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Electronically Filed
Oct 27 2016 04:33 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT
OF THE STATE OF NEVADA

K-KEL, INC., d/b/a Spearmint Rhino Gentlemen's Club, et al.,

Appellants,

vs.

NEVADA DEPARTMENT OF TAXATION, et al.,

Respondents.

Supreme Court Docket: 69886

District Court Case: A-11-648894-J
Consolidated with A-14-697515-J

Appellants' Appendix

APPELLANTS' APPENDIX
VOLUME 4, PAGES 742 – 989

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APPENDIX 3

99 Nev. 133, 660 P.2d 104

Supreme Court of Nevada.
Governor Robert LIST; Nevada Tax Commission, Roy E. Nickson, Executive Director of the Department of Taxation, State of Nevada and Legislative Commission of the State of Nevada, Appellants,
v.
T.L. WHISLER, Maj. USMC, Retired, et al., Respondents.
No. 14440.
March 4, 1983.
Rehearing Denied June 10, 1983.

Taxpayers' suit was filed challenging certain 1981 amendments to tax statutes as violative of state and federal Constitutions. The Eighth Judicial District Court, Clark County, Howard W. Babcock, J., held that statutes violated state Constitution, and appeal was taken. The Supreme Court, Gunderson, J., held that since legislation neither applied separate tax rates to different classes nor partially exempted a particular class of property from legitimate burdens of taxation, it did not violate the uniform and equal clause of state Constitution but, rather, it provided a limited adjustment mechanism, by which prior inequitable valuations could be melded into hopefully more uniform valuation and assessment procedures established under the 1981 tax package.
Reversed.

West Headnotes

[1] KeyCite Notes

361 Statutes
361I Enactment, Requisites, and Validity in General
361k57 Determination of Validity of Enactment
361k61 k. Presumptions and Construction in Favor of Validity. Most Cited Cases
(Formerly 92k48(1))

All acts passed by legislature are presumed to be valid until the contrary is clearly established.

[2] KeyCite Notes

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases
(Formerly 92k48(1))

92 Constitutional Law KeyCite Notes
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k996 k. Clearly, Positively, or Unmistakably Unconstitutional. Most Cited Cases
(Formerly 92k48(1))

Every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated.

[3] KeyCite Notes

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases
(Formerly 92k48(1))

92 Constitutional Law KeyCite Notes
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k996 k. Clearly, Positively, or Unmistakably Unconstitutional. Most Cited Cases
(Formerly 92k48(1))

92 Constitutional Law KeyCite Notes
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In General. Most Cited Cases
(Formerly 92k48(1))

Presumption of constitutional validity places upon those attacking a statute the burden of making a clear showing that the statute is unconstitutional.

[4] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k214 k. In General. Most Cited Cases

If possible, legislative intent should be determined by looking at the act itself.

[5] KeyCite Notes

371 Taxation
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2134 Classification of Subjects, and Uniformity as to Subjects of Same Class
371k2135 k. In General. Most Cited Cases
(Formerly 371k42(1))

Expressed intent of legislature in enacting taxation statute was not either to favor a particular class of property or to exempt a particular class of property partially from the legitimate burdens of taxation but, rather, the legislature intended to correct a method of assessment and taxation which it perceived to be unjust and potentially unconstitutional. St.1975, c. 427, § 31.

[6] KeyCite Notes

371 Taxation
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2134 Classification of Subjects, and Uniformity as to Subjects of Same Class
371k2135 k. In General. Most Cited Cases
(Formerly 371k42(1))

Since tax statute neither applied separate tax rates to different classes nor partially exempted a particular class of property from legitimate burdens of taxation, it did not violate uniform and equal clause of Constitution but, rather, statute provided a limited adjustment mechanism, by which prior inequitable valuations could be melded into hopefully more uniform valuation and assessment procedures established under 1981 tax package. St.1981, c. 427, § 31; Const. Art. 10, § 1.

***134 **104** D. Brian McKay, Atty. Gen., Frank Daykin, Legislative Counsel, Carson City, for appellants.
Robert J. Miller, Dist. Atty., William P. Curran, County Counsel and James M. Bartley, Chief Civil Deputy Dist. Atty., John P. Foley, Las Vegas, for respondents.

OPINION

GUNDERSON, Justice:
This appeal arises out of a taxpayers' suit challenging certain 1981 amendments to Nevada tax statutes as violative of the ***135** Nevada and United States Constitutions. In our view, such challenge lacks merit. The relevant background follows.

****105** In 1981, the Nevada Legislature undertook a comprehensive revision of the state's tax structure. The primary components of this effort were contained in Assembly Bill 369, Chapter 149, 1981 Statutes of Nevada 285; Senate Bill 69, Chapter 427, 1981 Statutes of Nevada 786; and Senate Bill 411, Chapter 150, 1981 Statutes of Nevada 305.[FN1] These three pieces of legislation, constituting the 1981 "tax package," were intended, *inter alia*, to provide property tax relief to homeowners by limiting the revenues which local government might generate through property taxes. Increases in the state retail sales tax were expected to offset any loss of revenues occasioned by the limitation on property taxes.

FN1. Hereinafter, this legislation will be referred to respectively as A.B. 369, S.B. 69 and S.B. 411.

As part of the 1981 tax package, the Legislature undertook to revise the statutory method theretofore utilized in the valuation of property. Under the statutory procedure previously established, assessment was based on the "full cash value" of property. *See* 1977 Nev.Stat. 1318 (NRS 361.227). This "full cash value" had in turn been determined by resort to a series of considerations, which were given such weight as the assessor deemed appropriate. These considerations included the value of the vacant land plus the cost of improvements minus any depreciation, the market value of the property as evidenced by certain other considerations, and the value of the property estimated by capitalization of the fair economic income expectancy. As a practical matter, however, the exigencies of assessment resulted in residential property usually being appraised on the basis of its market value as determined

on the basis of comparable sales. In contrast, commercial and other property was usually appraised on the basis of cost less depreciation, or on its production of income.

It seems the Legislature, having determined that existing methods of assessment and valuation had occasioned an inequitable disparity in the tax burdens imposed on property, decided as part of the 1981 tax package to replace the existing valuation system with a system based largely on the costs of improvements less applicable depreciation. *See* NRS 361.227 (effective July 1, 1983). The Legislature apparently concluded that the use of this new method of valuation would help eliminate many of the inequities generated under the old system.

There remained the problem, however, of adjusting current assessed valuations to conform to the valuations which would go into effect under the new system. Property in Nevada must ***136** be physically reappraised at least once every five years; in order to make most effective use of money and manpower, many assessors in Nevada utilize a "cyclical" or continuous reappraisal scheme whereby approximately one-fifth of a jurisdiction's taxable property is reappraised each year. *See* NRS 361.260; *Recanzone v. Nevada Tax Commission*, 92 Nev. 302, 550 P.2d 401 (1976). Due to the widespread use of cyclical reappraisals, when the Legislature amended the valuation system in 1981 a significant percentage of property in Nevada was being taxed on the basis of valuations made as early as 1976. Further, under the cyclical reappraisal system, property valued under the prior system would not be reappraised until it came up for the routine five-year reappraisal. This meant that property last appraised in 1981 would not come under the new system until its reappraisal in 1986.

In order to avoid a perceived injustice which would result if some property owners were forced to pay inequitable taxes for the five-year period required for the normal cyclical reappraisal, the 1981 tax package contained a mechanism for adjusting valuations appraised under the prior system. This "factoring system;" contained in Section 31 of S.B. 69, provided:

Sec. 31. 1. Notwithstanding the provisions of NRS 361.225, except as provided in section 32 of this act, all property subject to taxation must be assessed at 35 percent of its adjusted cash value. The adjusted cash value is calculated by multiplying the full cash value of the property by the factor shown in the following table for the class and for the fiscal year ****106** in which the property was most recently appraised:

Year of Appraisal	Factor for Residential Improvements	Factor for Other Property
1976-1977 or earlier	1.416	1.438
1977-1978	1.190	1.313
1978-1979	1.000	1.199
1979-1980	0.840	1.095
1980-1981	0.706	1.000

2. The assessment provided in subsection 1 must be used only for the levying of taxes to be collected during the fiscal year 1981-1982 on all property to which they apply.

3. As used in this section, "residential improvement" means a single-family dwelling, a townhouse or a condominium, and its appurtenances.

As delineated in Section 31, property is to be assessed at 35 percent of its "adjusted ***137** cash value." In turn, this "adjusted cash value" is to be calculated by multiplying the "full cash value" of the property in question by a "factor" established by the Legislature. As conceived by the Legislature, it seems these factors are weighted so that the valuations of property made earlier in the reappraisal cycle will be adjusted to bring them into parity with the valuation of property assessed more recently. The value given the factor applicable to any given year evidently reflects the Legislature's considered analysis of the economic dislocations and disparate valuations which had occurred during the early

part of the current assessment cycle.

There are, however, two separate sets of weighted factors: one set for residential improvements, and a second set for other property. Further, it is clear that for any given year of appraisal the factors to be applied to residential improvements are less than the factors applicable to other property. It necessarily follows that for any given year of appraisal, residential improvements of a given "full cash value" will have a lower "adjusted cash value," and be subject to less tax liability, than other property of the same "full cash value."

It is this differentiation in the factoring system which is at issue in the instant appeal. Respondent taxpayers sought declaratory relief alleging, *inter alia*, that Section 31 violated the "uniform and equal" rate of assessment and taxation mandated by Article 10, Section 1 of the Nevada Constitution. After a trial, during which considerable testimony was adduced as to the Legislature's intent in enacting the tax package, and concerning the projected effects of the legislation, the district court determined that Section 31 violated Article 10, Section 1.[FN2] In so doing, we have concluded, the court erred.

FN2. The district court also determined that the unconstitutional provisions of Section 31 could not be severed from the remainder of the 1981 tax package, and that therefore the entire tax package must be stricken as unconstitutional. Upon motion of appellants, the judgment of the court was stayed pending this appeal.

[1] [2] [3] Our analysis of Section 31 begins with the presumption of constitutional validity which clothes statutes enacted by the Legislature. *Viale v. Foley*, 76 Nev. 149, 152, 350 P.2d 721 (1960). All acts passed by the Legislature are presumed to be valid until the contrary is clearly established. *Hard v. Depaoli et al.*, 56 Nev. 19, 26, 41 P.2d 1054 (1935). In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated. *City of Reno v. County of Washoe*, 94 Nev. 327, 333-334, 580 P.2d 460 (1978); *Mengelkamp v. List*, 88 Nev. 542, 545, 501 P.2d 1032 (1972); *State of* ***138** *Nevada v. Irwin*, 5 Nev. 111 (1869). Further, the presumption of constitutional validity places upon those attacking a statute the burden of making a clear showing that the statute is unconstitutional. *Ottenheimer v. Real Estate Division*, 97 Nev. 314, 315-316, 629 P.2d 1203 (1981); *Damus v. County of Clark*, 93 Nev. 512, 516, 569 P.2d 933 (1977); *Koscot Interplanetary, Inc. v. Draney*, 90 Nev. 450, 456, 530 P.2d 108 (1974).

The district court concluded the factoring system set forth in Section 31 violated Article 10, Section 1 of the Nevada Constitution. Article 10, Section 1 provides in pertinent**107 part: "The legislature shall provide by law for *a uniform and equal rate of assessment and taxation*, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal and possessory ...." (Emphasis added.) The import of this Uniform and Equal Clause has been discussed several times by this court. In the seminal case of *State of Nevada v. Eastabrook*, 3 Nev. 173 (1867), we analyzed Article 10, Section 1 and held:

We have no hesitation in saying that the constitutional convention, in using the language last quoted, meant to provide for at least one thing in regard to taxation: that is, that all *ad valorem* taxes should be of a uniform rate or percentage. *That one species of taxable property should not pay a higher rate of taxes than other kinds of property*. If the language we have quoted did not express this idea, then it was perfectly meaningless.

3 Nev. at 177 (emphasis added). The interpretation of the Uniform and Equal Clause established in *Eastabrook* has been approved by this court many times. *See United States v. State ex rel. Beko*, 88 Nev. 76, 86-87, 493 P.2d 1324 (1972); *Boyne v. State ex rel. Dickerson*, 80 Nev. 160, 166, 390 P.2d 225 (1964); *State of Nevada v. Kruttschnitt*, 4 Nev. 178, 200 (1868). Further, other jurisdictions having occasion to address virtually identical constitutional provisions have reached similar results. *See State ex rel. Stephan v. Martin*, 608 P.2d 880, 886 (Kan.1980); *Wheeler v. Weightman*, 96 Kan. 50, 149 P. 977 (Kan.1915). Thus, faced with the weight of authority interpreting Article 10, Section 1,

the question before this court is whether Section 31 requires one species of taxable property to pay a higher rate of taxes than other kinds of property.

[4] In addressing this question, the crucial inquiry is the legislative intent and purpose for enacting Section 31. It is well-established that judicial construction of legislation should be ***139** based on legislative intent, and legislative intent is to be determined by looking at the whole act, its object, scope and intent. If possible, legislative intent should be determined by looking at the act itself. *Escalle v. Mark*, 43 Nev. 172, 176, 183 P. 387 (1919); *State v. Brodigan*, 37 Nev. 245, 256, 141 P. 988 (1914) (Talbot, C.J., concurring); *State v. Hamilton*, 33 Nev. 418, 421-422, 111 P. 1026 (1910); *In re Primary Ballots*, 33 Nev. 125, 135, 126 P. 643 (1910); *State of Nevada v. Toll-Road Co.*, 10 Nev. 155, 160 (1875).

[5] In the instant case, the intent of the Legislature in enacting Section 31 is unequivocally expressed in S.B. 69. Section 33 of S.B. 69 provides:

Sec. 33. The legislature finds that:

1. The factors prescribed in section 31 of this act for the respective years of appraisal *have the approximate effect of placing property appraised before the fiscal year 1980-1981 on a parity with property appraised during that fiscal year, and the respective classes of real property separately specified in that section on a parity with one another.*

2. Such an approximation is necessary in order to permit the orderly collection of taxes ad valorem during the fiscal year 1981-1982.

3. Each of the classes of property excluded from the operation of section 31 of this act is assessed pursuant to NRS in such a manner that no adjustment is required to place all property within that class on a parity.

(Emphasis added.) Accordingly, it seems the expressed intent of the Legislature in enacting Section 31 was not either to favor a particular class of property or to exempt a particular class of property partially from the legitimate burdens of taxation. Rather, the Legislature intended to correct a method of assessment and taxation which it perceived to be unjust and potentially unconstitutional. As previously noted, legislative hearings and debate on the 1981 tax package established that residential property was then usually appraised on the basis of comparable sales, while commercial property was appraised primarily on the basis of cost less depreciation or on the property's production of income. *See* 1977 Nev.Stat. ***108** 1318 (NRS 361.227). The Legislature came to the conclusion that, due to the economic forces at work over the years, this method of valuation and appraisal had placed an inordinate and undesirable burden on the residential property taxpayer. By the Legislature's own declaration, the factoring system contained in ***140** Section 31 represents an attempt to rectify this situation and to achieve parity in valuation between residential improvements and other property. The question remains, however, whether the factoring system contained in S.B. 69 nonetheless violates the constitutional prohibition, as delineated in *Eastabrook*, that one species of taxable property not pay higher taxes than other kinds of property.

[6] In this regard, we initially note that Section 31 does not expressly impose two different *rates* of taxation. Both residential improvements and other property are to be taxed at the same rate: 35 percent of "adjusted cash value." If the Legislature had flatly mandated that residential property be taxed at a lower rate than other property, and had provided no rationale for such a disparity of treatment, prior case authority might well compel the conclusion that such legislation was unconstitutional. For example, in *Boyne v. State ex rel. Dickerson*, 80 Nev. at 160, 390 P.2d 225, this court examined a statute which permitted the owner of land used exclusively for agricultural purposes to contract with the county assessor for assessment and payment of taxes based on the "full cash

value" of the property for agricultural purposes, rather than on its value for other purposes. The avowed purpose of this statute was to shift or defer the burden of increased taxation on agricultural property caused by increased population pressures and the growth of urban areas. Nonetheless, we found the statute unconstitutional, because such a practice gave owners of agricultural property the very type of distinct tax advantage prohibited by Article 10, Section 1. Of like import is *State ex rel. Stephan v. Martin*, 608 P.2d at 880, which involved a flat, across-the-board reduction of 20 percent in the appraised value of farm machinery and equipment, in order to avoid a "severe economic crisis" confronting farmers and ranchers. This partial exemption was held to violate the Equal and Uniform Clause of the Kansas Constitution. In contrast, on its face, the instant legislation neither applies separate tax rates to different classes nor partially exempts a particular class of property from the legitimate burdens of taxation.

It is true that Section 31 temporarily establishes two separate sets of factors to be used in calculating the "adjusted cash value" on which tax liability is based. Furthermore, for any given year of assessment, the factor for residential improvements is significantly less than the corresponding factor for other property. Finally, as previously noted, for any given year, a residential improvement with a "full cash value" identical to a given piece of non-residential property will thus derive ***141** a lower "adjusted cash value" than the non-residential property, and will therefore obtain a reduced assessment. However, while the district court concluded this procedure resulted in a nonuniform and unequal method of assessment and taxation, we do not agree with this characterization.

To the contrary, given the existing disparities-caused by the prior use of cost minus depreciation or income production valuation for commercial property, as opposed to comparable sales valuation for residential property-it appears to us that the factoring system contained in Section 31 simply reflects the Legislature's considered judgment that residential improvements have been over-valued and commercial property under-valued during recent assessments. The factoring system contained in Section 31 thus appears to represent a mechanism by which previously faulty valuations will be adjusted, to the best of the Legislature's ability, thereby yielding the equal and uniform taxation required by our Constitution.

In reaching this conclusion, we find it significant that S.B. 69 limits the use of the factoring system to the brief transitional period required to "phase out" the valuations made under the prior system and ***109** "phase in" the new valuations made pursuant to the 1981 tax package. Effective July 1, 1983, all property subject to taxation must be assessed at 35 percent of its taxable value. *See* NRS 361.225. Further, effective July 1, 1983, taxable value of property is to be determined under the new method of valuation which emphasizes cost minus depreciation. *See* NRS 361.227. Finally, subsection 2 of Section 31 provides that the assessment made under the factoring system "must be used only for the levying of taxes to be collected during the fiscal year 1981-1982 on all property to which they apply." Thus, it does not appear that Section 31 violates the constitutional prohibition, as delineated in *Eastabrook*, against taxing different species of property at different rates. Instead, it appears that Section 31 provides a limited adjustment mechanism, by which prior inequitable valuations may be melded into the hopefully more uniform valuation and assessment procedures established under the 1981 tax package.

Accordingly, because the factoring system contained in Section 31 of S.B. 69 does not appear to offend the Equal and Uniform Clause contained in Article 10, Section 1 of the Nevada Constitution, we need not consider whether Section 31 would be severable from the remainder of the 1981 tax package. We note, however, that respondents have advanced a number of additional constitutional challenges to the 1981 tax package, contending that even if the district court erred in regard to Section 31, its judgment was nonetheless correct and ***142** should be sustained. *See Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 632 P.2d 1155 (1981); *Sievers v. County Treas., Douglas Co.*, 96 Nev. 819, 618 P.2d 1221 (1980) (a correct judgment should not be reversed simply because it is based on a wrong reason). We have therefore examined respondents' additional arguments, and have found them to be without merit.

Accordingly, the judgment of the district court is reversed.

MANOUKIAN, C.J., and SPRINGER, MOWBRAY and STEFFEN, JJ., concur.

Nev.,1983.
List v. Whisler
99 Nev. 133, 660 P.2d 104

END OF DOCUMENT

APPENDIX 4

110 Nev. 874, 878 P.2d 913

Supreme Court of Nevada.
In re Petition for a Writ of Prohibition or in the Alternative for a Writ of Mandamus.
The Honorable Jerry Carr WHITEHEAD, Petitioner,
v.
NEVADA COMMISSION ON JUDICIAL DISCIPLINE, Respondent.
No. 24598.
July 26, 1994.

Judge against whom proceedings were pending before the Commission on Judicial Discipline, petitioned Supreme Court for writ of prohibition to interpret rules of Commission, and moved to preclude involvement of Attorney General in matter. The Supreme Court, Addellar D. Guy, District Judge, held that: (1) Attorney General's staff may not act as counsel to Commission or as prosecution before Commission in matters regarding judicial misconduct, and (2) Supreme Court had authority to appoint special master to inquire into source of breaches of confidentiality regarding charges against judge.

Motions granted in part, judgment reversed in part.
Springer, J., concurred and filed opinion.
Shearing, J., dissented and filed opinion.

West Headnotes

[1] KeyCite Notes

227 Judges
227I Appointment, Qualification, and Tenure
227k11 Removal or Discipline
227k11(3) k. Jurisdiction or Authority to Remove or Discipline. Most Cited Cases

227 Judges KeyCite Notes
227I Appointment, Qualification, and Tenure
227k11 Removal or Discipline
227k11(5) Proceedings and Review
227k11(5.1) k. In General. Most Cited Cases

Commission on Judicial Discipline is part of judicial branch of government, subject to such rules as Supreme Court promulgates, and subject to appellate review by Supreme Court. Const. Art. 6, § 21.

[2] KeyCite Notes

46 Attorney General
46k5 Powers and Duties
46k6 k. In General. Most Cited Cases

Attorney General is constitutional officer in executive branch, whose duties are established by legislature. Const. Art. 5, § 19.

[3] KeyCite Notes

46 Attorney General
46k5 Powers and Duties
46k6 k. In General. Most Cited Cases

227 Judges KeyCite Notes
227I Appointment, Qualification, and Tenure
227k11 Removal or Discipline
227k11(3) k. Jurisdiction or Authority to Remove or Discipline. Most Cited Cases

Constitution vests power and duty to deal with all matters relating to judges charged with violating Code of Judicial Conduct with Commission on Judicial Discipline, rather than Attorney General. Const. Art. 6, § 21, subd. 1.

[4] KeyCite Notes

46 Attorney General
46k5 Powers and Duties
46k6 k. In General. Most Cited Cases

Attorney General may not represent Commission on Judicial Discipline in judicial discipline matters, nor may Attorney General "prosecute" judge or justice before Commission; as one department cannot exercise power of other two under State Constitution, specifically, member of executive branch is not constitutionally permitted to act in judicial capacity. Const. Art. 3, § 1; Art. 5, § 19; Art. 6, § 21, subd. 1.

[5] KeyCite Notes

46 Attorney General
46k5 Powers and Duties
46k6 k. In General. Most Cited Cases

Executive branch, through Attorney General's office, was impermissibly engaged in judicial discipline process, constitutionally carried out only by Commission on Judicial Discipline itself, even if extent of involvement was merely to advise Commission, where Special Deputy Attorney General engaged in extensive investigation of allegations against judge on behalf of Commission, was involved in Commission function of screening complaints, and made determination that many incidents alleged in complaint against judge did not warrant further action by Commission. Const. Art. 3, § 1; Art. 5, § 19; Art. 6, § 21, subd. 1.

[6] KeyCite Notes

46 Attorney General
46k5 Powers and Duties
46k6 k. In General. Most Cited Cases

If Commission on Judicial Discipline or its members were sued for actions taken in judicial capacity, Attorney General could defend Commission under statute which commands Attorney General to act as counsel upon request of Commission, as long as suit did not involve Commission's constitutional mandate to hear and decide misconduct complaints against judges. Const. Art. 3, § 1; Art. 5, § 19; Art. 6, § 21, subd. 1; N.R.S. 1.450, subd. 2, 41.0338, 41.0339.

[7] KeyCite Notes

227 Judges
227I Appointment, Qualification, and Tenure
227k11 Removal or Discipline
227k11(3) k. Jurisdiction or Authority to Remove or Discipline. Most Cited Cases

Commission on Judicial Discipline is not administrative agency able to combine investigative, prosecutorial and judging functions, but is rather a court of judicial performance, created by State Constitution as part of judicial branch. Const. Art. 3, § 1; Art. 5, § 19; Art. 6, § 21, subd. 1.

[8] KeyCite Notes

46 Attorney General
46k5 Powers and Duties
46k6 k. In General. Most Cited Cases

Statute which commands Attorney General to act as counsel upon request of Commission on Judicial Discipline, does not permit Attorney General to represent Commission in matters relating to specific cases of judicial misconduct or permit Commission's legal advisor to be prosecutor of judicial discipline complaints, as legislature, in absence of express constitutional authority, is powerless to add to constitutional office duties foreign to that office; or take away duties belonging to it. Const. Art. 3, § 1; Art. 5, § 19; Art. 6, § 21, subd. 1; N.R.S. 1.450, subd. 2.

[9] KeyCite Notes

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases
(Formerly 92k48(3))

Where statute is susceptible to both constitutional and unconstitutional interpretation, Supreme Court is obliged to construe statute so that it does not violate Constitution.

[10] KeyCite Notes

46 Attorney General
46k5 Powers and Duties
46k6 k. In General. Most Cited Cases

Statute which commands Attorney General to act as counsel upon request of Commission on Judicial Discipline is constitutional insofar as it permits Commission to request official legal opinions of Attorney General in matters unrelated to judicial discipline, but statute cannot authorize Attorney General to act as counsel to Commission in, or prosecutor in, judicial discipline proceedings or matters. Const. Art. 3, § 1; Art. 5, § 19; Art. 6, § 21, subd. 1; N.R.S. 1.450, subd. 2.

[11] KeyCite Notes

227 Judges
227I Appointment, Qualification, and Tenure
227k11 Removal or Discipline
227k11(5) Proceedings and Review
227k11(5.1) k. In General. Most Cited Cases

Commission on Judicial Discipline rules adopted by Supreme Court as to judicial disciplinary process, pursuant to State Constitution, require confidentiality of charges against judge at least until after probable cause hearing, finding of probable cause, and filing of formal statement of charges as public document. Const. Art. 6, § 21, subd. 5(a); Commission on Judicial Discipline Rule 5, subd. 1.

[12] KeyCite Notes

46 Attorney General
46k5 Powers and Duties
46k6 k. In General. Most Cited Cases

Attorney General is official legal representative of judges and justices in state, and cannot engage in prosecution of same before Commission on Judicial Discipline.

[13] KeyCite Notes

46 Attorney General
46k5 Powers and Duties
46k6 k. In General. Most Cited Cases

Attorney General is constitutionally authorized to pursue criminal investigations and prosecutions of judges or justices. Const. Art. 5, § 22; N.R.S. 228.175, subds. 2, 4.

[14] KeyCite Notes

92 Constitutional Law
92XX Separation of Powers
92XX(D) Executive Powers and Functions
92k2622 Encroachment on Judiciary
92k2623 k. In General. Most Cited Cases
(Formerly 92k79)

Given adversarial system, fairness requires that adjudicative functions be kept separate from prosecutive functions.

[15] KeyCite Notes

46 Attorney General
46k5 Powers and Duties
46k6 k. In General. Most Cited Cases

Supervisory control or "probation" exercised over judge by Attorney General in conjunction with Commission on Judicial Discipline, requiring judge to report to Attorney General's office, while Attorney General's staff or district attorneys over whom Attorney General has control are appearing

before same judge, is clear conflict of interest on part of Attorney General, and may compromise appearance of impartial judiciary.

[16] KeyCite Notes

- 92 Constitutional Law
  - 92XXVII Due Process
    - 92XXVII(G) Particular Issues and Applications
      - 92XXVII(G)7 Labor, Employment, and Public Officials
        - 92k4175 k. Judges and Judicial Officers or Employees. Most Cited Cases
          (Formerly 92k278.4(5))

- 227 Judges KeyCite Notes
  - 227I Appointment, Qualification, and Tenure
    - 227k11 Removal or Discipline
      - 227k11(5) Proceedings and Review
        - 227k11(5.1) k. In General. Most Cited Cases

Commission on Judicial Discipline may employ independent counsel, but does not have due process right to employ counsel of its choice where such choice creates clear conflict of interest and violates separation of powers provisions of State Constitution. Commission on Judicial Discipline Rule 41; Const. Art. 3, § 1; Art. 5, § 19; Art. 6, § 21.

[17] KeyCite Notes

- 327 Reference
  - 327I Nature, Grounds, and Order of Reference
    - 327k5 Compulsory Reference for Trial of Issues
      - 327k7 Nature of Cause or of Issues
        - 327k7(1) k. In General. Most Cited Cases

Supreme Court has authority to appoint fact-finding master to inquire into source of violations of State Constitution provisions requiring confidentiality of charges before Commission on Judicial Discipline until finding of probable cause and filing as public record of formal statement of charges, as well as the impact of violations on judge's due process rights. Const. Art 6, § 21, subd. 5(a); Commission on Judicial Discipline Rule 5, subd. 1.

***915 *874** Ohlson & Springgate, Hamilton & Lynch, Reno, Gentile, Porter & Kelesis, Laura Wightman FitzSimmons, Las Vegas, for petitioner.
Frankie Sue Del Papa, Atty. Gen., Brooke Nielsen, Asst. Atty. Gen., Carson City, Donald J. Campbell, Las Vegas, for respondent.

***876 OPINION**

ADDELIAR D. GUY, District Judge.
On May 20, 1994, the court heard oral argument on a number of motions filed by both parties. Today, we address Petitioner Whitehead's "motion to preclude further illegal involvement in [this] case by attorney general and associates in order to promote the administration of justice and guarantee due process of law in this and related proceedings" and Petitioner Whitehead's "motion for order to show cause, an investigation, and a protective ***877** order," and "motion for appointment of a master to conduct factual investigation."

We are compelled to conclude that Petitioner's motions are meritorious. We accordingly order that Attorney General Frankie Sue Del Papa, Assistant Attorney General Brooke Nielsen and Special Deputy Attorney General Donald J. Campbell be removed as counsel for the Nevada Commission on Judicial Discipline ("Commission") in these writ proceedings and in all disciplinary proceedings now pending against Petitioner Whitehead before the Commission. [[FN1 For reasons hereinafter specified, the Office of the Attorney General is precluded from acting as legal advisor or prosecutor in the present matter or in any matter relating to the constitutional duties of the Commission to hear and decide judicial discipline complaints.

FN1. Although the Attorney General and the Commission have continued to assert that Special Deputy Attorney General Don Campbell was not and is not acting on behalf of, or in concert with, the Attorney General's office, we put that contention to rest in *Whitehead II*, noting in general the contacts among Assistant Attorney General Brooke Nielsen, Mr. Campbell, and the Commission, and noting in particular, the fact that Mr. Campbell was placed under contract to the Attorney General to serve "at the pleasure of the Attorney General" and was required to "report regularly to the Attorney General concerning the status of the above-named case." *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 380, 873 P.2d 946 (1994). Furthermore, the Attorney General and Mr. Campbell have both signed the bulk of pleadings filed in this matter on behalf of the Commission. Mr. Campbell appeared at oral argument and argued on behalf of the Commission along with Assistant Attorney General Nielsen.

In granting Petitioner Whitehead's motion for the appointment of a master to conduct a factual investigation, we grant the motion in part by adjudicating the clear need for the appointment of a special master, but we defer our decision as to the scope of the investigation and the identity of the investigator for resolution in the near future.FN2

FN2. This interlocutory opinion represents one more incremental measure leading to the eventual resolution of what has become a proceeding transmuted from a comparatively simple writ proceeding to a proceeding far more expansive and complex than otherwise warranted. Petitioner simply invoked this court's exclusive jurisdiction in interpreting, for the first time, the meaning of several of the current permanent rules of the Commission. It is now clear, that in order to provide absolute clarity in the final disposition of this matter issued by this court, and to provide an unmistakable justification for this court's actions, it will be necessary to show, as the evidence will demonstrate, that the Commission has been functioning on an *ad hoc* basis in the imposition of discipline, and that adherence to Commission rules, in an even-handed, non-discriminatory methodology is essential to the independence of the Nevada judiciary. It is this court's intention to finalize these proceedings as soon as humanly possible, consistent with the demands of judicial responsibility and due process.

*878 REMOVAL OF THE ATTORNEY GENERAL, THE ASSISTANT ATTORNEY GENERAL AND SPECIAL DEPUTY ATTORNEY GENERAL CAMPBELL AS COUNSEL FOR THE COMMISSION

Petitioner Whitehead urges three grounds for requiring the Attorney General's removal as legal counsel and prosecutor for the Commission. The *first ground* is that the Attorney General, as an elected, Constitutional officer of the Executive Department of Nevada's government, is not permitted by the separation of powers clause of our State Constitution to represent the Commission in the **916 exercise of its disciplinary functions or to exercise powers relating to judicial discipline proceedings that are constitutionally vested in the Discipline Commission. The *second ground* is that, generally, and under the specific facts of this case, the Attorney General has a number of disqualifying conflicts in representing the Commission. These conflicts include the conflicts relating to giving the Attorney General access to confidential documents and proceedings of the Commission, the conflict arising out of the fact that the Attorney General is official counsel for the judges and justices of the

state, and, most importantly, the conflict arising out of the Attorney General's acting as legal advisor to the Commission (which is Petitioner Whitehead's judge and jury) and at the same time prosecuting Whitehead before the tribunal to which the Attorney General has been giving legal advice and counsel. Of equal concern and importance is the problem and potential problem of the Attorney General, and district attorneys over whom the Attorney General has the power of supervision, [FN3] prosecuting criminal and civil cases before judges who are under investigation and prosecution by the Attorney General in Commission proceedings, and the potential for holding such judges actual or imagined "hostages" without any awareness by opposing counsel. As to the *third ground* which Petitioner Whitehead asserts for seeking the removal of the Attorney General as the Commission's lawyer and prosecutor, we conclude that the Attorney General must be removed as counsel and prosecutor for the Commission in this case. Our conclusion is based on the stated constitutional grounds and on the mentioned conflict of interest created by the Attorney General's office, particularly, the Attorney General's acting as both legal advisor to the Commission and as the prosecutor who has been ***879** prosecuting Petitioner Whitehead before the Commission. It is unnecessary to reach the claim relating to the Attorney General's misconduct in arriving at our decision on this motion.

FN3. NRS 228.120(2) states that the attorney general may:

> Exercise supervisory powers over all district attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge.

First Ground: Constitutional Disqualification [FN4]

FN4. In *Whitehead I,* Judge Guy wrote that he would "order the Attorney General, her associates and Special Deputy Attorneys General to have no further contact with this case or any other matter appearing before the Commission." Judge Guy further observed as follows:

> It is certain that to permit the executive department, to wit, the Attorney General, whether upon request or otherwise, to be counsel or in any way participate in the possible disciplinary action procedure of a justice or district judge before whom the Attorney General must appear for judicial decisions, could cause investigations, brought about for political reasons or because of decisions that were unfavorable.
>
> *Whitehead v. Comm'n on Jud. Discipline,* 110 Nev. 128, 166, 869 P.2d 795, 818-19 (1994) (Guy, D.J., concurring).

Our present opinion reflects the previously expressed judgment of Judge Guy, on this issue.

Article 3, section 1 of the Nevada Constitution provides as follows:

> The powers of the Government of the State of Nevada shall be divided into three separate departments,-the Legislative,-the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.

This court has consistently affirmed that "[t]he division of powers is probably the most important single principle of government declaring and guaranteeing the liberties of the people." *Galloway v. Truesdell,* 83 Nev. 13, 18, 422 P.2d 237, 241 (1967). This principle is also of Federal Constitutional dimension and has occupied a position of unquestioned importance since the early days of the Republic. As James Madison noted in The Federalist No. 47, " '[w]ere the power of judging joined ... to the executive power, the judge might behave with all the violence of the oppressor' " (quoting Montesquieu). Merging the adjudicative power of the Commission with the executive power, as evidenced ***917** in the case before us raises this very specter.

[1] [2] [3] [4] Article 6 (the *Judicial* Article), section 21 of the Nevada Constitution creates the Commission on Judicial Discipline. The Commission is a part of the judicial branch of government, vested with the constitutional power to "censure, retire or remove" a ***880** judge or justice, subject to such rules as this court might promulgate, and subject to appellate review by this court. Nev. Const. art. 6, § 21(1). The Attorney General, on the other hand, is "a constitutional officer in the executive branch of government" whose various duties are established by the legislature. *See Ryan v. District Court*, 88 Nev. 638, 642, 503 P.2d 842, 844 (1972); *see generally* Nev. Const. art. 5 § 19. In matters of judicial discipline, it is the Commission, not the Attorney General, which the constitution vests with the power and duty to deal with all matters relating to erring judges who are charged with violating the Code of Judicial Conduct. The Commission is constitutionally empowered to "designate *for each hearing* an attorney or attorneys at law to act as counsel to conduct the proceeding," (*Id.* at art. 6, § 21(9)(a)). Nowhere in the constitution is the Commission required or empowered to employ the Attorney General, a member of a separate and co-equal branch of government, to act as its counsel.[FN5] It is not constitutionally permissible for the Attorney General to investigate or prosecute a judge or justice on behalf of the Commission. The Attorney General may not represent the Commission in judicial discipline matters, nor may the Attorney General "prosecute" a judge or justice before the Commission, because "one department cannot exercise the power of the other two" without violating article 3, section 1 of the Nevada Constitution. *Galloway*, 83 Nev. at 19, 422 P.2d at 242.[FN6]

FN5. In *Goldman v. Nevada Comm'n on Judicial Discipline*, 108 Nev. 251, 830 P.2d 107 (1992), the Commission in fact hired independent counsel to prosecute the judge.

FN6. Our present holding relative to separation of powers is consistent with our prior rulings in this area. For example, in *Dunphy v. Sheehan*, 92 Nev. 259, 549 P.2d 332 (1976), this court held that the section of Nevada's Ethics in Government law excluding members of the judiciary from regulation under that law was mandated by the separation of powers clause of the Nevada Constitution. *Id.* at 265, 549 P.2d at 336. Similarly, in *Galloway v. Truesdell*, this court held that it was an impermissible violation of separation of powers to require district court judges to determine which ministers were qualified to administer legally valid marriage ceremonies. *Id.* at 31, 422 P.2d at 249. In *In Re Platz*, this court held that state bar disciplinary proceedings did not violate separation of powers because this court retained the ultimate decision as to any penalty to be imposed. 60 Nev. 296, 302-303, 108 P.2d 858, 861 (1940); *see also Desert Chrysler-Plymouth v. Chrysler Corp.*, 95 Nev. 640, 600 P.2d 1189 (1979) (statute requiring district courts to determine "good cause" for issuing automobile dealership licenses violates separation of powers); *State v. Douglass*, 33 Nev. 82, 110 P. 177 (1910) (legislature may not combine the offices of Clerk of the Supreme Court and Secretary of State). This line of cases is bolstered by a persuasive opinion of the Attorney General which concludes that, because a Highway Patrol Trooper is a member of the executive branch of government, it would be "constitutionally invalid for an employee of the patrol to simultaneously serve as a member of the state legislative or judicial departments." Op. Att'y Gen. No. 168 (May 22, 1974). A member of the executive branch is simply not constitutionally permitted to act in a judicial capacity.

*881 [5] Although the Commission disputes that the Attorney General's office engaged in exercising any Commission functions, the record clearly reflects that Special Deputy Attorney General Don Campbell engaged in a very extensive investigation of the allegations against Petitioner on behalf of the Commission. Mr. Campbell's affidavit also indicates that he was involved in carrying out the Commission function of screening complaints and that in doing so made the determination that many of the incidents alleged in one of the complaints against Petitioner did not warrant further action by the Commission. Whether Special Deputy Attorney General Campbell was acting for the Commission in making these Commission decisions or was merely advising the Commission to take these actions,

the *executive branch*, through the Attorney General's office, has been actively engaged in the judicial discipline process-a process that can be carried out properly and constitutionally only by the Commission on Judicial Discipline itself. Nev. Const. art. 6, § 21(7).

***918** The State of Minnesota has recognized that it is not proper for the Attorney General to act as the Attorney General has acted in this case. *See* Rules of Board on Judicial Standards, Minn. Rules of Court, Rule 1(d)(10) at 693 (West Supp.1994) (Authorizing the Executive Secretary of the Board on Judicial Standards to "[e]mploy, with the approval of the board, special counsel, private investigators, or other experts as necessary to investigate and process matters before the board or the Supreme Court. *The use of the attorney general's staff for this purpose shall not be allowed.*") (Emphasis added.) The source of and basis for the Minnesota rule is the ABA's *Standards Relating to Judicial Discipline and Disability Retirement. See Judicial Conduct Organizations Governing Provisions* (Kathleen Sampson, ed., 1984). Standard 2.8 states that the use of members of "the attorney general's staff" to perform commission functions "is not recommended.... *Their use may also interfere with the independence of the judiciary.*" *Id.* at 15; *see infra* note 5 (emphasis added).

[6] [7] We are, of course, well aware of NRS 1.450(2) which commands the Attorney General to act as counsel "upon request" of the Commission. If the Commission or its members were to be sued for, say, some alleged tortious activity, there would be no bar to the Attorney General's defending such a lawsuit, as long as ***882** it did not involve the Commission's constitutional mandate to hear and decide misconduct complaints against judges.[FN7]

> FN7. Contrary to respondent's assertions, the Judicial Discipline Commission is not just another administrative agency which can combine investigative, prosecutorial and judging functions. As this court held in *Whitehead I*, the Commission is a court of judicial performance, created by the Nevada Constitution as a part of the judicial branch of government. *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 128, 160 n. 24, 869 P.2d 795, 815 n. 24 (1994); *cf.*, *Laman v. Nevada R.E. Adv. Commission*, 95 Nev. 50, 589 P.2d 166 (1979).

[8] If we were to read NRS 1.450(2) as permitting the Attorney General to represent the Commission in matters relating to specific cases of judicial discipline or, worse, as permitting the Commission's legal advisor also to be the prosecutor of judicial discipline complaints, such a reading would run contrary to the constitution. *State v. Douglass*, 33 Nev. 82, 92, 110 P. 177, 180 (1910) ("the Legislature, in the absence of express constitutional authority, is as powerless to add to a constitutional office duties foreign to that office, as it is to take away duties that naturally belong to it"). The statute may properly permit the Commission to seek the legal advice of the Attorney General, much as another state entity might [FN8]; however, the statute cannot permit the invasion of the judicial department by the executive department of government. This would occur if the Attorney General were permitted to sit in from day to day in the Commission's meetings, during which the principal Commission business is to deal with matters relating to judicial discipline. To allow this would be to allow the Attorney General to become almost an *ex facto* member of the Commission. It must be remembered that the Attorney General and her extensive staff must, in the performance of their constitutional duties, appear before the judges and justices of this state on a daily basis. If those same lawyers are privy to confidential and damaging information about judges, then, at the very least, the *appearance* of an impartial tribunal is lost. *See* conflict of interest section, *infra*, pp. 9-13; *compare* ARJD 2(9) ("Prosecuting officer means *an attorney* designated by the commission to file and prosecute the Formal Statement of Charges.") (Emphasis added.)

