime committed, the fact that the president of the school teachers' union would countenance the suggestion is highly newsworthy and of public significance. Our concerns are only heightened by the Supreme Court's admonition in *Smith* that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." ***

Our dissenting colleague does not disagree with any of the applicable legal principles. He candidly states that the difference between us is one of "ultimate application of [the agreed upon] analysis to the case at bar." *** Therefore, we add only a few brief comments pertaining to that application.

Evidently, one of the principal differences between our respective applications lies in the weight we give the factors to be balanced. The dissent suggests the Supreme Court's decisions in *Schneider*, *Struthers*, and *Schaumburg* are not pertinent to this case because the state interests in those cases (littered streets, annoying door-to-door proselytizers, *** and fraudulent charitable solicitors, respectively) were "not very important." The dissent contrasts those interests with the significant governmental interest at issue here -- that of maintaining the confidentiality of wire, electronic, and oral communications.

Presumably, the dissent's point is that we must weigh more heavily the privacy interests furthered by the Wiretapping Acts than the Court weighed the state interests in the three cited cases. Given the conceded importance of privacy and confidentiality at issue here, we nonetheless find it difficult to accord it more weight than the interests in preventing disclosure of the name of a rape victim, the identity of a judge in a putative disciplinary proceeding, or the identity of a youth charged as a juvenile offender at issue in *Cox Broadcasting*, *Landmark Communications* and *Smith*, respectively. Yet when faced with each of those circumstances, the Supreme Court determined that despite the strong privacy interest underlying the statutory and state constitutional provisions punishing disclosure of such information, the interests served by the First Amendment must take precedence.[7] It would be difficult to hold that privacy of telephone conversations are more "important" than the privacy interests the states unsuccessfully championed in those cases.

In addition, we do not share the dissent's confidence that imposition of civil liability on those who neither participated in nor encouraged the interception is an effective deterrent to such interception. The dissent finds such a nexus in the legislative landscape, where half of the states that prohibit wiretapping also authorize civil damage actions. With due respect, we find this a slim reed, not only because it appears from the dissent's statistics that the other half of the states with wiretapping statutes have not included a damage provision but because the incidence of state statutes, and hence "widespread legislative consensus," does not prove the deterrent effect of the prohibition. Indeed, there is not even general agreement as to the deterrent effect of a criminal statute on the perpetrator, *** much less on those who were not in league with the perpetrator. In determining whether a regulation that restricts First Amendment rights "substantially serves [its asserted] purposes," *** the Court has never found that question satisfied by sheer numbers of state statutes.

The dissent engages in hyperbole when it suggests that our decision "invalidates a portion of the federal statute" and "by necessary implication spells the demise of a portion of more than twenty other state statutes." *** The statutes, which are designed to prohibit and punish wiretapping, remain unimpaired. All that is at issue is the application of those statutes to punish members of the media who neither encouraged nor participated directly or

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[7] Although we acknowledge that those decisions arose from a stricter level of scrutiny than we employ here and somewhat different circumstances, the fact remains that the Court has generally tilted for the First Amendment in the tension between press freedom and privacy rights. This is bemoaned by the dissenting Justices in *The Florida Star*, who state candidly they "would strike the balance rather differently." *** So, apparently, would the dissent in this case.

indirectly in the interception, an application rarely attempted.

Moreover, we do not agree that the recent decision in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), presented that court with the same issue presented here. Most particularly, in *Boehner*, where a divided court upheld the constitutionality of § 2511(1)(c), all three judges emphasized in their separate opinions that there was no effort to impose civil damages on the newspapers (The New York Times, et al.) which had printed the details of a conversation that been illegally intercepted. Thus, for example, in the lead opinion the court stated at the outset, "nor should we be concerned with whether § 2511(1)(c) would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call." *** Liability in that case was sought to be imposed on James McDermott, a congressman who caused a copy of the tape to be given to the newspapers. Although technically, defendant Yocum in our case stands in the same position as McDermott, i.e. as the source but not the interceptor, there is an indication in *Boehner* that McDermott was more than merely an innocent conduit. Indeed, McDermott, unlike Yocum, knew who intercepted the conversation because he "accepted" the tape from the interceptors and, the opinion suggests, not only sought to embarrass his political opponents with the tape but also promised the interceptors immunity for their illegal conduct. *** In fact, the second judge, who concurred in the judgment and in only a portion of the opinion for the court, specifically limited his concurrence to the decision that § 2511(1)(c) "is not unconstitutional as applied in this case," *** and pointed out that "McDermott knew the transaction was illegal at the time he entered into it," ***. In contrast, Yocum has not been shown to have "entered into" any transaction with the interceptors. In the posture of this case, all parties accept his allegation that the tape was left in his mailbox.

The *Boehner* court was acutely aware that no court has yet held that the government may punish the press through imposition of damages merely for publishing information of public significance because its original source acquired that information in violation of a federal or state statute. *** As noted earlier in this opinion, the Supreme Court has been asked to permit a state to penalize the publication of truthful information in at least four instances. In three of the four cases, the statutes at issue protected the privacy interests of such vulnerable individuals as juveniles and the victims of sexual assault. *** In the remaining case, the statute at issue was meant to protect the state's interest in an independent and ethical judiciary. *** Despite the strength of the state interests asserted, the Supreme Court in each case concluded that those interests were insufficient to justify the burdens imposed on First Amendment freedoms.

We likewise conclude that the government's significant interest in protecting privacy is not sufficient to justify the serious burdens the damages provisions of the Wiretapping Acts place on free speech. We are skeptical that the burden these provisions place on speech will serve to advance the government's goals. Even assuming the provisions might advance these interests, the practical impact on speech is likely to be "substantially broader than necessary." ***

We therefore hold that the Wiretapping Acts fail the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception. It follows that we need not decide whether these provisions leave open ample alternative channels for communication of information.

III.

CONCLUSION

For the reasons set forth, we will reverse the order of the District Court denying summary judgment to the defendants, and will remand with directions to grant that motion.

POLLAK, District Judge, dissenting.

The Court of Appeals for the District of Columbia Circuit has recently determined, in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), that the First Amendment does not bar a civil damage action brought, pursuant to 18 U.S.C. § 2511(1)(c) and 18 U.S.C. § 2520(a), and pursuant to the Florida statutory provisions that are counterparts of the federal statute, against one who, so the plaintiff alleged, gave to the New York Times and other newspapers copies of a tape recording of a telephone conversation which the defendant had "knowledge and reason to know" had been unlawfully intercepted. *** Today this court holds that the First Amendment does bar a civil damage action brought, pursuant to the Federal statute and its Pennsylvania counterpart, against (1) one who handed over a copy of a taped telephone conversation to a radio reporter, and (2) the radio reporter and the two radio stations that subsequently broadcast the tape, plaintiffs having alleged that both the person who handed over the tape and the radio reporter had, in the statutory language, "reason to know" that the taped conversation had been intercepted in contravention of the federal and Pennsylvania statutes. In the case decided today the court addresses a broader range of issues then those presented in *Boehner v. McDermott*: in *Boehner v. McDermott* the only defendant was the person who allegedly delivered to the media a copy of a tape of an allegedly wrongfully intercepted telephone conversation; in today's case there are three "media defendants" in addition to the defendant who allegedly delivered to the media a copy of a tape of an allegedly wrongfully intercepted telephone conversation.[2]

I am in general agreement with the careful analytic path traced by the court through the minefield of First Amendment precedents. However, I find myself in disagreement with the court's ultimate application of its analysis to the case at bar.

Accordingly, I respectfully dissent.

I.

***

Where I part company with the court is in its application of intermediate scrutiny in this case.

A.

The court begins by acknowledging what I take to be beyond dispute: namely, that the professed governmental interest -- the interest of the United States (which is presumably also Pennsylvania's interest) in "maintaining the confidentiality of wire, electronic, and oral communications," *** -- is "a significant state interest." *** Then -- evidently with a view to exploring whether the challenged prohibition on disclosure or use of a conversation by one who had "reason to know" that the conversation was intercepted unlawfully is "narrowly tailored to serve [that] significant governmental interest" -- the court undertakes to "focus on the United States' . . . contention . . . that the provisions promote privacy by eliminating the demand for intercepted materials on the part of third parties." ***

***

With all respect, I find this portion of the court's opinion unpersuasive:

First: I take issue with the proposition that "the connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception

[2] The *Boehner v. McDermott* court was at pains to point out the limited scope of its ruling. ***

is indirect at best." "Preventing the initial interception" is only part of the statutory scheme. The statutory purposes, as the court has noted, are "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *** Unauthorized interception of a communication is prohibited -- and made both a criminal offense and an event giving rise to civil liability -- both to protect parties to a communication from an initial trespass on their privacy and to protect them from subsequent disclosure (and/or other detrimental use). "Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves. It was therefore 'essential' for Congress to impose upon third parties, that is, upon those not responsible for the interception, a duty of non-disclosure." *Boehner v. McDermott*, 191 F.3d at 470.

Second: Given the close nexus between the legislative prohibition on unauthorized interception and the legislative imposition upon "third parties, that is, upon those not responsible for the interception, [of] a duty of non-disclosure," I am puzzled by the court's view that the argument presented by the United States in support of the statutory regime of civil liability lacks persuasiveness because it is not supported by a demonstration that "imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation," or "that these [statutory] provisions have deterred any other would-be interceptors." Nor do I think the court's view is buttressed by the court's invocation of *Landmark Communications, Inc. v. Virginia*, ***. It is true that in *Landmark*, in which the Supreme Court struck down, as applied to a newspaper, a statute making it a misdemeanor to "divulge information" about confidential proceedings conducted by Virginia's Judicial Inquiry and Review Commission, the Court observed that "the Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme [which contemplated a process of confidential inquiry into alleged judicial misconduct] would be seriously undermined." But the special -- and limited -- pertinence of the Court's observation becomes clear when it is read in context. The full paragraph follows:

> It can be assumed for purposes of decision that confidentiality of Commission proceedings serves legitimate state interests. The question, however, is whether these interests are sufficient to justify the encroachment on First Amendment guarantees which the imposition of criminal sanctions entails with respect to nonparticipants such as Landmark. The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined. While not dispositive, we note that more than 40 States having similar commissions have not found it necessary to enforce confidentiality by use of criminal sanctions against nonparticipants.

In striking contrast is the legislative landscape that forms the setting of the case at bar. Complementing the federal statute are more than forty state wiretapping statutes. Of these state statutes, approximately half have provisions which, like the federal statute, (1) prohibit disclosure or use of an intercepted conversation by one who knows or has "reason to know" that the interception was unlawful, and (2) authorize civil damage actions against one who discloses or uses such unlawful

interception. As this case illustrates, Pennsylvania is one of those states. So are Delaware and New Jersey -- Pennsylvania's Third Circuit siblings. ***

In short, there appears to be a widespread legislative consensus that the imposition of civil liability on persons engaged in conduct of the kind attributed to these defendants is an important ingredient of a regime designed to protect the privacy of private conversations. Moreover, the decision announced today not only invalidates a portion of the federal statute and the counterpart portion of the Pennsylvania statute, it by necessary implication spells the demise of a portion of more than twenty other state statutes (and also of a statute of the District of Columbia); in the two centuries of our constitutional history there cannot have been more than a handful of prior decisions, either of a federal court or of a state court, which, in the exercise of the awesome power of judicial review, have cut so wide a swath.

Third: What has been said points up the non-pertinence to the case at bar of *Schneider v. State* ***, *Martin v. Struthers* ***, and *Village of Schaumburg v. Citizens for a Better Environment* ***, cases cited by the court as illustrative of the proposition that regulations designed to promote significant governmental interests should not sweep so broadly as to impose unnecessary constraints on First Amendment rights of free expression and communication. The constitutional shortcomings in *Schneider* (combating the littering of streets by curbing leafleting), *Struthers* (banning door-to-door distribution of circulars, including religious literature, in order to protect homeowners from annoyance), and *Village of Schaumburg* (combating allegedly fraudulent charitable solicitation by banning all solicitation by groups not disbursing 75% of receipts) involved situations in which small towns imposed on traditional First Amendment activities pervasive constraints sought to be justified as ways of dealing with distinct (and not very important) problems that could have been more effectively addressed by governmental action directed at the actual problems -- e.g., prosecuting litterers (*Schneider*); prosecuting as trespassers solicitors who do not depart when requested by homeowners to do so (*Struthers*); requiring organizations soliciting contributions to disclose how receipts are used (*Village of Schaumburg*). In the case at bar, unauthorized disclosure (or other use) of private conversations is a central aspect of the very evil the challenged statutory provisions are designed to combat.

