CONSTITUTIONAL LAW

Constitutional Law: Amendments
Finance & Taxation: Ad Valorem

Barley v. South Florida Water Management District,
823 So. 2d 73 (Fla. 2002)

A constitutional amendment that holds polluters “primarily responsible” for Everglades clean-up does not vest in non-polluters the right to refuse to pay existing ad valorem taxes for Everglades clean-up. The phrase “primarily responsible” does not mean that polluters bear the total burden.

FACTS

In 1994, the Florida Legislature passed the Everglades Forever Act (EFA), which was intended to prevent pollution and degradation of the Everglades Agricultural Area (EAA). The EFA granted the South Florida Water Management District (SFWMD) the power to collect funds through two sources. First, SFWMD could levy a 0.1 mill ad valorem tax against any residential property in the Okeechobee Basin, an area described by statute as within SFWMD’s jurisdiction. Second, SFWMD could collect tax revenue from agricultural users surrounding the EAA. Essentially, the EFA split the clean-up responsibility between residential property owners and the agricultural community.

In 1996, Florida voters, by initiative, amended the Florida Constitution to address pollution in the Everglades and passed what is now Florida Constitution Article II, Section 7(b). The initiative purported to hold parties who caused EAA pollution “primarily responsible” for the clean-up costs.

Citing the new Amendment, nonpolluting residential property owners in the Okeechobee Basin petitioned the circuit court for a declaration that the EFA was unconstitutional because it improperly allowed SFWMD to levy an ad valorem tax on nonpolluters, when the recent Amendment mandated that polluters “primarily” bear the clean-up costs. The circuit court held that the new Amendment did not prohibit SFWMD from
levying a tax against residential property for the purpose of cleaning up pollution in the Everglades. The Fifth District Court of Appeal affirmed the circuit court’s opinion. The Fifth District reasoned that the new Amendment was not self-executing; therefore, it was without effect absent enabling legislation. The Supreme Court of Florida addressed the issue of whether the language of the new Amendment to the Florida Constitution expressly invalidated a preceding statute, the EFA.

DISCUSSION

A constitutional amendment that is not self-executing requires enabling legislation to interpret the amendment’s meaning and give it effect. An amendment is not self-executing when the amendment, standing on its own, cannot carry out and accomplish the amendment’s purpose. If a statute is in effect at the time of the amendment, the statute will remain in effect after the non-self-executing constitutional amendment’s passage if the statute does not conflict with the clear intent of the amendment.

The Florida Supreme Court determined that the new Everglades Amendment was not self-executing, and it did not conflict with the EFA, because the Amendment’s language was unclear. Too many questions remained unresolved for government agencies to enforce the Amendment. One question concerned the definition of who must contribute to the Everglades clean-up. Although polluters would be “primarily responsible,” the language was not absolute. It did not divest landowners of the responsibility for contributing to the Everglades clean-up by payment of the ad valorem tax authorized by the EFA. Thus, the Amendment did not conflict with the EFA. Any conflict with the EFA would come from the new Amendment’s enabling legislation, if it would come at all.

SIGNIFICANCE

It is axiomatic that statutes remain in full effect until held unconstitutional or repealed. The Barley decision reaffirms that a non-self-executing constitutional amendment will not invalidate an existing statute unless the amendment’s language reveals the express intent to do so. Constitutional amendments, especially those by initiative, often are worded too broadly to be self-executing. Those who draft constitutional initiatives, therefore, should take care to make their intent clear. An unclear word such as “primarily” may produce an unintended result when a court
construes the initiative’s language. Likewise, unclear language will not guide the legislative body that must enact enabling legislation to bring the initiative to life. As Barley demonstrates, those who seek to enforce rights that they believe have vested by constitutional amendment will not succeed when the language is ambiguous.

RESEARCH REFERENCE


Ethan J. Loeb

Constitutional Law: Amendments – Standing

*Sanco v. Smith,*

830 So. 2d 856 (Fla. Dist. App. 1st 2002)

When the Legislature places proposed constitutional amendments on a ballot, the ballot summary must accurately describe the substance of the proposed amendment; however, the summary is not subject to the seventy-five word limit imposed on proposals from other legislative sources. Additionally, elections supervisors lack standing to raise constitutional equal-protection challenges to the statutory brevity requirement.

FACTS AND PROCEDURAL POSTURE

In 1998, the Florida Legislature, by joint resolution, proposed an amendment to the Florida Constitution that would limit claims of “excessive” punishment. A summary of the proposed amendment appeared on the ballot in the 1998 general election and was approved by the voters. The Florida Supreme Court subsequently declared the ballot summary invalid because the summary did not give voters fair notice of what the proposed amendment would do.

The Legislature then adopted, again by joint resolution, a more detailed ballot summary of the proposed amendment. This
proposed summary was longer than, and included, the text of the amendment itself. Fifteen elections supervisors sued the Secretary of State and the Attorney General to have the summary declared inaccurate, misleading, and in violation of minimum constitutional standards. Suit was brought in circuit court in Leon County. The circuit court denied the petition for injunctive relief, and the supervisors appealed to the First District Court of Appeal. The First District granted the supervisors’ motion to certify the circuit court’s order to the Florida Supreme Court under the pass-through provision of Article V, Section 3(b)(5) of the Florida Constitution. The Supreme Court declined to review the circuit court’s order and returned the case to the First District for a decision on the merits.

BALLOT SUMMARIES FOR PROPOSED STATE CONSTITUTIONAL AMENDMENTS

In Florida, a ballot summary of a proposed State constitutional amendment must meet the accuracy requirements in Article XI, Section 5 of the Florida Constitution. The summary must accurately represent the proposed amendment and must give voters “fair notice” of the amendment’s meaning. Armstrong v. Harris, 773 So. 2d 7, 15 (Fla. 2000). This case clarifies that the accuracy requirement applies to every proposed ballot summary of a proposed amendment. This holds true even to those proposed by joint resolution of the State Legislature. The court clarified the underlying rationale for this rule “to ensure that each voter will cast a ballot based on the full truth.” Sancho, 830 So. 2d at 861 (quoting Armstrong, 773 So. 2d at 21). The Fifth District had no difficulty deciding that the proposed summary in Sancho accurately described the proposed amendment, and that no voter would be confused about the meaning and effect of the proposed amendment. The length of the “summary” was not a problem because the brevity requirement was no longer applicable to amendments proposed by joint resolution of the Legislature. So long as a ballot summary is true and is not misleading, it is constitutional, and its verbosity will not raise constitutional issues.

CONCLUSION

The ballot summary in Sancho went above and beyond the State constitutional requirement of clarity and was exempt from the brevity requirement. Florida voters approved the proposed
amendment on November 5, 2002. The amendment reduced the constitutional right of Floridians to be free from cruel or unusual punishment. Before the amendment, Florida’s Constitution provided greater protection than the federal Constitution, which prohibited only punishment that is both cruel and unusual. The amendment thus brought Florida in line with the federal Constitution in terms of all punishment imposed by the criminal justice system, including the death penalty. The First District pointedly declined to say whether this was a good idea, leaving the wisdom of this change to the voters. If the voters who approved the amendment failed to fully understand its consequences, such failure cannot be attributed to the ballot summary.

RESEARCH REFERENCES

Ann M. Piccard, Instructor of Legal Research and Writing

Constitutional Law: Due Process
Land-Use Planning & Zoning: Substantive Due Process

City of Pompano Beach v. Yardarm Restaurant, Incorporated,
834 So. 2d 861 (Fla. Dist. App. 4th 2002)

A developer whose building permits are delayed and even “stonewalled” has no substantive-due-process claim against the city that issues the permits because any property interest in the permits is created by state law, and not the United States Constitution. Additionally, issuing and revoking building permits are executive, not legislative, acts. Finally, a complaining party may not maintain a procedural-due-process claim when the party availed itself of full judicial procedures to challenge an administrative decision.

FACTS
Yardarm Restaurant, Incorporated initially sued the City of Pompano Beach alleging that the City tried to prevent the restaurant from expanding into an eighteen-story hotel and marina complex. From 1973 until 1981, according to Yardarm,
the City obstructed Yardarm’s development efforts, either by refusing to issue or revoking building permits, and by first granting and then repealing a special-use permit. Through the years, individual City employees made decisions about Yardarm’s various applications, and Yardarm utilized legal avenues to appeal unfavorable decisions.