> FN8. NRS 41.0338-41.0339 would allow the Commission members to seek the representation of the Attorney General if they were sued for actions taken in their official capacity.

We must necessarily disapprove of the practice of having a member of the Attorney General's staff routinely participate in *883 Commission meetings and deliberations.[FN9] The policy rationale behind requiring the Commission to use independent counsel to perform both advisory and prosecutorial functions for the Commission in judicial discipline **919 proceedings is obvious: it ensures that disciplinary proceedings are not pursued for personal, partisan, or political gain, and it ensures that one branch of government does not usurp the vital functions of another or place itself in the position of holding the others hostage.

FN9. The proposed ABA Model Rules suggest that independent counsel be retained to act as legal counsel to the commission to avoid these very conflicts.

[9] [10] Where a statute is susceptible to both a constitutional and an unconstitutional interpretation, this court is obliged to construe the statute so that it does not violate the constitution. *Sheriff v. Wu*, 101 Nev. 687, 708 P.2d 305 (1985). NRS 1.450(2) is constitutional insofar as it permits the Commission to request official legal opinions of the Attorney General in matters unrelated to judicial discipline. NRS 1.450(2) cannot be constitutionally read to authorize the Attorney General to act as counsel to the Commission or to act as prosecutor in judicial discipline proceedings.

Second Ground: The Attorney General's Conflict of Interest.

Amici (Ad Hoc Committee for the Preservation of an Independent Judiciary) argue that the involvement of the Attorney General in the disciplinary process creates hopeless conflicts of interest and roles and that such involvement creates an untoward and undesirable opportunity for undue influence upon the judiciary. We examine this argument carefully.

[11] First we look at the potential for abuse inherent in any involvement by the Attorney General in the disciplinary process. As we held in *Whitehead I*, the Commission is part of the Judicial Department. *See Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 128, 159, 869 P.2d 795, 814 (1994). The rules this court has adopted pursuant to its constitutional mandate provide a clear requirement of confidentiality at least until after a probable cause hearing, a finding of probable cause, and the filing of a formal statement of charges. ARJD 5(1). It is not difficult to see the possibilities that exist if the Attorney General is allowed to participate in the Commission's disciplinary activities. If the Attorney General has free access to the confidential information in possession of the Commission, the temptation is clearly *884 present for putting adverse, confidential information about a judge to improper and even political use. Anonymous "leaks" or threats of leaks could very well provide those with improper access to confidential information about judges considerable leverage over sitting judges, who, in our elective system, are always faced with the possibility of a contested election. Although we are not suggesting the existence of such implications in the present case, there is certainly a potential for an Attorney General who has adverse information relating to a judge to use this information to damage the career of any judicial officer that is seen as a political threat to the Attorney General or to his or her political allies or political agenda.

The Attorney General's office, as now constituted, has close to one hundred attorneys who appear in many courts of this state. It is not difficult to see how the independence of judges might be compromised if a judge before whom a deputy attorney general was appearing felt threatened by the Attorney General's possession of confidential information, whether true or not, that might be harmful to the judge if released to the public.

[12] [13] The threat just described is only one of the possible conflicts presented by allowing the Attorney General to participate in the judicial discipline process. Another conflict is presented by the fact that the Attorney General is the official legal representative of the judges and justices in this state and cannot, by the nature of that office engage in the prosecution of the very judges that the

Attorney General represents as counsel. [FN10] It is not the foregoing conflicts, however, that give us the most pause. The most dangerous conflict lies in the Attorney General's acting as both legal counsellor to the Commission and as prosecutor of judicial discipline complaints.

> FN10. Of course the Attorney General is constitutionally authorized to pursue *criminal* investigations and prosecutions of judges or justices. Nev. Const. art. 5, § 22; NRS 228.175(2) and (4).

Special Deputy Attorney General Campbell has been acting in the role of investigator**920 and prosecutor in this case. The Attorney General apparently sees nothing untoward or unusual about Special Deputy Attorney General Campbell's acting in such capacities in this case, as the Attorney General freely tells us that her office has "investigated and processed literally dozens of [other] judicial misconduct complaints over the years." Petition for Rehearing at 7. Such engagement by the Attorney General in the investigation and prosecution of judges is not only a violation of the separation of powers doctrine of our Constitution, it is a conflict of interest for the Attorney General to be prosecuting *885 before the Commission the very judges that she represents as counsel, and before whom she appears in the course of prosecuting criminal and civil cases. Again, of equally great concern is the conflict created by the Attorney General's acting as either prosecutor or legal advisor to the judicial tribunal.

[14] It cannot be denied that the Attorney General has been acting as legal advisor to the Commission while investigations and prosecutorial activities were being conducted by that office against Petitioner Whitehead. Ordinarily, a client's regular consultation with his or her attorney, by the nature of the relationship, tends to instill feelings of trust and confidence and, frequently, friendship as between the client and the attorney. Most readers of this opinion should not have to be further convinced that it is simply not fair to require an accused judge or justice to appear before a tribunal where the judge's prosecutor is also acting as legal counsel to the tribunal. In our adversarial system we have always been scrupulous about keeping adjudicative functions separate from the prosecutive function, and fairness requires that we continue to do so.

The proposed changes to the American Bar Association's Model Rules for Judicial Disciplinary Enforcement deal quite extensively with this problem. The Report and Recommendation to the ABA House of Delegates strongly recommends "the separation of conflicting functions." Thus "[a] commission member who participates in the investigation should not participate in the adjudicative process and vice versa." Similarly, the proposed Model Rules also envision separate counsel for the Commission: One attorney ("disciplinary counsel") would assist the Commission in performing its investigative and prosecutorial functions, another ("commission counsel") would provide the Commission with "legal research, drafting, and advice." The report observes that the roles of prosecutor and advisor are "inconsistent" and ought not be embodied in a single person, because such a separation of functions is "crucial to the perception of fairness." The report also notes that "[a] system that relies on other government agencies to investigate complaints or present evidence, or both, loses efficiency and endangers confidentiality," concluding that "[d]isciplinary counsel should not use law enforcement officials or staff to investigate complaints or present cases.... Their use could compromise the confidentiality of investigations and could pose separation of powers problems." [FN11]

> FN11. The ABA Standards Relating to Judicial Discipline and Disability Retirement currently in force also note these same concerns. For example, Standard 2.1, entitled "Need for Independence," provides that "[t]he commission should be independent of and free from interference from the executive or legislative branches and, although operating within the judicial branch, should report only to the supreme court." American Bar Association, *Standards Relating to Judicial Discipline and Disability Retirement* 9 (February, 1978). Similarly, the commentary to Standard Rule 2.8 states that the use of law enforcement officers such as "members of the attorney general's staff" to perform commission functions "is not recommended ... [as] [t]heir use may also interfere with the independence of the judiciary." *Id.* at 15.

*886 [15] The conflicts envisioned by the ABA have manifested themselves all too clearly in the manner in which cases are currently being handled by the Commission. As noted in *Whitehead II,* the Attorney General and the Commission have had at least one judge under some kind of supervisory control or "probation," which requires the judge to report to the Attorney General's Office under penalty of more severe disciplinary action in the event the "probation" fails. This supervision is going on while the Attorney General's staff is presumably still trying cases before the supervised judge. 110 Nev. at ----, 873 P.2d at 971. This is a clear conflict of **921 interest. Obviously, the Attorney General or the district attorneys over whom she has supervisory control, appear in an adversarial setting before the very judges she is investigating or is supervising under "probation." Again, given the current rules of confidentiality surrounding judicial discipline matters prior to a finding of probable cause, it is inevitable that some members of the Attorney General's and district attorneys' staffs will appear before judges while in possession of damaging and confidential information about those judges. This may compromise the appearance of an impartial tribunal. [[FN12

FN12. The Attorney General appears in this case to have initially recognized this conflict when she requested the Board of Examiners to provide the funds to hire Don Campbell as a Special Deputy Attorney General, stating that the hiring was necessary in part because the Attorney General's office had a potential conflict of interest in this case. (Contract between Attorney General and Don Campbell.) *See* Petitioner's Motion to Preclude Further Involvement, Exhibit 2.

[16] The Commission has asserted that if this court does not allow the Attorney General to act as Commission counsel, the Commission will be unable to fulfill its constitutional function. This rather extravagant assertion may be rejected out-of-hand because the rules clearly contemplate that the Commission may employ independent counsel. ARJD 41; Nevada Const. art. 6 § 21(9)(a). We also reject the Commission's argument that this court will violate the Commission's right to counsel of its choice and thereby deny the Commission due process of law if it determines *887 that the Attorney General may not act as she has in this proceeding. Even if we were to assume that a public body has some identifiable legal right to "counsel of its choice," such a right would not include the Commission's right to be represented by counsel with the clear conflict of interest problems that are discussed in this Opinion; and, certainly such a right could not be sufficient to overcome the separation of powers clause of the Nevada Constitution. *See Kabase v. District Court,* 96 Nev. 471, 611 P.2d 194 (1980).

The separation of powers clause of the Nevada Constitution prohibits the Attorney General from acting as prosecutor of judges in judicial discipline cases and from acting as the Commission's counsel in disciplinary matters. We have, of course, already held that the Attorney General may issue official opinions to the Commission and that the Attorney General may "supply[ ] the Commission with abstract advice on an occasional basis...," *Whitehead I,* 110 Nev. at 133 n. 5, 869 P.2d at 798 n. 5. However, this certainly does not mean that the Attorney General can advise the Commission in matters relating to judicial discipline nor that the Attorney General can act as prosecutor, prosecuting judicial discipline complaints before the Commission. What is painfully clear, as mentioned previously, is that the Attorney General may not be allowed to act as either advisor or prosecutor.FN13

FN13. The Dissent garners suggestions that the Majority in this limited Opinion somehow is, or will prevent, the Commission from carrying out its constitutional mandate. There is no intent and none should be inferred that this limited Opinion subjugates or prevents the Commission from fulfilling its duties. This limited Opinion only prevents the Attorney General, the Attorney General's regular deputies and the Special Deputy Attorney General, in this matter, from any further representation of the Commission in these proceedings, or in any proceedings before the Commission. It does not prevent the Commission from engaging its own independent counsel as provided in article 6, section 21, subsection 9(a) of the Constitution and by the rules of this court. On the contrary, this limited Opinion directs the Commission to engage independent counsel for this and

any other matters before the Commission.

In *Goldman v. Nevada Comm'n on Judicial Discipline*, 108 Nev. 251, 830 P.2d 107 (1992), independent counsel was appointed for the Commission as the Attorney General either recognized the conflict or the constitutional prohibition. Likewise, in these proceedings, the Attorney General initially recognized the conflict and requested special counsel to represent the Commission. Had the Attorney General not appointed the special counsel or Special Deputy Attorney General, *inter alia*, responsible to the Attorney General for his retention and payment, then this limited Opinion may not have been necessary except in future proceedings.

The Dissent infers that this Opinion nullifies NRS 1.450(2). If that is the effect of preventing the Attorney General from proceeding as the attorney for the Commission, then, so be it. This will not be the first time, nor the last, that this court and other courts have stricken portions or all of legislative acts as being unconstitutional.

The Dissent raises the presumption that this Opinion rests its arguments on the assumption that the Attorney General will be unable to resist the temptation to engage in misconduct with respect to judges. This court has so often reversed judgments and criminal convictions, not upon any actual misconduct, but upon the perception or assumption that misconduct could occur, either intentionally or unintentionally. Given the history of overzealous or over-aggressive prosecutors in these United States, there can be no doubt that misconduct does and has occurred either intentionally or unintentionally.

922 *888 Ground Three: Attorney Misconduct

Petitioner Whitehead maintains as a third and independent ground for asking that the Attorney General be removed from this case the Attorney General's intemperate and accusatory public statements relating to these proceedings. Because of the foregoing conclusions regarding disqualification based upon constitutional and conflict of interest grounds, it is unnecessary to presently rule on Petitioner Whitehead's allegations of ethical misconduct on the part of the Attorney General or the effect that this conduct might have on Petitioner Whitehead's ability to receive fair treatment, which is the essence of due process.

INVESTIGATION OF BREACHES OF CONFIDENTIALITY AND VIOLATIONS OF OTHER RULES OF THIS COURT

Petitioner Whitehead claims not only that he has been severely prejudiced by the unlawful public disclosure of charges which the Nevada Constitution requires to be kept confidential, he claims that the integrity of the whole judicial discipline process is endangered by what appear to be almost routine "leaks" of judicial disciplinary proceedings.

Now is not the time to go into extended discussion of the confidentiality provisions mandated by the Nevada Constitution in judicial discipline matters, but a few words may be said.[FN14] The argument of some is, of course, that judges are no different from any other public official and that if any allegations of misconduct are made by anyone, such charges should immediately be open to the public. The counterargument (and the one adopted by the framers of the Nevada Constitution) is that the judiciary depends to a large degree for its effectiveness on the trust and confidence that the people place in that institution's ability to render, day-to-day, fair and impartial decisions. By its very nature, the judiciary deals with disputes that often leave litigants or counsel with negative or agitated feelings. As a result, many complaints may ***889** be generated and sent to the Commission about judges that are entirely without merit. If all of these unfounded complaints were available to the public and the media, without any inquiry into their substance, public esteem for the judiciary as a whole would suffer, thus making it more difficult for the one branch of government that should be a safe haven for the impartial and fair resolution of disputes, to inspire public confidence in the integrity

of judicial proceedings.

> FN14. "The supreme court shall make appropriate rules for: (a) The confidentiality of all proceedings before the commission, except a decision to censure, retire or remove a justice or judge." Nev. Const. art. 6, § 21(5)(a); *see* ARJD 5 and 6.

To a great extent, the willingness of litigants-great and small-to respect and obey the judgments issued by our courts depends upon a deserved public perception that the judiciary does, in fact, dispense justice. Premature exposure of meritless complaints against judges would make it appear that our judges were guilty of rampant misconduct and would threaten the independent function of the judiciary. *See Kamasinski v. Judicial Review Council*, 797 F.Supp. 1083 (D.Conn.1992).

Whichever side of this argument one might want to espouse, the fact remains that, at present, all complaints against judges must, as commanded by the Nevada Constitution and by the rules of this court enacted in accordance with the direct command of the Constitution, remain confidential until there has been a finding of probable cause and a formal statement of charges has been filed as a public document. Despite the voices of those who minify the seriousness of breaches of confidentiality, we are unable to arrogate to ourselves a superior wisdom or authority than the people of this State who mandated the confidentiality of judicial discipline proceedings***923** in our fundamental law, the Nevada Constitution.

The Commission is entrusted with the constitutional responsibility of safeguarding the confidentiality of Commission proceedings until, under the current Commission rules, there has been a finding of probable cause. One would therefore assume that the Commission would be greatly concerned about the breaches of confidentiality in this case and in others that are documented in this record. One would further assume or at least hope that as soon as the Commission learned of these constitutional violations it would have taken immediate steps to uncover the source of the breaches and of the "leaks" that have punctuated these proceedings and expanded them into a vastly more complex and multi-dimensional dispute. To our dismay, the Commission and the Attorney General have not only evinced no concern about the breaches of confidentiality, but they have taken affirmative steps to oppose any inquiry into the source of the "leaks." FN15

> FN15. The Commission and the Attorney General's office have steadfastly opposed any investigation into the leaks, arguing at various times that Petitioner leaked the confidential information, that this court lacked the authority to enforce these constitutional provisions, and that the First Amendment prevents this court from requiring the Commission to enforce its own confidentiality rules.

***890** [17] It is most apparent that someone must get to the bottom of these flagrant constitutional infractions. At this stage of the proceedings we are not prepared, as a court, to launch a full investigation into these matters. Although it is clear that we have the authority to appoint a fact-finding master to delve into the source of the violations,FN16 we are not ready at this time to define the scope of activities to be conducted in this regard. We do, however, conclude that an investigation into the breaches of confidentiality is warranted. A master will have to be appointed having the power to issue subpoenas and other compulsory process. In due time the court will issue an order naming the court master or other investigator and defining the scope of the powers and duties that will be necessary to carry out the required investigation.

> FN16. *See, e.g., Young v. Board of County Comm'rs*, 91 Nev. 52, 530 P.2d 1203 (1975).

For the reasons discussed above,

IT IS HEREBY ORDERED:

1. The Attorney General and her staff, and Special Deputy Attorney General Donald J. Campbell shall be, and the same hereby are removed as counsel to the Commission in the instant proceeding, and the Attorney General and her staff shall hereafter take no part or assume any role in disciplinary matters brought before the Commission.[FN17]

FN17. The Commission is herein authorized to obtain a Nevada attorney. There are a multitude of Nevada attorneys who are well-qualified to act as counsel to the Commission to replace the Attorney General, her staff, and any special deputy attorney general, to continue in this matter and in any other matter presently before the Commission and/or to be brought before the Commission.

2. A special master shall hereafter be appointed by the court and shall be specially empowered by further and specific order of this court to conduct such investigations as shall be necessary to determine the sources of the unlawful breaches of confidentiality that have occurred in these proceedings and the extent to which they may have impacted Petitioner's due process rights. [[[FN18]

FN18. The Governor appointed the Honorable Addellar D. Guy, Judge of the Eighth Judicial District Court, to sit in place of the Honorable Cliff Young, Justice, who is disqualified because he is a member of the Commission on Judicial Discipline. Nev. Const., art. 6 § 4.

STEFFEN, V.C.J., SPRINGER, J., and ZENOFF, Senior Justice, [[[FN19] concur.

FN19. The Honorable Thomas L. Steffen, Vice-Chief Justice, assigned the Honorable David Zenoff, Senior Justice, to sit in the place of the Honorable Robert E. Rose, Chief Justice. Nev. Const., art. 6 § 19; SCR 10.

***891** SPRINGER, Justice, concurring:
I have signed the four-judge Majority Opinion in this case because I am convinced that the Attorney General must be removed from any participation in judicial discipline prosecution of Judge Jerry Carr Whitehead. ****924** I write this Concurring Opinion for two reasons: one is to answer some of the contentions raised by Justice Shearing in her Dissent, the other is that I wish to discuss the misconduct of Attorney General Del Papa, which I see as a ground for removing her from this case, in addition to, and entirely separate from, the grounds of constitutional incapacity and conflict of interest relied upon by the Majority Opinion.

Inasmuch as the Attorney General's conflicts of interest and constitutional incapacity provide ample and sufficient grounds for the action taken by the Majority, I had initially agreed that it was unnecessary to voice my view that the Attorney General's misconduct constitutes a discrete and independent ground warranting her removal from this matter. In light of the position now advanced by the Dissent, that constitutional incapacity and conflict of interest provide insufficient cause to support the Majority's decision, I now feel compelled to address the additional cause found in the Attorney General's disqualifying misconduct.

THE SHEARING DISSENT

Article 6, section 21(1) of the Nevada Constitution provides:

A justice of the supreme court or a district judge may, in addition to the provision of article 7 for impeachment, be *censured, retired or removed by the commission on judicial discipline*. A justice or judge *may appeal* from the action of the commission to the supreme court, which may reverse such action or take any alternative action provided in this subsection.

(Emphasis added.)

Despite this clear and unambiguous language contained in the "Judicial Article" of the Nevada Constitution, the Dissent insists: (1) that the Nevada Constitution does not vest the Commission "with the authority to exercise the judicial power of this state"; (2) that "the decisions of the Commission are not final"; and (3) that this court "alone has the power to enforce the Commission's orders."

From these three conclusions, it is apparent that my dissenting colleague perceives the Nevada Commission on Judicial Discipline as an impuissant tribunal possessed of mere advisory or recommendatory powers. Restrained by article 6, section 21(1) of the Nevada Constitution and persuasive, prior precedent of this court interpreting that provision, neither I, nor my colleagues in ***892** the Majority, are willing or able to ascribe to the view that the Commission has been relegated to the impotent and ineffectual advisory status perceived by the Dissent. Therefore, for the reasons which follow, I emphatically and respectfully reject the views expressed in the Dissent.

First, the Dissent declares:

> The decisions of the Commission are not final, but are subject to review by the Supreme Court, which alone has the judicial power to enforce the Commission's orders.

This view of the Commission's authority, however, is directly repelled by this court's holding in *Goldman v. Nevada Comm'n on Judicial Discipline*, 108 Nev. 251, 830 P.2d 107 (1992), a holding which the Attorney General, on behalf of the Commission, has repeatedly-albeit inaccurately and incompletely-cited to this court in the instant proceeding.

Specifically, in *Goldman*, this court explained at length:

> The relevant constitutional provision defining this court's jurisdictional role in an appeal challenging commission action specifies as follows:
>
> A justice of the supreme court or a district judge may, in addition to the provision of article 7 for impeachment, be *censured, retired or removed by the commission on judicial discipline*. A justice or judge *may appeal* from the action of the commission to the supreme court, which may reverse such action or take any alternative action provided in this subsection.
>
> Nev. Const. art. 6, § 21(1). *Absent the prosecution of an appeal to this court by an aggrieved judge, this provision unambiguously vests the commission with final authority to order the censure, removal or retirement of a judicial officer. A commission decision to censure, remove or **925 retire is not merely advisory or recommendatory in nature; it is of independent force and effect absent perfection of an appeal to this court.*[FN1]
>
> FN1. Of course, as the Majority Opinions in *Whitehead I and II* have emphasized, this section of the *Goldman* opinion only addressed the standards of review applicable to *appeals* from Commission decisions to censure, retire or remove. The quoted passage does not speak to this court's authority to intervene in commission proceedings by way of extraordinary writ. *See* ARJD 40(7); Nev. Const. art. 6, § 4 (Nevada's "all writs" provision).

This broad constitutional authority distinguishes Nevada's commission from similar commissions in other jurisdictions. The California Commission on Judicial Performance, ***893** for example, is constitutionally empowered only to make "recommendations" concerning the imposition of disciplinary sanctions. *See* Cal. Const. art. 6, § 18(c). Formal approval of further action by the California Supreme Court is necessary before any disciplinary sanctions may be imposed. *Id.*

In declaring the standard of review to be applied under this "recommendation" system, the California Supreme Court has observed:

Were a recommendation of independent force and effect absent further action by this court, our review of the evidentiary basis for that recommendation might properly be limited to a determination whether the Commission's findings of fact were supported by substantial evidence. Under such a standard of review we would not be free to disregard the Commission's findings merely because the circumstances involved might also be reasonably reconciled with contrary findings of fact.

Geiler [*v. Commission on Judicial Qualifications*, 10 Cal.3d 270, 110 Cal.Rptr. 201, 203-04,] 515 P.2d [1,] at 4. In *Geiler*, however, the court further noted that the California Constitution expressly entrusts that state's high court with the sole responsibility and authority to render "the ultimate, dispositive decision to censure or remove...." *Id.* In exercising that authority, the California court independently evaluates the record evidence and renders its own findings of fact and conclusions of law. Judicial disciplinary procedures in many other jurisdictions are patterned after California's pioneering judicial disciplinary procedures and similarly require review and final approval of commission recommendations by a higher tribunal.

Thus, the express authority vested in this court under article 6, section 21 of the Nevada Constitution contrasts sharply with the ultimate and dispositive constitutional authority conferred upon courts of review in these "recommendation" jurisdictions. It is readily apparent that by deviating from the California model, the drafters of article 6, section 21 of the Nevada Constitution rejected California's "recommendation" system in favor of procedures intended to vest a far greater degree of authority in Nevada's commission. See, e.g., Matter of Samford, 352 So.2d 1126, 1129 (Ala.1978) (where adoption of constitutional amendment replaced old "recommendation" system of judicial discipline with new system merely authorizing appeal, Alabama court's scope of review was restricted by such amendment to a determination of "whether the record shows clear and convincing evidence to support the order of the Court of the Judiciary").

***894** We conclude, therefore, that the Nevada Constitution does not contemplate this court's de novo or independent review of factual determinations of the commission on appeal. To the contrary, the constitution confines the scope of appellate review of the commission's factual findings to a determination of whether the evidence in the record as a whole provides clear and convincing support for the commission's findings. The commission's factual findings may not be disregarded on appeal merely because the circumstances involved might also be reasonably reconciled with contrary findings of fact. See Samford, 352 So.2d at 1129; cf. Geiler, [110 Cal.Rptr. at 203-04,] 515 P.2d at 4.*

This court, of course, is not bound by the commission's conclusions of law. *Cf. In re Jones*, 728 P.2d 311, 313 (Colo.1986). ****926** Moreover, where an appeal from the commission's order of censure, removal or retirement is taken, this court is expressly empowered to "reverse such action or take any alternative action provided in this subsection." Nev. Const. art. 6, § 21(1). Thus, *on appeal*, we are specifically enjoined by the constitution to exercise our independent judgment regarding the appropriate sanction warranted by factual findings properly adduced by the commission.

See Goldman v. Nevada Comm'n on Judicial Discipline, 108 Nev. 251, 265-268, 830 P.2d 107, 116-118 (1992) (footnotes omitted; emphasis added). [[FN2

FN2. In a footnote in *Goldman*, this court further observed that the intent to vest far greater authority in Nevada's Commission than is vested in states with "recommendation" systems is also evidenced by:

the care taken by the drafters to insure fairness, competence, non-partisanship and geographic diversity in the commission's makeup. The commission, for example, must be composed of two justices or judges appointed by the supreme court, two attorneys appointed by the state bar, and three lay members appointed by the Governor. See Nev. Const. art. 6, § 21(2). Moreover, an appointing authority may not appoint more than one resident of any county, nor more than two members of the same political party. *See* Nev. Const. art. 6, § 21(4).

Goldman, 108 Nev. at 267 n. 16, 830 P.2d at 117 n. 16.

Thus, in interpreting article 6, section 21(1) of the Nevada Constitution, this court held in *Goldman*: (1) that the constitution "unambiguously" vests the Commission with " *final authority to order the censure, removal or retirement of a judicial officer*"; and (2) that " *a commission decision to censure, remove or retire is not merely advisory or recommendatory in nature; it is of independent force and effect absent perfection of an appeal to this court.*" *Id.* (emphasis added).

Contrary to the Dissent's assertion that the conclusions of the ***895** Majority in *Whitehead I* are bereft of any supporting legal precedent, the Majority Opinion in *Whitehead I* did indeed cite this precise holding in *Goldman* as authority for the position that the Commission must be "regarded as being a constitutionally established 'court of judicial performance and qualifications,' whose functions are judicial in nature and essentially of the same fact-finding and law-applying nature that the state constitution assigns to the District Courts of this State." *See Whitehead I*, 110 Nev. 128, 160 n. 25, 869 P.2d 795, 815 n. 25 (1994). Specifically, the *Whitehead I* Majority explained:

> [The court in *Goldman*] assigned a higher status to the Commission and accorded greater deference to its *final decisions* than other courts have done, in accord with our view that *the Commission is not to be regarded merely as an administrative agency but as a true "Court of Judicial Performance and Qualifications."* Our deference to the Commission is in significant contrast to the California Supreme Court action in the case *Geller v. Comm'n on Judicial Qualifications*, [10 Cal.3d 270, 110 Cal.Rptr. 201,] 515 P.2d 1 (1973). Still, the fact that we held in *Goldman* that the Commission, *like the District Courts*, is free from our *de novo* or independent review of factual findings only emphasizes how important it is in Nevada's system that the Commission, like our District Courts shall apply with fidelity the substantive legal principles articulated by other constituted authority. It also underscores that in Nevada it is highly important that the established substantive rules or principles be applied only in compliance with the procedural requirements delineated by constituted authority. Moreover, in Nevada, as with our District Courts, when counsel may have led the Commission to stray from its jurisdiction as defined in the rules by other constituted authority, it is important that such deviations be subject to review by interlocutory writ, as are those of the District Courts.
>
> *Id.*

Notwithstanding this court's meticulously crafted prior precedent interpreting the unambiguous language of article 6, section 21(1), the Dissent seems to be saying that the Judicial Discipline Commission is a mere "fact-finding" agency, akin to the Board of Medical Examiners or the Real Estate Commission. Citing to *Bergman v. Kearney*, 241 F. 884, 898 (D.Nev.1917), the Dissent observes***927** that "[j]udicial power, in the constitutional sense, is something more than authority to hear and determine; it includes the power to decide finally and conclusively, and also power to carry its determination into effect." Neither I, nor the ***896** other justices in the Majority, quarrel with this definition in *Kearney* of "judicial power." The Dissent, however, can cite to no constitutional provision, statute, or case authority which interprets article 6, section 21 of the Nevada Constitution so as to support the further conclusion in the Dissent that the Commission on Judicial Discipline should be viewed as merely an administrative "agency or commission" which is "not vested with the authority to exercise the judicial power of this state." To the contrary, the relevant constitutional provision and case law unambiguously establish that the Commission is indeed empowered "to decide finally and conclusively" matters related to judicial disability and misconduct, and "to carry its determinations into effect."

For example, as the Majority Opinion in *Whitehead I* explained:

> [The Commission] was created in 1976 by an amendment to the ... "Judicial Department" article of our constitution that inserts into article 6 a new section 21, which not only creates the Commission but also grants this court certain powers over it. In very broad terms, section 21(1) recognizes that the Supreme Court, theretofore also created by the "Judicial Department" article, is to have appellate jurisdiction over the Commission, as it does over Nevada's District Courts....

Whitehead I, 110 Nev. at 131, 869 P.2d at 797. Significantly, the 1976 constitutional amendment

establishing the Commission amended this state's *Judicial Article*, the very Judicial Article cited by the Dissent as declaring where the judicial power of this state resides. Thus, while it is true that article 6, section 1 of the Nevada Constitution vests the judicial power of this state in a court system comprised of the supreme court, the district courts and the justice's courts, the Dissent overlooks the fact that the 1976 amendment changed our Judicial Article so as to vest judicial power in the Commission as well.

As amended, the Nevada Constitution's "Judicial Article," now provides that a judge or justice may be "censured, retired or removed *by the Commission.*" Nev. Const. art. 6, § 21(1) (emphasis added). This adjudicative function includes, but is much more than, mere fact-finding. It simply cannot be seriously contended that the power "to censure, retire or remove," vested *in the Commission* by an amendment to Nevada's Judicial Article, does not now encompass the power to decide finally and conclusively questions related to censure, retirement and removal of a judge or justice, and to carry determinations respecting those ***897** matters into effect.[FN3] Thus it is not merely that the Nevada Supreme Court has the constitutional power to fashion rules for the Commission that makes the Commission a true Court of the Judiciary within the judicial branch of government. The Nevada Constitution and the citizens of this state accomplished that task.

FN3. With respect to the Commission's power to carry its determinations into effect, the following passage from *Goldman* appears particularly relevant:

> [T]he Nevada Constitution specifically empowers the commission to remove a judge from office for "willful misconduct, willful or persistent failure to perform the duties of his office or habitual intemperance...." *See* Nev. Const. art. 6, § 21(6)(a). Further, the commission is authorized to retire a judge for advanced age or for a disabling mental or physical condition that is likely to be permanent in nature. *See* Nev. Const. art. 6, § 21(6)(b). The power to adjudicate and order the removal or retirement of a judge must necessarily imply the power to declare the office vacant. *See generally, Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967). To the extent that the commission's exercise of this implied authority may have conflicted with any express ministerial duty imposed upon the governor by the legislature, the commission's power was clearly preeminent. *See Goldman v. Bryan*, 106 Nev. 30, 37, 787 P.2d 372, 377 (1990) (citing *Robison v. District Court*, 73 Nev. 169, 175, 313 P.2d 436, 440 (1957)). To hold otherwise would elevate form over substance.
>
> *Goldman*, 108 Nev. at 303, 830 P.2d at 141.

Furthermore, as this court has previously stated, the separation of powers requires the judiciary and not another branch of government***928** to administer judicial affairs. *See Dunphy v. Sheehan*, 92 Nev. 259, 266, 549 P.2d 332, 336-37 (1976) (promulgation of Code of Judicial Ethics is essential to the due administration of justice and within the inherent power of the judicial department of this state). Thus, the creation of the Judicial Discipline Commission within the judicial branch of government is mandated by the separation of powers clause.

The Dissent observes that several state agencies exercise functions which may be described as quasi-judicial in nature. None of those agencies, however, have the kind of direct control over the judiciary itself which is vested in the Judicial Discipline Commission, a court constitutionally created as part of the judicial branch of government. This power to control the judiciary has been constitutionally placed within the judicial branch of government, specifically in the Commission, and it may not be directed by the executive branch without offending the doctrine of separation of powers.

The principle that a duty constitutionally entrusted to the judiciary cannot be exercised by one of the other branches of government is basic, black-letter law, appearing in standard legal reference works:

***898** Although executive or administrative officers or bodies may exercise powers of a judicial or quasi-judicial nature incidental to the exercise of their administrative functions, they may not exercise judicial authority, or interfere with the exercise thereof by the courts.

.... [I]t is a well established and universally recognized rule of constitutional law that executive or administrative officers, boards, or commissions may not, by reason of their executive or administrative powers, exercise judicial authority, or control or interfere with the courts in the exercise by the latter of judicial functions.

16 C.J.S. *Constitutional Law* § 219 (1984). While the quoted section of the Corpus Juris Secundum goes on to explain that "[executive officers] may investigate and determine facts as an incident to the performance of their administrative functions," judicial discipline is *not* among the administrative functions of any executive office, but is the province of the Commission, constitutionally created as part of the judicial branch of government.

[T]he power of the judiciary, stemming from the doctrine of separation of powers, must prevail to control its own members. Any decision by the Attorney General's office not to present [matters involving a judge's misconduct] to a grand jury involves a discretionary determination by the executive branch and cannot bind or affect the judicial branch in matters concerning the governance of the judiciary.

Matter of Yaccarino, 101 N.J. 342, 502 A.2d 3, 9 (1985).[FN4]

FN4. The Dissent correctly observes, "not every exercise of a function judicial in nature constitutes an exercise of judicial power." Nonetheless, it is evident that the Commission is empowered by the Constitution to exercise the inherent power of the judiciary to control the conduct of its own members. *See, e.g., In re DeSaulnier*, 360 Mass. 787, 279 N.E.2d 296 (1971); *see also* Nev. Const. art. 4, § 1; Nev. Const. art. 5, § 1; Nev. Const. art. 6, § 21; *Goldman v. Bryan*, 104 Nev. 644, 654 n. 7, 764 P.2d 1296, 1302 n. 7 (1988); *Goldberg v. District Court*, 93 Nev. 614, 572 P.2d 521 (1977); *Dunphy v. Sheehan*, 92 Nev. 259, 549 P.2d 332 (1976); *Lindauer v. Allen*, 85 Nev. 430, 456 P.2d 851 (1969); *State v. District Court*, 85 Nev. 485, 457 P.2d 217 (1969); *St. Ex Rel. Watson v. Merialdo*, 70 Nev. 322, 268 P.2d 922 (1954).

The Dissent further declares: "The relationship of the Supreme Court to the Nevada Commission on Judicial Discipline is virtually the same as its relationship to the State Bar Disciplinary Boards and Hearing Panels except that the powers over the Bar are not expressly granted in the Constitution, but are deemed inherent powers." The Dissent's analogy is flawed.

The disciplinary boards and hearing panels of the state bar ***899** conduct individual attorney disciplinary proceedings and tender *findings and recommendations* to this court respecting the imposition of public discipline including the sanctions of suspension and disbarment. If the 1976 amendments to the Nevada Constitution had created a Commission similar to the recommendatory judicial disciplinary systems presently in place in California and other states cited in the Dissenting Opinion, then the comparison with the state bar disciplinary function might have some ****929** force. Indeed, the recommendatory systems of judicial discipline in California and many other states have much in common with the procedures that govern attorney discipline in Nevada. For example, pursuant to SCR 105(3)(b), a decision of a hearing panel recommending suspension or disbarment is automatically appealed to the supreme court. Moreover, SCR 102(1) and (2) specifically provide that only the supreme court may order the disbarment or suspension of an attorney. Thus, like a judge facing discipline in a state with a recommendatory system of judicial discipline like California's, an attorney facing discipline under Nevada's attorney discipline system can only be suspended or disbarred from the practice of law by the state's supreme court.

The inescapable fact remains, however, that the 1976 amendments to the Nevada Constitution *did not create such a recommendatory system of judicial discipline* in this state. Thus, the Dissent's attempt to analogize attorney and judicial discipline procedures is not only insupportable, but somewhat unsettling inasmuch as it sets forth an analysis that appears oblivious to the fundamental structure of both Nevada's attorney and judicial disciplinary procedures.

What the Dissent fails to appreciate is that Petitioner Whitehead is entitled to a judicial discipline proceeding free from the serious conflicts and constitutional improprieties created by the Attorney General's association with the case precisely because the Nevada Commission on Judicial Discipline possesses the broad constitutional power to issue a *final* decision. Citing to the Commentary to Rule 4 of the 1993 proposed draft of the ABA Model Rules for Judicial Disciplinary Enforcement, the Dissent declares: "[A]lthough the separation of investigatory and prosecutorial functions is desirable, such separation is 'not constitutionally mandated.' " The Dissent, however, overlooks the reason *why* such internal separation of judicial discipline functions of most state commissions is "not constitutionally mandated." As the Report of the ABA Subcommittee recommending the proposed Model Rules also observes, systems of judicial discipline which combine all functions-investigation, prosecution, hearing and decision making-in a single process have " *survived due process challenges because in this type of system the highest *900 court has the ultimate authority to review de novo and impose sanctions." See* Majority Report of Joint Subcommittee on Judicial Discipline on Model Rules for Judicial Disciplinary Enforcement at 3 (August 1994).

As noted above, and as the Attorney General herself has repeatedly emphasized in the instant case, this court decided in *Goldman* that "the Nevada Constitution does not contemplate this court's *de novo* or independent review of factual determinations of the commission on appeal." Thus, the analysis set forth in the Dissent fails to appreciate the substantial due process implications arising from the critical distinctions between a "recommendatory" system of judicial discipline, and the system established under the Judicial Article of the Nevada Constitution. Under Nevada's system, where the state's highest court is foreclosed from conducting *de novo* or independent review of factual findings of the Commission, increased vigilance and careful scrutiny of the procedures employed by the Commission are essential to assure that an accused judge is accorded the fundamental fairness to which he or she is entitled under the Due Process Clause of the Constitution.

The Dissent's analysis also apparently overlooks other crucial distinctions between the state bar's disciplinary panels and the Judicial Discipline Commission. The state bar is emphatically not, as the Dissent points out, an "independent body created ... by the people of the State of Nevada" as a part of the judicial branch of government; it does not draw its power from constitutional enabling provisions. Rather, the state bar is under the exclusive jurisdiction and control of the supreme court. *Compare* Nev. Const. art. 6, § 21 (constitutional referendum creating Judicial Discipline Commission) *with* NRS 7.275 (statute continuing state bar as a public corporation under the exclusive jurisdiction and control of the supreme court) and SCR 99 and 103 (Supreme Court Rule creating state bar disciplinary boards and hearing panels within the "exclusive disciplinary jurisdiction of the supreme court").

****930** More importantly, the disciplinary panels of the state bar *do not* possess the same final, independent authority over attorneys that the Commission possesses over judges. The state bar disciplinary panels have no authority to suspend or disbar attorneys; they merely *recommend* such discipline to this court, which retains the ultimate power to impose any appropriate sanction. By contrast, and as emphasized above, in the absence of an appeal by the aggrieved judge, the Nevada Judicial Discipline Commission has final, independent authority to censure, remove or retire a judge. *Compare Goldman*, 108 Nev. at 266, 830 P.2d at 117 (Commission decision to censure, remove or retire is not merely ***901** advisory or recommendatory but is of independent force and effect absent perfection of an appeal; constitution does not contemplate this court's *de novo* or independent review of factual findings of Commission on appeal) *with In re Kenick*, 100 Nev. 273, 680 P.2d 972 (1984) (Supreme Court Rules cannot be construed to limit supreme court's power to suspend or disbar; court is not bound by the findings and recommendations of the disciplinary board and must examine the record anew and exercise its independent judgment).

The Dissent relies on California and North Carolina precedent for the proposition that "case law indicates that several states have sanctioned the use of state Attorneys General for various functions in judicial discipline cases" (Dissent page 7). *See Wenger v. Commission on Judicial Performance*, 29 Cal.3d 615, 175 Cal.Rptr. 420, 422 n. 3, 630 P.2d 954, 956 n. 3 (1981); *Spruance v. Commission on Judicial Qualifications*, 13 Cal.3d 778, 119 Cal.Rptr. 841, 844 n. 5, 532 P.2d 1209, 1212-13 n. 5 (1975); *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978); *In re Stuhl*, 292 N.C. 379, 233 S.E.2d 562 (1977). The Dissent's reliance on the cited cases is misplaced because: (1) the separation of powers

issue was simply not raised or addressed; (2) the attorneys general involved in these cases were not performing the kinds of multiple roles seen in this case; and (3) unlike Nevada, the systems of judicial discipline applicable in these jurisdictions are "recommendation" systems in which the state's highest court has the ultimate authority to review commission decisions *de novo* and impose sanctions.

More specifically, the Dissent cites *Wenger* and *Spruance* as examples of instances where attorneys general acted in multiple capacities during judicial discipline proceedings, assuming the roles of examiners, investigators, prosecutors and counsel to the commissions on appeal or in proceedings attacking the legal correctness of the commissions' actions. In *Wenger* and *Spruance,* however, it is clear that it is the California Supreme Court, and not the California Commission, which makes the final decision to censure, retire or remove the accused judge, although this power is contingent upon the recommendation of the Commission. In Nevada, by contrast, the Commission may itself order the censure, removal or retirement of a judge (ARJD 30(2)); the judge *may* then appeal this final decision to this court. Consequently, even though an attorney general may be utilized in California as the Dissent contends, the conflicts of interest created by an attorney general's acting in multiple roles are far more significant in Nevada where, unlike California, the attorney general has been serving as an investigator, a prosecutor, *and as counsel for the very tribunal empowered to issue a final decision respecting judicial misconduct.* As the *Spruance* opinion notes, the California Commission appears before the California ***902** Supreme Court, the final arbiter of all judicial discipline, in an adversarial role, and the examiners-which may be attorneys general-appear "merely as counsel to [the] respondent" Commission. Further, although the *Wenger* and *Spruance* opinions show that an examiner, who may be an attorney general, may act as a presenter of evidence before the Commission, and as counsel for the Commission before the California Supreme Court, the opinions do not provide specific support for the proposition that deputy attorneys general may act in these two roles at the same time.

A similar analysis applies to the two North Carolina cases cited in the Dissent. *See* *In re Hardy,* 294 N.C. 90, 240 S.E.2d 367 (1978); *In re Stuhl,* 292 N.C. 379, 233 S.E.2d 562 (1977). In *Hardy,* a deputy attorney general was utilized to present charges to a judicial ***931** discipline commission. In *Stuhl,* a deputy attorney general represented the judicial discipline commission in an adversary proceeding. However, a careful reading of these cases reveals that North Carolina follows the same scheme to which California adheres, namely, the judicial discipline commission in the cited cases merely recommends discipline, and the actual order to discipline is entered by the state supreme court. Thus, the cases are not applicable to the instant case for the same reasons discussed above.

