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Separation of Church and State and Political Candidacy as a Fundamental Right - Paty v. McDaniel

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SEPARATION OF CHURCH AND STATE AND POLITICAL CANDIDACY AS A FUNDAMENTAL RIGHT - *PATY V. MCDANIEL*

"Render therefore, unto Caesar the things which are Caesar's; and unto God the things that are God's."[1] Quoting the Bible and taking judicial notice of the religious composition of the State of Tennessee, the Tennessee Supreme Court in *Paty v. McDaniel*[2] upheld Article IX, Section 1, of the Constitution of Tennessee which bars priests and ministers of any denomination from holding a seat in either house of the state legislature.[3] The purpose of this Note will be to analyze the decision of the Tennessee Supreme Court and to predict how the United States Supreme Court will respond to appellant's arguments based on free exercise of religion and equal protection.

FACTS AND PROCEDURAL HISTORY

The Tennessee State Legislature called for a limited constitutional convention to take place in 1977,[4] and set the requirements for delegates to be the same as those for membership in the House of Representatives, thus invoking Article IX, Section 1 of the state constitution.[5] Selma Cash Paty, a candidate for the office of delegate to the convention, brought suit to have the Reverend Paul A. McDaniel, an opposing candidate, declared ineligible because of his position as a Baptist minister.[6] Rev. McDaniel defended arguing that the Tennessee provision violated the free exercise and establishment clauses of the First Amendment of the United States Constitution[7] as applied to

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1. *Matthew* 22:21.
2. 547 S.W.2d 897 (Tenn. Sup. Ct. 1977).
3. TENN. CONST. art. IX, § 1 provides:

   Whereas Ministers of the Gospel are by their profession dedicated to God and the care of souls, and ought not to be diverted from the great duties of their functions; therefore no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature.
4. 1976 TENN. PUB. ACTS ch. 848.
5. *Id.*
6. Because of delays in the litigation, by the time the Tennessee Supreme Court had a chance to decide the question, the election had already taken place and the Rev. McDaniel was victorious. The final vote tally read: Paul A. McDaniel 4570, Selma Cash Paty 2944, Samuel Lee Doney 900, and Ralph W. Timberlake 743.
7. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

   The establishment clause assertions made by Rev. McDaniel will not be discussed in this Note. Rev. McDaniel argued that:

   Article IX discloses a sectarian bias on its face—it applies only to "ministers of the Gospel" and "priests of any denomination whatever." The gospel obviously refers to

the states through the Fourteenth Amendment.[8] Rev. McDaniel also argued that Article IX, Section 1, violated the equal protection clause of the Fourteenth Amendment.

The Chancery Court of Hamilton County, Tennessee held that the exclusion of ministers from public office infringed upon the free exercise of religion guaranteed by the First Amendment. The Tennessee Supreme Court reversed and declared Rev. McDaniel to be ineligible for the office of delegate to the 1977 Constitutional Convention.[8a] Rev. McDaniel appealed to the United States Supreme Court. The Supreme Court stayed the order of the Tennessee Supreme Court and noted probable jurisdiction on June 15, 1977.[8b] Oral arguments were heard on December 5, 1977.

THE FREE EXERCISE ARGUMENT

Historically, plaintiffs have not successfully asserted free exercise claims before the United States Supreme Court.[9] Under free exercise challenges, the conduct affected by the law in question is categorized as either religious belief, which is protected from government interference, or religious action, which is not protected.[10]

> the Bible. The meaning of the word "gospel" is "Good news" and is used in a religious context exclusively by Christians to mean "Good news of Jesus." . . . Thus, apparently neither rabbis of the Jewish faith nor their counterparts among Buddhists, Confuscians, Taoists or Mohammedans would be excluded from candidacy by Article IX.

Brief for Appellant at 17-18, Paty v. McDaniel, 547 S.W.2d 897 (Tenn. Sup. Ct. 1977). The court adequately dealt with this issue and was correct in holding that "the phrase . . . 'priests of any denomination whatever' is intended to embrace the counterparts of ministers, priests, and rabbis in every religious sect, whatever may be their title or designation." 547 S.W.2d at 908.

8. In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Supreme Court held that the religious protection secured by the First Amendment was embodied in the Fourteenth Amendment. The latter amendment rendered the states as incompetent as Congress to enact laws violating the religious protections.

8a. 547 S.W.2d at 910.

8b. 97 S. Ct. 2948 (1977).

