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Freedom of Speech After Justice Brennan

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FREEDOM OF SPEECH AFTER JUSTICE
BRENNAN

Marc Rohr*

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INTRODUCTION

As zealous supporters of First Amendment rights are all too well aware, William J. Brennan, Jr. retired as an Associate Justice of the United States Supreme Court in 1990, following 34 years of memorable service. Few would disagree that Justice Brennan’s tenure on the Court coincided with an unprecedented blossoming of judicial protection of freedom of speech in this country, and that he had as much to do with that evolution as any other Justice. His special and important contributions to the law of freedom of speech have been explored elsewhere,¹ and are undeniable. Justice Brennan’s colleague, Thurgood Marshall, ended 24 years of service as an Associate Justice in 1991. Together, Brennan and Marshall supported challenges to governmental authority under the First Amendment with a consistency and fervor matched only by their former brethren, Hugo Black and William O. Douglas. Now that Justices Brennan and Marshall are gone, and especially considering the fact that a majority of the present Justices — O’Connor, Scalia, Kennedy, Souter, and Thomas — were appointed by conservative presidents determined to select judges who are not “judicial activists,” the time seems right to inquire: Whither freedom of speech?

This article will explore the positions taken in a number of the most important areas of the law of freedom of speech by each of the Justices presently on the Court,² and will attempt to suggest the extent to which protection of speech has been, or likely will be, diminished in the post-Brennan era. Obviously, not every aspect of the law of freedom of speech could be, or is, covered in this article. To that extent, any picture that emerges from the ensuing discussion may not be fully representative; the selected topics are, however, by their nature, highly indicative of the depth of a Justice’s commitment to the protection of speech.

The law of freedom of speech — unlike some other prominent aspects of constitutional law³ — is not an arena of ideologi-

². Thus, references to Justices no longer on the Court are frequently omitted in the discussion of a given case.
³. Compare the topics of affirmative action based upon race, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), and the right to an abortion, Planned Parenthood
cal warfare among the Justices. With few exceptions, the Justices do not bring an “agenda” to their evaluation of arguments in the realm of freedom of expression. No sitting Justice is hostile to core values of freedom of expression, nor is any of them grossly insensitive to such values. The inquiry at hand, however, is a comparative one: To what extent, if any, are the present Justices (or some of them) less committed to the protection of speech than were Brennan and Marshall? The standard of measurement is, admittedly, a high one.

Because the assessment herein of the Justices is essentially comparative in nature, this article does not evaluate each of their rulings and doctrinal positions in terms of their ultimate persuasiveness or desirability.

Finally, this article assumes a fair amount of knowledge of First Amendment law on the part of the reader; space limitations simply do not permit elaborate explanation of every underlying concept in an article of this scope.  

I. FACIAL OVERBREADTH

The application of the First Amendment facial overbreadth doctrine by the Supreme Court over the past two decades has been marked by sharp disagreement and a fair amount of unpredictability. The Justices have frequently differed on the questions of whether, and when, to utilize this highly speech-protective procedural tool. They have also differed significantly in their readiness to find statutes facially overbroad. Clearly, the doctrine has survived, but the extent of the Court’s enthusiasm for it is open to question.

Antipathy to the facial overbreadth device was expressed as long ago as 1971, in Justice White’s dissenting opinion, joined by Justice Blackmun, in Coates v. City of Cincinnati. A turning
point was Broadrick v. State of Oklahoma, in 1973, in which White, writing for a bare majority of the Court that included Blackmun and Rehnquist, imposed the requirement of “substantial” overbreadth as a necessary condition to facial invalidation of a statute on First Amendment grounds. “[W]e believe”, White wrote, “that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” Brennan’s dissent, joined by Marshall, was quite reflective of their inclination to give great protection to freedom of speech. Their hypothesized examples of speech which appeared to be punishable under the Oklahoma civil service regulations (limiting political activities by civil servants) were indeed minimal in relation to the statute’s “plainly legitimate sweep.” Yet, for Brennan and Marshall, these examples sufficed. To Brennan, the majority assumed, not only that the ban on the wearing of badges and buttons may be “impermissible,” but also that the Act “may be susceptible of some other improper applications” . . . Under principles that I had thought were established beyond dispute, that assumption requires a finding that the statute is unconstitutional on its face. 

The adoption of the substantiality requirement did not, of course, mark the end of the Court’s use of the facial overbreadth device to invalidate statutes. One such holding occurred the very next year, in Lewis v. City of New Orleans. As in Gooding v. Wilson two years earlier, the case involved a “fighting-words”-type ordinance, although this time more narrowly focused upon speech directed to (“or with reference to”) police officers. Again, Brennan wrote for the majority. The ordinance in Lewis was, on its face, considerably more restrictive than the acceptable

7. Id. at 615. White did, in Broadrick, suggest that this principle applied “particularly where conduct and not merely speech is involved.” Id. Later cases, notably New York v. Ferber, 458 U.S. 747 (1982), made clear that the requirement of substantial overbreadth is not limited to cases involving expressive conduct.
Chaplinsky concept of “fighting words,” and had not been meaningfully narrowed by the Louisiana Supreme Court. Yet Justice Blackmun, joined by Rehnquist, dissented. Their antipathy to the use of the facial overbreadth device as a tool for striking down “chilling” laws, even though the challenger before the court could be constitutionally punished, seemed clear. The doctrine, in Blackmun’s words, was

being invoked indiscriminately without regard to the nature of the speech in question, the possible effect the statute or ordinance has upon such speech, the importance of the speech in relation to the exposition of ideas, or the purported or asserted community interest in preventing that speech. And it is no happenstance that in each case the facts are relegated to footnote status, conveniently distant and in a less disturbing focus. This is the compulsion of a doctrine that reduces our function to parsing words in the context of imaginary events.

Blackmun went on to contend that Mrs. Lewis’ speech was “plainly” within the category of fighting words. But to the Brennan majority (which included White), the point was irrelevant. It is on such occasions, of course, when the facial overbreadth doctrine affords the challenger her only basis for victory, that the doctrine has real meaning and significance.