In 1994, the Fourth District Court of Appeal reversed the circuit court’s finding that the City’s delaying tactics had amounted to a taking of Yardarm’s property for the purposes of inverse condemnation. *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So. 2d 1377 (Fla. Dist. App. 4th 1994) [hereinafter *Yardarm I*]. The Fourth District remanded the case to the circuit court. The circuit court reinstated Yardam’s due-process claim, ultimately concluding that Yardarm’s substantive-and procedural-due-process rights were violated by the City’s “obstructionist conduct.” *Yardarm Restaurant, Inc.*, 834 So. 2d at 862 [hereinafter *Yardarm II*]. The City appealed both the damages and the attorney’s-fees awards, and Yardarm cross-appealed on portions of both.

**PROCEDURAL DUE PROCESS**

Although procedural due process protects a party from having its property interests violated without due process of law, a party that is afforded and that utilizes “full judicial procedures” has not been deprived of any process to which it is due. *Id.* at 866. In this case, Yardarm did not show any due-process violations. Yardarm utilized the courts to seek and obtain injunctions and a trial. The City never deprived Yardarm of procedural due process.

**SUBSTANTIVE DUE PROCESS**

Substantive due process is afforded only to fundamental rights. The United States Constitution creates these rights, which are “implicit in the concept of ordered liberty.” *Id.* at 868. The United States Court of Appeals for the Eleventh Circuit has applied the “concept of ordered liberty” to preclude a party from prevailing on a substantive-due-process claim that involves state-created rights. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994). Therefore, “substantive rights [that] are created only by state law . . . are not subject to substantive due process protection under the Due Process Clause . . . .” *Id.* McKinney involved an employment dispute; however, McKinney’s rationale has affected Florida land-use decisions. *Jacobi v. City of Miami Beach*, 678 So.
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2d 1365 (Fla. Dist. App. 3d 1996); but see Gardens Country Club, Inc. v. Palm Beach County, 712 So. 2d 398, 403 (Fla. Dist. App. 4th 1998) (holding that McKinney was inapplicable to denial of a vested right).

The Fourth District explicitly stated that a substantive-due-process claim is cognizable only when legislative action is involved; executive or administrative functions never rise to that level, in part because they affect smaller numbers of people than do legislative actions. An executive act, such as the issuance or the revocation of an individual building permit, or even the repeal of a special exception, does not implicate substantive due process. Yardarm’s substantive-due-process claim failed.

CONCLUSION

Yardarm raised both substantive- and procedural-due-process claims against the City based on allegedly “obstructionist conduct” in granting and denying building permits and special exceptions. The Fourth District clarified the standard to be used in evaluating due-process claims as applied to permit denials. First, procedural due process is not denied when a party avails itself of available legal remedies. Second, substantive due process is implicated only when the property right in question is fundamental and when the act complained of is legislative rather than executive. This case should clarify to Florida attorneys that due-process claims face difficult hurdles unless a party can demonstrate, for procedural due process, that it was precluded from pursuing any legal remedies, and for substantive due process, that the interest was a fundamental one created by federal, not state, law and that the complained of actions were legislative rather than executive or administrative.

RESEARCH REFERENCES


Ann M. Piccard, Instructor of Legal Research and Writing
Constitutional Law: Elections – Term Limits

**Cook v. City of Jacksonville,**
823 So. 2d 86 (Fla. 2002)

The Florida Constitution establishes the only disqualifications that may be imposed on county offices established under the constitution; therefore, any additional restrictions, including the imposition of term limits, may be provided only by constitutional amendment.

**FACTS**

In *Cook*, the Florida Supreme Court consolidated for review two appellate-court decisions. Both cases, *City of Jacksonville v. Cook*, 765 So. 2d 289 (Fla. Dist. App. 1st 2000), and *Pinellas County v. Eight Is Enough in Pinellas*, 775 So. 2d 317 (Fla. Dist. App. 2d 2000), affected a class of constitutional officers, thereby invoking the Court's discretionary jurisdiction. The issue was whether a charter county may amend its charter to impose on county officers term limits established by the Florida Constitution. *Cook*, 823 So. 2d at 90.

In *Cook*, the voters amended the Jacksonville charter by imposing a two-term limitation on the Clerk of the Circuit Court. After serving two complete terms, the Duval County Circuit Court Clerk requested the circuit court to invalidate the term limit and order the Supervisor of Elections to accept his candidacy papers for a third term. The circuit court ruled that, regardless of whether the term limitation was a qualification or disqualification, the Florida Constitution prevented the City from imposing the requirement. On appeal, the First District reversed the circuit court’s decision and upheld the constitutionality of the term limit. Relying on the Florida Supreme Court’s decision in *Thomas v. State ex rel. Cobb*, 58 So. 2d 173 (Fla. 1952), the First District noted that the constitution was completely silent on the issue; therefore, the Legislature itself could impose the qualifications.

The Second District addressed the same issue in *Eight Is Enough in Pinellas*, wherein the court validated a provision of the county charter imposing a two-term limitation on several county offices. Although the court did not address whether the term limitation was an actual disqualification from office, it held that
nothing in the Florida Constitution prevented the charter county from imposing the restriction. In fact, the Second District stated that Florida Constitution Article VIII, Section 1(g) granted charter counties the power to establish their own governmental framework, including imposing limits on county officers.

CREATION OF CONSTITUTIONAL OFFICERS

The Florida Constitution requires counties to establish several political offices, including sheriff, tax collector, property appraiser, supervisor of elections, and clerk of the circuit court. Fla. Const. art. VIII, § 1(d). Although these are county offices, the Florida Constitution expressly authorizes their creation, which means that the individuals elected to these positions are constitutional officers. These officers remain subject to other provisions, which impose on them various qualifications and disqualifications. Both the officers and counties alike must comply with these provisions and may not amend or change them “by legislative or judicial fiat.” Cook, 823 So. 2d at 94.

DISQUALIFICATIONS FOR HOLDING A CONSTITUTIONAL OFFICE CAN BE PROVIDED ONLY BY THE FLORIDA CONSTITUTION

The Florida Supreme Court held that term limits were disqualifications from office. This single determination was largely dispositive of the issue before the Court. The Constitution provides the only acceptable disqualifications pertaining to constitutional offices. Fla. Const. art. VI, § 4. It excludes from office any person convicted of a felony or declared mentally incompetent. These restrictions apply to all constitutional officers and constitute the exclusive list of disqualifications. To eliminate, modify, or supplement these disqualifications, the electors of the State must amend the Constitution.

In addition to the general disqualifications, which pertain to all constitutional officers, the Constitution imposes a two-term limitation on six specifically enumerated constitutional officers. Fla. Const. art. VI, § 4(b). County officers, however, like those in Cook and Eight Is Enough in Pinellas, are not included among the six. Applying a basic cannon of construction, expressio unius est exclusio alterius, the Court held that the county officers in this case were not bound by the term limitations because they were not among the six officers identified in the Constitution.
SIGNIFICANCE

The Court’s opinion is consistent with the general rule that charter counties must abide by the federal and state constitutions. *Hollywood, Inc. v. Broward County*, 431 So. 2d 606, 609 (Fla. Dist. App. 4th 1983). Despite its deference to the Constitution, this decision could undermine a county’s ability to establish its own governmental framework. The Constitution grants charter counties broad authority and vests in them “all powers of local self-government.” Fla. Const. art. VIII, § 1(g). However, this decision appears to be at odds with the idea of self-government.

Although the Constitution requires charter counties to establish several county offices, it allows county electors to decide how the officers are selected. *Id.* Furthermore, the Constitution permits the counties in certain instances to abolish the county offices. *Id.* It seems entirely inconsistent that a county may choose how it will select an official, or may even abolish the office entirely, but it does not have the power to determine the appropriate qualifications or disqualifications pertaining to the office. As it stands now, the Constitution provides the only disqualifications that may be imposed upon constitutional officers.

RESEARCH REFERENCES


Dustin Duell Deese

Constitutional Law: Equal Protection

*Frandsen v. County of Brevard*,
800 So. 2d 757 (Fla. Dist. App. 5th 2001)

Gender-based discrimination in Florida statutes and a county ordinance that prohibit indecent exposure do not violate the equal-protection guarantee of the Florida Constitution, despite a 1998 amendment declaring that “female[s] and male[s] alike” are equal before the law.

FACTS

Brevard County Ordinance 95-21 prohibits anyone from
appearing nude in a public place. Additionally, Florida Statutes Sections 800.03 and 877.03 (2002) prohibit anyone from publicly exposing his or her sexual organs or physically appearing in a way that would corrupt public morals.