B.

The court also notes that "reporters often will not know the precise origins of information they receive from witnesses and other sources, nor whether the information stems from a lawful source," or, indeed, "whether material they are considering publishing has previously been disclosed to the public." *** As a result, the court opines, "it is likely that in many instances these [challenged statutory] provisions will deter the media from publishing even material that may lawfully be disclosed under the Wiretapping Acts." ***

I think the court overstates the potential problems of the media. One would suppose that a responsible journalist -- whether press or broadcast -- would be unlikely to propose publication of a transcript of an apparently newsworthy conversation without some effort to insure that the conversation in fact took place and to authenticate the identities of the parties to the conversation. As part of such an inquiry, the question whether the parties to the conversation had authorized its recording and release, or whether others had lawfully intercepted the conversation, would seem naturally to arise. Moreover, current technology would make it relatively easy to determine whether the conversation had been the subject of a prior press or broadcast report. ***

II.

As the court's opinion makes plain, the First Amendment values of free speech and press are among the values most cherished in the American social order. Maintenance of these values (and the other values of the Bill of Rights) against overreaching by the legislature or the executive is among the judiciary's major and most demanding responsibilities. In the case at bar, however, the First Amendment values on which defendants take their stand are countered by privacy values sought to be advanced by Congress and the Pennsylvania General Assembly that are of comparable - indeed kindred - dimension. Three decades ago the late Chief Judge Fuld of the New York Court of Appeals put the matter well in *Estate of Hemingway v. Random House* *** (in words that the Supreme Court has quoted with approval ***):

The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

SUPREME COURT ROUNDUP: JUSTICES AGREE TO REVIEW PRIVACY OF CELLULAR CALLS

The New York Times

Tuesday, June 27, 2000

Neil A. Lewis

The Supreme Court agreed today to decide whether people, including journalists, may be sued for disclosing the contents of telephone calls that were illegally intercepted and recorded by someone else.

The court accepted a case from Pennsylvania that is expected to help define the balance between the First Amendment rights of Americans to disseminate information, and state and federal wiretapping laws intended to prevent people from intercepting private conversations.

The Pennsylvania case involved a tape recording made illegally of a cell phone conversation that was later given to a radio station, which broadcast it repeatedly. The case is likely to affect a similar lawsuit brought by a Republican leader in the House against a Democratic colleague for disclosing a taped cell phone conversation among Republican leaders about the House ethics investigation of former Speaker Newt Gingrich.

The court's decision to hear the case was one of many actions today as the justices moved to conclude their term this week. The court also agreed to revisit a North Carolina case to see if race played too large a role in how a Congressional district was created.

The wiretap case involved heated contract negotiations between the teachers union and the school board in the Wyoming Valley West School District. A teacher who was president of the union was talking on her cell phone with the union's chief negotiator and said angrily that if school board members did not budge from their offer, the teachers were going to "blow off the front porches" of their homes. An opponent of the teachers union said he found a tape recording of the conversation in his mailbox and gave it to a radio station, which eventually broadcast it.

Neither the teachers' opponent nor the radio station was involved in intercepting or taping the conversation, according to the record. The federal appeals court in Philadelphia ruled 2 to 1 that wiretapping laws could not be extended to the defendants because that would violate constitutional guarantees of free speech. The outcome will have particular significance for news organizations and will almost certainly bear on a lawsuit brought by Representative John A. Boehner, Republican of Ohio, against Representative Jim McDermott, Democrat of Washington.

In December 1996, a Florida couple illegally taped a cell phone conversation in which Mr. Gingrich, Mr. Boehner and other Republican leaders were heard discussing matters related to Mr. Gingrich's ethics case. The couple gave the tape to Mr. McDermott, who passed it on to the House ethics committee. The New York Times and several other news organizations published transcripts of the conversations. An appeals court in the District of Columbia had ruled 2 to 1 that the Boehner suit could go forward.

The Pennsylvania cases are Bartnicki v. Vopper (99-1687) and United States v. Vopper (99-1728).

In other matters, the court dealt with these cases:

Traffic Stop

The court also agreed to hear the appeal of a Texas woman who was arrested, handcuffed and jailed because she and her two children did not use seat belts.

The case involves the reach of Fourth Amendment protections against unreasonable search and seizure by the police. Lawyers for the Texas woman, Gail Atwater, argued that the traffic stops are the most frequent experience Americans have with the Fourth Amendment as there are 185 million licensed drivers.

Ms. Atwater was driving her two children home one afternoon in 1997 when her truck was stopped by Bart Turek, then a Lago Vista, Tex., police officer, because no one had the seat belt fastened.

Texas law gives police the discretion to make arrests for routine traffic violations, except for speeding. Mr. Turek arrested Ms. Atwater, handcuffed her and took her to the police station. She was booked and placed in a cell for about an hour before she appeared before a magistrate and paid a $50 fine, the maximum penalty for the offense.

The case is Atwater v. Lago Vista (99-1408).

Redistricting

The court agreed to consider once again how much the issue of race may be used in drawing lines for a Congressional district.

The case involves the 12th District in North Carolina, which has been represented since 1992 by Melvin Watt, a Democrat.

After the Supreme Court ruled that the 1992 boundaries were so extraordinary as to be unconstitutional, the district was redrawn in 1997. This time, the General Assembly tried to avoid some of the odd features that attracted the court, like the way the district jumped back and forth across a highway to take in more black voters.

Nonetheless, the new plan was challenged as relying too heavily on race, and a three-judge appeals court agreed, saying District 12 remained "an impermissible and unconstitutional racial gerrymander."

The cases are Hunt vs. Cromartie (99-1864) and Smallwood vs. Cromartie (99-1865).

School Prayer

The court set aside an appeals court ruling that let public school students in an Alabama county lead group prayers at graduations, assemblies and sports events.

The justices told a federal appeals court in Atlanta to restudy the case in light of a school-prayer decision announced last week in a Texas case. In that ruling, the court said prayer in public schools must be private and that such prayers at high school football games violated the separation of church and state.

In 1993, Alabama enacted a law requiring public schools to allow student-initiated prayer at "compulsory or noncompulsory" school activities.

The case is Michael Chandler v. Siegelman (99-935).

License to Practice Law

The court rejected the appeal of a white supremacist in Illinois who said the state committee that denied him a law license violated his free-speech rights. The court rejected Matthew Hale's arguments that Illinois had used "orthodox religious and political beliefs to which (an aspiring lawyer) must subscribe as a condition of admission."

Mr. Hale, of East Peoria, a leader of the segregationist World Church of the Creator, was denied a law license last summer, even though he graduated from Southern Illinois University's law school and passed the state bar exam. State bar officials noted that he had "dedicated his life to inciting racial hatred," and

said that "he cannot do this as an officer of the court."

The case is Hale v. Committee on Character and Fitness (99-1349).

Assistance to Counsel

The Supreme Court agreed to consider when a criminal defense lawyer's failure to challenge a sentencing error should result in a ruling that the defendant did not have adequate legal representation.

The case involves Paul L. Glover, former vice president and general counsel of Chicago Truck Drivers, Helpers and Warehouse Workers Union, who was convicted of racketeering and conspiracy charges. Mr. Glover has argued that he is entitled to a new sentencing hearing because his lawyer failed to challenge a sentence that was up to 21 months longer than he should have received.

The case is Glover v. U.S. (99-8576).

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FREE SPEECH AND WIRELESS PRIVACY FACE OFF

Radio Comm. Report

Monday, July 3, 2000

Jeffrey Silva

WASHINGTON-The Supreme Court last week agreed to decide whether individuals who divulge illegally intercepted electronic communications are as liable as eavesdroppers themselves, setting a showdown between free speech and wireless privacy.

The case has major implications for the wireless industry, which has aggressively fought in recent years for stronger privacy laws for the nation's 90 million mobile phone subscribers. A decision that favors free speech over telephone privacy would be a severe blow to wireless security.

The Supreme Court will review a decision made last December by a federal appeals court in Philadelphia, which rejected as unconstitutional federal and Pennsylvania wiretap laws.

The case was brought by Gloria Bartnicki, a Pennsylvania teacher's union negotiator whose conversation from her cell phone was intercepted, recorded and aired on a local radio talk show in September 1993. Both Bartnicki and the Clinton administration sought a review by the high court.

While the Third Circuit Court of Appeals ruled against Bartnicki, saying the radio station that aired the intercepted telephone conversation was protected by the First Amendment, the Court of Appeals for the District of Columbia Circuit came to a markedly different conclusion in a politically high-profile eavesdropping case pitting Rep. John Boehner (R-Ohio) against Rep. James McDermott (D-Wash.).

In that litigation, the appeals court here overturned a federal district court ruling that threw out Boehner's 1998 suit against McDermott. Boehner's suit is seeking $10,000 in statutory damages.

In April, McDermott asked the Supreme Court to review the case.

Boehner, then-chairman of the House Republican Conference, claimed McDermott gave several major newspapers audio tapes of a December 1996 conference call among several GOP House leaders about how to deal in public with an expected settlement between then-House Speaker Newt Gingrich (R-Ga.) and the House Ethics Committee over alleged misconduct.

The GOP conference call, in which Boehner participated in via his cell phone while vacationing in northern Florida, was overheard and recorded by a Florida couple. John and Alice Martin gave the taped GOP conference call to Rep. Karen Thurman (D-Fla.) and discussed with her the prospect of getting immunity from illegally intercepting the call.

Thurman pointed the Martins to McDermott, who at the time sat on the House Ethics Committee that was investigating Gingrich. McDermott later stepped down from the panel. In 1997, the Martins pled guilty, and each paid a $500 fine.

"I think it will have a big impact," said Christopher Landau, a lawyer for McDermott, referring to the Supreme Court's decision to review the Pennsylvania mobile phone privacy case.

The Cellular Telecommunications Industry Association and Boehner's office did not return calls for comment.

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LEGAL SERVICES CORPORATION v. VELAZQUEZ
&
UNITED STATES v. VELAZQUEZ

Limiting Legal Aid

Meredith Lugo*

How far can attorneys receiving federal funds go in representing indigent clients seeking welfare benefits? Only as far as the government permits, says the government, but attorneys contend that's not far enough, particularly at a time when states are experimenting with aggressive welfare reform. The Supreme Court will get its say later this year when it hears the *Velazquez* case, the latest consideration of the question of the government's ability to limit the way in which its monies are spent.

The federal government created the Legal Services Corporation (LSC) in 1974 to help finance legal assistance for the poor in noncriminal matters. Since its inception, the government has limited LSC's scope. This latest challenge by LSC grantees and their clients is in response to the Congressional expansion, in 1996, of restrictions placed on the Corporation. Congress forbade participating attorneys from lobbying, participating in class actions, providing legal assistance to aliens in certain categories, supporting advocacy training, litigating on behalf of prisoners, and, most importantly for the purposes of this case, seeking to reform welfare. The United States Court of Appeals for the Second Circuit upheld all of the regulations except that which prohibited attorneys from participating in lobbying or rulemaking involving an effort to reform a state or Federal welfare system and permitted them to represent clients seeking welfare benefits only so long as such an effort did not involve an attempt to reform or challenge the existing welfare system. The Supreme Court agreed to hear appeals filed by both the United States and the LSC challenging the Second Circuit's 2-1 holding striking down this provision as impermissible viewpoint discrimination.

In his majority opinion, Judge Pierre Leval emphasized that legal advocacy is closely akin to the most protected categories of speech under the First Amendment. His decision was based largely on the contention that the courtroom constitutes a forum, or marketplace, uniquely suited for the airing of challenges to governmental action. With the regulation at issue, the government has decided what arguments are acceptable and attempted to exclude all other viewpoints. The restriction serves as an "absolute prohibition ... muzzl[ing] grant recipients from expressing any and all forbidden arguments." This, the majority held, the government cannot do.