The Court has continued to find statutes facially overbroad, but, at least during the early 1980’s, dissenting Justices continued to articulate apparently categorical objections to the practice. In 1981, in Schad v. Borough of Mt. Ephraim, the Court struck down a zoning ordinance which, in effect, prohibited all live entertainment in a municipality. Justice White wrote for the majority and, along with the concurring Justices (including Blackmun), focused entirely upon the challenged ordinance, rather than upon the nature of the challenger — an “adult” bookstore which featured “a live dancer, usually nude.” Rehnquist, in contrast, joined a dissenting opinion by Chief Justice

13. Id. at 141. But see Justice Powell’s concurrence, arguing the contrary. Id. at 135.
15. Id. at 62.
Burger which chose to focus only on the nature of the challenger. "I would hold," wrote Burger, "that, as applied, the ordinance is valid. . . . An overconcern about draftsmanship and overbreadth should not be allowed to obscure the central question before us."\(^{16}\)

A 1984 decision, *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*\(^{17}\) was another case in which the doctrine was applied, but with notable resistance. Justice Blackmun wrote for the (bare) majority, thus revealing his willingness to embrace the doctrine at least some of the time. Following its 1980 ruling in *Village of Schaumburg v. Citizens for a Better Environment*,\(^{18}\) the Court struck down a state law which, similar to the ordinance invalidated in *Schaumburg*, imposed serious limitations on organized charitable solicitations. What made the case particularly interesting was the fact that the plaintiff, Munson, was not itself a charitable organization, but rather a professional fundraiser. Munson was injured by the statute, which barred charitable organizations from paying more than 25% of its receipts for expenses, but Munson had no First Amendment rights of its own to raise in opposition to the Maryland law; rather, the First Amendment interests recognized (in *Schaumburg*, initially) were those of the charities with whom Munson dealt. To the majority (which included White and Stevens, along with Brennan and Marshall), this was of no consequence, given the First Amendment facial overbreadth doctrine:

> The fact that, because Munson is not a charity, there might not be a possibility that the challenged statute could restrict Munson's own First Amendment rights does not alter the analysis. Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society — to prevent the statute from chilling the First Amendment rights of other parties not before the court. Munson's ability to serve that function has nothing to do with whether or not its own First Amendment

\(^{16}\) *Id.* at 85, 86.
\(^{17}\) 467 U.S. 947 (1984).
\(^{18}\) 444 U.S. 620 (1980).
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But Justice Rehnquist, joined in dissent by O'Connor, bemoaned the Court’s use of the overbreadth doctrine, “not at the behest of any affected charity, but at the behest of a professional fundraising organization.” Comparing the more conventional “as-applied” challenge to a facial attack, he went on to assert, more generally:

The advantages of the first approach are obvious. It is less intrusive on the legislative prerogative and less disruptive of state policy to limit the permitted reach of a statute only on a case-by-case basis. Such restraint also allows State courts the opportunity to construe a law to avoid constitutional infirmities . . . . Finally, the decision itself is likely to be more sound when based on data relevant and adequate to an informed judgment. The facts of the case focus and give meaning to the otherwise abstract and amorphous issues the court must decide . . . .

One might as a matter of original inquiry question whether an overbreadth challenge should ever be allowed, given that the Declaratory Judgment Act and the availability of preliminary injunctive relief will usually permit a litigant to discover the scope of constitutional protection afforded his activity without subjecting himself to criminal prosecution. Be that as it may, however, our cases at least indicate that the doctrine is to be used sparingly.

Rehnquist’s dissent concluded with words of similar import, describing the majority’s “misunderstanding” of, and “ungrounded speculation” about, the Maryland statute as “the natural hazards of overbreadth analysis.” “When the Court’s sights are not focused on the actual application of a statute to a specific set of facts,” Rehnquist warned, “its vision proves sadly

19. 467 U.S. at 958.
20. Id. at 975.
21. Id. at 977-78 (citations omitted).
22. Id. at 985.
deficient." These are strong words, indeed — and suggestive of a profound disinclination to use the facial overbreadth tool. To these Justices, the policy concerns that underlie the facial overbreadth doctrine — namely, the desire to dispel quickly the "chilling effects" of statutes that violate the First Amendment much of the time — are apparently outweighed by the interest in maximizing the chances of reaching "correct" results in individual cases.

Although the use of facial overbreadth in Munson itself was critical to the resolution of an issue of standing, Justice Blackmun, in a footnote, pointed out that the concept of "overbreadth" transcends that particular category of case:

The dissenters appear to overlook the fact that "overbreadth" is not used only to describe the doctrine that allows a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though "as applied" to him the statute would be constitutional . . . . "Overbreadth" has also been used to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest . . . .

Whether that challenge should be called "overbreadth" or simply a "facial" challenge, the point is that there is no reason to limit challenges to case-by-case "as applied" challenges when the statute on its face and therefore in all its applications falls short of constitutional demands.24

The footnote may help explain Blackmun's own willingness to accept a facial challenge to a statute, notwithstanding his own previously expressed reservations about the facial overbreadth tool.

23. Id.
24. Id. at 965-66 n.13 (citations omitted). See also the Blackmun majority opinion in Bigelow v. Virginia, 421 U.S. 809, 817 (1975), in which he appeared to view the facial overbreadth doctrine more favorably than he had in earlier decisions.
Along the way, other indications of a disinclination to apply facial overbreadth — probably for more particularized reasons — have surfaced. In the 1978 ruling in *FCC v. Pacifica Found.*,25 Justice Stevens, writing for a plurality that included Justice Rehnquist, declined to engage in a facial review of the section of the Federal Communications Act that authorized the FCC order in question. The statute forbade the use of “any obscene, indecent, or profane language by means of radio communications,”26 and the Commission’s order applied that law to the famous George Carlin monologue on “dirty” words. As Justice Powell recognized in his concurring opinion, it was (technically) proper to reject the facial challenge, because the Commission’s order was limited to the facts of this case, and the Supreme Court had granted certiorari with respect to the validity of the order, not the validity of the statute. But Stevens went further, purporting to bolster his refusal to address the controversy on broader grounds by offering these words:

> It is true that the Commission’s order may lead some broadcasters to censor themselves. At most, however, the Commission’s definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of those references may be protected, they surely lie at the periphery of First Amendment concern. . . . Invalidating any rule on the basis of its hypothetical application to situations not before the Court is “strong medicine” to be applied “sparingly and only as a last resort” . . . . We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.”27

Powell, joined by Blackmun, replied that he “had not thought that the application *vel non* of overbreadth analysis should depend on the Court’s judgment as to the value of the protected speech that might be deterred.”28 But to Justice Ste-

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26. *Id.* at 731.
27. *Id.* at 743 (citations omitted). See also Stevens’ similar statements in the earlier case of *Young v. American Mini Theatres*, 427 U.S. 50, 61 (1976).
28. *Id.* at 761 n.4.
vens, it apparently did.