The Dissent also protests that no actual conflicts of interest have been established or identified as a result of the Attorney General's staff having acted as investigator, prosecutor, legal counsel to the Commission, and appellate advocate for the Commission in this matter. The Dissent perceives no evidence contradicting the averments of Special Deputy Attorney General Campbell and Assistant Attorney General Nielsen that Campbell was not in any way connected with or beholden to the Attorney General's Office. Much more than a mere "fanciful scenario," however, supports the Majority's conclusions. For example, a cursory review of the Commission's minutes, Campbell's billings, and the affidavits, statements, and exhibits discloses that Campbell was deputized as a member of the Attorney General's staff, is contractually bound to serve "at the pleasure of the Attorney General" and is contractually bound to "report regularly to the Attorney General concerning the status of [this] case." *See* *Whitehead v. Comm'n on Jud. Discipline,* 110 Nev. 380, ----, 873 P.2d 946, 954 (1994).

The Dissent also brands as "mere speculation" the Majority's concern that the Attorney General's office could present cases before the very judges her office is investigating or supervising.[FN5] ***903** The case of Judge D---, however, outlined in the Majority Opinion in *Whitehead II,* presents precisely such a scenario. Judge D--- was placed under the supervision of the Attorney General's office which had the power to conduct ongoing "follow-up examinations" including contacting witnesses. *Id.,* 110 Nev. at ----, 873 P.2d at 970. This ad hoc probationary scheme obviously creates at a minimum the appearance of impropriety, if not an inference of actual bias.

FN5. *United States v. Hastings,* 681 F.2d 706, 710-11 (11 Cir.1982), *cert. denied,* 459

> U.S. 1203, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1983), cited in the Dissent, is inapposite. The judge in *Hastings* sought judicial *immunity* from a federal criminal prosecution. The Majority Opinion obviously does not immunize judges from judicial discipline-it merely concludes that the Attorney General may not act as legal advisor or prosecutor in judicial discipline matters. Moreover, the Majority Opinion expressly states that the "Attorney General is constitutionally authorized to pursue *criminal* investigations and prosecutions of judges or justices."

The Pennsylvania Supreme Court was faced with a similar situation. *See In Interest of McFall*, 533 Pa. 24, 617 A.2d 707 (1992). *McFall* involved appeals by some twenty-nine criminal defendants who charged that they had been denied their right to a fair and impartial tribunal because the judge who presided over their trials was assisting in an FBI investigation. *Id.* 617 A.2d at 711. The FBI had previously caught the judge accepting a monetary gift from a potential litigant and had obtained the judge's cooperation in its investigation by promising to tell any other investigating or prosecuting body of the judge's full cooperation. *Id.* The Pennsylvania Supreme Court affirmed the intermediate appellate court's order granting all twenty-nine criminal defendants a new trial because the defendants' "rights to an impartial tribunal [had] been trampled upon" and because the court concluded "that the appearance of impropriety compels us to affirm the grant of new proceedings in view of the blatant potential conflict of interest of the trial judge." *Id.* at 712. The court went on to note "[o]ne could reasonably conclude that, under the circumstances, [the judge]'s cooperation with the United States Attorney's office cast her in the role of a confederate of the prosecutors in the appellees' cases." *Id.* at 713.

Although the Dissent perceives this type of potential conflict of interest to be a mere "specter," it should be noted that there are two motions in criminal cases currently pending before this court in which the appellants seek to discover whether Judge D--- or any other judge who is or has been subject to informal probation under the supervision of ***932** the Attorney General's office presided over any portion of their criminal trials. Obviously if these appellants were prosecuted by the Attorney General's office before judges like Judge D--- who were simultaneously being "supervised" by the Attorney General's office-this court would have to consider whether those appellants, like the appellants in ***904** the *McFall* case, were denied a fair and impartial tribunal. The instant Majority Opinion seeks to avoid having this court placed in the unenviable position that the Pennsylvania Supreme Court found itself, *i.e.*, having to order new proceedings in dozens of criminal cases because of the appearance that the judge who presided over those cases might be beholden to the prosecution.

Finally, the Dissent raises First Amendment concerns as a kind of all-purpose panacea against the Majority's desire to appoint a special master to investigate the cause of leaks of confidential information in derogation of Petitioner's constitutional rights. Although this expression of concern with the First Amendment might be an effective strategy for swaying public opinion, it has no legitimate legal basis.

Put quite simply, the First Amendment does not stand for the proposition that one who is under a duty not to reveal confidential information may breach this duty with impunity. *See, e.g., Landmark Communication, Inc. v. Virginia*, 435 U.S. 829, 837 n. 9, 98 S.Ct. 1535, 1540 n. 9, 56 L.Ed.2d 1 (1978) (statute imposing criminal liability for breach of confidential judicial discipline proceedings might well be constitutional under the First Amendment if it is applicable only to direct participants in a judicial discipline inquiry); *United States v. Richey*, 924 F.2d 857 (9th Cir.1991) (government may properly limit speech when compelling government interests out-weigh free expression interests of speaker); *Kamasinski v. Judicial Review Council*, 797 F.Supp. 1083 (D.Conn.1992) (state's interest in prohibiting disclosure prior to determination of probable cause is sufficiently compelling to survive the strictest First Amendment scrutiny).[FN6]

> FN6. *See also Kamasinski v. Judicial Review Council*, 843 F.Supp. 811 (D.Conn.1994); *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580 (D.C.Ct.App.1985) ("[a] defendant is not released from an obligation of confidence merely because the information learned constitutes a matter of legitimate public interest."); *Cherne Indus., Inc. v. Grounds &*

> *Assoc.*, 278 N.W.2d 81, 94 (Minn.1979) ("a former employee's use of confidential information or trade secrets of his employer in violation of a contractual or fiduciary duty is not protected by the First Amendment").

Moreover, a duty of confidentiality can be lawfully imposed and enforced where a breach of confidentiality is in derogation of the constitutional rights of the party meant to be protected thereby. As the United States Supreme Court stated in *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522-23, 16 L.Ed.2d 600 (1966):

The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted ***905** to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only *subject to regulation, but is highly censurable and worthy of disciplinary measures.* [[FN7]

> FN7. It should be noted that the decision of the United States Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991), is not contrary authority to our decision on this issue. The *Gentile* decision involved attorney speech which was censured, not because it implicated the breach of a duty of confidentiality, but because it was substantially likely to prejudice materially an adjudicative proceeding. Moreover, a majority of the Supreme Court in *Gentile* specifically held that the proscription of speech there involved did satisfy the First Amendment. The rule was held unconstitutional as applied on vagueness grounds only.

(Emphasis added.)

If collaboration between counsel and the press is "subject to regulation ... highly censurable and worthy of disciplinary measures" how much more would collaboration between a sitting judge and the press be worthy of such censure? *Whitehead I* ruled that the Judicial Discipline Commission constitutes a "Court of Judicial Performance and ***933** Qualifications" (despite the Dissent's objection to this ruling, it is obvious, given the Commission's authority to issue a final order censuring, removing or retiring a judge, that the Commission members are very real "judges" over petitioner). I need not belabor the obvious point that a judge, by virtue of his or her office, is prohibited from exercising certain First Amendment rights otherwise enjoyed by the general citizenry, namely, the right to comment on a pending case, even though that case may clearly implicate matters of great public concern. *See* Nevada Code of Judicial Conduct, Canon 3B, § 9. Judges are certainly not entitled to divulge confidential information learned in the course of their official duties; and they may be subject to disqualification, at the very least, for making public statements indicative of bias against a litigant.

In this regard, it must be remembered that the tone and effect of the news coverage of this matter has clearly been indicative of hostility towards Petitioner on the part of whomever made the leaks to the press. If such party is a member of the Judicial Discipline Commission who will sit in judgment over Petitioner, it cannot be expected that Petitioner will be given a fair hearing. Accordingly, the appointment of a master is necessary to protect Petitioner's constitutional rights to an impartial tribunal.

ATTORNEY GENERAL DEL PAPA'S DISQUALIFYING MISCONDUCT IN THIS CASE

Even if the Dissent were correct in saying that there are no constitutional or conflict-of-interest bars to the Attorney General's ***906** continuing to act in the role of legal advisor and prosecutor in this case, I believe that there is another independent basis for disqualification of Attorney General Del Papa in the *Whitehead* case. Attorney General Del Papa should not be permitted to act as counsel in any capacity in this case, because she has displayed such animus, such a publicly-proclaimed antipathy toward the "defendant" judge in this case that she has rendered herself and her office

unsuitable and incapacitated to serve as a prosecutorial advocate in the judicial discipline case involving Judge Whitehead. The Attorney General appears to have forgotten that her "primary duty is not to convict, but to see that justice is done" and that "cases must be tried in the courtroom rather than in the media." *Williams v. State,* 103 Nev. 106, 110, 111, 734 P.2d 700, 703 (citations omitted). The Attorney General's running public comments on this case display a continuous effort to influence public opinion against Judge Whitehead. Not only is this conduct ethically unacceptable, it is in direct violation of ARJD 8.[FN8] ARJD 8 is a very clear and explicit court rule which has been flouted by the Attorney General. This rule expressly commands that all counsel in judicial discipline matters, "at all times," refrain from engaging in " *any private or public discussion*" which relates to the merits of any judicial discipline matter or which might " *prejudice a [judge's] reputation or rights to due process.*" (Emphasis added.)

> FN8. ARJD 8 provides, in pertinent part, that Commission counsel "must refrain from any public or private discussion about the merits of any pending or impending matter, or discussion which might otherwise prejudice a [judge's] reputation or rights to due process."

For most of the time that this case has been pending the Attorney General has been engaging in "public discussion[s]" of one kind or another about the case, saying over and over again that Judge Whitehead was charged with "serious misconduct" and issuing public statements that rather clearly violate ARJD 8. Rather than attempting to catalogue the various violations of ARJD 8, I will rely in making my point on one very obvious and, may I say, flagrant example of the manner in which Attorney General Del Papa has defied this court rule. The Attorney General's press release of January 31, 1994, epitomizes her refusal to abide by the rules. In this statewide press release, issued to all public news media sources, the Attorney General publicly accuses the judge of lying ("misrepresentation"), slander ("smearing others") and tampering with the justice system ("going around and above the law"). [[[FN9] ***934** The Attorney General has ***907** waged a public opinion war against Judge Whitehead and in public statements and press releases has repeatedly attempted to "try her case" in the media. The January 31 release is probably the worst and most undeniable example of the Attorney General's misconduct.

> FN9. The actual public charges made by Attorney General Del Papa against Judge Whitehead are that (1) the judge was guilty in this case of "gross misrepresentations of fact," (2) that he was guilty of "smearing others in order to try desperately to save himself," (3) that the judge had gone "around and above the law, and (4) that "even Judge Whitehead was not above the law."

Presumably the Attorney General is aware of the contents of ARJD 8 and aware that she is obliged to refrain from such "public ... discussion[s]" and that she must not do or say anything that will "prejudice a [judge's] reputation or rights to due process." Can anyone doubt that publicly calling a judge a liar or slanderer or publicly accusing a judge of going "around and above the law" does not "prejudice" the judge's reputation-especially when such statements go to every news source in the state and *are made by none other than the Attorney General of the State of Nevada?* Can anyone doubt that Judge Whitehead's "due process rights" before the Commission have not been damaged by the Attorney General's conduct? It may be that notwithstanding the history of this case there is some possibility that Judge Whitehead might somehow be afforded due process in the future, I do not know; but one thing is clear and that is that, given the damage that Attorney General Del Papa has done to Judge Whitehead's reputation and the prejudicial effect that damage necessarily has had on Judge Whitehead's due process rights, we cannot, entirely apart from any consideration of constitutional incapacity or conflict of interest, allow Attorney General Del Papa to continue to act in any capacity in this case. The Attorney General's misconduct, by itself, and independent of the two grounds stated in the Majority Opinion, requires that she be removed from any contact with this case at once.

In *Collier v. Legakes,* 98 Nev. 307, 646 P.2d 1219 (1982), we recognized that the "disqualification of a prosecutor's office rests with the sound discretion of the district court" and that "[I]n exercising that

discretion, [the court] should consider all the facts and circumstances and determine whether the prosecutorial function could be carried out impartially...." *Id.* at 309-10, 646 P.2d at 1220 (citations omitted). I cannot imagine how the Attorney General, who has also been acting as both Judge Whitehead's prosecutor and the Judicial Commission's legal counsel, can, given the pattern of her manner of handling this case and the inexcusable issuance of the press release of January 31, 1994, possibly be able to carry out the prosecutorial function "impartially" in this case. I do not see how it can be denied that the Attorney General is clearly unable to act "impartially" with ***908** regard to a man whom she called "desperate" and whom she has publicly branded as a liar and slanderer who is trying to escape his just deserts by going "around and above the law." In my opinion, her flagrant violation of court rules, her public comments on a pending judicial discipline case, and her prejudicial public statements against Judge Whitehead all combine to deny Judge Whitehead any possibility of receiving fair treatment and due process for so long as Attorney General Del Papa, her staff or her special prosecutor have anything to do with this case. I would disqualify her on this ground alone.

I am not ready at this time to pass judgment on what penalties should be meted out as a result of the Attorney General's flouting of ARJD 8, but I am convinced that her actions relative to this case disqualify her from proceeding another day as the prosecutor or in any other capacity on this case.

SHEARING, Justice, dissenting:
I do not agree that the Attorney General, the Assistant Attorney General or the special counsel hired by the Nevada Commission on Judicial Discipline should be disqualified from appearing in this proceeding or any disciplinary proceeding now pending before the Commission. The grounds which the majority and the concurrence allege require the disqualification of the Attorney General are (1) violation of the separation of powers doctrine, (2) conflicts of interest and (3) misconduct amounting to violation of due process. None of these grounds is supported in law or fact.

***935** *SEPARATION OF POWERS*

There is no basis in the Nevada Constitution, the Nevada statutes or the rules adopted by this court for holding that the Nevada Commission on Judicial Discipline lacks the authority to seek the assistance of the Attorney General's office for legal advice and representation. On the contrary, the Commission is specifically authorized to do so. The legislature enacted NRS 1.450(2) directing the Attorney General to provide, upon request of the Judicial Discipline Commission, legal counsel in any investigation or proceeding of the Commission. The majority would have this statute declared unconstitutional in violation of the doctrine of separation of powers.

Article 3, Section 1 of the Constitution of the State of Nevada provides:

Three separate departments; separation of powers. The powers of the Government of the State of Nevada shall be divided into three separate departments,-the Legislative,-the Executive and the Judicial; and no persons ***909** charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted.

There is no dispute that Nevada has adopted the traditional separation of powers doctrine which provides the checks and balances necessary to prevent any one branch of government from becoming all-powerful and tyrannical. Each branch has the exclusive authority to exercise the powers delegated to it. Legislative power is the power to set the policies of the state through its enactments and the allocation of funds. *See Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). Executive power is the power to enforce and implement the policies of the state as set forth by the legislature. *Id.* Judicial power is the power to interpret legislation, to hear and determine justiciable controversies and to enforce any valid judgment, decree or order. *Id.*

This does not mean that there is a wall between any of the branches preventing them from interacting. On the contrary, the structure of government is such that the branches must interact. That is what keeps any one branch from dominating the government. In The Federalist No. 47,

responding to criticism that there was not sufficient separation of powers in the proposed federal constitution, James Madison stated:

If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom [separation of powers] has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.

More recently, the United States Supreme Court has stated, in *Morrison v. Olson*, that

[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." We have not hesitated to invalidate provisions of law which violate this principle. On the other hand, we have never held that the Constitution requires that the three branches of Government "operate with absolute independence." In the often-quoted words of Justice Jackson:

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.***910*** It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

487 U.S. 654, 693-94, 108 S.Ct. 2597, 2620, 101 L.Ed.2d 569 (1988) (citations omitted).

And in *Buckley v. Valeo*, the United States Supreme Court stated:

[I]t is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government.... The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing ****936*** off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.

424 U.S. 1, 121, 96 S.Ct. 612, 683, 46 L.Ed.2d 659 (1975) (per curiam).

Neither does the doctrine of separation of powers mean that the legislature or the constitution may not assign fact-finding functions in disputes to agencies in branches of government other than the judiciary. There are numerous state agencies which perform quasi-judicial functions, agencies such as the State Industrial Insurance System, the Board of Medical Examiners, Board of Parole Commissioners and Real Estate Commission, to name a few. The adjudicatory decisions made by these agencies affect the fundamental rights of individuals, and absent an appeal to the courts, are final, with the full force and effect of law. The majority states "A member of the executive branch is simply not constitutionally permitted to act in a judicial capacity." Fortunately, the majority is wrong. If the majority's implication that agency adjudication violates the separation of powers doctrine were correct, the overwhelming majority of government would be unconstitutional.

It has long been settled that the exercise of duties that are judicial in nature is not necessarily an exercise of the judicial power of the state and therefore does not violate the separation of powers doctrine. In *Sawyer v. Dooley*, 21 Nev. 390, 396, 32 P. 437, 439 (1893), this court stated regarding Article 3, Section 1 of the Nevada Constitution:

These departments are each charged by other parts of the constitution with certain duties and functions, and it is to these that the prohibition just quoted refers. For instance, the governor or the judiciary shall not be members of the legislature, nor shall they make the laws under which we ***911*** must live. But this is quite a different thing from saying that no member of the executive or judicial departments shall exercise powers in their nature legislative, but which are not particularly charged by the constitution upon the legislative department; such as where the board of commissioners for the insane makes rules for the management of the asylum, or a court establishes rules for the transaction

of the business coming before it. It would be impossible to administer the state government were the officers not permitted and required, in many instances, to discharge duties in their nature judicial, in that they must exercise judgment and discretion in determining the facts concerning which they are called upon to act, and in construing the laws applicable to them. Hence we see no constitutional objection to members of the executive branch being charged with the duty of assessing property, or of acting upon the board of equalization, for neither of these functions have been, either expressly or impliedly, placed by the constitution upon either of the other departments; for certainly, although in equalizing valuations a board may act in a judicial capacity, the constitution nowhere contemplates that the judicial department, as organized by article 6, shall discharge that duty.

Thus, it is clear that not every exercise of a function judicial in nature constitutes an exercise of judicial power, which power the constitution states is not to be performed by other branches of government. In *Bergman v. Kearney,* 241 F. 884, 898 (D.Nev.1917), the court stated: "Judicial power, in the constitutional sense, is something more than authority to hear and determine; it includes the power to decide finally and conclusively, and also power to carry its determination into effect." This power does not rest in any agency or commission, unless the agency or commission or the party before it, agrees to accept the result with resort to the courts. The Nevada Constitution makes clear that the judicial power of this state rests exclusively in the courts. Article 6, Section 1 states:

Judicial power vested in court system. The judicial power of this State shall be vested in a court system, comprising a Supreme Court, District Courts, and Justices of the Peace. The Legislature may also establish, as part of the system, Courts for municipal purposes only in incorporated cities and towns.

***937** What is now Article 6, Section 21 of the Nevada Constitution, entitled *Commission on Judicial Discipline,* began as a proposed Constitutional amendment in the 1973 legislature. Following the ***912** procedure for constitutional amendment established by Article 16 of the Nevada Constitution, the elected representatives of the state voted in 1973 and again in 1975 in favor of the proposed amendment. Finally, in November of 1976 the amendment was ratified by direct vote of the people.

Prior to 1976 the people of Nevada had no effective remedy for judicial misconduct falling short of criminal behavior. The traditional checks and balances in our constitutional organization were not adequate to curb the abuses of power by members of the judicial branch. Judicial misconduct was, by and large, entirely beyond the jurisdiction of the executive branch, the legislative branch and all existing administrative agencies. Only the justices of the Supreme Court could impose discipline on judges of the state.

That the people of Nevada believed that the Supreme Court had not, and could not, effectively police judicial misconduct is not surprising. Judges and justices, following their constitutional mandate, hear and determine questions in controversy that are properly brought before them. *See Galloway v. Truesdell,* 83 Nev. 13, 20, 422 P.2d 237, 242 (1967). In carrying out their duties, judges, unlike legislators and especially unlike executive branch officials, do not ordinarily have occasion to investigate complaints of misconduct, much less to prosecute after determining that the complaints have merit. In striking down a statute which placed the judges in a position of investigator, this court warned, "Centuries of common law tradition warn us with echoing impressiveness that this is not a judge's work." 83 Nev. at 29, 422 P.2d at 248.

Furthermore, in a small state like Nevada, the justices and judges usually know one another personally. Thus, except in the case of the rare errant judge without strong personal ties of friendship with the judicial community, it was nearly psychologically impossible for the justices to adopt, on their own initiative, the role of investigator and prosecutor of judicial misconduct. The result was a dissatisfied public and the adoption of Article 6, Section 21 of the Nevada Constitution.

In adopting and ratifying Article 6, Section 21, the people of Nevada clearly intended to *remove* the power and responsibility for disciplining noncriminal judicial misconduct from the judiciary. In so doing, they clearly intended to leave the judiciary with less power and greater accountability. The one difference in the Nevada Commission on Judicial Discipline from most other agencies is that it was

designed to have greater independence. The members are not selected by any one branch of government. The Governor appoints three members, the Supreme Court ***913*** appoints two members and the Board of Governors of the State Bar appoints two members. In addition, if the state bar ceases to exist as a public corporation, the legislature must determine how the attorney members are appointed.

In the *Whitehead* opinions issued thus far, the majority of this court argues that this could not have been the intent of the people because the provision creating the Judicial Discipline Commission was placed in Article 6 of the Nevada Constitution entitled "Judicial Department." Therefore, according to the majority's reasoning, because of the provision's placement and because the Commission also has some "quasi-judicial" powers, the Commission must be a court exercising the judicial power vested in the court system by Article 6, Section 1.

This analysis does not survive a careful review of Article 6, which contains twenty-one sections ranging in title from "Judicial Power vested in court system" to "One form of civil action" to "Fees or perquisites of judicial officers." First, when the voters added section 21 to the Constitution, Section 1 of Article 6, which vests the judicial power in the courts, was *not* amended to include the Judicial Discipline Commission in the list of courts authorized to exercise the judicial power of the state. This should be dispositive of the issue.

Furthermore, the contents of the other sections make clear that not all powers created in Article 6 relate to the exercise of ****938*** judicial power. What the twenty-one sections have in common is that each section impacts in some way on the judicial branch of government. For example, Section 15 grants power to the legislature to fix the salaries of state judges and justices. It makes no more sense to state that the Judicial Discipline Commission is part of the judicial branch of government because it receives its powers from a section placed in Article 6 than it does to say that the legislature is part of the judicial branch of government because it too is the recipient of powers granted by a section of Article 6. Constitutional law does not depend upon principles of legislative indexing.

This court has recognized that the attorneys of this state are an integral part of Article 6. Such recognition is embodied in Supreme Court Rule 39, which provides:

Inherent powers of courts. Attorneys being court officers and essential aids in the administration of justice, the government of the legal profession is a judicial function. Authority to admit to practice and to discipline is inherent and exclusive in the courts. The supreme court rules set forth in this Part III are the exclusive rules for the governing of the legal profession in Nevada.

914 Yet no one has suggested that because attorneys are officers of the court, they are part of the judicial branch and are therefore disqualified from representing or serving in the executive or legislative branches of government.

The judicial power, for constitutional purposes, can be found where it was placed by Article 6, Section 1 when the Nevada Constitution was ratified in 1864: in a "court system, comprising a Supreme Court, District Courts, and Justices of the Peace...."

Justice Springer, in his concurring opinion, offers another reason why he believes that Article 6, Section 21 must be interpreted as placing the Judicial Discipline Commission in the judicial branch of government: if it were not so read, Article 6, Section 21 would violate the separation of powers clause, and thus, by implication, be unconstitutional. In support of this proposition, Justice Springer cites *Dunphy v. Sheehan*, 92 Nev. 259, 266, 549 P.2d 332, 336-37 (1976).

There are at least three problems with this analysis. First, it is an oxymoron to state that a duly-ratified constitutional amendment can, at the time of its passage, violate that same constitution. It is one of the best-established principles of constitutional interpretation that in the case of a clear conflict between a constitutional amendment and another constitutional provision already existing at the time the amendment is ratified, the amendment, being the later expression of will of the lawmaker, must prevail. *Schick v. United States*, 195 U.S. 65, 68-69, 24 S.Ct. 826, 826-27, 49 L.Ed. 99 (1904). Thus, had the language of Section 21 placed the Judicial Discipline Commission entirely within the executive

or legislative branch, neither Article 3, Section 1, nor any then-existing constitutional provision could be held to invalidate the new amendment.

Second, the court in *Dunphy* merely stated, in dicta no less, that the *promulgation* of a Code of Judicial Ethics, not the *enforcement* of such a code, is "within the inherent power of the judicial department of this state." 92 Nev. at 266, 549 P.2d at 336-37 (1976). Since promulgation of the Code of Judicial Ethics remains today in the judicial branch of government, the decision is irrelevant regarding the creation of the Judicial Discipline Commission.

Finally, the *Dunphy* case was decided April 29, 1976, several months before Article 6, Section 21 was ratified in the November 1976 elections. Thus, even if *Dunphy* could be read to immunize the judiciary from judicial disciplinary proceedings from non-judicial bodies, the case would have been explicitly overruled by the voters as of November 1976.

Justice Springer also seems to believe that there is an inconsistency between the view that the Commission does not exercise ***915** the judicial powers of the State and the opinion in *Goldman v. Nevada Comm'n on Judicial Discipline*, 108 Nev. 251, 830 P.2d 107 (1992). There is no inconsistency whatsoever. The issue in *Goldman* was the scope of review, not whether judicial power rested in the Commission, and not whether the Commission**939 was a "Court of Judicial Performance and Qualifications." *Goldman* held that this court must accord Commission findings a deferential standard of review. This is no different than the deference this court must grant other state agencies by statute. *See* NRS 233B.135.[FN1] Additionally, there is no dispute that the Commission has broad power to discipline judges and that its orders are final unless appealed to this court. The same is true of most state agencies. Thus, Justice Springer's discussion regarding Commissioners in other states and the fact that they only have power to make recommendations to the court rather than have final decision-making power is irrelevant to the instant case.

> FN1. This court held in *Goldman* that it would not undertake *de novo*-or independent-review of Commission decisions. 108 Nev. at 267, 830 P.2d at 117-18. In this respect, we adopted the same deferential type of review that we accord other agencies.
>
> It is true that the prosecutor before the Commission, like the prosecutor before the Board of Medical Examiners (the Board), bears a higher burden than prosecutors in most agency determinations. In most agency determinations the burden below is substantial evidence. *See* NRS 233B.135. In professional discipline cases, on the other hand, the burden imposed below is higher, and we review those cases to determine whether the evidence presented at the hearing was sufficient to establish, by clear and convincing evidence, that the alleged violations had been proven. *See Goldman*, 108 Nev. at 264, 830 P.2d at 115 (stating that burden of proof before commission is clear and convincing evidence); *see also* NRS 630.352(1) (requiring the Board to find violations by clear and convincing evidence before sanctioning a health provider).
>
> Although we review the determinations of the Board and the Commission in accordance with the higher standards imposed on them by law and court rule, the fact that we do not engage in independent review is evidence that our review is deferential.

Specifically, *Goldman* does not support the sweeping proposition for which it is cited in *Whitehead I* that "the Commission is not to be regarded merely as an administrative agency but as a true 'Court of Judicial Performance and Qualifications.' " *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 128, 161 n. 25, 869 P.2d 795, 816 n. 25 (1994). As stated, this court in *Goldman* merely held that the Judicial Discipline Commission is accorded the same deferential standard of review as any other state agency.

Since the Judicial Discipline Commission does not exercise the judicial power of the state, certainly the Commission's attorney would not be exercising that power, even if providing legal advice could properly be equated with serving as an "ex facto member of the Commission."

*916 Furthermore, it can be stated as a general rule that the attorney providing legal advice does not take on the character, for constitutional separation of powers purposes, of the client being served. That is why the legislature could, without violating the constitution, order the Attorney General to represent any and all government officers, officials, agencies and even judges and legislators. *See* NRS 41.0339. In all branches of government, decision makers, and not their legal advisors, take responsibility for the decisions they make. Contrary to the majority's implication, there is nothing sinister about the Commission making decisions either consistent or inconsistent with the advice of an attorney from the Office of the Attorney General.

CONFLICTS OF INTEREST

The majority of this court also holds that the Attorney General is disqualified from representing the Commission because of conflicts of interest. The majority does not make clear under which constitutional provision it finds a conflict of interest which operates to nullify NRS 1.450(2). Some of the majority's language suggests that the institutional position of the Attorney General is so rife with conflicts of interest with respect to the judicial branch of government that providing legal advice to the Commission violates the separation of powers clause. Other language suggests that in some way the petitioner's due process rights will be violated if the Attorney General represents the Commission. Both contentions rest, not on any actual conflict of interest evidenced in the instant case, but on specters of potential conflicts and misuses of power, as well as criminal activity.

**940 The general rule regarding conflicts of interests for attorneys is stated in Supreme Court Rule 157, which provides as follows:

Rule 157. Conflict of interest; General rule.

1. A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(a) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(b) Each client consents, preferably in writing, after consultation.

2. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(a) The lawyer reasonably believes the representation will not be adversely affected; and

*917 (b) The client consents, preferably in writing, after consultation.

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

This rule would have some bearing on the majority's allegation that there is a conflict arising from the fact that the Attorney General is official counsel for the judges and justices of the state. In the event that a judge involved in disciplinary proceedings were in need of legal services, it is quite possible that the Attorney General would not be able to form a reasonable belief that the representation would not be adversely affected, mandating disqualification under SCR 157. The solution to this conflict, which can hardly be characterized as one of constitutional dimension, is simple and straightforward. Under NRS 41.03435, the Attorney General would, with the approval of the State Board of Examiners, employ an attorney from the private sector to act as special counsel for the judge or justice.

Supreme Court Rule 157 does not apply to disqualify the Attorney General from providing legal advice to the Commission under any of the conflicts of interest alleged by the majority. Yet, despite the absence of a constitutional violation, the majority would nullify an act of the legislature directing the

Attorney General to represent the Commission on the basis of hypothetical conflicts. This court has no general authority to strike down an act of the legislature merely because it sees potential or actual conflicts of interest. In *State of Nevada v. Doron*, 5 Nev. 399 (1870) this court stated:

[E]very statute is to be upheld, unless plainly and without reasonable doubt in conflict with the constitution; [and] the legislature has power to pass any law, not positively prohibited, or by clear implication forbidden by the constitution....

Both Judge Guy in his concurrence in *Whitehead I* and the majority in this opinion rest their arguments on the assumption that Attorneys General will be unable to resist the temptation to engage in misconduct with respect to judges. The implication is that allowing NRS 1.450(2) to function as it has since it was enacted by the legislature in 1977 will inevitably lead to an epidemic of politically-motivated persecutions of judges. This fanciful scenario may be possible, but does not warrant legal action unless there is some actual evidence of its occurring. Government operates on the principle that its officers and employees are persons of good will and honesty who not only ***918** follow the law, but their professional ethical obligations. We have been presented with no evidence that the executive officials have not been acting with professional integrity and ethics.

The majority view also ignores the very powerful disincentives to such conduct. An Attorney General or any attorney on the Attorney General's staff who initiated a prosecution motivated by "personal, partisan or political gain," or who attempted to hold a judge "hostage" to affect the outcome of a case, would be subject to prosecution under one or more of the following criminal statutes:

NRS 197.110	Misconduct of public officer-a gross misdemeanor
NRS 197.170	Extortion of public officer-a felony
NRS 197.200(2)(b)	Oppression under color of office-a gross misdemeanor
NRS 199.300(1)(b)	Intimidating public officer, public employee, juror, referee, arbitrator, appraiser, assessor or similar person-a gross misdemeanor
NRS 199.310	Malicious prosecution-a felony or misdemeanor
NRS 199.320	Inducing lawsuit-a misdemeanor
NRS 200.510	Criminal libel-a gross misdemeanor
NRS 200.560	Threatening to publish libel-a gross misdemeanor
NRS 205.320 (4) & (5)	Extortion-a felony

****941** If criminal prosecution were not enough of a deterrent, the violator could also be charged with the violation of SCR 101, 174, 179, 181, 201 and 203, which, if found to be true, would almost

certainly lead to disbarment under SCR 102. The law is well-equipped to deal with the extreme conduct that the majority seems to believe NRS 1.450(2) makes imminent.

The majority's argument, however, suffers from a more serious defect than the fear being out of proportion to the danger. The argument contains no limiting principle. It could be said of every district attorney in Nevada that he or she has the power to bring about prosecution of judges, of legislators and of private citizens for political reasons or to influence decisions. In fact, all government officials with significant power, including judges and justices, are in a position to attempt to abuse that power if they are so inclined. That does not justify this court in prohibiting, as a prophylactic measure, an official from executing the functions assigned to it by law. On the contrary, even if there are public officials who have abused their powers, they could only be kept from their assigned duties after procedures which ensure that the officials have received due process of law.

***919** The majority would do well to heed the words of Justice Frankfurter in his concurrence in *In Re Groban's Petition*, 352 U.S. 330, 335-37, 77 S.Ct. 510, 514-15, 1 L.Ed.2d 376 (1957):

To whatever extent history may confirm Lord Acton's dictum that power tends to corrupt, such a doctrine of fear can hardly serve as a test, under the Due Process Clause of the Fourteenth Amendment, of a particular exercise of a State's legislative power. And so, the constitutionality of a particular statute, expressive of a State's view of desirable policy for dealing with one of the rudimentary concerns of society-the prevention of fires and the ascertainment of their causes-and directed towards a particular situation, cannot be determined by deriving a troupe of hobgoblins from the assumption that such a particularized exercise of power would justify an unlimited, abusive exercise of power.

....

We are admonished from time to time not to adjudicate on the basis of fear of foreign totalitarianism. Equally so should we not be guided in the exercise of our reviewing power over legislation by fear of totalitarianism in our own country.

It is disingenuous for the majority to suggest that it is a conflict for the Attorney General to be privy to confidential information regarding judges and justices by virtue of representation of the Nevada Commission on Judicial Discipline while the Attorney General is not only free, but obligated, under NRS 41.0338, to represent judges in legal proceedings. The very same considerations apply in either scenario. When the Attorney General's office represents judges and justices in litigation, the deputies assigned are also in a position to learn privileged and confidential information. The specter presented of judges held "hostage" and basically ***942** subjected to extortion or blackmail is possible, but the mere speculation that such could occur is no basis for disqualification. A judge is conceivably subject to being held "hostage" and subject to extortion or blackmail by anyone-an attorney, a litigant, a family member or a total stranger.

When similar arguments were raised in the federal courts against allowing the Attorney General to prosecute judges criminally, the Eleventh Circuit Court of Appeals replied as follows:

[The judge] contends that the courts would be subject to intolerable pressure from the executive if executive officers were allowed to prosecute active federal judges for acts involving the exercise of their judicial power.

***920** Appellant is of course correct that the independence of the judiciary from external pressures is a highly valued element of our constitutional system. That independence is already protected by *specific* provisions in the Constitution.... Additionally, judges enjoy the same protection as do all citizens from vindictive prosecution by officers of the executive branch. We are not persuaded that the proposed rule of absolute judicial immunity from federal criminal prosecution is a necessary complement to the Constitution's explicit protections. Indeed, the miniscule increment in judicial independence that might be derived from the proposed rule would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high that he is above the law.

(Citations and footnotes omitted). In the instant case, the hypothetical potential for abuses must also give way to the competing interest of assuring effective means of preventing abuse of judicial power.

In addition, the alleged conflict between giving legal advice to the Commission and also acting as prosecutor before the Commission has long since been resolved by this court. In *Laman v. Nevada R.E. Adv. Commission*, 95 Nev. 50, 56-57, 589 P.2d 166, 170 (1979), this court stated:

Appellant contends that there was an improper commingling of judicial and prosecutorial functions during the Commission proceedings in that a Deputy Attorney General participated by advising the Commission on evidentiary matters, while his subordinate in the same office was engaged in prosecuting appellant. This contention, unsupported by case authority, is adequately answered by this court's ruling in *Rudin v. Nevada Real Estate Advisory Commission, supra*, 86 Nev. [562] at 565, 471 P.2d [658] at 660 [1970]:

It is not uncommon in administrative law to find the combination of investigating, prosecuting and judging functions. As a general proposition, such a combination, standing alone, does not constitute a denial of due process. 2 Davis, Administrative Law Treatise § 13.02. Such combination of functions possesses the potential for unfairness, but unfairness is not its inevitable consequence. In the matter at hand that combination did not exist. The investigation was conducted by investigators, the prosecution, by counsel for the Commission, and the decision was made by the Commission itself. There is nothing to suggest that the prosecutor decided the case.

***921** To the extent that federal due process is said to be implicated, even if we assume that the Attorney General performed the roles of investigator, prosecutor, legal advisor and even adjudicator in this case, [FN2] the United States Supreme Court has answered clearly. In *Withrow v. Larkin*, 421 U.S. 35, 47-53, 95 S.Ct. 1456, 1464-68, 43 L.Ed.2d 712 (1975), the court stated:

FN2. This assumption is contradicted by the respondents' affidavits.

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring***943** investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Very similar claims have been squarely rejected in prior decisions of this Court.

....

More recently we have sustained against due process objection a system in which a Social Security examiner has responsibility for developing the facts and making a decision as to disability claims, and observed that the challenge to this combination of functions "assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson v. Perales*, 402 U.S. 389, 410 [91 S.Ct. 1420, 1432, 28 L.Ed.2d 842] (1971).

That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely. Within the Federal Government itself, Congress has addressed the issue in several different ways, providing for varying degrees of separation from complete separation of functions to virtually none at all. For the generality of agencies, Congress has been content with § 5

of the Administrative Procedure Act, 5 U.S.C. § 554(d), which provides ***922** that no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function, but which also expressly exempts from this prohibition "the agency or a member or members of the body comprising the agency."

It is not surprising, therefore, to find that "[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process...." 2 K. Davis, Administrative Law Treatise § 13.02, p. 175 (1958). Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle.

(Footnotes omitted.)

Because *Withrow*, like other United States Supreme Court precedent on federal due process, is controlling on the courts of all fifty states, it is not surprising that not one of the different procedures used for judicial disciplinary proceedings in the 50 states, including all that use the Attorney General for various functions, has ever been struck down as unconstitutional on due process grounds.

The majority regards Special Counsel Don Campbell as an "attache" or "functionary" of the Attorney General based on (1) the title "special deputy attorney general" given to Campbell after he agreed to serve on the case and (2) the March 25, 1993, contract between the State of Nevada, acting by and through the Attorney General, and Donald J. Campbell & Associates. The conclusion drawn by the majority is that Campbell's position is indistinguishable from that of a full-time salaried employee of the Office of the Attorney General. This conclusion elevates form over substance. The contract with Campbell is clearly a form contract used in any case requiring appointment of special counsel under the terms of NRS 41.03435. The majority in *Whitehead II* stated that "[t]his court will recognize a document for what it is, rather than the name associated with it." *Whitehead v. Comm'n on Jud. Discipline*, 110 Nev. 380, ----, 873 P.2d 946, 961 (1994). Following this wisdom, it is clear that the form contract tells little, if anything, about the role that Campbell played in this case. It represents the type of bureaucratic obstacle that anyone from the private sector serving the state must sign in ****944** order to collect the modest financial remuneration which is allowed for such service.

The substance of special counsel Campbell's service is set ***923** forth in uncontradicted affidavits in the record. As a former state and federal prosecutor, he had substantial knowledge of and experience with proper investigatory and prosecutorial procedures. He discharged his investigatory duties personally, without relying on the use of agents and without sharing any factual findings with the Attorney General or any member of her staff. While a few conversations took place between Campbell and Assistant Attorney General Brooke Nielsen, all were of an administrative nature, primarily concerning the details of the procedures by which Campbell would be paid for his services. Campbell had long since left the public sector, had no prior connection with the Attorney General's office and, since his appointment was for this one case only, he could anticipate having no future connection with the Attorney General's office more substantial than that of any other attorney in private practice. After completing his investigation, Campbell reported his findings to the Judicial Discipline Commission and prepared to commence his prosecutorial responsibilities at the probable cause hearing scheduled by the Commission.

This sequence of events as set forth by the uncontradicted affidavits in the record illustrates the very type of separation of the investigatory and prosecutorial function from the adjudicatory and legal advisory functions recommended in the Report and Recommendation to the ABA House of Delegates on the proposed changes to the American Bar Association's Model Rules for Judicial Disciplinary Enforcement. The procedures followed by the Commission and its special counsel far exceeded the due process standards that have been set forth in both state and federal cases.

It should also be apparent that Campbell's participation in these writ proceedings against the Commission is not only reasonable but mandatory, considering that so many of petitioner's allegations of impropriety focus on Campbell's actions. The majority states that, "Although the Attorney General

and the Commission have continued to assert that Special Deputy Attorney General Don Campbell was not and is not acting on behalf of, or in concert with, the Attorney General's office, we put that contention to rest in *Whitehead II*...." In so stating, the majority implies that this court has already determined that Special Counsel Campbell is nothing more than an agent or attache of the Attorney General and that consequently, whatever responsibilities Campbell undertakes are responsibilities undertaken by the Attorney General. The majority mischaracterizes *Whitehead II.*

The majority in *Whitehead II* simply addressed respondent's contention that "the decision to employ and the selection of ***924** Special Counsel Donald J. Campbell was made *solely* by the Commission, *not* by the Attorney General." *Whitehead II*, 110 Nev. 380 at ----, 873 P.2d at 953. The *Whitehead II* majority pointed out the various ways in which it believed that the Attorney General to have acted in concert with Campbell; however, it never addressed whether the Attorney General's office and Campbell performed the same functions in this case. In fact, the majority specifically stated that it would not "decide the extent to which the Attorney General and others under her direct control and supervision have also functioned in an investigatory and prosecutorial capacity." *Id.* at ---- n. 2, 873 P.2d at 950 n. 2. The majority further stated, "We may have occasion to address this subject further at a later date in the course of disposing of other pending motions." *Id.* at ----, 873 P.2d at 955.

Given these statements and the question presented and addressed in *Whitehead II*, it cannot be said that this court "put to rest" any contention other than the claim that the decision to employ and select Campbell was not made solely by the Commission.[FN3] Considering the uncontradicted affidavits, it is difficult to determine how the majority ***945** reaches its conclusion that the Attorney General's office, as opposed to Special Counsel Campbell, is investigating and prosecuting in this case. Unfortunately, it is also a conclusion forming the edifice upon which much of the majority's argument is built.