Judge Dennis Jacobs in dissent sharply criticized the majority for ignoring *Rust v. Sullivan*, a 1991 Supreme Court decision which he maintained was controlling. By a 6-3 decision, the majority in *Rust* upheld a prohibition on abortion counseling by clinics receiving Title X funds. Judge Leval's majority opinion had quickly dispensed with *Rust* by distinguishing legal advocacy as entitled to greater First Amendment protection than abortion counseling. Judge Jacobs disputed this distinction, and held that the statute as a whole, including the provision struck by the majority, is constitutional because Congress may set parameters for the programs which it funds. He also rejected the majority's description of the courtroom as a public forum, and characterized LSC grantees as contractors whose actions the

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government may prescribe because it is footing the bill for their services. He quoted at length from the majority in *Rust* to support his conclusions: "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."

The Supreme Court is also likely to rely on *Rust* for guidance when it decides *Velazquez* this term. Whatever the outcome, this decision is sure to have a great impact upon legal representation of the poor.

99-603 Legal Services Corporation v. Velazquez

Ruling below (2d Cir., 164 F.3d 757, 67 U.S.L.W. 1404):

Federal statute that bars Legal Services Corporation grantees from challenging existing law in representing individual welfare claimants discriminates on basis of viewpoint in seeking to discourage challenges to status quo and thus violates First Amendment's free speech clause.

Question presented: Did court of appeals err in refusing to follow *Rust v. Sullivan*, 500 U.S. 173 (1990), when it invalidated limitation imposed by Congress on services that may be provided by Legal Services Corporation grantees and held that Congress must subsidize grantees involved in litigation that seeks to amend or otherwise challenges existing welfare laws?

99-960 United States v. Velazquez

Ruling below (*Velazquez v. Legal Services Corporation*, 2d Cir., 164 F.3d 757, 67 U.S.L.W. 1404):

Statutory restrictions on activities of recipients of Legal Services Corporation funds and LSC regulations requiring that groups engaging in prohibited activities be separate from LSC fund recipients do not violate First Amendment, except for statutory provision barring LSC grantees from challenging existing law in representing individual welfare claimants.

Question presented: Does Section 504(a)(16) of 1996 Omnibus Consolidated Rescissions and Appropriations Act, which precludes recipients of LSC funds from participating in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system," except that it allows representation of "an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation," violate First Amendment?

CAREEN VELAZQUEZ, et al, Plaintiffs-Appellants
v.
LEGAL SERVICES CORPORATION, Defendant-Appellee,
UNITED STATES OF AMERICA, Intervenor-Appellee.

United States Court of Appeals
for the Second Circuit

Decided January 7, 1999

LEVAL, Circuit Judge:

This appeal concerns the validity of restrictions imposed by Congress and the Legal Services Corporation ("LSC") on the professional activities of entities that receive funding from LSC ("LSC grantees"). Plaintiffs are lawyers employed by New York City LSC grantees, their indigent clients, private contributors to LSC grantees, and state and local public officials whose governments contribute to LSC grantees. Plaintiffs sought a preliminary injunction against the enforcement of the restrictions, contending they violate various provisions of the U.S. Constitution. The district court denied a preliminary injunction, finding that plaintiffs had failed to establish a probability of success on the merits. We affirm in part and reverse in part.

I. Background

A. The Legal Services Corporation and the Challenged Statute.

LSC is a non-profit government-funded corporation, created by the Legal Services Corporation Act of 1974 ("LSCA")***, "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." *** LSC fulfills this mandate by making and administering grants to hundreds of local organizations that in turn provide free legal assistance to between 1,000,000 and 2,000,000 indigent clients annually. *** Many LSC grantees are funded by a combination of LSC funds and other public or private sources. *** LSC grantees are governed by local Boards of Directors who set policies and priorities in response to local conditions and client needs. LSC is empowered to implement the LSCA through the traditional administrative rulemaking process. ***

From the outset of the LSC program, LSC grantees have been restricted in the use of LSC funds. See 42 U.S.C. § 2996f(b)(1)-(10) (prohibiting use of LSC funds in, inter alia, most criminal proceedings, political activities, and litigation involving nontherapeutic abortion, desegregation, or military desertion). Recipient organizations are also barred from using most nonfederal funds for any activity proscribed by the LSCA. ***

In 1996, Congress substantially expanded the restrictions on activities of LSC grantees. See Omnibus Consolidated Rescissions and Appropriations Act of 1996 *** ("OCRAA," or "the 1996 Act"), reenacted in the Omnibus Consolidated Rescissions and Appropriations Act of 1997 ***. Section 504 of OCRAA *** bars the use of LSC funds to aid entities that perform various activities including lobbying, participation in class actions, providing legal assistance to aliens in certain categories, supporting advocacy training programs, collecting attorneys' fees under fee shifting laws, litigating on behalf of prisoners, and seeking to reform welfare.

Congress left no question of its intention to restrict grantees' use of non-federal and federal funds alike. ***

***

3. Viewpoint Discrimination.

We turn finally to plaintiffs' claim that the 1996 Act discriminates against certain speech on the basis of viewpoint and is therefore unconstitutional even as applied to the use of federal monies. It appears that plaintiffs direct this argument against the lobbying provisions and the welfare reform provision of the Act.

***

The welfare reform provision of § 504(a)(16) is more obscure. It includes four categories of prohibited activities "involving an effort to reform a Federal or State welfare system" -- initiating legal representation, and participating in litigation, lobbying, or rulemaking -- with an exception relating to the legal representation or litigation prohibitions. Under the most natural reading of each of these provisions, three appear to prohibit the type of activity named regardless of viewpoint, while one might be read to prohibit the activity only when it seeks reform.

***

Subsection (a)(16) expressly provides that its prohibitions do not prevent a grantee from representing "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation" (the "suit-for-benefits exception"). According to this exception, representation of a client seeking a welfare benefit is permitted, but only if the representation will not involve any challenge to the propriety of any previously existing rule that led to the denial of benefits. The grantee thus could not argue that the rule that led to the denial of the client's benefits was unauthorized by the governing regulation, that the regulation was unauthorized by the statute, or that the regulation or statute was unauthorized by the Constitution. Such representation is permitted only if it includes no challenge to the underlying law. It seems clear to us that this limitation on the suit-for-benefits exception is not viewpoint neutral. It accords funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules. It clearly seeks to discourage challenges to the status quo. The provision thus discriminates on the basis of viewpoint, and requires us to decide whether this discrimination is permissible in the context of the LSCA.

The government's "discrimination against speech because of its message" is suspect under the First Amendment. *Rosenberger v. Rector and Visitors of University of Virginia*, *** (noting that such discrimination is "presumed to be unconstitutional"). Whether a subsidy that is dependent on viewpoint constitutes illegal discrimination presents a complex question, which is illuminated by three relevant recent Supreme Court holdings.

In *Rust v. Sullivan*, the Court upheld regulations forbidding recipients of government funds for family planning from counseling or advocacy related to abortion. ***

In *National Endowment for the Arts v. Finley*, the Court last term upheld a requirement that the NEA, in making grants for the arts based on excellence, also "take into consideration general standards of decency and respect for the diverse beliefs and values of the American people." ***

In *Rosenberger*, the Court struck down a provision in a program of governmental grants to support student publications that excluded from eligibility publications expressing a viewpoint on religion. ***

We assess the relevance of these precedents differently from our dissenting colleague. Judge Jacobs argues that *Rust* and *Finley* together

establish the government's broad entitlement to discriminate on the basis of viewpoint in making financial grants. Viewpoint discrimination, he argues, is suspect only where, as in *Rosenberger*, the government seeks to promote a diversity of private speech. Judge Jacobs relies heavily on explanatory language in the *Rust* opinion, which was quoted by the Supreme Court in *Finley*:

> The Government can, without violating the Constitution, selectively fund a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. ***

Under Judge Jacobs's analysis, just as Congress may lawfully fund family planning services conditioned on the grantee's not counseling on the availability of abortion, so Congress also may fund the legal representation of a welfare applicant conditioned on the grantee's not raising arguments that question the validity of any statute, regulation or governmental procedure pertaining to welfare.

We acknowledge that the words from *Rust* that Judge Jacobs cites seem on their face to support his view. But we doubt that these words can reliably be taken at face value. In seeking to understand how a judicial precedent in a relatively unexplored area of law bears on other undecided questions, it is often more instructive to look at what the Court has done, rather than at what the Court has said in explanation. Explanations that seem sound enough in the context of the facts for which they are devised often carry implications the court would never subscribe to if applied to other facts not in contemplation. ***

The quotation from *Rust*, for example, seems on its face to imply that Congress could lawfully fund institutions to study the nation's foreign or domestic policies, conditioned on the grantee's not criticizing, or advocating change in, the policies of the government. That would fall within the parameters of choosing "to fund one activity to the exclusion of another." Congress would be "selectively funding a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." Nonetheless, we think it inconceivable that the Supreme Court that approved the *Rust* regulation would have intended its language to authorize grants funding support for, but barring criticism of, governmental policy. ***

We think the resolution lies in the fact that different types of speech enjoy different degrees of protection under the First Amendment. "Expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co.* *** The strongest protection of the First Amendment's free speech guarantee goes to the right to criticism government or advocate change in governmental policy. "Expression of dissatisfaction with the policies of this country [is] situated at the core of our First Amendment values." *Texas v. Johnson* ***. Criticism of official policy is the kind of speech that an oppressive government would be most keen to suppress. It is also speech for which liberty must be preserved to guarantee freedom of political choice to the people. For those reasons we think it clear that, notwithstanding *Rust*'s semantic endorsement of Congress's right to fund one activity to the exclusion of another, the Supreme Court would not approve a grant to study governmental policy, conditioned on the grantee's not criticizing the policy.

In our view, a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion

counseling or indecent art. The fact that Congress can make grants that favor family planning over abortion, or that favor decency over indecency, in no way suggests that Congress may also make grants to fund the legal representation of welfare applicants under terms that bar the attorney from arguing the unconstitutionality or illegality of whatever rule blocks the client's success. Among the only directly effective ways to oppose a statute, regulation or policy adopted by government is to argue to a court having jurisdiction of the matter that the rule is either unconstitutional or unauthorized by law. The limitation on the suit-for-benefits exception prohibits a legal services organization that has received LSC grant funds from making such an argument on behalf of a client, even though that argument may be necessary to establish the client's rights in precisely the representation for which the funding was granted. Such a restriction is a close kin to those "calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Finley* ***. If the idea in question is the unconstitutionality or illegality of a governmental rule, the courtroom is the prime marketplace for the exposure of that idea. *** To forbid a lawyer from articulating that idea in the court proceeding effectively drives the idea from the marketplace where it can most effectively be offered.

The Supreme Court's discussion in *Finley* underscores the suspect nature of the limitation on the suits-for-benefits exception for a further reason. In *Finley*, considerations of "decency and respect" were merely to be taken "into consideration." The Supreme Court stressed that the questioned provision offered "vague exhortations" and "imposed no categorical requirement." *** The NEA might still make grants notwithstanding indecency. The Court, in fact, seemed to imply that an absolute prohibition, of the sort "calculated to drive 'certain ideas or viewpoints from the marketplace,'" would have required a different result. *** The limitation on the suit-for-benefits exception is just such an absolute prohibition: It muzzles grant recipients from expressing any and all forbidden arguments.

For these reasons, we believe that the suit-for-benefits exception is viewpoint discrimination subject to strict First Amendment scrutiny. Defendants offer no arguments why the provision can survive such scrutiny and we perceive none. We therefore conclude that the suit-for-benefits exception of § 504(a)(16) unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law.

The next question is which part of the statute should be found invalid as a result of the unconstitutionality of the viewpoint-based proviso to the suit-for-benefits exception.

***

We *** conclude that the viewpoint-based proviso barring grantee lawyers representing individuals from contesting the legality of an existing rule is severable from the overall suit-for-benefits exception. The exception permitting a grantee to "represent[] an individual eligible client who is seeking specific relief from a welfare agency" will survive our holding that the viewpoint-based proviso to the suit-for-benefits exception is unconstitutional.

