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THE STORM ARRIVES: THE FIRST AMENDMENT CASES IN THE SUPREME COURT'S 1999-2000 TERM

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INTRODUCTION

When I was a young lawyer finishing up a judicial clerkship, I had two wonderful job offers within the public interest community. One was from the ACLU and the other was from the Legal Aid Society, working for Will Hellerstein. I chose to accept the ACLU offer, and I had a wonderful time working with the people there on important constitutional law cases. But I always knew that if I had taken the Legal Aid offer I would have had a chance to learn the art of lawyering from a lawyer's lawyer. I am glad that Will Hellerstein and I have been colleagues working together at Brooklyn Law School for a long time. So, it all worked out in the long run.

I took the ACLU path and spent most of my time laboring in the First Amendment² vineyards. This past Term in the Supreme Court has been a fateful season for the First Amendment. When I spoke a year ago, I characterized the previous Term as "the calm before the storm," because the Court decided only two, relatively inconsequential, First Amendment cases. I think the storm has finally hit this year, and in its wake we see a Court sharply divided on the First Amendment issues of freedom of speech, freedom of expression, and freedom of association.³ Since the country was so divided politically, perhaps it is not surprising that the Court was as well. What this means is that the future of the First Amendment is very much in the balance.

Since this is the baseball play-off season, let me tell you that the Court's batting average on First Amendment claims was .375; the Court accepted the First Amendment claim three out of

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² U.S. CONST. amend. I. This amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

³ The Court was also sharply divided in the two First Amendment religion cases it decided this Term, *Santa Fe Independent School District v. Doe*, 120 S. Ct. 2266 (2000) and *Mitchell v. Helms*, 120 S. Ct. 2530 (2000).

eight times. That is a pretty good average if you are in the major leagues.⁴ But that average is a little weak if you are looking for a Supreme Court that strongly protects First Amendment rights. I will pursue that sports metaphor a little further in terms of the season's batting averages of the individual Justices. The strongest First Amendment hitter on the Court was Justice Anthony M. Kennedy, with an average of .750, ruling for the First Amendment claim in six out of eight cases; Justice Clarence Thomas followed with an average of .625; Justice Antonin Scalia, with .500; and Justices David Souter and John Paul Stevens, with .375. Chief Justice William H. Rehnquist, Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg supported the First Amendment claim only two out of eight times, for a pretty paltry .250 average. The weakest First Amendment supporter was the Court's most recent member, Justice Stephen L. Breyer, who voted in favor of First Amendment rights in only one out of eight cases, for a low score of .125.

Lately, there has been much talk in the political world about the importance of the 2000 elections in terms of Supreme Court appointments. I did a little further refinement of those statistics and found that last Term, the two Justices admired the most by candidate George W. Bush, namely, Justices Scalia and Thomas, had a combined First Amendment batting average of .562. On the other hand, Justices Breyer and Ginsburg, appointed by President Clinton, had a combined average of .187. If First Amendment issues are a barometer for you in the selection of presidential candidates, and you like a libertarian approach to those issues, you can fill in the blank about who your candidate should be.⁵

⁴ In the 2000 baseball season, the batting leaders in both the National League, Todd Holton of the Colorado Rockies, and the American League, Norman Garciaparra of the Boston Red Sox, each hit an extremely respectable .372.

⁵ I realize, of course, that one season does not a career make. As Professor Eugene Volokh has pointed out, if one assesses the Court's work over a six-year period, the averages in terms of supporting First Amendment claims are significantly different. In his scorecard the Justices rated as follows in terms of taking speech-supportive positions in 34 cases he surveyed: Kennedy, 74%; Thomas, 63%; Souter, 63%; Ginsburg, 58%; Stevens, 58%; Scalia, 52%; Rehnquist, 46%; O'Connor, 46% and Breyer, 45%. See Eugene Volokh, *Where The Justices Are Unpredictable*, THE NEW YORK TIMES, October 30, 2000, A23.

Several years ago I titled my presentation here “A Championship Season” because the Court came down in favor of First Amendment rights in virtually every case. The common theme of that year was that the First Amendment requires that the government not take sides in any debate. The First Amendment is about government neutrality and agnosticism. The Court enforced that by showing a great deal of skepticism toward any law where it seemed that the government was putting its thumb on the scale of one side of the debate or the other. That skepticism was not quite as evident this past term. In five of the eight cases, the Court rejected the First Amendment claim. The issue for the future is whether the First Amendment can weather another storm. I will now address those eight cases more specifically.

WARMING UP

The Court’s season got off to a rather slow and cautious start.

In *Los Angeles Police Department v. United Reporting Publishing Corp.*,⁶ a statute restricting access to arrestees’ addresses was challenged by a commercial information company.⁷ The statute provided that state and local law enforcement agencies were required to provide the names of arrestees, but not their addresses.⁸ Access to the addresses would be granted only on the condition that the address was requested for “scholarly, journalistic, political or governmental” purposes,⁹ or requested by

⁶ 120 S. Ct. 483 (1999).

⁷ *Id.* at 486. The Court noted that prior to July 1, 1996, when the challenged law went into effect, one could obtain the names and addresses of arrestees under a previous version of the California Government Code, 6254(f)(3), which made public the names, addresses and occupations of all arrestees. State and local law enforcement agencies were required, by statute, to provide the information. *Id.* The challenged statute sharply restricted the information available.

⁸ *Id.* The state legislature amended Section 6254(f)(3) on July 1, 1996. The statute limited public access to arrestees’ records, placing “two conditions on public access to arrestees’ addresses – that the person requesting an address declare that the request is being made for one of five prescribed purposes, and that the requestor also declare that the address will not be used directly or indirectly to sell a product or a service.” *Id.* at 486.

⁹ *Id.*

a licensed private investigator for investigation purposes, but not “to sell a product or service.”¹⁰ The case stems from the denial of such access to a reporting company, United Reporting Publishing.¹¹ This company was a private publishing business that obtained the names of recently-arrested individuals and provided them to attorneys, bail bondsmen, insurance companies, drug and alcohol counselors, community groups, and driving schools,¹² for the purpose of allowing them to communicate with the arrestee and offer their services. The issue was whether restricted information made available to groups or individuals with a noble purpose, but not to those with a commercial purpose, is a permissible distinction under the First Amendment.¹³ By a vote of seven to two,¹⁴ the Court concluded that it was. The lower court had invalidated the statute on facial grounds and held that it was violative of the right to commercial free speech insofar as it drew a distinction with regard to the purposes needed to obtain the information.¹⁵ That court had reasoned that commercial speakers, who want to use the information in order to offer their services and solicit business, should be as entitled to gain access to the information as those who want to put it in a newspaper or use it for an academic study or other worthy cause.¹⁶ The Supreme Court, however, was not troubled by the distinction and felt that the statute did not restrain the free expression or communication of the information.¹⁷ On the

¹⁰ *Id.*

¹¹ *Id.* at 488. United Reporting Publishing Corporation’s primary contention was that the statute was invalid on its face. The Court rejected the facial challenge to the law which restrained *access* to information, not speech about or publication of such information. Moreover it was not even clear that the challenger would be denied access to the information.

¹² *Los Angeles Police Dep’t*, 120 S. Ct. at 486.

¹³ *Id.* at 485. The Court, led by Chief Justice Rehnquist, held that the statute did not constitute “an abridgment of anyone’s right to engage in speech, but [was] simply a law regulating access to information in the government’s hands.” *Id.*

¹⁴ *Id.* at 485-86. Justice Rehnquist delivered the opinion of the Court. Justices Scalia, Thomas, Ginsburg, O’Connor, Souter and Breyer also concurred in separate opinions. Justices Stevens and Kennedy were the two dissenters. *Id.*

¹⁵ *United Reported Publishing Corp. v. Los Angeles Police Dep’t*, 946 F. Supp. 822, 825 (S.D. Cal. 1996); *aff’d* 146 F.3d 1133 (9th Cir. 1998)

¹⁶ *Id.*

¹⁷ *Los Angeles Police Dep’t*, 120 S. Ct. at 489.

contrary, the statute merely put a restraint on access to the information in the government's possession.¹⁸

The Court did not permit a facial challenge to the statute,¹⁹ since the government was not required to release this information in the first place.²⁰ Therefore, if the government chooses to release it, subject to some restrictions, it may do so. The Court suggested that an as-applied challenge might be mounted in the future.²¹ In terms of the facial validity of the statute, the Court felt facial invalidity was not an appropriate response, because the case involved regular access to information in the government's possession.²²

The two dissenters, Justices Stevens and Kennedy, took the position that the Court was denigrating the important protection given to commercial speech and commercial information.²³ The dissenting Justices found that most of the uses precluded by the statute were a denial of access to highly important information, such as the availability of legal services, bail bond services or other information that would facilitate the right to counsel.²⁴ The dissenters felt that this was not an effort to protect the privacy of the arrestees' addresses, but one to restrain communication by disfavored commercial speakers because the government did not

¹⁸ *Id.*

¹⁹ *Id.* The Court stated that at any time the California legislature could decide not to give out arrestee information at all and not violate the First Amendment. *Id.*

²⁰ *Id.*

²¹ *Id.* at 489. The Court found that respondent's claim "did not fit within the case law allowing courts to entertain facial challenges." *Id.*

²² *Los Angeles Police Dep't*, 120 S. Ct. at 489. Four concurring Justices believed that the commercial non-commercial distinction would be permissible since it was viewpoint neutral. *See id.* at 491.