> FN3. I will accept this for the sake of argument even though I conclude that the record does not support it. The uncontradicted affidavits indicated that although the Attorney General's office assisted in finding an attorney and in implementing the procedural details of hiring, the Commission alone made the decision to hire Campbell.

ATTORNEY MISCONDUCT

In his concurring opinion, Justice Springer also alleges that the Attorney General's office should be disqualified from continuing to represent the Judicial Discipline Commission because of misconduct. Specifically, he alleges that the Attorney General has displayed such animus and antipathy toward the petitioner "that she has rendered herself and her office unsuitable and incapacitated to serve as a prosecutorial advocate in the judicial discipline case involving Judge Whitehead" and her "running comments on this case display a continuous effort to influence public opinion against Judge Whitehead." These allegations are unsupported by any competent evidence in the record. Counsel for the Petitioner have made these allegations, but there are no affidavits or competent evidence on which this court can, consistent with due process, condemn and sanction an attorney. This is particularly ***925** inappropriate when the client Commission is also, in effect, being sanctioned.

Furthermore, Justice Springer quotes a very small portion of ARJD 8. He neglects to point out that ARJD 8 also states:

In any case in which the subject matter becomes public, through independent sources, or upon a finding of probable cause and filing of a formal statement of charges, the commission may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the respondent to a fair hearing without prejudgment, and to state that the respondent denies the allegations.

The documents in the file indicating public comments, although not authenticated or properly considered as evidence, may well conform to the part of Rule 8 quoted above. Certainly, any decision on whether Rule 8 was violated should be determined after presentation of proper evidence and an

opportunity to controvert the evidence. It should also be noted that any public comments alleged to have been made by the Attorney General were made after Petitioner had waived any right to confidentiality and after he and his attorneys had apparently made extensive comments to the media.

Justice Springer seems to hold it as self-evident that adverse public comment about Petitioner automatically equates with violation of the Petitioner's due process rights. It should be apparent that such a concept has never been the law. We would have very few criminal prosecutions if that were the case.

Justice Springer quotes *Collier v. Legakes* for the proposition that in exercising its discretion to disqualify a prosecutor the court "should consider all the facts and circumstances and determine whether the prosecutorial function could be carried out impartially...." 98 Nev. 307, 309-10, 646 P.2d 1219, 1220 (1982). Justice Springer chooses to ignore the uncontradicted evidence that the Attorney General has not been acting as prosecutor. The uncontradicted evidence establishes that Special Counsel Don Campbell has been performing the prosecutorial function. There is not one iota of evidence that Campbell could not carry out his functions impartially or that he has engaged in any misconduct.

I agree that some violations of the rules could amount to a denial of due process, but whether due process has been provided is inherently fact-bound and requires only "such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Pre-hearing publicity can ***926** only be of constitutional dimension if it deprives the petitioner of his due process right to an unbiased decision-maker. Thus any public comments of the Attorney General would be relevant to any constitutional inquiry only if her remarks can be assumed to be of such great influence on members of the Judicial Discipline Commission so as to render the Commissioners incapable of deciding the case on the basis of the evidence at the ***946** contested hearing. Nothing in the record so suggests.

Aside from the lack of evidence that the Commission members are particularly impressionable individuals, none of the remarks even alleged to be made by the Attorney General discuss the factual allegations against the Petitioner, which would be the subject of the Commission's inquiry. The discussions relate to the proceedings before this court, not proceedings before the Commission to which ARJD 8 refers. The "presumption of honesty and integrity in those serving as adjudicators," simply cannot be rebutted on such an insubstantial basis. *See Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464.

This proceeding has been extraordinary in a number of respects, not the least of which has been the incredibly hostile tone of the pleadings. Unfortunately, the majority of this court has adopted a similar hostility toward the Nevada Judicial Discipline Commission and its counsel. This is unjustified, considering that the case involves complex legal issues, many of constitutional dimension and many of first impression. Many issues are ones over which competent and ethical attorneys and judges can legitimately disagree. Yet, this court has treated good faith disagreements with the opinions of the majority as not just ridiculous, but evilly motivated. Even attorneys whose legal reasoning is incorrect deserve to be treated with courtesy and respect, not sarcasm and vilification. We should encourage healthy, open debate on legal issues, not stifle it.

The Commission's attorneys have been especially attacked. I do not recall seeing a case in which actions of the litigant have all been attributed to the attorney without any evidence that such attribution is warranted. This seems totally unjustified in any case, but especially here where the affidavits of the individual members of the Commission refute the attribution. The members of the Judicial Discipline Commission, judges, attorneys, and non-attorneys alike-are caricatured as spineless sycophants at the tender mercies of tyrannical attorneys run amok. It is a tragedy that respected and respectable public servants who have generously given of their time, energy and abilities should be so denigrated.

The majority of this court has presumed that it has heard the ***927** conversations between the attorneys and their client, and have, in effect, accused the attorneys of:

1. Counseling "acts of resistance" (*Whitehead I,* 110 Nev. 128, 141, 869 P.2d 795, 803);

2. Making "extended effort to establish grounds for charges against petitioner Whitehead, and to find witnesses to support them...." (*Whitehead I,* 110 Nev. at 147, 869 P.2d at 807);

3. Not reading "our *Goldman* opinion with adequate care." (*Whitehead I,* 110 Nev. at 148, 869 P.2d at 807);

4. Using a special prosecutor as an attache and special deputy attorney general "to help [her] pursue ends that [she] may have desired to see realized." (*Whitehead I,* 110 Nev. at 148, 869 P.2d at 807);

5. Not relying "on evidentiary data compiled by original complaints," but rather on "grievances he searched out himself." (*Whitehead I,* 110 Nev. at 148 n. 16, 869 P.2d at 808 n. 16);

6. Counseling the Commission members "to place themselves in jeopardy of sanctions for contempt." (*Whitehead I,* 110 Nev. at 149, 869 P.2d at 808);

7. Counseling the Commission to proceed "in direct violation of the current procedural rules or ARJD." (*Whitehead I,* 110 Nev. at 162, 869 P.2d at 816);

8. "Contumaciously" withholding documents. (*Whitehead II,* 110 Nev. 380, ----, 873 P.2d 946, 951 (1994));

9. Violating "constitutional principles and court rules." (*Whitehead II,* 110 Nev. at ----, 873 P.2d at 951);

10. Engaging in "exaggerated and hysterical rhetoric as merely a transparent attempt to attract media attention and inflame public passion." (*Whitehead II,* 110 Nev. at ----, 873 P.2d at 953);

11. Improperly undertaking commitments "in violation of the ARJD." ***947** (*Whitehead II,* 110 Nev. at ----, 873 P.2d at 957);

12. Demonstrating "inordinate and unexpected sensitivity...." (*Whitehead II,* 110 Nev. at ----, 873 P.2d at 956);

13. Attempting "to mislead this court into believing that our intervention in this proceeding is premature...." (*Whitehead II,* 110 Nev. at ----, 873 P.2d at 959);

14. "[P]ublicly attempting to arrogate to the Commission a preeminent right of judicial review...." (*Whitehead II,* 110 Nev. at ----, 873 P.2d at 964);

15. "[T]ried to capitalize on contrived 'leaks' to the media (hopefully engineered by others) by basing efforts to *928 disqualify justices upon inaccurate 'leaked' material." (*Whitehead II,* 110 Nev. at ---- n. 33, 873 P.2d at 969 n. 33);

16. Having "not only engaged in conduct that is not in accord with the ARJD, but, as mentioned, have made false statements of fact and law to the tribunal, SCR 172, and have unlawfully obstructed Judge Whitehead's access to evidence, SCR 173." (*Whitehead II,* 110 Nev. at ---- n. 33, 873 P.2d at 969 n. 33);

17. Having "sought to influence this tribunal by false, abusive statements to the media and other means possibly prohibited by law, SCR 14...." (*Whitehead II,* 110 Nev. at ---- n. 33, 873 P.2d at 969 n. 33);

18. "[I]nciting a circus-like atmosphere...." (*Whitehead II,* 110 Nev. at ---- n. 33, 873 P.2d at 969 n. 33);

19. Making untrue "representations about the Commission's prior position" which were "manufactured

for the purpose of persuading someone other than the Justices of this court." (*Whitehead II*, 110 Nev. at ---- n. 23, 873 P.2d at 963 n. 23).

The majority of this court is willing to presume not only what Commission counsel has advised, but to ascribe unflattering motivations for their actions without one bit of evidence supporting these presumptions and ascriptions. On the contrary, in some cases there is uncontradicted evidence denying the presumptions. Furthermore, the majority has adopted a hostile and sarcastic tone and characterization regarding legal arguments which competent and honorable attorneys can legitimately espouse. Furthermore, we should bear in mind that the opinions of this court are the law of this state, not necessarily because they are legally sound, but because this court is the court of last resort in this state.

I believe this hostile atmosphere has infected the proceeding and the decision to disqualify present Commission counsel. There are other forums appropriate for the determination of whether counsel have behaved appropriately. These forums provide procedures which recognize the attorney's due process rights, and where sanctions must be based on evidence, not assumptions.

The rhetoric by all parties involved in this case, as well as by the media, leaves much to be desired, but it is totally unfair to single out the counsel for the Commission. Aside from my contention that it is legally wrong, it is also unfair to deprive the Commission of its experienced counsel in the middle of a proceeding. It continues and lengthens the paralysis of the ***929** constitutionally-created system of judicial discipline in this state. The citizens of this state deserve better.

Of course, the Commission will be free to hire another prosecutor and another legal advisor, but considerable delay is inevitable. Furthermore, if a former prosecutor like Donald Campbell can take time away from his private law practice to make his investigatory and prosecutorial skills available to the public, then proceed to follow the rules of law, procedure and ethics to the best of his ability, only to be unceremoniously dismissed, surrounded by insinuations by his state's highest court that he is a ruthless political hit man of a public official he had never met prior to this case, one can be certain that his successor will have to be a very brave individual indeed. Much the same could be said for the next legal advisor to the Commission.

APPOINTMENT OF MASTER

There is no dispute that a breach of a duty to maintain confidentiality can and should be ***948** sanctioned in an appropriate tribunal. I do not agree that this court should appoint a master to investigate the source of information reported in the media without serious consideration of the ramifications of such an investigation and without setting forth specific guidelines. This is a very sensitive area in which Supreme Court Rules regarding confidentiality are likely to come into conflict with First Amendment rights under the constitution of the United States and with provisions of the constitution and statutes of the State of Nevada. Justice Springer apparently believes that there are no legal concerns in such an investigation. He ignores the fact that the member of the media who was given the information is the one person (other than the perpetrator) who knows who provided it and that this person is protected from revealing his source by NRS 49.275. Justice Springer is further assuming (with no justification whatsoever) that the source is a member of Judicial Discipline Commission. Furthermore, recent events lead to the strong inference that the breach of confidentiality occurred within this court. This court should check its own personnel and procedures before casting aspersions on others.

CONCLUSION

I still protest the piecemeal handling of this case. All of the issues should be resolved in one opinion as soon as possible. The rights of the citizens of this state, as well as those of Petitioner, are at stake.

For the reasons discussed above, I would deny the motion to ***930** preclude further involvement of the Attorney General and I would defer decision on the appointment of a master.

110 Nev. 874, 878 P.2d 913

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APPENDIX 5

319 U.S. 105, 63 S.Ct. 870, 146 A.L.R. 81, 87 L.Ed. 1292

Supreme Court of the United States.
MURDOCK
v.
COMMONWEALTH OF PENNSYLVANIA and seven other cases.
Nos. 480-487.
Argued March 10, 11, 1943.
Decided May 3, 1943.

On Writs of Certiorari to the Superior Court of the Commonwealth of Pennsylvania.
Robert Murdock, Jr., Anna Perisich, Willard L. Mowder, Charles Seders, Robert Lamborn, Anthony Maltezos, Anastasia Tzanes and Ellaine Tzanes were convicted of violating an ordinance of the City of Jeannette, Commonwealth of Pennsylvania prohibiting the sale of goods, wares and merchandise of any kind within the city by canvassing for, or soliciting without a license. The convictions were affirmed by the Superior Court of Pennsylvania, 149 Pa.Super. 175, 27 A.2d 666, and they bring certiorari.
Reversed and remanded with directions.
See, also, Jones v. City of Opelika, 319 U.S. 105, 63 S.Ct. 891, 87 L.Ed. 1292; Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 882, 87 L.Ed. 1324.
Mr. Justice REED, Mr. Justice FRANKFURTER, Mr. Justice JACKSON, and Mr. Justice ROBERTS, dissenting.

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92XXVII Due Process
92XXVII(A) In General
92k3848 Relationship to Other Constitutional Provisions; Incorporation
92k3851 k. First Amendment. Most Cited Cases
(Formerly 92k251)

The Fourteenth Amendment of the Federal Constitution makes the First Amendment applicable to the states. U.S.C.A.Const. Amends. 1, 14.

[2] KeyCite Notes

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1389 k. Solicitation; Distribution of Literature. Most Cited Cases
(Formerly 92k84.5(16), 92k84)

92 Constitutional Law KeyCite Notes
92XVIII Freedom of Speech, Expression, and Press
92XVIII(M) Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising
92k1879 k. Charities or Religious Organizations. Most Cited Cases
(Formerly 92k90.1(1.1), 92k90.1(1), 92k90)

Spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism which is entitled to protection under Constitution guaranteeing "freedom of speech", "freedom of press" and "freedom of religion". U.S.C.A.Const.Amends. 1, 14.

[3] KeyCite Notes

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)4 Government Property, Facilities, and Funds
92k4103 Transportation
92k4105 Streets, Highways, and Sidewalks
92k4105(5) k. Non-Transportation Use; Parades and Demonstrations. Most Cited Cases
(Formerly 92k274(5), 92k274)

A state can prohibit the use of a street for distribution of purely commercial leaflets even though such leaflets may have a civic appeal or a moral platitude appended to them. U.S.C.A.Const. Amends. 1, 14.

[4] KeyCite Notes

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1389 k. Solicitation; Distribution of Literature. Most Cited Cases
(Formerly 92k274(5), 92k274)

The state may not prohibit distribution of handbills on the streets in pursuit of a clearly religious activity merely because the handbills invite the purchase of books for improved understanding of religion, or because handbills seek in a lawful fashion to promote the raising of funds for religious purposes. U.S.C.A.Const. Amends. 1, 14.

[5] KeyCite Notes

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1310 k. In General. Most Cited Cases
(Formerly 92k274.1(2.1), 92k84.5(16), 92k84)

The mere fact that religious literature is sold by itinerant preachers rather than donated does not transform evangelism into a "commercial enterprise", and the constitutional rights of those spreading their religious beliefs through the printed and spoken word are not to be gauged by standards governing retailers or wholesalers of books. U.S.C.A.Const.Amends. 1, 14.

[6] KeyCite Notes

92 Constitutional Law

92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1389 k. Solicitation; Distribution of Literature. Most Cited Cases
(Formerly 92k274.1(2.1), 92k274.1(2), 92k274)

92 Constitutional Law KeyCite Notes
92XVIII Freedom of Speech, Expression, and Press
92XVIII(M) Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising
92k1879 k. Charities or Religious Organizations. Most Cited Cases
(Formerly 92k274.1(2.1), 92k274.1(2), 92k274)

238 Licenses KeyCite Notes
238I For Occupations and Privileges
238k7 Constitutionality and Validity of Acts and Ordinances
238k7(3) k. Uniformity as to Occupations or Privileges of Same Class. Most Cited Cases
(Formerly 92k274.1(2.1), 92k274.1(2), 92k274)

Where defendants went about from door to door in city distributing literature and soliciting people to purchase religious books and pamphlets, and in connection with such activities defendants used a phonograph on which they played a record expounding certain of their views on religion, defendants were engaged in a "religious venture" rather than in a "commercial venture", for purpose of determining validity of licensing ordinance. U.S.C.A.Const. Amends. 1, 14.

[7] KeyCite Notes

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)6 Taxation
92k4135 k. In General. Most Cited Cases
(Formerly 92k283)

The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. U.S.C.A.Const. Amends. 1, 14.

[8] KeyCite Notes

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)6 Taxation
92k4135 k. In General. Most Cited Cases
(Formerly 92k283)

A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution. U.S.C.A.Const. Amends. 1, 14.

[9] KeyCite Notes

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1390 Licenses
92k1391 k. In General. Most Cited Cases
(Formerly 92k274(2), 92k274)

92 Constitutional Law KeyCite Notes

92XVIII Freedom of Speech, Expression, and Press
92XVIII(M) Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising
92k1879 k. Charities or Religious Organizations. Most Cited Cases
(Formerly 92k274(2), 92k274)

92 Constitutional Law KeyCite Notes

92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2079 k. Distribution of Materials in Public Places. Most Cited Cases
(Formerly 92k274(2), 92k274)

The fact that city ordinance requiring religious colporteurs to pay a license tax as a condition to the pursuit of their activities was nondiscriminatory did not render it constitutional, since the protection afforded by the Constitution is not so restricted and freedom of press, freedom of speech and freedom of religion are in a preferred position. U.S.C.A.Const. Amends. 1, 14.

[10] KeyCite Notes

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1390 Licenses
92k1391 k. In General. Most Cited Cases
(Formerly 92k274(2), 92k274)

92 Constitutional Law KeyCite Notes

92XVIII Freedom of Speech, Expression, and Press
92XVIII(M) Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising
92k1879 k. Charities or Religious Organizations. Most Cited Cases
(Formerly 92k274(2), 92k274)

92 Constitutional Law KeyCite Notes

92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2079 k. Distribution of Materials in Public Places. Most Cited Cases
(Formerly 92k274(2), 92k274)

City ordinance requiring colporteurs to pay a license tax as a condition to the pursuit of their activities violates Constitution guaranteeing "freedom of press", "freedom of speech" and "freedom of religion" where the fee is not a nominal one imposed as a regulatory measure and calculated to defray the

expense of protecting those on the streets and at home against the abuse of solicitors. U.S.C.A.Const. Amends. 1, 14.

***871 *106** Mr. Hayden C. Covington, of Brooklyn, N.Y., for petitioners.
Mr. Fred B. Trescher, of Greensburg, Pa., for respondent.

Mr. Justice DOUGLAS delivered the opinion of the Court.
The City of Jeannette, Pennsylvania, has an ordinance, some forty years old, which provides in part:

'That all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business***872** and shall pay to the Treasurer of said Borough therefore the following sums according to the time for which said license shall be granted.

'For one day $1.50, for one week seven dollars ($7.00), for two weeks twelve dollars ($12.00), for three weeks twenty dollars ($20.00), provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers doing business in said Borough of Jeannette.'

Petitioners are 'Jehovah's Witnesses'. They went about from door to door in the City of Jeannette distributing literature and soliciting people to 'purchase' certain religious books and pamphlets, all published by the ***107** Watch Tower Bible & Tract Society.[FN1] The 'price' of the books was twenty-five cents each, the 'price' of the pamphlets five cents each. [FN2] In connection with these activities petitioners used a phonograph [FN3] on which they played a record expounding certain of their views on religion. None of them obtained a license under the ordinance. Before they were arrested each had made 'sales' of books. There was evidence that it was their practice in making these solicitations to request a 'contribution' of twenty-five cents each for the books and five cents each for the pamphlets but to accept lesser sums or even to donate the volumes in case an interested person was without funds. In the present case some donations of pamphlets were made when books were purchased. Petitioners were convicted and fined for violation of the ordinance. Their judgments of conviction were sustained by the Superior Court of Pennsylvania, 149 Pa.Super. 175, 27 A.2d 666, against their contention that the ordinance deprived them of the freedom of speech, press, and religion guaranteed by the First Amendment. Petitions for leave to appeal to the Supreme Court of Pennsylvania were denied. The cases are here on petitions for writs of certiorari which we granted along with the petitions for rehearing of Jones v. Opelika, 316 U.S. 584, 62 S.Ct. 1231, 86 L.Ed. 1691, 141 A.L.R. 514, and its companion cases.

FN1 Two religious books-Salvation and Creation-were sold. Others were offered in addition to the Bible. The Watch Tower Bible & Tract Society is alleged to be a non-profit charitable corporation.

FN2 Petitioners paid three cents each for the pamphlets and, if they devoted only their spare time to the work, twenty cents each for the books. Those devoting full time to the work acquired the books for five cents each. There was evidence that some of the petitioners paid the difference between the sales price and the cost of the books to their local congregations which distributed the literature.

FN3 Purchased along with the record from the Watch Tower Bible & Tract Society.

***108** [1] The First Amendment, which the Fourteenth makes applicable to the states, declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press * * *.' It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is in substance just that.

Petitioners spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers.[FN4] They claim to follow the example of Paul, teaching 'publickly, and from house to house.' Acts 20:20. They take literally the mandate of the Scriptures, 'Go ye into all the world, and preach the gospel to every creature.' Mark 16:15. In doing so they believe that they are obeying a commandment of God.

FN4 The nature and extent of their activities throughout the world during the years 1939 and 1940 are to be found in the 1941 Yearbook of Jehovah's Witnesses, pp. 62-243.

The hand distribution of religious tracts is an age-old form of missionary evangelism-as old as the history of printing presses.[FN5] It has been a potent force in various religious movements down through the years.[FN6] This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the ***873** Gospel to thousands***109** upon thousands of homes and seek through personal visitations to win adherents to their faith.[FN7] It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.

FN5 Palmer, The Printing Press and the Gospel (1912).

FN6 White, The Colporteur Evangelist (1930); Home Evangelization (1850); Edwards, The Romance of the Book (1932) c. V; 12 Biblical Repository (1944) Art. VIII; 16 The Sunday Magazine (1887) pp. 43-47; 3 Meliora (1861) pp. 311-319; Felice, Protestants of France (1853) pp. 53, 513; 3 D'Aubigne, History of The Reformation (1849) pp. 103, 152, 436-437; Report of Colportage in Virginia, North Carolina & South Carolina, American Tract Society (1855). An early type of colporteur was depicted by John Greenleaf Whittier in his legendary poem, The Vaudois Teacher. And see, Wylie, History of the Waldenses.

FN7 The General Conference of Seventh-Day Adventists who filed a brief amicus curiae on the reargument of Jones v. Opelika has given us the following data concerning their literature ministry: This denomination has 83 publishing houses throughout the world issuing publications in over 200 languages. Some 9,256 separate publications were issued in 1941. By printed and spoken word the Gospel is carried into 412 countries in 824 languages. 1942 Year Book, p. 287. During December 1941 a total of 1018 colporteurs operated in North America. They delivered during that month $97,997.19 worth of gospel literature and for the whole year of 1941 a total of $790,610.36-an average per person of about $65 per month. Some of these were students and temporary workers. Colporteurs of this denomination receive half of their collections from which they must pay their traveling and living expenses. Colporteurs are specially trained and their qualifications equal those of preachers. In the field each worker is under the supervision of a field missionary secretary to whom a weekly report is made. After fifteen years of continuous service each colporteur is entitled to the same pension as retired ministers. And see Howell, The Great Advent Movement (1935), pp. 72-75.

[2] The integrity of this conduct or behavior as a religious practice has not been challenged. Nor do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. ***110** Reynolds v. United States, 98 U.S. 145, 161, 167, 25 L.Ed. 244, and Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637, denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same

fate. We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types. The manner in which it is practiced at times gives rise to special problems with which the police power of the states is competent to deal. See for example Cox v. New Hampshire 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396, and Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031. But that merely illustrates that the rights with which we are dealing are not absolutes. Schneider v. State, 308 U.S. 147, 160, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155. We are concerned, however, in these cases merely with one narrow issue. There is presented for decision no question whatsoever concerning punishment for any alleged unlawful acts during the solicitation. Nor is there involved here any question as to the validity of a registration system for colporteurs and other solicitors. The cases present a single issue-the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities.

[3] [4] [5] [6] The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds. Thus it was stated**874 in Jones v. Opelika, supra, 316 U.S. at page 597, 62 S.Ct. at page 1239, 86 L.Ed. 1691, 141 A.L.R. 514, that when a religious sect uses 'ordinary commercial methods of sales of articles to raise propaganda funds', it is proper for the state to charge 'reasonable fees for the privilege of canvassing'. Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital. As we stated only the other day in Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 672, 87 L.Ed. 869, 'The state can prohibit the use of the street for *111 the distribution of purely commercial leaflets, even though such leaflets may have 'a civil appeal, or a moral platitude' appended. Valentine v. Chrestensen, 316 U.S. 52, 55, 62 S.Ct. 920, 922, 86 L.Ed. 1262. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.' But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. And the Pennsylvania court did not rest the judgments of conviction on that basis, though it did find *112 that petitioners 'sold' the literature. The Supreme Court of Iowa in State v. Mead, 230 Iowa 1217, 300 N.W. 523, 524, described the selling activities of members of this same sect as 'merely incidental and collateral' to their 'main object which was to preach and publicize the doctrines of their order.' And see State v. Meredith, 197 S.C. 351, 15 S.E.2d 678; People v. Barber, 289 N.Y. 378, 385-386, 46 N.E.2d 329. That accurately summarizes the present record.

[7] We do not mean to say that religious groups and the press are free from all financial burdens of government. See Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of

Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Magnano Co. v. Hamilton, 292 U.S. 40, 44, 45, 54 S.Ct. 599, 601, 78 L.Ed. 1109, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.

****875** [8] It is contended, however, that the fact that the license tax can suppress or control this activity is unimportant**113* if it does not do so. But that is to disregard the nature of this tax. It is a license tax-a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (McGoldrick v. Berwind-White Co., 309 U.S. 33, 56-58, 60 S.Ct. 388, 397, 398, 84 L.Ed. 565, 128 A.L.R. 876), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. Id., 309 U.S. at page 47, 60 S.Ct. at page 392, 84 L.Ed. 565, 128 A.L.R. 876 and cases cited. A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down. Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Schneider v. State, supra; Cantwell v. Connecticut, 310 U.S. 296, 306, 60 S.Ct. 900, 904, 84 L.Ed. 1213, 128 A.L.R. 1352; Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873; Jamison v. Texas, supra. It was for that reason that the dissenting opinions in Jones v. Opelika, supra, stressed the nature of this type of tax. 316 U.S. at pages 607-609, 620, 623, 62 S.Ct. at pages 1243, 1244, 1250, 1251, 86 L.Ed. 1691, 141 A.L.R. 514. In that case, as in the present ones, we have something very different from a registration system under which those going from house to house are required to give their names, addresses and other marks of identification to the authorities. In all of these cases the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee **114* imposed as a regulatory measure to defray the expenses of policing the activities in question.[FN8] It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise. That is almost uniformly recognized as the inherent vice and evil of this flat license tax. As stated by the Supreme Court of Illinois in a case involving this same sect and an ordinance similar to the present one, a person cannot be compelled 'to purchase, through a license fee or a license tax, the privilege freely granted by the constitution.'[FN9] Blue Island v. Kozul, 379 Ill. 511, 519, 41 N.E.2d 515, 519. So it may not be said that proof is lacking that these license taxes either separately or cumulatively have restricted or are likely to restrict petitioners' religious activities. On their face they are a restriction of the free exercise of those freedoms which are protected by the First Amendment.

FN8 The constitutional difference between such a regulatory measure and a tax on the exercise of a federal right has long been recognized. While a state may not exact a license tax for the privilege of carrying on interstate commerce (McGoldrick v. Berwind-White Co., supra, 309 U.S. at pages 56-58, 60 S.Ct. at pages 397, 398, 84 L.Ed. 565, 128 A.L.R. 876) it may, for example, exact a fee to defray the cost of purely local regulations in spite of the fact that those regulations incidentally affect commerce. 'So long as they do not impede the free flow of commerce and are not made the subject of regulation by Congress, they are not forbidden.' Clyde-Mallory Lines v. Alabama, 296 U.S. 261, 267, 56 S.Ct. 194, 196, 80 L.Ed. 215, and cases cited. And see Sough Carolina v. Barnwell Bros., Inc., 303 U.S. 177, 185-188, 625, 58 S.Ct. 510, 513-515, 82 L.Ed. 734.

FN9 That is the view of most state courts which have passed on the question. McConkey v. Fredericksburg, 179 Va. 556, 19 S.E.2d 682; State v. Greaves, 112 Vt. 222, 22 A.2d 497; People v. Banks, 168 Misc. 515, 6 N.Y.S.2d 41. Contra: Cook v. Harrison, 180 Ark. 546, 21 S.W.2d 966.

876** The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom ***115 of the press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed. Grosjean v. American Press Co., supra, 297 U.S. at pages 244-249, 56 S.Ct. at pages 446-449, 80 L.Ed. 660. They may indeed operate even more subtly. Itinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. The way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found. This method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town, village by village. The spread of religious ideas through personal visitations by the literature ministry of numerous religious groups would be stopped.

[9] The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

It is claimed, however, that the ultimate question in determining the constitutionality of this license tax is whether the state has given something for which it can ask a return. That principle has wide applicability. State Tax Commission v. Aldrich, 316 U.S. 174, 62 S.Ct. 1008, 86 L.Ed. 1358, 139 A.L.R. 1436, and cases cited. But it is quite irrelevant here. This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the federal constitution.

[10] Considerable emphasis is placed on the kind of literature which petitioners were distributing-its provocative, ***116*** abusive, and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. See Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324, concurring opinion, decided this day. But those considerations are no justification for the license tax which the ordinance imposes. Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights.

Jehovah's Witnesses are not 'above the law'. But the present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover, and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation. Cf. Chaplinsky v. New Hampshire, supra. Nor do we have here, as we did in Cox v. New Hampshire, supra, and Chaplinsky v. New Hampshire, supra, state regulation of the streets to protect and insure the safety, comfort, or convenience of the public. Furthermore, the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations. See Cantwell v. Connecticut, supra, 310 U.S. at 306, 60 S.Ct. at page 904, 84 L.Ed. 1213, 128 A.L.R. 1352. As we have said, it is not merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community. And the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of

solicitors. See *117 Cox v. New Hampshire, supra, 312 U.S. at pages 576, 577, 61 S.Ct. at pages 765, 766, 85 L.Ed. 1049, 133 A.L.R. 1396. Nor can the present ordinance strued to apply only to solicitation from survive if we assume that it has been con-**877 house to house.[FN10] The ordinance is not narrowly drawn to prevent or control abuses or evils arising from that activity. Rather, it sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid. That restraint and one which is city wide in scope (Jones v. Opelika) are different only in degree. Each is an abridgment of freedom of press and a restraint on the free exercise of religion. They stand or fall together.

FN10 The Pennsylvania Superior Court stated that the ordinance has been 'enforced' only to prevent petitioners from canvassing 'from door to door and house to house' without a license and not to prevent them from distributing their literature on the streets. 149 Pa.Super. at page 184, 27 A.2d at page 670.

The judgment in Jones v. Opelika has this day been vacated. Freed from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature. The judgments are reversed and the causes are remanded to the Pennsylvania Superior Court for proceedings not inconsistent with this opinion.

Reversed.

The dissenting opinions of Mr. Justice REED and Mr. Justice FRANKFURTER in Jones v. City of Opelika, 63 S.Ct. at page 891 cover these cases also.

For dissenting opinion of Mr. Justice JACKSON, see 63 S.Ct. 882.

U.S. 1943.
MURDOCK v. COMMONWEALTH OF PENNSYLVANIA
319 U.S. 105, 63 S.Ct. 870, 146 A.L.R. 81, 87 L.Ed. 1292

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APPENDIX 6

493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796, 58 USLW 4135

Briefs and Other Related Documents

Supreme Court of the United States
JIMMY SWAGGART MINISTRIES, Appellant
v.
BOARD OF EQUALIZATION OF CALIFORNIA.
No. 88-1374.
Argued Oct. 31, 1989.
Decided Jan. 17, 1990.

Religious organization brought action seeking refund of sales and use taxes paid under protest. The Superior Court, San Diego County, Jack R. Levitt, J., refused refund, and religious organization appealed. The Court of Appeal, 204 Cal.App.3d 1269, 250 Cal.Rptr. 891, affirmed, and religious organization appealed. The Supreme Court, Justice O'Connor, held that: (1) collection and payment of generally applicable sales and use tax did not impose constitutionally significant burden on organization's religious practices or beliefs, and thus free exercise clause did not require California to grant organization an exemption from tax; (2) imposition of sales and use tax on religious organization did not result in excessive entanglement between government and religion, and thus did not violate establishment clause; and (3) Supreme Court would not reach merits of organization's contention that California's imposition of use tax liability violated commerce and due process clauses, where California courts below had ruled that claim was procedurally barred because it was not raised before Board of Equalization.
Affirmed.

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1384 Taxation
92k1386 Religious Organizations or Educational Institutions
92k1386(1) k. In General. Most Cited Cases
(Formerly 92k84.5(8))

92 Constitutional Law KeyCite Notes
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1390 Licenses
92k1391 k. In General. Most Cited Cases
(Formerly 92k84.5(8))

Rule that free exercise clause prevents imposition of tax on religious organization applies only where flat license tax operates as prior restraint on free exercise of religious beliefs. U.S.C.A. Const.Amend. 1.

[2] KeyCite Notes

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1384 Taxation
92k1386 Religious Organizations or Educational Institutions
92k1386(2) k. Exemptions. Most Cited Cases
(Formerly 92k84.5(8))

371 Taxation KeyCite Notes
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(D) Persons Subject to or Liable for Tax
371k3664 k. Clubs, Co-Operatives, and Nonprofit Organizations. Most Cited Cases
(Formerly 371k1265)

Collection of sales and use taxes on distribution of religious materials by religious organization and religious organization's payment of the taxes did not impose constitutionally significant burden on organization's religious practices or belief, and thus free exercise clause did not require California to grant organization an exemption from taxes; sales and use tax was not flat tax, represented only small fraction of any retail sale, and applied neutrally to all retail sales of tangible personal property made in California. West's Ann.Cal.Rev. & T.Code §§ 6051, 6201; U.S.C.A. Const.Amends. 1, 14.

[3] KeyCite Notes

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1384 Taxation
92k1386 Religious Organizations or Educational Institutions
92k1386(1) k. In General. Most Cited Cases
(Formerly 92k84.5(8))

371 Taxation KeyCite Notes
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(D) Persons Subject to or Liable for Tax
371k3664 k. Clubs, Co-Operatives, and Nonprofit Organizations. Most Cited Cases
(Formerly 371k1265)

Requirement under California tax laws that seller must register to facilitate reporting and payment of sales and use taxes, and the sales and use taxes themselves, did not act as prior restraints to religious organization's exercise of evangelistic activity; fee was not charged for registration, tax was due regardless of preregistration, and tax was not imposed as precondition of disseminating the message. West's Ann.Cal.Rev. & T.Code §§ 6066-6074; U.S.C.A. Const.Amends. 1, 14.

[4] KeyCite Notes

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1384 Taxation

92k1386 Religious Organizations or Educational Institutions
92k1386(1) k. In General. Most Cited Cases
(Formerly 92k84.5(8))

371 Taxation KeyCite Notes
371III Property Taxes
371III(B) Laws and Regulation
371III(B)3 Constitutional Requirements and Restrictions
371k2100 k. In General. Most Cited Cases
(Formerly 371k37)

To extent that imposition of generally applicable tax merely decreases amount of money religious organization has to spend on its religious activities, any such burden is not constitutionally significant. U.S.C.A. Const.Amend. 1.

[5] KeyCite Notes

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1384 Taxation
92k1386 Religious Organizations or Educational Institutions
92k1386(1) k. In General. Most Cited Cases
(Formerly 92k84.5(8))

371 Taxation KeyCite Notes
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(D) Persons Subject to or Liable for Tax
371k3664 k. Clubs, Co-Operatives, and Nonprofit Organizations. Most Cited Cases
(Formerly 371k1265)

California's imposition of sales and use tax liability on religious organization for distribution of religious materials did not result in excessive entanglement between government and religion, and thus did not violate establishment clause, even if tax imposed administrative and record keeping burdens on organization. West's Ann.Cal.Rev. & T.Code §§ 6051, 6201; U.S.C.A. Const.Amends. 1, 14.

[6] KeyCite Notes

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak669 Preservation of Questions Before Administrative Agency
15Ak669.1 k. In General. Most Cited Cases
(Formerly 15Ak669)

371 Taxation KeyCite Notes
371III Property Taxes
371III(H) Levy and Assessment

371III(H)10 Judicial Review or Intervention
371k2691 Review of Board by Courts
371k2696 k. Presentation and Reservation Before Board or Officer of Grounds of Review. Most Cited Cases
(Formerly 371k493.5)

Supreme Court would not reach merits of religious organization's claim that California's imposition of use tax liability on organization violated commerce and due process clauses on basis that organization had insufficient "nexus" to California, where California courts had ruled the claim was procedurally barred because organization failed to raise such claims before California Board of Equalization, and California law provided that administrative claim for tax refund shall state specific grounds upon which claim is founded. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amends. 5, 14; West's Ann.Cal.Rev. & T.Code §§ 6904(a), 6932, 6933.

[Z] KeyCite Notes

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(H) Payment
371k3699 Refunding Taxes Paid
371k3700 k. In General. Most Cited Cases
(Formerly 371k1333.1, 371k1333)

Taxpayer failed to substantiate any claim that California courts in general apply in an irregular, arbitrary, or inconsistent manner the public policy exception to rule that courts will not decide issue that was not raised in administrative claim for refund before Board of Equalization, and thus United States Supreme Court would not determine whether California courts improperly declined to apply public policy exception and consider taxpayer's commerce clause and due process clause challenges to use taxes which were not raised before Board. U.S.C.A. Const. Art. 1, § 8, cl. 3; Amends. 5, 14; West's Ann.Cal.Rev. & T.Code §§ 6904(a), 6932, 6933.

***378 Syllabus** FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

California law requires retailers to pay a 6% sales tax on in-state sales of tangible personal property and to collect from state residents a 6% use tax on such property purchased outside the State. During the tax period in question, appellant religious organization, which is incorporated in Louisiana, sold a variety of religious materials at "evangelistic crusades" within California and made mail-order sales of other such materials to California residents. Appellee State Board of Equalization (Board) audited appellant and advised it that it should register as a seller as required by state law and report and pay sales and use taxes on the aforementioned sales. Appellant paid the taxes and the Board ruled against it on its petitions for redetermination and refund, rejecting its contention that the tax on religious materials violated the First Amendment. The state trial court entered judgment for the Board in appellant's refund suit, the State Court of Appeal affirmed, and the State Supreme Court denied discretionary review.

Held:

1. California's imposition of sales and use tax liability on appellant's sales of religious**690 materials does not contravene the Religion Clauses of the First Amendment. Pp. 693-699.

(a) The collection and payment of the tax imposes no constitutionally significant burden on appellant's religious practices or beliefs under the Free Exercise Clause, which accordingly does not *require* the State to grant appellant a tax exemption. Appellant misreads *Murdock v. Pennsylvania*, 319 U.S. 105,

63 S.Ct. 870, 87 L.Ed. 1292, and *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938, which, although holding flat license taxes on commercial sales unconstitutional with regard to the evangelical distribution of religious materials, nevertheless specifically stated that religious activity may constitutionally be subjected to a generally applicable income or property tax akin to the California tax at issue. Those cases apply only where a flat license tax operates as a prior restraint on the free exercise of religious belief. As such, they do not invalidate California's generally applicable sales and use tax, which is not a flat tax, represents only a small fraction of any sale, and applies neutrally to all relevant sales regardless of the nature of the seller or purchaser, so that there is no danger that appellant's*379* religious activity is being singled out for special and burdensome treatment. Moreover, the concern in *Murdock* and *Follett* that flat license taxes operate as a precondition to the exercise of evangelistic activity is not present here, because the statutory registration requirement and the tax itself do not act as prior restraints-no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the message. Furthermore, since appellant argues that the exercise of its beliefs is unconstitutionally burdened by the reduction in its income resulting from the presumably lower demand for its wares (caused by the marginally higher price generated by the tax) and from the costs associated with administering the tax, its free exercise claim is in significant tension with *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2148-2149, 104 L.Ed.2d 766, which made clear that, to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant because it is no different from that imposed by other generally applicable laws and regulations to which religious organizations must adhere. While a more onerous tax rate than California's, even if generally applicable, might effectively choke off an adherent's religious practices, that situation is not before, or considered by, this Court. Pp. 693-697.

(b) Application of the California tax to appellant's sale of religious materials does not violate the Establishment Clause by fostering an excessive governmental entanglement with religion. The evidence of administrative entanglement is thin, since the Court of Appeal expressly found that, in light of appellant's sophisticated accounting staff and computerized accounting methods, the record did not support its assertion that the collection and payment of the tax impose severe accounting burdens on it. Moreover, although collection and payment will require some contact between appellant and the State, generally applicable administrative and recordkeeping burdens may be imposed on religious organizations without running afoul of the Clause. See, *e.g.*, *Hernandez, supra*, at 696-697, 109 S.Ct., at 2147. The fact that appellant must bear the cost of collecting and remitting the tax-even if the financial burden may vary from religion to religion-does not enmesh the government in religious affairs, since the statutory scheme requires neither the involvement of state employees in, nor on-site continuing inspection of, appellant's day-to-day operations. Most significantly, the imposition of the tax without an exemption for appellant does not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing them, since they are subject to the tax regardless of content or motive. Pp. 697-699.

***691 *380* 2. The merits of appellant's Commerce Clause and Due Process Clause claim are not properly before, and will not be reached by, this Court, since both the trial court and the Court of Appeal ruled that the claim was procedurally barred because it was not presented to the Board as required by state law. See, *e.g.*, *Michigan v. Long*, 463 U.S. 1032, 1041-1042, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201. Appellant has failed to substantiate any claim that the California courts in general apply the procedural bar rule and a pertinent exception in an irregular, arbitrary, or inconsistent manner. Pp. 699-701.

204 Cal.App.3d 1269, 250 Cal.Rptr. 891, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Michael W. McConnell argued the cause for appellant. With him on the brief were *Charles R. Ajalat*, *Edward McGlynn Gaffney, Jr.*, and *Jessee H. Choper*.

Richard E. Nielsen, Deputy Attorney General of California, argued the cause for appellee. With him on the brief were *John K. Van de Kamp*, Attorney General, and *Neal J. Gobar*, Deputy Attorney General.*

* Briefs of *amici curiae* urging reversal were filed for the Association of Public Justice by *Bradley P. Jacob;* for the Evangelical Council for Financial Accountability et al. by *Samuel E. Ericsson*, *Michael J. Woodruff*, and *Forest D. Montgomery;* for the International Society for Krishna Consciousness of California, Inc., by *David M. Liberman*, *Robert C. Moest*, and *Barry A. Fisher;* for the National Council of Churches of Christ in the U.S.A. by *Douglas Laycock;* and for the National Taxpayers Union by *Gale*

A. Norton.
Steven R. Shapiro filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.
Briefs of *amici curiae* were filed for the National Conference of State Legislatures et al. by *Benna Ruth Solomon* and *Charles Rothfeld;* and for the Watchtower Bible and Tract Society of New York, Inc., by *James M. McCabe* and *Donald T. Ridley.*

Justice O'CONNOR delivered the opinion of the Court.
This case presents the question whether the Religion Clauses of the First Amendment prohibit a State from imposing a generally applicable sales and use tax on the distribution of religious materials by a religious organization.