We therefore direct the district court to enter a preliminary injunction barring enforcement of that part of the suit-for-benefits exception of § 504(a)(16) that would make an entity ineligible for an LSC grant if, in the course of a representation of an individual client seeking specific relief from a welfare agency, that entity sought "to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." In all other respects, the statute will continue to function as written. Grantees will be barred (on penalty of losing their entitlement to grantee status) from engaging in any of the activities prohibited by § 504. They will be prohibited under § 504(a)(16) from initiating legal

representation, or participating in any other way in litigation, lobbying, or rulemaking concerning "efforts [by anyone] to reform a Federal or State welfare system." On the other hand, grantees will be permitted to represent "an individual eligible client who is seeking specific relief from a welfare agency," regardless whether such representation includes arguments that seek "to amend or otherwise challenge existing law." § 504(a)(16).

Conclusion

The district court's denial of a preliminary injunction is reversed solely with respect to the limitation on the suit-for-benefits exception of § 504(a)(16). In all other respects, the district court's order denying a preliminary injunction is affirmed.

JACOBS, Circuit Judge, concurring in part, dissenting in part:

I agree with the conclusions of the majority opinion except insofar as it holds unconstitutional a critical proviso in a subsection of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA") *** The majority throws the section out of kilter by preserving the exception but striking the proviso, on the ground that under *Rosenberger v. Rector & Visitors of the University of Virginia* the proviso amounts to viewpoint discrimination.

I respectfully dissent because:

(A) The proviso, which helps specify the type of representation that a grant recipient may undertake, is part of Congress's entirely appropriate--and necessary--specification of the services available in a program it created.

(B) The majority has not successfully identified a disfavored viewpoint of any person in any public forum. To the extent that this legislation funds a "viewpoint" at all, it is one that advocates the delivery of welfare benefits to claimants.

A. Program Definition

In creating a government program, Congress can of course specify the goods and services that will be provided and the goods and services that will be excluded. In so doing, Congress is permitted to fund the exercise of some constitutionally protected rights, but not others. See *Rust v. Sullivan.* Although *Rosenberger* curbs the government's power to fund some viewpoints to the exclusion of others, that limitation operates only when the government creates a limited public forum for the expression of diverse viewpoints. A grantee of the Legal Services Corporation is not a public forum or the participant in a public forum in which it is invited to contribute its point of view; it is a contractor furnishing services that the government wants provided, and in that way it resembles the recipients of Title X funds in *Rust*, and any of the private agencies that carry out myriad other government programs that have limited and specified purposes.

1. Statutory Authority

From its inception, the purpose of the LSC has been to fund individual client services for indigent persons with legal problems. *** Over the years, Congress has shaped and clarified the kind of legal services that LSC and, in some cases, its grant recipients may fund. *** The majority opinion correctly rejects the constitutional challenges that the plaintiffs make to several of these program-shaping provisions. ***

The restriction that § 504(a)(16) imposes--on the use of LSC money to fund political agitation concerning welfare policy--is another effort by Congress to define the types of services that LSC grantees may provide and to channel all the government's funds (without substitution or displacement) to those services and no others. The exception for advocacy in suits to collect welfare benefits, as limited by the proviso barring expenditures to challenge

existing law, serves the same purpose and operates in the same way.

The proviso on welfare litigation is not (as the majority appears to believe) an effort to weed out a certain class of arguments in cases in which LSC-funded lawyers appear. The statute nowhere contemplates or requires that an LSC-funded lawyer appear in a case in which he or she must forbear from challenging a welfare statute on meritorious constitutional grounds; to the contrary, the proviso says that a lawyer or grantee may not take on such a representation in the first place. There is nothing remarkable about this. Lawyers often turn down representations that they cannot fulfill, either by reason of conflict or otherwise (such as availability of time and resources, or lack of expertise). *** The LSC's authorizing legislation as well as rules of legal ethics prohibit a lawyer from undertaking a representation in which that lawyer would be barred from pursuing a potentially fruitful avenue of argument. A grantee (or a lawyer employed by a grantee) is ethically obliged to decline such a case, and may refer the client to a lawyer who can handle it, *** and in some instances, the client will be referred to an affiliated entity ***.

The majority argues that as a "practical matter" an attorney will "often" not know what arguments may be needed in a given representation. *** Since this is a facial challenge, however, this Court may not base its invalidation of this statute on a hypothetical set of circumstances, even one it believes will "often" occur. *** Moreover, as the majority points out, the LSC does not fund a traditional, all-encompassing lawyer-client relationship. It has always operated under significant restrictions, and it is required to advise prospective clients of these limitations. So there is therefore "no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services," *** such as help in mounting a Constitutional challenge to a welfare statute.

2. Supreme Court Authority

On its face, this statute funds a program that provides certain services, and the restriction found in § 504(a)(16) (together with its exception and its proviso) prohibits grantees from rendering services that fall outside the scope of the program. The Supreme Court has recognized the undoubted power of Congress to do this. See *Rust*; *Harris v. McRae.*

In *Rust*, the Court considered a section of the Public Health Service Act prohibiting the use of funds appropriated for family-planning services "in programs where abortion is a method of family planning." *** The Court upheld the constitutionality of that prohibition because it ensured that grantees did not engage in activities outside the scope of the program:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. ***

The program definition upheld in *Rust* is therefore "not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *** Of the present case it is possible to say in paraphrase of *Rust* that the scope of the LSC project is the funding of certain individual client services, that the law does not single out any "disfavored group," and that the government has simply "refused to fund activities, including speech, which are specifically excluded from the scope of the project funded."

The error of the majority opinion arises from its inapt (and complete) reliance on *Rosenberger*, a case in which the purpose of the government program was to fund the expression of politically diverse views. The University of Virginia was defraying part of the printing costs of student publications, but denied funding to journals that promoted a religious viewpoint. The Supreme Court held that such content-based funding decisions are impermissible when the expenditure of funds is intended to facilitate private speech and thus to "encourage a diversity of views from private speakers." The holding of *Rosenberger* is that when government subsidizes private speakers to express their own viewpoints, it cannot discriminate among potential recipients on the basis of viewpoint. The LSC, which supports a defined program of legal representation to indigent clients, of course does not underwrite the expression of the private speech or viewpoints of its grantees or their lawyers, or (for that matter) their clients.

Rosenberger does not impair the principle--explicitly announced in *Rust* and not implicated by the facts of *Rosenberger*--that when the government funds specific services it deems to be in the public interest, it may require grantees to get with its program. The majority's surprising, short answer to this argument is that the passage from *Rust* on which I rely cannot "reliably be taken at face value." *** This approach to Supreme Court opinions is not one previously employed in this Circuit. I think the Supreme Court meant what it said, and that it bears repeating:

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. ***

Recently the Supreme Court itself invoked *Rust*--and quoted that passage-- to uphold restrictions on the disbursement of funds by the National Endowment for the Arts. See *National Endowment for the Arts v. Finley* ***.

There is one sure fire way to find out whether the Supreme Court meant what it said in *Rust* and *Finley*, and now that the majority has split with the Ninth Circuit on this issue, we may not have long to wait. Relying on *Rust*, the Ninth Circuit rejected a viewpoint discrimination challenge to the LSC restrictions that are at issue on this appeal. *** Justice White (part of the *Rust* majority), sitting by designation on the Ninth Circuit, wrote: "Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas." ***

In an attempt to distinguish the *Rust* opinion from the *Rust* result, the majority offers the hypothetical of government-financed think tanks commissioned to study American foreign policy, but forbidden to criticize it. This hypothetical is far removed from any program to furnish legal services; tellingly, it looks very much like the University of Virginia's student-publication program in *Rosenberger*.

A closer analogy would be presented if Congress (i) decided to out-source the advice that the Internal Revenue Service now gives taxpayers on how much taxes they owe and how much they can shelter or deduct, (ii) underwrote accountants and tax lawyers to counsel and represent qualifying middle-class taxpayers, and then (iii) discovered that the outside contractors were expending appreciable grant resources on agitation for tax reform along lines favored by the contractors and deemed by them to be in the interest of the middle classes. Congress could certainly plug that drain by specifying that the representation be limited to achieving the accurate

computation of amounts due under the present tax code, and by barring advocacy aimed at, inter alia, tax reform, establishing the single tax or flat tax, or organizing constitutional litigation to challenge particular revenue provisions or the ratification of the 16th Amendment. Congress could do this, and if it did, the legislation would look like the restriction that the majority here holds unconstitutional.

The LSC restrictions, like my hypothetical statute to assist taxpayers, is not a promotion of advocacy for the good old status quo, or a suppression of a point of view. Both programs channel money to an identified public purpose, which is the administration of a complex existing statute so that everyone can get what the statute provides. I cannot imagine a more viewpoint-neutral legislative scheme.

B. Viewpoint Discrimination

Considering that the majority has invalidated a statute on the ground that it constitutes impermissible viewpoint discrimination, it is odd that the majority only vaguely articulates the viewpoint that is supposedly disfavored by this legislation and (reciprocally) never states what viewpoint is favored. The fact is, the LSC subject-matter restrictions do not lend themselves to analysis in these terms. *** If limitations on classes of cases eligible for representation by LSC-financed lawyers constitute impermissible discrimination against the people who may want to advance theories in such cases, then it is hard to see how any of the many statutory limitations on LSC funds are constitutional.

By the same token, I cannot agree that the statute promotes one favored view over others in a supposed public forum. Whose viewpoint? What forum? According to the majority opinion: the government-funded lawyers possess the protected expressive interest; and the public forum is the courtroom (an idea that may come as a surprise to trial judges). *** But the proviso stricken by the majority bars representation in lawsuits. The viewpoints of litigating lawyers in a courtroom cannot matter for present purposes, because (among other things) the advocacy of a lawyer in litigation is at the service of the client; it would be inaccurate (and unfair) to assume that a lawyer's advocacy expresses that lawyer's personal view on politics or morals. ***

It also cannot be said that the proviso disfavors the speech of the clients; the only litigants who are funded are those who seek benefits. There are certainly people on the other side of welfare issues, such as those who favor narrowing welfare eligibility, or reduced benefits, or abolition of the welfare system. But the statute gives them nothing. Where then is the viewpoint discrimination, even if one assumed (as I do not) that the LSC makes every courtroom into a public forum?

The statute bars constitutional and other challenges to the welfare laws, but it certainly does not fund the view that the welfare laws are constitutionally impregnable. The proviso invalidated by the majority does not promote or favor any message. It lays down specifications for services to be provided to favored beneficiaries. And it excludes some of the most expensive services--constitutional litigation and statutory challenges--in the same way that the statute elsewhere bars the expenditure of LSC funds for class actions. In excluding these expensive initiatives, the statute maximizes the expenditure of limited available funds for less expensive benefit-collection lawsuits. *** Congress is able to do that; and a statute in which Congress does that should be able to withstand a facial challenge.

HIGH COURT WILL CONSIDER LIMITS OF LEGAL AID TO POOR

The Washington Post

Tuesday, April 4. 2000

Joan Biskupic

In a case that thrusts the Supreme Court into the perennial controversy over legal aid for the poor, justices agreed yesterday to decide whether Congress can prohibit federally funded lawyers from challenging welfare laws on behalf of their indigent clients.

The court agreed to review a ruling that the restriction on lawyers funded by the Legal Services Corporation discriminates against particular viewpoints and violates the First Amendment.

The appeal will be an important test of what strings government may attach to its funds in an array of programs. But it will particularly affect the federally financed legal services program, which has been frequently attacked in Congress for pursuing "liberal causes" and repeatedly subject to restrictions on what kinds of cases its lawyers can take.

Established in 1974, the nonprofit corporation was designed to help the poor with basic legal problems by providing grants and other assistance to local legal aid offices. From the outset, Congress restricted the kinds of advocacy that would be financed, prohibiting LSC lawyers from working on cases related to abortion, school desegregation or military desertion.

The condition at issue in the new dispute allows LSC lawyers to seek welfare benefits for individual clients but bars litigation that aims to change federal or state welfare law. It was adopted in 1996, along with restrictions on class action lawsuits, claims for lawyers' fees, and the representation of prisoners and certain immigrants.

Lawyers for a New York woman who sought legal aid after her welfare benefits were cut say the new restriction "is particularly damaging in this era of welfare reform . . . [as] states are experimenting with a wide range of welfare responses--some of them far more punitive and arbitrary than Congress could have contemplated."