Jan Frandsen and other plaintiffs sought a judgment declaring that the ordinance and statutes violated the equal-protection guarantee of Article I, Section 2 of the Florida Constitution because the laws effectively prohibit exposing bare female breasts in circumstances in which bare male breasts may be exposed. The trial court dismissed the plaintiffs’ complaint, and the Fifth District Court of Appeal affirmed.

DISCUSSION

The plaintiffs claimed that a 1998 amendment to the Equal Protection Clause of the Florida Constitution now requires a strict-scrutiny review of all laws that discriminate between men and women. Frandsen, 800 So. 2d at 759. The amendment added the following relevant phrases to Article I, Section 2: “All natural persons, female and male alike, are equal before the law. . . . No person shall be deprived of any right because of race, religion, national origin, or physical disability.” (Emphasis added.)

Addressing the constitutional amendment, the Fifth District relied on commentary by the Constitution Revision Commission to determine the amendment’s intent. Noting that the amendment added “national origin” to the end of the last sentence, the court concluded the Commission intended to explicitly identify “national origin” as a new protected class subject to strict scrutiny.

By contrast, the placement of the added words “female and male alike” demonstrated an intent to modify only the existing term “natural persons.” The addition served to secure constitutional equality for women because Florida had failed to adopt the Equal Rights Amendment of the United States Constitution. In fact, the court acknowledged that the Commission had rejected the proposal to prohibit discrimination “because of sex” to avoid opening the door to same-sex marriages. Id. at 759 (referring to the Hawaii Supreme Court’s interpretation in Baehr v. Lewin, that Hawaii’s constitutional prohibition against discrimination “because of sex” required strict scrutiny of Hawaii’s marriage statute including the prohibition of same-sex marriages). The word placement, coupled with the Commission’s commentary, led the court to conclude that gender
discrimination is not subject to strict scrutiny in Florida. *Id.* at 759–760.

Instead, the court reiterated the standard that the United States Supreme Court articulated in *United States v. Mississippi University for Women*, 458 U.S. 718 (1982), requiring the lesser standard of an exceedingly persuasive justification in matters of gender discrimination. *Frandsen*, 800 So. 2d at 758. In *Mississippi University*, the Court concluded that for discrimination based on gender to be exceedingly persuasive, the discrimination must be substantially related to an important governmental objective. 458 U.S. at 724. Although the Fifth District did not offer an explanation regarding how the challenged laws in the instant case pass the “exceedingly persuasive” test, it aligned itself with numerous courts that have held state and local laws that discriminate between the sexes under similar circumstances do not violate equal-protection guarantees. *Frandsen*, 800 So. 2d at 760. Such courts have found that, while “different talents, capacities, or preferences of males and females” are not persuasive grounds for gender-based discrimination, the “physical differences” between the sexes “are enduring.” *Id.* at 758; see *Craft v. Hodel*, 683 F. Supp. 289, 300 (D. Mass. 1988) (concluding that “the Constitution surely does not require a state to pretend that demonstrable differences between men and women do not really exist”). Thus, protecting society’s moral sensibilities, which largely regard the female, but not the male, breast as an erogenous zone is an important governmental objective achieved by prohibiting the exposure of female breasts.

SIGNIFICANCE

*Frandsen* affirms that Florida statutes and local ordinances prohibiting indecent exposure remain constitutional under Florida’s amended equal-protection guarantee. This presupposes the fact that any gender-based discrimination is substantially related to an important governmental objective.

REFERENCES


Betty Fitterman
Ordinances & Regulations

Watchtower Bible and Tract Society of New York, Incorporated v. Village of Stratton,
122 S. Ct. 2080 (2002)

The First Amendment protects the right to remain anonymous when going door-to-door and engaging in pure non-commercial religious or political speech. A municipal ordinance requiring all door-to-door canvassers and solicitors to reveal their names was unconstitutionally overbroad because it abridged “pure speech” in addition to commercial speech.

FACTS AND PROCEDURAL HISTORY
The Village of Stratton, Ohio, population 278, enacted an ordinance requiring all uninvited “solicitors, peddlers, hawkers, [and] itinerant merchants” to obtain a permit, signed by the mayor, before going door-to-door to the Village’s residences. Stratton, 122 S. Ct. at 2083 n. 2, 2084. The ordinance also covered “canvassers” promoting any “cause,” regardless of what the “cause” may be. Id. at 2083. The purpose of the ordinance was to protect residents from annoyance, fraud, and crime, especially “from ‘flim flam’ con artists who prey on small town populations,” according to the mayor. Id. at 2085. When enacting the ordinance, the Village did not make legislative findings about the link between door-to-door canvassing and the threat of fraud and crime.

There was no charge for the permit, which was routinely issued upon completion of a Solicitor’s Registration Form. The form required an applicant—canvasser to disclose his or her name, address, name and nature of the organization, and the length of time he or she intended to canvass. The Village did not verify the identities of applicants or perform criminal background checks. The mayor often left signed, blank permits in the Village offices to be issued immediately upon receipt of the completed form. Id. at 2083.

By receiving a permit, canvassers agreed to carry the permit and display it upon request of any resident or the police. Canvassers also agreed to respect the procedure by which residents could prevent an unwelcome knock at the door. If
residents posted a “No Solicitation” sign and filed a No Solicitation Registration Form with the Village, otherwise validly permitted canvassing would be prohibited. On the form, residents could exempt groups whom they would welcome despite the “No Solicitation” sign.

Representing Jehovah’s Witnesses, the Watchtower Bible and Tract Society of New York (the Society) challenged the ordinance as violating, on its face, constitutional First Amendment freedoms of speech, of the press, and free exercise of religion, applicable to the states through the Fourteenth Amendment. The preaching activities of Jehovah’s Witnesses throughout the United States are coordinated by the Society, which also publishes Bibles and religious pamphlets, including the periodicals *Awake!* and *The Watchtower*. The religious literature is offered free to anyone interested in reading it by door-to-door canvassers, who will accept, but do not solicit, contributions. Believing their authority to preach door-to-door was derived directly from Scripture, and not from any municipality, the Society sought to enjoin the registration procedure without first applying for a permit. The Society did agree, however, to honor the “No Solicitation” signs, although Jehovah’s Witnesses did not consider themselves to be solicitors.

The district court upheld the ordinance as valid, content-neutral regulation of speech, applicable to Jehovah’s Witnesses as well as political canvassers or commercial solicitors with one minor modification of allowable canvassing hours. The permitting and registration procedure, including the requirement that applicants disclose their names, remained intact.

The United States Court of Appeals for the Sixth Circuit upheld the ordinance as a reasonable time, place, and manner restriction as reviewed under intermediate scrutiny. *Watchtower Bible & Tract Socy. of N.Y., Inc. v. Village of Stratton*, 240 F.3d 553, 560 (6th Cir. 2001). The level of scrutiny was crucial to the court’s decision.

Under intermediate scrutiny, the government must show that the regulation is narrowly tailored to meet a substantial state interest. On the other hand, under strict scrutiny, the government must demonstrate a compelling state interest and that no less restrictive alternative exists. In this case, because the ordinance was content-neutral and generally applicable, it was entitled to intermediate scrutiny, according to Supreme Court precedent on permitting speech in public places. Had the
ordinance been directed at speech based on its content, strict scrutiny would have applied. Strict scrutiny applied to an Ohio law that prohibited distribution of anonymous political campaign literature in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). In *McIntyre*, a law required that all political literature bear the name and address of its author. The Court invalidated the law, citing a cherished American tradition of anonymous political writing dating from the Federalist Papers forward. The Sixth Circuit distinguished *McIntyre* on the ground that Jehovah's Witnesses, by engaging in face-to-face contact, had already given up a portion of anonymity, even if they did not reveal their names. Moreover, the Stratton ordinance was subject to intermediate scrutiny, unlike the *McIntyre* law, and as such it was reasonably tailored to meet substantial state interests, given its light infringement on the time, place, and manner of speech. The court noted, however, that if strict scrutiny had attached, the ordinance would have failed. *Stratton*, 240 F.3d at 563 n. 6.

Other challenges based on freedom of the press and free exercise of religion also were rejected under the same standard of intermediate scrutiny and were not appealed. On petition to the Supreme Court, the sole issue was whether the Stratton ordinance violated a constitutionally protected right to distribute pamphlets anonymously. Although the Jehovah's Witnesses did not themselves object to revealing their names, they asserted the right to speak anonymously as part of their challenge that the ordinance was overbroad on its face. The Supreme Court struck down the ordinance by a vote of eight to one.