9. *See* Pfeffer, *The Supremacy Of Free Exercise*, 61 GEO. L.J. 1115, 1130 (1973). In the cases which upheld a free exercise claim, the assertion was linked with either a freedom of speech or freedom of press claim as well. Conversely, when the free exercise claim was made alone it was unsuccessful. In reality free exercise claims were treated as though they occupied a place of lesser prominence in the scope of First Amendment freedoms. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961); Heisler v. Board of Review, 343 U.S. 939 (1952); Schneider v. New Jersey, 308 U.S. 147 (1939); Lovell v. Griffen, 303 U.S. 444 (1938); Hamilton v. Regents, 293 U.S. 245 (1934); United States v. Macintosh, 283 U.S. 605 (1931); Davis v. Beason, 133 U.S. 333 (1890); and Reynolds v. United States, 98 U.S. 145 (1878). This line of cases is not all inclusive. For other cases *see* Pfeffer, *supra* at 1130 nn.114, 115.

10. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878); Braunfeld v. Brown, 366 U.S. 599, 603-04 (1961). To keep the free exercise clause viable, the belief-action dichotomy must not be rigidly applied. Since most religious practices involve some elements of action, a certain

Religious practices are often treated as action in cases challenging laws on free exercise grounds.[11] Legislation may impose a minor burden or inconvenience upon religious practices, but the establishment clause prevents the state or federal government from making a religious practice itself unlawful.[12] The state may reach specific religious conduct with regulatory laws which have a secular purpose and which are a valid exercise of a state's Tenth Amendment[13] police power in the areas of public health, safety, and welfare.[14] Nevertheless, even an incidental burden on the free exercise of religion must be justified by a compelling state interest.[15] Further, there must be no alternative means available to the state which would accomplish its goal without imposing such a burden.[16]

The Tennessee Supreme Court's Analysis

In beginning its analysis the Tennessee Supreme Court noted that the only case involving the identical issue was *Kirkley v. Maryland.*[17] The court dismissed the importance of that decision by pointing out that the governor and the attorney general of the State of Maryland admitted the unconstitutionality of a Maryland constitutional provision similar to Tennessee's. The lack of analysis in *Kirkley* left the Tennessee Supreme Court free to apply its own analysis.

The Tennessee Supreme Court first classified the conduct governed by Article IX, Section 1, as the following of a profession, which is secular action, and concluded that there was no restriction on Rev. McDaniel's religious beliefs. The ministry, however, is an expression

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amount of flexibility is needed to allow for free exercise protection. *See* Pfeffer, *supra* note 9, at 1122.

11. *See* Reynolds v. United States, 98 U.S. 145 (1878). In *Reynolds* the Court upheld the bigamy conviction of George Reynolds. Reynold's defense was that the Utah law outlawing bigamy was a violation of his free exercise of religion. Reynolds, a Mormon, believed the tenet of his faith calling for all male members of the Mormon Church to practice polygamy as part of their religious duty. The Court upheld the conviction calling the conduct in question action rather than belief. The Court drew an analogy between the proscribed conduct at issue here—polygamy—and a belief in human sacrifice. *Id.* at 166.

12. *See* Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

13. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

14. *See* Braunfeld v. Brown, 366 U.S. 599, 607 (1961); Reynolds v. United States, 98 U.S. 145, 164 (1878).

15. Sherbert v. Verner, 374 U.S. 398, 403 (1963). This case is discussed in detail in note 29 and accompanying text *infra*.

16. Braunfeld v. Brown, 366 U.S. 599, 607 (1961). *See generally* Comment, *A Uniform Valuation of the Religion Gurarantees*, 80 YALE L.J. 77, 78, 79 (1970).

17. 381 F. Supp. 327 (D. Md. 1974) (the case was decided on equal protection grounds).

of Rev. McDaniel's belief. Living one's religion as an expression of belief is not a novel concept or a distinction based on semantics.[18] A man or woman can in few ways manifest a greater belief in his or her religion than to enter its ministry.

The Tennessee Supreme Court cited two decisions to support its analysis. It relied on *Everson v. Board of Education*,[19] as holding that religious organizations are prohibited from participating in governmental activity. In addition, the court cited *Illinois ex rel. McCollum v. Board of Education*[20] for the proposition that there must be an absolute wall of separation between church and state.[21]

The Tennessee Supreme Court, however, went too far in its application of the separation doctrine. It set up the State of Tennessee as an adversary to religion by excluding the clergy from participating in certain governmental functions. This is not in line with the *Everson* decision which commanded states to be neutral in dealing with religious matters.[22] Further, government hostility toward religion is contrary to our national tradition of freedom of religion embodied in the First Amendment.[23]

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18. Several authors have already noted the problems presented by such restrictions:

> [I]t may well be argued that to deny the right to hold public office to one because he chooses to *live* his religion in the role of a clergyman also violates religious freedom. Such an individual is discriminated against not because he is *religious*, but because he is *a religious*. If he were only religious he would be eligible . . . . To this extent the disqualification clauses in the Maryland and Tennessee constitutions may well be invalid.

