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Back From the Brink

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BACK FROM THE BRINK

Hon. Leon D. Lazer:

Our next speaker will be dealing with the area of the First Amendment.[1] As far as the number of cases, at least, there was no shortage of First Amendment cases, and no shortage of important First Amendment cases. Professor Joel Gora is a very distinguished authority in this area. He is a professor at the Brooklyn Law School and currently general counsel to the New York American Civil Liberties Union. Professor Gora was national staff counsel to the ACLU from 1969 to 1978 and he was the pro se clerk at the Second Circuit Court of Appeals. He is also the co-author of a book entitled "The Right to Protest."[2] So it is my pleasure to introduce to you Professor Joel Gora.

Professor Joel M. Gora:

Thank you, Judge Lazer. To paraphrase Mark Twain, last year's reports of the death of the First Amendment were greatly exaggerated.[3] When I was privileged to speak about the Court's First Amendment cases at this symposium a year ago, my discussion was titled the "First Amendment on the Brink."[4] I gloomily reported that the Court's 1991 Term had been skeptical about free speech.[5] This year I have a different title. It is either "away from the edge," "back from the brink," "away from the abyss," or concepts of that kind. Surprisingly, this past Term was

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1. U.S. CONST. amend. I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

2. JOEL M. GORA, THE RIGHT TO PROTEST (1991).

3. JOHN BARTLETT, FAMILIAR QUOTATIONS 625 (15th rev. ed. 1980). Mark Twain (Samuel Langhorne Clemens) wrote in a cable from London to the Associated Press that "the reports of my death are greatly exaggerated." *Id.*

4. *See* Joel M. Gora, *On the Brink: The First Amendment in the Rehnquist Court, 1990-91 Term*, 9 TOURO L. REV. 111 (1992).

5. *See generally id.* at 111-17.

a very good year for First Amendment claimants.[6] The First Amendment, which had seemed so vulnerable the previous year, proved remarkably resilient this past Term.[7]

When I hear remarks like those from my former colleague at the ACLU, Janet Benshoof,[8] or hear discussions about books concerning how Chief Justice Rehnquist is seeking to and succeeding in bringing about his agenda of change at the Supreme Court,[9] I feel a little guilty. At least on the issues I keep track of, constitutional rights still have not been vanquished and we are not in a constitutional crisis.

The 1992 Term heard ten cases involving First Amendment issues,[10] nine on the constitutional side,[11] and one parallel case dealing with free speech rights under a federal statute.[12] For the box score types among you, the First Amendment assertion pre-

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6. *See infra* notes 10-15 and accompanying text.

7. 61 U.S.L.W. 3043 (U.S. Aug. 4, 1992).

8. *See generally* Janet Benshoof, *Pennsylvania's Abortion Case*, 9 TOURO L. REV. 217 (1993).

9. DAVID SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST COURT 412-13, 451-58 (1992); *see also* DONALD E. BOLES, MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST 120-21, 123, 127-30 (1987); DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS xvii, 83-85, 128-29, 156 (1991); CHARLES M. LAMB & STEPHEN C. HALPERN, THE BURGER COURT 322-23, 337 (1991).

10. Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. 2709 (1992); Lee v. Weisman, 112 S. Ct. 2649 (1992); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992); Burdick v. Takushi, 112 S. Ct. 2059 (1992); Burson v. Freeman, 112 S. Ct. 1846 (1992); Dawson v. Delaware, 112 S. Ct. 1093 (1992); Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992); Norman v. Reed, 112 S. Ct. 698 (1992); Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991).

11. Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. 2709 (1992); Lee v. Weisman, 112 S. Ct. 2649 (1992); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992); Burson v. Freeman, 112 S. Ct. 1846 (1992); Dawson v. Delaware, 112 S. Ct. 1093 (1992); Norman v. Reed, 112 S. Ct. 698 (1992); Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991).

12. Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992).

vailed in six cases,[13] was unsuccessful in three,[14] and split the difference in the tenth.[15] That is a .650 batting average, which is pretty good in any league.

The Term was marked by a number of interesting developments. There were several cases where the Court really got down to basics about First Amendment doctrines.[16] If there is any theme that I think most captures the cases this year, it is this: "regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[17] That is a quote from a Supreme Court case decided in the early 1980s,[18] and it appeared three or four times as a bellwether capturing the Court's sentiment on these issues this Term.[19] No government discrimination can be based on the desire to censor the message.[20]

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13. Lee v. Weisman, 112 S. Ct. 2649 (1992); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992); Dawson v. Delaware, 112 S. Ct. 1093 (1992); Norman v. Reed, 112 S. Ct. 698 (1992); Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991).

14. Burdick v. Takushi, 112 S. Ct. 2059 (1992); Burson v. Freeman, 112 S. Ct. 1846 (1992); Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992).

15. Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. 2709 (1992).

16. *See* Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. 2709 (1992) (public forum doctrine); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (content based restrictions); Burson v. Freeman, 112 S. Ct. 1846 (1992) (public forum doctrine and content based restrictions).

17. Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984), *quoted in Simon & Schuster*, 112 S. Ct. at 508.

18. *Regan*, 468 U.S. at 648-49.

19. *R.A.V.*, 112 S. Ct. at 2542; *Forsyth*, 112 S. Ct. at 2404; *Burson*, 112 S. Ct at 1858.

20. *See Forsyth*, 112 S. Ct. at 2401 (holding permit schemes controlling time, place, and manner of speech must not be content-based); Cohen v. California, 403 U.S. 15, 21 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."); New York Times v. Sullivan, 376 U.S. 254, 269-70 (1964) ("[C]onstitutional protection does not turn upon 'the truth, popularity or social utility of the ideas which are offered.'") (quoting NAACP v. Button, 371 U.S. 415, 445 (1962)).

Another interesting development is that Justice Souter is starting to emerge as a significant swing Justice on First Amendment matters,[21] and approaches them with a kind of balanced perspective that is reminiscent of Justice Harlan.[22] Even more interesting in terms of Court watching has been Justice Anthony Kennedy. He has emerged as the Court's most vigorous advocate of the

21. In the following recent cases, Justice Souter's vote was dispositive in breaking four to four ties existing between the other eight Justices, thereby forming the majority opinion: Lee v. Weisman, 112 S. Ct. 2649, 2652 (1992); R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2541 (1992); Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2398 (1992); Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2458 (1991); Rust v. Sullivan, 111 S. Ct. 1759, 1764 (1991).

22. *See* International Soc'y For Krishna Consciousness v. Lee, 112 S. Ct. 2711, 2724-25 (1992) (Souter, J., concurring) (defining "public forum" inquiry as necessarily specific to each particular property, but dissenting as to the Court's upholding of overall ban on solicitation of funds in New York City airports); Lee v. Weisman, 112 S. Ct. 2649, 2676-77 (1992) (Souter, J., concurring) (pointing out that in order for non-sectarian prayer at public school graduation to be accommodated under the Establishment Clause of the First Amendment, omission of prayer must be shown to burden students' religious beliefs); *see also* Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2522-23 (1991) (Souter, J., dissenting). In *Cohen*, the Court held that the First Amendment did not prohibit a publisher's confidential source from recovering damages against the publisher who breached a promise not to reveal his source's identity. *Id.* at 2516. Justice Souter's dissent argued that the majority should have used a balancing approach. "I find it necessary to articulate, measure, and compare the competing interests involved in any given case to determine the legitimacy of burdening constitutional interests . . . ." *Id.* at 2522 (Souter, J., dissenting). Justice Souter also applied a balancing test in his concurring opinion in Barnes v. Glen Theatre, Inc. 111 S. Ct. 2456 (1991), which held a public indecency statute applicable to nude dancers did not violate First Amendment, in which he weighed the state's interests against First Amendment rights. *Id.* at 2468 (Souter, J., concurring). Comparatively, Justice Harlan used a balancing test in Street v. New York, 394 U.S. 576, 590-91 (1969) (holding that governmental interests in punishing words uttered in contempt of American flag did not outweigh appellant's First Amendment right to use such words). *See also* Cohen v. California, 403 U.S. 15, 26 (1971) (Justice Harlan writing for the majority, held that governmental interests in protecting people in public places from being exposed to subversive and objectionable speech did not outweigh appellant's First Amendment right to wear a jacket bearing an expletive in a Los Angeles courthouse).

fullest protection of First Amendment rights.[23] This Term, a few of his opinions reminded me of those of Justice Brennan[24] or the late Justice Black.[25]

Finally, by way of introduction, the Court's commitment to First Amendment rights, or its willingness to protect First Amendment rights, was particularly tested in two cases involving very delicate issues: first, the question of banning hate speech,[26] and second, the question of allowing prayers at public school

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23. *See* Lee v. Weisman, 112 S. Ct. 2649, 2566 (1992) (Justice Kennedy, writing for the majority, held that nonsectarian prayer at public school graduation was forbidden by Establishment Clause of First Amendment); Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. 2709, 2713 (1992) (Kennedy, J., concurring) (agreed with Court's finding that airports are public forums and that distribution of literature was speech protected by First Amendment, but concluded that ban on solicitation of funds was a permissible time, place, and manner restriction); Gentile v. State Bar of Nev., 111 S. Ct. 2720, 2735 (1991) ("[T]he First Amendment does not permit suppression of speech because of its power to command assent . . . ."); Texas v. Johnson, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring) (agreed with Justice Brennan that burning of American flag is speech protected by First Amendment, but expressed distaste at result).

24. *See* Rutan v. Republican Party of Ill., 497 U.S. 62 (1990) (Justice Brennan, writing for the majority, holding that subjecting public employees to employment decisions based upon their political beliefs and associations violated First Amendment rights); United States v. Eichman, 496 U.S. 310 (1990) (Justice Brennan, writing for the majority, holding that Flag Burning Act was subject to most exacting scrutiny and violated First Amendment protection of expressive conduct).

25. *See* United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971) (Justice Black, writing for the majority, holding that state court decision enjoining union from furnishing legal advice to members violated First Amendment by interfering with their right to cooperate in helping each other to obtain competent and affordable legal representation); Baird v. State Bar of Ariz., 401 U.S. 1 (1971) (Justice Black, writing for the majority, holding that Bar applicant was protected by First Amendment principles from being required to divulge whether she had ever been a member of the Communist Party).

26. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (holding bias speech crime ordinance facially invalid).

graduation ceremonies.[27] I will talk about these two cases a little later. Both cases required the Court to discharge its difficult constitutional duty of requiring the majority's desires to yield to the minority's rights. In both cases, the Court honored its highest tradition.

I. CRIME AND PUNISHMENT

Simon & Schuster v. New York Crime Victims Board

Of the ten cases decided last Term concerning the First Amendment, two of them dealt with crime and punishment.[28] The first one was *Simon & Schuster v. New York Crime Victims Board*.[29] It was a New York case and, of course, it involved the challenge to the so-called Son of Sam law.[30]

You will recall that "Son of Sam" was the press nickname given to David Berkowitz, a serial killer who terrorized New York in the summer of 1977.[31] In order to prevent Berkowitz and others like him from reaping a financial windfall from selling the rights to their grisly stories while the victims went uncompensated,[32] the New York legislature required that income of an accused or convicted person derived from telling the stories of the crimes would, in effect, be escrowed for five years and made available for compensating victims.[33] The forfeiture escrow provision of the New York statute was triggered by entrance into any contract with a criminal for the "re-enactment" of the crime, or

27. Lee v. Weisman, 112 S. Ct. 2649 (1992) (holding that even nonsectarian prayers by clergyman were impermissible at public school graduation ceremonies).

28. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501 (1991); Dawson v. Delaware, 112 S. Ct. 1093 (1992).

29. 112 S. Ct. 501 (1991).

30. N.Y. EXEC. LAW § 632-a (McKinney 1982).

31. *Simon & Shuster*, 112 S. Ct. at 504.

32. *Id.*

33. *Id.* at 505; N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

"expression" of the perpetrator's "thoughts, feelings, opinions or emotions regarding such crime."[34]

The law was never applied to Berkowitz because he never stood trial.[35] But it was sought to be applied to Simon & Schuster, the publisher of a book called *Wiseguy*.[36] *Wiseguy* was about the exploits of Henry Hill, a fabulously successful professional criminal.[37] You are probably more familiar with the story when it became a box office smash movie called *Goodfellas*. The New York State Crime Victims Board contacted Simon & Schuster and sought to escrow the funds.[38] Simon & Schuster resisted and filed suit.[39] A divided Second Circuit panel upheld the Son of Sam statute,[40] but the Supreme Court unanimously reversed.[41]

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34. N.Y. EXEC. LAW 632-a(1) (McKinney 1982) provides in pertinent part:

> Every person . . . contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representatives.