²³ *Id.* at 491 (Stevens, J., dissenting). The dissenters believed that "[b]y allowing such widespread access to the information, the State has eviscerated any rational basis for believing that the Amendment will truly protect the privacy of these persons." *Id.* at 493.

²⁴ *Id.* (Stevens, J., dissenting). The Court found that this "interest is arguably consistent with trying to uphold the ethics of the legal profession. Also at stake here, however, are the important interests of allowing lawyers to engage in protected speech and potentially giving criminal defendants better access to needed professional assistance." *Id.* The dissenters also believed that the many exceptions in the statute undercut the claim that privacy of arrestees was being protected.

care for the information being communicated.²⁵ The majority disagreed and reasoned that because this was an issue of access to information within the government's possession, rather than one of restraining or repressing a private party's communication of information, the statute's facial validity would be sustained.²⁶

It was disappointing that the Court would take such a broad view of government's power to selectively withhold information within its control and such a narrow view of the public's right of access to such information. The Term was not off to an auspicious First Amendment start.

DIGGING IN

The next two cases I want to talk about are cases dealing with issues that have bedeviled the Court for a long time. They fall under the rubric of "lesser speech," *i.e.*, sexually-oriented speech that is legally protected by the First Amendment, but barely so.²⁷ One case involved live nude dancing, and the other dealt with the Playboy Channel.²⁸ In one of the first so-called "erogenous zoning" cases, in which the local government used its zoning power to disperse certain establishments that featured X-rated entertainment,²⁹ such regulation was upheld by a sharply-divided Court.³⁰ In one of his first opinions on the Court, Justice John Paul

²⁵ *Id.*

²⁶ *Id.* at 489-90. The Court felt that resorting to a facial challenge "was not warranted because there is 'no possibility that protected speech will be muted.'"

Id.

²⁷ The Court has long struggled with the question of what level protection to give so-called "lesser speech" such as sexual speech or commercial speech. *See, e.g.,* *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Central Hudson Gas Co. v. Public Service Commission*, 447 U.S. 557 (1980).

²⁸ *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000); *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000).

²⁹ *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Operators of two adult theaters brought an action against city officials for a declaratory judgment of unconstitutionality and injunctive relief against two Detroit zoning ordinances, which provided that an "adult theater may not be located within 1000 feet of any two other 'regulated uses' or within 500 feet of a residential area. The term 'regulated uses' includes 10 different kinds of establishments in addition to adult theaters." *Id.* at 52.

³⁰ *Id.* at 73.

Stevens stated that although the speech may be technically protected by the First Amendment, “. . . few of us would march our sons and daughters off to war” to defend it.³¹ Ever since this opinion, the Court has struggled with whether this was the correct approach to take towards lawful sexual material. Here, we are not dealing with material that is legally obscene; such material can be banned. Instead, we are dealing with legally-protected material. However, in the eyes of some Justices it is barely protected. That is what divided the Court in this Term’s two cases as well.

The live nude dancing case, *City of Erie v. Pap’s A.M.*,³² involved not only sexual speech, but also the analytical conundrum of what to do with expressive conduct. The City of Erie enacted an ordinance banning all public nudity.³³ There is no question that banning public nudity is generally valid and does not violate any rights. The problem arises when one particular type of public nudity is intended to be suppressed, namely live nude dancing, where this is done to censor whatever message of eroticism or sexuality it embodies or communicates. This is when the Court has to decide how to deal with the issue. How can we tease out the First Amendment components of live nude dancing in order to determine whether laws restricting public nudity, but targeted on that one expressive form of it, should be sustained? The Court visited this issue about ten years ago in a case called *Barnes v. Glen Theatres, Inc.*³⁴ There, a sharply-divided Court upheld a comparable ban.³⁵

In this year’s case, there was also no majority opinion, only a four-person plurality. The majority of justices agreed, in a six to three result, that requiring pasties and G-strings on female dancers does not violate the First Amendment.³⁶ In terms of the rationale,

³¹ *Id.* at 70.

³² 120 S. Ct. 1382 (2000).

³³ *Id.* at 1384. The city of Erie enacted “an ordinance making it a summary offense to knowingly or intentionally appear in public in a ‘state of nudity.’” *Id.*

³⁴ 501 U.S. 560 (1991).

³⁵ The State of Indiana enacted a public indecency law, which required dancers at nude dancing establishments to “wear pasties and G-strings.” *Id.* at 567. Two Indiana establishments claimed that their First Amendment rights were violated by the state’s law against total nudity in public. *Id.*

³⁶ 120 S. Ct. at 1398 (plurality opinion), 1400 (Scalia, J. and Thomas, J., concurring).

however, there were some sharp divisions of opinion, which need to be noted for the implications they have in future cases. The plurality saw this as an *O'Brien* case.³⁷ By "*O'Brien*," I am referring to the Vietnam-era case involving a federal statute that prohibited the burning of draft cards.³⁸ The whole world knew that the statute was not passed to make sure that all registrants had their draft certificates with them at all times. The underlying reason for the law was that there was a lot of public burning of draft cards in acts of protest against the Vietnam War, and some members of Congress were outraged by that. So, Congress made it a crime to destroy, burn or mutilate any selective service registration certificates.³⁹ Although everyone knew that the law was designed against burning draft cards, on its face it was not; it was neutral. How should the Court deal with this under the First Amendment?

In the *O'Brien* case, the Court asked itself what should be done when a claim arises out of conduct, which would otherwise be punishable, but which is engaged in for expressive purposes. Further, how does one determine whether the First Amendment component of that expressive conduct renders the conduct itself exempt from punishment?⁴⁰ The Court's answer was to determine whether the reason for the ban was to suppress the message that the conduct was communicating.⁴¹ In other words, the issue was whether or not the purpose of the ban was related to suppressing free expression.⁴² In the *O'Brien* case, the Court concluded that the ban was unrelated to suppressing free expression.

³⁷ *United States v. O'Brien*, 391 U.S. 367 (1968).

³⁸ *Id.* at 369-70. *O'Brien* was tried upon the charge that he "willfully and knowingly did mutilate, destroy, and change by burning . . . (his) Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462 (b) . . . at the time *O'Brien* burned his certificate an offense was committed by any person, 'who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate . . .'" *Id.* at 370.

³⁹ *Id.* at 370.

⁴⁰ *O'Brien*, 391 U.S. at 376. The Court found that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.*

⁴¹ *Id.* at 377.

⁴² *Id.* The Court stated:

The plurality in *Pap's A.M.* came to the same conclusion, that the ban on nudity viewed under the *O'Brien* test was essentially a content-neutral ban.⁴³ Even assuming that live nude dancing conveyed a message, there was no evidence that the purpose of the ban was to suppress that message.⁴⁴ The purpose was to prevent public nudity, and that was just another application of a valid content-neutral law.⁴⁵ These issues were seen as governed by the *O'Brien* test.⁴⁶ They saw the law as a content-neutral regulation of nudity in public. The Court reasoned there was no requirement that the local community show any specific evidence of the "secondary effects" problem with live nude dancing in order to sustain this law.⁴⁷ The plurality concluded that since the law was based on a concern about the impact of nude dancing on the neighborhood, not on the audience, it passed the *O'Brien* test. One thing that is significant in terms of the precedential effect of the case is a fifth vote by Justice David Souter, concurring in part and dissenting in part.⁴⁸ He concurred to the extent that he agreed that the *O'Brien* test should be applied to the issue of live nude dancing.⁴⁹ Thus, five Justices have now taken the position that the *O'Brien* test applies to this type of regulation, which is a significant change in the law from nine years ago. But, he *dissented* because, in his view, under the *O'Brien* test, the government must prove in a factually detailed way that there really was a secondary effects problem associated with live nude dancing which would justify a ban on live nude dancing.⁵⁰ Therefore, Justice Souter called for more of an evidentiary showing.⁵¹ There were concurring opinions by Justices Scalia and

"governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*

⁴³ 120 S. Ct. at 1388.