**DISCUSSION**

The Supreme Court assailed both the “breadth and unprecedented nature” of the restriction on speech and that the regulation was not tailored to the Village’s stated interests. Finding no need to resolve what level of scrutiny to apply, the Court found that the ordinance reached too much religious, political, and spontaneous speech, given that the Village had made no legislative findings that burdening such “pure speech” by door-to-door canvassers prevented fraud or crime. *Stratton*, 122 S. Ct. at 2088, 2090.

Ironically, the feature of the ordinance that saved it before the Sixth Circuit — that the ordinance was content-neutral and generally applicable — was a fatal factor contributing to the Supreme Court’s finding of overbreadth. Whereas the Sixth
Circuit used an analytical framework that focused on the nature of the government regulation, the Supreme Court instead considered the nature of the speech affected. The Court observed that “hand distribution of religious tracts is an age-old form of missionary evangelism — as old as the history of printing presses.” Id. at 2087. Since the 1930s, the Court had upheld the right of Jehovah’s Witnesses to preach and distribute literature door-to-door as one of the religion’s core beliefs. Thus, the Court inferred some overlap with the right of free exercise of religion, as well as freedom of the press and speech.

The Court emphasized the value of door-to-door pamphleteering to political speech, and it is here that the value of anonymous speech becomes apparent. A speaker may favor anonymity out of fear of economic or official retaliation, or out of concern about being ostracized by the community, or out of a simple desire to preserve one’s privacy. Indeed, door-to-door pamphleteering had been “essential to the poorly financed causes of little people,” and anonymity had been crucial to protect powerless dissenting voices from retribution. Id. at 2088. Relying on McIntyre, which the Sixth Circuit had distinguished, the Court found that the anonymity interests of the Stratton canvassers were implicated merely by requiring them to register their names at the mayor’s office.

In addition to over-extending its reach to religious and political speech, the ordinance “effectively banned” a great deal of spontaneous speech. “Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor’s permission.” Stratton, 122 S. Ct. at 2090. A clue to the true breadth of the ordinance, intended at the time of enactment, lay in the suggested list of excepted canvassers in the residents’ “No Solicitation Form.” Such canvassers included Camp Fire Girls, Christmas carolers, political candidates, persons affiliated with Stratton Church, and Jehovah’s Witnesses. Presumably, the “No Solicitation” procedure portion of the ordinance would prohibit each of these groups from canvassing unless specifically exempted, thus demonstrating the ordinance’s reach as a whole. The Court surmised that the ordinance extended to residents casually “ringing doorbells to enlist support for employing a more efficient garbage collector.” Id. at 2089. The Court found it offensive that a citizen would be required to “first inform the government of her desire to speak to her neighbors and then
obtain a permit to do so.” *Id.*

Despite the Village’s protestations that the ordinance was narrowly tailored to combat the threat of crime and fraud in a vulnerable community, the Court found the ordinance fatally overbroad in its intent and in its reach.

**A NARROW HOLDING**

From the Court’s analysis, the right of anonymous door-to-door speech appears to apply narrowly to purely noncommercial religious and political activity. The Court expressly stated that, had the ordinance applied “only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village’s interest in protecting the privacy of its residents and preventing fraud.” Presumably, an ordinance exempting pure speech from its reach would pass constitutional muster.

In this way, *Stratton* addresses a question raised by Justice Antonin Scalia’s dissent in *McIntyre*. In *McIntyre*, the Court held that the state could not require authors of election handbills to reveal their names. Justice Scalia dissented, opposing the recognition of any general right to anonymity in speech. *McIntyre*, 514 U.S. at 380. He believed that the state’s interest in protecting the integrity of the electoral process outweighed the individual’s right to remain anonymous, which, he argued, was not constitutionally guaranteed. *McIntyre*, in fact, did solidify the right to anonymous speech as a First Amendment freedom. The question remained, however, How far does this right extend?

*Stratton* appears to draw the line at the exchange of money. So long as the activity is pure speech, the right to complete anonymity outweighs the government’s interests, even if legitimate. But when money is introduced into activity, either by solicitation for donation or sale of merchandise, the state’s interest to prevent fraud and crime presumably ascends to eclipse the right of anonymity. The state appears not to have a stronger interest simply because the speech occurs on private property at residents’ doorsteps, rather than a public space.

One caveat is necessary. A factual dispute, unresolved by the *Stratton* Court, raises the question of whether *Stratton* expands the holding of *Buckley v. American Constitutional Law Foundation, Incorporated*, 525 U.S. 182 (1999), with regard to regulation of the electoral process. In *Buckley*, the Court invalidated a Colorado law requiring paid initiative-petition
signature-gatherers to wear identification badges. The Court let stand, however, a provision requiring a master list of the signature-gatherers’ names and salaries to be filed with the state after completion of the petition drive. The Court reasoned that the state’s interest in preserving the integrity of the initiative-petition process against the influence of well-financed, large-scale petition-gathering organizations outweighed the individual signature-gatherer’s anonymity on a master list. In *Stratton*, it was undisputed that the Village would maintain a public record of the canvassers who registered in compliance with the ordinance, similar to the master list in *Buckley*. It was not clear, however, whether the permit canvassers were required to carry would display the name of the canvasser to whom it was issued. The uncertainty remained through oral argument, to the palpable annoyance of the Court. See Oral Argument Trans., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 2002 WL 341775 at *10 (Feb. 26, 2002) (quoting Justice Ruth Bader Ginsberg, “[I]t’s very confusing . . . ”). The Court’s opinion reflected the uncertainty: the Court phrased the question presented in terms of a “permit, which contains one’s name,” but decided the case assuming that the canvasser would not reveal his or her name during face-to-face contact, because “strangers to the resident certainly maintain their anonymity.” *Stratton*, 122 S. Ct. at 2086, 2090.

The difference is subtle, but potentially important. If the *Stratton* canvassers were required to display their names on the permits, then the case falls squarely within *Buckley*’s holding without expanding its reach. If, on the other hand, the *Stratton* canvassers were entitled to preserve their anonymity past the point of face-to-face contact to records maintained at a remote location, then a master list like the one in *Buckley* might also be unconstitutional. The *Stratton* Court avoided resolving the issue by finding the ordinance to be greatly overbroad, reaching a great deal of religious and spontaneous speech, even if it had purported to protect the electoral process. One wonders, however, if *Stratton* had been decided before *Buckley*, whether *Buckley* would have recognized the same right to complete anonymity found in *Stratton*.

THE PROBLEM OF SCRUTINY

Overbreadth was only one of two grounds on which the Court invalidated the ordinance. The other was that the ordinance was
not tailored to the Village’s stated interests, which were unsupported by legislative findings, at the time of enactment. For example, although the Village asserted on appeal that the ordinance was designed to protect residents from serious crimes, the legislative history revealed no such intent. “I can only conclude that if the village of Stratton thought preventing burglaries and violent crimes was an important justification for this ordinance, it would have said so.” *Stratton*, 122 S. Ct. at 2091–2092 (Breyer, Souter & Ginsburg, JJ., concurring). But what if the Village had made specific legislative findings on the danger of unregulated noncommercial religious or political speech? In other words, What if the ordinance survived the overbreadth challenge? Then the case may have turned on the problem of what level of judicial scrutiny to apply, much as it did when the Sixth Circuit considered the Stratton ordinance.

In his dissent, Chief Justice William Rehnquist recognized the dangers posed by canvassers, regardless of their cause. Sixty years ago, the Court warned that burglars often pose as canvassers as a pretense either to enter empty houses or to select targets for later burglary. In addition to burglary, violence too, was an ever-present threat, as evidenced by the 2002 double-murder of two college professors in Hanover, New Hampshire, by two teenagers who went door-to-door under the pretense of noncommercial canvassing for an environmental cause. Given these justifications, according to the Chief Justice, the ordinance was not overbroad and reasonable time, place, and manner analysis should apply. *Id.* at 2095–2096 (Rehnquist, C.J., dissenting).