Id.

35. *Simon & Schuster*, 112 S. Ct. at 506.

36. *Id.*; NICHOLAS PILEGGI, WISEGUY: LIFE IN A MAFIA FAMILY (1986) [hereinafter WISEGUY].

37. *See generally* WISEGUY.

38. *Simon & Schuster*, 112 S. Ct. at 507.

39. *Id.*

40. *Id.* at 508 (citing Simon & Schuster v. Fishetti, 916 F.2d 777 (2d Cir. 1990)).

41. *Id.* at 512.

Justice O'Connor wrote this opinion and spoke for six Justices.[42] She found that the applicable constitutional cornerstones were clear.[43] First, a statute is presumptively invalid if it imposes a financial burden on speakers because of the content of their speech.[44] Second, this is a reflection of the larger "no censorship" principle that the government may not try to drive certain ideas or certain viewpoints from the marketplace of ideas.[45] She evoked memories, of course, of the great Justice Oliver Wendell Holmes, originator of the concept of the "free market of ideas."[46]

Moreover, she pointed out, preventing government from dictating the terms of public discussion and penalizing those who speak certain words also served to further individual liberty. It meant people, rather than government, would be deciding the basic issues of what should be said and what should be heard.[47] She found that the Son of Sam escrow forfeiture statute ran afoul of these principles because only certain kinds of speech were singled out for control.[48] It was basically a content-based provision.[49]

First, it only captured a criminal's income from certain activities.[50] It did not capture income from clipping coupons, instead capturing only income from expressive activities.[51] Second, of the expressive activity, only a description of the crime would

42. *Id.* at 504. Justice Thomas did not participate in the decision of this case.

43. *Id.* at 508 (citing Leathers v. Medlock, 111 S. Ct. 1438, 1444 (1991)).

44. *Id.* (citing *Leathers*, 111 S. Ct. at 1443-44).

45. *Id.* (citing *Leathers*, 111 S. Ct. at 1444).

46. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

47. *Simon & Schuster*, 112 S. Ct. 508 (citing *Leathers*, 111 S. Ct. at 1444-45); *see* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

48. *Simon & Schuster*, 112 S. Ct. at 508.

49. *Id.*

50. *Id.*

51. *Id.*; N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

cause the proceeds to be subject to the statute.[52] A Son of Sam cookbook would escape statutory regulation. The Supreme Court basically said the penalty, the escrow, and the potential confiscation of funds, were invoked solely on the expression of ideas or the re-enactment of the crime.[53] Therefore, it was a classic case of content-based regulation and presumptively defective for that reason.[54]

The Court did not find that such content-based restriction was automatically a basis for invalidating the statute.[55] Content-based censorship does not *per se* invalidate a statute. Instead, the Court required the government to try to justify and sustain the statute by showing that the content-based discrimination was necessary to serve a compelling state interest, and that the statute was narrowly drawn to achieve that end.[56]

This compelling interest test is a familiar staple of constitutional law, requiring courts to assess the gravity of the law's objectives and the precision with which the law achieves any objectives found to be compelling.[57] The Court looked at the objectives that were posited by New York and found the only valid interest was in providing a way to compensate victims of crime from the fruits of the crime.[58] However, that interest was not directly served by this law because the law regulated speech in too sweeping a fashion.[59] The state had "little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime."[60] In other words, the state had no valid

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52. *Simon & Schuster*, 112 S. Ct. at 505; *see* N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

53. *Simon & Schuster*, 112 S. Ct. at 508; *see* N.Y. EXEC. LAW § 632-a(1) (McKinney 1982).

54. *Simon & Schuster*, 112 S. Ct. at 508.

55. *Id.* at 509.

56. *Id.* (citing Arkansas Writers' Project v. Ragland, 481 U.S. 221, 231 (1987)).

57. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626-27 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Loving v. Virginia, 388 U.S. 1, 11 (1967).

58. *Simon & Schuster*, 112 S. Ct. at 509.

59. *Id.* at 511.

60. *Id.*

interest in punishing the wrongdoer for telling his story beyond its valid interest in compensating the victim. Moreover, even though the latter interest was concededly compelling, the law was found defective because it did not pursue that objective in a carefully limited fashion.[61] If a description of a crime occupied one page of a five-hundred page book, the entire book was conscripted by the statute.[62] Likewise, even if the crime revealed had never been the basis of formal accusation, the proceeds of the book were subject to escrow.[63] The law was struck down, essentially, because it failed to serve a valid interest in any direct or precise way.[64]

I want to spend a moment talking about the compelling interest test because Justice Kennedy, in his concurring opinion, spoke about it at some length.[65] Many First Amendment cases are won by use of the type of compelling interest test analysis that was employed by Justice O'Connor in the "Son of Sam" case.[66] However, the formula has been criticized as ultimately unprotective of First Amendment rights because it gives courts too much flexibility to try to balance those rights away.[67] In his concurring opinion, Justice Kennedy criticized the majority's use of the balancing formula inherent in the compelling interest test.[68] He argued that the use of the compelling interest test in First Amend-

61. *Id.*

62. *Id.* at 511-12.

63. *Id.*

64. *Id.* at 512.

65. *Id.* (Kennedy, J., concurring).

66. *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62 (1990) (patronage practices affecting promotions, transfers, and recalls following layoffs were not sufficiently narrowly tailored to further government interests); Arkansas Writers' Project v. Ragland, 481 U.S. 221, 231 (1987) (state failed to show that its discriminatory tax scheme was necessary to serve compelling state interest and narrowly tailored to serve such end); Democratic Party of the United States v. Wisconsin, 450 U.S. 105 (1981) (state failed to show compelling state interest for imposition of voting requirements upon those who later become delegates).

67. *E.g.*, Rosen v. Brown, 970 F.2d 169, 175 (6th Cir. 1992); Mark Conrad, *The Demise of New York's Son of Sam Law - the Supreme Court Upholds Convicts' Rights to Sell Their Stories*, N.Y. B.J. (Mar./Apr. 1992).

68. *Simon & Schuster*, 112 S. Ct. at 512 (Kennedy, J., concurring).

ment cases came about by accident, and further, that the test "has no real or legitimate place"[69] when the question presented to the Court concerns the constitutionality of a state restriction on speech which is based solely on its content.[70] It is Justice Kennedy's position that, if a law restricts speech solely by the content of the speech, it is *per se* unconstitutional unless it falls within one of the few categories of speech in which some form of content-based regulation has been either permitted, or at least considered — obscenity,[71] defamation,[72] fighting words,[73] or the like. Therefore, in his view, in the case at hand, the fact that the government was picking out speech, solely because of its content, and the content did not fall within one of those few off limits areas of speech, that should have, as he puts it, "end[ed] the matter."[74]

I should note parenthetically, the New York legislature, this past summer, altered the Son of Sam statute considerably.[75] The new law treats profits from First Amendment activities no differently from any other activities of the wrongdoer and makes them available across the board rather than only on the basis of engaging in speech about the crime.[76]

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69. *Id.* (Kennedy, J., concurring).

70. *Id.* (Kennedy, J., concurring).

71. Roth v. United States, 354 U.S. 476 (1957).

72. New York Times v. Sullivan, 376 U.S. 254 (1964).

73. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

74. *Simon & Schuster*, 112 S. Ct. at 513 (Kennedy, J., concurring).

75. N.Y. EXEC. LAW § 618 (McKinney 1992). The amended statute provides in pertinent part:

> 2(a) Every person, firm, corporation, partnership, association or other legal entity which knowingly contracts for, pays, or agrees to pay, any profit from a crime, as defined in subdivision one of this section, to a person charged with or convicted of that crime shall give written notice to the crime victims board of the payment, or obligation to pay as soon as practicable after discovering that the payment or intended payment is a profit from a crime.
>
> (b) The board, upon receipt of notice of a contract, an agreement to pay or payment of profits of the crime shall notify all known victims of the crime of the existence of such profits at their last known address.

Id.

76. *Id.*

Dawson v. Delaware

The other law and order, crime and punishment case is *Dawson v. Delaware*.[77] It involved the interesting problem of whether otherwise protected First Amendment activity can be admitted into evidence on issues of guilt or innocence or punishment.[78] The First Amendment prevailed in this case, but really on very narrow grounds.[79]

Dawson, an escaped prisoner, was convicted for the brutal murder of an elderly woman shortly after his escape from prison.[80] At the sentencing phase of the case, the district attorney was allowed to tell the jury that while in prison, Dawson had been associated with the Aryan Brotherhood and that the Aryan Brotherhood was a white racist prison gang.[81] The state argued that evidence of the kind of groups a person belonged to is relevant to his character[82] and that it was relevant to sentencing, and therefore was properly admitted.[83] Dawson claimed that under the First Amendment, evidence about a defendant's protected activities and speech should *never* be admissible because that would be a penalty on those activities.[84]

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77. 112 S. Ct. 1093 (1992).

78. *Id.* at 1097.

79. *Id.* at 1098. The court concluded that disclosure of association was permissible during sentencing proceedings. In this particular case, however, the stipulation rendered the Aryan Brotherhood evidence irrelevant. *Id.* at 1097.

80. *Id.* at 1095.

81. *Id.* at 1096.

82. *See* United States v. Sickles, 524 F. Supp. 506, 510 (Del. 1981), *aff'd*, 688 F.2d 827 (3d Cir. 1982) (participation in Ku Klux Klan relevant character evidence).

83. *Dawson*, 112 S. Ct. at 1096.

84. *Id.* at 1097. *See also* Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) (holding that evidence of emotional and mental development of 16 year old convicted of killing a police officer were relevant "mitigating factors" to be considered in sentencing); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding character evidence relevant in evaluating whether a convicted murderer should not receive death penalty); DEL. CODE ANN. ch. 11,

By an 8-1 vote,[85] the Court rejected both of those broad positions.[86] Chief Justice Rehnquist said that First Amendment protected activities have been held to be admissible into evidence in criminal cases where they were directly relevant to one of the issues.[87] For example, in a murder case,[88] evidence that the defendant was an advocate of race warfare between the races was admissible to show character in terms of punishment.[89]

Similarly, evidence that a defendant was a member of the Aryan Brotherhood in prison had been held admissible in another case[90] to impeach a witness, who himself was also a member of the Aryan Brotherhood, by showing that the group has, as one of its planks, that its members will always lie to protect one another.[91] Introducing that evidence, and showing the link between the witness' membership in the group and the defendant's membership in the group, was found to be a valid way to undermine the credibility of that particular witness.[92]

The Court concluded that the Constitution did not prevent the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations were otherwise protected by the First Amendment.[93] Finally, and this was the Court's specific point, the evidence must be directly relevant.[94] In this case, the defendant was a member of a white

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§ 4209(a)(1) (1989) (holding character as a relative determinant when imposing the death sentence).

85. *Dawson*, at 1095. The dissenting Justice was Justice Thomas.

86. *Id.* at 1097-99.

87. *E.g.*, United States v. Abel, 469 U.S. 45 (1984) (holding evidence of membership in the Aryan Brotherhood and the organization's plank that members must lie for one another admissible for impeachment of witness); Barclay v. Florida, 463 U.S. 939 (1983) (holding defendant's desire to start a race war admissible in death penalty sentencing phase of case).

88. *See* Barclay v. Florida, 463 U.S. 939 (1983) (moral, factual, and legal judgment play a proper role in sentencing).

89. *Id.* at 949.

90. United States v. Abel, 469 U.S. 45 (1984).

91. *Id* at 48.

92. *Id.* at 49; *see* FED. R. EVID. 608(b).

93. *Dawson*, 112 S. Ct. at 1097.

94. *Id.* at 1097-98.

racist group.[95] The victim of his crime was a white person also, leaving no question of racial hostility in the commission of the crime.[96] There was no evidence of illegal activity by the group.[97] The Supreme Court essentially said there was no probative weight to this information about his membership in this white, racist prison gang and allowing the jury to consider it in the death penalty phase was a violation of the First Amendment.[98]

There are two interesting things to note about this case. I do not think this case has widespread ramifications. First, with respect to the hate speech problem and the issue of whether bias-motivated crime or sentencing laws are still valid, the *Dawson* case suggests they are.[99] There was one dissenter, and that was Justice Clarence Thomas.[100] This was one of his first cases after he was appointed to the Court,[101] and it provided him with an opportunity to take a very tough law-and-order stance. What he essentially said was if the defendant was entitled to prove he was a member of the Boy Scouts to show his good character, the prosecutor could introduce membership in the Aryan Brotherhood to demonstrate the contrary.[102]

Finally, Justice Thomas said this was not a First Amendment case at all.[103] He stated that if there are any outer limits on the kinds of evidence of activities and speech that can be admissible in a criminal proceeding, those limits come from the Due Process

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95. *Id.* at 1096.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1097. The Supreme Court has recently agreed to hear such a "bias-motivated" crime case. *See infra* notes 351-55. We will see how *Dawson* fares in that context.