***381** I

California's Sales and Use Tax Law requires retailers to pay a sales tax "[f]or the privilege of selling tangible personal property at retail." Cal.Rev. & Tax.Code Ann. § 6051 (West 1987). A "sale" includes any transfer of title or possession of tangible personal property for consideration. Cal.Rev. & Tax.Code Ann. § 6006(a) (West Supp.1989).

The use tax, as a complement to the sales tax, reaches out-of-state purchases by residents of the State. It is "imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer," § 6201, at the same rate as the sales tax (6 percent). Although the use tax is imposed on the purchaser, § 6202, it is generally collected by the retailer at the time the sale is made. §§ 6202-6206. Neither the State Constitution nor the State Sales and Use Tax Law exempts religious organizations from the sales and use tax, apart from a limited exemption for the serving of meals by religious organizations, § 6363.5.

During the tax period in question (1974 to 1981), appellant Jimmy Swaggart Ministries was a religious organization incorporated as a Louisiana nonprofit corporation and recognized as such by the Internal Revenue Service pursuant to § 501(c)(3) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 501(c)(3) (1982 ed.), and by the California State Controller pursuant to the Inheritance Tax and Gift Tax Laws of the State of California. Appellant's constitution and bylaws provide that it "is called for the purpose of establishing and maintaining an evangelistic outreach for the worship of Almighty God." App. 107. This outreach is to be performed "by all available means, both at home and in foreign lands," and

"shall specifically include evangelistic crusades; missionary endeavors; radio broadcasting (as owner, broadcaster, and placement agency); television broadcasting (both as owner and broadcaster); and audio production and reproduction of music; audio production and reproduction***382** of preaching; audio production and reproduction of teaching; writing, printing and publishing; and, any and all other individual or mass media methods that presently exist or may be devised in the future to proclaim the good news of Jesus Christ." *Id.*, at 107-108.

From 1974 to 1981, appellant conducted numerous "evangelistic crusades" in auditoriums and arenas across the country in cooperation with local churches. *Id.*, at 61. During this period, appellant held 23 crusades in California-each lasting 1 to 3 days, with one crusade lasting 6 days-for a total of 52 days. *Id.*, at 19-20. At the crusades, appellant conducted religious services that included preaching and singing. Some of these services were recorded for later sale or broadcast.***692** Appellant also sold religious books, tapes, records, and other religious and nonreligious merchandise at the crusades.

Appellant also published a monthly magazine, "The Evangelist," which was sold nationwide by subscription. The magazine contained articles of a religious nature as well as advertisements for appellant's religious books, tapes, and records. The magazine included an order form listing the various items for sale in the particular issue and their unit price, with spaces for purchasers to fill in the quantity desired and the total price. Appellant also offered its items for sale through radio, television, and cable television broadcasts, including broadcasts through local California stations.

In 1980, appellee Board of Equalization of the State of California (Board) informed appellant that religious materials were not exempt from the sales tax and requested appellant to register as a seller to facilitate reporting and payment of the tax. See Cal.Rev. & Tax.Code Ann. §§ 6066-6074 (West 1987 and Supp.1989) (tax registration requirements). Appellant responded that it was exempt from such taxes under the First Amendment. In 1981, the Board audited appellant and advised appellant that it should register as a seller and report and pay sales tax on all sales made at its **383* California crusades. The Board also opined that appellant had a sufficient nexus with the State of California to require appellant to collect and report use tax on its mail-order sales to California purchasers.

Based on the Board's review of appellant's records, the parties stipulated "that [appellant] sold for use in California tangible personal property for the period April 1, 1974, through December 31, 1981, measured by payment to [appellant] of $1,702,942.00 for mail order sales from Baton Rouge, Louisiana and $240,560.00 for crusade merchandise sales in California." App. 58. These figures represented the sales and use in California of merchandise with specific religious content-Bibles, Bible study manuals, printed sermons and collections of sermons, audiocassette tapes of sermons, religious books and pamphlets, and religious music in the form of songbooks, tapes, and records. See App. to Juris. Statement B-1 to B-3. Based on the sales figures for appellant's religious materials, the Board notified appellant that it owed sales and use taxes of $118,294.54, plus interest of $36,021.11, and a penalty of $11,829.45, for a total amount due of $166,145.10. App. 8. Appellant did not contest the Board's assessment of tax liability for the sale and use of certain nonreligious merchandise, including such items as "T-shirts with JSM logo, mugs, bowls, plates, replicas of crown of thorns, ark of the covenant, Roman coin, candlesticks, Bible stand, pen and pencil sets, prints of religious scenes, bud vase, and communion cups." *Id.*, at 59-60.

Appellant filed a petition for redetermination with the Board, reiterating its view that the tax on religious materials violated the First Amendment. Following a hearing and an appeal to the Board, the Board deleted the penalty but otherwise redetermined the matter without adjustment in the amount of $118,294.54 in taxes owing, plus $65,043.55 in interest. Pursuant to state procedural law, appellant paid the amount and filed a petition for redetermination and refund with the Board. See Cal.Rev. & Tax.Code Ann. § 6902 **384* West 1987). The Board denied appellant's petition, and appellant brought suit in state court, seeking a refund of the tax paid.

The trial court entered judgment for the Board, ruling that appellant was not entitled to a refund of any tax. The California Court of Appeal affirmed, 204 Cal.App.3d 1269, 250 Cal.Rptr. 891 (1988), and the California Supreme Court denied discretionary review. We noted probable jurisdiction pursuant to 28 U.S.C. § 1257(2) (1982 ed.) (amended in 1988), 490 U.S. 1018, 109 S.Ct. 1741, 104 L.Ed.2d 178 (1989), and now affirm.

****693*** II

Appellant's central contention is that the State's imposition of sales and use tax liability on its sale of religious materials contravenes the First Amendment's command, made applicable to the States by the Fourteenth Amendment, to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Appellant challenges the Sales and Use Tax Law under both the Free Exercise and Establishment Clauses.

A

The Free Exercise Clause, we have noted, "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Abington School Dist. v. Schempp*, 374 U.S. 203, 222-223, 83 S.Ct. 1560, 1571-1572, 10 L.Ed.2d 844 (1963). Indeed, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 220, 92 S.Ct. 1526, 1535, 32 L.Ed.2d 15 (1972). Our cases have established that "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of

a central religious belief or practice and, if so, whether a compelling governmental interest justifies the ***385*** burden." Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S.Ct. 2136, 2148, 104 L.Ed.2d 766 (1989) (citations omitted).

Appellant relies almost exclusively on our decisions in Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), and Follett v. McCormick, 321 U.S. 573, 576, 64 S.Ct. 717, 719, 88 L.Ed. 938 (1944), for the proposition that a State may not impose a sales or use tax on the evangelical distribution of religious material by a religious organization. Appellant contends that the State's imposition of use and sales tax liability on it burdens its evangelical distribution of religious materials in a manner identical to the manner in which the evangelists in *Murdock* and *Follett* were burdened.

We reject appellant's expansive reading of *Murdock* and *Follett* as contrary to the decisions themselves. In *Murdock,* we considered the constitutionality of a city ordinance requiring all persons canvassing or soliciting within the city to procure a license by paying a flat fee. Reversing the convictions of Jehovah's Witnesses convicted under the ordinance of soliciting and distributing religious literature without a license, we explained:

"The hand distribution of religious tracts is an age-old form of missionary evangelism ... [and] has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching in the pulpits." 319 U.S., at 108-109, 63 S.Ct., at 872-873 (footnotes omitted).

Accordingly, we held that "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature***386*** and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." *Id.*, at 110, 63 S.Ct., at 873; see also *Jones v. Opelika*, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943); *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943).

We extended *Murdock* the following Term by invalidating, as applied to "one who earns ****694*** his livelihood as an evangelist or preacher in his home town," an ordinance (similar to that involved in *Murdock*) that required all booksellers to pay a flat fee to procure a license to sell books. *Follett v. McCormick*, 321 U.S., at 576, 64 S.Ct., at 719. Reaffirming our observation in *Murdock* that " 'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment,' " 321 U.S., at 577, 64 S.Ct., at 719 (quoting *Murdock, supra*, 319 U.S., at 112, 63 S.Ct., at 874), we reasoned that "[t]he protection of the First Amendment is not restricted to orthodox religious practices any more than it is to the expression of orthodox economic views. He who makes a profession of evangelism is not in a less preferred position than the casual worker." 321 U.S., at 577, 64 S.Ct., at 719.

Our decisions in these cases, however, resulted from the particular nature of the challenged taxes-flat license taxes that operated as a prior restraint on the exercise of religious liberty. In *Murdock,* for instance, we emphasized that the tax at issue was "a license tax-a flat tax imposed on the exercise of a privilege granted by the Bill of Rights," 319 U.S., at 113, 63 S.Ct., at 875, and cautioned that "[w]e do not mean to say that religious groups and the press are free from all financial burdens of government.... We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities." *Id.*, at 112, 63 S.Ct., at 874 (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936)); see also 319 U.S., at 115, 63 S.Ct., at 876 ("This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state"). In *Follett,* we reiterated that a preacher is not "free from all financial burdens of government, including taxes on income ***387*** or property" and, "like other citizens, may be subject to *general* taxation." 321 U.S., at 578, 64 S.Ct., at 719 (emphasis added).

Significantly, we noted in both cases that a primary vice of the ordinances at issue was that they operated as prior restraints of constitutionally protected conduct:

"In all of these cases [in which license taxes have been invalidated] the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, *it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise.* That is almost uniformly recognized as the inherent vice and evil of this flat license tax." *Murdock, supra,* 319 U.S., at 113-114, 63 S.Ct., at 875-876 (emphasis added).

See also *Follett, supra,* 321 U.S., at 577, 64 S.Ct., at 719 ("The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint") (citations omitted). Thus, although *Murdock* and *Follett* establish that appellant's form of religious exercise has "as high a claim to constitutional protection as the more orthodox types," *Murdock, supra,* 319 U.S., at 110, 63 S.Ct., at 873, those cases are of no further help to appellant. Our concern in *Murdock* and *Follett*-that a flat license tax would act as a *precondition* to the free exercise of religious beliefs-is simply not present where a tax applies to all sales and uses of tangible personal property in the State.

Our reading of *Murdock* and *Follett* is confirmed by our decision in ***695** *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), where we considered ***388** a newspaper's First Amendment challenge to a state use tax on ink and paper products used in the production of periodic publications. In the course of striking down the tax, we rejected the newspaper's suggestion, premised on *Murdock* and *Follett,* that a generally applicable sales tax could not be applied to publications. Construing those cases as involving "a flat tax, unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme, as a *condition* of the right to speak," 460 U.S., at 587, n. 9, 103 S.Ct., at 137, n. 9 (emphasis in original), we noted:

"By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax. Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible." *Ibid.* (citations omitted).

Accord, *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 229, 107 S.Ct. 1722, 1727, 95 L.Ed.2d 209 (1987) ("[A] genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible").

We also note that just last Term a plurality of the Court rejected the precise argument appellant now makes. In *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), Justice BRENNAN, writing for three Justices, held that a state sales tax exemption for religious publications violated the Establishment Clause. *Id.,* at 14-21, 109 S.Ct., at 899-903 (plurality opinion). In so concluding, the plurality further held that the Free Exercise Clause did not prevent the State from withdrawing its exemption, noting that "[t]o the extent that our opinions in *Murdock* and *Follett* might be read ... to suggest that the States and the Federal Government may never tax the sale of religious or other publications, we reject those dicta." *Id.,* at 24, 109 S.Ct., at 904. Justice WHITE, concurring in the judgment, concluded ***389** that the exemption violated the Free Press Clause because the content of a publication determined its tax-exempt status. *Id.,* at 24-25, 109 S.Ct., at 905. Justice BLACKMUN, joined by Justice O'CONNOR, concurred in the plurality's holding that the tax exemption at issue in that case contravened the Establishment Clause, but reserved the question whether "the Free Exercise Clause requires a tax exemption for the sale of religious literature by a religious organization; in other words, defining the ultimate scope of *Follett* and *Murdock* may be left for another day." *Id.,* at 28, 109 S.Ct., at 907. In this case, of course, California has not chosen to create a tax exemption for religious materials, and we therefore have no need to revisit the Establishment

Clause question presented in *Texas Monthly*.

[1] [2] We do, however, decide the free exercise question left open by Justice BLACKMUN's concurrence in *Texas Monthly* by limiting *Murdock* and *Follett* to apply only where a flat license tax operates as a prior restraint on the free exercise of religious beliefs. As such, *Murdock* and *Follett* plainly do not support appellant's free exercise claim. California's generally applicable sales and use tax is not a flat tax, represents only a small fraction of any retail sale, and applies neutrally to all retail sales of tangible personal property made in California. California imposes its sales and use tax even if the seller or the purchaser is charitable, religious, nonprofit, or state or local governmental in nature. See *Union League Club v. Johnson*, 18 Cal.2d 275, 278, 115 P.2d 425, 426 (1941); *People v. Imperial County*, 76 Cal.App.2d 572, 576-577, 173 P.2d 352, 354 (1946); *Bank of America National Trust & Savings Assn. v. State Board of Equalization*, 209 Cal.App.2d 780, 796-797, 26 Cal.Rptr. 348, 357-358 (1962). Thus, the sales and use tax is not a tax on the right to disseminate religious information, ideas, or ***696** beliefs *per se;* rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California. For example, ***390** California treats the sale of a Bible by a religious organization just as it would treat the sale of a Bible by a bookstore; as long as both are in-state retail sales of tangible personal property, they are both subject to the tax regardless of the motivation for the sale or the purchase. There is no danger that appellant's religious activity is being singled out for special and burdensome treatment.

[3] Moreover, our concern in *Murdock* and *Follett* that flat license taxes operate as a precondition to the exercise of evangelistic activity is not present in this case, because the registration requirement, see Cal.Rev. & Tax.Code Ann. §§ 6066-6074 (West 1987 and Supp.1989), and the tax itself do not act as prior restraints-no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the message. Thus, unlike the license tax in *Murdock,* which was "in no way apportioned" to the "realized revenues" of the itinerant preachers forced to pay the tax, 319 U.S., at 113-114, 63 S.Ct., at 875-876; see also *Texas Monthly, supra,* 489 U.S., at 22, 109 S.Ct., at 903, the tax at issue in this case is akin to a generally applicable income or property tax, which *Murdock* and *Follett* specifically state may constitutionally be imposed on religious activity.

[4] In addition to appellant's misplaced reliance on *Murdock* and *Follett,* appellant's free exercise claim is also in significant tension with the Court's decision last Term in *Hernandez v. Commissioner,* 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989), holding that the Government's disallowance of a tax deduction for religious "auditing" and "training" services did not violate the Free Exercise Clause. *Id.,* at 694-700, 109 S.Ct., at 2146-2149. The Court reasoned that

"[a]ny burden imposed on auditing or training ... derives solely from the fact that, as a result of the deduction denial, adherents have less money to gain access to such sessions. This burden is no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the 'contribution or gift' deduction ***391** would seem to pale by comparison to the overall federal income tax burden on an adherent." *Id.,* at 699, 109 S.Ct., at 2149.

There is no evidence in this case that collection and payment of the tax violates appellant's sincere religious beliefs. California's nondiscriminatory Sales and Use Tax Law requires only that appellant collect the tax from its California purchasers and remit the tax money to the State. The only burden on appellant is the claimed reduction in income resulting from the presumably lower demand for appellant's wares (caused by the marginally higher price) and from the costs associated with administering the tax. As the Court made clear in *Hernandez,* however, to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant. See *ibid.; Texas Monthly, supra,* 489 U.S., at 19-20, 109 S.Ct., at 902 (plurality opinion); see also *Bob Jones University v. United*

States, 461 U.S. 574, 603-604, 103 S.Ct. 2017, 1381-1382, 76 L.Ed.2d 157 (1983).

Appellant contends that the availability of a deduction (at issue in *Hernandez*) and the imposition of a tax (at issue here) are distinguishable, but in both cases adherents base their claim for an exemption on the argument that an "incrementally larger tax burden interferes with their religious activities." 490 U.S., at 700, 109 S.Ct., at 2149. It is precisely this argument-rather than one applicable only to deductions-that the Court rejected in *Hernandez*. At bottom, though we do not doubt the economic cost to appellant of complying***697** with a generally applicable sales and use tax, such a tax is no different from other generally applicable laws and regulations-such as health and safety regulations-to which appellant must adhere.

Finally, because appellant's religious beliefs do not forbid payment of the sales and use tax, appellant's reliance on *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and its progeny is misplaced, because in no sense has the State " 'condition[ed] receipt of an important benefit upon conduct proscribed by a ***392** religious faith, or ... denie[d] such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.' " *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987) (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 717-718, 101 S.Ct. 1425, 1431-1432, 67 L.Ed.2d 624 (1981)). Appellant has never alleged that the mere act of paying the tax, by itself, violates its sincere religious beliefs.

We therefore conclude that the collection and payment of the generally applicable tax in this case imposes no constitutionally significant burden on appellant's religious practices or beliefs. The Free Exercise Clause accordingly does not *require* the State to grant appellant an exemption from its generally applicable sales and use tax. Although it is of course possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices, cf. *Murdock, supra*, 319 U.S., at 115, 63 S.Ct., at 876 (the burden of a flat tax could render itinerant evangelism "crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town"), we face no such situation in this case. Accordingly, we intimate no views as to whether such a generally applicable tax might violate the Free Exercise Clause.

B

[5] Appellant also contends that application of the sales and use tax to its sale of religious materials violates the Establishment Clause because it fosters " 'an excessive government entanglement with religion,' " *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971) (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970)). Appellant alleges, for example, that the present controversy has featured on-site inspections of appellant's evangelistic crusades, lengthy on-site audits, examinations of appellant's books and records, threats of criminal prosecution, and layers of administrative and judicial proceedings.

***393** The Establishment Clause prohibits "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz, supra*, at 668, 90 S.Ct., at 1411. The "excessive entanglement" prong of the tripartite purpose-effect-entanglement *Lemon* test, see *Lemon*, 403 U.S., at 612-613, 91 S.Ct., at 2111-2112, requires examination of "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority" *id.*, at 615, 91 S.Ct., at 2112; see also *Walz*, 397 U.S., at 695, 90 S.Ct., at 1425 (separate opinion of Harlan, J.) (warning of "programs, whose very nature is apt to entangle the state in details of administration"). Indeed, in *Walz* we held that a tax exemption for "religious organizations for religious properties used solely for religious worship," as part of a general exemption for nonprofit institutions, *id.*, at 666-667, 90 S.Ct., at 1410-1411, did not violate the Establishment Clause. In upholding the tax exemption, we specifically noted that taxation of religious properties would cause at least as much administrative entanglement

between government and religious authorities as did the exemption:

***698** "Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of these legal processes.

"Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.*, at 674-675, 90 S.Ct., at 1414-1415.

***394** The issue presented, therefore, is whether the imposition of sales and use tax liability in this case on appellant results in "excessive" involvement between appellant and the State and "continuing surveillance leading to an impermissible degree of entanglement."

At the outset, it is undeniable that a generally applicable tax has a secular purpose and neither advances nor inhibits religion, for the very essence of such a tax is that it is neutral and nondiscriminatory on questions of religious belief. Thus, whatever the precise contours of the Establishment Clause, see *County of Allegheny v. American Civil Liberties Union of Pittsburgh*, 492 U.S. 573, 589-594, 109 S.Ct. 3086, 3099-3101, 106 L.Ed.2d 472 (1989) (tracing evolution of Establishment Clause doctrine); cf. *Bowen v. Kendrick*, 487 U.S. 589, 615-618, 108 S.Ct. 2562, ----, 101 L.Ed.2d 520 (1988) (applying but noting criticism of the entanglement prong of the *Lemon* test), its undisputed core values are not even remotely called into question by the generally applicable tax in this case.

Even applying the "excessive entanglement" prong of the *Lemon* test, however, we hold that California's imposition of sales and use tax liability on appellant threatens no excessive entanglement between church and state. First, we note that the evidence of administrative entanglement in this case is thin. Appellant alleges that collection and payment of the sales and use tax impose severe accounting burdens on it. The Court of Appeal, however, expressly found that the record did not support appellant's factual assertions, noting that appellant "had a sophisticated accounting staff and had recently computerized its accounting and that [appellant] in its own books and for purposes of obtaining a federal income tax exemption segregated 'retail sales' and 'donations.' " 204 Cal.App.3d, at 1289, 250 Cal.Rptr., at 905.

Second, even assuming that the tax imposes substantial administrative burdens on appellant, such administrative and recordkeeping burdens do not rise to a constitutionally significant level. Collection and payment of the tax will of course require some contact between appellant and the State, ***395** but we have held that generally applicable administrative and recordkeeping regulations may be imposed on religious organization without running afoul of the Establishment Clause. See *Hernandez*, 490 U.S., at 696-697, 109 S.Ct., at 2147-2148 ("[R]outine regulatory interaction [such as application of neutral tax laws] which involves no inquiries into religious doctrine, ... no delegation of state power to a religious body, ... and no 'detailed monitoring and close administrative contact' between secular and religious bodies, ... does not of itself violate the nonentanglement command"); *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-306, 105 S.Ct. 1953, 1963-1964, 85 L.Ed.2d 278 (1985) ("The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations, *Lemon, supra*, 403 U.S., at 614, 91 S.Ct., at 2112, and the recordkeeping requirements of the Fair Labor Standards Act, while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs"). To be sure, we noted in ***699** *Tony and Susan Alamo Foundation* that the recordkeeping requirements at issue in that case "appl[ied] only to commercial activities undertaken with a 'business purpose,' and would therefore have no impact on petitioners' own evangelical activities," 471 U.S., at 305, 105 S.Ct., at 1963, but that recognition did not bear on whether the generally applicable regulation was nevertheless "the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion," *ibid.*

The fact that appellant must bear the cost of collecting and remitting a generally applicable sales and use tax-even if the financial burden of such costs may vary from religion to religion-does not enmesh government in religious affairs. Contrary to appellant's contentions, the statutory scheme requires neither the involvement of state employees in, nor on-site continuing inspection of, appellant's day-to-day operations. There is no "official and continuing surveillance," *Walz, supra*, 397 U.S., at 675, 90 S.Ct., at 1414, by government auditors. The sorts of ***396** government entanglement that we have found to violate the Establishment Clause have been far more invasive than the level of contact created by the administration of neutral tax laws. Cf. *Aguilar v. Felton*, 473 U.S. 402, 414, 105 S.Ct. 3232, 3238, 87 L.Ed.2d 290 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-127, 103 S.Ct. 505, 511-512, 74 L.Ed.2d 297 (1982).

Most significantly, the imposition of the sales and use tax without an exemption for appellant does not require the State to inquire into the religious content of the items sold or the religious motivation for selling or purchasing the items, because the materials are subject to the tax regardless of content or motive. From the State's point of view, the critical question is not whether the materials are religious, but whether there is a sale or a use, a question which involves only a secular determination. Thus, this case stands on firmer ground than *Hernandez*, because appellant offers the items at a stated price, thereby relieving the State of the need to place a monetary value on appellant's religious items. Compare *Hernandez*, 490 U.S., at 697-698, 109 S.Ct., at 2148 (where no comparable good or service is sold in the marketplace, Internal Revenue Service looks to cost of providing the good or service), with *id.*, at 706, 109 S.Ct., at 2152 (O'CONNOR, J., dissenting) ("It becomes impossible ... to compute the 'contribution' portion of a payment to charity where what is received in return is not merely an intangible, but an intangible (or, for that matter a tangible) that is not bought and sold except in donative contexts"). Although appellant asserts that donations often accompany payments made for the religious items and that items are sometimes given away without payment (or only nominal payment), it is plain that, in the first case, appellant's use of "order forms" and "price lists" renders illusory any difficulty in separating the two portions and that, in the second case, the question is only whether any particular transfer constitutes a "sale." Ironically, appellant's theory, under which government may not tax "religious core" activities but may tax "nonreligious" activities, would require government to do precisely what appellant asserts the Religion ***397** Clauses prohibit: "determine which expenditures are religious and which are secular." *Lemon*, 403 U.S., at 621-622, 91 S.Ct., at 2115-2116.

Accordingly, because we find no excessive entanglement between government and religion in this case, we hold that the imposition of sales and use tax liability on appellant does not violate the Establishment Clause.

III

[6] Appellant also contends that the State's imposition of use tax liability on it violates the Commerce and Due Process Clauses because, as an out-of-state distributor, it had an insufficient "nexus" to the ****700** State. See *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 554, 97 S.Ct. 1386, 1389, 51 L.Ed.2d 631 (1977); *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 756-760, 87 S.Ct. 1389, 1391-1393, 18 L.Ed.2d 505 (1967). We decline to reach the merits of this claim, however, because the courts below ruled that the claim was procedurally barred.

California law provides that an administrative claim for a tax refund "shall state the specific grounds upon which the claim is founded," Cal.Rev. & Tax.Code Ann. § 6904(a) (West Supp.1989), and that refund suits will be entertained only if "a claim for refund or credit has been duly filed" with the Board, § 6932. Suit may thereafter be brought only "on the grounds set forth in the claim." § 6933. Thus, under state law, "[t]he claim for refund delineates and restricts the issues to be considered in a taxpayer's refund action. The trial court and [appellate] court are without jurisdiction to consider grounds not set forth in the claim." *Atari, Inc. v. State Board of Equalization*, 170 Cal.App.3d 665, 672, 216 Cal.Rptr. 267, 271 (1985) (citations omitted). This rule serves a legitimate state interest in

requiring parties to exhaust administrative remedies before proceeding to court, for "[s]uch a rule prevents having an overworked court consider issues and remedies available through administrative channels." *Id.*, at 673, 216 Cal.Rptr., at 272.

***398** The record in this case makes clear that appellant, in its refund claim before the Board, failed even to cite the Commerce Clause or the Due Process Clause, much less articulate legal arguments contesting the nexus issue. See App. 34 (incorporating petition for redetermination, which in turn raised only First Amendment arguments, see *id.*, at 11-16). The Board's hearing officer specifically noted, in forwarding his decision to the Board, that appellant's "[c]ounsel does not argue nexus," *id.*, at 22, and indeed the parties stipulated before the trial court that appellant's request for a refund was based on its First Amendment claim, *id.*, at 59. Accordingly, both the trial court and the Court of Appeal declined to rule on the nexus issue on the ground that appellant had failed to raise it in its refund claim before the Board. 204 Cal.App.3d, at 1290-1292, 250 Cal.Rptr., at 905-906; App. 213. This unambiguous application of state procedural law makes it unnecessary for us to review the asserted claim. See *Michigan v. Long*, 463 U.S. 1032, 1041-1042, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201 (1983); *Michigan v. Tyler*, 436 U.S. 499, 512, n. 7, 98 S.Ct. 1942, 1951, n. 7, 56 L.Ed.2d 486 (1978).

[Z] Appellant nevertheless urges that the state procedural ground relied upon by the courts below is inadequate because the procedural rule is not " 'strictly or regularly followed.' " *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 1736, 12 L.Ed.2d 766 (1964)). Appellant asserts that state courts in California retain the authority to hear claims "involving important questions of public policy" notwithstanding the parties' failure to raise those claims before an administrative agency. See *Lindeleaf v. Agricultural Labor Relations Bd.*, 41 Cal.3d 861, 870-871, 226 Cal.Rptr. 119, 124-125, 718 P.2d 106, 112 (1986); *Hale v. Morgan*, 22 Cal.3d 388, 394, 149 Cal.Rptr. 375, 379, 584 P.2d 512, 516 (1978). Appellant observes, for example, that although the Court of Appeal in this case found appellant's nexus claim to be procedurally barred, it ignored the procedural bar and ruled on the merits of appellant's Ninth and Tenth Amendment arguments, see 204 Cal.App.3d, at 1292-1293, 250 Cal.Rptr., at 907-908, even though those arguments ***399** were likewise not raised in appellant's refund claim, see *id.*, at 1292, n. 19, 250 Cal.Rptr., at 907, n. 19.

The Court of Appeal, however, specifically rejected appellant's claim that the nexus issue raised "important questions of public policy," noting that the issue instead "raise[d] ****701** factual questions, the determination of which is not a matter of 'public policy' but a matter of evidence." *Id.*, at 1292, 250 Cal.Rptr., at 907. Even if the Court of Appeal erred as a matter of state law in declining to rule on appellant's nexus claim, appellant has failed to substantiate any claim that the California courts in general apply this exception in an irregular, arbitrary, or inconsistent manner. Accordingly, we conclude that appellant's Commerce Clause and Due Process Clause argument is not properly before us. We thus express no opinion on the merits of the claim.

The judgment of the California Court of Appeal is affirmed.

It is so ordered.

U.S.Cal.,1990.
Jimmy Swaggart Ministries v. Board of Equalization of California
493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796, 58 USLW 4135

Briefs and Other Related Documents (Back to top)

- 1989 WL 1126883 (Appellate Brief) Brief of National Council of Churches of Christ in the U.S.A. As Amicus Curiae in Support of Appellant (Oct. Term 1989)
- 1989 WL 1126894 (Appellate Brief) Reply Brief for Appellant (Sep. 19, 1989)
- 1989 WL 1126892 (Appellate Brief) Brief of the National Conference of State Legislatures, National

League of Cities, U.S. Conference of Mayors, National Association of Counties, and International City Management Association; Joined by the Multistate Tax Commission as Amici Curiae in Support of Appellee (Aug. 21, 1989)
• 1989 WL 1126891 (Appellate Brief) Appellee's Brief (Aug. 18, 1989)
• 1989 WL 1126888 (Appellate Brief) Brief Amicus Curiae of the American Civil Liberties Union in Support of Appellee (Jul. 26, 1989)
• 1989 WL 1126881 (Appellate Brief) Brief of Amicus Curiae Watchtower Bible and Tract Society of New York, Inc. (Jun. 22, 1989)
• 1989 WL 1126882 (Appellate Brief) Brief Amicus Curiae of the Evangelical Council for Financial Accountability, Focus on the Family, Insight for Living, the Master's Communication, and Prison Fellowship, As Amici Curiae in Support of Appellant (Jun. 22, 1989)
• 1989 WL 1126885 (Appellate Brief) Brief Amicus Curiae of the Association for Public Justice in Support of Appellant (Jun. 22, 1989)
• 1989 WL 1126887 (Appellate Brief) Brief for the Appellant (Jun. 22, 1989)
• 1989 WL 1126880 (Appellate Brief) Brief Opposing Motion to Dismiss or Affirm (Apr. 06, 1989)
• 1988 WL 1025616 (Appellate Brief) Brief Amicus Curiae of the International Society for Krishna Consciousness of California, Inc. in Support of Appellant (Oct. Term 1988)
• 1988 WL 1025619 (Appellate Brief) Brief Amicus Curiae of the National Taxpayers Union in Support of Appellant (Oct. Term 1988)

END OF DOCUMENT

APPENDIX 7

460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295, 9 Media L. Rep. 1369

Supreme Court of the United States
MINNEAPOLIS STAR AND TRIBUNE COMPANY, Appellant
v.
MINNESOTA COMMISSIONER OF REVENUE.
No. 81-1839.
Argued Jan. 12, 1983.
Decided March 29, 1983.

Newspaper brought an action seeking a refund of use taxes imposed on the cost of paper and ink products consumed in the production of its publication. The District Court, Hennepin County, Minnesota, entered summary judgment in favor of the newspaper, and the State Commissioner of Revenue appealed. The Minnesota Supreme Court, 314 N.W.2d 201, reversed. The United States Supreme Court, Justice O'Connor, held that imposition of use tax on cost of paper and ink products consumed in production of publications violated the First Amendment by imposing significant burden on freedom of the press.
Reversed.
Justice Blackmun joined the opinion except footnote 12.
Justice White concurred in part and dissented in part and filed opinion.
Justice Rehnquist dissented and filed opinion.

West Headnotes

[1] KeyCite Notes

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371k1212)

Use tax on cost of paper and ink products consumed in production of publications was not unconstitutional under *Grosjean* decision where there was no legislative history and no indication, apart from structure of tax itself, of any impermissible or censorial motive on part of legislature. M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(l).

[2] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2072 k. Enforcement of Generally Applicable Laws. Most Cited Cases
(Formerly 92k90.1(8))

States and the federal government can subject newspapers to generally applicable economic regulations without creating constitutional problems. U.S.C.A. Const.Amend. 1.

[3] KeyCite Notes

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(A) In General
371k3601 Nature of Taxes
371k3603 k. Use Tax. Most Cited Cases
(Formerly 371k1202)

"Use tax" ordinarily serves to complement sales tax by eliminating incentive to make major purchases in states with lower sales taxes; it requires resident who shops out-of-state to pay use tax equal to sales tax savings.

[4] KeyCite Notes

92 Constitutional Law
92X First Amendment in General
92X(B) Particular Issues and Applications
92k1170 k. In General. Most Cited Cases
(Formerly 92k82(6.1), 92k82(6))

Tax that burdens rights protected by First Amendment cannot stand unless burden is necessary to achieve overriding governmental interest. U.S.C.A. Const.Amend. 1.

[5] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2070 k. In General. Most Cited Cases
(Formerly 92k90(1))

Differential treatment of press, unless justified by some special characteristic of the press, suggests that goal of regulation is not unrelated to suppression of expression, and such goal is presumptively unconstitutional. U.S.C.A. Const.Amend. 1.

[6] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8), 92k90.1(1))

Differential taxation of press places such burden on interest protected by First Amendment that such treatment cannot be countenanced unless state asserts counterbalancing interest of compelling importance that it cannot achieve without differential taxation. U.S.C.A. Const.Amend. 1.

[7] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(U) Press in General
92k2070 k. In General. Most Cited Cases
(Formerly 92k90(1))

Regulation of press can survive only if governmental interest outweighs burden and cannot be achieved by means that do not infringe First Amendment rights as significantly. U.S.C.A. Const.Amend. 1.

[8] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8), 92k90.1(1))

Raising of revenue, standing alone, cannot justify special treatment of press, for alternative means of achieving same interest without raising concerns under First Amendment is clearly available: state could raise revenue by taxing businesses generally, avoiding censorial threat implicit in tax that singles out the press. U.S.C.A. Const.Amend. 1.

[9] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8))

371 Taxation KeyCite Notes
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371k1212)

Use tax on cost of paper and ink products consumed in production of publications could not be justified as merely substitute for generally applicable sales tax, thereby avoiding First Amendment threat implicit in the use tax, where there was no explanation for choosing to use substitute for sales tax rather than sales tax itself and where permitting state to single out press for different method of taxation even if effect of burden was no different from that on other taxpayers posed too great a threat to First Amendment concerns. U.S.C.A. Const.Amend. 1; M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(1).

[10] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases

(Formerly 92k90.1(8))

371 Taxation KeyCite Notes
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371k1212)

Use tax on cost of paper and ink products consumed in production of publications was unconstitutional not only because it singled out the press but also because, due to effect of exemption for first $100,000 in ink and paper purchases, it targeted small group of newspapers. U.S.C.A. Const.Amend. 1; M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(l).

[11] KeyCite Notes

92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1150 k. In General. Most Cited Cases
(Formerly 92k82(3))

Illicit legislative intent is not sine qua non of violation of First Amendment. U.S.C.A. Const.Amend. 1.

[12] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2081 k. Taxation. Most Cited Cases
(Formerly 92k90.1(8))

371 Taxation KeyCite Notes
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371k1212)

Imposition of use tax on cost of paper and ink products consumed in production of publications violated the First Amendment by imposing significant burden on freedom of the press. U.S.C.A. Const.Amend. 1; M.S.A. §§ 297A.14, 297A.24, 297A.25, subd. 1(i).

***1366 Syllabus** FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*575 While exempting periodic publications from its general sales and use tax, Minnesota imposes a "use tax" on the cost of paper and ink products consumed in the production of such a publication, but exempts the first $100,000 worth of paper and ink consumed in any calendar year. Appellant newspaper publisher brought an action seeking a refund of the ink and paper use taxes it had paid during certain years, contending that the tax violates, *inter alia,* the guarantee of the freedom of press in the First Amendment. The Minnesota Supreme Court upheld the tax.
Held: The tax in question violates the First Amendment. Pp. 1368-1376.
(a) There is no legislative history, and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the Minnesota Legislature in enacting the tax. *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 distinguished. Pp. 1368-1369.
(b) But by creating the special use tax, which is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. When a State so singles out the press, the political constraints that prevent a legislature from imposing crippling taxes of general applicability are weakened, and the threat of burdensome**1367 taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, thus undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. Moreover, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such goal is presumptively unconstitutional. Differential treatment of the press, then, places such a burden on the interests protected by the First Amendment that such treatment cannot be countenanced unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. Pp. 1369-1372.
(c) Minnesota has offered no adequate justification for the special treatment of newspapers. Its interest in raising revenue, standing alone, cannot justify such treatment, for the alternative means of taxing businesses generally is clearly available. And the State has offered no explanation of why it chose to use a substitute for the sales tax rather *576 than the sales tax itself. A rule that would automatically allow the State to single out the press for a different method of taxation as long as the effective burden is no different from that on other taxpayers or, as Minnesota asserts here, is lighter than that on other businesses, is to be avoided. The possibility of error inherent in such a rule poses too great a threat to concerns at the heart of the First Amendment. Pp. 1369-1375.
(d) Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption is that only a handful of publishers in the State pay any tax at all, and even fewer pay any significant amount of tax. To recognize a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. Pp. 1375-1376.
314 N.W.2d 201 (Minn.1981), reversed.

Lawrence C. Brown argued the cause for appellant. With him on the briefs were *John D. French, John P. Borger,* and *Norton L. Armour.*
Paul R. Kempainen, Special Assistant Attorney General of Minnesota, argued the cause for appellee. With him on the brief was *Warren Spannaus,* Attorney General.*
* Briefs of *amici curiae* urging reversal were filed by *Peter W. Schroth* and *Charles S. Sims* for the American Civil Liberties Union et al.; and by *Phillip A. Lacovara, W. Terry Maguire,* and *Pamela J. Riley* for Knight-Ridder Newspapers, Inc., et al.

Justice O'CONNOR delivered the opinion of the Court.FN*

FN* Justice BLACKMUN joins this opinion except footnote 12.

This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

*577 I

Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum.[FN1] Act of June 1, 1967, ch. 32, art. XIII, § 2, 1967 Minn.Laws Sp.Sess. 2143, 2179, codified at Minn.Stat. § 297A.02 (1982). In general, the tax applies only to retail sales. *Ibid.* An exemption for industrial and agricultural users shields from the tax sales of components to be used in the production of goods that will themselves be sold at retail. § 297A.25(1)(h). As part of this general system of taxation and in support of the sales tax, see Minn.Code of Agency Rules, Tax S & U 300 (1979), Minnesota also enacted a tax on the "privilege of using, storing or consuming in Minnesota tangible personal property." This use tax applies to any nonexempt tangible personal property unless the sales tax was paid on the sales price. Minn.Stat. § 297A.14 (1982). Like the classic use tax, this use tax protects the State's sales tax by eliminating the residents'***1368** incentive to travel to States with lower sales taxes to buy goods rather than buying them in Minnesota. §§ 297A.14, 297A.24.

FN1. Currently, the tax applies to sales of items for more than 9¢ . Minn.Stat. § 297A.03 (3) (1982). When first enacted, the threshold amount was 16¢. Act of June 1, 1967, ch. 32, art. XIII, § 3(2), 1967 Minn.Laws Sp.Sess. 2143, 2180.

The appellant, Minneapolis Star and Tribune Company "Star Tribune", is the publisher of a morning newspaper and an evening newspaper in Minneapolis. From 1967 until 1971, it enjoyed an exemption from the sales and use tax provided by Minnesota for periodic publications. 1967 Minn.Laws Sp.Sess. 2187, codified at Minn.Stat. § 297A.25(1)(i). In 1971, however, while leaving the exemption from the sales tax in place, the legislature amended the scheme to impose a "use tax" on the cost of paper and ink products consumed in the production of a publication. Act of October 31, 1971, ch. 31, art. I, § 5, 1971 Minn.Laws Sp.Sess. 2561, 2565, codified ***578** with modifications at Minn.Stat. §§ 297A.14, 297A.25(1)(i) (1982). Ink and paper used in publications became the only items subject to the use tax that were components of goods to be sold at retail. In 1974, the legislature again amended the statute, this time to exempt the first $100,000 worth of ink and paper consumed by a publication in any calendar year, in effect giving each publication an annual tax credit of $4,000. Act of May 24, 1973, ch. 650, art. XIII, § 1, 1973 Minn.Laws 1606, 1637, codified at Minn.Stat. § 297A.14 (1982).[FN2] Publications remained exempt from the sales tax, § 2, 1973 Minn.Laws 1639.

FN2. After the 1974 amendment, the use tax provision read in full:

"For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 [the sales tax] was paid on said sales price.

"Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its [*sic*] transport into this state.

"Notwithstanding any other provisions of section 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section." 1973 Minn.Laws 1637, codified at Minn.Stat. § 297A.14 (1982).

The final paragraph was the only addition of the 1974 amendment. The provision has since been amended to increase the rate of the tax, Act of June 6, 1981, ch. 1, art. IV, § 5, 1981 Minn.Laws Sp.Sess. 2396, but has not been changed in any way relevant to this litigation.

After the enactment of the $100,000 exemption, 11 publishers, producing 14 of the 388 paid circulation newspapers in the State, incurred a tax liability in 1974. Star Tribune was one of the 11, and, of the $893,355 collected, it paid $608,634, or roughly two-thirds of the total revenue raised by the tax. ***579** See 314 N.W.2d 201, 203 and n. 4 (1981). In 1975, 13 publishers, producing 16 out of 374 paid circulation papers, paid a tax. That year, Star Tribune again bore roughly two-thirds of the total receipts from the use tax on ink and paper. *Id.*, at 204 and n. 5.

Star Tribune instituted this action to seek a refund of the use taxes it paid from January 1, 1974 to May 31, 1975. It challenged the imposition of the use tax on ink and paper used in publications as a violation of the guarantees of freedom of the press and equal protection in the First and Fourteenth Amendments. The Minnesota Supreme Court upheld the tax against the federal constitutional challenge. 314 N.W.2d 201 (1981). We noted probable jurisdiction, 457 U.S. 1130, 102 S.Ct. 2955, 73 L.Ed.2d 1347 (1982), and we now reverse.