The Court upheld the Commission's order, passing up the opportunity to remove the chilling effect created by a statute that actually uses such subjective and potentially sweeping terms as "indecent" and "profane". Technically proper or not, the decision demonstrates little commitment to the policy concerns underlying the facial overbreadth doctrine.\textsuperscript{29}

Justice Stevens has been a persistent source of creative thinking with respect to the facial overbreadth doctrine. In \textit{New York v. Ferber},\textsuperscript{30} the "child pornography" case of 1982, Justice White's opinion for the majority, that the New York statute amounted to "the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications,"\textsuperscript{31} was so reasonable a conclusion that Justices Brennan and Marshall, concurring in the judgment, agreed. But Stevens felt the need to address the matter at length. Positing a hypothetical violation of the New York statute that would, in his view, constitute protected expression, he stated that he "would refuse to apply overbreadth analysis for reasons unrelated to any prediction concerning the relative number of protected communications that the statute may prohibit."\textsuperscript{32} Was Stevens effectively saying that he was refusing to join his colleagues in estimating the "substantiality" of the perceived overbreadth of any statute? He went on to recite, in a fashion reminiscent of the (later) Rehnquist dissent in \textit{Munson}, the general policy reasons for not employing the facial overbreadth tool:

29. Yet another avoidance of facial review, this time unacknowledged, occurred in the Court's 1986 decision in Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), the case involving the sexually suggestive campaign speech delivered by a high school student at an assembly. The school district suspended the student, pursuant to a school disciplinary rule prohibiting "[c]onduct which materially and substantially interferes with the educational process. . . including the use of obscene, profane language or gestures." \textit{Id.} at 678. The District Court held that the rule was overbroad, and a Ninth Circuit panel affirmed. The Supreme Court reversed, through a majority opinion by Chief Justice Burger that spoke very generally about the governmental interests at stake, but which ultimately appeared to focus on the facts of Fraser's case. Not one word was said, explicitly, about whether the disciplinary rule was or was not overbroad on its face. Surprisingly, neither did the opinion of Justice Brennan, concurring in the judgment. Justice Marshall dissented, but he, too, limited himself to the facts of the case.

31. \textit{Id.} at 773.
32. \textit{Id.} at 780.
When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.  

Stevens then harked back to his view, expressed in *Pacifica*, that certain low-value speech was deserving of less protection than other speech, concluding that "generally marginal speech does not warrant the extraordinary protection afforded by the overbreadth doctrine."  

Despite these protestations, every sitting Justice has at some point concurred in a finding of facial overbreadth. On the same day in 1987, the Court held two municipal laws facially overbroad. In *City of Houston v. Hill*, only Justice Rehnquist dissented from the invalidation of a Houston ordinance making it unlawful "to . . . in any manner oppose, . . . or interrupt any policeman in the execution of his duty. . . ." Justice Brennan wrote the majority opinion, clearly finding that the law was substantially overbroad. As in *Lewis v. City of New Orleans*, the challenger could probably have been punished constitutionally under a narrowly drawn statute.  

The other decision, *Board of Airport Comm's v. Jews for Jesus, Inc.*, was unanimous. Justice O'Connor, despite her position in *Munson*, wrote the relatively brief majority opinion,

33. Id. at 780-81.  
34. Id. at 781. *See also* Stevens' opinion in *Metromedia, Inc.* v. San Diego, 453 U.S. 490, 545-46 (1981), eschewing the use of facial overbreadth despite the absence of "low value" speech.  
36. Id. at 455.  
37. Blackmun, concurring, took pains to dissociate himself from "any implication — if one exists — that *Gooding v. Wilson*, . . . and *Lewis v. City of New Orleans* . . . are good law in the context of their facts . . . ." *Id.* at 472 (citations omitted). But he was not troubled by the success of a facial challenge here. Justice Powell, joined by O'Connor, would have certified a question to a Texas appellate court, in order to receive an authoritative state-court construction of the ordinance. Failing that, they, along with Scalia, were willing to join the result, but apparently on grounds of vagueness rather than first amendment overbreadth. *Id.* at 480-81.  
finding an official resolution banning all “First Amendment activities” at Los Angeles International Airport to be substantially overbroad, and “not fairly subject to a limiting construction.” Finding an official resolution banning all “First Amendment activities” at Los Angeles International Airport to be substantially overbroad, and “not fairly subject to a limiting construction.” Interestingly, the Court ruled as it did without resolving what is ordinarily a threshold issue in First Amendment litigation — namely, whether the airport terminal was or was not a “public forum”; O’Connor made clear that the resolution was unacceptably overbroad even if the airport were not a public forum. This law was an unusually oppressive one; as O’Connor explained, “the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting all protected expression, purports to create a virtual ‘First Amendment Free Zone’ at LAX . . . .” It was an easy case, but, notably, no Justice argued that the court should focus only on the plaintiffs’ activity at the airport, which was the distribution of free religious literature on a pedestrian walkway in the Central Terminal Area. O’Connor, moreover, demonstrated considerable sensitivity to First Amendment values in declining the petitioners’ invitation to impose a narrowing construction on the resolution. She concluded: “[I]t is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable.”

In 1988, in *Frisby v. Schultz*, a case that could not be said to involve “marginal” speech, Stevens joined Brennan and Marshall, in dissent, in arguing that a municipal restriction on residential picketing was facially overbroad, despite appearing to believe that the plaintiffs’ own conduct could be validly prohibited.

Finally, the entire Court was once again unanimous (albeit for differing reasons) in finding the St. Paul Bias-Motivated Crime Ordinance facially unconstitutional, in *R.A.V. v. City of

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39. *Id.* at 577.
40. *Id.* at 574.
41. As the later decision in International Soc’y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992) (discussed at note 318, infra) demonstrated, moreover, not all of the Justices believe that there is a first amendment right to distribute literature in an airport terminal.
42. 482 U.S. at 575-76.
St. Paul" in 1992. The case involved a criminal prosecution for cross-burning, and so we might well have expected someone on the Court to insist that an as-applied challenge would be more appropriate; but no one did. Granted, the posture of the case as it came to the Court — on a motion to dismiss — militated against such a position, but the readiness of each Justice to evaluate the ordinance on its face (including Stevens, concurring separately and emphasizing “the importance of context”45) is further evidence that the anguished objections to “abstract” adjudication as intrinsically undesirable may well have been abandoned.46

Less sweeping doctrinal constrictions of the availability of facial challenges have emerged, however, and it is with respect to these that the law of overbreadth has become somewhat unpredictable.

Stevens introduced one such limitation in 1984, as the author of the majority opinion in Los Angeles City Council v. Taxpayers for Vincent.47 The relevant Los Angeles code section prohibited the posting of signs on public property. The plaintiffs wished to post political campaign signs on utility poles. The Court upheld the law, finding the city’s interests in safety and aesthetics to be sufficiently important. Given the essence of the Court’s reasoning, it could surely have addressed the plaintiff’s facial challenge by ruling that the code section, being adequately justified, was not substantially overbroad. Instead, Stevens wrote that

[T]his is not . . . an appropriate case to entertain a facial challenge based on overbreadth. For we have found nothing in the record to indicate that the ordinance will have any different impact on any third parties’ interests in free speech than it has on [the plaintiffs] . . . .