The lawyers, who are affiliated with New York University's Brennan Center for Justice, claim the provision unconstitutionally bars attorneys for the poor from questioning the legality of new welfare regulations.

In its decision siding with the challengers, the U.S. Court of Appeals for the Second Circuit said the regulation allowing LSC lawyers to bring individual welfare claims but not to challenge the welfare laws discriminates against certain points of view.

"It accords funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules," the appeals court said. "It clearly seeks to discourage challenges to the status quo."

The Legal Services Corp. and the Justice Department, which intervened on behalf of the Clinton administration, contend the welfare-related rules are permitted under a 1991 high court ruling that gave Congress considerable latitude to define the limits of programs it funds. In that 5-to-4 decision, the court upheld a restriction on the discussion of abortion by doctors who worked in a government-financed health clinic.

Legal Services Corp. lawyers say that decision in Rust v. Sullivan allows Congress to choose whether to subsidize various points of view without violating the First Amendment. The Justice Department, in a separate appeal, asserted that Congress could choose to pay for lawsuits in which poor people seek benefits under the law, but not lawsuits that would undermine the law.

The consolidated cases of Legal Services Corp. v. Velazquez and United States v. Velazquez will be heard during the term that begins in October.

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SUPREME COURT ROUNDUP: WEIGHING RESTRICTIONS ON LEGAL AID FOR POOR

The New York Times

Tuesday, April 4, 2000

Linda Greenhouse

The highly charged question of what strings the government can attach to the use of federal money reached the Supreme Court again today, this time in the context of legal services for the poor.

The court agreed to decide whether Congress had violated the First Amendment when it restricted the type of arguments that lawyers supported by the federal Legal Services Corporation can make on behalf of clients seeking welfare benefits. Under the restriction, the lawyers can help clients who are seeking to receive or restore specific welfare benefits, but may not become involved in "an effort to amend or otherwise challenge existing law."

The federal appeals court in New York ruled last year that because the provision, first imposed on the agency in 1996, "clearly seeks to discourage challenges to the status quo," it amounted to "viewpoint discrimination" that the First Amendment makes impermissible.

"The strongest protection of the First Amendment's free speech guarantee goes to the right to criticize government or advocate change in government policy," Judge Pierre N. Leval said in his majority opinion for the United States Court of Appeals for the Second Circuit, adding that criticism of the government "is also speech for which liberty must be preserved to guarantee freedom of political choice to the people."

The welfare restriction that the court will review was adopted as part of an appropriations bill during a contentious election-year Congressional session in which opponents of the Legal Services Corporation came close to eliminating financing for the program altogether.

As a compromise, the corporation accepted a long list of restrictions on lawyers who work in programs that receive its money, including bans on class actions, on most representation of undocumented aliens, on actions to recover lawyers' fees, on participating in cases on behalf of a prisoner and on representing tenants evicted for drug use from public housing. The restrictions have been carried over in subsequent fiscal years.

The Clinton administration appealed to the Supreme Court, arguing that the restriction posed no constitutional problem because Congress "has simply chosen to pay for certain services but not others."

The administration's brief said what was barred was not a viewpoint but rather "a certain class of case," explaining that Congress limited the program "to ensure that the program focuses on the day-to-day legal problems of the poor people who are attempting to obtain benefits to which they may be entitled under the current program" rather than on trying to change the program.

The Brennan Center for Justice at New York University Law School challenged the restrictions, as well as separate limitations on the use of private money by legal services lawyers, on behalf of groups of legal services lawyers and clients. While the Legal Services Corporation itself was the defendant in the lawsuit, filed in 1997 in Federal District Court in Brooklyn, the federal government intervened to defend the constitutionality of the

restrictions. Legal Services of New York, a recipient of Legal Services Corporation money, was also a defendant in the lawsuit.

The plaintiffs lost in district court and, for the most part, in the Second Circuit as well. The appeals court upheld most of the restrictions, with the exception of the welfare restriction. Under the analysis of the appellate panel's 2-to-1 decision, it might well have been acceptable for Congress to place welfare cases of all kinds out of bounds for legal services lawyers; what offended the majority was the limitation on the legal tools that lawyers could use once they were in the midst of representing clients seeking welfare benefits.

The Supreme Court today granted appeals from both the Legal Services Corporation (Legal Services Corp. v. Velazquez, No. 99-603) and the government (United States v. Velazquez, No. 99-960). The two appeals will be consolidated for argument, which will be held in October. The justices took no action on the plaintiffs' separate appeal from the portions of their suit that they lost in the Second Circuit (Velazquez v. Legal Services Corp., No. 99-604).

In its appeal, the administration said it was clear from Supreme Court precedents that the government could incorporate its preference for the use of its money into federal law or regulations. The case the administration cited was a 1991 decision, Rust v. Sullivan, which upheld a prohibition on counseling about abortion in family planning clinics that received federal money.

In fact, the administration said, the legal services restrictions were less stringent than those the Supreme Court upheld in the 1991 case, because employees of clinics that received federal money were prohibited from mentioning abortion at all, and could not refer women to private clinics or doctors even if the patient made a direct request. President Clinton repealed those regulations early in his administration.

Under the legal services restrictions, lawyers can still refer potential clients to outside lawyers, including to affiliated poverty law programs that are not financed with federal money.

Whether Rust v. Sullivan, the precedent on which the administration is relying, ultimately proves reliable depends in part on Justice David H. Souter's current view of that case. It was a 5-to-4 decision in which Justice Souter, then just completing his first term on the court, joined Chief Justice William H. Rehnquist's majority opinion.

But as Justice Souter indicated last week, when he repudiated an approach he took to a state ban on nude dancing, in another 1991 case, his view of the First Amendment has changed over the years. Two years ago, in fact, Justice Souter was the lone dissenter from a decision that rejected a challenge to the decency standards that Congress imposed on the grant-making procedures of the National Endowment for the Arts.

These were among the other developments at the court today.

Abortion Argument

Without comment, the justices turned down the Clinton administration's request for time to argue later this month against the constitutionality of Nebraska's so-called partial-birth abortion law. The lawyers challenging the state law on behalf of a Bellevue, Neb., doctor, Dr. LeRoy Carhart, had agreed to give the administration 10 minutes of their half-hour argument.

Lawyers speculated today that the court might have turned down the request because there was no equivalent federal law on the books, making the government's interest somewhat more remote than usual when it seeks to participate in a state case. President Clinton has twice vetoed a proposed federal law. The administration has filed a brief in this case, Stenberg v. Carhart, No. 99-830.

Case Dismissed

Deadlocked in a 4-to-4 tie vote, the court dismissed a case argued last week that had been expected to produce a ruling on federal court jurisdiction over certain kinds of plaintiffs in class-action lawsuits. The case was Free v. Abbott Laboratories, No. 99-391, a price-fixing case against manufacturers of baby formula. Justice Sandra Day O'Connor, who owns a modest amount of stock in one of the defendant companies, did not participate.

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Donald James GRALIKE v. Rebecca McDowell COOK

The Struggle for Term Limits Goes On.

David P. Primack*

Four years ago, the citizens of Missouri asked their candidates for Congress to demonstrate them whether or not they supported term limits. This upcoming term, the Supreme Court will decide, to paraphrase a Missouri native, if the news of the death of the term limits movement has been greatly exaggerated.

The early 1990's were marked by a national anti-incumbent attitude that expressed itself most notably in the 1994 Republican takeover of Congress. One of the key provisions of the Republican's "Contract with America" was the institution of term limits on Congressional members. States, likewise, reflected this attitude by amending their state constitutions to impose term limits on their various officeholders, including members of Congress. In 1995, the Supreme Court, in *U.S. Term Limits v. Thornton* (1995), struck down these state specific qualifications for Congress in a close 5-4 vote. The Court decided that congressional term limits could only be imposed by an amendment to the federal Constitution.

Not daunted by *Thornton*, this term limit movement was able to pass measures in many states that placed next to the names of candidates on election ballots a statement as to whether or not this particular candidate was a supporter of term limits. In 1996, the citizens of Missouri ratified an amendment to the state constitution that enacted one of these "instruct and inform" or "scarlet letter" measures, depending on one's view of the matter. Missouri's measure required current congressional members to work and vote in favor of a federal constitutional amendment for imposing term limits and if they did not do so, on the next election ballot it would say "disregarded voters' instructions" besides their name. Furthermore, the Missouri amendment required new candidates to pledge that they would work for term limits if elected. If an aspiring candidate did not do so, the election ballot would read "declined to pledge support for term limits" beside their name. In 1998, Donald Gralike challenged the constitutionality of the Missouri amendment when he ran for the U.S. House of Representatives. The district court agreed with Gralike and found the amendment an unconstitutional infringement of free speech. The Eighth Circuit upheld the lower court's decision.

At issue in this case is whether the Missouri amendment violates Article I, Article V, or the First Amendment of the Constitution. Writing for the Eighth Circuit panel majority, Judge Theodore McMillian held that the labeling violated Gralike's First Amendment right to free speech because, "[t]he Missouri Amendment compels candidates to speak about term limits." Judge McMillian noted that the Missouri Amendment "does not allow candidates to remain silent on the issue, which is precisely the type of state-compelled speech which violates the First Amendment right not to speak." The State of Missouri, represented by the Secretary of State Rebecca Cook, argued that since there were no criminal or monetary sanctions, the measure only compels the exposure of a candidate's view on term limits, but the majority rejected this because the political damage is sanction enough to compel speech unjustly.

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The Eighth Circuit also concluded that the Missouri Amendment added an impermissible qualification for candidacy to the U.S. Congress in violation of Article I of the Constitution. Basing their conclusion on the two-prong test in *Thornton* for identifying an impermissible indirect attempt to alter qualifications for Congress, the Eighth Circuit asserted that the Missouri Amendment failed the *Thornton* two part analysis because it (1) specifically targets a distinct class of candidates and (2) has the sole purpose of creating additional qualifications indirectly. The distinct class of people is "those who oppose term limits, refuse to take the term limit pledge, or fail to do one or more of the actions prescribed by the Amendment while serving in Congress." Furthermore, the amendment requires the candidate "to initiate, pursue, and support the Article V amendment process," and as such is "an indirect attempt to add a qualification to those listed in the Qualifications Clause."

Finally, the Eighth Circuit found that the Missouri amendment violated the federal amendment process as stated in Article V of the Constitution. The court noted that "[v]oter initiatives which seek to coerce legislators into proposing or ratifying a particular constitutional amendment violate Article V." According to the court, legislative bodies, not voter referendums, are the proper forum for amending the Constitution. Missouri cited *Kimble v. Swackhamer* (1978) for support. In that case, Justice William Rehnquist wrote that a non-binding referendum about the Equal Rights Amendment did not interfere with the Article V amendment process because legislators were free to disregard it. The Eighth Circuit distinguished this case from *Kimble* because legislators are not free under the Missouri amendment to disregard the politically damaging penalty of having a label being placed beside their name at the next election.

Those who have followed *Cook v. Gralike* have noted how unusual it is that the Supreme Court decided to grant certiorari because there has been no disagreement in the lower courts and other similar measures in other states have been struck down without any further controversy. When the Court takes up the case next term, the ailing term movement will find out whether or not its time has ended.

99-929 Cook v. Gralike

Ruling below (8th Cir., 191 F.3d 911, 68 U.S.L.W. 1153):

Voter-initiated amendment to Missouri Constitution that directs state's congressional delegation and candidates for such offices to support federal constitutional amendment creating congressional term limits and prescribes that any noncompliance or nonsupport of such directive be noted on ballot violates First Amendment and Article V of U.S. Constitution, as well as qualification and speech and debate clauses of Article I.

Questions presented: (1) Do people violate Article V of Constitution when they participate in evolution of their government by communicating their opinion to federal legislators or by communicating on ballot to voters about behavior of federal candidates? (2) Do people violate qualifications clauses and First Amendment when they comment on ballot regarding elected representative's actions and voting record or when they comment on ballot about non-incumbent congressional candidate's silence concerning prospective constitutional amendment? (3) Does speech and debate clause of Constitution prohibit people from commenting on ballot about federal legislator's actions and voting record in regard to prospective constitutional amendment?

Donald James GRALIKE, Plaintiff-Appellee,
v.
Rebecca McDowell COOK, Defendant-Appellant.

