TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 11 | Number 2 Article 7

1995

Free Speech: The Status Of The First Amendment

Martin B. Margulies

FREE SPEECH: THE STATUS OF THE FIRST AMENDMENT

Hon. Leon D. Lazer:

Now we turn to the First Amendment. There were some immensely interesting cases and to discuss those cases we have a very distinguished authority on the First Amendment, Professor Margulies, who is currently teaching at Quinnipiac Law School; that is the former Bridgeport Law School. He, prior to that, had taught at Western New England Law School, and prior to that, I guess at the beginning, North Dakota Law School. He is, I suppose these things always require mentioning, a graduate of Harvard Law School. He has been a litigator for the Connecticut Civil Liberties Union in numerous cases and has written numerous articles on civil liberties and the First Amendment. He has also been a member of the American Civil Liberties Union's Board of Directors since 1988. It is my pleasure to introduce Professor Margulies.

*Professor Martin B. Margulies**:

INTRODUCTION

I wish, for self-serving reasons, that instead of describing me as a distinguished speaker, Judge Lazer had described me as a second choice, a last-minute fill-in for Burt Neuborne, because that way I would not have to live up to a glowing introduction. But I am going to try.

The United States Supreme Court decided six First Amendment cases this past Term: five dealing with speech, and one dealing

with religion. There was *City of Ladue v. Gilleo*,[1] which held that the government cannot prevent me from displaying non-commercial signs on my own residential property.[2] There was *Turner Broadcasting System, Inc. v. Federal Communications Commission*,[3] which held that an Act of Congress, requiring cable television operators to carry a specified percentage of local broadcasting stations, is content-neutral and therefore need not satisfy strict scrutiny.[4] There was *Waters v. Churchill*,[5] which stated that when a government employer discharges or disciplines an employee for her speech, it had better use reasonable procedures to find out what she actually said.[6] *Waters* was decided by a four-member plurality, but since two dissenting Justices advocated even tougher, that is, more speech-protective standards,[7] the plurality opinion plainly sets forth the minimum standards which the government must satisfy.[8]

In *Ibanez v. Florida Department of Business and Professional Regulation*,[9] the Court declared that government licensing agencies may not discipline professionals for potentially misleading commercial speech unless they can prove that the speech is harmful.[10] They cannot rely on speculation; they cannot rely on broad prophylactic rules.[11] In *Madsen v. Women's Health Center, Inc.*,[12] the Court held that a content-neutral, speech-restrictive injunction is not a prior restraint, and is therefore subject to a lower

---

* Professor of Law, Quinnipiac College School of Law. A.B. 1961, Columbia University; LL.B. 1954, Harvard University; LL.M. 1966, New York University.

1. 114 S. Ct. 2038 (1994).
2. *Id.* at 2046-07.
3. 114 S. Ct. 2445 (1994).
4. *Id.* at 2469.
5. 114 S. Ct. 1878 (1994).
6. *Id.* at 1889.
7. *Id.* at 1899-1900 (Stevens & Blackmun, JJ., dissenting).
8. *Id.* at 1886.
9. 114 S. Ct. 2084 (1994).
10. *Id.* at 2086.
11. *Id.* at 2090.
12. 114 S. Ct. 2516 (1994).

standard of review.[13] *Madsen* also held, however, that the standard's means component is more rigorous than for time, place, and manner regulations.[14] In plain English, this says that if judges, by injunction, can limit the speech rights of abortion protesters (and according to *Madsen* they can), then state or local legislatures can do so *a fortiori*, as long as they construct an adequate record.[15] Finally, *Board of Education of Kiryas Joel Village School District v. Grumet*[16] concluded that the government may not create a separate school district for Orthodox Jews, when the sole purpose for doing so is to accommodate the religious practices of handicapped Jewish children and their families.[17]

I am not going to summarize further what each decision said, or what this or that Justice said. You have the cases in your printed materials. My mandate, my brief, today was to discuss trends, and that is what I propose to do.