45. Id. at 2566.
46. See also the recent ruling in Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992), in which the majority — Blackmun, Stevens, O’Connor, Kennedy, and Souter — held a parade permit ordinance facially invalid, over the protest of the dissenters that the case should be remanded to the lower courts for an interpretation of the ordinance. See id. at 2404 n.12.
They have, in short, failed to identify any significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to their political signs. Specifically, [the plaintiffs] have not attempted to demonstrate that the ordinance applies to any conduct more likely to be protected by the First Amendment than their own . . . signs . . . . Accordingly, on this record it appears that if the ordinance may be validly applied to [the plaintiffs], it can be validly applied to most if not all of the signs of parties not before the Court . . . . It would therefore be inappropriate in this case to entertain an overbreadth challenge to the ordinance.48

At first glance, Stevens’ argument seems logical. But was it really necessary? If all Stevens meant was that, given the position of the plaintiffs, their case was as strong as any that might be hypothesized, fine. But if he meant that, even if the plaintiffs were successful, a facial challenge would not be entertained, that conclusion seems inappropriate and a bit odd. Why leave the ordinance standing, simply because those who challenged it had been in the strongest position to do so? Justices Brennan, Marshall, and Blackmun dissented, but with no separate discussion of facial overbreadth.

Perhaps the Stevens discussion in Vincent can be properly seen, in retrospect, as a harbinger of Justice White’s majority opinion in the 1985 decision, Brockett v. Spokane Arcades, Inc.49 A panel of the Ninth Circuit Court of Appeals had, somewhat inexplicably, invalidated a Washington obscenity statute in its entirety because it contained a definition of the word “prurient” (incorporating an ambiguous reference to “lust”) that, as the Supreme Court agreed, swept too far. Justice White was correct in ruling that the Ninth Circuit’s remedy exceeded that which was called for, and that “the Washington law should have been invalidated only insofar as the word ‘lust’ is to be understood as reaching [constitutionally] protected materials.”50 But

48. Id. at 801-02.
50. Id. at 504. Brennan and Marshall dissented in Brockett, based on the Brennan position on obscenity generally; see Paris Adult Theater I v. Slaton, 413 U.S. 49, 73 (1973).
White used language which was itself unnecessary, and which, again, suggested a serious limitation upon the use of facial overbreadth. After describing the doctrine, with particular reference to the situation in which the challenger can succeed only by invoking a facial challenge, he stated:

It is otherwise where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish. . . . There is then no want of a proper party to challenge the statute, no concern that an attack on the statute will be unduly delayed or protected speech discouraged. The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact.

The cases before us are ones governed by the normal rule that partial, rather than facial, invalidation is the required course.\(^{51}\)

First of all, the last-quoted sentence appears to compare an apple ("partial") to an orange ("facial"); the successful challenge in \textit{Brockett} was surely "facial", in that it had nothing to do with the facts of a particular case, but the remedy should indeed have been \textit{partial} invalidation of the statute.

More significantly, the passage as a whole may be said to imply that a facial challenge should not be entertained when an "as-applied" challenge would succeed. That has not been "the normal rule" (as decisions such as \textit{Brandenburg v. Ohio}\(^{52}\) and \textit{Jews for Jesus}\(^{53}\) arguably demonstrate), and it should not be. Indeed, it would be perverse to remove a "chilling" law from the books, on facial grounds, only at the behest of one whose speech was unprotected.

Justice Scalia appeared to address these aspects of \textit{Vincent} and \textit{Brockett}, but without referring to either case, in his 1989

\(^{51}\) 472 U.S. at 504.
majority opinion in *Board of Trustees of State Univ. of N.Y. v. Fox.* Because the Court in *Fox* needed only to correct an error made by a Court of Appeals pertaining to the law of commercial speech, the Court ultimately remanded the case, without actually resolving any issue of overbreadth. But Scalia saw fit to hold forth on the availability of a facial overbreadth challenge. He saw the challengers in this case as directly affected by the allegedly overbroad applications of the statute, but he made it clear that that fact should not deprive them of the opportunity to raise a facial challenge. As Scalia persuasively demonstrated, a contrary rule "would produce absurd results." Arguably, this is at odds, at least in spirit, with the position put forth by Stevens in *Taxpayers for Vincent.* But Scalia continued, in apparent agreement with White's position in *Brockett:*

> It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily — that is, before it is determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth question is ordinarily more difficult to resolve than the as-applied. . . . Thus, for reasons relating both to the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first.

In dissent, Justices Blackmun, Brennan, and Marshall had no difficulty finding the regulation in question to be substan-

55. See the discussion at note 479, infra.
56. 492 U.S. at 484.
57. *Id.* at 484-85. The core of this excerpt was quoted, in a somewhat inconclusive fashion, by Justice Kennedy for the majority in *Renne v. Geary,* 111 S. Ct. 2331, 2340 (1991), a case in which the first amendment challenge was deemed nonjusticiable. Marshall and Blackmun, dissenting, responded by pointing out that "the rule that a court should consider as-applied challenges before overbreadth challenges is not absolute." *Id.* at 2351.
tially overbroad on its face. They responded to Scalia's theoretical discourse quickly, observing in a footnote that “[a]lthough at times we have suggested that as-applied challenges should be decided before overbreadth challenges, . . . we have often felt free to do otherwise,” citing Jews for Jesus and Houston v. Hill.58

Three years later, Scalia’s admonition in Fox was seemingly forgotten when, in R.A.V.59 Scalia himself proceeded immediately to a finding of facial overbreadth, never considering the constitutionality of the Minnesota “hate-speech” law as applied. White did the same for the concurring Justices.

In 1989, the Court considered, but rejected, a very different kind of limitation upon the availability of a facial overbreadth challenge. The case was Massachusetts v. Oakes,60 which involved a “child nudity” law. The Massachusetts Supreme Judicial Court struck down the statute as overbroad under the First Amendment, but the Supreme Court vacated that judgment and remanded.

For four Justices — O'Connor, Rehnquist, White, and Kennedy — the key to their decision was the fact that the statute had been amended, to add a “lascivious intent” requirement, after certiorari had been granted. O'Connor stated that “[b]ecause it has been repealed, the former version of [the statute] cannot chill protected expression in the future. Thus, . . . the overbreadth question in this case has become moot as a practical matter, and we do not address it.”61 She added:

An overbroad statute is not void ab initio, but rather voidable. . . . Because the special concern that animates the overbreadth doctrine is no longer present after the amendment or repeal of the challenged statute, we need not extend the benefits of the doctrine to a defendant whose conduct is not protected. . . . We also note that the amendment of a statute pending appeal to eliminate overbreadth is not different, in terms of ap-

58. Id. at 487 n.2.
61. Id. at 583-84.
plying the new law to past conduct from a state appellate court adopting a limiting construction of a statute to cure overbreadth.\textsuperscript{62}

Since the Court had taken this case only to consider the overbreadth issue, the proper resolution to this plurality was remanding to the Massachusetts courts for the purpose of deciding whether the former version of the statute could constitutionally be applied to \textit{Oakes}.