⁴⁴ *Pap's A.M.*, 120 S. Ct. at 1392.

⁴⁵ *Id.* at 1394.

⁴⁶ *Id.* at 1395.

⁴⁷ *Id.* at 1394.

⁴⁸ *Id.* at 1402-06 (Souter, J., concurring and dissenting).

⁴⁹ *Id.* at 1402.

⁵⁰ *Pap's A.M.*, 120 S. Ct. at 1402-03.

Thomas, stating that this is not expression at all, but merely the conduct of nudity in public which can properly be banned.⁵² Accordingly, in their view, there is no need for further justification of the regulation beyond that since this was basically not a First Amendment case at all.⁵³

The two dissenters who would have struck down the statute, in addition to Justice Souter, felt that the majority had misused the secondary-effects concept.⁵⁴ The plurality, in sustaining the statute, stated that town officials had some concern over the so-called secondary-effects of nude dancing establishments.⁵⁵ The town had expressed concerns that where these businesses were located, things like prostitution, drug use, and pandering tended to be a problem and that banning live nude dancing would prevent those non-speech secondary effects.⁵⁶

The secondary-effects concept, which came out of those early erogenous zoning cases, said that it is permissible to zone such X-rated establishments and separate them in the community.⁵⁷ The reasoning was that if these businesses were all together in one downtown area, it would draw negative secondary-effects.⁵⁸ But,

⁵¹ *Id.* at 1402. Justice Souter said “Erie’s stated interest in combating the secondary effects associated with nude dancing establishments is an interest . . . properly considered under the *O’Brien* standards. I do not believe . . . that the city has made a sufficient evidentiary showing to sustain its regulation . . .” *Id.*

⁵² *Id.* at 1401 (Scalia, J., concurring).

⁵³ *Id.* Justice Scalia, in comparing this case with *Barnes v. Glen Theatre*, 501 U.S. 560, stated “I voted to uphold the challenged . . . statute . . . ‘because, as a general law regulating conduct and not . . . directed at expression, it is not subject to First Amendment scrutiny at all.’ Erie’s ordinance, too, by its terms prohibits not merely nude dancing, but the act . . . of going nude in public.” *Id.* at 1401.

⁵⁴ *Id.* at 1407. Justice Stevens and Justice Ginsburg were the two dissenters. The dissenters believed that the secondary effects concept applied only to the regulation of the *location* of these businesses not to the *content* of the nude dancing. *Id.*

⁵⁵ *Id.* at 1395.

⁵⁶ *Pap’s A.M.*, 120 S. Ct. at 1395.

⁵⁷ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54-55 (1986). See also *City of Erie*, 120 S. Ct. 1395 (2000) (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)).

⁵⁸ *City of Renton*, 475 U.S. at 50-52. See also *City of Erie*, 120 S. Ct. at 1395 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)).

the dissenters pointed out that this ordinance was not a “zoning” of the location of this type of speech, but rather a total ban on that speech.⁵⁹ As a doctrinal matter, the dissenters felt it was inappropriate for the plurality to use the secondary-effects concept to again justify a prohibition of speech deemed disagreeable and not a relocation of certain types of barely protected speech.⁶⁰ They concluded that the law on live nude dancing was *not* unrelated to suppressing the message of sexuality it conveyed.

Despite these dissenting views, at least for the time being the issue seems to be resolved. Communities can continue to ban these live nude-dancing establishments, without a significant showing of the factual concerns that motivated that ban.⁶¹ In *City of Erie*, four Justices gave a light reading to the *O'Brien* test.⁶² In combining those views with the position of Justices Scalia and Thomas, who felt there was no First Amendment problem at all, there is essentially a six-person majority for upholding those laws.⁶³

The Court’s other sexual content case was decided in a different manner. *United States v. Playboy Entertainment Group*,⁶⁴ dealt with sexual speech and involved cable television.⁶⁵ In this case, the First Amendment claimant, Playboy Entertainment Group, prevailed.⁶⁶ With an opinion written by Justice Anthony Kennedy, Justice Clarence Thomas was the “swing vote” in favor of protecting Playboy.⁶⁷

⁵⁹ *City of Erie*, 120 S. Ct. at 1406 (Stevens, J., dissenting). “Until now, the ‘secondary effects’ of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. *For the first time, the Court has now held that such effects may justify the total suppression of protected speech.*” *Id.* (emphasis added).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1389. The Court reasoned that if the governmental purpose for enacting the regulation was unrelated to the suppression of expression, as it was here, then the regulation need only satisfy the “*less stringent*” standard from *O'Brien* for evaluating restrictions on symbolic speech. *Id.* (emphasis added).

⁶³ The four Justices referred to are Justice O’Connor, Chief Justice Rehnquist, Justice Kennedy and Justice Breyer. *Id.* at 1387.

⁶⁴ 120 S. Ct. 1878 (2000).

⁶⁵ *Id.* at 1882.

⁶⁶ *Id.* at 1893.

⁶⁷ *Id.* at 1894.

The case dealt with the cable television problem of “signal bleed.” Signal bleed occurs when a viewer can see or hear a little bit of programming on a sexually-oriented channel, although “scrambled,” even though the viewer does not subscribe to the channels and does not want access to that content.⁶⁸

As part of the major Telecommunications Act of 1996,⁶⁹ there was a provision that if sexually oriented material is being communicated, two things must be done.⁷⁰ The program must be fully blocked so that there is no visual or audible signal bleed.⁷¹ If that cannot be done because the technology of the local cable operator does not allow the total blocking, then those programs can only be run between ten o'clock at night and six o'clock in the morning.⁷²

The Playboy Channel challenged the Act because Playboy likes to be “all sex all the time.”⁷³ They argued that the ban was content-based, since it applied to channels “primarily dedicated to sexually oriented programming,” and that there should not be a ban on the hours of broadcasting such sexually explicit programs; their challenge succeeded.⁷⁴ Justice Kennedy’s glowing tribute to free speech observed that “the history of the law of free expression is

⁶⁸ *Id.* at 1883. The Court describes signal bleed as a phenomenon occurring as the result of the impreciseness of signal scrambling, where-discernible pictures may appear from time to time on the scrambled screen or the listener may hear the audio portion of the program. *Id.*

⁶⁹ 47 U.S.C. § 561 (1994 ed., Supp. III).

⁷⁰ *Id.* Section 505 of the Telecommunications Act of 1996 provides that, “in providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.” *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Playboy Entertainment Group*, 120 S. Ct. at 1883. The Court noted that Playboy’s revenues were reduced by the restriction of programming to the hours between 10:00 p.m. and 6:00 a.m. *Id.* at 1884.

⁷⁴ *Id.* at 1884. The Court stated that “‘since 30 to 50% of all adult programming is viewed by households prior to 10:00 p.m.’, the result was a significant restriction of communication . . .” Ultimately, the Court agreed with the District Court’s conclusion that § 505 was unconstitutional and affirmed the District Court’s decision. *Id.* at 1885.

one of vindication in cases involving free speech that many citizens may find offensive or even ugly.”⁷⁵ The Court stated that First Amendment and content-protected rights were clearly at issue, since it was clear that the purpose of this law restricting the information was content-based, in that the only kind of programs that were subject to this regulation were those which involved sexually-oriented materials.⁷⁶ In effect, this Court said, neither HBO nor the Disney Channel had to block and scramble, but the Playboy channel did because the Act was content-based.⁷⁷

Content-based laws have to meet the strict scrutiny standard.⁷⁸ They have to be shown to advance a compelling governmental interest in the least restrictive way.⁷⁹ The Court conceded that protecting children from unwitting exposure to Playboy material was a compelling interest, but that Section 505 of the Act was not the least restrictive means of doing so.⁸⁰ Technology came to Playboy’s rescue. Under another provision of the law, cable operators had to provide, upon a subscriber’s request, the technological capacity for subscribers to shut off certain channels and not receive them at all.⁸¹ Since there was an alternative to a flat ban or a rerouting of this programming -- an option which allowed viewers to make a choice -- the Court reasoned that First Amendment issues were handled better through the less restrictive alternative.⁸² That way, people, not government, get to decide. Finally, the case is doctrinally important because it reaffirms that content-based laws which only

⁷⁵ *Id.* at 1893.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1885.