---

13. *Id.* at 2524 & n.2 "Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone. Moreover, the injunction was issued not because of the content of petitioners' expression . . . but because of their prior unlawful conduct." *Id.* at 2524 n.2.

14. *Id.* at 2525.

15. But on later reflection, perhaps not. *Madsen* offered two reasons for giving higher scrutiny to injunctions against abortion protesters. One was that injunctions by definition target discrete individuals or groups, and thus create a greater risk of censorship than regulations, which by definition apply throughout society; the other was that regulations, unlike injunctions, reflect democratic policy choices, and therefore command more deference. *Id.* at 2524. What happens, then, when a legislature passes a speech-restrictive regulation which -- though it is not overtly based on the content of expression -- applies only to protests taking place outside abortion clinics? Should courts use the lower time, place and manner standard, on the ground that the regulation reflects a democratic policy choice? Or should it use the higher *Madsen* standard, on the ground that the regulation, being targeted, creates a risk of censorship? This issue is being tested right now before the United States Court of Appeals for the Ninth Circuit in Sabelko v. City of Phoenix, No. 94-15495 (9th Cir. filed Mar. 22, 1994).

16. 114 S. Ct. 2481 (1994).

17. *Id.* at 2484.

I. SPEECH, PROPERTY, AND POWER

I am going to begin in an unusual way. I am going to tell you what I would have said if I had given this talk a year or two ago. I would have said what I am sure Joel Gora and Burt Neuborne have been telling you, because I have heard them say it on other occasions.[18] What I would have said, therefore, would have been something along the following lines.

When I went to law school, I learned that speech enjoyed a "preferred position"[19] in relation to other individual rights and government interests. When I went to law school I also learned that speech was a mechanism whereby people who lack power and property could acquire both.

Beginning, however, in the 1970s, and culminating with *International Society for Krishna Consciousness v. Lee*,[20] the 1992 airport speech case, a barebones but nevertheless clear United States Supreme Court majority began to take a very different view of speech. Speech was no longer a preferred right; property was. The Justices did not exactly say that, but I am talking about what they did. Thus, there were no speech rights on other people's private property, even large commercial shopping centers, except for privately owned company towns, which no longer exist.[21] There were no speech rights on government property, except for municipal streets, sidewalks, and parks, where nobody goes anymore except to mug or be mugged, as Justice Kennedy pointed out in his separate opinion in *Krishna Consciousness*.[22] (The Second Circuit recently reminded me of that, Judge Pratt, in *Longo v. United States Postal Service*,[23] which I lost two years ago.) And

18. *See, e.g.*, Norman Dorsen and Joel Gora, *Free Speech, Property, and the Burger Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195 (1982).

19. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

20. 112 S. Ct. 2701 (1992).

21. Hudgens v. NLRB, 424 U.S. 507 (1976) (shopping centers); Marsh v. Alabama, 326 U.S. 501 (1946) (company towns).

22. *Krishna Consciousness*, 112 S. Ct. at 2717 (Kennedy, J., concurring).

23. 953 F.2d 790 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1993) (discussing whether post office interior sidewalks connecting post office parking

even on municipal streets, sidewalks, and parks where people do have speech rights because streets, sidewalks, and parks, historically, have been held "in trust" for the public (another interesting property metaphor) the government is free to impose substantial burdens on those speech rights, in the name of aesthetics, economy or efficiency, by enacting content-neutral time, place, and manner regulations. These regulations, in the 'eighties, were subject to a very low standard of review, in practice if not in theory.[24]

There was only one category of speech that the United States Supreme Court protected with vigor and rigor. That was the right to use one's own property for speech purposes. The poor as well as the rich had the indefeasible right, therefore, to advertise in the *New York Times* or on prime time television, or to buy their own newspapers or television channels and advertise or editorialize there. The poor as well as the rich had the right to conduct mass mailings. And furthermore, when poor people did these things they had the indefeasible right to say anything they wanted — to advocate communism, socialism, syndicalism, or whatever — because the government was constitutionally required to treat all viewpoints the same.[25]

But in practice, of course, this approach was anything but viewpoint neutral, because people who own or have access to these kinds of property do not ordinarily use the property to bash or challenge the system. The people who would have challenged the system were, in contrast, effectively silenced because they had no property with which to speak. In consequence, the marketplace of ideas was badly distorted in favor of the status quo. But this, to that barebones Supreme Court majority, was simply an example of a

---

lots with entrances to the post office building were public forums for First Amendment purposes).

24. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) ("[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so."); *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

25. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

constitutionally irrelevant unintended discriminatory impact. Put differently: by 1992, speech was no longer a way for the unpropertied and disempowered to acquire property and power. Instead, first you needed property, power, or both in order to speak.

Well, things may be changing. And the harbingers of change appeared this past Term in the unlikeliest of places. Let me begin with *Ladue*.

II. RESIDENTIAL SIGNS AND AFFORDABLE SPEECH

Now, *Ladue* at first glance appears to be in the classic mold. Unanimously, the Supreme Court stated that the government may not prohibit me from using my own residential property to speak through the medium of signs, even when the prohibition is entirely content-neutral.[26] *Ladue* even goes out of its way to say that speakers who use their own property are less likely to threaten important countervailing government interests, such as aesthetics, than speakers who use public property, because of their incentive to keep up their property values.[27]

So then, why do I say that *Ladue* is a harbinger of change? Well, look at the reasons that Justice Stevens gave in his opinion for the Court. The first reason was unexceptional enough. He pointed out that residential signs are a venerable and traditional medium of expression.[28] I suspect that this was a gesture to the Scalia-Thomas-Rehnquist bloc, and it worked. But then he said something else, and this was amazing. He noted that residential signs provided a uniquely cheap, convenient and effective speech mechanism for people of modest means; that indeed these signs often supplied, practically speaking, the only available speech mechanisms for such people.[29] Now, maybe my memory is failing, but I do not recall seeing language like that in a United States Supreme Court opinion since the Court said, more than fifty years

26. City of Ladue v. Gilleo, 114 S. Ct. 2038, 2046 (1994).
27. *Id.* at 2047.
28. *Id.* at 2045.
29. *Id.* at 2046.

ago in *Martin v. Struthers*,[30] that door-to-door solicitation is essential to the poorly financed causes of little people.[31] Justice Stevens' statement was an extraordinary acknowledgment, from the modern Court, of the practical impact of private sector wealth disparities on the effective exercise of speech rights even under content-neutral rules.[32]

III. COMMERCIAL SPEECH

A. A Brief History

Now, the next harbinger of change: *Ibanez*, the commercial speech decision, written by Justice Ginsburg. Here again we have to do some broken field running, because *Ibanez* does not at first glance seem the departure I believe it to be. But it is.

To explain why, I will interject a description of how the commercial speech elevator has fluctuated, risen and fallen, over the past half century. Originally, of course, commercial speech enjoyed no protection at all.[33] Then, in the mid-'seventies, all of a sudden the elevator rose, and commercial speech commanded a very high level of protection. This occurred in *Virginia Pharmacy Board v. Virginia Consumer Council*.[34] But then, the elevator began to drop to intermediate review in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[35] in 1980. And in the late 'eighties, the elevator plummeted further in *Board of Regents of State University of New York v. Fox*[36] and *Posadas de Puerto Rico Associates v. Tourism Company*,[37] where the Court continued to announce an intermediate review standard but applied, in

30. 319 U.S. 141 (1943).
31. *Id.* at 146.
32. *Ladue*, 114 S. Ct. at 2046.
33. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942).
34. 425 U.S. 748 (1976).
35. 447 U.S. 557 (1980).
36. 492 U.S. 469 (1989).
37. 478 U.S. 328 (1986).

practice, something closer to rational basis scrutiny.[38] As I tell my students, when you are trying to figure out what the Justices are up to, do not just watch what they say, watch what they do.