But the other five Justices — including Brennan and Marshall, as well as Blackmun and Stevens — joined in part of a partially dissenting opinion authored by Scalia; thus their “dissenting” opinion was in reality, in 1989, a majority opinion. In that opinion, Scalia forthrightly disagreed that the overbreadth defense is unavailable once the statute has been amended to cure the defect. Scalia stated: “It seems to me strange judicial theory that a conviction \textit{initially invalid} can be resuscitated by postconviction alteration of the statute under which it was obtained.”\textsuperscript{63} Scalia, then, apparently regards a conviction under a facially overbroad statute as \textit{invalid}, even if the defendant’s own speech could constitutionally be punished. And Blackmun, whose early dissenting opinions suggested disagreement with such a belief, joined that opinion. Scalia continued:

\begin{quote}
The overbreadth doctrine serves to protect constitutionally legitimate speech not merely . . . after the offending statute is enacted, but also . . . when the legislature is contemplating what sort of statute to enact. If the promulgation of overbroad laws affecting speech was cost free, as the plurality’s new doctrine would make it — that is, if no conviction of constitutionally proscribable conduct would be lost, so long as the offending statute was narrowed before the final appeal — then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place . . . \textmd{[A]} substantial amount of legitimate speech would be “chilled” as a consequence.
\end{quote}

\ldots Even if one were of the view that some of

\begin{itemize}
\item \textsuperscript{62.} \textit{Id.} at 584.
\item \textsuperscript{63.} \textit{Id.} at 586 (emphasis added) (citations omitted).
\end{itemize}
the uses of the overbreadth doctrine have been excessive, this would not be a legitimate manner in which to rein it in.\(^4\)

Although the \textit{Oakes} situation seems unlikely to recur with great frequency, and while one's position on the precise question raised therein is not necessarily indicative of any other position, the debate seems revealing. The Scalia position appears to reflect a heartening solicitude for freedom of expression, and an appreciation of the importance of the overbreadth tool in facilitating that freedom. One wonders, however, whether legislators will truly be affected by such opinions, as Scalia seems to assume, and whether legislators will even be aware of them. Perhaps the more persuasive argument for the Scalia position is that those who challenge facially overbroad statutes should not be deterred, or defeated, by the prospect of belated amendment of the challenged statute.

In \textit{Oakes} itself, Scalia and Blackmun, while prepared to consider the issue of facial overbreadth, went on to decide that the statute (pre-amendment) was simply not substantially overbroad, estimating "that the legitimate scope [of the law] vastly exceeds the illegitimate."\(^6\) Brennan, on the other hand, joined by Marshall and Stevens, would have reached the opposite conclusion, demonstrating again their lower tolerance for speech-threatening statutes. They were influenced, too, by the "severity" of the possible criminal sanctions, and by the very fact that the statute was so easily amended to cure its defects; "[t]he availability of such simple correctives renders the statute's overbreadth less acceptable."\(^6\)

Regrettably, no Justice has publicly opposed the well-established principle that a judicial narrowing construction can save an otherwise facially overbroad statute from invalidation. \textit{Boos v. Barry}\(^6\) and \textit{Frisby v. Schultz},\(^6\) both decided in 1988, made clear that such a saving construction could be imposed in the very litigation in which the facial overbreadth challenge was considered.

\(^{64}\) \textit{Id.} at 586-87 (footnote omitted).
\(^{65}\) \textit{Id.} at 588.
\(^{66}\) \textit{Id.} at 598.
\(^{67}\) 485 U.S. 312 (1988).
\(^{68}\) 487 U.S. 474 (1988).
raised, and *Ward v. Rock Against Racism*, in 1989, gave support to the corollary that an administrative agency, as well as a court, could supply the narrowing construction. *Osborne v. Ohio*, in 1990, provided the setting for a full explication of the rationale for allowing a contemporaneous narrowing construction to cure the problem of facial overbreadth, even in a criminal case. Justice White stated: “Our cases have long held that a statute as construed ‘may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendant[.]’” He added: “This principle, of course, accords with the rationale underlying overbreadth challenges...” *Osborne* a statute is authoritatively construed, there is no longer any danger that protected speech will be deterred and therefore no longer any reason to entertain the defendant’s challenge to the statute on its face.” White, in *Osborne*, restated Scalia’s *Oakes* argument, and explained the difference: A legislature would not be encouraged by the *Osborne* ruling to act without regard to First Amendment rights, because the legislature could not predict that a judicial narrowing construction would emerge to save the statute.

The problem with the entire concept of the benevolent narrowing construction is that it is arguably at odds with the underlying purposes of the facial overbreadth doctrine. In the case of a contemporaneous narrowing construction, not only does a broadly-worded statute remain on the books, but even the courageous and knowledgeable challenger is taken by surprise, possibly at great cost. But, again, every Justice has apparently accepted the prevailing rules.

*Osborne v. Ohio*, like *Massachusetts v. Oakes*, also reveals differences in the Justices’ readiness to reach a finding of substantial overbreadth. In *Osborne*, the defendant was convicted under an Ohio child pornography statute for possessing offending photographs. The Ohio Supreme Court, in affirming the conviction, had placed a narrowing construction on the statute in this very case. As Justice White appeared to recognize for the

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70. 495 U.S. 103 (1990).
71. *Id.* at 115.
72. *Id.* at 115-16 n.12.
73. *Id.* at 120-21.
majority, Osborne’s facial overbreadth argument was a credible one; still, the majority was “skeptical” of the overbreadth claim, in light of the statute’s exemptions. White acknowledged: “It is true that, despite the statutory exceptions, one might imagine circumstances in which the statute, by its terms, criminalizes constitutionally protected conduct.”\textsuperscript{74} But it was “far from clear” that any such overbreadth was substantial.\textsuperscript{75} The argument failed, in any event, because of the Ohio court’s narrowing construction.