100. *Dawson*, 112 S. Ct. at 1100 (Thomas, J., dissenting).

101. Justice Thomas joined the Court on October 18, 1991. He also authored Molzf v. United States, 112 S. Ct. 711 (1992), Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992), and a concurring opinion in White v. Illinois, 112 S. Ct. 736 (1992).

102. *Dawson*, 112 S. Ct. at 1101 (Thomas, J., dissenting).

103. *Id.* at 1104 (Thomas, J., dissenting).

Clause,[104] but they do not come from the First Amendment.[105] However, the Court itself found a First Amendment violation by introducing evidence of one's First Amendment activities where that evidence was not directly probative of the issues in the case.[106]

II. ELECTORAL PROCESS

The next group of cases deal with the First Amendment and the electoral process.[107] Here you have the constitutional rights of candidates, voters, and political activists pitted against the state's regulation of the electoral process. Two of the cases involved control of the ballot and whose name gets to be on it.[108] The third case dealt with state regulation of access to the area around polling places where ballots are kept.[109] In this area, the First Amendment claimants were largely unsuccessful.[110]

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104. U.S. Const. amend. XIV, cl. 1.

105. *Dawson*, 112 S. Ct. at 1104 (Thomas, J., dissenting).

106. *Id.* at 1098.

107. Burdick v. Takushi, 112 S. Ct. 2059 (1992) (holding Hawaii's prohibition on write-in voting does not unreasonably burden voting rights under the First and Fourteenth Amendments); Burson v. Freeman, 112 S. Ct. 1846 (1992) (holding Tennessee statute preventing electioneering within 100 feet of polls survived First Amendment scrutiny); Norman v. Reed, 112 S. Ct. 698 (1992) (holding disparate requirements for establishment of new political parties violate First and Fourteenth Amendments).

108. *Burdick*, 112 S. Ct. 2059 (1992); *Norman*, 112 S. Ct. 698 (1992).

109. *Burson*, 112 S. Ct. 1846 (1992).

110. *Burdick*, 112 S. Ct. at 2067-68 (holding laws prohibiting write-in voting will be presumptively valid when burdens imposed on First and Fourteenth Amendments were reasonable); *Burson*, 112 S. Ct. at 1857-58 (holding law requiring campaign solicitors to refrain from distributing campaign materials within 100 feet of a polling area does not infringe on First Amendment rights); *Norman*, 112 S. Ct. at 708 (holding law requiring 25,000 signatures for new political party to get on ballot violated First and Fourteenth Amendments).

Norman v. Reed

The first of the three cases is *Norman v. Reed.*[111] It involved the requirements for getting a new political party on the ballot in Chicago and Cook County.[112] The law in this area is quite settled, the Court said, and it described the relevant principles:

> The constitution protects the right of citizens to create and develop new political parties. That right derives from the first and fourteenth amendment and advances the constitutional interests of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunity of all voters to express their own political preferences. To the degree that the state would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighted to justify the limitation. And we have accordingly required any severe restrictions to be narrowly drawn to advance a state interest of compelling importance.[113]

Well, again, this is a variation of the compelling interest test.[114] The case involved Chicago and Cook County politics and efforts of the Harold Washington Party (HWP) to expand to the Cook County suburbs.[115] Election officials claimed that the Cook County party could not use the HWP name because that belonged to the Chicago city party.[116] In addition, officials insisted that the new party, in order to run in districts that encompassed both the City of Chicago and areas of the suburbs within Cook County, had to get 25,000 petition signatures in Chicago and another 25,000 in the suburban areas, even though to run statewide all that was needed was a cap of 25,000 signatures.[117]

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111. 112 S. Ct. 698 (1992).

112. *Id.* at 702.

113. *Id.* at 705 (citing Illinois Election Bd. v. Socialist Workers Party, 440 U.S. 173, 184, 186 (1979)).

114. *Id.* at 705.

115. *Id.* at 702.

116. *Id.* at 702-03.

117. *Id.* at 702; *see* ILL. REV. STAT., ch. 46, §10-2 (1989).

The Supreme Court, by a 7-1 margin, held most of these restrictions invalid under the neo-compelling interest analysis described a moment ago.[118] First, while states may regulate the use of the political party names and designations in order to prevent fraud on the voters, in this instance such regulation was unnecessary since the new county-wide party had clear authority to use the HWP designation.[119] Second, requiring more signatures for local offices than for statewide slots is not a precise way to ensure that parties demonstrate substantial voter support before gaining access to the ballot.[120] In other words, if you want to run in a suburban district, you need 25,000 signatures there; if you want to run in the city district, you need 25,000 signatures there; but if you want to run in a county-wide district that comprises both, 25,000 is the maximum requirement that can be imposed.[121] Justice Scalia, the lone dissenter, felt the Illinois rule was valid in all respects since it was designed to require that parties file a complete slate of candidates in all geographical areas of the political unit and the signature requirement helps insure that broad local support.[122]

Burdick v. Takushi

In *Burdick v. Takushi*,[123] the Court dealt with a broader election law question, and that was the validity of a Hawaii ban on write-in voting.[124]

Six Justices concluded, in an opinion by Justice White, that the ban was not unconstitutional.[125] A state is not constitutionally required to provide for the casting, tabulation, and publication of

118. *See supra* note 113.
119. *Norman*, 112 S. Ct. at 707.
120. *Id.* at 708.
121. *Id.* at 707-08.
122. *Id.* at 710-11 (Scalia, J., dissenting).
123. 112 S. Ct. 2059 (1992).
124. *Id.*
125. *Id.* at 2067-68.

write-in votes so long as the state's electorate scheme otherwise affords constitutionally sufficient methods to get on the ballot.[126]

All Justices agreed that, despite the fundamental importance of the right to vote, there is no broad First Amendment right to cast a write-in protest vote,[127] not all burdens on the franchise require strict scrutiny by the courts,[128] and the states are given considerable leeway in managing their electoral systems.[129] The Justices were also in unanimous agreement that the Court weighs and measures the nature and magnitude of the harm to the right to vote, the precise interests asserted by the state, and the extent to which there is the need to burden the right to vote in order to achieve those interests.[130] Obviously, the more severe the burden on the right to vote, the greater the required justification, and vice versa.

But the Court was sharply divided over the application of these principles. For the majority, the injury and burden from the ban on write-in voting were moderate since Hawaii afforded several other ways for candidates to get on the ballot and voters to select them.[131] The majority found that one could get on the ballot by petitioning,[132] by forming a new party,[133] or by creating a separate ballot for Independents.[134] Given all of these other methods of access, the majority determined that denying the right to write people's name on the ballot is not unconstitutionally burdensome.[135] The majority further found that the state had valid interests in protecting against the confusion that would come if a

126. *Id.; but see* Paul v. Indiana Election Bd., 743 F. Supp. 616 (S.D. Ind. 1990) (holding state's ban on write-in voting violation of voter's rights of association and political expression); Canaan v. Abdelnour, 710 P.2d 268 (Cal. 1985) (striking down city's prohibition against write-in voting in municipal elections because it violated fundamental right of franchise).

127. *Burdick,* 112 S. Ct. at 2066; *id.* at 2068 (Kennedy, J., dissenting).

128. *Id.* at 2063-64; *id.* at 2069-70 (Kennedy, J., dissenting).

129. *Id.* at 2066; *id.* at 2069 (Kennedy, J., dissenting).

130. *Id.* at 2069-70 (Kennedy, J., dissenting).

131. *Id.* at 2064-65.

132. *Id.* at 2064.

133. *Id.*

134. *Id.* at 2065.

135. *Id.*

loser in a primary were then to mount a write-in campaign in the general election.[136] In order to prevent that kind of 'sore loser' write-in approach, the Supreme Court upheld the ban on the write-in voting.[137] Accordingly, the justifying interests did not have to be so weighty, and Hawaii's concerns with preventing 'sore-loser' candidacies, for example, a write-in campaign for Geraldine Ferraro or Elizabeth Holtzman, was sufficient.[138]

Justice Kennedy, along with Justices Blackmun and Stevens, saw a radically different political landscape.[139] To the dissenters, the ban on write-in voting was designed to perpetuate one-party rule in a state controlled by the Democratic Party and prevent effective write-in or insurgent candidates to challenge the party hacks.[140] Moreover, such a ban was contrary to a long historical tradition of permitting write-in votes as part of the democratic process, and served no valid interest.[141]

Burson v. Freeman

The final case concerning electoral rights dealt not so much with the ballot itself, but the area around the ballot, and the question of whether you could engage in First Amendment activities — handing out leaflets, political discussion — near the ballot box. Like the Hawaii case, the Supreme Court ruled in fa-

136. *Id.* at 2066. The Court explained the state interests in regulating write-in campaigns: avoiding factions in general elections; preserving the general election, not primaries, as the forum for interparty race; avoiding party raiding; and preventing circumvention of the state electoral system via primaries. *Id.* Other cases have enumerated additional state interests including voter education, Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 185 (1979) (assuring the winner of election will be supported by strong plurality); American Party of Tex. v. White, 415 U.S. 782, 785 n.14 (1974) (avoiding voter confusion); Canaan v. Abdelnour, 710 P.2d 268, 278 (Cal. 1985) (preservation of electoral process and regulating number of candidates).

137. *Burdick,* 112 S. Ct. at 2066.

138. *Id.*

139. *Id.* at 2068-69 (Kennedy, J., dissenting).

140. *Id.* (Kennedy, J., dissenting).

141. *Id.* at 2072 (Kennedy, J., dissenting).

vor of government control of the integrity of the electoral process and against the interests of political activists.[142]

The case is *Burson v. Freeman.*[143] It was a Tennessee case upholding a long-standing New York tradition of banning electioneering within one hundred feet of the polls.[144] We all know the familiar — I think it's diamond-shaped blue signs that say "no electioneering within one hundred feet of the polls."[145] It was a New York invention about a century ago.[146] It was challenged by a Tennessee campaign worker.[147] Now every state has a barrier of that kind, a kind of campaign-free zone.[148] The Tennessee Supreme Court threw out the ban,[149] finding the dissemination of leaflets about a candidate was core political speech.[150] It was in a

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142. *See* Burson v. Freeman, 112 S. Ct. 1846 (1992).

143. *Id.*

144. *Id.* at 1858. The century-old New York Law prohibits campaign speech within 100 feet of the polls on election day. Act of May 2, 1890, ch. 262, 335, 1890 N.Y. Laws 482, 494.

145. 18 Op. Att'y Gen. 245 (1896).

146. *See* Act of May 18, 1892, ch. 680, art. V, § 102, 1892 N.Y. Laws 1602, 1633 (Banks) which provided in relevant part: "No person shall, while the polls are open at any polling place, do any electioneering within such polling place, or within one hundred and fifty feet therefrom in any public street or room, or in a public manner." The current version of this provision is codified at N.Y. ELEC. LAW, art. 5, § 204(9) (McKinney 1978 & Supp. 1992).

147. *Burson,* 112 S. Ct. at 1848.

> That section reads in pertinent part: "Within the appropriate boundary as established in subsection (a) [100 feet from the entrances], and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited." Tenn. Code Ann. § 2-7-111(b) (Supp. 1991).

Id.

148. *Id.* at 1855.

149. Freeman v. Burson, 802 S.W.2d 210, 214 (Tenn. 1990), *rev'd*, 112 S. Ct. 1846 (1992).

150. *See id.* at 212, 214; *see also* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2564 (1992) (core political speech considered to be entitled to highest First Amendment protection); Lenhert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1960-61 (1991) (holding that union's use of service fees for lobbying or other political activities violated political speech rights at core of First

classic public forum, right there on the sidewalk.[151] The only speech that you cannot talk about within that zone is politics.[152] You can talk about commercial speech or anything else.[153] You just cannot talk about politics.[154] The statute was content-based[155] and it really did not carefully serve the government's interest in preventing voter fraud or voter intimidation.[156] For that reason, the Tennessee Supreme Court held the statute and ban on politicking within one hundred feet of the polls, not inside where people vote, but out on the street, violated the First Amendment.[157]

The Supreme Court reversed and upheld the one hundred foot ban,[158] although the Court was quite divided on this issue.[159] It was not an easy one. There was a four-Justice plurality opinion[160] written by Justice Blackmun that agreed serious restrictions on political activity were going on in this case,[161] but found that the state had a compelling interest in restricting handing out

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Amendment freedoms); Meyer v. Grant, 486 U.S. 414, 420 (1988) (holding statute prohibiting paying individuals to circulate petitions burdened "core political speech" and was thus subject to highest First Amendment scrutiny).