United States Court of Appeals
for the Eighth Circuit

Decided August 31, 1999

McMILLIAN, Circuit Judge.

Appellant Rebecca McDowell Cook, in her official capacity as Secretary of State of the State of Missouri, appeals from a final order entered in the United States District Court for the Western District of Missouri granting summary judgment in favor of appellee Donald James Gralike, and invalidating as unconstitutional the 1996 Missouri ballot initiative concerning term limits for members of the United States Congress, codified at Article VIII, Sections 15-22 of the Missouri Constitution. *** For reversal, Cook argues that the district court erred in granting summary judgment for appellee because the amendment does not violate the First Amendment or Articles I or V of the United States Constitution. For the reasons discussed below, we affirm the judgment of the district court.

***

I. BACKGROUND

In November 1996 the voters of Missouri passed an amendment to Article VIII of the Missouri Constitution (hereinafter "Missouri Amendment" or "Amendment") to limit the number of terms any individual may serve in the United States Congress. The Amendment seeks to limit congressional service to three terms in the House of Representatives and two terms in the Senate. See MO. CONST. Art. VIII, §16. To achieve this goal, the Missouri Amendment orders members of Missouri's congressional delegation to use their authority to amend the United States Constitution to impose the term limits in §16 on Congressional service. See id. § 17.

If a Missouri Representative or Senator fails to comply with this order, the Missouri Amendment dictates that the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed next to his or her name on all ballots during the next election. Id. The Missouri Amendment defines a failure to comply with the instructions as: (1) failure to vote in favor of a term limit amendment conforming with §16; (2) failure to second it if a second is lacking; (3) failure to propose or otherwise bring to a vote a term limit amendment conforming with §16; (4) failure to vote favorably on measures to bring such an amendment before committee; (5) failure to vote against all measures to delay, table, or otherwise prevent a vote by the full body; (6) failure to vote against amendments allowing longer terms of Congressional service than §16 allows; (7) sponsoring or cosponsoring an amendment with longer terms than those in §16; and (8) failure to ensure that all votes on term limits are recorded and available to the public. See id.

The Missouri Amendment requires non-incumbent candidates to take a pledge to use their authority to amend the United States Constitution to impose the term limits in §16 if elected. It orders that those who do not take the pledge have the label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed next to their names on the ballot. Id. §18. To avoid being labeled on the ballot, non-

incumbent candidates must take the following pledge:

I support term limits and pledge to use all my legislative powers to enact the proposed Constitutional Amendment set forth in the Term Limits Act of 1996. If elected, I pledge to vote in such a way that the designation "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" will not appear adjacent to my name. §18(3).

For both incumbent and non-incumbent candidates, the Missouri Amendment requires the Secretary of State to decide whether a label will be printed on the ballot and to consider public comment in making that determination. See id. §19 (1-4). It allows individual voters to appeal the Secretary of State's decision not to print the label by a candidate's name directly to the Missouri Supreme Court, in which case the Secretary of State must produce clear and convincing evidence that the candidate conformed with the initiative or took the pledge. It also permits a candidate, whom the Secretary of State decides shall have the label appear next to his or her name on the ballot, to appeal this decision to the Missouri Supreme Court, in which case the candidate must produce clear and convincing evidence why the label should not be printed on the ballot. See id. §19(5, 6). In addition, the Missouri Amendment automatically repeals itself if and when the United States Constitution is amended to conform with the §16 term limits. See id. §20. It also grants the Missouri Supreme Court original jurisdiction to hear challenges to the Amendment. See id. §21. Finally, it contains a severability clause. See id. §22.

Soon after its passage, appellee initiated this action in federal district court challenging the Missouri Amendment on several federal constitutional grounds. Appellee is not currently a member of the Missouri congressional delegation, but he was a candidate for the third district Congressional seat in 1998 and has issued a declaration of his intent to run for the same seat in 2000. The district court issued three memorandum orders addressing different motions by the parties. In the first order, the district court denied in part and granted in part appellant's motion to dismiss, finding that appellee did have standing to sue, did meet the requirements for injunctive relief, that appellant was not protected by Eleventh Amendment immunity, that the court need not abstain from judgment since there were no unanswered questions of state law, and that the court need not certify questions of federal law to the Missouri Supreme Court since that court has held that it lacks jurisdiction over such questions. *** In its second order, the district court granted in part and denied in part appellant's motion to dismiss for failure to state a claim; it denied appellant's motion to dismiss appellee's claims that the Missouri Amendment violates Article I, Article V, and the First and Fourteenth Amendments of the United States Constitution, but granted her motion to dismiss appellee's claim that §21 of the Missouri Amendment violates the Supremacy Clause of the United States Constitution. *** In its final order in this case, the district court granted appellee's motion for summary judgment on his Article I, Article V, and First Amendment Claims; the district court did not reach plaintiff-appellee's Due Process vagueness claim because it determined that the other three claims were sufficient to dispose of the case.*** The district court, in Gralike III, relied upon its earlier order in Gralike II for the analysis supporting its decision to grant summary judgment for plaintiff-appellee. Judgment was entered for appellee, and appellant timely appealed.

II. DISCUSSION

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A. FIRST AMENDMENT

Appellant argues that the district court erred in holding that the Missouri Amendment violates the First Amendment guarantee of free speech. First, she argues that, because the Missouri Amendment imposes no sanction on

candidates for United States Congress for failure to speak, the district court erred in concluding that the Missouri Amendment compels or coerces candidates to speak. Second, she argues that the district court should not have analyzed the Missouri Amendment under strict scrutiny review, but rather should have balanced candidates' right to keep their views on term limits secret with the electorate's right to know the views of candidates. Furthermore, she points out, the Amendment was the result of a popular election, and the courts should be especially careful when considering legislation passed by direct democracy. We agree with the district court's well-reasoned analysis, and reject appellant's arguments.

1. Compelled speech

It is well established that the First Amendment to the United States Constitution bars not only state action which restricts free expression but also state action which compels individuals to speak or express a certain point of view. *** Moreover, "the burden upon freedom of expression is particularly great where, as here, the compelled speech is in the public context."*** We hold that the Missouri Amendment is an impermissible attempt by the State of Missouri to compel candidates to express a point of view on term limits. ***

In Wooley, the Supreme Court invalidated the conviction of a New Hampshire couple who covered the state motto "Live Free or Die" on their license plate, concluding that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *** Since Wooley, the Supreme Court has reaffirmed the prohibition on compelled speech and refined it to apply to cases in which the government orders certain types of speech or speech about certain topics. For example, in *Riley v. Nat'l Fed. of the Blind of North Carolina, Inc., 487 U.S. 781, 786, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988),* the Court invalidated on First Amendment grounds a North Carolina law which, among other things, required professional fund raisers, before soliciting donations, to disclose what portion of donations they turned over to the charities for which they solicited in the preceding twelve months. The Court concluded that the state law violated the First Amendment prohibition on state-compelled speech because "the First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.... To this end, the government... may not substitute its judgment as to how best to speak for that of speakers and listeners...." *Id. at 790-91;* see also *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1, 14-16, 89 L. Ed. 2d 1, 106 S. Ct. 903 (1986)* ("the State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold.... The choice to speak includes within it the choice of what not to say....").

The Missouri Amendment compels candidates to speak about term limits. First, it attempts to force candidates to speak in favor of term limits by threatening them with the ballot label if they fail to do so. Second, if a candidate refuses to speak in favor of term limits, the label on the ballot forces him or her to speak in opposition to the Amendment by noting that he or she failed to follow the voters' wishes. Either way, the Missouri Amendment does not allow candidates to remain silent on the issue, which is precisely the type of state-compelled speech which violates the First Amendment right not to speak. First, the Missouri Amendment selects the topic for public debate: term limits. Second, it chooses an approved position: favoring term limits. Third, it provides the actual words which non-incumbent candidates shall speak: the pledge. Finally, in the event its attempts to compel speech in favor of term limits fail, the Missouri Amendment provides a mechanism to compel candidates to speak in opposition: the ballot labels.

Appellant attempts to distinguish the Missouri Amendment from other compelled speech cases by arguing that the Missouri Amendment does not compel speech because it imposes no criminal or monetary sanction for refusing to speak. Rather, the only possible sanction the Missouri Amendment could impose, appellant argues, is the exposure of candidates' views and/or record on term limits. We disagree. As a threshold matter, we note that the concept of compelled speech has never been limited to those cases in which the state seeks to impose or compel speech through threat of financial or criminal sanction. See, e.g., *Miami Herald, 418 U.S. at 258* ("Even if a newspaper would face no additional costs to comply ... the Florida statute [compelling speech] fails to clear the barriers of the First Amendment ...."). Nevertheless, we believe that the Missouri Amendment in fact threatens a penalty that is serious enough to compel candidates to speak--the potential political damage of the ballot labels. ***

Contrary to appellant's contentions that the labels only provide information about the candidates' views, the labels do far more than advise voters of a candidates' opposition to term limits. The labels are phrased in such a way they are likely to give (and we believe calculated to give) a negative impression not only of a labeled candidate's views on term limits, but also of his or her commitment and accountability to his or her constituents. *** The nonincumbent label "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS," in light of the preamble and §16 of the Amendment which state that the people of Missouri desire term limits, indicates that a candidate so labeled refused to promise to do the people's bidding. The incumbent label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" indicates that, during the preceding term, the candidate failed to act in accordance with his or her constituents' wishes. Each label implies that a labeled candidate cannot be trusted to carry out the people's bidding, which in turn casts doubt on his or her suitability to serve in Congress.

The pejorative nature of the labels is heightened by the fact that there are no labels for candidates who take the pledge or comply with the mandates of §17 while in office. The only "information" the Missouri Amendment adds to the ballot is derogatory labels for candidates who do not do what it requires. Furthermore, the labels are particularly harmful because they appear on the ballot, an official document produced by the state. Thus, the labels appear to be an official denunciation of certain candidates who are singled out by the state for their failure to speak in favor of term limits or take all action that §17 requires. *** The ballot labels are a serious sanction, which we believe is sufficient to coerce candidates to speak out in favor of term limits rather than risk the political consequences associated with being labeled on the ballot. Moreover, the fact that the label appears on the ballot compels candidates to speak because the labels themselves constitute speech. Once the label is on the ballot, it ascribes a point of view to the labeled candidate.

Arguing that the First Amendment does not insulate candidates from the electorate, appellant points out that individuals become subject to the Missouri Amendment only if they chose to run for office. However, "[a] political candidate does not lose the protection of the First Amendment when he [or she] declares himself [or herself] for public office." *** An individual's choice to serve the public by seeking congressional office does not grant the state licence to restrict or compel his or her speech. On the contrary, speech restrictions are particularly destructive in the political arena, where the importance of free exchange of ideas and information--a vital aspect of our democratic system--is at its zenith. Furthermore, "the identity of the speaker is not decisive in determining whether speech is protected." *Pacific Gas, 475 U.S. at 8.* Thus we reject appellee's suggestion that candidates for

public office are afforded diminished First Amendment protections.

2. Application of Strict Scrutiny

Appellant also argues that the district court erred in applying strict scrutiny analysis to determine the constitutionality of the Missouri Amendment. She contends that instead the district court should have applied a "balancing test" and upheld the Amendment since the electorate's right to know candidates' views on term limits outweighs that of candidates to remain silent on the issue. Appellee's Brief at 19 (hereinafter "App. Br."). We disagree.