⁷⁸ *Id.* at 1886.

⁷⁹ *Playboy Entertainment Group*, 120 S. Ct. at 1886 (citing *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115 (1998)).

⁸⁰ *Id.* at 1888.

⁸¹ 47 U.S.C. §560 (1994 ed., Supp. III). Section 504(a) states in pertinent part: “Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming . . . so that one not a subscriber does not receive it.” *Id.*

⁸² *Playboy Entertainment Group*, 120 S. Ct. at 1886-87. The Court reasoned that the alternative to §505 is found in § 504, where “the whole point of a publicized §504 would be to advise parents that indecent material may be shown and to afford them an opportunity to block it at all times, even when they are not home and even after 10:00 p.m.” *Id.* at 1893.

burden, but do not *ban* certain speech, are subject to the *same* strict scrutiny as total bans.

It is interesting that, once again, Justice Scalia dissents,⁸³ as he did in the nude dancing case. But he did so by resurrecting an old concept not seen in the Court since 1966, in a case called *Ginzberg v. United States*.⁸⁴ This case involved the concept of commercial trafficking or pandering of sexual material.⁸⁵ In *Ginzberg*, the liberal Earl Warren Court nonetheless upheld the conviction of a person who put out sexual material which itself was quite bland, but the marketing was rather provocative.⁸⁶ The *Ginzberg* Court reasoned that the marketing could be used as evidence of the intent to distribute prohibited material.⁸⁷ Only Justice Scalia subscribed to this reasoning.

Surprisingly, one of the Court's more liberal members, Justice Stephen Breyer wrote the principal dissenting opinion. He noted that there was insufficient evidence that many families had contacted the cable company and asked not to have the material presented to them.⁸⁸ Accordingly, the less-drastic alternative was not in fact actually being used to protect children from the absence of direct parental supervision when watching cable television.⁸⁹ Since the speech in question as well as the speaker were not deserving of full First Amendment protection, the law should stand. But ultimately, the majority held five to four that Playboy is entitled to be free of the blocking or segregated time requirement.⁹⁰

These two cases show that the Court remains sharply divided over the proper protection for sexual or erotic speech. Justices Kennedy and Thomas switched sides in the Playboy case to turn the six to three anti-First Amendment coalition in the nude

⁸³ *Id.* at 1895 (Scalia, J., dissenting). Justice Scalia states in his dissent, “[w]e have recognized that commercial entities which engage in the ‘sordid business of pandering’ by ‘deliberately emphasizing the sexually provocative aspects of their nonobscene products . . .’, engage in constitutionally unprotected behavior.” *Id.* at 1896 (citing *Ginzburg v. United States*, 383 U.S. 463 (1966)).

⁸⁴ 383 U.S. 463 (1966).

⁸⁵ *Id.* at 466.

⁸⁶ *Id.* at 475-76.

⁸⁷ *Id.* at 472.

⁸⁸ *Playboy Entertainment Group*, 120 S. Ct. at 1898 (Breyer, J., dissenting).

⁸⁹ *Id.* at 1901.

⁹⁰ *Id.* at 1883.

dancing case into a five to four free speech majority in the cable case. The difference may be that the cable law was more obviously a case of speech content censorship than was the dancing case.

FREE SPEECH STRIKES OUT

Shifting from pornography to politics, the next two cases, though dealing with widely disparate issues, are of a piece. They both deal with very controversial public political issues that resulted in six to three decisions upholding the laws and rejecting the First Amendment claims. They also have the identical Supreme Court lineups. In both cases, the majority of the Court consisted of Justices Breyer, Ginsburg, Souter, Stevens, O'Connor, and Rehnquist. Justices Kennedy, Scalia and Thomas were the dissenters.⁹¹ In both cases, the division is sharp. The conservative libertarians found that the statute failed the First Amendment, but the majority of the Court, four liberals and two more conservative justices, sustained the statute.⁹² It is ironic that the liberal Justices found no warrant for restraining the sexual speech at issue in the Playboy and nude dancing cases, but found sufficient justification for rejecting the free speech claims in the two cases about to be discussed. I agree with the dissenters who contended that the rulings slight First Amendment values and will come back to haunt the Court.

The two cases are *Nixon v. Shrink Missouri Government PAC*,⁹³ a campaign finance case, and *Hill v. Colorado*,⁹⁴ an anti-abortion demonstration case. In *Nixon*, disclosure is one of the remedies frequently discussed in terms of campaign finance.⁹⁵ In the interest of full disclosure, therefore, I should reveal that not only did I author the ACLU Friend of the Court brief in the *Nixon* case, but I was one of the lawyers who argued against campaign funding limits in the original landmark campaign finance case of

⁹¹ *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000); *Hill v. Colorado*, 120 S. Ct. 2480 (2000).

⁹² *Id.*

⁹³ 120 S. Ct. 897 (2000).

⁹⁴ 120 S. Ct. 2480 (2000).

⁹⁵ *Nixon*, 120 S. Ct. at 909 & n.7.

Buckley v. Valeo.⁹⁶ The *Nixon* case gave the Court the opportunity to reconsider some of what it had done in *Buckley*, but the Court basically decided to leave things alone in *Nixon*. That was a real disappointment.

The *Buckley* decision held that Congress could not limit political expenditures, but could limit political contributions.⁹⁷ Expenditures could not be limited because they cut too close to the bone of freedom of expression and communication.⁹⁸ But, contributions could be limited because they were closer to concerns about corruption or the appearance of undue influence on elected officeholders by those individuals who made the contributions.⁹⁹

As a result of the dichotomy set up in *Buckley*, the last 25 years have witnessed efforts to get around this distinction. The result has been a greater reliance on “soft money” and “issue advocacy.”¹⁰⁰ These are communications that do not explicitly advocate the election or defeat of candidates, and since they do not emanate from candidates or their campaigns, soft money and issue advocacy escape the bans and limits on contributions to candidates and to campaigns that were sustained in the *Buckley* case.¹⁰¹ That has been the major consequence of limiting contributions, but not expenditures. In *Nixon* the Court had a chance to ease those problems by eliminating low contribution limits, but it declined to do so. Contributions are limitable, and expenditures are not, and that has produced the situation that we have today.¹⁰²

The *Nixon* case involved state level contribution limits, while *Buckley* dealt with federal limits.¹⁰³ In Missouri, contributions were limited to \$1,000 for statewide elections and \$500 or \$250 for local elections.¹⁰⁴ Those limitations were

⁹⁶ 424 U.S. 1 (1976).

⁹⁷ *Id.* at 22.

⁹⁸ *Id.* at 19.

⁹⁹ *Id.* at 26-27. *Nixon*, 120 S. Ct. at 908.

¹⁰⁰ Joel Gora, *Buckley v. Valeo: A Landmark of Political Freedom*, 33 AKRON L. REV. 7, 28-34 (1999).

¹⁰¹ *Id.* at 28-30.

¹⁰² *Id.* at 23-26.

¹⁰³ See *Nixon*, 120 S. Ct. 897; *Buckley*, 424 U.S. 1.

¹⁰⁴ *Nixon*, 120 S. Ct. at 901. The Missouri Legislature enacted Senate Bill 650. As amended in 1997, the provision states that “to elect an individual to the

challenged by a Republican candidate for statewide office, who did not have a lot of money, but who had a lot of good ideas. He wanted to rely on a small group of wealthy supporters to help him with his campaign, but the law prevented this.¹⁰⁵ He challenged the law as violative of the First Amendment, and the Eighth Circuit struck the law down.¹⁰⁶ The Court of Appeals' theory was that before government could restrict contributions, even though *Buckley* said it could, Missouri had to show a pattern of corruption from contributions or political funds as a predicate for such legislation.¹⁰⁷ This required a demonstration of proof of a problem that required restricting First Amendment rights in order to solve.¹⁰⁸ The Eighth Circuit said there had been no such proof. Missouri had not shown it was dealing with a situation like Watergate that had led to the original federal campaign finance laws a generation earlier.¹⁰⁹ In addition, one judge said \$1,000 is not what it used to be.¹¹⁰ The \$1,000 limit as upheld in *Buckley* is currently worth about \$325.¹¹¹ One cannot buy a whole lot of influence by making a contribution of \$325, nor, conversely, can one buy a lot of speech with that contribution if he is the speaker or the candidate. Therefore, the lower court struck down the limit on the grounds that even within the *Buckley* framework of the power

office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, the amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed one thousand dollars." MO. REV. STAT. § 130.032.1 (1998 Cum. Supp.). The law adjusted the levels to keep up with inflation, so that by the time of suit the limits were \$1,075, \$525 and \$275 for the different level offices. *Nixon*, 120 S. Ct. at 901-02.