II

[1] Star Tribune argues that we must strike this tax on the authority of *Grosjean v. American Press Co., Inc.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). Although there are similarities between the two cases, we agree with the State that *Grosjean* is not controlling.

****1369** In *Grosjean*, the State of Louisiana imposed a license tax of 2% of the gross receipts from the sale of advertising on all newspapers with a weekly circulation above 20,000. Out of at least 124 publishers in the State, only 13 were subject to the tax. After noting that the tax was "single in kind" and that keying the tax to circulation curtailed the flow of information, *Id.*, at 250-251, 56 S.Ct., at 449, this Court held the tax invalid as an abridgment of the freedom of the press. Both the brief and the argument of the publishers in this Court emphasized the events leading up to the tax and the contemporary political climate in Louisiana. See Arg. for Appellees, 297 U.S., at 238, 56 S.Ct., at 445; Brief for Appellees, O.T. 1936, No. 303, pp. 8-9, 30. All but one of the large papers subject to the tax had "ganged up" on Senator Huey Long, and a circular distributed by Long and the governor to each member of the state legislature ***580** described "lying newspapers" as conducting "a vicious campaign" and the tax as "a tax on lying, 2c [*sic*] a lie." *Id.*, at 9. Although the Court's opinion did not describe this history, it stated, "[The tax] is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information," 297 U.S., at 250, 56 S.Ct., at 449, an explanation that suggests that the motivation of the legislature may have been significant.

Our subsequent cases have not been consistent in their reading of *Grosjean* on this point. Compare *United States v. O'Brien*, 391 U.S. 367, 384-385, 88 S.Ct. 1673, 1683, 20 L.Ed.2d 672 (1968) (stating that legislative purpose was irrelevant in *Grosjean*) with *Houchins v. KQED, Inc.*, 438 U.S. 1, 9-10, 98 S.Ct. 2588, 2594, 57 L.Ed.2d 553 (1978) (plurality opinion) (suggesting that purpose was relevant in *Grosjean*); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 383, 93 S.Ct. 2553, 2557, 37 L.Ed.2d 669 (1973) (same). Commentators have generally viewed *Grosjean* as dependent on the improper censorial goals of the legislature. See T. Emerson, The System of Freedom of Expression 419 (1970); L. Tribe, American Constitutional Law 592 n. 8, 724 n. 10 (1978). We think that the result in *Grosjean* may have been attributable in part to the perception on the part of the Court that the state imposed the tax with an intent to penalize a selected group of newspapers. In the case currently before us, however, there is no legislative history [FN3] and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature. We cannot resolve the case by simple citation to *Grosjean*. Instead, we must analyze the problem anew under the general principles of the First Amendment.

FN3. Although the Minnesota legislature records some proceedings and preserves the recordings, it has specifically provided that those recordings are not to be considered as evidence of legislative intent. See Minnesota Legislative Manual, Rule 1.18, Rules of the Minn. House of Representatives; Rule 65, Permanent Rules of the Senate (1981-1982).

There is no evidence of legislative intent on the record in this litigation.

***581** III

[2] Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems. See, *e.g.*, *Citizens Publishing Co. v. United States*, 394 U.S. 131, 139, 89 S.Ct. 927, 931, 22 L.Ed.2d 148 (1969) (antitrust laws); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-156, 72 S.Ct. 181, 187, 96 L.Ed. 162 (1951) (same); *Breard v. Alexandria*, 341 U.S. 622, 71 S.Ct. 921, 95 L.Ed. 1233 (1951) (prohibition of door-to-door solicitation); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-193, 66 S.Ct. 494, 497-98, 90 L.Ed. 614 (1946) (Fair Labor Standards Act); *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946) (same); ***1370** *Associated Press v. United States*, 326 U.S. 1, 6-7, 19-20, 65 S.Ct. 1416, 1418, 1424, 89 L.Ed. 2013 (1945) (antitrust laws); *Associated Press v. NLRB*, 301 U.S. 103, 132-133, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937) (NLRA); see also *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (enforcement of subpoenas). Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. Although the State argues now that the tax on paper and ink is part of the general scheme of taxation, the use tax provision, quoted in note 2, *supra*, is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law.

[3] Minnesota's treatment of publications differs from that of other enterprises in at least two important respects: [FN4] it imposes a use tax that does not serve the function of protecting the sales tax, and it taxes an intermediate transaction rather than the ultimate retail sale. A use tax ordinarily serves to complement the sales tax by eliminating the incentive to make major purchases in States with lower sales taxes; it requires***582** the resident who shops out-of-state to pay a use tax equal to the sales tax savings. *E.g.*, *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555, 97 S.Ct. 1386, 1389, 51 L.Ed.2d 631 (1977); P. Hartman, Federal Limitations on State and Local Taxation §§ 10:1, 10:5 (1981); Warren & Schlesinger, Sales and Use Taxes: Interstate Commerce Pays Its Way, 38 Colum.L.Rev. 49, 63 (1938). Minnesota designed its overall use tax scheme to serve this function. As the regulations state, "The 'use tax' is a compensatory or complementary tax." Minn.Code of Agency Rules, Tax S & U 300 (1979); see Minn.Stat. § 297A.24 (1982). Thus, in general, items exempt from the sales tax are not subject to the use tax, for, in the event of a sales tax exemption, there is no "complementary function" for a use tax to serve. See *DeLuxe Check Printers, Inc. v. Commissioner of Tax*, 295 Minn. 76, 203 N.W.2d 341, 343 (1972). But the use tax on ink and paper serves no such complementary function; it applies to all uses, whether or not the taxpayer purchased the ink and paper in-state, and it applies to items exempt from the sales tax.

> FN4. A third difference is worth noting, though it may have little economic effect. The use tax is not visible to consumers, while the sales tax must, by law, be stated separately as an addition to the price. See Minn.Stat. § 297A.03(1) (1982).

Further, the ordinary rule in Minnesota, as discussed above, is to tax only the ultimate, or retail, sale rather than the use of components like ink and paper. "The statutory scheme is to devise a unitary tax which exempts intermediate transactions and imposes it only on sales when the finished product is purchased by the ultimate user." *Standard Packaging Corp. v. Commissioner of Revenue*, 288 N.W.2d 234 (Minn.1979). Publishers, however, are taxed on their purchase of components, even though they will eventually sell their publications at retail.

[4] By creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. We then must determine whether the First Amendment permits such special taxation. A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. See, ***583** e.g., United States v. Lee, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). Any tax that the press must pay, of course, imposes some "burden." But, as we have observed, see p. 1369, *supra*, this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasized the general applicability of the challenged regulation to all businesses, *e.g.*, Oklahoma Press Publishing Co. v. Walling, supra, 327 U.S., at 194, 66 S.Ct., at 498; Mabee v. White Plains Publishing Co., supra, 327 U.S., at 184, 66 S.Ct., at 514; ****1371** Associated Press v. NLRB, supra, 301 U.S., at 132-133, 57 S.Ct., at 655-56,[FN5] suggesting that a regulation that singled out the press might place a heavier burden of justification on the State, and we now conclude that the special problems created by differential treatment do indeed impose such a burden.

> FN5. The Court recognized in *Oklahoma Press* that the FLSA excluded seamen and farm workers. See 327 U.S., at 193, 66 S.Ct., at 497. It rejected, however, the publisher's argument that the exclusion of these workers precluded application of the law to the employees of newspapers. The State here argues that *Oklahoma Press* establishes that the press cannot successfully challenge regulations on the basis of the exemption of other enterprises. We disagree. The exempt enterprises in *Oklahoma Press* were isolated exceptions and not the rule. Here, everything is exempt from the use tax on ink and paper, except the press.

There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment.[FN6] The role of the press in mobilizing sentiment***584** in favor of independence was critical to the Revolution. When the Constitution was proposed without an explicit guarantee of freedom of the press, the Antifederalists objected. Proponents of the Constitution, relying on the principle of enumerated powers, responded that such a guarantee was unnecessary because the Constitution granted Congress no power to control the press. The remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists:

> FN6. It is true that our opinions rarely speculate on precisely how the Framers would have analyzed a given regulation of expression. In general, though, we have only limited evidence of exactly how the Framers intended the First Amendment to apply. There are no recorded debates in the Senate or in the States, and the discussion in the House of Representatives was couched in general terms, perhaps in response to Madison's suggestion that the representatives not stray from simple acknowledged principles. See Constitution of the United States: Analysis & Interpretation, 92d Cong., 2d Sess., S.Doc. 92-82 at 936 and n. 5 (1973); see also Z. Chafee, Freedom of Speech in the United States 16 (1941). Consequently, we ordinarily simply apply those general principles, requiring the government to justify any burdens on First Amendment rights by showing that they are necessary to achieve a legitimate overriding governmental interest, see note 7, *infra*. But when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone. Prior restraints, for instance, clearly strike to the core of the Framers' concerns, leading this Court to treat them as particularly suspect. Near v. Minnesota, 283 U.S. 697, 713, 716-718, 51 S.Ct. 625, 630, 631-32, 75 L.Ed. 1357 (1931); cf. Grosjean v. American Press Co., Inc., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936) (relying on the role of the "taxes on knowledge" in inspiring the First Amendment to strike down a contemporary tax on knowledge).

"I confess I do not see in what cases the congress can, with any pretence of right, make a law to suppress the freedom of the press; though I am not clear, that congress is restrained from laying any duties whatever on printing, and from laying duties particularly heavy on certain pieces printed." R. Lee, Observation Leading to a Fair Examination of the System of Government, Letter IV, reprinted in 1

B. Schwartz, The Bill of Rights: A Documentary History 466, 474 (1971).

See also A Review of the Constitution Proposed by the Late Convention by a Federal Republican, reprinted in 3 H. Storing, The Complete Anti-Federalist 65, 81-82 (1981); M. Smith, Address to the People of New York on the Necessity of Amendments to the Constitution, reprinted in 1 B. Schwartz, *supra,* 566, 575-576; cf. The Federalist No. 84, p. 440 and n. 1 (A. Hamilton) (M. Beloff ed. 1948) (recognizing and attempting to refute the argument). The concerns voiced by the Antifederalists led to the adoption of the Bill of Rights. See 1 B. Schwartz, *supra,* at 527.

***585** The fears of the Antifederalists were well-founded. A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. See ****1372** *Railway Express Agency v. New York,* 336 U.S. 106, 112-113, 69 S.Ct. 463, 467, 93 L.Ed. 533 (1949) (Jackson, J., concurring). When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. See generally, Stewart, "Or of the Press," 26 Hastings L.J. 631, 634 (1975). "[A]n untrammeled press [is] a vital source of public information," *Grosjean,* 297 U.S., at 250, 56 S.Ct., at 449, and an informed public is the essence of working democracy.

[5] [6] [7] Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. See, *e.g., Police Department of the City of Chicago v. Mosley,* 408 U.S. 92, 95-96, 92 S.Ct. 2286, 2289-90, 33 L.Ed.2d 212 (1972); cf. *Brown v. Hartlage,* 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982) (First Amendment has its "fullest and most urgent" application in the case of regulation of the content of political speech). Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.[FN7]

> FN7. Justice REHNQUIST'S dissent analyzes this case solely as a problem of equal protection, applying the familiar tiers of scrutiny. *Post,* at 1380. We, however, view the problem as one arising directly under the First Amendment, for, as our discussion shows, the Framers perceived singling out the press for taxation as a means of abridging the freedom of the press, see note 6, *supra*. The appropriate method of analysis thus is to balance the burden implicit in singling out the press against the interest asserted by the State. Under a long line of precedent, the regulation can survive only if the governmental interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly. See, *e.g., United States v. Lee,* 455 U.S. 252, 257-258, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); *United States v. O'Brien,* 391 U.S. 367, 376-377, 88 S.Ct. 1673, 1678-79, 20 L.Ed.2d 672; *NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

***586** IV

[8] The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally,[FN8] avoiding the censorial threat implicit in a tax that singles out the press.

FN8. Cf. *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (generally applicable tax may be applied to those with religious objections).

[9] Addressing the concern with differential treatment, Minnesota invites us to look beyond the form of the tax to its substance. The tax is, according to the State, merely a substitute for the sales tax, which, as a generally applicable tax, would be constitutional as applied to the press.[FN9] **1373 There are *587 two fatal flaws in this reasoning. First, the State has offered no explanation of why it chose to use a substitute for the sales tax rather than the sales tax itself. The court below speculated that the State might have been concerned that collection of a tax on such small transactions would be impractical. 314 N.W.2d, at 207. That suggestion is unpersuasive, for sales of other low-priced goods are not exempt, see note 1, *supra*.[FN10] If the real goal of this tax is to duplicate*588 the sales tax, it is difficult to see why the State did not achieve that goal by the obvious and effective expedient of applying the sales tax.

FN9. Star Tribune insists that the premise of the State's argument-that a generally applicable sales tax would be constitutional-is incorrect, citing *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944), *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), and *Jones v. Opelika*, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943). We think that *Breard v. Alexandria*, 341 U.S. 622, 71 S.Ct. 921, 95 L.Ed. 1233 (1951), is more relevant and rebuts Star Tribune's argument. There, we upheld an ordinance prohibiting door-to-door solicitation, even though it applied to prevent the door-to-door sale of subscriptions to magazines, an activity covered by the First Amendment. Although *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), had struck down a similar ordinance as applied to the distribution of free religious literature, the *Breard* Court explained that case as emphasizing that the information distributed was religious in nature and that the distribution was noncommercial. 341 U.S., at 642-643, 71 S.Ct., at 932-33. As the dissent in *Breard* recognized, the majority opinion substantially undercut both *Martin* and the cases now relied upon by Star Tribune, in which the Court had invalidated ordinances imposing a flat license tax on the sale of religious literature. See *Id.*, at 649-650, 71 S.Ct., at 936 (Black, J., dissenting) ("Since this decision cannot be reconciled with the *Jones*, *Murdock* and *Martin v. Struthers* cases, it seems to me that good judicial practice calls for their forthright overruling.") Whatever the value of those cases as authority after *Breard*, we think them distinguishable from a generally applicable sales tax. In each of those cases, the local government imposed a flat tax, unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme, as a *condition* of the right to speak. By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. *Follett, supra*, 321 U.S., at 576-578, 64 S.Ct., at 718-19; *Murdock, supra*, 319 U.S., at 112, 113-114, 63 S.Ct., at 874, 875; *Jones v. Opelika*, 316 U.S. 584, 609, 611, 62 S.Ct. 1231, 1244, 1245, 86 L.Ed. 1691 (1942) (Stone, C.J., dissenting), adopted as opinion of Court, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943); see *Grosjean v. American Press Co., Inc., supra*, 297 U.S., at 249, 56 S.Ct., at 448; see generally *Near v. Minnesota, supra*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357. In that regard, the cases cited by Star Tribune do not resemble a generally applicable sales tax. Indeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible, *Branzburg v. Hayes*, 408 U.S. 665, 683, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (dictum); *Grosjean v. American Press Co., Inc., supra*, 297 U.S., at 250, 56 S.Ct., at 449 (1936) (dictum); cf. *Follett, supra*, 321 U.S., at 578, 64 S.Ct., at 719 (preacher subject to taxes on income or property) (dictum); *Murdock, supra*, 319 U.S., at 112, 63 S.Ct., at 874 (same) (dictum).

FN10. Justice REHNQUIST'S dissent explains that collecting sales taxes on newspapers

entails special problems because of the unusual marketing practices for newspapers-sales from vending machines and at newstands, for instance. *Post*, at 1382. The dissent does not, however, explain why the State cannot resolve these problems by using the same methods used for items like chewing gum and candy, marketed in these same unusual ways and subject to the sales tax, see Minn.Stat. § 297A.01(3)(c)(vi), (viii) (defining the sale of food from vending machines as a sale); see also § 297A.04 (dealing with vending machine operators).

Further, Justice REHNQUIST fears that the imposition of a sales tax will mean that vending machine prices will be 26¢ instead of 25¢; or prices will be 30¢, with publishers retaining an extra 4¢ per paper; or the price will be 25¢, with publishers absorbing the tax. *Post*, at 1381. It is difficult to see how the use tax rectifies this problem, for it increases publishers' costs. If the increase is a penny, the use taxes forces publishers to choose to pass the exact increment along to consumers by raising the price of the finished product to 26¢; or to increase the price by a nickel and retain an extra 4¢ per paper; or to leave the price at 25¢ and absorb the tax.

Further, even assuming that the legislature did have valid reasons for substituting another tax for the sales tax, we are not persuaded that this tax does serve as a substitute. The State asserts that this scheme actually *favors* the press over other businesses, because the same rate of tax is applied, but, for the press, the rate applies to the cost of components rather than to the sales price. We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses. One reason for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may deter [the] exercise of [First Amendment]***1374** rights almost as potently as the actual application of sanctions." NAACP v. *Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963).[FN11]

FN11. Justice REHNQUIST'S dissent deprecates this concern, asserting that there is no threat, because this Court will invalidate any differentially more burdensome tax. *Post*, at 1380-1381. That assertion would provide more security if we could be certain that courts will always prove able to identify differentially more burdensome taxes, a question we explore further, *infra*.

***589** A second reason to avoid the proposed rule is that courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation.[FN12] The ***590** complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility.[FN13] Minnesota, therefore, has offered no adequate justification for the special treatment of newspapers. [FN14]

FN12. We have not always avoided evaluating the relative burdens of different methods of taxation in certain cases involving state taxation of the Federal Government and those with whom it does business. See *Washington v. United States*, 460 U.S. 536, 103 S.Ct. 1344, 74 L.Ed.2d ---- (1983); *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977). Since *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), the Supremacy Clause has prohibited not only state taxation that discriminates against the Federal Government but also any direct taxation of the Federal Government. See generally *United States v. New Mexico*, 455 U.S. 720, 730-734, 102 S.Ct. 1373, 1380-82, 71 L.Ed.2d 580 (1982). In spite of the rule against direct taxation of the Federal Government, States remain free to impose the *economic* incidence of a tax on the Federal Government, as long as that tax is not discriminatory. *E.g.*, *id.*, at 734-735 and n. 11,

102 S.Ct., at 1382-83 and n. 11; *United States v. County of Fresno*, 429 U.S. 452, 460, 97 S.Ct. 699, 703, 50 L.Ed.2d 683 (1977). In that situation, then, the valid state interest in requiring federal enterprises to bear their share of the tax burden will often justify the use of differential methods of taxation. As we explained in *Washington v. United States*, "[Washington] has merely accommodated for the fact that it may not impose a tax directly on the United States...." 460 U.S., at ----, 103 S.Ct., at 1350. The special rule prohibiting direct taxation of the Federal Government but permitting the imposition of an equivalent economic burden on the Government may not only justify the State's use of different methods of taxation, but may also force us, within limits, see *Washington, supra*, at ----, n. 11, 103 S.Ct., at 1350, n. 11, to compare the burdens of two different taxes. Nothing, however, prevents the State from taxing the press in the same manner that it taxes other enterprises. It can achieve its interest in requiring the press to bear its share of the burden by taxing the press as it taxes others, so differential taxation is not necessary to achieve its goals.

Justice WHITE insists that the Court regularly inquires into the economic effect of taxes, relying on a number of cases arising under the Due Process Clause and the Commerce Clause. In the cases cited, the Court has struck down state taxes only when "the inequality of the ... tax burden between in-state and out-of-state manufacturer-users [was] admitted," *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70, 83 S.Ct. 1201, 1204, 10 L.Ed.2d 202 (1963), and when the Court was able to see that the tax produced a " *grossly* distorted result," *Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 326, 88 S.Ct. 995, 1001, 19 L.Ed.2d 1201 (1968) (emphasis added). In these cases, the Court required the taxpayer to show "gross overreaching," recognizing "the vastness of the State's taxing power and the latitude that the exercise of that power must be given before it encounters constitutional restraints." *Id.*, at 326, 88 S.Ct., at 1001; see *Alaska v. Arctic Maid*, 366 U.S. 199, 205, 81 S.Ct. 929, 932, 6 L.Ed.2d 227 (1961). When delicate and cherished First Amendment rights are at stake, however, the constitutional tolerance for error diminishes drastically, and the risk increases that courts will prove unable to apply accurately the more finely tuned standards.

FN13. If a State employed the same *method* of taxation but applied a lower *rate* to the press, so that there could be no doubt that the legislature was not singling out the press to bear a more burdensome tax, we would, of course, be in a position to evaluate the relative burdens. And, given the clarity of the relative burdens, as well as the rule that differential methods of taxation are not automatically permissible if less burdensome, a lower tax rate for the press would not raise the threat that the legislature might later impose an extra burden that would escape detection by the courts, see pp. 1373-1374, and note 11, *supra*. Thus, our decision does not, as the dissent suggests, require Minnesota to impose a greater tax burden on publications.

FN14. Disparaging our concern with the complexities of economic proof, Justice REHNQUIST'S dissent undertakes to calculate a hypothetical sales tax liability for Star Tribune for the years 1974 and 1975. *Post*, at 1378-1379. That undertaking, we think, illustrates some of the problems that inhere in any such inquiry, see generally R. Musgrave and P. Musgrave, Public Finance in Theory and Practice 461 (2d ed. 1976) (detailing some of the complexities of calculating the burden of a tax); cf. *Id.*, at 475 (in evaluating excess burden of taxes, "quantitative evidence is sketchy and underlying procedures are necessarily crude"). First, the calculation for 1974 and 1975 for this newspaper tells us nothing about the relative impact of the tax on other newspapers or in other years. Since newspapers receive a substantial portion of their revenues from advertising, see generally Newsprint Information Committee, Newspaper and Newsprint Facts at a Glance 12 (24th ed. 1982), it is not necessarily true even for profitable newspapers that the price of the finished product will exceed the cost of inputs. Consequently, it is not necessary that a tax imposed on components is less burdensome than a tax at the same rate imposed on the price of the product. Although the

relationship of Star Tribune's revenues from circulation and its revenues from advertising may result in a lower tax burden under the use tax in 1974 and 1975, that relationship need not hold for all newspapers or for all time.

Second, if, as the dissent assumes elsewhere, *post,* at 1381, the sales tax increases the price, that price increase presumably will cause a decrease in demand. The decrease in demand may lead to lower total revenues and, therefore, to a lower total sales tax burden than that calculated by the dissent. See generally P. Samuelson, Economics 381-383, 389-390 (10th ed. 1976); R. Musgrave and P. Musgrave, Public Finance in Theory and Practice 21 (3d ed. 1980) ("[I]t is necessary, in designing fiscal policies, to allow for how the private sector will respond."). The dissent's calculations, then, can only be characterized as hypothetical. Taking the chance that these calculations or others like them are erroneous is a risk that the First Amendment forbids.

***591 **1375** V

[10] Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax.[FN15] The State explains this exemption as part of a policy favoring an "equitable" tax system, although there are no comparable exemptions for small enterprises outside the press. Again, there is no legislative history supporting the State's view of the purpose of the amendment. Whatever the motive of the legislature in this ***592** case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. It has asserted no interest other than its desire to have an "equitable" tax system. The current system, it explains, promotes equity because it places the burden on large publications that impose more social costs than do smaller publications and that are more likely to be able to bear the burden of the tax. Even if we were willing to accept the premise that large businesses are more profitable and therefore better able to bear the burden of the tax, the State's commitment to this "equity" is questionable, for the concern has not led the State to grant benefits to small businesses in general.[FN16] And when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises.

FN15. In 1974, 11 publishers paid the tax. Three paid less than $1,000, and another three paid less than $8,000. Star Tribune, one of only two publishers paying more than $100,000, paid $608,634. In 1975, 13 publishers paid the tax. Again, three paid less than $1,000, and four more paid less than $3,000. For that year, Star Tribune paid $636,113 and was again one of only two publishers incurring a liability greater than $100,000. See 314 N.W.2d, at 203-204 and nn. 4, 5.

FN16. Cf. *Mabee v. White Plains Publishing Co.,* 327 U.S. 178, 183, 184, 66 S.Ct. 511, 513, 514, 90 L.Ed. 607 (1946) (upholding exemption from Fair Labor Standards Act of small weekly and semi-weekly newspapers where the purpose of the exemption "was to put those papers more on a parity with other small town enterprises.")

**1376 VI

[11] [12] We need not and do not impugn the motives of the Minnesota legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First

Amendment. See *NAACP v. Button*, 371 U.S., at 439, 83 S.Ct., at 341; *NAACP v. Alabama*, 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958); *Lovell v. Griffin*, 303 U.S. 444, 451, 58 S.Ct. 666, 668-69, 82 L.Ed. 949 (1938). We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment. *E.g.*, *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939). A tax that singles out the press, or that targets individual publications within the press, places a ***593** heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment,[FN17] and the judgment below is

> FN17. This conclusion renders it unnecessary to address Star Tribune's arguments that the $100,000 exemption violates the principles of *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054 (1935).

Reversed.

Justice WHITE, concurring in part and dissenting in part.
This case is not difficult. The exemption for the first $100,000 of paper and ink limits the burden of the Minnesota tax to only a few papers. This feature alone is sufficient reason to invalidate the Minnesota tax and reverse the judgment of the Minnesota Supreme Court. The Court recognizes that Minnesota's tax violates the First Amendment for this reason, and I subscribe to Part V of the Court's opinion and concur in the judgment.

Having found fully sufficient grounds for decision, the Court need go no further. The question whether Minnesota or another state may impose a use tax on paper and ink that is not targeted on a small group of newspapers could be left for another day.

The Court, however, undertakes the task today. The crux of the issue is whether Minnesota has justified imposing a use tax on paper and ink in lieu of applying its general sales tax to publications. The Court concludes that the State has offered no satisfactory explanation for selecting a substitute for a sales tax. *Ante*, at 1373. If this is so, that could be the end of the matter, and the Minnesota tax would be invalid for a second reason.

The Court nevertheless moves on to opine that the State could not impose such a tax even if "the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses." ***594** *Ante*, at 1374. The fear is that the government might use the tax as a threatened sanction to achieve a censorial purpose. As Justice REHNQUIST demonstrates, *post*, at 1380-1381, the proposition that the government threatens the First Amendment by favoring the press is most questionable, but for the sake of argument, I let it pass.

Despite having struck down the tax for three separate reasons, the Court is still not finished. "A second reason" to eschew inquiry into the relative burden of taxation is presented. The Court submits that "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation," *ante*, at 1374, except, it seems, in cases involving the sovereign immunity of the United States. Why this is so is not made clear, and I do not agree that the courts are so incompetent to evaluate the burdens of taxation that we must decline the task in this case.

The Court acknowledges that in cases involving state taxation of the Federal government and those with whom it does business, the Court has compared the burden of two different taxes. *Ante*, at 1374, n. 12. See, *e.g.*, *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977); ***1377** *United States v. City of Detroit*, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958). It is not apparent to me why we are able to determine whether a state has imposed the economic incidence of a tax in a discriminatory fashion upon the federal government, but incompetent to determine whether a tax imposes discriminatory treatment upon the press. The Court's rationale that these are a unique set of cases which nevertheless "force us" to assume a duty we are incompetent to perform is wholly unsatisfactory. If convinced of its inherent incapacity for tax analysis, the Court

could have taken the path chosen today and simply prohibited the states from imposing a compensatory "equivalent" economic burden on those who deal with the Federal government. It has not done so.

Moreover, the Court frequently has examined-without complaint-the actual effect of a tax in determining whether the state has imposed an impermissible burden on interstate ***595*** commerce or run afoul of the Due Process Clause. [FN1] In a number of cases concerning railroad taxes, for example, the Court considered the tax burden to decide whether it was the equivalent of a property tax or an invalid tax on interstate commerce.[FN2] The Court has compared the burden of use taxes on competing products from sister states with that of sales taxes on products sold in-state to decide whether the former constituted discrimination against interstate commerce. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937).[FN3] We have also measured tax burdens in our cases considering whether state tax formulas are so out of proportion***596*** to the amount of in-state business as to violate due process. See, *e.g. Moorman Mfg. v. Bair*, 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879 (1931). In sum, the Court's professed inability to determine when a tax poses an *actual* threat to constitutional principles is a novel concept, and one belied by the lessons of our experience.

FN1. See, *e.g., Alaska v. Arctic Maid*, 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227 (1961) (Alaska occupational tax collected from freezer ships at rate of 4% of value of salmon not discriminatory because Alaskan canneries pay a 6% tax on the value of salmon obtained for canning).

FN2. See *Norfolk & Western R. Co. v. Tax Comm'n*, 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201 (1968), (holding property tax on rolling stock based on a mileage formula violated due process) ("[W]hen a taxpayer comes forward with strong evidence tending to prove that the mileage formula will yield a grossly distorted result in a particular case, the State is obliged to counter that evidence..."); *Great Northern R. v. Minnesota*, 278 U.S. 503, 509, 49 S.Ct. 191, 192, 73 L.Ed. 477 (1929) ("We find nothing in the record to indicate that the tax under consideration, plus that already collected, exceeds 'what would be legitimate as an ordinary tax on the property valued as part of a going concern, [or is] relatively higher than the taxes on other kinds of property.' *Pullman Co. v. Richardson*, 261 U.S. 330, 339 [43 S.Ct. 366, 368, 67 L.Ed. 682]"). See also *Pullman Co. v. Richardson*, 261 U.S. 330, 339, 43 S.Ct. 366, 368, 67 L.Ed. 682 (1923); *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 453-455, 38 S.Ct. 373, 374-75, 62 L.Ed. 827 (1918); *United States Express Co. v. Minnesota*, 223 U.S. 335, 32 S.Ct. 211, 56 L.Ed. 459 (1912); *Galveston, Harrisburg & San Antonio R. Co. v. Texas*, 210 U.S. 217, 28 S.Ct. 638, 52 L.Ed. 1031 (1908).

FN3. In *Henneford*, a 2% tax was imposed on the privilege of using products coming from other states. Excepted from the tax was any property, the sale or use of which, had already been subjected to an equal or greater tax. The Court, speaking through Justice Cardozo, upheld the use tax, noting that "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates." 300 U.S. 583-584, 57 S.Ct. 527-28. See also *Halliburton Oil Co. v. Reily*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963), (holding use tax burden went beyond sales tax and constituted invalid discriminatory burden on commerce); *Scripto v. Carson*, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960) (upholding use tax as complement to sales tax).

There may be cases, I recognize, where the Court cannot confidently ascertain whether a differential method of taxation imposes a greater burden upon the press than a generally applicable tax. In these circumstances, I too may be unwilling to entrust freedom of the press to uncertain economic proof. But, as Justice REHNQUIST***1378*** clearly shows, *post*, at 1378-1379, this is not such a case. Since it is plainly evident that Minneapolis Star is not disadvantaged and is almost certainly benefitted by a use tax vis-à-vis a sales tax, I cannot agree that the First Amendment forbids a state from choosing

one method of taxation over another.

Justice REHNQUIST, dissenting.
Today we learn from the Court that a State runs afoul of the First Amendment proscription of laws "abridging the freedom of speech, or of the press" where the State structures its taxing system to the advantage of newspapers. This seems very much akin to protecting something so overzealously that in the end it is smothered. While the Court purports to rely on the intent of the "Framers of the First Amendment," I believe it safe to assume that in 1791 "abridge" meant the same thing it means today: to diminish or curtail. Not until the Court's decision in this case, nearly two centuries after adoption of the First Amendment has it been read to prohibit activities which in no way diminish or curtail the freedoms it protects.

I agree with the Court that the First Amendment does not *per se* prevent the State of Minnesota from regulating the press even though such regulation imposes an economic burden. It is evident from the numerous cases relied on by the ***597** Court, which I need not repeat here, that this principle has been long settled. *Ante*, at 1370. I further agree with the Court that application of general sales and use taxes to the press would be sanctioned under this line of cases. *Id.*, at 1372-1373, n. 9. Therefore, I also agree with the Court to the extent it holds that any constitutional attack on the Minnesota scheme must be aimed at the classifications used in that taxing scheme. *Id.*, at 1370-1371. But it is at this point that I part company with my colleagues.

The Court recognizes in several parts of its opinion that the State of Minnesota could avoid constitutional problems by imposing on newspapers the 4% sales tax that it imposes on other retailers. *Id.*, at 1372-1375 and nn. 9, 13. Rather than impose such a tax, however, the Minnesota legislature decided to provide newspapers with an exemption from the sales tax and impose a 4% use tax on ink and paper; thus, while both taxes are part of one "system of sales and use taxes," 314 N.W.2d 201, 203 (1981), newspapers are classified differently within that system.[FN*] The problem the Court finds too difficult to deal with is whether this difference in treatment results in a significant burden on newspapers.

> FN* The sales tax exemption and use tax liability are not, strictly speaking, for newspapers alone. The term of art used in the Minnesota taxing scheme is "publications." Publications is defined to include such materials as magazines, advertising supplements, shoppers guides, house organs, trade and professional journals, and serially issued comic books. See Minn.Stat. § 331.02 (1982); 13 Minn.Code of Agency Rules, Tax S & U 409(b) (1979).

The record reveals that in 1974 the Minneapolis Star & Tribune had an average daily circulation of 489,345 copies. *Id.*, at 203-204, nn. 4 and 5. Using the price we were informed of at argument of 25¢ per copy, see Tr. of Oral Arg. at 46, gross sales revenue for the year would be $38,168,910. The Sunday circulation for 1974 was 640,756; even assuming that it did not sell for more than the daily paper, gross sales revenue for the year would be at least $8,329,828. Thus, total sales revenues in 1974 would be $46,498,738. Had a 4% sales tax ***598** been imposed, the Minneapolis Star & Tribune would have been liable for $1,859,950 in 1974. The same "complexities of factual economic proof" can be analyzed for 1975. Daily circulation was 481,789; at 25¢ per copy, gross sales revenue for the year would be $37,579,542. The Sunday circulation for 1975 was 619,154; at 25¢ per copy, gross sales revenue for the year would be $8,049,002. Total sales revenues in 1975 would be $45,628,544; at a 4% rate, the sales tax for 1975 would be $1,825,142. Therefore, had the sales tax been imposed, as the Court agrees would have been permissible,***1379** the Minneapolis Star & Tribune's liability for 1974 and 1975 would have been $3,685,092.

The record further indicates that the Minneapolis Star & Tribune paid $608,634 in use taxes in 1974 and $636,113 in 1975-a total liability of $1,244,747. See 314 N.W., at 203-204, nn. 4 and 5. We need no expert testimony from modern day Euclids or Einsteins to determine that the $1,224,747 paid in use taxes is significantly less burdensome than the $3,685,092 that could have been levied by a sales tax. *A fortiori,* the Minnesota taxing scheme which singles out newspapers for "differential

treatment" has benefited, not burdened, the "freedom of speech, [and] of the press."

Ignoring these calculations, the Court concludes that "differential treatment" alone in Minnesota's sales and use tax scheme requires that the statutes be found "presumptively unconstitutional" and declared invalid "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.*, at 1372. The "differential treatment" standard that the Court has conjured up is unprecedented and unwarranted. To my knowledge this Court has never subjected governmental action to the most stringent constitutional review solely on the basis of "differential treatment" of particular groups. The case relied on by the Court, *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96, 92 S.Ct. 2286, 2289-90, 33 L.Ed.2d 212 (1972), certainly does not stand for this proposition. In *Mosley* all picketing except "peaceful picketing" was prohibited within a particular public area. ***599** Thus, "differential treatment" was not the key to the Court's decision; rather the essential fact was that unless a person was considered a "peaceful picketer" his speech through this form of expression would be totally abridged within the area.

Of course, all governmentally created classifications must have some "rational basis." See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949). The fact that they have been enacted by a presumptively rational legislature, however, arms them with a presumption of rationality. We have shown the greatest deference to state legislatures in devising their taxing schemes. As we said in *Allied Stores of Ohio, Inc. v. Bowers*:

"The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests.... The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Citations omitted]. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government....' " 358 U.S. 522, 526-527, 79 S.Ct. 437, 440, 3 L.Ed.2d 480 (1959) (quoting *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159, 50 S.Ct. 310, 314, 74 L.Ed. 775 (1930)). See also *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70, 67 S.Ct. 1062, 91 L.Ed. 1346 (1947); *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 55 S.Ct. 333, 79 L.Ed. 780 (1935); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 58 S.Ct. 721, 82 L.Ed. 1024 (1938).

***600** Where the State devises classifications that infringe on the fundamental guaranties protected by the Constitution the Court has demanded more of the State in ****1380** justifying its action. But there is no *infringement*, and thus the Court has never required more, unless the State's classifications *significantly burden* these specially protected rights. As we said in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (*per curiam*) (emphasis added), "equal protection analysis requires strict scrutiny of a legislative classification only when the classification *impermissibly interferes* with the exercise of a fundamental right...." See also *California Medical Ass'n v. FEC*, 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981); *Maher v. Roe*, 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977); *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974); *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). To state it in terms of the freedoms at issue here, no First Amendment issue is raised unless First Amendment rights have been infringed; for if there has been no infringement, then there has been no "abridgment" of those guaranties. See *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

Today the Court departs from this rule, refusing to look at the record and determine whether the classifications in the Minnesota use and sales tax statutes significantly burden the First Amendment rights of petitioner and its fellow newspapers. The Court offers as an explanation for this failure the self-reproaching conclusion that

"courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility. Minnesota, ***601** therefore, has offered no adequate justification for the special treatment of newspapers." *Ante,* at 1374-1375 (footnotes omitted).

Considering the complexity of issues this Court resolves each Term, this admonition as a general rule is difficult to understand. Considering the specifics of this case, this confession of inability is incomprehensible.

Wisely not relying solely on its inability to weigh the burdens of the Minnesota tax scheme, the Court also says that even if the resultant burden on the press is lighter than on others:

"[T]he very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for '[t]he threat of sanctions may deter [the] exercise of [First Amendment] rights almost as potently as the actual application of sanctions.' " *Ante,* at 1374.

Surely the Court does not mean what it seems to say. The Court should be well aware from its discussion of *Grosjean v. American Press Co., Inc.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), that this Court is quite capable of dealing with changes in state taxing laws which are intended to penalize newspapers. As Justice Holmes aptly put it, "[T]his Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox,* 277 U.S. 218, 223, 48 S.Ct. 451, 453, 72 L.Ed. 857 (1928) (Holmes, J., dissenting). Furthermore, the Court itself intimates that if the State had employed "the same *method* of taxation but applied a lower *rate* to the press, so that there could be no doubt that the legislature was not singling out the ****1381** press to bear a more burdensome ***602** tax" the taxing scheme would be constitutionally permissible. *Ante,* at 1375, n. 13. This obviously has the same potential for "the threat of sanctions," because the legislature could at any time raise the taxes to the higher rate. Likewise, the newspapers' absolute exemption from the sales tax, which the Court acknowledges is used by many other States, would be subject to the same attack; the exemption could be taken away.

The State is required to show that its taxing scheme is rational. But in this case that showing can be made easily. The Court states that "[t]he court below speculated that the State might have been concerned that collection of a [sales] tax on such small transactions would be impractical." *Id.,* at 1373. But the Court finds this argument "unpersuasive," because "sales of other low-priced goods" are subject to the sales tax. *Ibid.* I disagree. There must be few such inexpensive items sold in Minnesota in the volume of newspaper sales. Minneapolis Star & Tribune alone, as noted above, sold approximately 489,345 papers every day in 1974 and sold another 640,756 papers every Sunday. In 1975 it had a daily circulation of 481,789 and a Sunday circulation of 619,154. Further, newspapers are commonly sold in a different way than other goods. The legislature could have concluded that paper boys, corner newstands, and vending machines provide an unreliable and unsuitable means for collection of a sales tax. Must everyone buying a paper put 26¢ in the vending machine rather than 25¢; or should the price of a paper be raised to 30¢, giving the paper 4¢ more profit; or should the price be kept at 25¢ with the paper absorbing the tax? In summary, so long as the State can find another way to collect revenue from the newspapers, imposing a sales tax on newspapers would be to no one's advantage; not the newspaper and its distributors who would have to collect the tax, not the State who would have to enforce collection, and not the consumer who would have to pay for the paper in odd amounts. The reasonable alternative Minnesota chose was to impose the use tax on ink and paper. "There is no reason ***603** to believe that this legislative choice is insufficiently tailored to achieve the goal of raising revenue or that it burdens the first amendment in any way whatsoever." 314 N.W.2d, at 207. *Cf. Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981).

The Court finds in very summary fashion that the exemption newspapers receive for the first $100,000 of ink and paper used also violates the First Amendment because the result is that only a few of the newspapers actually pay a use tax. I cannot agree. As explained by the Minnesota Supreme Court, the exemption is in effect a $4,000 credit which benefits all newspapers. 314 N.W.2d, at 203. Minneapolis Star & Tribune was benefited to the amount of $16,000 in the two years in question; $4,000 each year for its morning paper and $4,000 each year for its evening paper. *Ibid.* Absent any improper motive on the part of the Minnesota legislature in drawing the limits of this exemption, it cannot be construed as violating the First Amendment. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 194, 66 S.Ct. 494, 498, 90 L.Ed. 614 (1946). Cf. *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 66 S.Ct. 511, 90 L.Ed. 607 (1946). The Minnesota Supreme Court specifically found that the exemption was not a "deliberate and calculated device" designed with an illicit purpose. 314 N.W.2d, at 208. There is nothing in the record which would cast doubt on this conclusion. The Minnesota court further explained:

"[I]t is necessary for the legislature to construct economically sound taxes in order to raise revenue. In order to do so, the legislature must classify or grant exemptions to insure that the burden upon the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state. 'Traditionally classification has been a device for fitting tax programs**1382 to local needs and usages in order to achieve an equitable distribution of the tax burden.' *Madden v. Kentucky*, 309 U.S. 83, 88 [60 S.Ct. 406, 408, 84 L.Ed. 590] (1940)." *Id.*, at 209-210.

*604 There is no reason to conclude that the State, in drafting the $4,000 credit, acted other than reasonably and rationally to fit its sales and use tax scheme to its own local needs and usages.

To collect from newspapers their fair share of taxes under the sales and use tax scheme and at the same time avoid abridging the freedoms of speech and press, the Court holds today that Minnesota must subject newspapers to millions of additional dollars in sales tax liability. Certainly this is a hollow victory for the newspapers and I seriously doubt the Court's conclusion that this result would have been intended by the "Framers of the First Amendment."

For the reasons set forth above, I would affirm the judgment of the Minnesota Supreme Court.

U.S.,1983.
Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue
460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295, 9 Media L. Rep. 1369

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APPENDIX 8

667 A.2d 21

Commonwealth Court of Pennsylvania.
ADAMS OUTDOOR ADVERTISING, LTD., a limited partnership, by its general partners, Adams Outdoor Advertising, Inc. and Stephen Adams, Pocono Outdoor Advertising Co., FKM Advertising Co., FKM Properties, John W. Wallace, James Ballard, Jerry Rubin, Elmer M. Rinehart, Seymour Katz, Lawrence T. Simon, Robert Stofflett and Shirley Stofflett, His Wife, Appellants,
v.
BOROUGH OF STROUDSBURG and Jeffrey B. Wilkins.
Argued Sept. 14, 1995.
Decided Oct. 20, 1995.
Reargument Denied Dec. 7, 1995.