The District Court correctly determined that the Missouri Amendment is subject to strict scrutiny review. First, as discussed above, the Amendment burdens candidates' right to free expression by compelling them to state or act in such a way as to portray a position on the §16 term limits proposal. This is an impermissible restriction on core political speech, which subjects the Amendment to strict scrutiny review. *** However, even assuming for purposes of analysis that the Missouri Amendment did not compel political speech, strict scrutiny review is warranted because the Amendment is a content-based, viewpoint-specific restriction on candidates' right to free speech. ***
The Missouri Amendment is content-based because it addresses the issue of term limits, completely ignoring all other issues. In addition, it is content-based because it compels candidates to speak about the issue of term limits, which they might not do absent state action. *** Furthermore, the Missouri Amendment is viewpoint-specific because the labeling provisions single out individual candidates for punishment based only on their opposition-actual or ascribed-to term limits. The Missouri Amendment only labels those who, according to the Secretary of State, oppose the Amendment's term limits proposal, and does nothing to those who pledge to support it. As such, the Missouri Amendment is a state-imposed, viewpoint specific restriction on candidates' speech which triggers strict scrutiny review. ***

We hold that the district court correctly determined that the Missouri Amendment should be subject to strict scrutiny review. n8 To survive strict scrutiny review, appellant must prove that the Missouri Amendment is narrowly tailored to achieve a compelling government interest.***

Appellant maintains that the Missouri Amendment ensures the electorate's right to know candidates' views. We construe this to mean that voter education is the compelling state interest the Missouri Amendment is meant to achieve. While we agree that an informed electorate is important in our democratic system of government, we hold that the Missouri Amendment fails strict scrutiny review because it is not narrowly tailored to achieve the goal of voter education. First, the Missouri Amendment only provides information about candidates views on term limits, neglecting every other issue. Although the voters of Missouri obviously feel strongly about term limits, we believe that a state measure that informs voters only of candidates' views on term limits does not ensure an informed electorate. Second, the Missouri Amendment is not narrowly tailored to achieve even the more limited goal of informing voters of candidates' views on term limits, because it can falsely identify candidates. For example, the Amendment could require the placement of a ballot label next to the name of a term limits supporter who failed to comply with an aspect of §17(2). See also supra note 7. Finally, there are less restrictive means to promote voter education, which indicates that the Missouri Amendment is not narrowly tailored.*** For example, Missouri could institute voluntary programs, such as debates or voter information guides, to provide information about candidates' views on term limits and other important issues. Such programs advance the State's interest in informing voters without compelling candidates to speak or restricting their right not to speak.

Since appellant failed to prove that the labeling provisions of the Missouri Amendment are narrowly tailored to achieve a compelling state interest, she has failed to justify its infringement on candidates' right to free speech. The label provisions of the Missouri Amendment are barred by the First Amendment as applicable to the States through the Fourteenth Amendment.

B. SPEECH AND DEBATE CLAUSE[9]

A related issue, which applies more appropriately to incumbent candidates, is whether the Missouri Amendment violates Article 1, section 6, clause 1 of the United States Constitution--the Speech and Debate Clause, which states, in relevant part: "... for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The Missouri Amendment contravenes this guarantee because it establishes a regime in which a state officer--the secretary of state-is permitted to judge and punish members of Congress for their legislative actions or positions.***

The Missouri Amendment specifically vests in the secretary of state of Missouri the responsibility to determine when the ballot label shall appear next to the name of an incumbent candidate. See MO. CONST. art. VIII, §19. In so doing, she is to accept and consider public comments. See id. at §19(3). As we discussed above, the ballot label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" is a pejorative label with politically damaging ramifications, which amounts to punishment. Thus, the Missouri Amendment establishes a system by which Senators and Representatives are questioned about and can be punished for speech, debate, and actions in Congress. This system contradicts the protections of the Speech and Debate clause, which is intended to allow Senators and Representatives to speak and vote their conscience without fear of retribution. ***

The portions of the Missouri Amendment dealing with labeling incumbent candidates based on their legislative speech and actions violate of the Speech and Debate clause. ***

C. QUALIFICATIONS CLAUSE

Appellant next contends that the district court erred in concluding that the Missouri Amendment constitutes an impermissible qualification for candidacy for the United States Congress in violation of the Qualifications Clause, Article 1 of the United States Constitution. Appellant argues that the Missouri Amendment does no more than provide information about candidates and does not constitute a qualification within the meaning of Article I. We disagree.

We believe that Qualifications Clause issues raised in this case were addressed by the Supreme Court in *U.S. Term Limits v. Thornton, 514 U.S. 779, 131 L. Ed. 2d 881, 115 S. Ct. 1842 (1995).* In that case the Court held that an amendment to the Arkansas Constitution, which banned the names of incumbents who had served more than two terms in the United States Senate or three terms in the United States House of Representatives from appearing on the ballot, established an impermissible additional qualification for candidacy for Congress. *** After conducting a thorough historical review, the Court determined that neither the Framers, the

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[9] Although the district court did not address this issue, we believe it is necessary to demonstrate why the Missouri Amendment is invalid as applied to incumbent candidates. Since the situation of incumbent candidates is somewhat different than that of non-incumbent candidates, the First Amendment issues discussed in Section II A do not apply as squarely to incumbent candidates. As such we exercise our discretion to affirm the judgment on this ground, although it was not considered by the district court.

constructs of our democratic society, the text of the Constitution itself, nor past Congressional action supported the contention that states may impose additional or different qualifications than those set out in the Qualifications Clause. *** Rather, the Court stated, any state authority to set qualifications for Congress was abrogated by the ratification of the Constitution, and the sole source of qualifications for Congressional office is contained in Article I. *** Thus, any attempt by a state to alter or add to these qualifications is clearly proscribed by the Constitution.

Furthermore, the Court found that indirect attempts to modify Congressional qualifications were equally infirm. Although the Arkansas Amendment did not prohibit incumbents from service in Congress, the Court rejected the petitioner's contention that the Arkansas Amendment did not impose an impermissible qualification because incumbents could still be elected as write-in candidates. *** The Court determined that States cannot achieve by indirect means what is constitutionally prohibited by direct means. *** To identify impermissible indirect attempts to alter qualifications for Congress, the Court devised a two-part test: "a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." ***

The Missouri Amendment fails US Term Limit's test. First, the Amendment specifically targets a distinct class of candidates-those who oppose term limits, refuse to take the term limits pledge, or fail to do one or more of the actions prescribed by the Amendment while serving in Congress. This class of candidates is singled out on the ballot with the damaging labels. The label provisions will have the likely effect of coercing candidates to support the term limits mandate or removing candidates who fail to do so by persuading voters not to elect them. As we discussed above, the ballot labels cast doubt on labeled candidates' ability to represent constituents, since the labels state that labeled candidates ignore their constituents' wishes. As such, the Missouri Amendment is likely to handicap labeled candidates' ability to be elected.

Second, as discussed above, the Missouri Amendment has the sole, expressed purpose of adding the qualification to congressional service that candidates must have served fewer than three terms in the House or two terms in the Senate. Sections 15 and 16 of the Missouri Amendment state that the people of Missouri seek to limit the number of terms of service in Congress to three in the House and two in the Senate. To attain this goal, the Missouri Amendment requires members of the Missouri congressional delegation to pursue the Article V amendment process, and it enforces this mandate with the threat of the ballot labels. See MO. CONST. art. VIII, §17. Thus, adding the term limit qualification is the sole purpose of the Missouri Amendment. The fact that the Missouri Amendment seeks to do so by compelling members of Congress from Missouri to initiate, pursue, and support the Article V amendment process does not change the analysis under US Term Limits, as it is still an indirect attempt to add a qualification to those listed in the Qualifications Clause. Since the Missouri Amendment seeks to impose an additional qualification for candidacy for Congress and does so in a manner which is highly likely to handicap term limit opponents and other labeled candidates, it fails the US Term Limits test.***

D. ARTICLE V

Lastly, appellant argues that the district court erred in holding that the Missouri Amendment violates Article V of the United States Constitution, which sets out the process through which the Constitution may be amended. She contends that the Missouri Amendment does not alter the Article V process. We disagree.

Article V of the United States Constitution sets forth the two processes through which the United States Constitution may be amended. Article V states in relevant part:

> the Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress....

U.S. CONST. art. V. Article V specifically delegates the amendment process to legislative bodies, not the voters.

Supreme Court precedent supports the conclusion that the people have a limited, third-party role in the amendment process. In invalidating an Ohio constitutional amendment which required ratification of the Eighteenth Amendment by popular referendum, the Court held that the ratification of a constitutional amendment was a federal function derived from Article V, which delineates the sole methods for ratification. In *Leser v. Garnett, 258 U.S. 130, 137, 66 L. Ed. 505, 42 S. Ct. 217 (1922),* the Court held that the ratification of the Nineteenth Amendment was not subject to state-imposed restrictions on the amendment process. The Court again determined that state legislatures ratifying constitutional amendments assume a federal function, which "transcends any limitations sought to be imposed by the people of a State." Id. Article V envisions legislatures acting as freely deliberative bodies in the amendment process and resists any attempt by the people of a state to restrict the legislatures' actions.

More recently, two state courts were confronted with voter-initiated attempts to direct the Article V amendment process. The Supreme Courts of California and Montana invalidated, on Article V grounds, voter initiatives that compelled the California and Montana State legislatures to apply to Congress to call a constitutional convention to consider a balanced budget amendment. *** In each case, the initiative required State legislators to continue in session without pay if they did not pass the necessary petitions within a specified period. Both courts determined that such voter-imposed restrictions on legislators' ability to deliberate the issues independently violated Article V. ***

Appellant maintains that Article V does not prohibit the electorate from directing elected officials to amend the Constitution. He relies principally on *Kimble v. Swackhamer. 439 U.S. 1385, 58 L. Ed. 2d 225, 99 S. Ct. 51 (1978),* to support this contention. In that case then Justice Rehnquist, sitting as Circuit Justice, denied an injunction against a non-binding referendum in Nevada about the Equal Rights Amendment. Justice Rehnquist reasoned that the referendum did not alter the Article V process because it only served to advise legislators of the people's wishes and legislators were free to disregard it. ***

However, the Missouri Amendment is far more than an advisory, non-binding show of voters' opinion on term limits. *** By its own terms, the Missouri Amendment requires Senators and Representatives from Missouri to initiate and support the Article V process: "We, the Voters of Missouri, hereby instruct each member of our congressional delegation to use all of his or her delegated powers to pass the Congressional Term Limits Amendment." MO. CONST. art. VIII, § 17(1). *** Furthermore, the Missouri Amendment seeks to coerce members of Congress to comply with this mandate by threatening them with the politically-damaging ballot labels if they fail to do so. Thus, unlike the Nevada legislators in

Kimble, members of Missouri's congressional delegation are not free to disregard the instruction embodied in the Amendment. ***

We cannot accept appellant's argument that the Missouri amendment does not alter the Article V process. Voter initiatives which seek to coerce legislators into proposing or ratifying a particular constitutional amendment violate Article V. As discussed above, the Missouri Amendment's ballot labels constitute such an attempt by the voters to directly influence the Article V process by directing Senators and Representatives from Missouri to support and pursue the proposal and ratification of a term limits amendment to the United States Constitution.

III. CONCLUSION

The record, viewed in the light most favorable to appellant, reveals no genuine issue of material fact and that appellee is entitled to judgment as a matter of law because the Missouri Amendment violates the First Amendment, the Speech and Debate Clause, the Qualifications Clause, and Article V of the United States Constitution.[12]

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[12] Judge Hansen dissents from our decision to strike the Missouri Amendment in its entirety and argues that, instead, we should sever §§17-19 and leave the remainder of the Amendment intact, if we followed Judge Hansen's recommendation, Article VIII of the Missouri Constitution would state that the people of Missouri seek to amend the United States Constitution by adding a term limit qualification for Congressional service. Although there would no longer be a State-imposed punishment for candidates who fail to support the proposed term limit, the Missouri Constitution would still contain: (a) a direct attempt by the people to amend the US Constitution and (b) an attempt by the State and people of Missouri to add a qualification to Article I. Because we believe that both these attempts are unconstitutional, we cannot follow Judge Hansen's suggestion, notwithstanding this court's decision in *Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999).*

First, as we noted in Part IID, the people are not to play a direct role in the Article V amendment process. While we agree with Judge Hansen that advisory communication between the people and their elected officials is permitted, we believe that the Missouri Amendment constitutes more than such merely advisory communications, and, as such, is barred by Article V. Assuming for the purposes of analysis that a Circuit Justice opinion for the Ninth Circuit is binding precedent in the Eighth Circuit, we believe that Kimble is distinguishable. The referendum in Kimble was initiated by the Nevada legislature and specifically stated that "the result of the voting on this question does not place any legal requirement on the legislature or any of its members." *439 U.S. at 1386* (quoting 1977 Nev. Stats., ch. 174, § § 3, 5). If the Missouri Amendment contained similar language, we would agree with Judge Hansen that it is not coercive. However, in the absence of such language, we believe that the memorialization in the Missouri Constitution of the people's intent to pass a specific amendment to the United States Constitution departs from the expressly advisory, non binding referendum then-Justice Rehnquist found to be permissible in Kimble and comes closer to the direct involvement the Supreme Court disallowed in Lesser and Hawke. See Part IID, above.