C. ANTIEAU, P. CARROLL, & T. BURKE, RELIGION UNDER THE STATE CONSTITUTIONS 160 (1965). Subsequent to this book's publication, the Maryland provision was declared unconstitutional. *See* note 17 and accompanying text *supra*.

19. 330 U.S. 1 (1948). In *Everson* the Court upheld a New Jersey statute authorizing local school districts to make rules and contracts for the transportation of children to and from schools (including parochial schools). The Court said the establishment clause was meant to erect a wall of separation between church and state, *id.* at 16, but felt that the New Jersey statute did not constitute a violation of that separation.

20. 333 U.S. 203 (1948). The Court in *McCollum* struck down, as a violation of the establishment clause, the use of public school classrooms by religious teachers for thirty minutes a week during regular school hours. Attendance at the religious instruction was voluntary although all children had to remain in school and pursue their secular studies if they chose not to attend the religious classes.

21. *Id.* at 212.

22. *Everson* stated: "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used to handicap religions than it is to favor them." 330 U.S. at 18. Separation of church and state should not be read as an absolute command. Even the author of the phrase, Thomas Jefferson, did not treat it as such. Acting on behalf of the University of Virginia, Jefferson recognized that providing for voluntary religious studies and activities is proper to avoid discrimination against religion. *See* Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 431 (1953).

23. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 211, 212 (1948). However, Justice Frankfurter viewed the separation doctrine in absolute terms, much the same way as the

After misreading and misapplying *Everson*, the Tennessee Supreme Court took judicial notice of the religious composition of the state and felt that clergymen of the three dominant religions[24] would enjoy a distinct political advantage if allowed to run for office.[25] This argument is not weighty in light of the fact that the restriction imposed by the Tennessee Constitution does not apply to other important elected offices such as the governor of the state.[26] It is also questionable whether or not any real political advantage could be gained by a religious sect.[27] Therefore, the state's interest here is clearly not compelling enough to warrant a restriction of the free exercise of religion by ministers.

In concluding its analysis, the court felt that the United States Supreme Court's decision in *Braunfeld v. Brown*[28] was sufficiently

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Tennessee Supreme Court. He stated:

> Separation means separation, not something less. Jefferson's metaphor in describing the relationship between Church and State speaks of a "wall of separation," not of a fine line easily overstepped. . . . We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion."

Id. at 231-32 (opinion of Frankfurter, J.), *quoting* Everson v. Board of Educ., 330 U.S. at 59.

24. Baptists, Methodists, and Catholics separately and collectively outnumber all other religious groups in the State of Tennessee. 547 S.W.2d at 904.

25. The advantage the court felt should be avoided was the supposed ability of the religious leaders in the three dominant sects to lead a campaign from their pulpits which would give them a far more extensive voter base from which to launch a campaign for office. *Id.* at 904.

26. Setting the requirements for governor, TENN. CONST. art 3. § 3, provides: "He shall be at least thirty years of age, shall be a citizen of the United States, and shall have been a citizen of the state seven years next before his election."

27. It has been noted that:

> Even assuming that clergy of all faiths were permitted freely by their churches to campaign for office, 'it is quite unlikely that enough of a particular faith or denomination could be elected to have any detrimental effect. In any event the conflict of interest, if such there be, should not be cognizable by the state.

C. ANTIEAU, P. CARROLL, & T. BURKE, RELIGION UNDER STATE CONSTITUTIONS 106 (1965).

28. 366 U.S. 599 (1961). In *Braunfeld* the Court sustained the validity of a Pennsylvania Sunday closing law. Braunfeld, an orthodox Jewish merchant, charged that the Sunday closing was a restriction on his free exercise of religion. His faith required the observance of a Saturday Sabbath. Consequently, if Braunfeld obeyed both the tenets of his faith and the Sunday closing law, his business would be closed Saturday and Sunday. He claimed this would result in a loss of revenue and ultimately in the loss of his business. Braunfeld argued the law was unfair because Sunday Sabbitarians were not forced to choose between their religion and their livelihood. Braunfeld claimed his free exercise of religion was impaired because the Sunday closing law forced him to choose between his religion and his business.