Only last year, though, in *Edenfield v. Fane*[39] and *City of Cincinnati v. Discovery Network*,[40] the elevator began to rise again. And finally, in *Ibanez*, it appears to have anchored, at least for the time being, at the intermediate level, and a pretty rigorous intermediate level at that.[41]

B. More Recently

Now, why do I say that *Ibanez* implicitly promotes the speech rights of poor people? After all, Ms. Ibanez herself was a business person, a lawyer who happened also to be an accountant, who was using her own property, specifically, business cards, to advertise her own services, which, of course, are also her own property.[42] But things are not as they seem. *Ibanez* does promote the speech rights of poor people. It does so in two ways.

First, and perhaps less importantly, what sorts of business people benefit most from relatively unfettered commercial speech? It is the outsiders, the small fry, who are trying to break into the market.

Number two, and more importantly, there is an inevitable and close relationship between the commercial speech standard of review and the standard of review for content-neutral time, place,

38. *Fox*, 492 U.S. at 480 ("[W]e have not gone so far as to impose upon . . . [the State] the burden of demonstrating that . . . the manner of restriction is absolutely the least severe that will achieve the desired end."); *Posadas*, 478 U.S. at 345-46 ("[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . .").

39. 113 S. Ct. 1792 (1993).

40. 113 S. Ct. 1505 (1993).

41. Ibanez v. Florida Dep't of Business and Professional Regulation, 114 S. Ct. 2084, 2086 (1994). By requiring evidence that forbidden commercial speech is harmful, *Ibanez*, for instance, may undermine older decisions that sustained, deferentially and almost casually, zoning regulations allowing on-site but not off-site commercial advertising. *See* National Advertising Co. v. Town of Niagara, 942 F.2d 145 (2d Cir. 1991); Burns v. Barrett, 515 A.2d 1378 (Conn.), *cert. denied*, 110 S. Ct. 563 (1989).

42. *Ibanez*, 114 S. Ct at 2086.

and manner regulations of speech in a public forum. Indeed, the Supreme Court acknowledged that relationship five years ago when it diluted the standard for both in *Fox* and in *Ward v. Rock Against Racism.*[43] The relationship is simply this. Both standards, the commercial speech standard and the time, place, and manner standard, profess to apply intermediate scrutiny. The language is different but the substance is the same.

This means that, if the United States Supreme Court dilutes the intermediate standard of scrutiny when dealing with time, place, and manner regulations, as it did in *Ward*,[44] there is going to be an inevitable spillover into the commercial speech standard. And lo and behold there was, because that same year, 1989, *Fox* followed *Ward* in very short order and diluted the commercial speech standard in the very same manner: that is, by rejecting the "least restrictive alternative" analysis of the means component.[45] And it cited *Ward* when doing so.[46]

Conversely, therefore, when the Court beefs up the commercial speech standard, as it did in *Ibanez*, there is going to be an inevitable impact on the time, place, and manner standard. And again, lo and behold, there has been, because now we come to *Turner*, the cablevision case.

IV. A STRONGER STANDARD OF REVIEW: NON-COMMERCIAL SPEECH

In *Turner*, remember, the Court found Congress' "must carry" cable requirements content-neutral, or apparently content-neutral.[47] Five of the nine Justices then voted to remand for further fact-findings on two issues.[48] One of the issues need not concern us; that was whether the regulations were truly as content-neutral

43. 491 U.S. 781 (1989).

44. *Id.* at 797-99.

45. Board of Regents of State Univ. of N.Y. v. Fox, 492 U.S. 469, 476-81 (1989).

46. *Id.* at 478.

47. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2469 (1994).