Second, as we noted in Part IIC, states cannot constitutionally add to or alter the qualifications for federal office. See U.S. Const. art. I. Thus, §§15 and 16 are arguably barred by Article I because they are an attempt by a State to add to or change the qualifications for service in the United States Congress--as opposed to an Article V petition for a Constitutional convention from a State legislature to consider amending the United States Constitution.

Finally, we refuse to sever the Missouri Amendment on jurisprudential grounds, because if we choose to sever §§17-19, we must

Accordingly, we affirm the judgment of the district court.

DISSENT:

HANSEN, Circuit Judge, concurring in part and dissenting in part.

I readily concur with Part I of the opinion of the court and with those portions of Part II which declare the labeling provisions (§§17, 18, and 19) of the Missouri Amendment to be in violation of the Constitution. I write separately, however, specifically to assert my view that §§15 and 16 of the Missouri Amendment are severable pursuant to §22 of the Amendment and are not independently unconstitutional under the court's reasoning in Part II. Because I believe §§15 and 16 remain legitimate political expressions of the citizens of Missouri, I must respectfully dissent from that portion of the court's opinion and judgment which sweeps away the entirety of the Missouri Amendment.

In *Miller v. Moore, 169 F.3d 1119, 1126 (8th Cir. 1999),* this court recently held, while striking down several sections of a similar Nebraska term limits amendment, that the section declaring the official position of the citizens of Nebraska to be that their elected officials should enact a term limits amendment was severable and constitutional. The principle established in Miller v. Moore is equally applicable to the Missouri Amendment at issue in this case. Standing alone, §§15 and 16 are a legitimate, nonbinding form of political expression by the citizens of Missouri explaining their support for a specific term limits amendment to the United States Constitution.

The opinion of the court suggests that §§15 and 16 standing alone violate Article V and Article I of the federal Constitution because they are, respectively, "a direct attempt by the people to amend the US Constitution" and "an attempt by the State and people of Missouri to add a qualification to Article I."*** With respect to the latter, I believe the people of Missouri indeed have the absolute right under Article V to propose in a public pronouncement an addition to or an alteration of the qualifications for congressional service found in Article I. Once §§17 through 19 are struck down, §§15 and 16 do not in any way add to or alter the current qualifications for Missouri's congressional delegation, nor do they affect in any way federal election procedures. Furthermore, §15 could not be more explicit when it states that the purpose of the voter-approved initiative is to "lead to the adoption of the following U.S. Constitutional Amendment." Therefore, I see nothing unconstitutional about these efforts (§§15 and 16) by the people of Missouri to secure an amendment to Article I through the Article V process, and nothing in the decision in *U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 131 L. Ed. 2d 881, 115 S. Ct. 1842 (1995),* suggests otherwise.

With respect to Article V, the "people" (that is, the citizenry) have more than "a limited, third party role in the amendment process." *** In fact, "We the People" have at least as important a role in the process of amending the Constitution as they did in creating it. It was, after all, the "people" who forced the first ten amendments to be adopted. As the court correctly points out, the people have no formal role in the amendment *procedures* set out in Article V. However, the people play a crucial, *substantive* role in the amendment process by bringing political pressure to bear--through political speech, mobilization, and other activities--on those who under the Constitution do control the formal procedures. Standing alone, §§15 and 16 are nothing more than the people of the state of Missouri

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also sever portions of §16 which are unconstitutional or superfluous in the absence of §§17-19. Such micro-management of the Missouri Constitution would entangle this court too much in State law issues. As such, we opt to abstain from such action.

SUPREME COURT TO WADE BACK INTO TERM-LIMITS DEBATE WITH MISSOURI CASE

The Freedom Forum Online

April 18, 2000

Tony Mauro

The Supreme Court, which has already done considerable damage to the term-limits movement, is poised to do it again in a Missouri case that it will take up this fall.

The justices yesterday agreed to consider the case of *Cook v. Gralike,* which tests the constitutionality of what some call "scarlet letter" laws aimed at forcing candidates for office to support term limits.

The court's action also reflects its continuing interest in cases that raise First Amendment issues in the context of election and ballot procedures.

In 1995, the Supreme Court in *U.S. Term Limits v. Thornton* said term limits could be imposed on members of Congress only by constitutional amendment, a decision that weakened the then-burgeoning term-limits movement.

In the wake of that decision, Missouri voters in 1996 passed a state constitutional amendment ordering the state's members of Congress to work and vote in favor of a term-limits constitutional amendment. It also required new candidates for congressional seats to pledge to work for a constitutional amendment if elected.

Members of Congress and candidates who did not cooperate would have the label "Disregarded Voters' Instructions on Term Limits" or "Declined to Pledge To Support Term Limits" placed next to their names on the next election ballot. No label would be placed next to the name of candidates who favor term limits.

Similar measures were passed that year in Alaska, Arkansas, Colorado, Idaho, Maine, Nebraska, Nevada and South Dakota. Two years later, California also approved an "instruct and inform" initiative. Every such initiative that has been challenged in court has been struck down on one or more constitutional grounds. One is the "speech and debate clause," which forbids the punishment of members of Congress for the positions they take on the floor of Congress.

Other judges have found the measures to be an unconstitutional method of amending the Constitution, while others say they unconstitutionally add new qualifications for becoming a member of Congress.

The First Amendment weakness of the provisions has been the "compelled speech" issue, namely that they place government in the position of forcing candidates and public officials to speak on a certain subject and in a certain way. Not only must they take a position on term limits, they must also favor term limits to avoid being branded on the officials state ballot as opponents.

That was the basis of the claim made by Missouri congressional candidate Don Gralike when he challenged the

constitutional amendment by suing Secretary of State Rebecca Cook. Two lower courts sided with Gralike.

In a decision last August, the 8th U.S. Circuit Court of Appeals found the Missouri amendment clearly violated the First Amendment. "The Missouri amendment does not allow candidates to remain silent on the issue, which is precisely the type of state-compelled speech which violates the First Amendment right not to speak."

The state of Missouri disputed that finding, asserting that the state amendment does not force candidates to take a position or punish them if they don't; it merely informs voters what the candidates' views are.

"It's clear to us that Missourians support term limits and any information on the ballot to help voters to make informed decisions is useful," state Attorney General Jay Nixon said yesterday.

"The labels do far more than advise voters of a candidates' opposition to term limits," the 8th Circuit found. "The ballot labels are a serious sanction, which we believe is sufficient to coerce candidates to speak out in favor of term limits rather than risk the political consequences associated with being labeled on the ballot."

The court also found that "speech restrictions are particularly destructive in the political arena, where the importance of free exchange of ideas and information — a vital aspect of our democratic system — is at its zenith."

Those points are likely to carry weight with the Supreme Court, which regards protection of core political speech as one of its highest callings. Justice Antonin Scalia and others are also usually adamant about not allowing government to favor one viewpoint over another.

Still, the court's action in taking the Missouri case came as something of a surprise. Usually the court takes up a case when lower courts have disagreed on a point of law raised by that case. But in this instance all of the lower courts that have ruled have struck down measures like Missouri's.

The court may have agreed to decide the issue nonetheless to put its own stamp on how these initiatives should be evaluated, and to keep states from inventing other ways to force candidates to take positions on term limits or other issues. The case will be argued in the fall, with a decision unlikely before next year.

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SUPREME COURT TO HEAR MISSOURI BALLOT ISSUE CASE

Wording Sought on Term Limit Stances

The Kansas City Star

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Kevin Murphy

The U.S. Supreme Court will decide whether Missouri election ballots can list the views congressional candidates have on term limits.

The court announced Monday it would review a lower court ruling that struck down a 1996 Missouri constitutional amendment to designate term limit positions so voters could see how candidates stood on the issue. Courts have struck down similar measures in nine states.

"What a shocker," said Arthur A. Benson II, a Kansas City lawyer who represents a former candidate for Congress who challenged the amendment. "It seems unusual the Supreme Court would take a case where there were no conflicts among" other courts.

Lawyers for the Missouri attorney general argued in briefs to the high court that the case should be heard, although the arguments wouldn't come in time to affect the 2000 election. At least four of the nine justices must agree to hear a case, but votes are not disclosed.

"It's appropriate for the Supreme Court to revisit this issue," Attorney General Jay Nixon said Monday. "It is important to look at the broader issues here. I don't think the court took this case to decide wording in this one case."

Nixon said the question revolves around how much information states are allowed to give voters about candidates and issues. For instance, candidates are listed as Democrat and Republican and there often are long explanations of ballot issues.

"I think it's an appropriate function of a state to determine the composition of its ballot," Nixon said. "Giving voters more information has not been dangerous to democracy in the past and I don't expect it to be in the future."

Voters passed the state amendment by a 58 percent margin in the November 1996 general election. It sought to have members of the congressional delegation enact term limits of 12 years in the Senate and six years in the House.

The amendment also would require incumbents to show they had supported term limits, otherwise the ballot would say they "disregarded voters' instructions." Non-incumbents who do not back term limits would have it noted on the ballot that they "declined to pledge support for term limits."

A challenge to the amendment was posed by Donald Gralike, a former state legislator from St. Louis who ran for U.S. House in 1998 as a Democrat.

On Aug. 31, 1999, the 8th U.S. Circuit Court of Appeals in St. Louis ruled that putting term limit views on a ballot was unconstitutional because it required candidates to back the limits or have a "derogatory" label attached to their names.

"It compels speech, which is a violation of free speech by forcing elected representatives and candidates to make declarations and say things," Benson said Monday. "Government should have no role in enforcing speech."

Benson said letting views on term limits go on a ballot could set a precedent.

"Why just this issue?" he said. "Why not abortion, gun control? Where does the list of issues end that could be put on a ballot?"

Nixon said he understood the concern about a precedent.

"There are potential practical problems, that's why the legislature and the people are vested with authority on ballot measures like this," Nixon said.

In 1995, the U.S. Supreme Court hurt the term limit movement by ruling that voters in individual states could not decide whether to limit terms of the members of Congress.

Only a federal constitutional amendment could achieve that purpose, it ruled.

As a result, term limit advocates in Missouri and elsewhere looked for other ways to bring about term limits, including electing candidates who favored the limits and would back them in a federal constitutional amendment.

The decision by the justices Monday is the second time in recent months that a voter initiative in Missouri has come before the court.

Earlier this year the court upheld limits Missouri voters placed on what individuals can contribute to state legislative candidates.

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Also This Term:

99-1680 City News and Novelty Inc. v. Waukesha, Wis.

Ruling below (Wis. Ct. App., 231 Wis. 2d 93, 604 N.W.2d 870):

When municipal ordinance involves prior restraint of expressive activity and challenged municipal action thereunder is ministerial act of assessing business license application in which reviewing authority does not exercise discretion by passing judgment on content of any protected speech, burden of proof does not shift to city to defend ordinance's constitutionality; while ordinance in question appears to contain discrete sections for issuance, revocation, and renewal of licenses for adult businesses, when read as whole it is clear that standards for issuance of license, which are explicit and provide narrow, objective, and definite standards for licensing authority, also apply to license renewal, and thus ordinance does not permit unbridled discretion when considering applications for license renewal; requirement imposed by *FW/PBS Inc. v. City of Dallas*, 493 U.S. 215 (1990), that licensor "must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained," is satisfied by ordinance's provisions that effectively require decision on license renewal at least 39 days before license is due to lapse; ordinance's timetable for challenging licensing decision, which grants aggrieved party 30 days to seek administrative review of initial decision before municipal authority that made decision, gives that authority 15 days to conduct its reviews, grants aggrieved party another 30 days to seek appeal of that decision before municipal body, requires municipality to provide hearing within 15 days of receipt of notice of appeal and to make final determination within 20 days after hearing, and allows aggrieved party to seek judicial review within 30 days of receipt of municipality's final determination, satisfies constitutional requirement for prompt access to judicial review.

Question presented: Is licensing scheme that acts as prior restraint required to contain explicit language that prevents injury to speaker's rights from want of prompt judicial decision?