The Court characterized the law as secular in purpose and one with only an indirect effect upon religious beliefs. "[T]he statute at bar does not make unlawful religious practices of appellants; the Sunday closing law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605. The Court held that the indirect burden on the free exercise of religion was justified by the state's interest in providing one uniform day of rest which could not be accomplished by alternative means not imposing the burden on religious freedom.

analogous to be the controlling case. In *Braunfeld*, the Court sustained a Sunday closing law while recognizing that the law undoubtedly served to make the religious practices of Orthodox Jewish merchants more expensive. The *Paty* court concluded that here, as in *Braunfeld*, the legislation only imposed an indirect burden on the exercise of religion, and did not attempt to make a religious practice itself unlawful.

The court also stated that the opposite result reached in *Sherbert v. Verner*[29] could be clearly distinguished. In *Sherbert*, the United States Supreme Court prohibited the denial of unemployment benefits claimed by a Seventh-Day Adventist who refused a job requiring Saturday labor. The court argued that the different results were justified by the fact that in *Braunfeld* the Sunday closing law was supported by the compelling state interest of providing a uniform day of rest. The distinctions between the two cases are not as clear as the court would lead us to believe.[30]

Sherbert is more closely analogous to this case and should control the outcome. Both in *Sherbert* and *Paty* the pressure upon the individual to forgo a religious belief is unmistakable. Both individuals were forced to choose between a religious belief (a Saturday Sabbath in *Sherbert* and the ministry on the part of Rev. McDaniel) and a public benefit (unemployment compensation in *Sherbert* and the right to run for certain public offices in this case). In addition, the deprivation the individuals suffered because of their religious beliefs is analogous to a fine imposed for that particular belief. This is directly contrary to the protection afforded religious beliefs in *Everson*.[31] Article IX, Section 1, of the Tennessee Constitution should be declared an impairment of the free exercise clause of the First Amendment, just as the denial of unemployment benefits was held to be so in *Sherbert*.[32]

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29. 374 U.S. 398 (1963). The plaintiff in *Sherbert* was a member of the Seventh-Day Adventist Church. The beliefs of that church call for a Saturday Sabbath. The plaintiff was denied unemployment benefits by the Employment Security Commission, because she refused to accept employment requiring Saturday work, which was contrary to her religious beliefs. The Court held the denial of benefits to be an impairment of the plaintiff's free exercise of religion.

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand. Governmental imposition of such a choice puts the same kind of a burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404.

30. *See* Pfeffer, *supra* note 9, at 1138.

31. *See* note 19 and accompanying text *supra*.

32. *See* Pfeffer, *supra* note 9, at 1138.

The Tennessee Supreme Court offered one final argument. The court feared that if ministers were elected to the proscribed offices, they might propose or vote for legislation that in itself violates the religious clauses of the First Amendment.[33] This alleged harm, however, could easily be remedied by judicial review of legislation that was enacted.[34] Significantly, this alternative method would not impose the unconstitutional burden on clergymen that Article IX, Section 1, of the Tennessee Constitution does. The fact that clergymen might support the views of their own church is insignificant and should be of little concern to the government.

The basis of individual affiliations, whether they are political, social, or religious is a personal decision that individuals should be free to make without government influence. All people support groups or organizations with which they identify and associate and in which they believe.[35] Given the alternative means of judicial review to protect the state interest, the harm feared by the Tennessee Supreme Court is once again not compelling enough to warrant the impairment of protected religious freedom.

The United States Supreme Court's Predicted Analysis

Applying the general principles governing the free exercise area[36]

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33. The court especially feared that clergymen would propose and vote for legislation that violated the establishment clause of the First Amendment. The legislation could take the form of state aid to parochial schools or other forms of unpermitted church–state entanglement proscribed by the United States Supreme Court. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding statutes providing financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects unconstitutional); School Dist. v. Schempp, 374 U.S. 203 (1963) (declaring mandatory daily Bible reading in the public schools unconstitutional); Engle v. Vitale, 370 U.S. 421 (1962) (declaring unconstitutional a standardized daily prayer read in all public schools).

34. Paty v. McDaniel, 547 S.W.2d 897, 911-12 (Brock, J. dissenting).

35. *See generally* L. PFEFFER, CHURCH STATE AND FREEDOM 221-64 (Rev. Ed. 1967).

36. In testing laws under the religious clauses of the First Amendment two inquiries must be made:

1. Are the purpose and primary effect of the law secular?
2. Does the state have a compelling interest in declining alternative legislative measures involving no secondary religious effects? If on its face, the statute manifests a purpose or necessary or primary effect which is religious, a presumption of unconstitutionality attaches to it, and the burden of rebutting devolves upon the government. Likewise, if the plaintiff demonstrates *prima facie* that in its specific application, a law's primary effect is religious, the burden of rebutting shifts to the state.