¹⁰⁵ *Id.* at 902.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Shrink Missouri Gov't PAC v. Adams*, 161 F.3d 519, 522 (8th Cir. 1998), *rev'd, sub nom Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897 (2000).

¹¹⁰ *Nixon*, 120 S. Ct. at 903 & n.2. Chief Judge Bowman also would have found the law invalid. He said that "after inflation, limits of \$1,075, \$525, and \$275 cannot compare with the \$1,000 limit approved in *Buckley* twenty-two years ago." *Id.*

¹¹¹ *Shrink Missouri Gov't*, 161 F.3d at 523, n.4.

to limit contributions, there had been no showing of corruption to justify the limit.¹¹²

The Supreme Court reversed the Eighth Circuit in the *Nixon* case in a six to three decision written by Justice Souter.¹¹³ The Court reaffirmed the *Buckley* dividing-line framework that contributions can be limited, though expenditures cannot.¹¹⁴ The Court applied a watered-down intermediate level scrutiny.¹¹⁵ They used “close scrutiny” to see if the statute is “closely drawn” to serve a “sufficiently important [governmental] interest.”¹¹⁶ Strict scrutiny was not used. *Buckley* had given lesser scrutiny to contribution limits than to expenditure limits. This decision followed *Buckley* although some say the scrutiny here is more deferential to the government’s justifications than was even true in the *Buckley* case.¹¹⁷

Another thing the Court did, which some say has expanded the government’s power to control contributions, was to say that the government had a valid interest in protecting against corruption, the appearance of corruption, and the concern about the effect of cynicism about corruption on the democratic process.¹¹⁸ These are ephemeral concepts. Moreover, the Court said governments do not have to meet a heavy burden of proof on those matters, which will make it even easier for the government to make its case.¹¹⁹

It is ironic that two months later, Justice Souter said in *City of Erie v. Pap’s A.M.*,¹²⁰ that government must meet a strong burden of proof to justify a ban on live nude dancing. But when it came to *political speech*, he felt you had to defer to the

¹¹² *Nixon*, 120 S. Ct. at 902-03. In this theory, the Appeals Court was relying on certain recent Supreme Court decisions that had put government to the proof where the need for restrictions of speech is concerned, especially where the regulations were an inconsistent hodge-podge. See *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173 (1999).

¹¹³ *Id.* at 903.

¹¹⁴ *Id.* at 901.

¹¹⁵ *Id.* at 903-04.

¹¹⁶ *Id.* at 904.

¹¹⁷ *Nixon*, 120 S. Ct. at 904.

¹¹⁸ *Id.* at 905.

¹¹⁹ See *id.* at 907.

¹²⁰ 529 U.S. 277 (2000).

government assessment of harm.¹²¹ I think there is an inconsistency there. The Court, in an almost indifferent approach to the issues, upheld contribution limits, as they had in *Buckley*, and refused to address any of the larger issues that politicians are addressing now, including soft money and issue advocacy and the like that had been brought to the Court's attention.¹²² Some people argue that everything has to be limited because campaign funding has gotten out of hand. Other people argue that since nothing else is limited except contributions given directly to candidates, it makes no sense to have that limitation, when so much else is unlimited.

An even more restrictive position received concurring support from Justices Stevens, Breyer and Ginsburg.¹²³ They indicated that on issues of soft money spending by political parties they would be receptive to allowing restrictions on those activities as well, and might be receptive to reconsidering the *Buckley* case and upholding even more limits if the need arose.¹²⁴ The dissenters took the opposite position.¹²⁵ Justice Kennedy pointed out that the *Buckley* regime of, "contributions bad, expenditures good," has led to what he calls "covert speech," namely, limits on contributions, yet tolerance of all of the other political funding, such as soft money or issue advocacy, that is not regulated. Such duality and duplicity does not serve either the integrity of the First Amendment or the integrity of our processes.¹²⁶ His position at the current point is that he would overrule *Buckley* and strike all restrictions on funding, relying instead on disclosure as the primary antidote to corruption.¹²⁷ Kennedy saw limits as a strong violation of the First Amendment and a hindrance to democratic honesty.¹²⁸

¹²¹ See, *Nixon*, 120 S. Ct. 879.

¹²² See *Nixon*, 120 S. Ct. at 909.

¹²³ *Id.* at 910-13.

¹²⁴ *Id.* at 914.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 916. Although he left open the possibility that if *Buckley* were struck down in the sense of not allowing any limits at all, and Congress were free to operate from a blank slate and start all over again, he might look at the issues differently depending on what Congress enacted.

¹²⁸ *Nixon*, 120 S. Ct. at 916.

Unfortunately, the Court lost the opportunity to shed some clear First Amendment light on the campaign finance dilemma.

In terms of the future, we will have a short term test and long term test of where the Court will go. The short term test will likely come up in a case out of the Tenth Circuit involving political party coordinated expenditures.¹²⁹ The situation involves money spent by parties for their candidates where the parties work with and communicate with the candidates about what message to get out.¹³⁰ The money comes in regulated form. It is not soft money, but so-called "hard money."¹³¹ It can be raised from people in limited amounts. The law up to now has prohibited parties from coordinating with their candidates in any way. The Tenth Circuit in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*,¹³² said that this limitation is a violation of the *Buckley* principles, notwithstanding the *Shrink* case.¹³³ It is likely that this case will be decided in the Spring of next year and that will tell us whether the *Shrink* case is a harbinger of more restrictions on campaign funding, or whether the Court will continue to draw the sharp distinctions between contributions coming in and expenditures going out, especially where political party activity is concerned.

The long term issue has to do with pending legislation, as in the McCain-Feingold bill,¹³⁴ which would essentially ban soft money. In the 2000 Presidential election, Vice President Gore promised that, if elected, this bill would be the first bill he would send up to Congress.¹³⁵ If Mr. Gore had won a couple of Supreme Court appointments to back that up, then there might have been a good chance that the bill would pass and be sustained. Since

¹²⁹ *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 296 (2000).

¹³⁰ *Id.*

¹³¹ *Id.* at 1230. In other words, it is regulated money that cannot come from certain sources like corporations or unions and is limited in amount. *Id.*

¹³² *Id.* 213 F.3d 1221.

¹³³ *Id.* at 1227.

¹³⁴ S. 27 (107th Congress, 1st Session).

¹³⁵ Bill Press, *Gore and Lieberman set new campaign agenda* (visited on October 31, 2000)

<http://www.cnn.com/2000/ALLPOLITICS/stories/08/18/press.column/>.

Governor Bush was elected, it is somewhat less likely that there will be campaign finance legislation. And even if the McCain-Feingold bill were enacted, if Mr. Bush's Supreme Court appointments were more like Justices Scalia and Thomas, they would strike the bill out as violating the First Amendment.

The other free speech case dealing with a very controversial and divisive political issue was *Hill v. Colorado*.¹³⁶ The issue is abortion, but abortion itself was not the issue in the case. Rather the case involved protests and demonstrations at abortion clinics. On two previous occasions, the Court dealt with injunctive orders that attempted to protect women and abortion clinic personnel from being harassed and physically obstructed as they exited and entered abortion clinics or medical facilities.¹³⁷ In these cases, the Court struck down injunctions that were too broad and that banned any protest within hundreds of feet of an abortion clinic, and other similar sweeping restrictions. But the Court upheld a ban on First Amendment activity within a small distance of the entrance to an abortion facility. The difficult issue was the so-called "floating bubbles" or moving buffer zones that an abortion protestor could not enter in order to approach a person. The bubble was floating in that it moved with the person out into the parking lot and prevented any uninvited approach. The Court in the context of injunctions said that a "floating bubble" of fifteen feet from which one had to stay away was too much, and burdened more speech than was necessary to protect important interests.¹³⁸

Colorado passed a statute saying a person could not approach within eight feet of anyone exiting or entering a medical facility and within one hundred feet of that facility.¹³⁹ It was a

¹³⁶ 120 S. Ct 2480 (2000).

¹³⁷ *Schenck v. Pro Choice Network*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

¹³⁸ *Schenck*, 519 U.S. at 377.

¹³⁹ COL. REV. STAT. § 18-9-122 (1993) reads in pertinent part:

No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.