151. *Freeman*, 802 S.W.2d at 212. For further discussion of public forum analysis, see Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. 270 (1992) (holding that airport terminal was not public forum); United States v. Kokinda, 497 U.S. 720 (1990) (holding that sidewalk on Postal Service property was not traditional public forum); Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983) (holding that public school was not a traditional public forum, and state could regulate speech so long as restriction was reasonable and not an attempt to prevent expression of speaker's viewpoint).

152. *Freeman*, 802 S.W.2d at 214.

153. *See id.* at 212.

154. *Id.*

155. *Id.* at 213.

156. *Id.* at 214.

157. *Id.*

158. *Burson*, 112 S. Ct. at 1858.

159. Chief Justice Rehnquist and Justices Blackmun, White, Kennedy, and Scalia concurred in the judgment. Justices O'Connor, Souter, and Stevens dissented. Justice Thomas took no part in the decision of the case. *Id.* at 1848.

160. The plurality opinion written by Justice Blackmun was joined by Chief Justice Rehnquist, and Justices White and Kennedy. *Id.*

161. *Id.* at 1850.

leaflets and engaging in political discussion within one hundred feet of the poll.[162]

One disturbing thing about the case is that the Court purported to be applying a compelling interest test and did a lot of breast beating about how seriously we take First Amendment rights.[163] But the evidence relied on by the Court was what was going on in Tammany Hall in New York in 1882.[164] Despite the Court's representations, the measure of scrutiny that was in fact given was considerably less demanding, and the Court upheld the ban not because of any evidence of present problems, but because of history and tradition.[165] The latter provided the most current evidence of voter fraud and people being badgered outside the polls.[166] In fairness to the Court, there were a few episodes in the twentieth century,[167] but by and large, maybe because there had been a ban for years in many states,[168] there really was no evidence that voters were being bribed, buttonholed, harassed, or intimidated down the block from the entrance to the school where the voting booths were located.[169] Nonetheless, purporting to apply the compelling interest test, the Court said this was one of those rare cases where a restriction on speech would be upheld because the government had a compelling interest.[170] Justice Scalia concurred in the result, but not in the reasoning.[171] For

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162. *Id.* at 1851.

163. *Id.* at 1849-51.

164. *See generally* GUSTAVUS MYERS, THE HISTORY OF TAMMANY HALL (2d ed. 1971).

165. *See Burson,* 112 S. Ct. at 1852-56.

166. The decision itself describes fraud and corruption during the colonial period through the nineteenth century. *Id.* at 1852-54. It did not describe any twentieth century voter fraud outside the polls.

167. *E.g.*, United States v. Malmay, 671 F.2d 869 (5th Cir. 1982) (conviction for buying votes in school board election); Lowenstein v. Larkin, 40 A.D.2d 604, 335 N.Y.S.2d 799 (2d Dep't 1972) (overturning primary election results because there was active campaigning at polling place).

168. *Burson*, 112 S. Ct. at 1855-56.

169. *Id.* at 1856.

170. *Id.* at 1857.

171. *Id.* at 1859-60 (Scalia, J., concurring).

him, tradition conclusively controlled the matter.[172] Since the area immediately surrounding the polling place had always been treated as off-limits for electioneering, it was not a traditional public forum, and reasonable regulation of access to it was acceptable.[173]

Justice Kennedy likewise concurred,[174] and explained why his concurrence was not inconsistent with his concurrence in the "Son of Sam" decision[175] where he harshly condemned the routine use of a compelling interest formula to limit otherwise protected speech.[176] The difference, he maintained, was that Tennessee was not so much censoring the content of the speech as protecting another vital constitutional right: the right to vote.[177]

The dissenters[178] were not buying any of this. They said the ban raised concerns of the first magnitude.[179] They said that the claim that it was necessary in order to protect the integrity of the electoral process bordered on the absurd.[180] As I noted, the fresh evils were few and far between. The dissenters said that the Court's watered-down use of strict scrutiny under the compelling interest test lifted the burden of proof from the government where it belonged,[181] and shifted it to the First Amendment challenger, where it did not belong.[182] Lastly, the dissenters observed, "[a]lthough we often pay homage to the electoral process, we must be careful not to confuse sanctity with silence. The hubbub of campaign workers outside a polling place may be a nuisance,

172. *Id.* (Scalia, J., concurring).

173. *Id.* at 1860 (Scalia, J., concurring).

174. *Id.* at 1858 (Kennedy, J., concurring).

175. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 512 (1992) (Kennedy, J., concurring).

176. *Burson*, 112 S. Ct. at 1858-59 (Kennedy, J., concurring).

177. *Id.* at 1859 (Kennedy, J., concurring).

178. Justices Stevens, O'Connor, and Souter dissented.

179. *Burson*, 112 S. Ct. at 1861 (Stevens, J., dissenting).

180. *Id.* at 1862 (Stevens, J., dissenting).

181. *Id.* at 1865-66 (Stevens, J., dissenting). The dissent corrected the majority's analysis by referring to Dunn v. Blumstein, 405 U.S. 330, 342 (1972). In *Dunn*, the Court articulated that under a strict scrutiny analysis, the state bears the burden of demonstrating a compelling governmental interest. *Id.*

182. *Burson*, 112 S. Ct. at 1866 (Stevens, J., dissenting).

but it is also the sound of a vibrant democracy."[183] In this last regard, I think the dissenters were correct. And I think that is one consequence of *Burson* which will go well beyond the election law area and will have repercussions in other First Amendment cases as well. If the very weak evidence of voter intimidation and duress was held to sustain the compelling interest test in this case, then it is hard to imagine what kind of mild showing of concern would not be successful. Maybe I am being a little too pessimistic about that.

Finally, I believe this case reflects the fact that in a couple of recent cases, the Court had been fairly deferential to legislative claims that certain kinds of political activities will corrupt or pollute the political process.[184] But when you remember that it is politicians in the legislature that are making those claims, I think scrutiny and not deference should be the order of the day. Just as war is too important to be left to the generals' control, political speech is too important to be left to the politicians.

III. TIME, PLACE, AND MANNER

The one hundred foot polling case was an election law case as well as a time, place and manner case.[185] The case dealt with restrictions on speech activity triggered by content, but operating on the basis of where and how your speech goes forward.[186] It is like the old joke that the three most important factors of real estate are location, location, location. This Term the Supreme Court had three cases dealing with location, location, location.[187]

183. *Id.* at 1866-67 (Stevens, J., dissenting).

184. *E.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (restrictions on corporate political activity upheld).

185. *Burson*, 112 S. Ct. at 1850.

186. *Id.*

187. Lee v. International Soc'y For Krishna Consciousness, 112 S. Ct. 2709 (1992) (holding ban on distribution of literature in Port Authority airport terminals was valid under First Amendment because it would cause substantial congestion at airport); Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992) (invalidating parade permit license fee scheme); Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992) (upholding limits on location of labor organization activity).

In addition, as I just noted, the Court upheld the one hundred foot ban in the Tennessee case.[188]

Lee v. International Society For Krishna Consciousness

The Court's doctrinally most significant case in this area was closer to home than Tennessee.[189] It involved the Port Authority airports — Kennedy, LaGuardia, and Newark — and the efforts by the Hare Krishna religious group to distribute leaflets and solicit contributions[190] inside the terminals at those airports.[191] They engage in such activities as part of their religious ritual.[192] However, the Port Authority has a rule against repetitious solicitation of money or distribution of literature in terminal

188. *Burson*, 112 S. Ct. at 1858.

189. The case originated in the United States District Court for the Southern District of New York. *See* Int'l Soc'y For Krishna Consciousness v. Lee, 721 F. Supp. 572 (S.D.N.Y. 1989), *aff'd in part*, 112 S. Ct. 2701 (1992). Summary judgment was granted in favor of the Krishnas. *Krishna*, 721 F. Supp. at 579. At the appellate level, the Second Circuit affirmed the regulation prohibiting in-person solicitation of the funds, Int'l Soc'y For Krishna Consciousness v. Lee, 925 F.2d 576, 581-82 (2d Cir. 1991), *aff'd*, 112 S. Ct. 2701 (1992), but found that the ban on the distribution of literature was invalid under the Constitution. *Id.* at 582, *aff'd per curiam sub nom.* Lee v. Int'l Soc'y For Krishna Consciousness, 112 S. Ct. 2709 (1992). The Supreme Court considered two issues in the case in one opinion, *see* Int'l Soc'y For Krishna Consciousness v. Lee, 112 S. Ct. 2701 (1992) (exploring whether airport terminal was public forum under First Amendment and whether prohibition on the solicitation of funds was constitutional), and considered the last issue in a separate decision. The Court resolved the final issue in yet another opinion, *see* Lee v. Int'l Soc'y For Krishna Consciousness, 112 S. Ct. 2709 (1992) (per curiam) (exploring whether First Amendment invalidated ban on distribution of literature). The opinions of the concurring and dissenting Justices were set forth in a distinct and separate decision. *See* Int'l Soc'y For Krishna Consciousness, 112 S. Ct. 2711 (1992) [hereinafter *Krishna 2*].

190. Lee v. Int'l Soc'y For Krishna Consciousness, 112 S. Ct. at 2708-09 (per curiam).

191. Lee v. Int'l Soc'y For Krishna Consciousness, 112 S. Ct. at 2710.

192. International Soc'y For Krishna Consciousness v. Lee, 112 S. Ct. 2701 (1992). The "ritual [is] known as *Sankirtan*, which consists of 'going into public places, disseminating religious literature, and soliciting funds to support the religion.'" *Id.* at 2703 (quoting International Soc'y for Krishna Consciousness v. Lee, 925 F.2d at 577).

locations.[193] However, the Port Authority has a rule against repetitious solicitation of money or distribution of literature in terminal locations.[194] The rule was challenged by the religious group.[195]

The litigation went on for a long, long time,[196] but then a divided panel of the Second Circuit upheld the ban on soliciting for money but struck down the restriction on the simple distribution of literature.[197] The Second Circuit got it absolutely right as far as the Supreme Court was concerned, and they agreed precisely with the circuit court of appeals and upheld the ban on soliciting for funds and contributions[198] while invalidating the ban on simply handing out leaflets and literature.[199]

Justice O'Connor was the swing vote on both issues.[200] She joined one majority to uphold the no fund solicitation ban[201] but she joined the other group to strike down the distribution of literature ban.[202] Justice O'Connor took the position that a ban on

193. International Soc'y For Krishna Consciousness v. Lee, 721 F. Supp. at 574 n.4 (1991).

194. *Id.*

195. *Id.* at 573.

196. *Id.* The action was first commenced in 1975 against the Port Authority and its then Superintendent, Walter Lee. *Id.* Final decision was rendered by the Supreme Court in 1992.

197. International Soc'y For Krishna Consciousness v. Lee, 925 F.2d 576, 577 (1991), *aff'd per curiam sub nom.* Lee v. International Soc'y For Krishna Consciousness, 112 S. Ct. 2709 (1992).

198. Lee v. International Soc'y For Krishna Consciousness, 112 S. Ct. at 2709 (per curiam).

199. *Id.* at 2710 (per curiam).

200. Justice O'Connor concurred, upholding the ban on solicitation of funds within the Port Authority airport terminals, *Krishna 2*, 112 S. Ct. 2711 (1992) (O'Connor, J., concurring). She also concurred in the judgment striking down a ban on the repetitive distribution of printed or written material within the terminals. *Id.* (O'Connor, J., concurring).

201. *Krishna*, 112 S. Ct. at 2703. This ruling was joined by Justices Scalia, Thomas, White, O'Connor, and Chief Justice Rehnquist. Justices Kennedy, Blackmun, Stevens, and Souter formed the other basic block.

202. *Krishna*, 112 S. Ct. at 2710 (per curiam). This ruling was joined by Justices Blackmun, Kennedy, O'Connor, Souter, and Stevens.

the distribution of literature was not reasonable[203] and she joined the four other Justices to form a dispositive majority on that issue. In her view, since the Port Authority was basically running a multi-purpose facility, much like a mini-shopping mall, leafleting was compatible with the location, and a total ban on it was unreasonable.[204]

The case has significance in two respects. First, it adds to the question of how you define a public forum.[205] The Court has developed this public forum concept to determine whether a speaker is presumptively entitled to engage in speech at a certain location, what kinds of regulations the government can seek to impose, and the kinds of justifications must be given. The courts have developed a kind of a tripartite categorization structure.[206] Let me just share the Court's description with you.