   If the plaintiff tenders *prima facie* proof of a secondary religious effect, the government must rebut the inference of the secondary effect, or prove that it has

and following *Sherbert*, the United States Supreme Court should find Article IX, Section 1, of the Tennessee Constitution to be a violation of the free exercise clause of the First Amendment. The purpose of the Tennessee provision is definitely religious: "[ministers] ought not to be diverted from the great duties of their functions."[37] The propriety of such a purpose is questionable.[38] Given this religious purpose, the state can only justify the restriction if it is necessary to promote a compelling state interest and there exist no alternative means which do not impose such a restriction in accomplishing the state's goal.[39]

The United States Supreme Court will most likely rule that the interest asserted by the State of Tennessee—separation of church and state[40]—is not compelling enough to justify a restriction on the free exercise of religion. The framers of the United States Constitution did not feel compelled to include such a provision in the national document, and no state other than Tennessee has such a provision in its constitution.[41] Tennessee itself must not deem the interest too compelling since it does not apply to all important elected offices.[42] It is doubtful whether political activity by clergymen amounts to any church-state problem.[43]

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considered alternative means free of such effects and that it has over-bearing reasons for not adopting them.

Comment, *A Uniform Valuation of the Religion Guarantees*, 80 YALE L.J. 77, 98-101 (1970). *See also* Epperson v. Arkansas, 393 U.S. 97 (1968); McGowan v. Maryland, 366 U.S. 420 (1961).

37. TENN. CONST. art. 9, § 1.

38. States should not be concerned with promoting the efficiency of ministers. Only the individual church should be concerned with these matters. The only concern of the state should be to prevent any impairment of the minister's ability to perform his or her duties. *See* C. ANTINEAU, P. CARROLL, & T. BURKE, RELIGION UNDER THE STATE CONSTITUTIONS 105-06 (1965).

39. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

> [I]f the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Id. See also note 36 *supra*.

40. The term separation of church and state is meant to embody all the interests and fears asserted by the State of Tennessee and the Tennessee Supreme Court.

41. A Maryland provision, MD. CONST. art. 3, § 11, almost identical to Article IX, Section 1, of the Tennessee Constitution, was struck down in 1974. *See* note 17 and accompany text *supra*.

42. As discussed earlier, the restriction on the candidacy of ministers applies only to the two houses of the state legislature. It does not apply to the governor of the state or other offices. *See* note 26 and accompanying text *supra*.

43. "Obviously, a clergyman is neither more nor less a citizen than anyone else; and like anyone else, he has the right and duty to strive for the political cause in which he believes. No

The alternative means of judicial review of legislation[44] is a further stumbling block to the provision's constitutionality. This alternative means accomplishes the purpose of keeping church and state separate while not penalizing clergymen for their religious belief as expressed through their ministry. Absent a compelling state interest, and given a less detrimental alternative means of protecting the asserted state interest, Article IX, Section 1, of the Tennessee Constitution cannot stand under the free exercise clause of the First Amendment of the United States Constitution.

THE EQUAL PROTECTION ARGUMENT

The Tennessee Supreme Court's Analysis

The Tennessee Supreme Court determined that Article IX, Section 1, of the Tennessee Constitution does not violate the equal protection clause of the Fourteenth Amendment. The court recognized the traditional two-tier analysis used in deciding equal protection claims[45] and correctly set out the three criteria for deciding which

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church-state problem is raised by such participation in politics." L. PFEFFER, CHURCH STATE AND FREEDOM 221 (Rev. Ed. 1967).

44. *See* note 34 and accompanying text *supra*. The alternative of judicial review is not limited to laws instituted or voted for by clergymen. It can reach all state or federal actions affecting the religious protections of the First Amendment. Judicial review is a useful tool for maintaining the required separation of church and state.

45. The level of scrutiny given a law is often dispositive of an equal protection claim. Basically there are two levels of scrutiny. The first level is "rigid" scrutiny. This level is invoked whenever the law being examined is based on suspect criteria. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Loving v. Virginia, 388 U.S. 1 (1967) (race); Graham v. Richardson, 403 U.S. 365 (1971) (alienage and nationality); or affects a fundamental right, Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to interstate travel). Laws based on suspect criteria or affecting a fundamental right are presumed to be unconstitutional. Such laws are valid only if they further a *compelling* state interest and there is no alternative means available to accomplish the state goal that is not based on such criteria or affects the exercise of fundamental rights. *See generally* Turkington, *Equal Protection of The Laws In Illinois*, 25 DEPAUL L. REV. 385 (1976); Comment, *Compelling State Interest Test And The Equal Protection Clause—An Analysis*, 6 CUM. SAM. L. REV. 109 (1975); Winter, *The Changing Parameters Of Substantive Equal Protection: From The Warren To The Burger Era*, 23 EMORY L.J. 657 (1974).