“floating bubble” for one hundred feet.¹⁴⁰ In order to avoid the charge that the statute was content motivated, it applied to all medical facilities and all advocacy activity directed toward any person within one hundred feet of those facilities.¹⁴¹ One could not approach anybody with any issue. Although the language of the statute is couched in advocacy terms, it clearly could have applied if there was a union dispute at a hospital or if someone wanted to protest the policies of an HMO. Union members would not be able to go up to people entering and leaving the hospital to hand them a leaflet. Also, the ban applied to *any* building with even one medical office inside, including, for example, a twenty-story office building which housed just *one* dentist. On its face the ban was neutral and extremely overbroad, but in its application it was particular because it was arguably passed for the purpose of protecting abortion clinics specifically, and that was what the issue was about in *Hill*.¹⁴²

Was this a content-neutral regulation of the place and manner of communication or was it content-based? Was it only designed to keep anti-abortion protesters and so-called sidewalk counselors from hassling women and clinic officials as they came and went? The Supreme Court said it was content-neutral.¹⁴³ It was designed to protect access and privacy in general, and was unrelated to the suppression of ideas.¹⁴⁴ It was not there to protect

Id. at § 18-9-122(3).

¹⁴⁰ *Id.*

¹⁴¹ COL. REV. STAT. § 18-9-122(4) (1993) reads in pertinent part: “For the purposes of this section, ‘health care facility’ means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.” *Id.*

¹⁴² *Hill*, 120 S. Ct. at 2484-85. The Court stated the issue as “[w]hether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener.” *Id.* at 2485.

¹⁴³ *Id.* at 2491. The Court said 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.” *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

¹⁴⁴ *Id.* The Court said that Colorado’s “interest in protecting access and privacy, and providing the police with clear guidelines, [was] unrelated to the content of the demonstrators’ speech” and “governmental regulation of expressive activity

against ideas the government did not like; rather, it was designed to protect people from being hassled over any idea near a medical facility.¹⁴⁵ The statute was also one-sided in terms of the message with which one could approach people. For example, going up to someone at an abortion clinic and asking, “do you have the time?” would not be covered by the statute. One is permitted to do that. But asking, “do you have the time to consider what you are about to do?” was deemed prohibited, unless the individual consented to that person’s coming within the eight-foot zone.¹⁴⁶ But the same six Justice majority as in the campaign finance case upheld the statute as content-neutral, and a reasonable regulation of the time, place and manner of speech. They were not impressed by the arguments that this was motivated to get at certain kinds of speech, and they sustained the statute on the basis of traditional time, place and manner rules.¹⁴⁷

The dissenters were Justices Scalia, Thomas and Kennedy, the same three Justices that dissented in the campaign finance case. Justice Scalia’s opinion was unyielding. This case was decided on the same day as *Stenberg v. Carhart*,¹⁴⁸ the case that struck the ban on so-called “partial birth abortions” in a five to four decision.¹⁴⁹ The *Hill* case was a six to three decision.¹⁵⁰ Justice Scalia accused the majority of operating an “ad hoc nullification machine” that struck down any law that interfered with abortion or those who would advocate against abortion and that distorted First

is ‘content neutral’ if it is justified without reference to the content of the regulated speech.” *Id.*

¹⁴⁵ *Id.* at 2488.

¹⁴⁶ *Id.* at 2489-90.

¹⁴⁷ *Id.* at 2491.

¹⁴⁸ 120 S. Ct. 2597 (2000).

¹⁴⁹ *Id.* Justice Breyer delivered the opinion of the Court, in which Justices Stevens, O’Connor, Souter, and Ginsburg joined. Chief Justice Rehnquist and Justice Scalia filed separate dissenting opinions. Justice Kennedy filed a dissenting opinion, which was joined by Chief Justice Rehnquist. Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined. *Id.*

¹⁵⁰ *Hill*, 120 S. Ct. 2480. Justice Stevens wrote the decision for the Court and was joined by Chief Justice Rehnquist and Justices O’Connor, Souter, Ginsburg, and Breyer. Justice Scalia delivered a dissenting opinion in which Justice Thomas joined. Justice Kennedy dissented as well in an opinion drafted by himself and not joined by any other Justice. *Id.*

Amendment and constitutional doctrine in the process. He felt the law was designed to protect abortion clinics against protesters only because the government did not like their message.¹⁵¹ In the view of the dissenters, this confounded decades of First Amendment doctrine that denied government the right to protect people from unwelcome or even offensive messages in a public place.¹⁵²

Justice Kennedy also wrote an impassioned dissent in the *Hill* case. The primary point of his dissent was that the majority opinion rolled back fifty years of First Amendment doctrine.¹⁵³ That doctrine provided for robust, unrestrained speech in public places no matter how offensive, hurtful or obnoxious.¹⁵⁴ Such speech was protected so long as it did not devolve into violence or incitement of violence.¹⁵⁵ Justice Kennedy said the majority's allowing states to suppress anti-abortion protest like this breaks the implied covenant of *Planned Parenthood v. Casey*.¹⁵⁶ The *Casey* case was the decision in 1992 that, with some modifications, reaffirmed *Roe v. Wade*.¹⁵⁷ That result was made possible by the concurrence of Justices Souter, O'Connor and Kennedy.¹⁵⁸ Justice Kennedy believed that the trade-off was that even though we would not allow abortion to be banned as a constitutional matter, the Court would allow the political and persuasive processes to fully continue to operate.¹⁵⁹ The compromise also allowed free discussion to operate in order to allow the society to decide what their views are on abortion. This law that restricts anti-abortion speech is a breach of that promise.¹⁶⁰ It is not only saying the government cannot reach a different conclusion about abortion, but it is stifling people that would urge the government to reach that

¹⁵¹ *Id.*

¹⁵² *See, e.g.,* *Cohen v. California*, 403 U.S. 15 (1971). Justice Scalia observed that without such protection, the First Amendment would be rendered a "dead letter." *Hill*, 120 S. Ct. at 2507.

¹⁵³ *Id.* at 2516 (Kennedy, J., dissenting).

¹⁵⁴ *Id.* at 2522.

¹⁵⁵ *Id.*

¹⁵⁶ 505 U.S. 833 (1992).

¹⁵⁷ 410 U.S. 113 (1973).

¹⁵⁸ *Casey*, 505 U.S. 833. Justices Souter, O'Connor, and Kennedy joined to write the critical plurality opinion.

¹⁵⁹ *Hill*, 120 S. Ct at 2529.

¹⁶⁰ *Id.*

opposite conclusion. And it is depriving the protestors of a unique medium for communicating their message at a critical moment: “The Court tears away from the protestors the guarantees of the First Amendment when they most need it.”¹⁶¹

IT’S MY BAT AND BALL

The last three cases of the Term are *Board of Regents v. Southworth*,¹⁶² the student activity fee case, *California Democratic Party v. Jones*,¹⁶³ the blanket primary election case; and *Boy Scouts of America v. Dale*,¹⁶⁴ the Boy Scouts case. They all involve cases where government wants to use private individuals or organizations to either subsidize a message the government wants communicated or to require those groups to include people that the government wants to be included.

The government prevailed in *Board of Regents* with the Court’s upholding the compulsory student activities fee.¹⁶⁵ But the government lost in the *Jones* case, with the Court’s striking down a requirement that political parties must allow any registered voter to help select their nominee.¹⁶⁶ The Court also struck down the government’s requirement in *Boy Scouts of America* that the Boy Scouts could not exclude an assistant scoutmaster because he was openly gay.¹⁶⁷ In both of these latter cases, the Court rejected the government’s effort to control the message that the organization wanted to send.

In *Board of Regents*, the claim was that the mandatory activities fees at large public universities, which were extracted from the students, were being used to fund left-wing student organizations.¹⁶⁸ This had been a long-standing conservative

¹⁶¹ *Id.* at 2530. It is ironic that the conservative dissenters here in championing this form of speech sound like liberal Justices in an earlier era. See *Clark v. Community for Creative Non Violence*, 468 U.S. 288 (1984) (upholding a ban on sleeping in the park to protest homelessness).

¹⁶² 120 S. Ct. 1346 (2000).

¹⁶³ 120 S. Ct. 2402 (2000).

¹⁶⁴ 120 S. Ct. 2446 (2000).

¹⁶⁵ *Board of Regents*, 120 S. Ct. at 1357.

¹⁶⁶ *Jones*, 120 S. Ct. at 2414.

¹⁶⁷ *Boy Scouts of America*, 120 S. Ct. at 2458.