First, you have what is referred to as a traditional or a full public forum.[207] This encompasses government property that has traditionally been available for public expression.[208] Any restrictions on speech in that context are subject to the highest scrutiny.[209]

The second category is a so-called designated public forum.[210] That is an area which had not been used for speech until the government said now we are going to use it for speech.[211] Once a government designates an area in that fashion, it becomes just

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203. Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. at 2711 (O'Connor, J., concurring).

204. *Id.* (O'Connor, J., concurring).

205. *Id.* (O'Connor, J., concurring).

206. Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983).

207. *See id.* at 45. A full public forum is a "plac[e] which by long tradition or by government fiat ha[s] been devoted to assembly and debate . . . ." *Id.*

208. *Id.* (streets and parks are "quintessential public forums").

209. *Id.* (regulations are subject to compelling state interest). For further discussion of the compelling interest test, see Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987).

210. *Perry*, 460 U.S. at 45 ("public property which the State has opened for use by the public as a place for expressive activity").

211. *Id.*

like a regular public forum, and the same limits on government censorship apply.[212]

Finally, all that is remaining is public property other than a public forum or a dedicated public forum,[213] which is referred to as a nonpublic forum.[214] In that context, limitations on expressive activity must only survive a much more limited review.[215] The challenged regulation need only be reasonable as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.[216]

Since there are public forums, designated public forums, and nonpublic forums, the primary issue is always going to be which type of forum is concerned. Where it is a nonpublic forum, the secondary issue is going to be what kind of reasonable restrictions may be imposed on the speech.[217]

On the first question, the Court did not find the terminal areas at airports to be public forums.[218] The Supreme Court, by a 5-4 vote,[219] took a narrow view of what qualifies as a public forum. The Court said, basically, only places which traditionally or by primary activity are for speech purposes will be considered a public forum.[220] The government does not create a public forum by inaction nor does it create one simply by permitting public access.[221]

Applying these very restrictive tests in regard to what constitutes a public forum, the Court concluded that airport terminals

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212. *Id.* at 46. ("Although a State is not required to indefinitely retain the open character of a facility, as long as it does so it is bound by the same standards as apply in traditional public forum.").

213. *Id.* ("public property which is not by tradition or designation a forum for public communication").

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 49.

218. International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2708 (1992).

219. *Id.* at 2703.

220. *Id.* at 2705.

221. *Id.* at 2706.

were not public forums either by tradition or designation.[222] Instead, they were deemed nonpublic forums where regulation of speech activities only had to survive a reasonableness review.[223]

As I pointed out, under that test, while the ban on handing out literature was found to be unreasonable, the ban on solicitation of funds was found to be reasonable to protect air travelers from harassment or fraud.[224] The four Justices who dissented from the public forum concept definition were led by Justice Kennedy.[225] This is one of those opinions that marks Justice Kennedy as taking a robust position on First Amendment issues.[226] He basically said that in a democracy, people need places to come and meet and talk with one another about politics and government and other kinds of things, and it derives not just from the Press Clause[227] or the Speech Clause of the First Amendment,[228] but from the Assembly Clause as well.[229] The right of the people to assemble is also part of the concept of the public forum.[230]

Accordingly, Justice Kennedy would take a very different approach to define whether a certain location was a public forum. His approach was: "If the objective physical characteristics of the property at issue and the actual public access and uses which have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the

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222. *Id.* at 2706-07.

223. *Id.* at 2705-06.

224. *Id.* at 2704.

225. *See Krishna 2*, 112 S. Ct. 2711, 2715 (1992). Four Justices, led by Justice Kennedy, concurred in the judgment, but differed substantially in the reasoning. Primarily, they differed with respect to the public forum principles as enumerated and applied by the majority.

226. *See infra* note 385 and accompanying text.

227. *Krishna 2*, 112 S. Ct. at 2716-17 (Kennedy, J., concurring); *see* U.S. CONST. amend. I, cl. 4 ("Congress shall make no law . . . abridging the freedom . . . of the press").

228. *Krishna 2*, 112 S. Ct. at 2716-17; *see* U.S. CONST. amend. I, cl. 3 ("Congress shall make no law . . . abridging the freedom of speech").

229. *Krishna 2*, 112 S. Ct. at 2716-17; *see* U.S. CONST. amend. I, cl. 5 ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble") .

230. *Krishna 2*, 112 S. Ct. at 2716-17 (Kennedy, J., concurring).

property is a public forum."[231] Since it is not incompatible to hand out leaflets in a busy airport where people are selling beer and lobsters and everything else, that is a public forum where speech can go forward. [232]

Applying these full public forum principles, Justice Kennedy would strike the ban on distribution and sale of literature, but allow the limitation on solicitation and receipt of funds.[233] Justices Souter, Blackmun, and Stevens would go further and invalidate the ban on solicitation of funds as well, finding that it was not narrowly tailored to the objective of protecting against fraud and duress, both of which can be banned directly.[234]

Therefore, the difference between the majority and the dissenters on that issue is that the majority basically looks to tradition and government action to decide whether a place is a robust public forum for speech activity,[235] whereas the dissenters would look to a test of incompatibility.[236] In a public place, where people gather, you are entitled to gather there for speech unless there is something incompatible between your speech and the functions of the place.[237] The dissenters felt that nothing incompatible could be shown between handing out leaflets or soliciting funds and the multipurpose uses of Newark, Kennedy, and LaGuardia airport terminals.[238]

Although the result in this case constitutes a one-half victory for the First Amendment position, the majority's narrow definition of a public forum was too grudging and inhospitable. There was a parallel ruling in a statutory setting, in a case where the Court took a similarly restrictive approach to the question of whether union organizers could use the parking lot of an employer-owned shopping center to hand out union literature.

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231. *Id.* at 2718 (Kennedy, J., concurring).

232. *Id.* at 2719 (Kennedy, J., concurring).

233. *Id.* at 2715 (Kennedy, J., concurring).

234. *Id.* at 2725-26 (Souter, J., dissenting).

235. Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. at 2706-07.

236. *Krishna 2*, 112 S. Ct. at 2724 (Souter, J., concurring).

237. *Id.* at 2725 (Souter, J., concurring).

238. *Id.* (Souter, J., concurring).

Lechmere, Inc. v. NLRB

The statutory case dealing with the locus of speech was *Lechmere, Inc. v. NLRB*.[239] The basic question in this case was the extent to which, under the federal labor laws,[240] union organizers could come onto a shopping center parking lot to try and talk to and organize workers at the main store in the shopping center.[241] The opinion was written by Justice Thomas,[242] and it was one of the first opinions he wrote.[243] The Court was divided 6-3.[244] He took a very narrow view of the union organizers' rights.[245]

The union organizers had been trying for months to organize workers at the main retail store in a Connecticut shopping center.[246] When they sought to enter the center's parking lot to hand out leaflets, the store refused to allow the activity, thus forcing the organizers onto an area outside the parking lot entrance which abutted a busy divided highway.[247] The NLRB ordered the employer to permit the union officials back onto the parking lot,[248] but the Supreme Court overturned the Board's order.[249]

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239. 112 S. Ct. 841 (1992).

240. Labor Management Relations Act of 1947, 29 U.S.C. § 157 (1989).

241. *Lechmere*, 112 S. Ct. at 843-44.

242. *Id.* at 843.

243. Prior to authoring *Lechmere*, Justice Thomas penned Molzof v. United States, 112 S. Ct. 711 (1992), and filed a concurring opinion in White v. Illinois, 112 S. Ct. 736 (1992).

244. *Lechmere*, 112 S. Ct. at 850. The three dissenters were Justices White, Blackmun, and Stevens.

245. Justice Thomas took a narrow view in construing what constitutes "reasonable access" to employees by nonemployee union organizers. *Id.* at 848-49. In his view, accommodation between employer's property rights and the right of the unions to disseminate information for purposes of organizing unions occurs "so long as nonemployee union organizers have reasonable access to employees outside an employer's property." *Id.* at 848. Thus, an employer's property rights should not yield simply because nontrespassory access to employees is "cumbersome or less than ideally effective." *Id.* at 849.

246. *Id.* at 844.

247. *Id.*

248. *Id.* at 844-45.

249. *Id.*

The Court basically said that the National Labor Relations Act[250] (N.L.R.A.) protects employees.[251] Justice Thomas made a number of significant anti-union points. First, the National Labor Relations Act gives employees, and not others, the basic right to organize.[252] Second, where employees want to use employer premises and property for protected organizing activities, a balancing and accommodation of rights must be undertaken.[253] Third, where access by non-employees is concerned, if such persons have reasonable access to employees outside an employer's property, the employer is privileged to deny permission to come onto the premises.[254] Finally, only where such access is not feasible must there be a balancing process.[255] Finding that off-premise access was easily available, the Court held in favor of the employer and against the NLRB.[256]

Thus, neither the First Amendment nor the N.L.R.A. provide an effective right of access to private property for speech purposes. The Act does not directly protect union organizers.[257] They are protected as necessary to help the employees assert their rights under the statute.[258] Here, no employees were seeking to gain access to the parking lot in order to speak. Access to workers will be permitted on private property only where there are isolated locations,[259] like logging camps or farms.[260] Except for

250. Labor Management Relations Act of 1947, 29 U.S.C. § 157 (1989).

251. *Lechmere,* 112 S. Ct. at 845.

252. *Id.* at 846.

253. *Id.* at 848 (citing NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956)).

254. *Id.*

255. *Id.*

256. *Id.* at 849-50.

257. *Id.* at 845.

258. *Id.*

259. *See* Central Hardware Co. v. NLRB, 407 U.S. 539, 544-45 (1972) (property rights of employers may be temporarily "yielded" when "alternative channels of communication" between nonemployee union organizers and isolated employees are nonexistent); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) (employer is under no obligation to allow nonemployee union organizers on his property absent showing by union that employees' place of employment or homes place them "beyond the reach of reasonable union efforts to communicate with them").

those situations, private property is private property. If that means the union organizers have to stand out by the edge of the highway and hand out their literature as people drive in and out of the parking lot, that is the price one pays for protecting private property.[261] This was an anti-union kind of decision, and it rejected claims of speech rights in a statutory setting.

Forsyth County v. Nationalist Movement

The final time, place, and manner case is *Forsyth County v. Nationalist Movement.*[262] It really deals with an old chestnut kind of issue, a parade permit ordinance.[263] The setting was rural Georgia, an atmosphere filled with racial tension.[264] To protest the troubled racial history of rural Forsyth County, Georgia, there was a small civil rights demonstration in 1987.[265] The protesters chose that area because at the turn of the century there had been a mass expulsion of all the black citizens living in that community.[266] The town from that point on had been 99% white.[267]

Civil rights protesters went to the county to hold their march.[268] They were met with five times as many counter-demonstrators who yelled racial epithets and threw rocks, and the

260. *Lechmere*, 112 S. Ct. at 846; *Babcock*, 351 U.S. at 112-13.

261. *Lechmere*, 112 S. Ct. at 846.

262. 112 S. Ct. 2395 (1992).

263. *See* Hague v. CIO, 307 U.S. 496 (1939).

264. *Forsyth*, 112 S. Ct. at 2398-99.

265. *Id.* The demonstration was held on January 17, 1987 and was entitled "March Against Fear and Intimidation." *Id.* at 2398.

266. During one month in 1912, the entire black population was systematically driven from Forsyth County. *Id.* at 2398 n.1. The expulsion followed the murder of a white woman and the lynching of the accused black murderer. *Id.*

267. The 1910 census calculated 1,098 African Americans in Forsyth County. Through 1987, 99% of the population of the county remained white. *Id.* at 2398 n.1 (citing Dep't of Commerce, Bureau of Census, Negro Population 1790-1915, at 779 (1918)).

268. *Id.*

march had to retreat.[269] Determined not to be intimidated, the civil rights marchers returned the following weekend and brought 20,000 friends with them, which turned out to be the largest civil rights march in the south since the 1960s.[270]

Protecting the competing groups from one another cost the local government $670,000.[271] In response, the county passed an ordinance[272] providing that in order to have a parade, marchers must obtain a parade permit and the county could charge a fee up to $1,000 per day for the activity to help defray the cost of maintaining order.[273]

A right-wing group called the Nationalist Movement challenged this parade fee.[274] The Nationalist Movement sought a parade permit to hold a rally protesting the Martin Luther King, Jr. federal holiday.[275] The county imposed a $100 permit fee which the Movement refused to pay.[276] Even though they were told they would only have to pay $100,[277] the law permitted a fee of up to $1,000 so the Nationalist Movement officers were allowed to challenge the law on its face.[278]

The question raised goes back to cases forty or fifty years ago, cases like *Cox v. New Hampshire*[279] and *Murdoch v. Pennsylvania*,[280] about whether the government can require a permit, li-

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269. The marchers were met by the Forsyth County Defense League, the Ku Klux Klan, and other residents. There were 400 counter-demonstrators. *Id.* at 2398-99.