48. *Id.* at 2472.

as they appeared to be.[49] But the second issue was very significant; it was whether the regulations, if they were indeed content-neutral, satisfied the standard of review for content-neutral regulations of non-commercial speech.[50] The lower court, relying on cases like *Ward* and *Vincent*, had applied a fairly deferential standard.[51] That standard, according to the Supreme Court in *Turner*, was not vigorous enough.[52] Instead, said the Court, the government on remand would have to make a very powerful showing, one, that the harms which the regulations were designed to prevent were real, not merely conjectural; two, that the regulations would actually be effective in remediating those harms; and three, that the regulations were not substantially more speech-burdensome than they had to be in order to remediate those harms.[53] And, guess what? In announcing this invigorated intermediate review standard for content-neutral regulations of non-commercial speech, the *Turner* Court cited *Edenfield*, the commercial speech decision that had come down the previous year.[54] The relationship is clear.

Now, again, some broken-field running. The immediate beneficiaries of the invigorated speech standards, in *Turner*, are cable companies — fat cats using their own property. How will these standards promote the speech rights of the poor? Simple: the standard announced in *Turner* is also going to be the standard for reviewing content-neutral regulations of the time, place, and manner of political speech in public forums.

Now, content-neutral time, place, and manner regulations of political speech in public forums can be very burdensome indeed, and in a twofold sense. One, these regulations can increase the costs of expression by requiring speakers to take out insurance policies or to pay for police protection. In 1992 the Supreme Court intimated that it might sustain such regulations if the regulations

49. *Id.*

50. *Id.*

51. Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 49 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994).

52. *Turner*, 114 S. Ct. at 2469-70.

53. *Id.* at 2469-72.

54. *Id.* at 2470.

were enacted and applied in a content-neutral way.[55] Additionally, content-neutral regulations can closely control, and severely curtail, the numbers of speakers and the locations and times where speech may occur, to the point where the speech is so muted as to be ineffective. Throughout the late 1970s and 1980s, the Supreme Court professedly subjected all such regulations to intermediate scrutiny, but in practice applied only cursory review, and in particular sustained regulations that were almost grotesquely over-inclusive or under-inclusive, or which rested upon wholly speculative, that is to say undocumented concerns.[56] *Turner* sends out a very clear message to municipalities across the nation: henceforward, in order to justify time, place, and manner regulations, even content-neutral ones, of speech in a public forum, you are going to have to come up with something better than that.

V. THE ESTABLISHMENT CLAUSE

I want to say a few words about the individual Justices. But before I do, let me turn to the *Kiryas* Establishment Clause decision. First, the $64,000 question: in the aftermath of *Kiryas*, what is the status of the, for some, infamous *Lemon*[57] test: the test that the United States Supreme Court has used virtually as a test for all seasons in Establishment Clause cases since 1971?

Many of you are familiar with this test, which inquires whether there is an exclusively religious purpose, whether there is a primary effect that advances or inhibits religion, and whether there is excessive church-state entanglement.[58] Many of you also know that the test has been challenged or at least questioned by a number

55. Forsyth County, Ga. v. The Nationalist Movement, 112 S. Ct. 2395, 2405 (1992) ("[T]he provision of the Forsyth County ordinance relating to fees is invalid because it unconstitutionally ties the amount of the fee to the content of the speech and lacks adequate procedural safeguards; no limit on such a fee can remedy these constitutional violations.").

56. *See* cases cited *supra* note 24.

57. Lemon v. Kurtzman, 403 U.S. 602 (1971).

58. *Id.* at 612-13.

of Justices, including five who are presently sitting.[59] What did *Kiryas* do with the test: preserve it or repudiate it?

Well, Justice Souter wrote the Court's opinion and it was a majority opinion. Five Justices joined it. And it did not repudiate *Lemon*. So, *Lemon* lives, right? *Lemon* is alive and well. But maybe not. Some of you have probably read the famous exchange between Sherlock Holmes and Inspector Gregory, in the story *Silver Blaze*.[60] "I draw your attention," said Holmes, "to the curious incident of the dog in the night-time." "The dog did nothing in the night-time," replied Gregory. "That," said Holmes, "was the curious incident."[61]

Well, Justice Souter did nothing with the *Lemon* test. He did not repudiate it, but neither did he use it. Indeed, to the best of my recollection, he did not even so much as mention it. Instead, he found the government's action unconstitutional primarily because it created an unacceptable and potentially unreviewable risk that the government might, in the future, deny similar accommodations to other similarly situated religious groups.[62]

Justice Blackmun, who joined Justice Souter's majority opinion, wrote separately to express his understanding that the opinion did not undermine *Lemon*.[63] But of course Justice Blackmun was speaking only for himself; and of course Justice Blackmun is no longer on the Court.