¹⁶⁸ *Board of Regents*, 120 S. Ct. at 1350-52.

cause celebre, to try to oppose such funding. The effort culminated unsuccessfully in the *Board of Regents* case.¹⁶⁹ The litigation campaign had been fueled by several Supreme Court cases that seemed to pave the way for the attack on mandatory student fees being used to subsidize campus political activity that the individual student might find objectionable. The Court had previously held that public sector employees could not be required to pay for the political activities of the unions that bargained for them,¹⁷⁰ and that lawyers in states with integrated bars to which all lawyers had to belong could not be made to pay for the political and lobbying activities of the state bar associations.¹⁷¹ The conservative groups tried to apply the same principle to student activities fees.¹⁷² The result was a unanimous ruling against them, and the fees were upheld.¹⁷³

The Court stated that it was aware that there was a First Amendment problem in extracting money from people to support groups and ideas with which they disagree.¹⁷⁴ The Court has long recognized that the right to speak and associate requires the negative cognate right to refuse to speak or to refuse to associate.¹⁷⁵ The Court said that the problem with applying that

¹⁶⁹ See generally *id.* at 1356. There are three main cases the Court relies on in analyzing *Board of Regents*. They are *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990); and *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (holding that the principal protection of the First Amendment interests of objecting students is the requirement of viewpoint neutrality in the allocation of funding support.) *Id.*

¹⁷⁰ *Abood*, 431 U.S. 209 (1977) (holding that union and nonunion members could prevent the Union from spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as the exclusive bargaining representative).

¹⁷¹ *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990) (holding that lawyers admitted to practice in California could be required to join a state bar association but to only fund activities “germane” to the association’s mission of “regulating the legal profession and improving the quality of legal services”).

¹⁷² *Board of Regents*, 120 S. Ct. at 1352.

¹⁷³ *Id.* at 1354.

¹⁷⁴ *Id.*

¹⁷⁵ *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that the freedom of thought protected by the First Amendment includes both the right to speak freely and the right to refrain from speaking at all). In *Wooley*, a New Hampshire man covered over the state motto, “Live Free or Die,” on his license plate and was

right in a university setting was an extremely practical one. It is one thing to decide what a germane activity is when it comes to unions and bar associations, such as supporting collective bargaining or professional regulation, and what is not a germane activity, such as supporting political action committees or candidates.¹⁷⁶ But, in a university setting how could it be decided what is a germane student activity, and what is a non-germane activity? How can the university allow you to refuse to pay the portion of your student fee that went to “non-germane” activities? In fact, the Court said, that inquiry itself would pose academic freedom problems, and the courts would be second guessing which student groups the university should use fees to subsidize.¹⁷⁷ Rather than getting into this quagmire, the Court said it was comfortable with only the First Amendment safety net supplied by the rule against view point discrimination. Student fees can be used for a wide variety of purposes without a First Amendment challenge unless it can be shown that they are administered in a way to promote discrimination against certain points of view.¹⁷⁸ As long as the money is available to all groups without regard to race, color or creed or political view point, the Court stated that it would pose too great a First Amendment problem to routinely intervene.¹⁷⁹ Therefore, if you pay your student activity fee, the university may subsidize ideas and groups you may not like so long as there is no discrimination against groups you *do* like.¹⁸⁰

charged with a misdemeanor pursuant to a New Hampshire statute. *Id.* After being convicted several times pursuant to the New Hampshire statute, Wooley, a Jehovah’s Witness, sought federal injunctive and declaratory relief. *Id.* The Supreme Court held the New Hampshire statute violative of the First Amendment and reasoned that there was a negative cognate right not to speak inherent in the First Amendment right to free speech. *Id.* at 715; *See also*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The most famous quote that comes from *West Virginia* is from Justice Jackson when he stated: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matter of opinion or force citizens to confess by word or act their faith therein.” *Id.* at 642.

¹⁷⁶ *Board of Regents*, 120 S. Ct. at 1355.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1355-56.

¹⁷⁹ *Id.* at 1356-57.

¹⁸⁰ *Id.* at 1357. This concept is discussed in Part III of the Court’s decision.

The final two First Amendment cases of the Term were really two variations on one theme, namely, whether the First Amendment right of association for expressive purposes is violated when government forces political or social groups to include members whose presence will change the nature of the group's message. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,¹⁸¹ the Court ruled that it violated a parade group's right of expression and association for government to compel the parade organizers to include a gay contingent in the parade. This would alter and change the message the parade organizers are seeking to express. This Term the Court applied similar principles to protect the freedom of association rights of both the Democratic Party and the Boy Scouts.

The first of the two cases is *California Democratic Party v. Jones*.¹⁸² It involved California's enactment of a so-called blanket primary.¹⁸³ During the primary elections, there is one ballot that is a blanket ballot for all parties and candidates. Everyone who is running is on that ballot, and every voter, no matter what party or non-party he or she is a member of, can vote to nominate any candidate to be any party's standard bearer.¹⁸⁴ That means that a lot of people who are not Republicans or Democrats can choose the nominee of the Democratic Party or the Republican Party or the Peace and Freedom Party. The Democratic Party argued that it is their job and right to choose their party's nominees, and it is not the prerogative of members of other parties. Moreover, this requirement was enacted with the purpose of making the parties less partisan and more congenial to cooperation.¹⁸⁵ The government's theory was that when you are nominating a person who has to appeal to all voters, you are going to nominate more moderate and "centrist" people.¹⁸⁶ The Court rejected this theory

¹⁸¹ 515 U.S. 557 (1995).

¹⁸² *Jones*, 120 S. Ct. 2402.

¹⁸³ *Id.* at 2405.

¹⁸⁴ See CAL. ELEC. CODE ANN. § 2001 (West Supp. 2000). This section reads in pertinent part that: "[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . for any candidate regardless of the candidate's political affiliation." *Id.*

¹⁸⁵ *Jones*, 120 S. Ct. at 2411.

¹⁸⁶ *Id.* at 2411-13.

in a seven to two decision.¹⁸⁷ This was a clear effort on the part of the state to dictate both the message and the messengers that the particular parties should choose.¹⁸⁸ That violates the party's right of expressive association, the party's right to decide what its message will be and who its messengers will be. The fact that the state did not like more partisan politics is an overt content-based action that could not survive the strict scrutiny that such content-based laws require.

Justice Scalia wrote the opinion and said that there is no compelling interest in trying to make the parties less partisan.¹⁸⁹ Parties are supposed to be partisan so they can get their messages out, and the competition in ideas will help the voters better decide. The state cannot interfere with partisanship by requiring that non-party members be part of the process of selecting party nominees.¹⁹⁰ In the seven to two decision, the right to expressive association prevails, and the right of parties to choose their "own" nominees is given very strong First Amendment protection.¹⁹¹

The final case is *Boy Scouts of America v. Dale*.¹⁹² This was a very close five to four decision.¹⁹³ The case was a stark conservative-liberal split.¹⁹⁴ The issue dealt with New Jersey's

¹⁸⁷ See *Jones*, 120 S. Ct. 2402. Justice Scalia delivered the opinion of the Court and Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Thomas, and Breyer joined him. Justice Stevens filed a dissenting opinion, in which Justice Ginsburg joined as to Part I. *Id.*

¹⁸⁸ *Id.* at 2412.

¹⁸⁹ *Id.* (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 578 (1995)).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 2409-10. It is interesting to note that the blanket primary decision and the campaign finance case are on a collision course. The campaign finance case recognizes broader government control over campaigns and elections, while the blanket primary case looks toward lesser government controls over campaigns and party politics. *Id.* at 2415 (Kennedy, J., concurring.) The clash of perspectives may very well be resolved in the *Colorado Republican* case currently pending, which deals with the right of parties to spend funds to support their candidates.

¹⁹² *Boy Scouts of America*, 120 S. Ct. 2446.

¹⁹³ *Id.* Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined. *Id.*

¹⁹⁴ *Id.* This split has been seen most often, and obviously, in the federalism cases, whereby the conservative majority, has cut back on Congress' power to

public accommodation law.¹⁹⁵ The New Jersey courts determined that the Boy Scouts was “a place of public accommodation” subject to the public accommodation law.¹⁹⁶ The law barred exclusion of anyone on a number of grounds, including sexual orientation.¹⁹⁷

Mr. Dale was an assistant scoutmaster and a college student, when it became apparent through his college political activities that he was a member of a gay rights group.¹⁹⁸ The Boy Scouts excluded him from that position due to his sexual orientation.¹⁹⁹ The New Jersey courts held that because the Boy Scouts was a place of public accommodation, and since there was no clear message against homosexual conduct or activity expressed by the organization, the Boy Scouts would be required to include Mr. Dale as a scoutmaster.²⁰⁰ The court also held that it was not a violation of the Boy Scouts’ First Amendment rights to require Mr.

legislate on many issues and returned that power to the States. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995). Chief Justice Rehnquist is the leader of the conservative faction that includes Justices O’Connor, Scalia, Kennedy and Thomas. The liberals are headed by Justice Stevens and followed, by rank of seniority, by Justices Souter, Ginsburg and Breyer. *Id.* That schism was also painfully apparent in the Court’s five to four decision in *Bush v. Gore*, 121 S. Ct. 525 (2000) (*per curiam*).