270. *Id.* at 2399.

271. *Id.*

272. Forsyth County, Ga. Ordinance 34 (Jan. 27, 1987 amended June 8, 1987).

273. *Id.*

274. *Forsyth*, 112 S. Ct. at 2400.

275. *Id.* at 2399.

276. *Id.* at 2400.

277. *Id.* at 2399.

278. *Id.* at 2400.

279. 312 U.S. 569 (1941) (upholding state law requiring parade permits).

280. 319 U.S. 105 (1943). In *Murdoch*, the Supreme Court held unconstitutional a local ordinance which imposed upon religious colporteurs a license tax as a condition to the pursuit of their activities. *Id.* at 117. The Court constitutionally distinguished between an impermissible tax on the exercise of a federal right and a proper regulatory measure to defray the

cense, or fee in order to hold a demonstration. The basic answer was what it was back then, yes.[281] The government can have a permit or licensing scheme for marches, rallies and demonstrations.[282] The government may regulate competing uses of the public forum via permit requirements. However, the licensing or permit scheme must follow established guidelines to insure that the decision is based on objective and neutral criteria and is not a cover for suppression of unpopular groups and ideas.[283]

What the ordinance cannot do is give the government official unfettered discretion to determine the amount of the fee where that determination is going to be based on a prediction of how provocative the speaker's message will be, how likely there will be a hostile reaction to that message, and therefore, how much it is going to cost to maintain law and order.[284] The majority basically said the county can require the license, but it cannot give the official discretion to decide what the message is, how provocative it is, what the counter-message is, how provocative that will be, and how much police protection against reaction to the ideas will cost.[285] That particular statute was thrown out.[286] The First Amendment does not permit such a financial penalty on the right to protest and communicate provocative or offensive ideas.[287] To the argument that it was only $100 fee in that particular case, Justice Blackmun pithily responded, "a tax based on

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expense of protecting citizens against the potential abuses of solicitors. *Id.* at 116-17.

281. *Forsyth* 112 S. Ct. at 2402-03; *see also Cox*, 312 U.S. at 576. Within a municipality's authority to control the use of its public streets for parades or processions is the authority to give nondiscriminatory consideration to time, place, and manner in relation to other proper uses of the streets. *Cox*, 312 U.S. at 576.

282. *Cox*, 312 U.S. at 574 (regulation of use of streets for parades and processions is traditional exercise of control by local government); *Forsyth*, 112 S. Ct. at 2401.

283. *Forsyth*, 112 S. Ct. at 2403.

284. *Id.* at 2403-04.

285. *Id.* at 2405.

286. *Id.*

287. *Id.*

the content of speech does not become more constitutional because it is a small tax."[288]

The four dissenters[289] thought it was all a bit of a tempest in a teapot. It had not even been clear that there was that much discretion to say that one group had to pay up to $1,000 and another group had to pay only $100.[290] Since the Court felt a nominal fee was clearly consistent with old cases on parade permits,[291] and since $100 was nominal,[292] there really was not any occasion for the decision.[293] But the majority said whether or not fees of this kind can be imposed, they cannot be imposed under a standardless, broad discretionary scheme of this kind.[294]

Forsyth involved some very difficult issues of race and race conflict in America — civil rights marchers, hostile audiences, hostile marchers — and sort of set the stage, if you will, for the two major cases of the Term, the two final cases I am going to discuss — which dealt with very sensitive issues in our society[295] and tested the Court's commitment to constitutional rights. The Court passed the test, from my perspective.

R.A.V. v. City of St. Paul

The first of the last two cases I will discuss is *R.A.V. v. City of St. Paul.*[296] This case involved a crudely homemade cross that was burned on the front lawn of a black family's home in St. Paul about four or five years ago.[297] A number of teenagers were

288. *Id.*

289. Chief Justice Rehnquist and Justices White, Scalia, and Thomas.

290. *Forsyth*, 112 S. Ct. at 2399.

291. *Id.* at 2405 (finding the fee consistent with Murdock v. Pennsylvania, 319 U.S. 105 (1943) and Cox v. New Hampshire, 312 U.S. 569 (1941)).

292. *Forsyth*, 112 S. Ct. at 2405.

293. *Id.* at 2404-05.

294. *Id.* at 2403.

295. Lee v. Weisman, 112 S. Ct. 2649 (1992) (separation of church and state); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (hate speech and racism).

296. 112 S. Ct. 2538 (1992).

297. *Id.* at 2541.

arrested following the incident.[298] Although several serious criminal charges could have been brought against the youths,[299] instead they were charged under the local bias motivated crime ordinance.[300] Well, the title is a misnomer because the ordinance does not deal with enhanced punishment for traditional crimes committed with biased motives. It basically outlawed biased speech. The ordinance provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[301]

It is undisputed that the ordinance was flatly unconstitutional.[302] The government is not allowed to outlaw speech that simply arouses anger, alarm, or resentment in people.[303] The Minnesota Supreme Court recognized that and construed the ordinance as only reaching biased, fighting words.[304] In other words, the ordinance only prohibited bigoted messages dealing with race, color, creed, religion, or gender in a manner which inflicted injury or tended to incite immediate violence.[305]

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298. *Id.*

299. They could have been charged with arson, terrorism, and trespass with criminal intent. *Id.*

300. *Id.* at 2541; ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990).

301. *R.A.V.*, 112 S. Ct. at 2541; ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990).

302. *R.A.V.* 112 S. Ct. at 2550. All of the Justices concurred in the judgment, despite varying rationales for reaching this conclusion. *Id.* at 2541.

303. *Id.* at 2550; *see* United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 414 (1989); Hustler Magazine v. Falwell, 485 U.S. 46, 55-56 (1988); FCC v. Pacific Found., 438 U.S. 726, 745 (1978).

304. *In re R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991), *rev'd sub nom.* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (court narrowly interpreted statute as applying only to *Chaplinsky's* "fighting words").

305. 464 N.W.2d at 510.

In spite of this attempted surgery by the Minnesota Supreme Court, the United States Supreme Court concluded that the ordinance, even as narrowed, was fatally flawed.[306] The Supreme Court unanimously threw out that hate speech statute.[307] Although all nine Justices agreed with that result,[308] they bitterly disagreed about the proper reasoning and doctrine to reach that result.

I would first like to discuss concurring Justices White, Blackmun, Stevens, and O'Connor.[309] They took a more modest and traditional path to the result. They found that, despite the narrowing interpretation by the Minnesota Supreme Court, the ordinance could still be applied to hate messages that only caused hurt feelings, offense or resentment.[310] Since such speech is protected by the First Amendment, the ordinance remained fatally overbroad and invalid on its face.[311] However, these four Justices all took the position that the particular hate message that was targeted to the audience, and only those messages, could be outlawed under a more carefully crafted enactment.[312]

Justice Scalia, speaking for a five-Justice majority,[313] took a bolder position. He said, "[a]ssuming, *arguendo,* that all of the expression reached by the ordinance is proscribable under the 'fighting words' doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[314] He based his conclusion on a number of prem-

306. *R.A.V.*, 112 S. Ct. at 2550.

307. *Id.*

308. *Id.* at 2541. The opinion of the Court, written by Justice Scalia, was joined by Justices Kennedy, Souter, Thomas, and Chief Justice Rehnquist. Concurring opinions were filed by Justices White, Blackmun, and Stevens joined by Justice O'Connor.

309. *Id.*

310. *Id.* at 2559-60 (White, J., concurring).

311. *Id.* (White, J., concurring).

312. *Id.* at 2554 (White, J., concurring).

313. *Id.* at 2541. The majority was composed of Justices Scalia, Kennedy, Souter, Thomas, and Chief Justice Rehnquist.

314. *Id.* at 2542.

ises.[315] He believed the core purpose of the First Amendment is to prevent government from outlawing speech because of disapproval of the ideas expressed.[316]

Justice Scalia stated that although certain categories of speech can be regulated because of their content,[317] it does not mean that once speech falls within those few disfavored categories it can be regulated unconditionally, like garbage.[318] Rather, it means that those areas of speech can be regulated consistently with the First Amendment because of their constitutionally proscribable content.[319] Justice Scalia concluded that it does not mean that they are "categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."[320]

Justice Scalia gave a number of examples of how this approach was applied in decided as well as hypothetical cases. He noted that although obscenity could be banned, it does not mean the

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315. Justice Scalia began his opinion on the premise that government cannot proscribe speech, or even expressive conduct, because it disapproves of the ideas expressed. *Id.* at 2542. Content-based regulations are presumptively invalid. *Id.* However, there are areas of speech which, consistent with the First Amendment, can be regulated because of their proscribable content, such as obscenity and defamation. *Id.* at 2543. Moreover, a particular instance of speech can be proscribable on the basis of one content element, but not on other content elements. *Id.* at 2544. Justice Scalia then noted that fighting words are excluded from the First Amendment scope, but a government cannot regulate their use based upon hostility or favoritism towards their underlying message. *Id.* at 2545. Justice Scalia stated that the First Amendment imposes a "content discrimination" limitation upon a state's prohibition of proscribable speech. *Id.*

316. *Id.* at 2542.

317. *E.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964) (holding defamation actions brought against public officials must make a showing of actual malice); Roth v. United States, 354 U.S. 476 (1957) (upholding federal obscenity statute punishing use of mails for obscene material); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding fighting words were not within First Amendment protections).

318. *R.A.V.*, 112 S. Ct. at 2543.

319. *Id.*

320. *Id.*

government could ban only obscenity that contains an anti-government message.[321] Furthermore, Justice Scalia explained that flag burning could be punished under an ordinance against outdoor fires, but not under a flag "desecration" law.[322] Government can regulate all noisy sound trucks, but not just noisy socialist sound trucks.[323] Justice Scalia also applied the same principle applied to the fighting words category: that there are unprotected, nonspeech features to fighting words does not mean that government has *carte blanche* to regulate some provocative ideas, but not others.[324] Therefore, Justice Scalia reasoned, the First Amendment imposes a kind of fallback "content discrimination" limitation upon the state's prohibition even of proscribable speech.[325] The purpose of this fallback protection is to ensure "that there is no realistic possibility that official suppression of ideas is afoot."[326] The "official suppression of ideas" is the core evil against which the First Amendment was written.[327]

Another example Justice Scalia gave was that "government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."[328] In other words, he viewed the First Amendment ban on censorship and content discrimination as a limitation on any effort by the state to pick and choose which messages would be allowed and which would be proscribed even within an area where presumptively all of the messages are proscribable.[329] Applying this principle to the St. Paul ordinance, Justice Scalia concluded that even though the ordinance as construed was limited to fighting words, it was only fighting words having to do with certain categories of bigotry that would lead to punishment under the stat-

321. *Id.* at 2543-44.
322. *Id.* at 2544.
323. *Id.* at 2545.
324. *Id.* at 2543-44.
325. *See generally id.* at 2544-47.
326. *Id.* at 2547.
327. *Id.*
328. *Id.* at 2543.
329. *Id.* at 2547.

ute.[330] If an individual uttered the most abusive and outrageous words attacking a person's politics, sexual orientation or mother, no crime had been committed under the ordinance.[331] It was only if the individual uttered fighting words based on race, gender or the other protected categories within the statute that an individual could go to jail.[332] Justice Scalia viewed that as "viewpoint discrimination."[333] Such content differentiation is forbidden by the First Amendment.[334]

Justice Scalia concluded that for that reason, "the First Amendment [did] not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[335] Finally, Justice Scalia determined that the ordinance also seemed to allow some fighting words if used to favor the cause of tolerance, but not the cause of bigotry.[336] For example, if a Klansman shouted a racial epithet at a black person, the ordinance would be violated; if the black person responded by calling the Klansman a "racist pig," the comment would be privileged.[337] As the Court puts it: "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."[338] The Court concluded that while the goal of protecting certain groups is compelling, it does not need to be achieved by suppressing disfavored offensive ideas.[339]

When the doctrinal dust had settled, the Court had ruled, perhaps not surprisingly, that the same First Amendment that protects flag burning protects cross burning.[340] In both cases, the

330. *Id.* at 2547-48.
331. *Id.*
332. *Id.*
333. *Id.*
334. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
335. *R.A.V.*, 112 S. Ct. at 2547.
336. *Id.* at 2547-48.
337. *Id.* at 2548.
338. *Id.*
339. *Id.*
340. *Id.* at 2550.

ideas conveyed are hateful; however, the Court reasoned that is precisely why they cannot be outlawed and must be protected.[341]

The concurring Justices charged the majority with unnecessarily unsettling established First Amendment doctrine.[342] Since the entire category of fighting words can generally be punished, targeting only a subset of that prohibitable category was no less valid.[343] There was no value to messages of racial hatred, and the government was entitled to determine that fighting words containing such messages are more problematic, blameworthy and prohibitable than other kinds of hateful speech.[344]

Let me just briefly note a couple of important implications of the St. Paul hate speech case. First, numerous similar laws and ordinances throughout the country will have to be revised in order to pass muster under the new ruling.[345] Localities will now have to deal with cross burning and other deplorable actions via arson, assault and battery laws, or other traditional criminal laws. Beyond that, localities will have to choose between repealing hate speech crimes or expanding their topical scope.