Justice O'Connor, who also joined most of the majority opinion, at least all of the parts that are relevant to this discussion, likewise wrote separately to express her understanding of what that opinion said. According to her, it does repudiate *Lemon* as a test for all seasons.[64] What she wrote was especially interesting to me,

---

59. The five include Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149-50 (Scalia, J., dissenting).

60. *See* Sir Arthur Conan Doyle, *Silver Blaze, in* THE COMPLETE SHERLOCK HOLMES 335 (1930).

61. *Id.* at 347.

62. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2491-92 (1994).

63. *Id.* at 2494-95 (Blackmun, J., concurring).

64. *Id.* at 2498-2500 (O'Connor, J., concurring).

because it struck a familiar note. Justice O'Connor did not deny that the *Lemon* test may still be useful in certain limited circumstances. But *Lemon* is not, she said, a test for all seasons. Establishment Clause issues, she explained, are simply too variegated and too complex to lend themselves to resolution by the facile application of a single standard.[65]

Why do I find this interesting? Because her view of the *Lemon* test replicates the history of the clear and present danger doctrine under the speech clause in the 1940s and 1950s. Many people believed, in those days, that the clear and present danger test was a test for all seasons when dealing with speech issues.[66] But then, of course, in the 'sixties, 'seventies, and 'eighties we began to learn that, once again, the issues were simply too variegated and too complex to lend themselves to resolution through the facile application of a single test. And today clear and present danger is just one test of many that the Court uses in speech cases, depending on the circumstances, even when government decision-making is content-based.[67] Perhaps the *Lemon* test is going the same way.[68]

---

65. *Id.* at 2499 (O'Connor, J. concurring).

66. *E.g.*, Dennis v. United States, 341 U.S. 494, 514-15 (1951). "We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent." *Id.* at 515; Bridges v. California, 314 U.S. 252, 263 (1941) ("What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.").

67. Differently put, "clear and present danger," today, may be only one example of a compelling government interest under the strict scrutiny test for content-based regulations. *E.g.*, Burson v. Freeman, 112 S. Ct. 1846, 1851 (1992) ("[A] State has a compelling interest in protecting voters from confusion and undue influence."); Texas v. Johnson, 491 U.S. 397, 412 (1989) ("We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.'" (quoting Boos v. Barry, 485 U.S. 312, 321 (1988))). And of course there are different tests altogether for laws that target certain discrete speech categories. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

> In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision,

Ultimately, however, what is important is that, regardless of whether and in what form the *Lemon* test survives, there is not likely to be much change in Establishment Clause outcomes. Justice Kennedy dislikes *Lemon*, but he wrote the Court's opinion in *Lee v. Weisman*[69] two years ago, invalidating graduation prayer. And he concurred, albeit on narrow grounds, in *Kiryas*.[70] He is certainly not insensitive to church-state separation issues. Justice O'Connor does not like *Lemon* either, but she concurred in the

---

it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id.; Miller v. California, 413 U.S. 15, 24 (1973).

The basic guidelines [in obscenity cases] . . . must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. (citation omitted); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("Any prior restraint on expression comes to this court with a 'heavy presumption' against its constitutional validity. [One] . . . carries a heavy burden of showing justification for the imposition of such a restraint.") (citations omitted); Shuttlesworth v. Birmingham, 394 U.S. 147, 155 (1969).

The inquiry in every [picketing and parading] case must be . . . whether control of the use of the streets for a parade or procession was, in fact, 'exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.'

Id. (quoting Cox v. New Hampshire, 312 U.S. 569, 574 (1941)).