To be valid in the rigid scrutiny tier, the law must also be perfectly reasonable. That is, given the law's purpose, it must not affect people it was not designed to reach, nor may it exclude people in the class it was designed to reach. *See* Tussman & tenBroeck, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343-46 (1949). If the law fails to meet any of these requirements it is unconstitutional under the compelling state interest test.

The second tier may be termed "minimal" scrutiny. This level of examination was intended to apply to areas not covered in the first tier. Here the law is presumed to be reasonable. The state need only demonstrate that the law is rationally related to a legitimate state interest. *See e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970). The legislature is also free to attack a problem one step at a time. There is a broad allowance for overinclusiveness (where the law reaches outside of its class) and underinclusiveness (where the law fails to reach people within its

tier to apply.[46] The court, however, neither applied this criteria nor set out its alternative criteria. Rather the court simply applied the test from *Bullock v. Carter*,[47] which the court read as an example of middle scrutiny.[48] Middle scrutiny is not as rigid as the compelling state interest test but provides that the law in question must be rationally related to a legitimate state interest.[49] The *Paty* court felt that the *Bullock* test was more than adequately satisfied since the court deemed Tennessee's asserted state interest in separation of church and state to be compelling.[50]

The Tennessee Supreme Court seemed to rely on *Bullock* because the individual right affected appeared to be the right of political candidacy—the same right asserted by Rev. McDaniel. *Bullock*, however, involved a qualified restriction on the right to run for public office based on wealth. Classifications based on wealth are not usually accorded rigid scrutiny under the compelling state interest test.[51]

Carrington v. Rash[52] is more analogous to the situation presented here. In *Carrington*, the Supreme Court struck down a Texas law

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purpose). Williamson v. Lee Optical Co., 348 U.S. 483 (1955). The rational basis test almost amounts to no scrutiny at all.

46. There are three factors that should be considered in deciding which tier of scrutiny to apply. First, the character of the classification in question must be considered. Next, the individual interest affected must be examined. Finally, one must take account of the interest asserted by the government. Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

47. 405 U.S. 134 (1972).

48. ". . . [T]he law must be found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." *Id.* at 144. The two tier analysis has not been strictly followed by the Supreme Court. There is a third tier or "middle" scrutiny that is used in some areas.

Stanton v. Stanton, 421 U.S. 7 (1975), was the first case to openly recognize the existence of the third tier which the Court had been using in equal protection cases based on sex classifications. The test could aptly be called the "fair and substantial relationship" test. The test provides that for a law to be valid it must have a fair and substantial relationship to a legitimate state objective. *See* Reed v. Reed, 404 U.S. 71, 76 (1971). Although only articulated in sex based claims, the test has also been applied to equal protection challenges of classifications based on illegitimacy. *See* Labine v. Vincent, 401 U.S. 532 (1971); Levy v. Louisiana, 391 U.S. 68 (1968). *See generally* Wilkinson, *The Supreme Court, The Equal Protection Clause, And The Three Faces Of Constitutional Equality*, 61 VA. L. REV. 945, 953 n.60 and accompanying text (1975); Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17-24 (1972).

49. Reed v. Reed, 404 U.S. 71, 76 (1971).

50. If the state's interest is compelling there is obviously a fair and substantial relationship between the law in question and a legitimate state purpose.

51. San Antonio Independant School Dist. v. Rodriguez, 411 U.S. 1 (1973). Discrimination by wealth alone is not suspect. Wealth is suspect when an individual is unable to pay for a benefit and as a result suffers an absolute deprivation of the benefit. *Id.* at 19-29.

52. 380 U.S. 89 (1965). In *Carrington* the Court struck down a Texas law prohibiting servicemen, who were stationed in Texas, from voting in state elections. The Court applied the

forbidding servicemen from voting in local elections. The restriction in *Bullock* was not as severe as the absolute restriction of voting rights in *Carrington*[53] or the absolute denial of the right to run for public office imposed on Rev. McDaniel. *Carrington* and the compelling state interest test should govern here.