Second, the case impacts on speech codes on public university and college campuses.[346] To the extent such provisions only prohibit some kinds of extremely provocative speech, they will be defective under the majority's approach. Moreover, to the extent such speech codes punish expression that simply causes hurt feelings, offense or resentment, they would probably fail, even

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341. *Id.*

342. *Id.* at 2550-51 (White, J., concurring).

343. *Id.* at 2553 (White, J., concurring).

344. *Id.* at 2552, 2554 (White, J., concurring).

345. Some 30 states currently have anti-bias regulations. *Hate Redux*, NAT'L L.J., Nov. 23 1992, at 7.

346. *See, e.g.*, Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (university's policy held unconstitutionally overbroad and vague).

> As many as 100 colleges and universities have speech codes and codes of behavior dealing with racially and sexually motivated harassment. Many of the laws are not as broad as the St. Paul ordinance; generally they take existing crimes and enhance penalties if the crimes are motivated by racial, religious or sex bias.

Don Terry, *Rights Advocates Uncertain About Ruling's Impact*, N.Y. TIMES, June 23, 1992, at A16.

under the milder overbreadth approach of the concurring opinions.[347]

Third, what is the fate of bias motivated crime provisions? True bias-motivated laws, i.e., those that treat more seriously or impose more severe punishment on regular crimes targeted against members of certain groups, may still be valid. The Court indicated that government could accord special protections to harm directed at certain groups, just as long as it does not discriminate against certain messages.[348] To be sure, proving such bias-motivated crimes may pose problems in terms of intruding into First Amendment interests, and some courts have even held that the very concept of bias-motivated crime poses such problems. But the Court's opinion leaves the issue open for the future. In New York if you threaten, attempt, or actually subject someone to physical contact because they are black or Jewish, you may get up to one year in jail.[349] The New York aggravated harassment statute prohibits violent conduct based solely on bias towards certain groups of people. New York courts have upheld these bias crime provisions under the First Amendment.[350]

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347. *R.A.V.*, 112 S. Ct. at 2553-54 (White, J., concurring).

348. *Id.* at 2542.

349. N.Y. PENAL LAW § 240.31 (McKinney 1991). New York's aggravated harassment in the second degree is a class A misdemeanor. The statute provides: "A person is guilty of aggravated harassment in the second degree when, with the intent to harass, annoy, threaten or alarm another person he . . . strikes, shoves, kicks, or otherwise subjects another person to physical contact or attempts to do the same because of the race[,] color, religion or national origin of such person." *Id.* "A sentence of imprisonment for a class A misdemeanor . . . shall not exceed one year . . . ." N.Y. PENAL LAW § 70.15 (McKinney 1991).

350. *See, e.g.*, People v. Miccio, 589 N.Y.S.2d 762 (Crim. Ct. Kings County 1992) (holding New York's aggravated harassment law does not violate the First Amendment); People v. Rivera, 144 Misc. 2d 565, 569, 545 N.Y.S.2d 252, 254 (Crim. Ct. N.Y. County 1989) (holding New York's aggravated harassment law does not operate to prohibit racial epithets, rather, it prohibits only physical contact resulting from bias); People v. Grupe, 141 Misc. 2d 6, 8-9, 532 N.Y.S.2d 815, 817-18 (Crim. Ct. N.Y. County 1989) (holding New York's aggravated harassment law regulates violent conduct rather than violent speech); People v. Dinan, 118 Misc. 2d 857, 858, 461 N.Y.S.2d 724, 726 (Long Beach City Ct. 1983) (noting that freedom of

The Supreme Court did not speak to these provisions directly. However, there has been one intervening case since June from Wisconsin[351] where a 4-2 state supreme court threw out a bias motivated felony statute[352] on the basis of the St. Paul case.[353] It found that the bias motivated statute simply punished bigoted thoughts with which an assault is then committed, and that violated the First Amendment.[354] The Supreme Court has agreed to hear that case,[355] so we will get an answer soon.

The final implication of the St. Paul case — and this is an implication the Court did debate — is what it may do to hostile environment sexual harassment rules in the workplace.[356] To some extent, the rules single out only certain forms of bigoted messages for prohibition. Are they now rendered suspect and vulnerable under this decision? Justice Scalia went out of his way to say that these rules were not called into question by the St. Paul reasoning.[357] The concurring Justice was not persuaded it was different.[358] If St. Paul cannot do what it did, how can

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speech was not absolute and "must bend to satisfy the common good" preventing harassment motivated by bigotry).

351. Wisconsin v. Mitchell, 485 N.W.2d 807 (Wis. 1992).

352. *Id.* at 815.

353. *Id.*

354. *Id.* Lower court cases dealing with "bias crimes" in the wake of the *R.A.V.* ruling include: Wisconsin v. Mitchell, 485 N.W.2d 807 (Wis.), *cert. granted*, 113 S. Ct. 810 (1992); Ohio v. Wyant, 597 N.E.2d 450 (Ohio 1992), *petition for cert. filed*, 61 U.S.L.W. 3303 (U.S. Sept. 29, 1992) (No. 92-568); Oregon v. Plowman, 838 P.2d 558 (Or. 1992), *petition for cert. filed*, (Nov. 23, 1992) (No. 92-6702).

355. Wisconsin v. Mitchell, 485 N.W.2d 807 (Wis.), *cert. granted*, No. 92-515, 113 S. Ct. 810 (1992).

356. A claim for sexual harassment may be brought under the rubric of a "hostile environment." Meritor Savings Bank v. Vinson, 477 U.S. 57, 63-69 (1986). A hostile environment is considered sexual harassment under Title VII and occurs when an employee encounters unwelcome sexual advances that create an offensive or hostile work environment. *Id.* at 64. "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult." *Id.* at 65 (citing 45 Fed. Reg. 74676 (1980); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

357. R.A.V. v. City of St. Paul, 112 S. Ct. at 2546-47.

358. *Id.* at 2557-58 (White, J., concurring).

Congress impose special limitations on hostile environment messages in the workplace? Obviously, these issues will have to be played out in future cases.

Lee v. Weisman

The final case I am going to discuss was another case where the issues were quite difficult, both doctrinally and politically. I am speaking here, of course, of *Lee v. Weisman*,[359] the graduation prayer case.

This case was closely watched.[360] Other than the abortion case[361]of which Janet Benshoof spoke,[362] this was probably the next most closely-watched case of the Term in the area of First Amendment, because it might have been a watershed moment in the history of separation of church and state. The questions people worried about were: would the decision lower the wall of separation; would the Court relax its concerns with religious dissenters who opposed the majority's efforts to embroil government with religion; would the Court use the case as the occasion to

359. 112 S. Ct. 2649 (1992).

360. Daniel S. Hamilton, *A Minority Rules*, N.Y. NEWSDAY, July 12, 1992, at 54 (stating that only minority of Americans support Supreme Court's decision in *Lee v. Weisman*); Dick Lehr, *Centrist Troika Slows the Right on High Court*, BOSTON GLOBE, July 3, 1992, at 1 (evidenced by its *Casey* and *Weisman* decisions, Supreme Court is not on runaway right-wing cause that conservatives and liberals alike had predicted); Douglas E. Mirell, *Supreme Court on School Prayer*, L.A. TIMES, July 24, 1992, at B6, col. 5 (agreeing with Justice Kennedy in *Lee v. Weisman* that Constitution was designed to give responsibility of preservation of religious belief to private sphere); Letter to the Editor from Lew Petterson, *Roger Williams Would Have Said "Amen" to School Prayer Ban*, N.Y. TIMES, July 12, 1992, § 4, at 20, col. 4 (founder of Massachusetts, Roger Williams, would have praised decision in *Lee v. Weisman* because he left Massachusetts to escape religious persecution); Samuel Rabinove, *In Prayer Case, the Supreme Court Kept History in Mind*, CHRISTIAN SCIENCE MONITOR, July 6, 1992, at 19 (although majority of people want school-sponsored prayer on voluntary basis, as polls prove, Supreme Court properly adhered to historical intent which shows that First Amendment was designed to protect minorities).

361. Planned Parenthood v. Casey, 112 S. Ct. 2781 (1992).

362. Janet Benshoof, *Pennsylvania Abortion Case*, 9 TOURO L. REV. 217 (1993).

change its much criticized formula for judging whether any particular government support for religion is permissible.[363]

In *Weisman,* middle schools and high schools in Providence, Rhode Island were permitted to invite members of the clergy to offer invocation and benediction prayers as part of its graduation ceremonies.[364] School officials conferred with clergy members to determine the proper nonsectarian content of the prayers.[365] Pursuant to that custom, a rabbi gave an invocation and benediction at a middle school graduation ceremony.[366] The prayers referred to a deity at several points.[367] Deborah Weisman, a middle school graduate, objected to the religious aspect of the ceremony, but she and her family attended. They sued to try to prevent such religious participation in the future.[368]

Writing for a 5-4 Court, Justice Kennedy observed that the issues in the case could be resolved without revisiting the broad and difficult questions of the extent to which government may or must "accommodate" the religious beliefs and practices of its citizens.[369] Nor did the Court have to reconsider its three-part formula for determining whether governmental aid or support for religion violated the Establishment Clause.[370] That formula, you will recall, asks whether the challenged program reflects a clearly secular purpose, whether its primary effect neither advances nor inhibits religion, and whether it promotes excessive entanglement

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363. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); *infra* notes 370-71 and accompanying text.

364. *Weisman*, 112 S. Ct. at 2652.

365. *Id.* It has been the custom of Providence school officials to provide invited clergy with a pamphlet entitled 'Guidelines for Civic Occasions,' prepared by the National Conference of Christians and Jews. The Guidelines recommend that public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity," though they acknowledge that "[p]rayer of any kind might be inappropriate on some civic occasions."
Id.

366. *Id.* at 2652-53.

367. *Id.*

368. *See* 728 F. Supp. 68 (D.R.I. 1990).

369. *Weisman*, 112 S. Ct. at 2655.

370. *Id.*; U.S. CONST. amend. I, cl. 1.

between church and state.[371] Rather, the Court noted that this was a school prayer case, and a special vigilance has marked the Court's cases in the area of permissible religious practices in primary and secondary schools, and those controlling precedents make clear that prayers at graduation are unconstitutional.[372]

In Providence, there was pervasive government involvement with religious activity to the point that school officials directed the form the prayers should take.[373] However, the government's obligation to honor individual free exercise of religion does not supersede the fundamental limits of the Establishment Clause.[374] At a minimum, the Court stated, "government may not coerce anyone to support or participate in religion or its exercise."[375] The objecting student was effectively forced into participating in a religious ceremony in order to attend her school graduation.[376] As the Court stated, "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands."[377]

Even though the prayer was a nonsectarian invocation and benediction given at a graduation ceremony by, in this case, a rabbi,[378] the Supreme Court essentially said whether the prayer was nonsectarian or preferential was not relevant.[379] What mattered here was that the school officials got in the business of re-

371. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

372. *See also* Wallace v. Jaffree, 472 U.S. 38 (1985) (striking state statute authorizing moment of silence for meditation or voluntary prayer); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (striking state statute requiring biblical passages on prayers to be recited despite provision for student exemption via written request of parents); Engle v. Vitale, 370 U.S. 421 (1962) (striking state statute requiring official denominationally neutral prayer despite provisions for nonparticipation of student objectors).

373. *Weisman*, 112 S. Ct. at 2652, 2656.

374. *Id.* at 2655.

375. *Id.*

376. *Id.* at 2660.

377. *Id.*

378. *Id.* at 2652.

379. *Id.* at 2656.

ligion.[380] They told the rabbi what the prayers should sound like, what areas they ought to stay away from, and those prayers were offered as part of the ceremony.[381] The ceremony was only voluntary in the strict sense of the term because high school graduations are important in young people's lives.[382] The Court analogized the prayer at the graduation ceremony to prayer in the classroom,[383] and found that the rights of the dissenters had to be respected.[384]

That opinion was written by Justice Kennedy. It is exhibit three or four in my case that he has become quite a vigorous champion of First Amendment rights.[385] Other issues about religious ob-

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380. *Id.*

381. *Id.*

382. *Id.* at 2556.