Justice Brennan, joined by Marshall and Stevens, dissented, contending that the statute was fatally overbroad even with the narrowing construction. The statute essentially criminalized “material . . . that shows a minor who is not the person’s child or ward in a state of nudity,”\textsuperscript{76} with some detailed exceptions. The majority was satisfied, with brief discussion resting on references to the \textit{Ferber} case, that the Ohio Supreme Court had saved the law by reading in the requirement that the prohibited nudity constitute “a lewd exhibition or [involve] a graphic focus on the genitals.”\textsuperscript{77} But the three dissenters were completely unconvinced, and demonstrated at length and in detail that the judicially-discovered elements of the crime “not only fail to cure the overbreadth of the statute, but . . . also create a new problem of vagueness.”\textsuperscript{78} It is a dissenting opinion that demonstrates considerable solicitude for freedom of speech.\textsuperscript{79}

Finally, a facial overbreadth challenge will, on occasion, lead a federal court to decide to abstain from hearing the case until a

\textsuperscript{74} \textit{Id.} at 113 n.9.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at 126.
\textsuperscript{77} \textit{Id.} at 128.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} See also the begrudging deflection of a facial challenge in Regan v. Time, Inc., 468 U.S. 641 (1984), on the part of Justice White, writing for a plurality that included Rehnquist and O’Connor. The case concerned the federal statute restricting the use of photographic reproductions of United States currency, but permitting such use, under limited circumstances, by publications. Time, Inc. was partially successful in its challenge to the law, but the plurality gave short shrift to its facial challenge to the “publication” requirement. Stevens, concurring in the judgment in part, seemed to join in that disposition. In contrast, the dissenting Brennan and Marshall argued persuasively that the requirement was substantially overbroad. Blackmun, dissenting in part on other grounds, did not reach the issue.

state court has had the opportunity to interpret the challenged statute. Even with respect to this aspect of the doctrine, the Justices have shown differing propensities. A unanimous Court adopted that approach in 1988, in *Virginia v. American Book-sellers Ass’n, Inc.*, where the scope of the statute at hand was the subject of serious debate. But in the *Brockett* decision of 1985, O'Connor and Rehnquist were the only Justices who deemed abstention appropriate. Those same two Justices, along with Powell, were also the only ones favoring certification of questions to the Texas Court of Criminal Appeals in *City of Houston v. Hill* in 1987. Justice Brennan, for the majority, felt simply that the ordinance — which, again, made it a crime to “oppose” or “interrupt” a policeman, among other things — “is not susceptible to a limiting construction because, as both courts below agreed, its language is plain and its meaning unambiguous.” Similarly, in 1992, in *Forsyth County v. Nationalist Movement*, Rehnquist, White, Scalia, and Thomas urged, in dissent, that the challenged parade permit ordinance be remanded for interpretation by a lower court; the majority, speaking through Blackmun, felt no such need.

What, then, is the prognosis for the facial overbreadth doctrine? Surely, no one on the Court was more likely to employ it than Brennan and Marshall. Their replacements, Souter and Thomas, along with Kennedy, have said little on the issue thus far.

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83. *Id.* at 468. He appeared to also take into account the facts that the City had raised the abstention issue belatedly, the city’s suggested narrowing construction was unsatisfying, state trial courts had applied the ordinance for years without giving it a narrowing construction, and state law placed limits on the possibilities for satisfactorily interpreting this municipal ordinance. Brennan also quoted, in passing, language from 1960’s cases suggesting the inappropriateness of abstention in speech cases. *Id.* Justices White and Blackmun were in the majority, and Scalia, who concurred in the judgment, indicated agreement with the majority with respect to the inappropriateness of certification.

But Justice Powell, joined by Rehnquist and O’Connor, felt that certification of questions to the Texas Court of Criminal Appeals was appropriate, given the existence of “a serious question as to the meaning of the ordinance.” *Id.* at 473. Powell, joined on this point by Rehnquist, O’Connor, and Scalia, viewed abstention as inappropriate because of the belated raising of this issue, “coupled with . . . doubts as to whether relief could be secured under Texas law.” *Id.* at 478. In the process, he expressed doubt about Brennan’s assertion of an established disinclination to abstain in facial overbreadth cases. *Id.* at 476 n.4.

far, but Scalia has shown himself to be somewhat sensitive to the concerns that underlie the doctrine. Of the other five Justices, all have joined, at least once, in finding a law facially overbroad under the First Amendment, but each of these five “veterans” has also had occasion (admittedly not recently) to raise pointed questions about the desirability of the facial approach. In Blackmun’s case, those questions were raised only during his early years on the Court. In Stevens’ case, they tended to be raised only in cases in which he was generally unwilling to extend such protection to what he viewed as “low-value” speech. Rehnquist has most frequently and emphatically rejected the device, with O’Connor a distant second in that category. While White authored the important Broadrick opinion, it seems clear that that decision was not meant to terminate the Court’s use of the facial overbreadth doctrine, but simply to make its beneficence somewhat less freely available; White has often since joined in striking down laws as facially invalid, but he has also often declined to do so. Along with O’Connor and Rehnquist (and, to a less consistent extent, Stevens and Scalia), White has been most willing to place limits on the availability of facial challenges; Blackmun, in recent years, has been least willing to accept such limitations. The entire Court, in any event, has been inconsistent in its application of announced limitations. In terms of a propensity to readily perceive laws as substantially overbroad, only Stevens, in recent years, has matched the departed Brennan and Marshall.

II. PRIOR RESTRAINT

As commentators have noted, it is not at all clear, beyond certain easy instances, when government action deserves the pejorative label of “prior restraint,” nor is it clear what the consequence of such a designation should be. But clearly the phrase continues to connote unconstitutionality, “invalid” prior restraints apparently far outnumbering “valid” ones. The readiness of a Supreme Court Justice to pin that label on a government practice is therefore indicative, in part, of that Justice’s intolerance for regulations posing threats to freedom of expression.

The easy prior restraint cases are legendary, but few. In the modern era, both of the landmark prior restraint cases involved court orders muzzling expression by particular prospective speakers. In the Pentagon Papers case of 1971, Brennan, Marshall, and White were members of the six-man majority, each writing separately to make clear that the burden the government must meet to obtain preliminary injunctive relief against the press is a very heavy one indeed. (Interestingly, the young Justice Blackmun was one of the dissenters, deeming the Court’s action too hasty, and seemingly more accommodating to the government.) The commitment of the present Court to that high standard has not yet been tested. In the 1976 decision in Nebraska Press Ass’n v. Stuart, the Court unanimously struck down a “gag order” imposed on the press by a state trial judge presiding over a criminal case. Justices White, Blackmun, Rehnquist, and Stevens remain from the Court of 1976, and there is no perceptible reason to fear slippage from the philosophy of that decision.