Sign owners filed suit to both declare invalid and enjoin borough from enforcing borough ordinance which taxed and required annual license fee for off-premises signs. The Court of Common Pleas, Monroe County, No. 3196 Civil 1993, O'Brien J., granted summary judgment to borough, and sign owners appealed. The Commonwealth Court, No. 205 C.D. 1995, Pellegrini, J., held that: (1) ordinance did not violate equal protection or uniformity clauses; (2) ordinance did not violate sign owners' First Amendment rights; and (3) ordinance was not unconstitutional taking.
Affirmed.

West Headnotes

[1] KeyCite Notes

371 Taxation
371I In General
371k2002 k. Distinguishing "Tax" and "License" or "Fee". Most Cited Cases
(Formerly 371k1)

Unlike license fee, purpose of which is to offset costs of regulation, tax is imposed for purpose of raising revenue.

[2] KeyCite Notes

371 Taxation
371I In General
371k2001 k. Nature of Taxes. Most Cited Cases
(Formerly 371k1)

371 Taxation KeyCite Notes
371I In General
371k2009 Public Purpose
371k2010 k. In General. Most Cited Cases
(Formerly 371k1)

Even though imposition of or exemption from tax may advance other governmental concerns, such as manufacturing exemption from state taxation which serves to encourage manufacturing within state, primary purpose of taxes is always to raise money for taxing authority.

[3] KeyCite Notes

371 Taxation
371I In General
371k2013 k. Power of Legislature in General. Most Cited Cases
(Formerly 371k25)

371 Taxation KeyCite Notes
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2121 k. Constitutional Requirements and Operation Thereof. Most Cited Cases
(Formerly 371k40(1))

Taxing authority possesses wide discretion regarding matters of taxation, with this discretion being limited by requirements of equal protection and uniformity clauses of Federal and State Constitutions. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[4] KeyCite Notes

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1012 k. Taxation and Revenue Legislation. Most Cited Cases
(Formerly 92k48(4.1))

92 Constitutional Law KeyCite Notes
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1032 Particular Issues and Applications
92k1033 k. In General. Most Cited Cases
(Formerly 92k48(4.1))

Legislation that imposes tax is presumed to be constitutional, and taxpayer challenging that legislation bears burden of proving that it clearly, palpably and plainly violates Constitution.

[5] KeyCite Notes

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1006 Particular Issues and Applications
92k1012 k. Taxation and Revenue Legislation. Most Cited Cases
(Formerly 92k48(4.1))

Any doubts regarding constitutionality of tax legislation should be resolved in favor of upholding its constitutionality.

[6] KeyCite Notes

238 Licenses
238I For Occupations and Privileges
238k7 Constitutionality and Validity of Acts and Ordinances
238k7(9) k. Reasonableness of Fees. Most Cited Cases

268 Municipal Corporations KeyCite Notes
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k957 Constitutional Requirements and Restrictions
268k957(3) k. Limitations as to Rate or Amount, or Property or Persons Taxable. Most Cited Cases

In determining whether ordinance is constitutional, argument that ordinance-mandated payment to borough exceeds reasonable costs of administration of ordinance does not apply to tax legislation, but instead, applies only to challenges to license fees.

[7] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3561 Property Taxes
92k3562 k. In General. Most Cited Cases
(Formerly 92k228.5)

268 Municipal Corporations KeyCite Notes
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k957 Constitutional Requirements and Restrictions
268k957(3) k. Limitations as to Rate or Amount, or Property or Persons Taxable. Most Cited Cases

371 Taxation KeyCite Notes
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2134 Classification of Subjects, and Uniformity as to Subjects of Same Class
371k2135 k. In General. Most Cited Cases
(Formerly 371k42(1))

Differences between off-premises signs and on-premises signs provided reasonable and nonarbitrary basis for borough to tax only off-premises signs, and therefore tax classification did not violate equal

protection or uniformity clauses, where off-premises signs were larger, had capacity to generate income, bore no direct relation to property on which they were posted, and changed messages relatively frequently. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[8] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3560 k. In General. Most Cited Cases
(Formerly 92k228.5)

371 Taxation KeyCite Notes
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2121 k. Constitutional Requirements and Operation Thereof. Most Cited Cases
(Formerly 371k40(1))

For purpose of constitutional challenges to taxation scheme, both equal protection clause and uniformity clause require same analysis. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[9] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3560 k. In General. Most Cited Cases
(Formerly 92k228.5)

371 Taxation KeyCite Notes
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2121 k. Constitutional Requirements and Operation Thereof. Most Cited Cases
(Formerly 371k40(1))

In context of tax legislation, equal protection and uniformity clauses do not require absolute equality and perfect uniformity in imposition of tax, but legislation cannot treat similarly situated entities differently. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[10] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation

92k3560 k. In General. Most Cited Cases
(Formerly 92k228.5)

371 Taxation KeyCite Notes
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2134 Classification of Subjects, and Uniformity as to Subjects of Same Class
371k2135 k. In General. Most Cited Cases
(Formerly 371k42(1))

Under equal protection and uniformity clauses, if tax is imposed only when entity falls within certain class, legislative body must have reasonable basis for singling out that category; i.e., classification must be nonarbitrary, as well as reasonable and just. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[11] KeyCite Notes

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)6 Taxation
92k3560 k. In General. Most Cited Cases
(Formerly 92k228.5)

371 Taxation KeyCite Notes
371III Property Taxes
371III(B) Laws and Regulation
371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity
371k2134 Classification of Subjects, and Uniformity as to Subjects of Same Class
371k2135 k. In General. Most Cited Cases
(Formerly 371k42(1))

Absent real distinction between classes in tax legislation, legislation will be deemed unconstitutional under equal protection and uniformity clauses. U.S.C.A. Const.Amend. 14; Const. Art. 8, § 1.

[12] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)3 Signs
92k1655 k. In General. Most Cited Cases
(Formerly 92k90.3)

268 Municipal Corporations KeyCite Notes
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k957 Constitutional Requirements and Restrictions

268k957(3) k. Limitations as to Rate or Amount, or Property or Persons Taxable. Most Cited Cases

Borough ordinance taxing off-premises signs, but not on-premises signs, did not violate sign owners' right to freedom of press by penalizing select members of print media, where nothing suggested that tax was directed at suppressing any particular ideas or that it was likely to stifle free exchange of opinions, and ordinance did not single out one small group of off-premise signs for tax while exempting others. U.S.C.A. Const.Amend. 1.

[13] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)3 Signs
92k1655 k. In General. Most Cited Cases
(Formerly 92k90.3)

268 Municipal Corporations KeyCite Notes
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k957 Constitutional Requirements and Restrictions
268k957(3) k. Limitations as to Rate or Amount, or Property or Persons Taxable. Most Cited Cases

Borough's ordinance which imposed tax on all off-premises signs regardless of their content did not violate sign owners' right to free speech, where ordinance exempted on-premises activities, including expression of opinions or political beliefs, zoning officer mechanically applied tax to all off-premises signs and to no on-premises signs, and, in adopting ordinance, borough considered increases in traffic and concomitant costs that benefit owners of off-premises signs, as well as aesthetics and vehicular safety, but not messages conveyed on such signs. U.S.C.A. Const.Amend. 1.

[14] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1572 k. Taxation. Most Cited Cases
(Formerly 92k90.1(1))

92 Constitutional Law KeyCite Notes
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1545 k. In General. Most Cited Cases
(Formerly 92k90.1(1))

Tax or fee on speech, amount of which depends upon content of that speech, is constitutionally suspect and will be found to be constitutional only if government shows that it is necessary to serve

compelling interest and that it is narrowly drawn to achieve that end. U.S.C.A. Const.Amend. 1.

[15] KeyCite Notes

- 92 Constitutional Law
  - 92XVIII Freedom of Speech, Expression, and Press
    - 92XVIII(E) Advertising and Signs
      - 92XVIII(E)3 Signs
        - 92k1655 k. In General. Most Cited Cases
          (Formerly 92k90.3)

Under First Amendment, if regulation taxing signs is "content neutral," i.e., it does not consider content of message in determining whether sign is to be taxed, then government need only prove that ordinance is narrowly tailored to serve significant governmental interest, and that it leaves open ample alternative channels for communication. U.S.C.A. Const.Amend. 1.

[16] KeyCite Notes

- 92 Constitutional Law
  - 92XVIII Freedom of Speech, Expression, and Press
    - 92XVIII(A) In General
      - 92XVIII(A)1 In General
        - 92k1511 Content-Neutral Regulations or Restrictions
          - 92k1512 k. In General. Most Cited Cases
            (Formerly 92k90(3))

92 Constitutional Law KeyCite Notes

- 92XVIII Freedom of Speech, Expression, and Press
  - 92XVIII(A) In General
    - 92XVIII(A)1 In General
      - 92k1516 Content-Based Regulations or Restrictions
        - 92k1517 k. In General. Most Cited Cases
          (Formerly 92k90(3))

In determining whether governmental regulation of speech is content based, courts' principal inquiry is whether government adopted regulation because of its disagreement with message to be conveyed by speech; government's purpose in enacting legislation is courts' controlling consideration, and if that purpose is unrelated to content of speech, then regulation will be deemed to be content neutral. U.S.C.A. Const.Amend. 1.

[17] KeyCite Notes

- 92 Constitutional Law
  - 92XVIII Freedom of Speech, Expression, and Press
    - 92XVIII(A) In General
      - 92XVIII(A)1 In General
        - 92k1516 Content-Based Regulations or Restrictions
          - 92k1517 k. In General. Most Cited Cases
            (Formerly 92k90(3))

92 Constitutional Law KeyCite Notes
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1516 Content-Based Regulations or Restrictions
92k1518 k. Strict or Exacting Scrutiny; Compelling Interest Test. Most Cited Cases
(Formerly 92k90(3))

If purpose behind governmental regulation is related to content of speech, or if, in determining whether regulation applies, one must look to content of speech, then, absent compelling reason offered by government, it will be found to be unconstitutional. U.S.C.A. Const.Amend. 1.

[18] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(E) Advertising and Signs
92XVIII(E)3 Signs
92k1662 k. Off-Premises Signs. Most Cited Cases
(Formerly 92k90.3)

268 Municipal Corporations KeyCite Notes
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k957 Constitutional Requirements and Restrictions
268k957(3) k. Limitations as to Rate or Amount, or Property or Persons Taxable. Most Cited Cases

Borough ordinance taxing off-premises signs regardless of content of signs was not unconstitutional burden on noncommercial speech, where borough did not seek complete ban on off-premises signs, and borough provided content-neutral reasons for tax, including offsetting costs of increased traffic, improving aesthetics, and improving vehicle safety. U.S.C.A. Const.Amend. 1.

[19] KeyCite Notes

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4075 Eminent Domain
92k4076 k. In General. Most Cited Cases
(Formerly 92k227)

268 Municipal Corporations KeyCite Notes
268XIII Fiscal Matters
268XIII(D) Taxes and Other Revenue, and Application Thereof
268k957 Constitutional Requirements and Restrictions
268k957(3) k. Limitations as to Rate or Amount, or Property or Persons Taxable. Most Cited Cases

Ordinance taxing off-premises signs was within borough's taxing authority and, therefore, could not be struck down under due process clause as taking without just compensation. U.S.C.A. Const.Amend. 14.

*23 David H. Moskowitz, for appellants.
Ralph A. Matergia, for appellees.

Before PELLEGRINI and KELLEY, JJ., and RODGERS, Senior Judge.

PELLEGRINI, Judge.
Adams Outdoor Advertising, Inc., Stephen Adams, Pocono Outdoor Advertising Company, FKM Advertising Company, FKM Properties, John W. Wallace, James Ballard, Jerry Rubin, Elmer M. Rinehart, Seymour Katz, Lawrence T. Simon, Robert Stofflett, and Shirley Stofflett (Sign Owners), appeal a decision of the Court of Common Pleas of Monroe County (trial court) granting summary judgment in favor of the Borough of Stroudsburg (Borough) and Jeffrey B. Wilkins.

*24 On August 7, 1991, the Stroudsburg Borough Council (Council) enacted Ordinance No. 706 (Ordinance), which provided for the payment of an annual tax for off-premises signs [FN1] located within the Borough. More specifically, the Ordinance required that property owners obtain an annual license for off-premises signs located on their property and pay an annual tax calculated at a rate of $2.00 per every square foot of the face of the sign. The Ordinance expressly exempted business signs, construction signs, directory signs, real estate signs, and political signs [FN2] from the licensing and taxing requirements.

FN1. Section 401 of the Ordinance defines off-premises signs as:

A sign visible from a public way that directs attention to a business, commodity, service, entertainment, attraction, or subject sold, offered, or existing elsewhere than upon the same lot where such sign is displayed. The term off-premises sign shall include an outdoor advertising sign (billboard) on which space is leased or rented by the owner thereof to others for the purpose of conveying a commercial or non-commercial message.

FN2. The definitions of these signs set forth in the Ordinance indicate that they are all on-premises signs, i.e., they contain information pertaining to the activity located on the premises where the signs are posted. Further, in construing the Ordinance, the Borough considers activities on the premises to include the expression of opinions and political views. *See* Affidavit of Harold A. Bentzoni.

The preamble to the Ordinance sets forth its purpose, indicating that, as a result of an increase in the volume of traffic, the Borough's costs for police, street, fire, and emergency management services have also increased. The preamble further specified that the tax was being imposed because the owners of off-premises signs, through leasing and rental fees, benefit from this increase in traffic volume.[FN3]

FN3. The preamble also indicated that off-premises signs are not assessed for purposes of real property taxes.

The Sign Owners subsequently filed a complaint for declaratory relief in the trial court, contending that the Ordinance is invalid and requesting the trial court to enjoin the Borough from imposing the licensing fee and tax upon the signs. After the Borough filed an answer to the complaint, both parties filed cross-motions for summary judgment. Based upon the affidavits, depositions, and pleadings before it, the trial court found that the Ordinance was not unconstitutional and entered judgment in favor of the Borough and against the Sign Owners. The Sign Owners then filed this appeal.

[1] [2] [3] [4] [5] [6] We begin by observing that, unlike a license fee, the purpose of which is to offset the costs of regulation, a tax is imposed for the purpose of raising revenue. *Talley v. Commonwealth*, 123 Pa.Cmwlth. 313, 553 A.2d 518 (1989). Even though the imposition of or exemption from a tax may advance other governmental concerns, e.g., the manufacturing exemption from state taxation serves to encourage manufacturing within Pennsylvania, the primary purpose of taxes is always to raise money for the taxing authority. *White v. Medical Professional Liability Catastrophe Loss Fund*, 131 Pa.Cmwlth. 567, 571 A.2d 9 (1990). Moreover, the taxing authority possesses wide discretion regarding matters of taxation, with this discretion being limited by the requirements of the Equal Protection and Uniformity Clauses of the United States and Pennsylvania Constitutions. *Leventhal v. City of Philadelphia*, 518 Pa. 233, 542 A.2d 1328 (1988). Legislation that imposes a tax is presumed to be constitutional, and the taxpayer challenging that legislation bears the burden of proving that it clearly, palpably and plainly violates the constitution. *Leonard v. Thornburgh*, 507 Pa. 317, 489 A.2d 1349 (1985); *Brown v. Department of Revenue*, 155 Pa.Cmwlth. 197, 624 A.2d 795 (1993), *aff'd*, 536 Pa. 543, 640 A.2d 412 (1994). Any doubts regarding the constitutionality of tax legislation should be resolved in favor of upholding its constitutionality. *Id.* In the instant case, because the parties admitted during oral argument that this is a tax and not a license fee, the only issues before us are whether the tax is uniform and whether it is an unlawful infringement upon the Sign Owners' First Amendment rights.[FN4]

FN4. Because the Sign Owners have conceded that this is a tax, and not a fee, we need not address their argument that it exceeds the reasonable costs of administration of the Ordinance. This argument is not applicable to tax legislation, but instead, applies only to challenges to license fees. *See White v. Medical Professional Liability Catastrophe Loss Fund*, 131 Pa.Cmwlth. 567, 571 A.2d 9 (1990).

*25 I.

[7] [8] The Sign Owners' primary contention is that the tax imposed by the Ordinance violates the Equal Protection Clause of the United States Constitution and the Uniformity Clause of the Pennsylvania Constitution.[FN5] The Sign Owners argue that, since the tax is imposed on off-premises signs but is not imposed upon on-premises signs or other types of structures, it affects only a small group of taxpayers and is, therefore, unconstitutional.

FN5. For purposes of constitutional challenges to a taxation scheme, both the Equal Protection Clause and the Uniformity Clause require the same analysis. *Brown v. Department of Revenue*, 155 Pa.Cmwlth. 197, 624 A.2d 795 (1993), *aff'd*, 536 Pa. 543, 640 A.2d 412 (1994). Hence, the discussion set forth in this Opinion addresses the Sign Owners' challenges under both of these clauses.

[9] [10] [11] In the context of tax legislation, equal protection and uniformity do not require absolute equality and perfect uniformity in the imposition of a tax. *City of Pittsburgh v. Commonwealth*, 522 Pa. 20, 559 A.2d 513 (1989). However, the legislation cannot treat similarly situated entities differently. *Leventhal v. City of Philadelphia*, 518 Pa. 233, 542 A.2d 1328 (1988). If a tax is imposed only when an entity falls within a certain class, the legislative body must have a reasonable basis for singling out that category; i.e., the classification must be non-arbitrary, as well as reasonable and just. *Brown v. Department of Revenue*, 155 Pa.Cmwlth. 197, 624 A.2d 795 (1993), *aff'd*, 536 Pa. 543, 640 A.2d 412 (1994); *City of Pittsburgh v. Commonwealth*, 522 Pa. 20, 559 A.2d 513 (1989). Absent a real distinction between the classes in tax legislation, it will be deemed unconstitutional. *Leonard v. Thornburgh*, 507 Pa. 317, 489 A.2d 1349 (1985).

Here, there is a real and non-arbitrary distinction between off-premises and on-premises signs that

would permit the Borough to classify the two differently for taxation purposes. An off-premises sign, which is classified as a billboard, is of considerable size and bears no direct relationship to the activities on the property on which it is located. The messages contained on off-premises signs generally change on a relatively frequent basis depending upon the company leasing the sign for advertising purposes. Additionally, off-premises signs, through leasing and rental fees, have the capacity to generate income, and as such, are a business in and of themselves. On the other hand, on-premises signs are generally smaller in size and bear some direct relationship to the property on which they are posted. They generally are of a more permanent duration, changing only with the status of the activity located on the property. Finally, unlike off-premises signs, on-premises signs do not, by themselves, generate income. Just as we held in *Magazine Publishers of America v. Department of Revenue*, 151 Pa.Cmwlth. 592, 618 A.2d 1056 (1992), *aff'd*, 539 Pa. 563, 654 A.2d 519 (1995), that there was a reasonable distinction between newspapers and magazines based upon format and frequency of publication, as well as ability of newspapers to carry legal advertising, the differences between off-premises and on-premises signs are, if anything, more substantial and provide a reasonable and non-arbitrary basis for the Borough's drawing of a distinction between the two in the Ordinance.

[12] KC Even if there is a reasonable distinction between off-premises and on-premises signs, thus making the Ordinance constitutional under the Equal Protection and Uniformity Clauses, the Sign Owners argue the tax nevertheless violates their First Amendment right to freedom and of the press. Citing to *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), the Sign Owners argue that the Ordinance unconstitutionally penalizes select members of the print media, i.e., off-premises signs, and as such, violates the First Amendment.

***26** In *Arkansas Writers' Project*, the Supreme Court held that a state tax, which was imposed upon some magazines and not upon others, infringed upon rights protected by the First Amendment.[FN6] As such, the Supreme Court reasoned, the state was required to prove that it had an overriding compelling interest to justify that discrimination, and that the tax was narrowly drawn to achieve that interest. Concluding that the state did not meet this burden of proof, the Supreme Court found the tax to be unconstitutional.[FN7] Similarly, in *Minneapolis Star*, the Supreme Court held that a use tax on the cost of paper and ink used for publications, for which there was a $100,000.00 annual exemption, was unconstitutional under the First Amendment.[FN8] In so doing, the Court reasoned that the tax singled out the press and also targeted a small group of newspapers, thus resembling a penalty for certain newspapers.

> FN6. The Supreme Court noted that the First Amendment claims were obviously intertwined with interests arising under the Equal Protection Clause. Because the tax directly implicated freedom of the press, the Supreme Court analyzed it primarily in First Amendment terms. *Arkansas Writers' Project*, 481 U.S. at 227 n. 3, 107 S.Ct. at 1727 n. 3.
>
> FN7. The Supreme Court also found the tax to be unconstitutional because it was content based.
>
> FN8. As in *Arkansas Writers' Project*, the Supreme Court did not consider Equal Protection violations.

The Supreme Court, however, addressed this issue again in *Leathers v. Medlock*, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), in which it considered the constitutionality of a sales tax that was imposed only upon cable television and no other media. Discussing *Arkansas Writers' Project* and *Minneapolis Star*, the Supreme Court noted that those cases "demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Id.* at 477. Observing that there was nothing in the case to indicate

that the tax was directed at suppressing particular ideas or that the tax was likely to stifle the free exchange of opinions, the Supreme Court upheld the tax as constitutional. *Id.*

The reasoning of *Leathers* was subsequently applied by this Court in *Magazine Publishers of America v. Department of Revenue, supra*. In that case, which involved a challenge to a statute that taxed magazines but not newspapers, we rejected the argument that such a taxation scheme infringed upon the magazine publishers' First Amendment rights. In so doing, we observed that the tax "does not reflect any interest by the General Assembly in censoring [the publishers'] activities or stifling the free exchange of ideas." *Id.* 618 A.2d at 1061.

Here, there is nothing in the record or in the Ordinance suggesting that the tax was directed at suppressing any particular ideas or that it is likely to stifle the free exchange of opinions.[FN9] In fact, the reasons advanced by the Borough for the Ordinance are to the contrary: to off-set the costs associated with increased traffic, to enhance aesthetic values, and to improve vehicular safety. Moreover, because that tax was imposed upon all off-premises signs, it does not single out one small group of off-premises signs while exempting others from taxation. Under the reasoning of *Leathers*, therefore, the tax cannot be deemed to be unconstitutional.[FN10]

FN9. This conclusion is further supported by the fact that the Ordinance does not prohibit off-premises advertising in the Borough. Moreover, under the Ordinance, there is no tax imposed, and consequently, no infringement upon other forms of media that would foster the exchange of ideas.

FN10. To hold otherwise would be absurd in light of several other Supreme Court cases that have found that a municipality's banning of off-premises outdoor advertising is constitutional. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); *Members of City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

II.

[13] The Sign Owners also argue that the tax imposed by the Borough is unconstitutional because it violates their rights to free speech. The Sign Owners contend that the Borough Zoning Officer, in determining whether the sign is exempt from the tax, ***27** must look to its content and determine whether it relates to the activity that occurs on the premises. As such, the Sign Owners argue, the Ordinance unconstitutionally imposes a content based tax.

[14] [15] As the Sign Owners correctly argue in their brief, a tax or fee on speech, the amount of which depends upon the content of that speech, is constitutionally suspect. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Such a tax or fee will be found to be constitutional only if the government shows that it is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). However, if the regulation is content neutral, i.e., it does not consider the content of the message in determining whether the sign is to be taxed, then the government need only prove that the ordinance is narrowly tailored to serve a significant governmental interest, and that it leaves open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 66, *rehearing den'd*, 492 U.S. 937, 110 S.Ct. 23, 106 L.Ed.2d 636 (1989).[FN11]

FN11. While neither party argues that the Borough does not have a significant interest or that the Ordinance does not leave ample avenues for communication, we note that these conditions have clearly been met by the reasons proffered by the Borough for the

Ordinance and by the fact that opinions and political views may be expressed via on-premises signs.

[16] [17] In determining whether a governmental regulation of speech is content based, our principal inquiry is whether the government adopted the regulation because of its disagreement with the message to be conveyed by the speech. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). In other words, the government's purpose in enacting the legislation is the Court's controlling consideration, and if that purpose is unrelated to the content of the speech, then the regulation will be deemed to be content neutral. *Ward, supra*. If, on the other hand, the purpose behind the regulation is related to the content of the speech, or if, in determining whether the regulation applies, one must look to the content of the speech, then, absent a compelling reason offered by the government, it will be found to be unconstitutional. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987).

In the present case, the Ordinance imposes the tax on all off-premises signs regardless of their content. Moreover, in adopting the Ordinance, the Borough Council considered the increase in traffic and concomitant costs that benefit the owners of off-premises signs, as well as aesthetics and vehicular safety. The Borough Council did not adopt the Ordinance because it disagreed with the messages conveyed on off-premises signs. Furthermore, because the exemption for activity occurring on-premises includes the expression of opinions or political beliefs, and because the Borough Zoning Officer mechanically applies the tax to all off-premises signs and to no on-premises signs,[FN12] the Ordinance is content neutral. *See Rappa v. New Castle County*, 18 F.3d 1043, 1067 (3d Cir.1994) (holding that tax exemption for signs advertising activities conducted on-premises is not content based).

FN12. Although neither of these facts are expressly stated in the Ordinance, the affidavits adduced in support of the motions for summary judgment indicated that this is how the Ordinance is applied. In considering the constitutionality of the Ordinance, we can examine the Borough's construction thereof, including its interpretation and implementation of the Ordinance. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

III.

[18] The Sign Owners contend that the Ordinance is unconstitutional because it disadvantages non-commercial speech. Citing to *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Sign Owners contend that, because the Ordinance imposes a tax on non-commercial signs, i.e., off-premises signs with non-commercial messages, while it exempts various types of commercial speech, i.e., on-*28 premises signs, it infringes on their right to free speech under the First Amendment.

In *Metromedia, Inc.*, the Supreme Court, recognizing that non-commercial speech is afforded a greater degree of protection under the First Amendment than commercial speech, invalidated a portion of the city ordinance that expressly banned all non-commercial messages, both on-site and off-site, while permitting on-site commercial advertising. In so doing, the Supreme Court held that the city had failed to offer any compelling reasons for its ban of all non-commercial messages. However, also in that case, the Supreme Court did uphold a portion of the ordinance banning all off-site advertising signs while permitting on-site billboards. Noting that the total ban on all off-site signs was directly related to the objectives of traffic safety and aesthetics, and deferring to the City's judgment that its interests in those objectives should yield to the greater interest of on-site commercial advertising, the Supreme Court upheld as constitutional that portion of the ordinance. *Id.*

Despite the Sign Owners' contention, *Metromedia* is simply inapplicable to the present case. First, it

involved the regulation of billboards via the prohibition of off-premises signs, not, as here, the imposition of a tax on such signs.[FN13] Also, unlike in *Metromedia,* the Borough in the instant case does not seek to ban off-premises signs. Even if we were to assume that *Metromedia* did apply to the facts of this case, its holding that the city's ban of all off-premises signs was constitutional would be supportive of the Borough's actions and contrary to the Sign Owners' position. The reasons proffered by the Borough for imposing the tax, i.e., to offset the costs on increased traffic, to improve aesthetics, and to improve vehicular safety, were found by the Supreme Court to be sufficient to support a municipality's ban of all off-premises signs.[FN14]

FN13. This distinction is also significant with respect to the Sign Owners' argument that the Ordinance unconstitutionally favors one type of commercial speech over another. In making this argument, the Sign Owners cite to *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). In that case, however, the Supreme Court struck down a city ordinance that banned all commercial handbills, stating that there must be a reasonable fit between the City's regulation of commercial advertising and its stated purpose. Here, there is no ban, and in fact, no regulation of commercial advertising in the Borough. Instead, there is only a tax on all off-premises signs, both commercial and non-commercial. As such, *Discovery Network* likewise is not applicable here.

FN14. Using this reasoning, and in light of the fact that on-premises signs can convey political messages, we reach the same conclusion with respect to the Sign Owners' contention that the tax improperly burdens political messages. Therefore, we will not address that contention in depth in this Opinion.

IV.

[19] KC Finally, the Sign Owners contend that the tax is invalid because it violates their rights to due process by taking their property without providing them with just compensation. Citing to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), in which the Supreme Court held that a regulation that denies a landowner all economically beneficial or productive use of his or her land will be considered to be a taking for which compensation is warranted, the Sign Owners argue that the tax would prevent some of them from leasing to off-premises signs at a profit. This, the Sign Owners argue, constitutes a taking of property without just compensation.

In making this argument, the Sign Owners fail to realize that *Lucas* involves a regulation, and the instant case involves a tax. As the Supreme Court observed in *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974), courts have consistently refused to entertain a due process claim that a tax is so excessive or unreasonable so as to cause a business to become unprofitable, and therefore, constitutes a taking. In *Alco Parking,* the operators of off-street parking facilities challenged the constitutionality of a Pittsburgh City Ordinance that imposed a twenty percent tax on the operators' gross receipts, contending that the tax was unreasonably high and constituted a taking without compensation. The Supreme Court refused to analyze the tax under*29 the operators' takings argument, stating that, so long as the tax is within the power of the taxing authority, it will not be struck down as violative of due process under the Fifth Amendment. *Id.*[FN15]

FN15. The Sign Owners also argue that the tax operates as a prior restraint on speech because it would tax non-commercial on-premises signs. This argument, however, disregards the fact that the Ordinance, as interpreted and applied by the Borough, does not tax on-premises signs which express opinions and political views. *See* note 13, *supra.*

Accordingly, the decision of the trial court granting summary judgment in favor of the Borough and against the Sign Owners is affirmed.[FN16]

FN16. Given our disposition of this case, we need not address the Borough's contention that several of the Sign Owners do not have standing to challenge the Ordinance.

ORDER

AND NOW, this 20th day of October, 1995, the order of the Court of Common Pleas of Monroe County at No. 3196 Civil 1993, dated December 22, 1994, is affirmed.

Pa.Cmwlth.,1995.
Adams Outdoor Advertising, Ltd. v. Borough of Stroudsburg
667 A.2d 21

END OF DOCUMENT

APPENDIX 9

491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661, 57 USLW 4879

Briefs and Other Related Documents

Supreme Court of the United States
Benjamin R. WARD, et al., Petitioners
v.
ROCK AGAINST RACISM.
No. 88-226.
Argued Feb. 27, 1989.
Decided June 22, 1989.
Rehearing Denied Aug. 30, 1989.
See 492 U.S. 937, 110 S.Ct. 23.

Sponsor of musical event at park band shell brought suit against city and city officials to challenge constitutionality of use guidelines for band shell. The United States District Court for the Southern District of New York, Charles S. Haight, Jr., J., 658 F.Supp. 1346, upheld guidelines from First Amendment challenge, and plaintiff appealed. The Court of Appeals, for the Second Circuit, Peter C. Dorsey, District Judge, sitting by designation, 848 F.2d 367, reversed. On petition for writ of certiorari, the Supreme Court, Justice Kennedy, held that municipal noise regulation designed to ensure that music performances in band shell did not disturb surrounding residents, by requiring performers to use sound system and sound technician provided by city, did not violate free speech rights of performers.
Judgment of Court of Appeals reversed.
Justice Blackmun, concurred in judgment.
Justice Marshall, dissented and filed opinion, in which Justices Brennan and Stevens joined.

West Headnotes

[1] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(N) Entertainment
92k1893 Music
92k1894 k. In General. Most Cited Cases
(Formerly 92k90.1(6))

Music, as form of expression and communication, is protected under First Amendment. U.S.C.A. Const.Amend. 1.

[2] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases
(Formerly 92k90(3))

92 Constitutional Law KeyCite Notes
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest. Most Cited Cases
(Formerly 92k90(3))

92 Constitutional Law KeyCite Notes
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1515 k. Existence of Other Channels of Expression. Most Cited Cases
(Formerly 92k90(3))

92 Constitutional Law KeyCite Notes
92XVIII Freedom of Speech, Expression, and Press
92XVIII(G) Property and Events
92XVIII(G)2 Government Property and Events
92k1732 Public Forum in General
92k1735 k. Justification for Exclusion or Limitation. Most Cited Cases
(Formerly 92k90.1(4))

Government may impose reasonable restrictions on time, place, or manner of protected speech, even of speech in public forum, as long as restrictions are justified without reference to content of regulated speech, are narrowly tailored to serve significant governmental interest, and leave open ample alternative channels for communication of information. U.S.C.A. Const.Amend. 1.

[3] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1513 k. Governmental Disagreement with Message Conveyed. Most Cited Cases
(Formerly 92k90(3))

Principal inquiry in determining whether restriction on free speech is "content-neutral" is whether government has adopted restriction because of its disagreement with the message that speech conveys; government's purpose is controlling consideration. U.S.C.A. Const.Amend. 1.

[4] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1512 k. In General. Most Cited Cases
(Formerly 92k90(3))

Government regulation of expressive activity is "content-neutral," even though it has incidental effect on some speakers or messages but not others, as long as it serves some purpose unrelated to content of regulated speech. U.S.C.A. Const.Amend. 1.

[5] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(J) Noise and Sound Amplification
92k1840 k. In General. Most Cited Cases
(Formerly 92k90.1(4))

Municipal noise regulation designed to ensure that musical performances at public band shell did not disturb surrounding residents was "content-neutral" time, place or manner regulation, which would be upheld as long as it was narrowly tailored to serve significant governmental interest and left open ample alternative channels of communication. U.S.C.A. Const.Amend. 1.

[6] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(J) Noise and Sound Amplification
92k1840 k. In General. Most Cited Cases
(Formerly 92k90.1(4))

Municipal noise regulation designed to ensure that musical performances in public band shell did not disturb surrounding residents, by requiring performers to use sound system and sound technician provided by city, was not invalid on its face as vesting unbridled discretion in city officials charged with enforcing it; regulation had to be interpreted to forbid city officials from purposefully selecting inadequate sound systems or from varying sound quality or volume based on message being delivered by performers. U.S.C.A. Const.Amend. 1.

[7] KeyCite Notes

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k997 k. Consideration of Limiting Construction. Most Cited Cases
(Formerly 92k47)

In evaluating facial challenge to state law, a federal court must consider any limiting construction that state has placed on law, including any administrative interpretation or implementation of law.

[8] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(N) Entertainment
92k1893 Music
92k1895 k. Concerts and Performances. Most Cited Cases
(Formerly 92k90.1(4))

Government has substantial interest in protecting its citizens from unwelcomed noise, and may act to prevent such noise even in traditional public forum such as city streets and parks. U.S.C.A. Const.Amend. 1.

[9] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest. Most Cited Cases
(Formerly 92k90(3))

Time, place, or manner regulation of protected free speech must be narrowly tailored to serve government's legitimate, content-neutral interest, but regulation need not be the least restrictive or least intrusive means of doing so. U.S.C.A. Const.Amend. 1.

[10] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1511 Content-Neutral Regulations or Restrictions
92k1514 k. Narrow Tailoring Requirement; Relationship to Governmental Interest. Most Cited Cases
(Formerly 92k90(3))

Time, place, or manner regulation is "narrowly tailored" to serve government's legitimate content-neutral interest, as long as means chosen are not substantially broader than necessary to achieve government's interest; it is immaterial that government's interest might be adequately served by some less-speech-restrictive alternative. U.S.C.A. Const.Amend. 1.

[11] KeyCite Notes

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(N) Entertainment
92k1893 Music
92k1895 k. Concerts and Performances. Most Cited Cases
(Formerly 92k90.1(4))

268 Municipal Corporations KeyCite Notes

268XI Use and Regulation of Public Places, Property, and Works

268XI(C) Public Buildings, Parks, and Other Public Places and Property

268k721 Parks and Public Squares and Places

268k721(2) k. Prevention of Improper Use or Obstruction. Most Cited Cases

Municipal noise regulation designed to ensure that musical performances in public band shell did not disturb surrounding residents, by requiring performers to use sound system and sound technician provided by city, did not violate free speech rights of performers. U.S.C.A. Const.Amend. 1.

***2748 Syllabus** FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***781** Respondent Rock Against Racism (RAR), furnishing its own sound equipment and technicians, has sponsored yearly programs of rock music at the Naumberg Acoustic Bandshell in New York City's Central Park. The city received numerous complaints about excessive noise at RAR's concerts from users of the nearby Sheep Meadow, an area designated by the city for passive recreation, from other users of the park, and from residents of areas adjacent to the park. Moreover, when the city shut off the power after RAR ignored repeated requests to lower the volume at one of its concerts, the audience became abusive and disruptive. The city also experienced problems at bandshell events put on by other sponsors, who, due to their use of inadequate sound equipment or sound technicians unskilled at mixing sound for the bandshell area, were unable to provide sufficient amplification levels, resulting in disappointed or unruly audiences. Rejecting various other solutions to the excessive noise and inadequate amplification problems, the city adopted a Use Guideline for the bandshell which specified that the city would furnish high quality sound equipment and retain an independent, experienced sound technician for all performances. After the city implemented this guideline, RAR amended a pre-existing District Court complaint against the city to seek damages and a declaratory judgment striking down the guideline as facially invalid under the First Amendment. The court upheld the guideline, finding, *inter alia,* that performers who had used the city's sound system and technician had been uniformly pleased; that, although the city's technician ultimately controlled both sound volume and mix, the city's practice was to give the sponsor autonomy as to mix and to confer with him before turning the volume down; and that the city's amplification system was sufficient for RAR's needs. Applying this Court's three-part test for judging the constitutionality of governmental regulation of the time, place, and manner of protected speech, the court found the guideline valid. The Court of Appeals reversed on the ground that such regulations' method and extent must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve the regulations' purpose, finding that there were various less restrictive means by which the city could control excessive volume without also intruding on RAR's ability to control sound mix.

***782** *Held:* The city's sound-amplification guideline is valid under the First Amendment as a reasonable regulation of the place and manner of protected speech. Pp. 2753-2760.

(a) The guideline is content neutral, since it is justified without reference to the content of the regulated speech. The city's ***2749** principal justification-the desire to control noise in order to retain the sedate character of the Sheep Meadow and other areas of the park and to avoid intrusion into residential areas-has nothing to do with content. The city's other justification, its interest in ensuring sound quality, does not render the guideline content based as an attempt to impose subjective standards of acceptable sound mix on performers, since the city has expressly disavowed any such intent and requires its technician to defer to the sponsor's wishes as to mix. On the record below, the city's sound quality concern extends only to the clearly content-neutral goals of ensuring adequate amplification and avoiding volume problems associated with inadequate mix. There is no merit to RAR's argument that the guideline is nonetheless invalid on its face because it places unbridled discretion in the hands of city enforcement officials. Even granting the doubtful proposition

that this claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority, the claim nevertheless fails, since the guideline's own terms in effect forbid officials purposely to select an inadequate system or to vary sound quality or volume based on the performer's message. Moreover, the city has applied a narrowing construction to the guideline by requiring officials to defer to sponsors on sound quality and confer with them as to volume problems, and by mandating that amplification be sufficient for the sound to reach all concert ground listeners. Pp. 2754-2756.

(b) The guideline is narrowly tailored to serve significant governmental interests. That the city has a substantial interest in protecting citizens from unwelcome and excessive noise, even in a traditional public forum such as the park, cannot be doubted. Moreover, it has a substantial interest in ensuring the sufficiency of sound amplification at bandshell events in order to allow citizens to enjoy the benefits of the park, in light of the evidence that inadequate amplification had resulted in the inability of some audiences to hear performances. The Court of Appeals erred in requiring the city to prove that the guideline was the least intrusive means of furthering these legitimate interests, since a "less-restrictive-alternative analysis" has never been-and is here, again, specifically rejected as-a part of the inquiry into the validity of a time, place, or manner regulation. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221; *Regan v. Time, Inc.*, 468 U.S. 641, 104 S.Ct. 3262, 82 L.Ed.2d 487. The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be ***783** achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest. If these standards are met, courts should defer to the government's reasonable determination. Here, the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that its technician control the mixing board. Absent this requirement, the city's interest would have been served less well, as is evidenced by the excessive noise complaints generated by RAR's past concerts. The city also could reasonably have determined that, overall, its interest in ensuring that sound amplification was sufficient to reach all concert-ground listeners would be served less effectively without the guideline than with it, since, by providing competent technicians and adequate equipment, the city eliminated inadequate amplification problems that plagued some performers in the past. Furthermore, in the absence of evidence that the guideline had a substantial deleterious effect on the ability of performers to achieve the quality of sound they desired, there is no merit to RAR's contention that the guideline is substantially broader than necessary to achieve the city's legitimate ends. Pp. 2756-2760.

(c) The guideline leaves open ample alternative channels of communication, since it does not attempt to ban any particular manner or type of expression at a given place and time. Rather, it continues to permit expressive activity in the bandshell ****2750** and has no effect on the quantity or content of that expression beyond regulating the extent of amplification. That the city's volume limitations may reduce to some degree the potential audience for RAR's speech is of no consequence, since there has been no showing that the remaining avenues of communication are inadequate. P. 2760.

848 F.2d 367 (CA2 1988), reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., concurred in the judgment. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 2760.

Leonard J. Koerner argued the cause for petitioners. With him on the brief were *Peter L. Zimroth, Larry A. Sonnenshein,* and *Julian L. Kalkstein.*

William M. Kunstler argued the cause for respondent. With him on the brief was *Noah A. Kinigstein.**

* Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Bolton, Deputy Solicitor General Ayer, Stephen L. Nightingale,* and *John F. Cordes;* and for the National League of Cities by *Benna Ruth Solomon, Joyce Holmes Benjamin,* and *Ogden N. Lewis.*

***784** Justice KENNEDY delivered the opinion of the Court.

In the southeast portion of New York City's Central Park, about 10 blocks upward from the park's beginning point at 59th Street, there is an amphitheater and stage structure known as the Naumberg Acoustic Bandshell. The bandshell faces west across the remaining width of the park. In close proximity to the bandshell, and lying within the directional path of its sound, is a grassy open area called the Sheep Meadow. The city has designated the Sheep Meadow as a quiet area for passive recreations like reclining, walking, and reading. Just beyond the park, and also within the potential

sound range of the bandshell, are the apartments and residences of Central Park West.

This case arises from the city's attempt to regulate the volume of amplified music at the bandshell so the performances are satisfactory to the audience without intruding upon those who use the Sheep Meadow or live on Central Park West and in its vicinity.

The city's regulation requires bandshell performers to use sound-amplification equipment and a sound technician provided by the city. The challenge to this volume control technique comes from the sponsor of a rock concert. The trial court sustained the noise control measures, but the Court of Appeals for the Second Circuit reversed. We granted certiorari to resolve the important First Amendment issues presented by the case.