383. *See* Wallace v. Jaffree, 472 U.S. 38 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

384. *Weisman,* 112 S. Ct. at 2660-61.

385. Justice Kennedy is emerging as one of the most vigorous proponents of the First Amendment. His zeal is evidenced by his stance in *Simon & Schuster* where he criticized the Court for relying on the compelling government interest test, which, in his view, has been "adopted by accident rather than the result of considered judgment." 112 S. Ct. 501, 513 (1992) (Kennedy, J., concurring). This test, he explained, "has no real or legitimate place" where the content itself is afforded full protection under the First Amendment, *id.* at 512 (Kennedy, J., concurring), because use of this test to regulate based on content would therefore be permissible "if confined in a narrow way to serve a compelling state interest." *Burson v. Freeman,* 112 S. Ct. 1846, 1858 (1992) (Kennedy, J., concurring). The result, Justice Kennedy feared, would produce "a misunderstanding that has the potential to encourage attempts to suppress legitimate expression" in direct contravention of First Amendment guarantees. *Id.*

Justice Kennedy also sought to redefine public forums in order to encompass those forums which fall outside the traditional categorization of "streets, parks and sidewalks." *Krishna 2,* 112 S. Ct. 2711, 2716-17 (1992) (Kennedy, J., concurring). Justice Kennedy found error in the fact that the Court's designation of public property as a public forum rested solely on the "government's defined purpose for the property, or on explicit decision by the government to dedicate the property to expressive activity," *id.* at 2716 (Kennedy, J., concurring), rather than an objective inquiry which had as its focal point the "actual, physical characteristics and uses of the property." *Id.* (Kennedy, J., concurring). One of the purposes of the First Amendment is to

servance in public places other than public schools will have to be revisited in future Terms, but so far as prayers at graduation are concerned, they are beyond constitutional pale.

I would like to make a couple of final points about that case. Justice Souter wrote a concurring opinion that took a very strong separationist position.[386] He made two points I think will be important in future cases beyond the school setting. First, the Establishment Clause, which says that "government shall make no law respecting an establishment of religion,"[387] guards against state sponsorship of nonsectarian messages no less than state sponsorship of messages that are more explicitly preferential toward one religion as against another.[388] His view seems to be that the First Amendment is designed to prevent government from favoring any religion and not just from favoring certain religions.[389]

Similarly, government endorsement of religion violates the Establishment Clause, regardless of whether anyone is coerced in

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prevent government control over freedom of expression. *Id.* (Kennedy, J., concurring). According to Justice Kennedy, however, the essential purpose will be frustrated by "the failure to recognize . . . that new types of property may be appropriate forums for speech" and will lead to "serious curtailment of our expressive activity." *Id.* at 2717 (Kennedy, J., concurring).

386. Separationists believe that a state must neither provide religious entities with financial support other than that bestowed upon the general populous nor "symbolically endorse any religion in any way." Richard H. Jones, *Acomodationist and Separationist Ideals in Supreme Court Establishment Clause Decisions*, 28 J. CHURCH AND ST. 193, 194 (1986). The views of Justice Souter endorse this notion that "religion is a matter which lies solely between a man and his God." Reynolds v. United States, 98 U.S. 145, 164 (1878) (citing a letter from Thomas Jefferson to the Danbury Baptist Association). His concurring opinion in *Lee v. Weisman* represents a strict construction of the Establishment Clause. 112 S. Ct. at 2667 (Souter, J., concurring). *See also* Everson v. Board of Educ., 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting) (purpose of Establishment Clause is to "create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion").

387. U.S. CONST. amend I, cl. 1.

388. *Weisman*, 112 S. Ct. at 2667 (Souter, J., concurring).

389. *Id.* (Souter, J., concurring).

violation of their own beliefs.[390] Otherwise, the Establishment Clause would be a nullity, since the Free Exercise Clause already prohibits government coercion of individual beliefs.[391] His basic message, in general, was that government may not benefit or favor religion, except in those rare cases where that is imperative in order to ease severe burdens on religious freedom.[392] Government endorsement of religion by having a religious figure at a public ceremony is a violation of the Establishment Clause, whether or not it offends any particular person's beliefs, or whether or not it coerces any particular person's beliefs.[393] Therefore, the Establishment Clause is an independent check on government support for religion, even if that support does not violate some person's free exercise rights.[394]

Justice Scalia dissented, speaking for Chief Justice Rehnquist and Justices White and Thomas.[395] First, he basically accused Justice Kennedy of altering his views because he cited a 1989 opinion[396] where Justice Kennedy seemed to take a more accommodating position on the right of government to acknowledge religion in ceremonial occasions.[397] So viewed, history has validated the general role of nonsectarian prayers at public events and ceremonies, and the specific tradition of such prayers in public

390. *Id.* at 2671 (Souter, J., concurring).

391. *Id.* at 2673 (Souter, J., concurring).

392. *Id.* at 2676-77 (Souter, J., concurring).

393. *Id.* at 2678 (Souter, J., concurring).

394. *See* Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 657 (1987) (explaining that "the establishment clause should be available as a check against noncoercive government influences"); *but see* Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 761 (1992) (reliance on Free Exercise Clause to defeat Establishment Clause claims "become[s] a springboard for power instead of a check upon it").

395. *Weisman,* 112 S. Ct. at 2678 (Scalia, J., dissenting).

396. *Id.* (Scalia, J., dissenting) (citing County of Allegheny v. ACLU, 492 U.S. 573 (1989)).

397. *Weisman,* 112 S. Ct. at 2678. In *County of Allegheny v. ACLU,* Justice Kennedy wrote that "Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." 492 U.S. at 657.

school graduations.[398] That being so, there was no warrant for outlawing the practices in this case.[399] Classroom prayers might be another matter; but no one here was coerced in any real way into participating in a religious ceremony.[400] Finally, this is not a case where the Constitution clearly mandates subordinating the majority's wishes to the minority's sensitivities.[401] Justice Scalia's position on the merits was that tradition plays an important role in these cases.[402] Justice Scalia stated that if there has generally been a tradition of religious mentioning or commentary at public events,[403] and if there has specifically been a tradition of offering nonsectarian prayers at public school events, then in the face of that tradition, the Court was wrong to read the First Amendment as requiring the contrary.[404]

However, that was just a dissent. The majority, of course, held, as I mentioned, that the preferences of the majority had to yield to the rights of the individual.[405] That is also what they did in the hate speech case. I think in that way, it was a good year for First Amendment interests. In deciding these two cases, the Court was faithful to its deepest principles and loyal to its finest traditions. Moreover, the re-affirmation of those principles of protecting individual rights against majoritarian demands could not have come at a more vital moment for the First Amendment. In recent years, the threats to freedom of speech have come from unexpected directions. Professor Kathleen Sullivan of the Harvard Law School describes the unusual phenomenon as follows:

> Old-fashioned free speech libertarians were always sure who the enemy was: government wielding the awesome power of the state. But some groups left of center now challenge this age-old demonology. Threats to true free speech, they say, may come as

398. *Weisman,* at 2679-80 (Scalia, J., dissenting).

399. *See id.* at 2678-79 (Scalia, J., dissenting).

400. *Id.* at 2684-85 (Scalia, J., dissenting).

401. *Id.* at 2686 (Scalia, J., dissenting).

402. *Id.* at 2678-79 (Scalia, J., dissenting).

403. *See id.* at 2679 (Scalia, J., dissenting); *see also* Engle v. Vitale, 370 U.S. 421, 435 n.21 (1962).

404. *Weisman,* 112 S. Ct. at 2686 (Scalia, J., dissenting).

405. *Id.* at 2661.

> much from private power as from the state. The influence of money skews political campaigns. A subtle reign of racist, sexist and homophobic verbal terror silences minorities on college campuses. And pornography represents the boot of man on woman's neck, stifling any voice that might talk back. The solution? See the government as a savior rather than a bogeyman; see the state not as a sword but a shield. Enact regulations to silence the voices of the powerful in order that the silenced may be heard. Government has long redistributed bargaining power in economic markets. Now, the critics say, it's time to redistribute speaking powers in the marketplace of ideas.[406]

Hopefully, the First Amendment will prove able to resist these post-modern assaults as it has resisted other attacks in the past.

Thank you.

IV. AUTHOR'S POSTSCRIPT

The election of President Bill Clinton will give vent in a serious way to many of these attempts to "redistribute" free speech and thereby will provide a critical crucible to test our commitment to First Amendment values. For the first time in over a decade, we will have one-party rule in Washington,[407] and governing majorities will have a clear field to enact laws which restrict free speech in order to serve the "needs of the community." On three vital fronts, we are likely to see major clashes between "reform," legislation and First Amendment values.

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406. Kathleen M. Sullivan, *The First Amendment Wars,* THE NEW REPUBLIC, Sept. 28, 1992, at 35, 35-36. Professor Sullivan goes on, very effectively, to restate the case for respecting the First Amendment. *Id.*

407. The 1992 Presidential election was won by the Democrats. The Senate is currently composed of 57 Democrats and 43 Republicans. The House of Representatives is currently composed of 258 Democrats, 176 Republicans, and 1 Independent. 1 Cong. Index (CCH) 10, 101, 24, 151 (1993) (calculating number of representatives from each House of Congress in the 103rd Congress).

First, candidate Clinton, speaking to a B'Nai Brith convention, endorsed a federal "bias-motivated crime" bill,[408] introduced by Representative Charles Schumer, which would sharply increase sentences for crimes "motivated" by bigotry. As one commentator has noted, the Schumer bill, which is opposed by the ACLU,

> goes out of its way to punish opinions rather than conduct. Instead of defining hate crimes as a substantive criminal offense (which would have to be proved at trial), the bill requires federal judges to conduct an inquisition into a criminal's thoughts and beliefs at the sentencing stage, after he has already been convicted. This poses an unusual threat to civil liberties: in a sentencing hearing, all the procedural protections that apply at trial go out the window.[409]

Despite these serious constitutional flaws, a strong push for this bill can be expected.

Also pending in Congress is a "Pornography Victims' Compensation"[410] bill that would permit damage awards against publishers if their readers later commit sexual crimes.[411] The theory of the bill, unprecedented in First Amendment doctrine, has been soundly rejected by lower courts. But Congress may try to say otherwise.

Finally, President Clinton is a staunch supporter of "political reform" measures to reduce the influence of "special interests" by, among other things, restricting campaign financing and imposing controls on lobbying activities.[412] That has long been a high priority on the liberal agenda, despite the pervasive and severe First Amendment problems posed by any effort to have government control and "reform" the political process and thereby tamper with political speech. These reform proposals typically impose a variety of conditions, restrictions, and blan-

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408. H.R. 4797, 102d Cong., 2d Sess. (1992) (Hate Crimes Sentencing Enhancement Act).

409. *Crime and Punishment,* THE NEW REPUBLIC, Oct. 12, 1992, at 7.

410. S. 2186-02, 102d Cong., 2d Sess. (1992) (Pornography Victims Compensation Act).

411. *Id.*

412. Gwen Ifill, *Team Issues 5-Year Lobby Ban,* N.Y. TIMES, Dec. 10, 1992, at A19.

dishments in an effort to control campaign funding and activity, and penalize those candidates who refuse to comply.[413] Were the goal to expand political opportunity, reform might be valid. But pending proposals are always linked to limits on campaign expenditures, and limits on campaign expenditures in the long run always inure to the benefits of incumbents. While campaign controls will make it more difficult to control and defeat incumbents at election time, controls on lobbyists will make it harder to control incumbent politicians between elections as well. Both kinds of "reforms" will clearly be in the legislative hopper.

Against these potential onslaughts, free speech stalwarts will have two lines of defense. First, the task will be to try to persuade governing majorities that it is a breach of First Amendment faith to try to remedy short-term problems with long-term repressions of free speech. But should that strategy fail, the second and last line of defense will be the Supreme Court. At troubled times in our history, the Court has been asked to choose between the will of the majority and the rights of the minority and to determine where the Constitution requires the proper boundary be set. We may be entering another such era. The Constitution seems to speak with particular insistence to the present political setting: "Congress shall make no law . . . ." With this injunction and the strong First Amendment precedents that this past Term has put on the books, we will be well armed for whatever battles lie ahead.

413. S. 6417, 102d Cong., 2d Sess. (1992) (Congressional Campaign Spending Limit and Election Reform of 1992).