Under time, place, and manner analysis, specific information about the unique forum of Stratton Village, not considered in any of the Justices’ opinions, would be relevant. For example, the Village, consisting of only seventy houses, plus some residential trailers and businesses, was located in a rural area near a major interstate, providing easy access and escape for strangers with ill intent. The Village employed only one full-time police officer, whose hours were from 7:00 p.m. to 4:00 a.m. Br. for Respt., *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 2002 WL 59128 at **1822 (Jan. 9, 2002). By having a registration procedure for canvassers, the Village would deter those who may enter the Village under false pretenses. Balanced against the Village’s legitimate interest to prevent crime would be the limited burden on speech on residents’ private property: to simply know
who is in town canvassing. Moreover, the ordinance placed no restrictions on speech in the public areas of the Village, including the town square, parks, or any public street.

At this point, the level of scrutiny would become dispositive. Considering the threat of crime and minimal intrusions on the time and manner of speech, but not its content, the ordinance may seem narrowly tailored to a substantial state interest, leaving “open ample alternative channels for communication of the information.” \textit{Stratton}, 122 S. Ct. 2094 (Rehnquist, C.J., dissenting). However, this is the case under an intermediate level of scrutiny. If the Village is required to show a compelling state interest with no less restrictive alternative, another result entirely may be reached. When the Court examines the reasoning behind the ordinance with strict scrutiny, the ordinance will be upheld only if there is no possible way the state interest could be accomplished in a less burdensome manner.

Even causal observers of constitutional law know that recitation of the compelling-state-interest standard often serves as Last Rites to a government regulation before it is sent quietly to oblivion. It is beyond the scope of this digest whether, in a future case, the Court will find legitimate government interests in protecting residents’ privacy or preventing crime or fraud to be “compelling” or merely “substantial.” But the issue will assume crucial importance if a municipality supports a \textit{Stratton}-like ordinance with legislative findings sufficient to survive an overbreadth challenge.

DOOR-TO-DOOR SPEECH IN THE INFORMATION AGE

With the rise of the Internet and the decline of close-knit neighborhoods, the idea of door-to-door pamphleteering may seem peculiar and even threatening. Similarly, the desire for anonymity seems out of step with a society in which more and more privacy is surrendered to commercial interests or the government. Despite these trends, the right to anonymous pure speech at the doorstep will likely remain entrenched. The Court is not likely to abandon the notion of door-to-door distribution of pamphlets as “essential to the poorly financed causes of little people,” nor deny that “[a]nonymity is a shield from the tyranny of the majority.” \textit{Id.} at 2088; \textit{McIntyre}, 514 U.S. at 357. In times when dissent is most likely to meet with fierce opposition, this right is all the more vital.
A municipal ordinance regulating the location of an adult-entertainment establishment is a valid content-neutral regulation of speech if the municipality establishes that the purpose of the ordinance is to further a substantial governmental interest and that reasonable alternatives to communication are still available. To establish the purpose of its ordinance, a municipality can rely on evidence that it reasonably believes fairly supports a connection between the location of an adult-entertainment establishment and an independent substantial governmental interest, such as reducing crime in areas surrounding a concentration of adult business.

FACTS

In 1977, the City of Los Angeles conducted a study of adult-entertainment businesses and concluded that concentrations of adult businesses were associated with higher incidents of crimes in the surrounding community. As a result, the City adopted an ordinance that prohibited adult-entertainment establishments from operating within 1000 feet of each other, or within 500 feet of a church, school, or public park.
The ordinance measured the distances from exterior walls, which allowed adult businesses to concentrate different adult uses within one building. To close this loophole, the City amended the ordinance to prohibit more than one establishment in a single building and to narrowly define an adult-entertainment establishment based on the type of goods or services sold. The result was that a single business could comprise numerous businesses that would have to be separated into different buildings more than 1000 feet from each other to comply with the ordinance.

The plaintiffs in Alameda Books were two adult businesses, each operating in a stand-alone building more than 1000 feet from other adult businesses and more than 500 feet from a church, school, or public park. Each business had adult products for sale and each operated a video arcade. The City's amended ordinance defined the adult-product retailer and the video arcade as two separate establishments, and, consequently, City inspectors found the businesses violated the adult-zoning ordinance.

The plaintiffs sued in federal district court to have the ordinance declared invalid and for injunctive relief to prevent its future enforcement. The district court granted summary judgment for the plaintiffs, holding that the ordinance was a content-based regulation of speech that failed strict scrutiny. The City appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the summary judgment but for different reasons. The Ninth Circuit noted that even if the ordinance were content-neutral, rather than content-based, the City failed to prove that the regulation was intended to serve a substantial governmental interest.

The City appealed to the United States Supreme Court, where it reversed the Ninth Circuit and remanded the case back to the district court. The Court found that the ordinance was a content-neutral regulation of speech and, in a plurality opinion, found that the City could use the 1977 study of adult businesses as evidence linking concentrations of adult-entertainment establishments with high rates of crime.

CLASSIFICATION OF ADULT-ENTERTAINMENT BUSINESSES

Municipalities may classify adult-entertainment businesses based on the content of their merchandise and may regulate the location of the businesses so classified. In determining the
validity of an ordinance restricting these businesses to certain locations, courts generally apply a three-step analysis. The first step is to determine whether the ordinance is a time, place, and manner regulation of speech, and, if so, the second step is to determine whether the ordinance is content-based or content-neutral. If the ordinance is content-neutral, the final analysis entails whether the ordinance serves a substantial governmental interest and allows reasonable alternatives for communication by not denying adult businesses reasonable opportunities to conduct business within the municipality.

In Alameda Books, both the district court and the Ninth Circuit found that the City's 1977 study of adult businesses was not enough evidence to support a reasonable belief that clusters of adult-entertainment establishments in a single building resulted in higher rates of crimes in the surrounding areas, which the City had asserted as its content-neutral justification for the ordinance.

The Supreme Court granted certiorari in this case to clarify the criteria for determining whether an adult-business zoning ordinance serves a substantial governmental interest under the standard established in City of Renton v. Playtime Theaters, Incorporated, 475 U.S. 41 (1986). In Renton, the Court held valid a city ordinance that prohibited an adult movie theater from operating within 1000 feet of a residence, residential zone, church, park, or school, but did not ban adult movie theaters. In analyzing the ordinance using the three-step process, the Court first found that the ordinance was a time, place, and manner regulation of speech, and then found that it was content-neutral because the ordinance was not directed at the content of the films, but rather at the effects of the theater on the surrounding area. The Court elaborated that the ordinance was valid if the city could prove that it was crafted to serve a substantial governmental purpose, and reasonable alternate means of communication were still available.

The Ninth Circuit had applied the reasoning in Renton to Alameda Books, but instead of finding the ordinance valid, it found that the City failed to prove that the ordinance had been enacted for the substantial governmental purpose of reducing the crime rate in areas surrounding adult-entertainment establishments. The Ninth Circuit noted that the City could not rely on the 1977 study because it did not show a link between a combination of adult businesses and the harmful secondary
effects of increased crime.

In its reversal, the Supreme Court reiterated its ruling in *Renton* that a municipality can rely on any evidence that it “reasonably believed to be relevant” to establish a connection between the regulated speech and a substantial, independent governmental purpose. The Court further elaborated that the evidence must “fairly support” the municipality’s rationale for the ordinance.

**BURDEN OF PROOF**

In remanding the case for further consideration of the evidentiary material, the Court instructed the district court on the burden of proof, declaring that the plaintiff first must attack the municipality’s underlying justification for the ordinance by either showing that the evidence offered does not support the rationale, or by furnishing other evidence that questions the municipality’s factual findings. If the plaintiff satisfies this burden, then the burden shifts to the municipality to supplement the record with evidence restoring the justification of its ordinance.

**DISSENTING OPINION**

The dissenting opinion of four justices focused on the portion of the City’s ordinance that required the separation of adult bookstores from video arcades. The dissent argued that the bookstores involved were not concentrations of separate adult businesses, but were instead combinations of adult entertainment that traditionally have been part of a single business. The dissent believed that the 1977 study the City relied on did not support the break-up of a single business because it provided no evidence that a combination bookstore–arcade increased crime in the surrounding area.

The dissenting opinion warned that courts have to apply intermediate scrutiny to the regulation of adult businesses with care because the secondary effects are directly correlated to the content of the speech, and governments can use the secondary effects to effectively eradicate expressive adult businesses. The dissent suggested that courts should apply a level of scrutiny to adult-business content-correlated regulation that should be less than strict scrutiny, when the regulation of speech is content-based. The level of scrutiny, however, should be greater than the intermediate scrutiny that currently applies to time, place, and
manner regulation of speech. Content-correlated regulations should require empirical evidence to prove the following:

1. The secondary effects actually exist;
2. The secondary effects are caused by the activity being regulated;
3. The regulation will either decrease the secondary effects, or enhance the government’s ability to combat them; and
4. The regulation does not suppress the expressive activity.