The United States Supreme Court's Predicted Analysis

The Supreme Court should apply strict scrutiny in analyzing this provision[54] because it is a classification which affects a fundamental right.[55] The right infringed upon by the provision is the right to political candidacy, which by analogy is as fundamental as the right to vote and freedom of association,[56] and therefore can be justified only by a compelling state interest.[57] Although there are no Supreme Court cases holding that the right to political candidacy is fundamental, the lower federal courts have clearly indicated that the right to run for office should be accorded as much protection as the right to vote.[58]

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compelling state interest test and held that sections of the population could not be "fenced out" from the franchise because of a fear of the way they may vote. *Id.* at 94.

In *Bullock*, the Court found a Texas law requiring candidates to pay filing fees before being eligible to run for office to be unconstitutional. Some of the fees ranged as high as $8900. The test used in *Bullock* is not as clearly in the middle tier as the Tennessee Supreme Court would lead us to believe. The Court in *Bullock* said the law must be given the same "close scrutiny" that was used in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), 405 U.S. at 144. In *Harper*, Justice Douglas, writing for the majority, declared the Virginia poll tax to be a violation of the equal protection clause of the Fourteenth Amendment. The Court held that the law must be "closely scrutinized" because it affected a fundamental interest. The Court cited several cases for this proposition including *Carrington*. All the cases cited employed the compelling state interest test. 383 U.S. at 670. Thus, *Bullock* does not necessarily mean that middle scrutiny is the appropriate tier for classifications restricting the right to run for office. *See* note 58 *infra*.

53. *See* note 52 *supra*.

54. *See* note 45 *supra*.

55. Shapiro v. Thompson, 394 U.S. 618 (1969). "[A]ny classification which serves to penalize the exercise of . . . [a fundamental] right unless shown to be necessary to promote a *compelling* government interest, is unconstitutional." *Id.* at 634.

56. The right to be a candidate in an election has been held to be a logical corollary of the right to vote. *See* Jennes v. Little, 306 F. Supp. 925, 926-27 (N.D. Ga. 1969), *appeal dismissed sub nom.* Matthews v. Little, 397 U.S. 94 (1970); Le Clercq, *The Emerging Federally Secured Right of Political Participation*, 8 IND. L. REV. 607, 619 (1975). The right to be a candidate stems from two separate but related sources: first, it is a derivative of the right to vote because candidacy restrictions have a great impact upon the right to cast a meaningful vote; second, it stems directly from the right of political association. *Id.* at 625.

57. "[O]nly a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms." NAACP v. Button, 371 U.S. 415, 438 (1963).

58. In American Independent Party v. Austin, 440 F. Supp. 670 (E.D. Mich. 1976), the court upheld a state of Michigan requirement that a political party submit a complete slate of

Once it is determined that the compelling state interest test applies, all that remains is to show that the provision does not meet the exacting standards of that test.[59] The articulated state interest in separation of church and state is no more compelling here than it was under the resolution of the free exercise issue.[60]

Even ignoring the weight of the asserted state interest, the law violates the equal protection clause because it is overinclusive. The law affects people outside the scope of its purpose.[61] Article IX, Section 1 is also underinclusive because, given the purpose of the law,

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candidates in order to be listed on the ballot. The law was upheld only because it served a "vital" governmental interest. Such an interest was required because the restriction affected the right of the party to run candidates for office. *Id.* at 672. In Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973) the court of appeals stated:

> In evaluating candidacy restrictions there are two interlocking interests, *both fundamental,* that must be considered. We naturally consider the right asserted by the plaintiff in claiming the opportunity to become a candidate for public office. But whenever a state or city regulates the right to become a candidate for public office, it also regulates the citizens' right to vote; the person or persons whose candidacy is effected may be the voters' choice for public official.

Id. at 193 (emphasis added). Continuing, the court held that:

> A view today, that running for public office is not an interest protected by the First Amendment, seems to us an outlook stemming from an earlier era when public office was the preserve of the professional and the wealthy. Consequently we hold that *candidacy is both a protected First Amendment right and a fundamental interest.* Hence any legislative classification that significantly burdens that interest must be subjected to strict equal protection review.

Id. at 196 (emphasis added).

In Lendall v. Bryant, 387 F. Supp. 397 (E.D. Ark. 1975) the court held that any restrictions on the right to vote *or run for office* were constitutionally suspect and subject to the compelling state interest test. *Id.* at 401. Applying the compelling state interest test, the court struck down a Pennsylvania nomination by petition statute in Salera v. Tucker, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd without opinion* at 424 U.S. 959 (1976).