68. A more particularized treatment of Establishment Clause issues would be consistent, for better or for worse, with the Supreme Court's ongoing efforts to harmonize its approaches to the First Amendment's various clauses. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (harmonizing the Free Exercise Clause and the Free Speech Clause); McDonald v. Smith, 472 U.S. 479 (1985) (harmonizing the Petition Clause and the Free Speech Clause).

69. 112 S. Ct. 2649 (1992).

70. *Kiryas*, 114 S. Ct. at 2500-05 (Kennedy, J., concurring).

graduation prayer decision[71] and she also concurred in *Kiryas*. She, too, is sensitive to separation issues and does not want any significant changes in results.

The only Justices who want to see significant changes in outcomes are Justices Scalia, Thomas, and Rehnquist.[72] And that adds up to three. As to the others, there may be a few changes in outcomes, but these will amount to small yardage. For instance — and this may be of interest to the municipal lawyers in the audience — five of the nine *Kiryas* Justices made it clear that they would like to overrule two 1985 decisions: *Aguilar v. Felton*[73] and *Grand Rapids School District v. Ball*.[74] Both of these decisions held, albeit for different reasons, that public school teachers could not render secular instruction on parochial school premises during or after the regular school day. In *Kiryas*, Justices Scalia,[75] Rehnquist, Thomas, Kennedy[76] and O'Connor[77] all made it clear that they would like to see both decisions overturned, but in Establishment Clause terms, this would be — literally and figuratively — small change.

Most importantly of all, to me, five of *Kiryas*' nine Justices, including O'Connor, very definitely including O'Connor, reiterated that, in their view, the Establishment Clause does not merely prevent government from favoring one religious sect above others. It also prohibits government from favoring religion over irreligion: that is to say, from favoring all religions over none.[78] True, one of those five, Justice Blackmun, is gone. But I do not think that my law school classmate, Justice Breyer, from what I remember of him, is likely to upset that balance.

---

71. *Lee*, 112 S. Ct. at 2667 (Souter, J., concurring).

72. *See Kiryas*, 114 S. Ct. at 2505-16 (Scalia, J., dissenting).

73. 473 U.S. 402 (1985).

74. 473 U.S. 373 (1985).

75. *Kiryas*, 114 S. Ct. at 2505-16 (Scalia, J., dissenting).

76. *Id.* at 2500-05 (Kennedy, J., concurring).

77. *Id.* at 2495-2500 (O'Connor, J., concurring).

78. *Id.* at 2491-92. Justices Blackmun, Stevens, O'Connor, and Ginsburg, all joined Justice Souter, the author, in this portion of the opinion.

VI. THE JUSTICES OF THE SUPREME COURT

Finally, let me turn to the opinions of the individual Justices. The two I find most fascinating are Justices Souter and Kennedy. Justice Souter was a stealth candidate all right, but not in the way that his detractors had supposed. This is the man who, together with Justice Kennedy, has written most eloquently about the dangers that private sector wealth and power imbalances pose to the effective exercise of speech rights. I am thinking not so much of anything they have written this past Term; rather I am thinking of their separate opinions in *Krishna Consciousness*.[79]

Also fascinating to me is another Justice whom I much admire, Justice O'Connor. She has made two principal points.

First, she has expressed and very well articulated her suspicion of all categorical rules. She did so not only in *Kiryas*; she also did it in *Waters*, where she wrote the plurality opinion,[80] and again in *Ladue*, where she wrote separately for that very reason.[81]

I also believe that Justice O'Connor is beginning to show some concern for the impacts of those private sector wealth and power disparities on the effective exercise of speech rights. Some glimmerings of these concerns came through in the airport speech case, *Krishna Consciousness*, where she cast a dispositive vote that gave the speakers in that case at least a partial victory.[82] She also said it very explicitly in *Turner*, where she wrote, in a separate opinion, that she both recognized and feared the dangers to speech of private sector power concentrations.[83] True, she added that the First Amendment is only concerned with dangers arising from

79. International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2715-20 (1992) (Kennedy, J., concurring); *id.* at 2724-27 (Souter, J., concurring in part and dissenting in part).