SIGNIFICANCE

*Alameda Books* is important to practitioners because the Court repeated and clarified its previous holdings on three issues in the analysis of whether a municipality’s adult-business zoning ordinance is valid. First, the Court reiterated its findings in *Renton* that as long as the ordinance serves a substantial governmental interest, the ordinance is content-neutral and not subject to strict scrutiny. Second, the Court clarified the type of evidence a municipality must produce to support a substantial governmental interest. Reaffirming *Renton*, the Court stated that the municipality has to reasonably believe its evidence is relevant to showing a link between adult businesses and a substantial governmental interest. The Court went on further to clarify this by requiring that the evidence fairly support the stated purpose for the ordinance. Third, the Court explained the burden of proof, putting the initial burden on the plaintiff to cast doubt on the rationale of the ordinance, but giving the municipality an opportunity to present additional evidence.

The dissent in *Alameda Books* may predict how the Court will scrutinize adult-entertainment regulations in the future, applying a level of scrutiny that is more demanding than the intermediate scrutiny currently applied to regulation of adult business as a time, place, and manner regulation. Practitioners drafting adult-business regulations should be aware of the content-correlated-regulation concept and the evidence that could be required to validate the regulation under this level of scrutiny.

RESEARCH REFERENCES

- Carol A. Crocca, *Validity of Ordinances Restricting Location of “Adult Entertainment” or Sex-Oriented Businesses*, 10


Elizabeth G. Bourlon

Constitutional Law: First Amendment – Elections

Republican Party of Minnesota v. White,
122 S. Ct. 2528 (2002)

A judicial canon that prohibits a candidate for state judicial office from “announc[ing] his or her views on disputed legal or political issues” violates the First Amendment and therefore is unconstitutional.

FACTS

All Minnesota state judges are elected, and in 1974, the Minnesota Supreme Court established Canon 5 of the Minnesota Code of Judicial Conduct, including Section (A)(3)(d)(i), which prohibits a judicial candidate from “announc[ing] his or her views on disputed legal or political issues” (the “announce clause”). This canon was modeled after Canon 7(b) of the ABA Model Code of Judicial Conduct. To run for a judicial office, a candidate must comply with the announce clause or risk such sanctions as disbarment, suspension, or probation. Minn. R. Prof. Conduct 8(4)(a) (2002).

One petitioner, Gregory Wersal, was a candidate for Associate Justice of the Minnesota Supreme Court in 1996. During his campaign, he criticized several previous decisions of that Court in literature he distributed. A complaint was filed — and was later dismissed — against Wersal, challenging the propriety of Wersal’s literature. Shortly thereafter, Wersal withdrew from the election, fearing that such “complaints would jeopardize his ability to practice law.” Republican Party of Minn., 122 S. Ct. at 2531.

In 1998, Wersal ran for the same judicial office. During this campaign, Wersal sought an advisory opinion from the Minnesota Lawyers Professional Responsibility Board (Board), which investigates and prosecutes ethical violations. The Board indicated that it had significant doubts about the Canon’s
constitutionality, but that it could not address Wersal’s concerns because he failed to include a list of statements he wished to make during the campaign. Wersal then sought declaratory and injunctive relief in federal court, alleging that the announce clause violated his First Amendment rights and thus should not be enforced.

The United States District Court for the District of Minnesota held that the clause was constitutional because the State had a compelling interest in preserving and protecting the judiciary’s integrity and independence, and the clause did “not unnecessarily curtail[] protected speech.” Republican Party of Minn. v. Kelly, 63 F. Supp. 2d 967, 986 (D. Minn. 1999). The United States Court of Appeals for the Eighth Circuit affirmed that the State had a compelling interest and held that the clause restricts a judicial candidate’s speech only when the candidate is discussing how he or she will “decide issues likely to come before [him or her] as [a] judge[ ]”; therefore, the clause is narrowly tailored. Republican Party of Minn. v. Kelly, 247 F.3d 854, 882 (8th Cir. 2001).

THE MEANING OF THE ANNOUNCE CLAUSE

Before discussing the Canon’s constitutionality, the Court needed to determine the meaning of the announce clause. The word “announcing” means more than the mere promise to decide an issue in a particular way; the word also covers a candidate’s statement of his or her current position on an issue. The Minnesota Supreme Court adopted the Eighth Circuit’s interpretation in which the Eighth Circuit relied on a Minnesota Board on Judicial Standards’ opinion, which stated that candidates could criticize previous decisions. The Eighth Circuit’s interpretation limited the scope of the announce clause in a way that was not in the text of the clause, such as (1) a judicial candidate could criticize past court decisions, (2) the clause prohibited only disputed issues that were likely to come before the candidate if elected, and (3) a candidate could discuss case law and his or her judicial philosophy.

However, the Court found that these limitations were not as clear as they could be. First, a judicial candidate could criticize past court decisions, but only if the candidate did not state that he or she, if elected, had the power to overrule *stare decisis*. Second, the limitation that prohibited candidates from discussing disputed issues was not a limitation at all because the number of
issues that could come before a judge is infinite. And finally, the fact that a candidate could discuss case law and his or her judicial philosophy was of little help in election campaigns because the limitation had no application to real-life issues and would not assist voters in making decisions about which candidate to vote for. Therefore, the Court interpreted the announce clause to mean that a candidate is prohibited “from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions,” unless the candidate “expresses the view that he is not bound by *stare decisis.*” Republican Party of Minn., 122 S. Ct. at 2534.

CONSTITUTIONALITY OF THE ANNOUNCE CLAUSE

Because the announce clause prohibits speech based on its content, the Court applied the strict-scrutiny test. The respondents — the officers of the Minnesota Lawyers Professional Responsibility Board and the Minnesota Board on Judicial Standards — had the burden to demonstrate that the “clause is (1) narrowly tailored, to serve (2) a compelling state interest.” *Id.* In this case, the State’s interests were to preserve judicial impartiality and the appearance of impartiality. The respondents argued that both interests were compelling because the interests protect a litigant’s due-process rights and preserve the public’s confidence in the judiciary. However, the respondents did not provide an adequate definition of the word “impartiality”; therefore, before the Court determined whether the respondents had met their burden under the strict-scrutiny test, the Court first examined three different possible definitions of the word “impartiality.”

First the Court discussed a traditional, dictionary definition of the word “impartiality” — “the lack of bias for or against either party to the proceeding” or the “equal application of the law.” *Id.* at 2535 (emphasis in original). Using this definition, the Court found that the announce clause was too broad and not narrowly tailored. Read with this definition of the word “impartiality,” the announce clause would restrict speech concerning particular issues and not speech concerning a particular party. The second definition the Court identified was a judicial definition — “lack of preconception in favor of or against a particular legal view.” *Id.* at 2536 (emphasis in original). Using this definition, the Court found no compelling state interest because of the impossibility of
finding judges without preconceptions about the law. Finally, the Court’s third definition was “open mindedness,” or that each litigant would be guaranteed a chance that the judge would “be willing to consider views [that oppose] his preconceptions . . . and remain open to persuasion” in any case. *Id.* Again, the Court found that the respondents had not met their burden because it is common for legal issues to arise about which a judge previously has expressed an opinion. Also, judges frequently state their opinions on disputed issues in classes they teach or speeches they give or in books or articles they write. Consequently, the Court found absurd that the respondents had not met their burden under the strict-scrutiny test. Moreover, the Court found the notion that since the speech occurred in the context of an election, the speech could be restricted, for the following three reasons: (1) debate is at the core of the election process, (2) due to the role that elective officers play in society, it is imperative that candidates are permitted to speak freely, and (3) the government cannot prohibit candidates from communicating relevant information during an election. The Court still found that the announce clause would fail the strict-scrutiny test, even if the First Amendment permitted greater regulation of judicial campaigns than legislative campaigns, because the clause is under-inclusive because it prohibits candidates’ speech at only certain times and in certain forms.

Also, when the Eighth Circuit ruled the clause constitutional, it mistakenly found that the clause’s prohibition was a universal, long-established tradition, which the Court stated was not the case. The Minnesota announce clause was modeled after Canon 7(b) of the ABA Model Rules of Judicial Conduct, which the Court pointed out, has not been adopted unanimously.