¹⁹⁵ N.J. STAT. ANN. §§ 10:5-4 and 10:5-5 (West Supp. 2000). The Supreme Court reprinted the New Jersey Public Accommodation Law as an appendix to the opinion in *Boy Scouts of America*, 120 S. Ct. at 2458-59.

¹⁹⁶ *Boy Scouts of America*, 120 S. Ct. at 2450. The New Jersey Superior Court’s Chancery Division granted summary judgment in favor of the Boy Scouts holding that “New Jersey’s public accommodation law was inapplicable because the Boy Scouts was not a place of public accommodation.” However, the New Jersey Superior Court, Appellate Division, and the Supreme Court, held that the “Boy Scouts was a place of public accommodation subject to the public accommodations law, that the organization was not exempt . . . , and that the Boy Scouts violated the law by revoking Dale’s membership based on his avowed homosexuality.” *Id.*

¹⁹⁷ N.J. STAT. ANN. § 10:5-4 (West Supp. 2000). This section reads in pertinent part that: “[a]ll persons shall have the opportunity to obtain . . . privileges of any place of public accommodation . . . without discrimination because of . . . sexual orientation.” *Id.*

¹⁹⁸ *Boy Scouts of America*, 120 S. Ct. at 2449.

¹⁹⁹ *Id.* Upon discovery of Dale’s sexual orientation, James Kay, an Executive from the Monmouth County New Jersey Council of Boy Scouts wrote to Dale revoking his adult membership in the organization.

²⁰⁰ *Id.* at 2450.

Dale to be a scoutmaster.²⁰¹ The United States Supreme Court reversed, in a close five to four ruling.

The Court, in an opinion by Chief Justice Rehnquist, said that the Boy Scouts, as an organization, has a right to expressive association, and may associate together to express various points of view.²⁰² One of their views is that the Boy Scouts have to pledge that they are morally straight and clean.²⁰³ The Boy Scouts interpret the pledge to exclude homosexual conduct.²⁰⁴ Therefore, requiring the Scouts to retain in a visible leadership position a person who symbolically expresses a contrary viewpoint, is an improper and burdensome imposition on the group's First Amendment expressive associational rights.

The dissenters in the Supreme Court said this was not the Boy Scouts message and that the Boy Scouts do not believe homosexual conduct is wrong.²⁰⁵ Therefore, it is not an imposition on the Scouts' ideology to require that they accept a person in an

²⁰¹ *Id.* More specifically, the New Jersey Supreme Court held that Dale's membership does not violate the Boy Scouts' right of "expression because his inclusion would not affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes." *Id.* (quoting Dale v. Boy Scouts of America, 160 N.J. 562, 615, 734 A.2d 1196, 1225 (1999) (citation omitted)).

²⁰² *Id.* at 2452 (citing Roberts v. United States Jaycees, 468 U.S. 609 (1984)). "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." Roberts, 468 U.S. at 636 (O'Connor, J., concurring).

²⁰³ *Boy Scouts of America*, 120 S. Ct. at 2452. The Boy Scout Handbook defines morally straight as:

To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

Id. at 2461. The Boy Scout Handbook states the following about a Scout being clean: "A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean." *Id.* (emphasis in original).

²⁰⁴ *Boy Scouts of America*, 120 S. Ct. at 2453.

²⁰⁵ *Id.* at 2461-62 (Stevens, J., dissenting). The dissenters went through an analysis of the Boy Scout Handbook and the Scoutmaster Handbook to arrive at the conclusion that nothing written in either book "expresses any position whatsoever on sexual matters." *Id.* at 2461.

official position who is involved in homosexual activities.²⁰⁶ However, the majority disagreed, stating it was up to the association, not the courts, to say what its views, doctrines and tenets were.²⁰⁷ The government cannot wield public accommodation laws in this fashion. The Court found that homosexuality was not consistent with the message that the Boy Scouts were trying to get across. Whether the Court agreed or disagreed was irrelevant because it was the Boy Scouts' position and it was part of their creed, and to say otherwise would minimize their right of expression.²⁰⁸ The Boy Scouts are permitted to have an official position or viewpoint, and when a person expresses the opposite because of his or her status or activity, he causes a significant burden on the Boy Scouts.²⁰⁹ The majority concluded that the Boy Scouts had a First Amendment right of expressive association to exclude openly gay or homosexual people from official positions.²¹⁰

The case did not involve excluding Boy Scouts because they were gay.²¹¹ The case involved excluding people from official positions, such as assistant scoutmasters.²¹² However, a case about excluding mere members might be more difficult for the

²⁰⁶ *Id.* at 2467 (Stevens, J., dissenting).

²⁰⁷ *Id.* at 2454-56.

²⁰⁸ *Id.* at 2453. The Court stated that they accepted the Boy Scouts' assertion as to its policy on homosexuality. *Id.* The Court noted that because the Boy Scouts viewpoint on homosexuality was contained in the written record, there was no need to inquire into the nature of the expression. It satisfied the Court that, contained within the written record, the Boy Scouts view was stated as such: "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." *Id.*

²⁰⁹ *Id.* at 2455. The Court stated that "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy." *Id.* The Court noted that the Boy Scouts did have a First Amendment right to portray one message and withhold another, and the distinction noted above was the Court's major premise for this reasoning. *Id.*

²¹⁰ *Boy Scouts of America*, 120 S. Ct. at 2455.

²¹¹ *Id.* at 2453.

²¹² *Id.*

Court. Justices Stevens and Souter wrote very strong dissents.²¹³ They said that homosexuality is not inconsistent with the Boy Scouts' message.²¹⁴ They felt that even though scouts were required to have a morally straight and clean status, a homosexual person did not interfere with that requirement.²¹⁵ Therefore the Scouts' expressive association claim should have been rejected.²¹⁶

In the future, the issue of membership exclusion based on homosexual status might be a more difficult issue for the Court because excluding a mere member would not seem to be as much of an embodiment of the Boy Scouts' philosophy, message or tenet.

In the news recently there have been reports that various school boards have entertained resolutions to deny school facilities to certain boy scout groups because the boards felt their policies, which were protected by the Court in *Boy Scouts of America v. Dale*, were still wrong and discriminatory.²¹⁷ I think that is something you would have to pursue with caution. If you are talking about public school facilities that are made generally available to all groups, then it is a public forum situation. For example, if you exclude some groups because you do not agree with their messages or policies, you would be going up against the rules of the public forum. Moreover, a federal statute requires equal access to school facilities for a wide variety of student groups.²¹⁸ Some light may be shed on such issues in a pending case dealing with access by a religious student group to public school facilities.²¹⁹

²¹³ See *Boy Scouts of America*, 120 S. Ct. 2446. Justices Souter, Ginsburg, and Breyer joined Justice Steven's dissenting opinion, and Justices Ginsburg and Breyer also joined in on Justice Souter's dissent.

²¹⁴ *Id.* at 2465, (Stevens, J., dissenting).

²¹⁵ *Id.* at 2470.

²¹⁶ *Id.* at 2478.

²¹⁷ Anemona Hartocollis, *Levy Limits Scout Events in the Schools*, THE NEW YORK TIMES, December 2, 2000, B1.

²¹⁸ Equal Access Act, 20 U.S.C.A. Section 4071 (1984).

²¹⁹ *The Good News Club v. Milford Central School*, 202 F.3d 502 (2d Cir. 2000) cert. granted, 121 S. Ct. 296 (2000). This case involves a nondenominational children's club that was denied access to use the Milford Central School. The United States District Court for the Northern District of New York, granted summary judgment for the school and a divided (2-1) Second Circuit panel affirmed, stating that the school policy was reasonable, and that because the

CONCLUSION

The Court's First Amendment Term this year seems relatively quiet and tranquil, as compared to last Term's. But who knows what storms are brewing just beyond the horizon.

club's message was religious in nature, excluding the club was not impermissibly based on viewpoint and not violative of the First Amendment. The Supreme Court granted certiorari on October 10, 2000. *Id.*