80. Waters v. Churchill, 114 S. Ct. 1878, 1885-86 (1994).

81. City of Ladue v. Gilleo, 114 S. Ct. 2038, 2048 (1994) (O'Connor, J., concurring).

82. *Krishna Consciousness*, 112 S. Ct. at 2711-15 (O'Connor, J., concurring).

83. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2480 (1994) (O'Connor, J., concurring in part and dissenting in part). She was joined by Justice Ginsburg and, interestingly, by Justices Scalia and Thomas.

government power, but she qualified that remark by observing, and I deem her choice of words significant, that this is the thrust of the First Amendment "as we understand it *today*."[84] For both reasons, her distrust of categorical rules, and her growing concerns about the impact of private sector wealth disparities on speech freedom, I suspect that she may be ready to reconsider her views on current First Amendment public forum theory. So far she has sided with that barebones majority which, through a categorical test, has allowed state and local governments to place most government property off-limits to speakers. Reading between the lines, I think she may be reconsidering her position on forum-analysis issues.

CONCLUSION

Regardless of Justice O'Connor's position, I believe that current public forum analysis, which has never commanded more than a barebones majority, is doomed. It is doomed by Justice White's departure, and his replacement by Justice Ginsburg. Or at least it is doomed, whatever Justice O'Connor does, if, as I suspect, Justice Breyer aligns himself on that question with Justice Ginsburg, and with Justices Stevens, Kennedy, and Souter, who have never left any doubt as to where they stand. I think, therefore, that we are going to see within a very few years a much more permissive and fact-specific test for speech access to government property: one whereby all government property, open to the public, is presumptively open to speech uses unless the government can prove, in each instance, that the speech would prevent the government agency that owns the property from carrying on its normal functions.[85]

---

84. *Id.* (O'Connor, J., concurring in part and dissenting in part) (emphasis added).

85. This was the access test that the Supreme Court formerly used. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972). In recent times, however, *Grayned*'s generous, fact-bound test has been displaced by a more stinting, categorical model, beginning with Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), and extending through International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701 (1992).

Incidentally, I have a case right now before the Connecticut Supreme Court which urges that Court to use our state constitution to impose that test.[86] But if my crystal ball is correct as to where the United States Supreme Court is headed, in a few years it will not much matter what our state court does.

Let me conclude pretty much as I began. I said there were six cases: five speech, one Establishment Clause. There is an amazing thing about all those six cases, and I think it has been some time since this has happened. In three of them, *Ibanez*, *Ladue*, and *Kiryas*, you had a clear victory for the First Amendment. And in the other three you had, at worst, mixed results. Indeed, in two of the three, *Turner* and *Waters*, the results on balance favored the First Amendment, that is, favored the speaker, the challenger. In none of the six did the First Amendment take a beating. We are in good hands. As they say, God save the Honorable Court, and thanks for listening to me.

Hon. Leon D. Lazer:

Are there any questions?

Audience Member:

Professor Margulies, how do you square the flag burning case[87] with the downgrading of speech protection that you ascribe to the Court's majority?

Professor Martin B. Margulies:

Whose property was that flag? The majority opinion emphasized that, for all the record revealed, the flag was the speaker's property or was given to the speaker by the person to whom it belongs.[88] Certainly that case neither acknowledged nor implied any right to use a government-owned flag for speech purposes. And second, Justice Scalia, who cast the deciding vote, is — to his credit —

86. State v. Linares, No. SC 14861 (Conn. filed Nov. 4, 1993).
87. Texas v. Johnson, 491 U.S. 397 (1989).
88. *Id.* at 399.

exquisitely sensitive to anything that smacks of intentional departure, by government, from the viewpoint-neutrality principle. What he does not seem to recognize, to my deep regret, is that even seemingly neutral rules can have a terribly disparate impact upon speakers who stand economically and politically outside the mainstream.