A point of growing disagreement, however, has been the reach and extent of the procedural requirements laid down in the Brennan opinion in the 1965 case of Freedman v. Maryland. More generally, the problem area for the law of prior restraint has been, for the most part, the realm of pornography and alleged obscenity. The Court made clear, as early as the Kingsley Books case of 1957, that it had no problem with injunctions against the distribution of materials already adjudicated obscene. What has typically caused consternation is a licensing scheme that targets obscenity (which poses no constitutional problems in itself), but which also threatens to suppress non-obscene films or publications. Such was the case in Freedman, in which a nearly unanimous Court invalidated a Maryland film censorship statute. Brennan wrote for a majority that included White, and the key passages of his opinion bear repeating:

87. Id. at 759. Justice White, on the other hand, took a position strongly opposing the use of preliminary injunctions against the press. Id. at 730-40.
88. 427 U.S. 539 (1976). Here, too, Justice White, concurring, took an especially vigilant position. Id. at 570-71.
89. 380 U.S. 51 (1965).
We hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. ... Second, while the State may require advance submission of all films, ... because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. To this end, the exhibitor must be assured ... that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must ... be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, ... the procedure must also assure a prompt final judicial decision. ...91

Remarkably, a majority of the Court, ten years later, coalesced around an application of the Freedman requirements in a very different context. The case was Southeastern Promotions, Ltd. v. Conrad,92 and Justice Blackmun wrote for a majority that included Brennan and Marshall. The directors of a municipally-controlled theater denied a production company the right to stage the musical “Hair” in that theater, because they believed that the play was, at least in part, obscene. Blackmun called the denial a prior restraint and found it invalid under Freedman. The majority thus believed that the directors of a municipal theater were constitutionally obliged to go into court — promptly — in order to give final effect to their decision to deny a request to use that theater. As Justice Rehnquist observed in his dissenting opinion, it was unclear from the majority opinion whether its reasoning would apply to any denial of access to a municipal theater, or only to denials predicated on the contention that the production was obscene.93 The Rehn-

91. 380 U.S. at 58-59 (citations omitted).
93. Id. at 571-73.
quist opinion, moreover, effectively raised questions about the workability of imposing the *Freedman* procedural requirements upon the public-theatrical setting. Justice White dissented separately, believing, among other things, that the city "may reserve its auditorium for productions suitable for exhibition to all the citizens of the city, adults and children alike" — without going to court to do so.84 For each of these two Justices, then, there were limits to the applicability of *Freedman* to the governmental "censorship" process.

In 1980, *Vance v. Universal Amusement Co.*85 provided another opportunity for Justices Rehnquist and White to dissent. In a *per curiam* opinion, the Court invalidated a Texas public nuisance statute directed toward the exhibition of obscene films. The District Court and the Fifth Circuit Court of Appeals had stricken the Texas law, construing it to authorize prior restraints, in the form of temporary injunctions, "of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene."96 Mindful of the holding of *Walker v. Birmingham*97 (a 1967 ruling in which White had joined, but from which Brennan had dissented), the *Vance* majority observed that, presumably, an exhibitor would be required to obey any such temporary injunction, pending review, "and would be subject to contempt proceedings even if the film is ultimately found to be nonobscene."98 Thus, the fundamental principle of *Freedman* was violated. White and Rehnquist, dissenting, seemed in effect to simply disagree as to how the Texas statute might operate, believing that any injunction thereunder would be phrased in general terms, and, as construed, the statute was "functionally indistinguishable from a criminal obscenity statute."99 It is notable that the majority, which included Justices Brennan, Marshall, Blackmun, and Stevens, chose to

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84. Id. at 569.
86. Id. at 316. As Chief Justice Burger observed in dissent, the majority was assuming that the Texas statute authorized temporary injunctions against named films, a point that he contended was far from clear under the Texas statute; he therefore would have abstained, in order to have the benefit of an interpretation by a Texas court. Id. at 319-20.
88. 445 U.S. at 316.
89. Id. at 324.
adopt the more speech-protective approach to the question at hand.

But in 1986, in a case dealing with a very different kind of statute, the result was not very protective of speech. *Arcara v. Cloud Books, Inc.*\textsuperscript{100} upheld a New York statute which authorized the closure of an “adult” bookstore for one year when a building or place has been “used for the purpose of lewdness, assignation, or prostitution.”\textsuperscript{101} The New York Court of Appeals had found this provision to amount to an unconstitutional prior restraint, but the Supreme Court reversed. The essence of Chief Justice Burger’s majority opinion was his conclusion that “the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books.”\textsuperscript{102} The law did not single out bookstores, but rather “was directed at unlawful conduct having nothing to do with books or other expressive activity.”\textsuperscript{103} The penalty was analogous to closure for fire-code violations, he said, rather than to an unconstitutional prior restraint. The challengers, he emphasized, remained free to sell their books at another location. Justice O’Connor, joined by Stevens, concurred, asserting that a contrary ruling “would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment.”\textsuperscript{104}

Justices Blackmun, Brennan, and Marshall dissented, viewing the closure penalty as “an unnecessary burden on speech.”\textsuperscript{105} Responding to the majority, Blackmun wrote:

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But the First Amendment . . . protects against all laws “abridging the freedom of speech” — not just those specifically directed at expressive activity. Until today, this Court has never suggested that a State may suppress speech as much as it likes, without justification, so long as it does so
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\textsuperscript{100} 478 U.S. 697 (1986).
\textsuperscript{101} Id. at 699.
\textsuperscript{102} Id. at 707.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 708.
\textsuperscript{105} Id. at 711.
through generally applicable regulations that have
“nothing to do with any expressive conduct . . . ."

. . . .

... [W]hen a State directly and substantially
impairs First Amendment activities, such as by
shutting down a bookstore, I believe that the
State must show, at a minimum, that it has cho­
sen the least restrictive means of pursuing its leg­
islative objectives. The closure of a bookstore can
no more be compared to a traffic arrest of a re­
porter . . . than the closure of a church could be
compared to the traffic arrest of a clergyman.106

Tying his views to the law of prior restraint, Blackmun added:
“Until today, the Court has required States to confine any book
banning to materials that are determined, through constitution­
ally approved procedures, to be obscene,” citing Freedman and
Vance.107 It is a powerful dissenting opinion that reflects a
highly speech-protective judicial inclination. But it was not per­
suasive to O'Connor, Stevens, Rehnquist, or White.