**DISSENT**

The Dissenting Justices, John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Steven Breyer, indicated that the majority's opinion is “unsound” because the majority failed to recognize the differences between judicial elections and legislative or executive elections, and the difference between what a judicial candidate would say in a judicial campaign and what he or she would say in an article or lecture outside the courtroom. *Id.* at 2546 (Stevens, Souter, Ginsburg & Breyer, JJ., dissenting). The differences boil down to the fundamental philosophy of an independent and impartial judiciary.
Candidates for legislative or executive positions are “agents of the people” who are focused on “advanc[ing] the interests of their constituencies.” *Id.* at 2551. These candidates must inform the voters about specific issues. Providing this information allows a voter to determine which candidate supports his or her position on issues and for which candidate to vote. In contrast, candidates for judicial offices are not “agents of the people” and are not concerned with popularity. Judges “must strive to do what is legally right, all the more so when the result is not the one ‘the home crowd’ wants.” *Id.* The outcome of individual cases does not depend on the voters’ interests. A judge must be removed “from the partisan fray”; therefore, a state may permissibly limit a judicial candidate’s speech, even though such restrictions would be impermissible in the arena of legislative or executive elections. *Id.* There is a balance between allowing the people to elect their judicial officers and protecting the integrity and impartiality of the judiciary, and the First Amendment should not interfere with this balance.

The dissenting Justices also disagreed with how the majority construed Minnesota’s announce clause. First, the majority ignored how the Eighth Circuit limited the clause by indicating that a candidate is not prohibited from generally discussing his or her views on legal questions, but is prohibited from discussing how he or she will decide a specific issue. This limitation does not cover many of the candidates’ comments, which would inform the voters, but does cover statements in which the candidate would commit himself or herself to specific positions on specific issues.

The dissenting Justices also disagreed with the majority’s interpretation of how the announce clause applies to candidates’ statements about past decisions. The clause permits the candidate to discuss biographical information, information about his or her role as a judge if elected, and views on a wealth of legal subjects that would interest voters. The announce clause does not prohibit a candidate’s criticism, explanation, or discussion of past decisions or a candidate’s discussion of how he or she would decide a case in the future, so long as the candidate did not discuss his or her views within the factual context of a particular case.

Finally, the Justices perceived that the Court ignored the important role that the announce clause plays in the “integrated system of judicial campaign regulation [that] Minnesota has developed”; consequently, the announce clause could not be
interpreted separately from other provisions, such as the pledges or promises provision. *Id.* at 2554. Both parties agreed that the pledges or promises provision “prohibit[s] . . . candidates from pledging or promising certain results,” and that this provision is constitutional. *Id.* The parties also agreed that pledges or promises of conduct are inconsistent with a judge’s independent, impartial role.

**FLORIDA’S RESTRICTIONS**

In Florida, only county and circuit-court judges are elected, but Canon 7 of Florida’s Code of Judicial Conduct states that “[a] judge or candidate for judicial office shall refrain from inappropriate political activity.” More specifically, Section (A)(3)(d)(ii) states that a judicial candidate “shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” Commentary then indicates that in any public statement, “[A judicial] candidate should emphasize [his or her] duty to uphold the law regardless of his or her personal views” on the issue. A pamphlet titled *An Aid to Understanding Canon 7: Guidelines to Assist Judicial Candidates in Campaigns and Political Activities*, and which was prepared by the Judicial Ethics Advisory Committee and is available online at the Florida State Court’s Web site (www.flcourts.org), explains how Section (A)(3)(d)(ii) is less restrictive than the previous prohibition, which was amended in 1994, and which was identical to Minnesota’s current announce clause — a candidate cannot announce “his or her views on disputed legal or political issues.”

Recently, the Florida Supreme Court in *In re Kinsey*, 2003 WL 193520 (Fla. Jan. 30, 2003), disciplined a county-court judge for her conduct during her 1998 election campaign, which violated Florida’s Canon 7 of Judicial Conduct. Justice Charles T. Wells, joined by Justice Peggy Quince, dissented from the majority decision because he believed that decision was in direct conflict with *Republican Party of Minnesota*.

**RESEARCH REFERENCES**


Brooke J. Bowman, Legal Writing Fellow
Constitutional Law: First Amendment –
Signs & Billboards
Ordinances & Regulations: Billboards

Granite Outdoor Advertising, Incorporated v.
City of Clearwater,
213 F. Supp. 2d 1312 (M.D. Fla. 2002)

Government agencies are permitted to pass ordinances to regulate signage within the city limits for governmental purposes. To further these governmental purposes, sometimes the governing agency must examine the words on the sign to determine whether provisions of an ordinance of this kind apply. Does an ordinance that requires officials to read a sign’s words for mere categorization purposes automatically make the ordinance unconstitutional?

Granite Outdoor Advertising, presents an approach to this question that requires a court to examine each of the sign ordinance provisions and determine (1) whether a sign ordinance’s provisions are a guise for censorship, and (2) whether impermissible content-based provisions can be severed from the ordinance in a way that preserves the ordinance’s purpose and does not further restrict speech. Granite Outdoor Advertising indicates that courts also should analyze some of a sign ordinance’s provisions to determine whether these provisions give officials too much discretion in denying or approving permits.

FACTS AND PROCEDURE
This case arose after the City of Clearwater’s Planning Department denied Granite Outdoor Advertising, Incorporated’s application for permission to construct billboards on leased property. The Department stated that it denied the plaintiff’s applications because the structure of the desired signs exceeded the size limitation of a city ordinance.

A portion of Clearwater’s Development Code generally regulates “the permitting, placement, number, construction, size, height, design, operation, and maintenance of . . . signs within the city’s boundaries”; however, this ordinance explicitly states that “no sign shall be subject to any limitation based on the content of the message contained on [the] sign,” and no part of the ordinance distinguishes between commercial and noncommercial speech.
Additionally, the City Code contains a signage-permitting process, which includes a step in which an applicant can appeal the Department’s denial of his or her permit in a quasi-judicial public hearing.

Rather than following the prescribed appeals process, the plaintiff challenged the constitutionality of the City’s sign ordinance and sued the City of Clearwater, its manager, and its mayor. The court dismissed the suits against the mayor and manager on the theory of qualified immunity. In substance, the plaintiff challenged the City’s sign ordinance by presenting facial challenges to (1) Article 3, Division 18 of the ordinance, which the plaintiff alleged vested undue discretion in government officials and prescribed unconstitutional, content-based regulations, and (2) Article 4 of the ordinance, which the plaintiff alleged provided an unlawful appeals process because that process lacked time limits. Notably, the plaintiff’s constitutional challenge was not based on the portion of the ordinance cited in the City’s reason for rejecting the plaintiff’s application.

First, the court addressed the plaintiff’s standing in this case. The court found that the plaintiff had standing on the first issue based on the rarely applied overbreadth exception to standing, because some of the parts of Article 3, Division 18 “may effectively chill First Amendment rights.” Granite Outdoor Advertising, 213 F. Supp. 2d at 1324. However, the court declined to apply the exception and granted standing on plaintiff’s challenge to Article 4 of the ordinance because the plaintiffs did not appeal the City’s decision as provided for in this part of the ordinance. The plaintiff did not suffer injury-in-fact. Second, the court analyzed the merits of the plaintiff’s First Amendment challenge. To the extent that the court agreed with the plaintiff that certain provisions were content-based and granted a municipality undue discretion, and thus unconstitutional, the court found those provisions severable because the severance preserved a legislative purpose and did not further restrict speech. There was a third part to the court’s analysis regarding equal protection; however, the thrust of this case centered around First Amendment law.

ANALYSIS

The court analyzed the plaintiff’s claims regarding Article 3, Division 18 in two parts. First, the court examined the ordinance’s provisions to determine whether they were
unconstitutionally content-based. Second, the court analyzed the ordinance to decide whether the ordinance gave government officials undue discretion.

1. Content-Based Ordinances

As an introduction, the court highlighted that content-based sign ordinances often present a “Catch-22.” Although government may regulate signage “to further legitimate government interests,” all such regulations must provide certain protections to signs that advertise items “For Sale.” Furthermore, content-based sign regulations — ones that require somebody to read the sign’s message — are generally unconstitutional. This problem of unconstitutionality arises because the protections to “For Sale” signs require the signs to identify the content. This requirement is almost impossible to satisfy while maintaining the ordinance’s constitutionality.