In Duncatell v. City of Houston, 333 F. Supp. 973 (S.D. Texas 1971) the court found unconstitutional a Houston ordinance requiring a filing fee and previous ownership of real estate as a condition precedent to running for the City Council. The court applied the compelling state interest test and held that the "right to seek public office is as fundamental in our governmental process as the right to vote." *Id.* at 976. *See also* note 17 and accompanying text *supra. But see* Walker v. Yucht, 352 F. Supp. 85 (D. Del. 1972). In *Walker* the district court upheld a Delaware residency requirement for the office of State Representative. "Neither *Turner* nor *Bullock* supports recognition of a right to run for political office sufficiently fundamental, in and of itself, so as to require, in any attempt to justify candidacy restrictions, the demonstration of a compelling state interest." *Id.* at 90.

59. *See* note 45 *supra.*

60. *See* notes 28, 34, 35, 39-44 and accompanying text *supra.*

61. The Court feared that if ministers were elected to the proscribed offices they would exert a religious influence contrary to the requirement of separation of church and state. *See* note 34 *supra.* Article IX, Section 1, of the Tennessee Constitution is patently overinclusive because there are obviously some ministers who are well qualified for elected office and who would be totally secular in their political activity.

there are people the law was designed to reach who are unaffected by it.[62]

An additional ground for voiding the provision under the compelling state interest test is the availability of a less detrimental alternative means.[63] As discussed in the free exercise analysis, the alternative means of judicial review of unconstitutional legislation is available to accomplish the state objective.[64] This alternative means also accomplishes the state's goal without denying clergymen their fundamental right to run for political office.

Given these constitutionally fatal flaws,[65] Article IX, Section 1 of the Tennessee Constitution cannot pass constitutional muster under the compelling state interest test and therefore violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

If the United States Supreme Court reverses the decision of the Tennessee Supreme Court in *Paty v. McDaniel*,[66] two important inroads will be established in federal constitutional law. First, a holding that Article IX, Section 1 of the Tennessee Constitution violates the free exercise clause of the First Amendment will significantly elucidate the application of the separation doctrine. It will become clear that the "wall of separation" which the Court read into the *Everson* decision is not an absolute prohibition.[67] The decision will also bring the Tennessee Constitution into line with the United States Constitution and the constitutions of the forty-nine other states.[68]

The second effect the decision will have is still more important. If the Court applies the compelling state interest test, as suggested, and declares Article IX, Section 1 to be in violation of the equal protection clause of the Fourteenth Amendment, the Court will have formally recognized the right to political candidacy as one of our fundamental

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62. The law is also underinclusive because it will not stop noncleric religious advocates from being elected and exerting the same type of influence on the legislature that Article IX, Section 1, was designed to prevent. Further, the provision does not apply to other offices where the same harm could occur. *See* note 26 and accompanying text *supra*.

63. *See* note 45 *supra*.

64. *See* notes 34, 35, & 44 and accompanying text *supra*.

65. *See* notes 60-62, & 64 and accompanying text *supra*.

66. 547 S.W.2d 897 (Tenn. Sup. Ct. 1977).

67. *See* notes 22 & 23 and accompanying text *supra*.

68. Tennessee currently is the only state in the union that prohibits ministers from holding a seat in the state legislature. *See* notes 17 & 18 and accompanying text *supra*.

freedoms.[69] Courts will have to invoke rigid equal protection scrutiny when reviewing claims of infringement upon this right. There is no doubt that the right to run for public office should be ranked among our most precious freedoms since it is so inextricably bound to the fundamental freedoms of voting and association.[70] The predicted decision will also demonstrate that our freedom of association embodies further fundamental freedoms that have not previously surfaced in United States constitutional case law.

Conversely, should the Court uphold the decision of the Tennessee Supreme Court, the free exercise area will be left in a state of turmoil.[71] Further, the Court will have indicated that the fundamental rights, which invoke the compelling state interest test, are strictly limited to freedom of religion, freedom of speech, freedom of association, privacy, the right to vote, and the right to interstate travel.[72] This limitation would further narrow the already restricted area of fundamental rights for equal protection analysis.[73]

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69. In San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court limited the fundamental freedoms warranting rigid scrutiny to freedom of religion, freedom of speech, freedom of association, the right to privacy, the right to interstate travel, and the right to vote. After the Supreme Court decides *Paty*, the right to run for political office may be added to the above six fundamental freedoms.

70. *See* note 51 and accompanying text *supra*.

71. This decision will leave unclear the question of how absolute the "wall of separation" between church and state must be. *See* note 64 and accompanying text *supra*.

72. *See* note 69 and accompanying text *supra*.

73. It is likely that the Court will avoid the equal protection issue and decide the case on free exercise grounds. The Court will probably be unwilling to expand the area of fundamental rights which it had so narrowly restricted in *San Antonio*.