I

Rock Against Racism, respondent in this case, is an unincorporated association which, in its own words, is "dedicated to the espousal and promotion of antiracist views." App. to Pet. for Cert. 3. Each year from 1979 through 1986, RAR has sponsored a program of speeches and rock music at the ***785*** bandshell. RAR has furnished the sound equipment and sound technician used by the various performing groups at these annual events.

Over the years, the city received numerous complaints about excessive sound amplification at respondent's concerts from park users and residents of areas adjacent to the park. On some occasions RAR was less than cooperative when city officials asked that the volume be reduced; at one concert, police felt compelled to cut off the power to the sound system, an action that caused the audience to become unruly and hostile. App. 127-131, 140-141, 212-214, 345-347.

Before the 1984 concert, city officials met with RAR representatives to discuss the problem of excessive noise. It was decided that the city would monitor sound levels at the edge of the concert ground, and would revoke respondent's event permit if specific volume limits were exceeded. Sound levels at the concert did exceed acceptable levels for sustained periods of time, despite repeated warnings and requests that the volume be lowered. Two citations for excessive volume were issued to respondent during the concert. When the power was eventually shut off, the audience became abusive and disruptive.

2751 The following year, when respondent sought permission to hold its upcoming concert at the bandshell, the city declined to grant an event permit, citing its problems with noise and crowd control at RAR's previous concerts. The city suggested some other city-owned facilities as alternative sites for the concert. RAR declined the invitation and filed suit in United States District Court against the city, its mayor, and various police and parks department officials, seeking an injunction directing issuance of an event permit. After respondent agreed to abide by all applicable regulations, the parties reached agreement and a permit was issued.

The city then undertook to develop comprehensive New York City Parks Department Use Guidelines for the Naumberg Bandshell. A principal problem to be addressed by ***786*** the guidelines was controlling the volume of amplified sound at bandshell events. A major concern was that at some bandshell performances the event sponsors had been unable to "provide the amplification levels required and 'crowds unhappy with the sound became disappointed or unruly.' " Brief for Petitioners 9. The city found that this problem had several causes, including inadequate sound equipment, sound technicians who were either unskilled at mixing sound outdoors or unfamiliar with the acoustics of the bandshell and its surroundings, and the like. Because some performers compensated for poor sound mix by raising volume, these factors tended to exacerbate the problem of excess noise.[FN1] App. 30, 189, 218-219.

FN1. The amplified sound heard at a rock concert consists of two components, volume and mix. Sound produced by the various instruments and performers on stage is picked up by microphones and fed into a central mixing board, where it is combined into one

> signal and then amplified through speakers to the audience. A sound technician is at the mixing board to select the appropriate mix, or balance, of the various sounds produced on stage, and to add other effects as desired by the performers. In addition to controlling the sound mix, the sound technician also controls the overall volume of sound reaching the audience. During the course of a performance, the sound technician is continually manipulating various controls on the mixing board to provide the desired sound mix and volume. The sound technician thus plays an important role in determining the quality of the amplified sound that reaches the audience.

The city considered various solutions to the sound-amplification problem. The idea of a fixed decibel limit for all performers using the bandshell was rejected because the impact on listeners of a single decibel level is not constant, but varies in response to changes in air temperature, foliage, audience size, and like factors. *Id.*, at 31, 220, 285-286. The city also rejected the possibility of employing a sound technician to operate the equipment provided by the various sponsors of bandshell events, because the city's technician might have had difficulty satisfying the needs of sponsors while operating unfamiliar, and perhaps inadequate, sound equipment. ***787** *Id.*, at 220. Instead, the city concluded that the most effective way to achieve adequate but not excessive sound amplification would be for the city to furnish high quality sound equipment and retain an independent, experienced sound technician for all performances at the bandshell. After an extensive search the city hired a private sound company capable of meeting the needs of all the varied users of the bandshell.

The Use Guidelines were promulgated on March 21, 1986.[FN2] After learning that it ***2752** would be expected to comply with the guidelines at its upcoming annual concert in May 1986, respondent returned to the District Court and filed a motion for an injunction against the enforcement of certain aspects of the guidelines. The District Court preliminarily enjoined enforcement of the sound-amplification rule on May 1, 1986. See 636 F.Supp. 178 (S.D.N.Y.1986). Under the protection of the injunction, and alone among users of the bandshell in the 1986 season, RAR was permitted to use its own sound equipment***788** and technician, just as it had done in prior years. RAR's 1986 concert again generated complaints about excessive noise from park users and nearby residents. App. 127, 138.

> FN2. In pertinent part, the Use Guidelines provide:
>
> "SOUND AMPLIFICATION
>
> "To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS.
>
> "Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician [who] will be fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park. The sound technician must also consider the Bandshell's proximity to Sheep Meadow, activities at Bethesda Terrace, and the New York City Department of Environmental Protection recommendations." App. 375-376.

After the concert, respondent amended its complaint to seek damages and a declaratory judgment striking down the guidelines as facially invalid. After hearing five days of testimony about various aspects of the guidelines, the District Court issued its decision upholding the sound-amplification guideline. [FN3] The court found that the city had been "motivated by a desire to obtain top-flight sound equipment and experienced operators" in selecting an independent contractor to provide the

equipment and technician for bandshell events, and that the performers who did use the city's sound system in the 1986 season, in performances "which ran the full cultural gamut from grand opera to salsa to reggae," were uniformly pleased with the quality of the sound provided. 658 F.Supp. 1346, 1352 (S.D.N.Y.1987).

> FN3. The court invalidated certain other aspects of the Use Guidelines, but those provisions are not before us.

Although the city's sound technician controlled both sound volume and sound mix by virtue of his position at the mixing board, the court found that "[t]he City's practice for events at the Bandshell is to give the sponsor autonomy with respect to the sound mix: balancing treble with bass, highlighting a particular instrument or voice, and the like," and that the city's sound technician "does all he can to accommodate the sponsor's desires in those regards." *Ibid.* Even with respect to volume control, the city's practice was to confer with the sponsor before making any decision to turn the volume down. *Ibid.* In some instances, as with a New York Grand Opera performance, the sound technician accommodated the performers' unique needs by integrating special microphones with the city's equipment. The court specifically found that "[t]he City's implementation of the Bandshell guidelines provides for a sound amplification system capable of meeting ***789** RAR's technical needs and leaves control of the sound 'mix' in the hands of RAR." *Id.*, at 1353. Applying this Court's three-part test for judging the constitutionality of government regulation of the time, place, or manner of protected speech, the court found the city's regulation valid.

The Court of Appeals reversed. 848 F.2d 367 (C.A.2 1988). After recognizing that "[c]ontent neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression," the court added the proviso that "the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation." *Id.*, at 370 (citing *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968)). Applying this test, the court determined that the city's guideline was valid only to the extent necessary to achieve the city's legitimate interest in controlling excessive volume, but found there were various alternative means of controlling volume without also intruding on respondent's ability to control the sound mix. For example, the city could have directed ***2753** respondent's sound technician to keep the volume below specified levels. Alternatively, a volume-limiting device could have been installed; and as a "last resort," the court suggested, "the plug can be pulled on the sound to enforce the volume limit." 848 F.2d, at 372, n. 6. In view of the potential availability of these seemingly less restrictive alternatives, the Court of Appeals concluded that the sound-amplification guideline was invalid because the city had failed to prove that its regulation "was the least intrusive means of regulating the volume." *Id.*, at 371.

We granted certiorari, 488 U.S. 816, 109 S.Ct. 53, 102 L.Ed.2d 31 (1988), to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech. Because the Court of Appeals erred in requiring the city to prove that its regulation was the least intrusive means of furthering its legitimate ***790** governmental interests, and because the ordinance is valid on its face, we now reverse.

II

[1] Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. See 2 Dialogues of Plato, Republic, bk. 3, pp. 231, 245-248 (B. Jowett transl., 4th ed. 1953) ("Our poets must sing in another and a nobler strain"); Musical Freedom and Why Dictators Fear It, N.Y. Times, Aug. 23, 1981, section 2, p. 1, col. 5; Soviet Schizophrenia toward Stravinsky, N.Y. Times, June 26, 1982, section 1, p. 25, col. 2; Symphonic Voice from China Is Heard Again, N.Y. Times, Oct. 11, 1987, section 2, p. 27, col. 1. The Constitution prohibits any like attempts in our own legal order. Music, as

a form of expression and communication, is protected under the First Amendment. In the case before us the performances apparently consisted of remarks by speakers, as well as rock music, but the case has been presented as one in which the constitutional challenge is to the city's regulation of the musical aspects of the concert; and, based on the principle we have stated, the city's guideline must meet the demands of the First Amendment. The parties do not appear to dispute that proposition.

[2] We need not here discuss whether a municipality which owns a bandstand or stage facility may exercise, in some circumstances, a proprietary right to select performances and control their quality. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 570-574, 95 S.Ct. 1239, 1252-1254, 43 L.Ed.2d 448 (1975) (REHNQUIST, J., dissenting). Though it did demonstrate its own interest in the effort to insure high quality performances by providing the equipment in question, the city justifies its guideline as a regulatory measure to limit and control noise. Here the bandshell was open, apparently, to all performers; and we decide*791 the case as one in which the bandshell is a public forum for performances in which the government's right to regulate expression is subject to the protections of the First Amendment. *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983); see *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495, 2500, 101 L.Ed.2d 420 (1988); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "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 the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); see *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981) (quoting **2754 *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976)). We consider these requirements in turn.

A

[3] [4] The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Community for Creative Non-Violence, supra*, 468 U.S., at 295, 104 S.Ct., at 3070. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 929-930, 89 L.Ed.2d 29 (1986). Government regulation of expressive activity is content neutral so long as it is " *justified* without reference to the content of the regulated speech." *Community for Creative Non-Violence, supra*, 468 U.S., at 293, 104 S.Ct., at 3069 (emphasis added); *Heffron, supra*, 452 U.S., at 648, 101 S.Ct., at 2564 (quoting *791 *Virginia Pharmacy Bd., supra*, 425 U.S., at 771, 96 S.Ct., at 1830); see *Boos v. Barry*, 485 U.S. 312, 320-321, 108 S.Ct. 1157, 1163-1164, 99 L.Ed.2d 333 (1988) (opinion of O'CONNOR, J.).

[5] The principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification for the guideline "ha[s] nothing to do with content," *Boos v. Barry, supra*, at 320, 108 S.Ct., at 1163, and it satisfies the requirement that time, place, or manner regulations be content neutral.

The only other justification offered below was the city's interest in "ensur [ing] the quality of sound at

Bandshell events." 658 F.Supp., at 1352; see 848 F.2d, at 370, n. 3. Respondent urges that this justification is not content neutral because it is based upon the quality, and thus the content, of the speech being regulated. In respondent's view, the city is seeking to assert artistic control over performers at the bandshell by enforcing a bureaucratically determined, value-laden conception of good sound. That all performers who have used the city's sound equipment have been completely satisfied is of no moment, respondent argues, because "[t]he First Amendment does not permit and cannot tolerate state control of artistic expression merely because the State claims that [its] efforts will lead to 'top-quality' results." Brief for Respondent 19.

While respondent's arguments that the government may not interfere with artistic judgment may have much force in other contexts, they are inapplicable to the facts of this case. The city has disclaimed in express terms any interest in imposing its own view of appropriate sound mix on performers. To the contrary, as the District Court found, the city requires its sound technician to defer to the wishes of event sponsors concerning sound mix. 658 F.Supp., at 1352-1353. On this record, the city's concern with sound quality extends only to the clearly content-neutral goals of ensuring adequate ***793** sound amplification and avoiding the volume problems associated with inadequate sound mix.[FN4] Any governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns, but this case provides us with no opportunity to address those questions. As related ****2755** above, the District Court found that the city's equipment and its sound technician could meet all of the standards requested by the performers, including RAR.

> FN4. As noted above, there is evidence to suggest that volume control and sound mix are interrelated to a degree, in that performers unfamiliar with the acoustics of the bandshell sometimes attempt to compensate for poor sound mix by increasing volume. App. 218, 290-291. By providing adequate sound equipment and professional sound mixing, the city avoids this problem.

[6] Respondent argues further that the guideline, even if not content based in explicit terms, is nonetheless invalid on its face because it places unbridled discretion in the hands of city officials charged with enforcing it. See *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-772, 108 S.Ct. 2138, 2150-2152, 100 L.Ed.2d 771 (1988) (4-to-3 decision); *Heffron v. International Society for Krishna Consciousness, Inc., supra*, 452 U.S., at 649, 101 S.Ct., at 2564; *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940). According to respondent, there is nothing in the language of the guideline to prevent city officials from selecting wholly inadequate sound equipment or technicians, or even from varying the volume and quality of sound based on the message being conveyed by the performers.

As a threshold matter, it is far from clear that respondent should be permitted to bring a facial challenge to this aspect of the regulation. Our cases permitting facial challenges to regulations that allegedly grant officials unconstrained authority to regulate speech have generally involved licensing schemes that "ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity." *Plain Dealer, supra*, 486 U.S., at 755, 108 S.Ct., at 2143. The grant of discretion that respondent ***794** seeks to challenge here is of an entirely different, and lesser, order of magnitude, because respondent does not suggest that city officials enjoy unfettered discretion to deny bandshell permits altogether. Rather, respondent contends only that the city, by exercising what is concededly its right to regulate amplified sound, could choose to provide inadequate sound for performers based on the content of their speech. Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority. Cf. 486 U.S., at 787, 108 S.Ct., at 2160 (WHITE, J., dissenting) (arguing that facial challenges of this type are permissible only where "the local law at issue require[s] licenses-not for a narrow category of expressive conduct that could be prohibited-but for a sweeping range of First Amendment protected activity").

We need not decide, however, whether the "extraordinary doctrine" that permits facial challenges to some regulations of expression, see *id.*, at 772, 108 S.Ct., at 2152 (WHITE, J., dissenting), should be extended to the circumstances of this case, for respondent's facial challenge fails on its merits. The city's guideline states that its goals are to "provide the best sound for all events" and to "insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of [the] Sheep Meadow." App. 375. While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. See *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222 (1972) ("Condemned to the use of words, we can never expect mathematical certainty in our language"); see also *Kovacs v. Cooper*, 336 U.S. 77, 79, 69 S.Ct. 448, 449, 93 L.Ed. 513 (1949) (rejecting vagueness challenge to city ordinance forbidding "loud and raucous" sound amplification) (opinion of Reed, J.). By its own terms the ***795** city's sound-amplification guideline must be interpreted to forbid city officials purposely to select inadequate sound systems or to vary the sound quality or volume based on the message being delivered by performers. The guideline is ****2756** not vulnerable to respondent's facial challenge.[FN5]

FN5. The dissent's suggestion that the guideline constitutes a prior restraint is not consistent with our cases. See *post*, at 2763-2764. As we said in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), the regulations we have found invalid as prior restraints have "had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." *Id.*, at 553, 95 S.Ct., at 1243. The sound-amplification guideline, by contrast, grants no authority to forbid speech, but merely permits the city to regulate volume to the extent necessary to avoid excessive noise. It is true that the city's sound technician theoretically possesses the power to shut off the volume for any particular performer, but that hardly distinguishes this regulatory scheme from any other; government will *always* possess the raw power to suppress speech through force, and indeed it was in part to avoid the necessity of exercising its power to "pull the plug" on the volume that the city adopted the sound-amplification guideline. The relevant question is whether the challenged regulation *authorizes* suppression of speech in advance of its expression, and the sound-amplification guideline does not.

[7] Even if the language of the guideline were not sufficient on its face to withstand challenge, our ultimate conclusion would be the same, for the city has interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement. The District Court expressly found that the city's policy is to defer to the sponsor's desires concerning sound quality. 658 F.Supp., at 1352. With respect to sound volume, the city retains ultimate control, but city officials "mak[e] it a practice to confer with the sponsor if any questions of excessive sound arise, before taking any corrective action." *Ibid.* The city's goal of ensuring that "the sound amplification [is] sufficient to reach all listeners within the defined concertground," *ibid.*, serves to limit further the discretion of the officials on the scene. Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for "[i]n evaluating a facial ***796** challenge to a state law, a federal court must ... consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, n. 5, 102 S.Ct. 1186, 1191, n. 5, 71 L.Ed.2d 362 (1982); see *Plain Dealer*, 486 U.S. at 769-770, and n. 11, 108 S.Ct., at 2150-2151, and n. 11; *United States v. Grace*, 461 U.S., at 181, n. 10, 103 S.Ct., at 1709, n. 10; *Grayned v. City of Rockford*, *supra*, 408 U.S., at 110, 92 S.Ct., at 2300; *Poulos v. New Hampshire*, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953). Any inadequacy on the face of the guideline would have been more than remedied by the city's narrowing construction.

B

[8] The city's regulation is also "narrowly tailored to serve a significant governmental interest." *Community for Creative Non-Violence*, 468 U.S., at 293, 104 S.Ct., at 3069. Despite respondent's protestations to the contrary, it can no longer be doubted that government "ha[s] a substantial interest in protecting its citizens from unwelcome noise." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806, 104 S.Ct. 2118, 2129, 80 L.Ed.2d 772 (1984) (citing *Kovacs v. Cooper*, *supra*); see *Grayned, supra*, 408 U.S., at 116, 92 S.Ct., at 2303. This interest is perhaps at its greatest when government seeks to protect " 'the well-being, tranquility, and privacy of the home,' " *Frisby v. Schultz*, 487 U.S., at 484, 108 S.Ct., at 2502 (quoting *Carey v. Brown*, 447 U.S. 455, 471, 100 S.Ct. 2286, 2295, 65 L.Ed.2d 263 (1980)), but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise. *Kovacs v. Cooper*, 336 U.S., at 86-87, 69 S.Ct., at 453-454 (opinion of Reed, J.); *id.*, at 96-97, 69 S.Ct., at 458-459 (Frankfurter, J., concurring); ***2757** *id.*, at 97, 69 S.Ct., at 459 (Jackson, J., concurring); see *Community for Creative Non-Violence*, *supra*, 468 U.S., at 296, 104 S.Ct., at 3070 (recognizing the government's "substantial interest in maintaining the parks ... in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them").

We think it also apparent that the city's interest in ensuring the sufficiency of sound amplification at bandshell events is a substantial one. The record indicates that inadequate ***797** sound amplification has had an adverse affect on the ability of some audiences to hear and enjoy performances at the bandshell. The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation. See *Community for Creative Non-Violence*, *supra*, at 296, 104 S.Ct. at 3070.

The Court of Appeals recognized the city's substantial interest in limiting the sound emanating from the bandshell. See 848 F.2d, at 370. The court concluded, however, that the city's sound-amplification guideline was not narrowly tailored to further this interest, because "it has not [been] shown ... that the requirement of the use of the city's sound system and technician was the *least intrusive means* of regulating the volume." *Id.*, at 371 (emphasis added). In the court's judgment, there were several alternative methods of achieving the desired end that would have been less restrictive of respondent's First Amendment rights.

The Court of Appeals erred in sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city's solution was "the least intrusive means" of achieving the desired end. This "less-restrictive-alternative analysis ... has never been a part of the inquiry into the validity of a time, place, and manner regulation." *Regan v. Time, Inc.*, 468 U.S. 641, 657, 104 S.Ct. 3262, 3271, 82 L.Ed.2d 487 (1984) (opinion of WHITE, J.). Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985).

The Court of Appeals apparently drew its least-intrusive-means requirement from *United States v. O'Brien*, 391 U.S., at 377, 88 S.Ct., at 1679, the case in which we established the standard for judging the validity of restrictions on expressive conduct. See 848 F.2d, at 370. The court's reliance was misplaced, ***798** however, for we have held that the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Community for Creative Non-Violence*, *supra*, 468 U.S., at 298, 104 S.Ct., at 3071. Indeed, in *Community for Creative Non-Violence*, we squarely rejected reasoning identical to that of the court below:

"We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands.... We do not believe ... that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the [parks department] as the manager of the [city's] parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." 468 U.S., at 299, 104 S.Ct., at 3072.

[9] [10] Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of ***2758** doing so.[FN6] ***799** Rather, the requirement of narrow tailoring is satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985); see also *Community for Creative Non-Violence, supra*, 468 U.S., at 297, 104 S.Ct., at 3071. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.[FN7] See ***800** *Frisby v. Schultz*, 487 U.S., at 485, 108 S.Ct., at 2502 ("A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil"). So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. "The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests" or the degree to which those interests should be promoted. *United States v. Albertini*, 472 U.S., at 689, 105 S.Ct., at 2906; see *Community for Creative Non-Violence, supra*, 468 U.S., at 299, 104 S.Ct., at 3072.

FN6. Respondent contends that our decision last Term in *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), supports the conclusion that "a regulation is neither precisely drawn nor 'narrowly tailored' if less intrusive means than those employed are available." Brief for Respondent 27. In *Boos* we concluded that the government regulation at issue was "not narrowly tailored; a less restrictive alternative is readily available." 485 U.S., at 329, 108 S.Ct., at 1168 (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6, 106 S.Ct. 1842, 1850, n. 6, 90 L.Ed.2d 260 (1986) (plurality opinion)). In placing reliance on *Boos*, however, respondent ignores a crucial difference between that case and this. The regulation we invalidated in *Boos* was a content-based ban on displaying signs critical of foreign governments; such content-based restrictions on political speech "must be subjected to the most exacting scrutiny." 485 U.S., at 321, 108 S.Ct., at 1164. While time, place, or manner regulations must also be "narrowly tailored" in order to survive First Amendment challenge, we have never applied strict scrutiny in this context. As a result, the same degree of tailoring is not required of these regulations, and least-restrictive-alternative analysis is wholly out of place. For the same reason, the dissent's citation of *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), is beside the point. See *post*, at 2762, n. 4. *Croson*, like *Boos*, is a strict scrutiny case; even the dissent does not argue that strict-scrutiny is applicable to time, place, or manner regulations.

Our summary affirmance of *Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (C.A.7 1986), aff'd, 479 U.S. 1048, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987), is not to the contrary. Although the Seventh Circuit in that case did adopt the least-restrictive-alternative approach, see 796 F.2d, at 1553-1554, its judgment was also supported by the alternative grounds that the regulation at issue did not serve to further the stated governmental interests and did not leave open alternative channels of communication. *Id.*, at 1555-1558. As we have noted on more than one occasion: "A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment." *Anderson v. Celebrezze*, 460 U.S. 780, 785, n. 5, 103 S.Ct. 1564, 1568, n. 5, 75 L.Ed.2d 547 (1983).

FN7. The dissent's attempt to analogize the sound-amplification guideline to a total ban

on distribution of handbills is imaginative but misguided. See *post,* at 2762. The guideline does not ban all concerts, or even all rock concerts, but instead focuses on the source of the evils the city seeks to eliminate-excessive and inadequate sound amplification-and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils. This is the essence of narrow tailoring. A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion, or noise. See *Martin v. Struthers,* 319 U.S. 141, 145-146, 63 S.Ct. 862, 864-865, 87 L.Ed. 1313 (1943). For that reason, a complete ban on handbilling would be substantially broader than necessary to achieve the interests justifying it.

****2759** [11] It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances. Absent this requirement, the city's interest would have been served less well, as is evidenced by the complaints about excessive volume generated by respondent's past concerts. The alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved. See *Community for Creative Non-Violence, supra,* at 299, 104 S.Ct., at 3072. The Court of Appeals erred in failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city's sound technician.

The city's second content-neutral justification for the guideline, that of ensuring "that the sound amplification [is] sufficient to reach all listeners within the defined concertground," ***801** 658 F.Supp., at 1352, also supports the city's choice of regulatory methods. By providing competent sound technicians and adequate amplification equipment, the city eliminated the problems of inexperienced technicians and insufficient sound volume that had plagued some bandshell performers in the past. No doubt this concern is not applicable to respondent's concerts, which apparently were characterized by more-than-adequate sound amplification. But that fact is beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case. Here, the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline than with it. *United States v. Albertini, supra,* 472 U.S., at 688-689, 105 S.Ct., at 2906-2907; *Community for Creative Non-Violence,* 468 U.S., at 296-297, 104 S.Ct., at 3070-3071. Considering these proffered justifications together, therefore, it is apparent that the guideline directly furthers the city's legitimate governmental interests and that those interests would have been less well served in the absence of the sound-amplification guideline.

Respondent nonetheless argues that the sound-amplification guideline is not narrowly tailored because, by placing control of sound mix in the hands of the city's technician, the guideline sweeps far more broadly than is necessary to further the city's legitimate concern with sound volume. According to respondent, the guideline "targets ... more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz, supra,* 487 U.S., at 485, 108 S.Ct., at 2503.

If the city's regulatory scheme had a substantial deleterious effect on the ability of bandshell performers to achieve the quality of sound they desired, respondent's concerns would have considerable force. The District Court found, ***802** however, that pursuant to city policy, the city's sound technician "give[s] the sponsor autonomy with respect to the sound mix ... [and] does all that he can to accommodate the sponsor's desires in those regards." 658 F.Supp., at 1352. The court squarely rejected respondent's claim that the city's "technician is not able properly to implement a sponsor's instructions as to sound quality or mix," finding that "[n]o evidence to that effect was offered at trial; as noted, the evidence is to the contrary." App. to Pet. for Cert. 89. In view of these findings, which were not disturbed by the Court of Appeals, we must conclude that the city's guideline has no material impact on any performer's ability to exercise complete artistic control over sound

quality. Since the guideline allows the city to control volume without interfering with the ***2760** performer's desired sound mix, it is not "substantially broader than necessary" to achieve the city's legitimate ends, *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S., at 808, 104 S.Ct., at 2130, and thus it satisfies the requirement of narrow tailoring.

C

The final requirement, that the guideline leave open ample alternative channels of communication, is easily met. Indeed, in this respect the guideline is far less restrictive than regulations we have upheld in other cases, for it does not attempt to ban any particular manner or type of expression at a given place or time. Cf. *Frisby, supra*, 487 U.S., at 482-484, 108 S.Ct., at 2501-2502; *Community for Creative Non-Violence, supra*, 468 U.S., at 295, 104 S.Ct., at 3070; *Renton v. Playtime Theatres, Inc.*, 475 U.S., at 53-54, 106 S.Ct., at 931-932. Rather, the guideline continues to permit expressive activity in the bandshell, and has no effect on the quantity or content of that expression beyond regulating the extent of amplification. That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate. See ***803** *Taxpayers for Vincent, supra*, 466 U.S., at 803 and n. 23, 812 and n. 30, 104 S.Ct., at 2128 and n. 23, 2133 and n. 30; *Kovacs*, 336 U.S., at 88-89, 69 S.Ct., at 455-456 (opinion of Reed, J.).

III

The city's sound-amplification guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of communication. Accordingly, it is valid under the First Amendment as a reasonable regulation of the place and manner of expression. The judgment of the Court of Appeals is

Reversed.

Justice BLACKMUN concurs in the result.

Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.
No one can doubt that government has a substantial interest in regulating the barrage of excessive sound that can plague urban life. Unfortunately, the majority plays to our shared impatience with loud noise to obscure the damage that it does to our First Amendment rights. Until today, a key safeguard of free speech has been government's obligation to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference. The majority's willingness to give government officials a free hand in achieving their policy ends extends so far as to permit, in this case, government control of speech in advance of its dissemination. Because New York City's Use Guidelines (Guidelines) are not narrowly tailored to serve its interest in regulating loud noise, and because they constitute an impermissible prior restraint, I dissent.

***804** I

The majority sets forth the appropriate standard for assessing the constitutionality of the Guidelines. A time, place, and manner regulation of expression must be content neutral, serve a significant government interest, be narrowly tailored to serve that interest, and leave open ample alternative channels of communication. See *Frisby v. Schultz*, 487 U.S. 474, 481-482, 108 S.Ct. 2495, 2500-2501, 101 L.Ed.2d 420 (1988); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44, 103 S.Ct. 948, 953, 74 L.Ed.2d 794 (1983). The Guidelines indisputably are content ***2761**

neutral as they apply to all bandshell users irrespective of the message of their music. App. 375; see *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 20, 106 S.Ct. 903, 914, 89 L.Ed.2d 1 (1985).[FN1] They also serve government's significant interest in limiting loud noise in public places, see *Grayned v. Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972), by giving the city exclusive control of all sound equipment.

FN1. The majority's reliance on *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), is unnecessary and unwise. That decision dealt only with the unique circumstances of "businesses that purvey sexually explicit materials," *Id.*, at 49, and n. 2, 106 S.Ct., at 929, and n. 2. Today, for the first time, a majority of the Court applies *Renton* analysis to a category of speech far afield from that decision's original limited focus. Given the serious threat to free expression posed by *Renton* analysis, see *Boos v. Barry*, 485 U.S. 312, 335-337, 108 S.Ct. 1157, 1171-1172, 99 L.Ed.2d 333 (1988) (BRENNAN, J., concurring in part and concurring in judgment); *Renton, supra*, 475 U.S., at 55, 106 S.Ct., at 933 (BRENNAN, J., concurring in part and concurring in judgment), I fear that its broad application may encourage widespread official censorship.

My complaint is with the majority's serious distortion of the narrow tailoring requirement. Our cases have not, as the majority asserts, "clearly" rejected a less-restrictive-alternative test. *Ante*, at 2757. On the contrary, just last Term, we held that a statute is narrowly tailored only "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz, supra*, 487 U.S., at 485, 108 S.Ct., at 2503. While there is language in a few opinions which, taken out of ***805** context, supports the majority's position,[FN2] in practice, the Court has interpreted the narrow tailoring requirement to mandate an examination of alternative methods of serving the asserted governmental interest and a determination whether the greater efficacy of the challenged regulation outweighs the increased burden it places on protected speech. See, *e.g.*, *Martin v. Struthers*, 319 U.S. 141, 147-148, 63 S.Ct. 862, 866-867, 87 L.Ed. 1313 (1943); *Schneider v. State*, 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939). In *Schneider*, for example, the Court invalidated a ban on handbill distribution on public streets, notwithstanding that it was the most effective means of serving government's legitimate interest in minimizing litter, noise, and traffic congestion, and in preventing fraud. The Court concluded that punishing those who actually litter or perpetrate frauds was a much less intrusive, albeit not quite as effective, means to serve those significant interests. *Id.*, at 162, 164, 60 S.Ct., at 151, 152; see also *Martin, supra*, 319 U.S., at 148, 63 S.Ct., at 867 (invalidating ban on door-to-door distribution of handbills because directly punishing fraudulent solicitation was a less intrusive, yet still effective, means of serving government's interest in preventing fraud).[FN3]

FN2. *United States v. Albertini*, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985), for example, involved a person's right to enter a military base, which, unlike a public park, is not a place traditionally dedicated to free expression. *Id.*, at 687, 105 S.Ct., at 2905 (commanding officer's power to exclude civilians from a military base cannot "be analyzed in the same manner as government regulation of a traditional public forum"). Nor can isolated language from Justice WHITE's opinion in *Regan v. Time, Inc.*, 468 U.S. 641, 657, 104 S.Ct. 3262, 3271, 82 L.Ed.2d 487 (1984), which commanded the votes of only three other Justices, be construed as this Court's definitive explication of the narrow tailoring requirement.

FN3. The majority relies heavily on *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), but in that case, the Court engaged in an inquiry similar to the one the majority now rejects; it considered whether the increased efficacy of the challenged regulation warranted the increased burden on speech. *Id.*, at 299, 104 S.Ct., at 3070 ("[P]reventing overnight sleeping will avoid a measure of actual or threatened damage"; however, "minimiz[ing] the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage").

***806** The Court's past concern for the extent to which a regulation burdens speech ****2762** more

than would a satisfactory alternative is noticeably absent from today's decision. The majority requires only that government show that its interest cannot be served as effectively without the challenged restriction. *Ante*, at 2758. It will be enough, therefore, that the challenged regulation advances the government's interest only in the slightest, for any differential burden on speech that results does not enter the calculus. Despite its protestations to the contrary, the majority thus has abandoned the requirement that restrictions on speech be narrowly tailored in any ordinary use of the phrase.[FN4] Indeed, after today's decision, a city could claim that bans on handbill distribution or on door-to-door solicitation are the most effective means of avoiding littering and fraud, or that a ban on loudspeakers and radios in a public park is the most effective means of avoiding loud noise. Logically extended, the majority's analysis would permit such far-reaching restrictions on speech.

> FN4. In marked contrast, Members of the majority recently adopted a far more stringent narrow tailoring requirement in the affirmative-action context. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-508, 109 S.Ct. 706, 729-730, 102 L.Ed.2d 854 (1989).

True, the majority states that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ibid.* But this means that only those regulations that "engage in the gratuitous inhibition of expression" will be invalidated. Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv.L.Rev. 1482, 1485 (1975). Moreover, the majority has robbed courts of the necessary analytic tools to make even this limited inquiry. The Court of Appeals examined "how much control of volume is appropriate [and] how that level of control is to be achieved," *ante*, at 2759, but the majority admonishes that court for doing so, stating that it should ***807** have "defer[red] to the city's reasonable determination." *Ibid.* The majority thus instructs courts to refrain from examining how much speech may be restricted to serve an asserted interest and how that level of restriction is to be achieved. If a court cannot engage in such inquiries, I am at a loss to understand how a court can ascertain whether the government has adopted a regulation that burdens substantially more speech than is necessary.

Had the majority not abandoned the narrow tailoring requirement, the Guidelines could not possibly survive constitutional scrutiny. Government's interest in avoiding loud sounds cannot justify giving government total control over sound equipment, any more than its interest in avoiding litter could justify a ban on handbill distribution. In both cases, government's legitimate goals can be effectively and less intrusively served by directly punishing the evil-the persons responsible for excessive sounds and the persons who litter. Indeed, the city concedes that it has an ordinance generally limiting noise but has chosen not to enforce it. See Tr. of Oral. Arg. 5-6.[FN5]

> FN5. Significantly, the National Park Service relies on the very methods of volume control rejected by the city-monitoring sound levels on the perimeter of an event, communicating with event sponsors, and, if necessary, turning off the power. Brief for United States as *Amicus Curiae* 21. In light of the Park Service's "experienc[e] with thousands of events over the years," *ibid.*, the city's claims that these methods of monitoring excessive sound are ineffective and impracticable are hard to accept.

By holding that the Guidelines are valid time, place, and manner restrictions, notwithstanding the availability of less intrusive but effective means of controlling volume, the majority deprives the narrow tailoring requirement of all meaning.[FN6] Today, ****2763** the majority enshrines efficacy but sacrifices free speech.

> FN6. Because I conclude that the Guidelines are not narrowly tailored, there is no need to consider whether there are ample alternative channels for communication. I note only that the availability of alternative channels of communication outside a public park does not magically validate a government restriction on protected speech within it. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448 (1975) (" '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place,' "

quoting *Schneider v. State*, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939)).

***808** II

The majority's conclusion that the city's exclusive control of sound equipment is constitutional is deeply troubling for another reason. It places the Court's *imprimatur* on a quintessential prior restraint, incompatible with fundamental First Amendment values. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Indeed, just as "[m]usic is one of the oldest forms of human expression," *ante*, at 2753, the city's regulation is one of the oldest forms of speech repression. In 16th- and 17th-century England, government controlled speech through its monopoly on printing presses. See L. Levy, Emergence of a Free Press 6 (1985). Here, the city controls the volume and mix of sound through its monopoly on sound equipment. In both situations, government's exclusive control of the means of communication enables public officials to censor speech in advance of its expression. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S.Ct. 1239, 1243, 43 L.Ed.2d 448 (1975). Under more familiar prior restraints, government officials censor speech "by a simple stroke of the pen," Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp.Prob. 648, 657 (1955). Here, it is done by a single turn of a knob.

The majority's implication that government control of sound equipment is not a prior restraint because city officials do not "enjoy unguided discretion to deny the right to speak altogether," *ante*, at 2755, is startling. In the majority's view, this case involves a question of "different and lesser" magnitude-the discretion to provide inadequate sound for performers. But whether the city denies a performer a bandshell permit or grants the permit and then silences or ***809** distorts the performer's music, the result is the same-the city censors speech. In the words of Chief Justice REHNQUIST, the First Amendment means little if it permits government to "allo[w] a speaker in a public hall to express his views while denying him the use of an amplifying system." *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 493, 105 S.Ct. 1459, 1466, 84 L.Ed.2d 455 (1985); see also *Southeastern Promotions, supra*, 420 U.S., at 556, n. 8, 95 S.Ct., at 1246, n. 8 ("A licensing system need not effect total suppression in order to create a prior restraint").

As a system of prior restraint, the Guidelines are presumptively invalid. See *Southeastern Promotions, supra*, at 558, 95 S.Ct., at 1248; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963). They may be constitutional only if accompanied by the procedural safeguards necessary "to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58, 85 S.Ct. 734, 740, 13 L.Ed.2d 649 (1965). The city must establish neutral criteria embodied in "narrowly drawn, reasonable and definite standards," in order to ensure that discretion is not exercised based on the content of speech. *Niemotko v. Maryland*, 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267 (1951); see also *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758, 108 S.Ct. 2138, 2144, 100 L.Ed.2d 771 (1988); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151, 89 S.Ct. 935, 938-939, 22 L.Ed.2d 162 (1969). Moreover, there must be "an almost immediate judicial determination" that the restricted material was unprotected by the First Amendment. *Bantam Books, supra*, 372 U.S., at 70, 83 S.Ct., at 639; see also *Southeastern Promotions, supra*, 420 U.S., at 560, 95 S.Ct., at 1250.

The Guidelines contain neither of these procedural safeguards. First, there are no "narrowly drawn, reasonable and definite standards" guiding the hands of the city's sound technician as he mixes the sound. ***2764** The Guidelines state that the goals are "to provide the best sound for all events" and to "insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone." App. 375; see also *ante*, at 2755. But the city never defines "best sound" or "appropriate sound quality." The bandshell program director-manager testified that quality of ***810** sound refers to tone and to sound mix. App. 229, 230. Yet questions of tone and mix cannot be separated from musical expression as a whole. See The New Grove Dictionary of Music and Musicians 51-55 (S. Sadie ed. 1980) (tonality involves relationship between pitches and harmony); F. Everest, Successful Sound System Operation 173 (1985) ("The mixing console ... must be considered as a creative tool"). Because judgments that sounds are too loud, noiselike, or discordant can mask disapproval of the music itself,[FN7] government control of the sound-mixing equipment necessitates

detailed and neutral standards.

> ENZ. "New music always sounds loud to old ears. Beethoven seemed to make more noise than Mozart; Liszt was noisier than Beethoven; Schoenberg and Stravinsky, noisier than any of their predecessors." N. Slonimsky, Lexicon of Musical Invective: Critical Assaults on Composers Since Beethoven's Time 18 (1953). One music critic wrote of Prokofiev: "Those who do not believe that genius is evident in superabundance of noise, looked in vain for a new musical message in Mr. Prokofiev's work. Nor in the *Classical Symphony*, which the composer conducted, was there any cessation from the orgy of discordant sounds." *Id.*, at 5 (internal quotations omitted).

The majority concedes that the standards in the Guidelines are "undoubtedly flexible" and that "the officials implementing them will exercise considerable discretion." *Ante*, at 2755. Nevertheless, it concludes that "[b]y its own terms the city's sound-amplification guideline must be interpreted to forbid city officials purposefully to select inadequate sound systems or to vary the sound quality or volume based on the message being delivered by performers." *Ante*, at 2755. Although the majority wishes it were so, the language of the Guidelines simply does not support such a limitation on the city's discretion. Alternatively, the majority finds a limitation in the city's practice of deferring to the sponsor with respect to sound mix, and of conferring "with the sponsor if any questions of excessive sound arise, before taking any corrective action." 658 F.Supp. 1346, 1352 (SDNY 1987). A promise to consult, however, does not provide the detailed ***811** "neutral criteria" necessary to prevent future abuses of discretion any more than did the city's promise in *Lakewood* to deny permit applications only for reasons related to the health, safety, or welfare of Lakewood citizens. Indeed, a presumption that city officials will act in good faith and adhere to standards absent from a regulation's face is "the very presumption that the doctrine forbidding unbridled discretion disallows." *Lakewood, supra*, 486 U.S., at 770, 108 S.Ct., at 2151.[FN8]

> FN8. Of course, if the city always defers to a performer's wishes in sound mixing, then it is difficult to understand the need for a city technician to operate the mixing console. See Tr. of Oral. Arg. 12 (city concedes that the possibilities for a confrontation over volume are the same whether the city technician directly controls the mixing console or sits next to a performer's technician who operates the equipment). Conversely, if the city can control sound only by using its own equipment and technician, then it must not be heeding all the performer's wishes on sound mixing.

Second, even if there were narrowly drawn guidelines limiting the city's discretion, the Guidelines would be fundamentally flawed. For the requirement that there be detailed standards is of value only so far as there is a judicial mechanism to enforce them. Here, that necessary safeguard is absent. The city's sound technician consults with the performers for several minutes before the performance and then decides how to present each song or piece of music. During the performance itself, the technician makes hundreds of decisions affecting the mix and volume of sound. Tr. of Oral Arg. 13. The music is played immediately after each decision. There is, of ***2765** course, no time for appeal in the middle of a song. As a result, no court ever determines that a particular restraint on speech is necessary. The city's admission that it does not impose sanctions on violations of its general sound ordinance because the necessary litigation is too costly and time consuming only underscores its contempt for the need for judicial review of restrictions on speech. *Id.*, at 5. With neither prompt judicial review nor detailed and neutral standards fettering the city's discretion to restrict protected ***812** speech, the Guidelines constitute a quintessential, and unconstitutional, prior restraint.

III

Today's decision has significance far beyond the world of rock music. Government no longer need balance the effectiveness of regulation with the burdens on free speech. After today, government need only assert that it is most effective to control speech in advance of its expression. Because such a result eviscerates the First Amendment, I dissent.

U.S.N.Y.,1989.
Ward v. Rock Against Racism
491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661, 57 USLW 4879

Briefs and Other Related Documents (Back to top)

- 1989 WL 1127099 (Appellate Brief) Reply Brief for the Petitioners (Feb. 10, 1989)
- 1989 WL 1127096 (Appellate Brief) Brief for Respondent (Jan. 11, 1989)
- 1988 WL 1025780 (Appellate Brief) Motion for Leave to File Brief and Brief of the National League of Cities, National Conference of State Legislatures, International City Management Association, National Association of Counties, U.S. Conference of Mayors, and Council of State Governm ents as Amici Curiae in Support of Petitioners (Nov. 29, 1988)
- 1988 WL 1025781 (Appellate Brief) Brief for the United States as Amicus Curiae Supporting Petitioners (Nov. 29, 1988)
- 1988 WL 1025782 (Appellate Brief) Brief for the Petitioners (Nov. 29, 1988)
- 1988 WL 1094097 (Appellate Petition, Motion and Filing) Petition (Aug. 03, 1988)

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