Following this introductory note, the court then summarized past United States Supreme Court decisions regarding First Amendment challenges to government regulations. Although a sign ordinance’s constitutionality was upheld when it was tailored to address government interests such as aesthetics the Court has rejected an ordinance drafted under the guise of an aesthetic purpose. A narrowly tailored ordinance that required a government-hired sound technician on the premises during public events was held constitutional. The ordinance withstood scrutiny despite the restriction on noise because this requirement protected citizens from unwanted noise. However, when a similar ordinance provided no alternative means of communication, that ordinance was held unconstitutional.

Ordinances that are necessarily content based, which endanger or threaten the health or safety of the permit applicant or the public, are constitutional. These types of ordinances are not using the content of the activity to censor the applicant. Instead, the ordinances are content neutral.

The First Amendment does not require content-neutral ordinances, which regulate the “time, place, and manner . . . of use of a public forum,” to meet detailed procedural requirements. Id. at 1332 (quoting Thomas v. Chi. Park Dist., 122 S. Ct. 775, 779–780 (2002)). Instead, viewpoint-neutral ordinances need to survive only intermediate scrutiny.

Case law undoubtedly allows for government regulation of signage for aesthetic purposes. It is difficult, however, to
Recent Developments

Two provisions of Clearwater's sign ordinance were internally inconsistent. For example, the court illustrated that two provisions in the ordinance regarding window signs were patently inconsistent. While one provision flatly prohibited window signs, another provision allowed window signs if they met certain requirements. Accordingly, the court severed the flatly prohibitive provision and left the limited prohibitive provision in tact. As a result, the court increased speech under the ordinance.

The plaintiff attacked other provisions because these provisions made unwarranted content-based distinctions. However, the court did not find that provisions restricting “the placement, size[,] and location of gasoline prices” and time and temperature signs were unconstitutional. The court stated that such signs merely relayed facts, and did not have viewpoint. Thus, restricting those signs could not equate to censorship because they did not suppress the expression of ideas and did not need to be severed from the ordinance. Similarly, provisions that merely limited the size of a sign or required a permit because of a sign's size were not content based and this type of provision did not limit the expression of ideas. Conversely, the court severed from the ordinance provisions that gave a sixty-day time limit on political, temporary yard signs; yet gave a ninety-day time limit for other temporary yard signs. The court stated that these time limits, although reasonable, were severable because of the unfounded distinction between political and nonpolitical speech.
2. Discretion within Ordinances

The plaintiff alleged that the provisions of the Clearwater sign ordinance did not sufficiently safeguard against the dangers of censorship. Citing the Supreme Court’s concern with unduly broad discretion, the court found that there was, in fact, too much discretion allowed in a provision that let Clearwater officials approve or disapprove the type, size, and length of certain signs on a case-by-case basis; however, this provision could be severed from the ordinance. Likewise, the court also found that a provision gave too much discretion because the provision allowed the city manager or city commission to use his or her discretion in making exceptions for signs on public land. This provision, however, could be severed from the sign ordinance as well.

In contrast, the court did not find a provision, which allowed officials to regulate certain types of signs based on a significant public purpose, to give impermissible discretion. Similarly, the court determined that a portion of the ordinance that allowed officials to make exceptions to the sign ordinance, provided a sign did not have an adverse impact on community character or replace a less attractive sign, was also reasonable.

SIGNIFICANCE

First Amendment law regarding municipal-sign regulations presents a fragmented picture. Not only does precedent have inconsistencies, which the Middle District noted above, but there is yet to be a decision outlining a less difficult way to distinguish between content-based and content-neutral provisions. As this court’s analysis suggests, there may not be a black-and-white approach to this issue. Not every provision that requires an official to read a sign is per se content-based because, while some signs express ideas, other signs merely display facts. Officials who enforce the provisions of a sign ordinance cannot stifle free speech where no speech is present. Therefore, there is a strong argument that the courts should devise and refine a test for this situation that may lie in a gray area.

RESEARCH REFERENCES

Recent Developments

Fuchs v. Robbins,
818 So. 2d 460 (Fla. 2002)

The Florida Supreme Court resolved a conflict between two district courts by holding that a property appraiser lacks standing to affirmatively challenge the constitutionality of a property-valuation statute. 

BACKGROUND

To fully understand the issue addressed by the Florida Supreme Court, a brief review of the conflicting district-court opinions is necessary. The Third District Court of Appeal addressed the issue in Fuchs v. Robbins, 738 So. 2d 338 (Fla. Dist. App. 3d 1999) [hereinafter Fuchs I]. Fuchs I involved the valuation of an incomplete, multimillion-dollar hotel that the property appraiser originally assessed at fair market value. The Value Adjustment Board (VAB) subsequently set aside the appraiser’s valuation and held that, under Florida Statutes Section 192.042 (1993), the hotel should have been valued at zero because it was not substantially completed. The appraiser challenged the VAB’s ruling and argued that the substantial-completion statute was unconstitutional. The Third District concluded that the appraiser could challenge the constitutionality of the statute, but held Florida Statutes Section 192.042 was constitutional.

The Second District Court of Appeal addressed a similar issue in Turner v. Hillsborough County Aviation Authority, 739 So. 2d 175 (Fla. Dist. App. 2d 1999). In Turner, the property appraiser valued a stadium without applying any tax exemption. The taxpayer argued that the structure qualified as a public stadium and was exempt under Florida Statutes Section 196.012(6) (1997). The VAB agreed and set aside the assessment. Thereafter, the appraiser challenged the VAB’s ruling and the constitutionality of the public-purpose exemption. The trial court dismissed the case, and the Second District affirmed, holding that the appraiser lacked standing to challenge the constitutionality of
the valuation statute. In its opinion, the Second District certified conflict with the Third District in *Fuchs I* to the Florida Supreme Court.

**ANALYSIS**

Generally, state officers must presume that any statutes affecting their duties are valid. Accordingly, courts historically have barred property appraisers from initiating any lawsuits challenging the constitutionality of valuation statutes.

In Florida, the rules regarding ad valorem taxation are promulgated in the Constitution and statutes. The Constitution requires that the Legislature develop all regulations necessary to ensure a “just valuation” of all taxable property. The Legislature enacted Florida Statutes Section 193.011 (2002), which specifies eight factors the appraiser must consider when determining a property’s “just valuation.” Despite the existence of several specifically enumerated factors, the valuation process remains highly subjective. As a result, the statutes allow a taxpayer to petition the VAB and to challenge the appraiser’s assessment. Although the VAB’s decision is binding, either the taxpayer or appraiser may appeal the decision to the trial court if either satisfies certain criteria. Fla. Stat. § 194.036 (2002).

As previously noted, an appraiser may bring an action in the trial court challenging the VAB’s decision. Here, the statutes clearly set forth the rules regarding the appellate process. For instance, Florida Statutes Section 194.036(1)(a) states “that nothing herein shall authorize the property appraiser to institute any suit to challenge the validity of any portion of the constitution or of any duly enacted legislative act of this state.” In *Fuchs*, 818 So. 2d 460 [hereinafter *Fuchs II*], the Florida Supreme Court noted that the purpose of Section 194.036(1)(a) was to prevent an appraiser from challenging the constitutionality of the valuation statutes. Therefore, the Florida Supreme Court affirmed the Second District’s *Turner* decision, which dismissed the appraiser’s constitutional challenge for a lack of standing.

**SIGNIFICANCE**

*Fuchs II* should have little impact on an appraiser’s ability to challenge a decision of the VAB. As previously stated, Section 194.036(1) governs the appellate process and provides that an appraiser may appeal the VAB’s decision insofar as one of several criteria are satisfied. *Fuchs II* merely reiterates the general rule
that an appraiser may not affirmatively challenge the constitutionality of a valuation statute. However, not even this rule is absolute.

Although Section 194.036(1)(a) specifically states that an appraiser may not challenge the constitutionality of a valuation statute, two important exceptions exist. First, an appraiser may challenge the validity of a valuation statute if the statute “involves the disbursement of public funds.” Fuchs II, 818 So. 2d at 464. In this situation, the necessity of protecting the public interest substantially outweighs any concern that the appraiser lacks a substantial interest in the litigation.

The other exception to the general rule — that ministerial officers may not challenge the validity of statutes affecting their positions — allows an appraiser to raise constitutionality as a defense when a taxpayer initiates an action against the appraiser. However, in both Fuchs I and Turner, the property appraisers initiated the litigation challenging the constitutionality of validation statutes, and thus were not in the defensive posture apparently necessary for this exception to apply.

RESEARCH REFERENCES


Dustin Duell Deese