The Court was unanimous, however, in striking down a dif­
ferent kind of property-related penalty in Fort Wayne Books,
Inc. v. Indiana108 in 1989. Pursuant to Indiana’s RICO statutes,
applicable to petitioners because of a pattern of obscenity viola­
tions at their bookstores, an Indiana court directed the seizure
of all of their property, real and personal, that was allegedly
“used in the course of, intended for use in the course of, derived
from, or realized through” their “racketeering” activities.109 The
court acted on the basis of a finding of “probable cause” that the
Indiana RICO law had been violated, and as a result the county
sheriff padlocked the stores and “hauling away” their contents.110

For the majority (and on this point there was no dissent),
Justice White appeared to have no difficulty finding this proce­
dure unconstitutional. Cases from the 1960s and 1970s had es­
tablished the principle, applicable here, that a publication “may

106. Id. at 709-11 (citations omitted).
107. Id. at 712.
109. Id. at 51.
110. Id. at 52.
not be taken out of circulation completely until there has been a
determination of obscenity after an adversary hearing.”\textsuperscript{111} White’s readiness to apply that principle here was all the more
striking because, as he recognized, the “predicate crimes” — i.e.,
the obscenity convictions underlying the alleged RICO violation
— “had been adjudicated and are unchallenged.”\textsuperscript{112} But the pe-
tition for seizure here, he observed, was “aimed at establishing
no more than probable cause to believe that a RICO violation
had occurred, and the order for seizure recited no more than
probable cause in that respect.”\textsuperscript{113} Equally heartening was
White’s rejection (in this case, at least) of the reasoning of the
Indiana Supreme Court, which had stressed that the pretrial
seizures “were not based on the . . . suspected obscenity of
the . . . items seized, but upon the neutral ground that the se-
qustered property represented assets used and acquired in the
course of racketeering activity.”\textsuperscript{114} But he did not reject that ra-
tionale completely and for all time and all cases; “we assume
without deciding,” he said, “that bookstores and their contents
are forfeitable . . . when it is proved that these items are prop-
erty actually used in, or derived from, a pattern of violations of
the State’s obscenity laws.”\textsuperscript{115} Here, however, it was
incontestable that these proceedings were begun
to put an end to the sale of obscenity at the three
bookstores named in the complaint, and hence we
are quite sure that the special rules applicable to
removing First Amendment materials from circu-
lation are relevant here. This includes specifically
the admonition that probable cause . . . is insuffi-
cient . . . .\textsuperscript{116}

Not a single Justice, in 1989, grabbed the opportunity to af-
firm the seizure orders on the basis of either the forfeiture-of-ill-
gotten-gains or prior-conviction rationale. But there was a hint
that some of the Justices would have affirmed, on the “forfei-
ture” theory, had the State presented a proper case in which to

\begin{itemize}
\item 111. \textit{Id.} at 63.
\item 112. \textit{Id.} at 66.
\item 113. \textit{Id.}
\item 114. \textit{Id.} at 64.
\item 115. \textit{Id.} at 65. In a footnote, White added that the Court was not reaching “the
question of the constitutionality of post-trial forfeiture . . . .” \textit{Id.} at 65 n.11.
\item 116. \textit{Id.} at 65-66.
\end{itemize}
do so. The notion that bookstores may be closed, and non-obscene publications seized, under any circumstances is a troubling one. Stevens, joined by Brennan and Marshall in dissent, appeared to recognize that. “I would extend the Court’s holding,” he wrote, “to prohibit the seizure of these stores’ inventories, even after trial, based on nothing more than a ‘pattern’ of obscenity misdemeanors.”117 There is a difference “of constitutional dimension,” he explained, between a business selling publications and one that is engaged in another commercial activity.118

The most recent decision of this broadly-defined genre is FW/PBS, Inc. v. City of Dallas,119 decided in 1990, in which a seriously splintered Court addressed the applicability of the Freedman requirements to a somewhat different contemporary setting. The case involved a Dallas ordinance which required, in pertinent part, that “sexually oriented businesses” (including adult bookstores and theaters) be licensed and inspected.120 The problem was that the ordinance, in practical effect, set no time limit within which the required inspection had to occur, and thus allowed for the possibility of indefinite postponement of the issuance of a license. Justice Brennan, joined by Marshall and Blackmun in concurring in the judgment, would have fully applied Freedman to this regulatory scheme. But Justice O’Connor, otherwise writing for a majority but speaking only for herself and Justices Stevens and Kennedy as to this aspect of the Dallas ordinance, distinguished Freedman, and declined to apply each of its three requirements. In the process of doing so, O’Connor showed appropriate sensitivity to First Amendment concerns:

The core policy underlying Freedman is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the li-

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117. Id. at 84.
118. Id.
120. Id. at 220-21.
Here, these requirements were not satisfied, and thus the ordinance was invalid. But the third Freedman requirement — that the censor bear the burden of going into court in order to suppress the speech and the burden of proof once there, if a license is to be denied — was, in the context of this regulatory scheme, not deemed necessary by this group of Justices. The reasons were twofold. First, Freedman, unlike the present case, involved “direct censorship of particular expressive material,” which was “presumptively invalid.” 122 Second, the license applicants in this case had “much more at stake” than the film distributor in Freedman, and thus had a greater incentive to pursue a license denial in court. 123

Brennan protested: “The heavy presumption against prior restraints requires no less” than the full application of Freedman to this ordinance. 124 “In distributing the burdens of initiating judicial proceedings and proof,” he continued, “we are obliged to place them such that we err, if we must, on the side of speech, not on the side of silence.” 125

Brennan also argued that, even if this case was factually distinguishable from Freedman in the ways O’Connor suggested, it was not meaningfully different from the Court’s 1988 decision in Riley v. National Fed’n of the Blind of N.C., Inc. 126 In Riley, Brennan wrote for a majority that invalidated a North Carolina requirement that a professional fundraiser obtain a license before engaging in solicitation. The Act imposed no time limit on the licensing agency, and was therefore unconstitutional. “[S]uch a regulation,” wrote Brennan therein, “must provide that a licensor ‘will, within a specified brief period, either issue a

121. Id. at 228 (citations omitted).
122. Id. at 229.
123. Id. at 229-30.
124. Id. at 241.
125. Id. at 241-42.
license or go to court,’ “127 citing Freedman. Justices White, Kennedy, and Scalia joined that opinion, along with Marshall and Blackmun. To Rehnquist, O’Connor, and Stevens, the licensing requirement in Riley “[did] not create a sufficiently significant burden on speech by charities” to warrant First Amendment analysis.128

In FW/PBS, White and Rehnquist viewed Freedman as completely inapplicable, and set forth an interesting explanation of their position:

The Dallas ordinance is in many respects analogous to regulations requiring parade or demonstration permits and imposing conditions on such permits. Such regulations have generally been treated as time, place, and manner restrictions and have been upheld if they are content neutral, serve a substantial government interest, and leave open alternative avenues of communication. . . .

The Dallas scheme regulates who may operate sexually oriented businesses, including those who sell materials entitled to First Amendment protection; but the ordinance does not regulate content and thus it is unlike the content-based prior restraints that this Court has typically scrutinized very closely.129

Riley (in which White had joined the majority) was distinguished on this basis. White also pointed out that “no evidence” suggested that arbitrary or undue delays in licensing had occurred, and urged the Court not to assume such occurrences.130

The White-Rehnquist theory would seriously restrict Freedman’s applicability. To the contrary, the O’Connor modification of Freedman, which may or may not turn out to be limited to fact patterns resembling that in FW/PBS, is, in the main, faithful to Freedman, retaining its important core. Indeed, the aban-

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127. Id. at 802.
128. Id. at 813.
129. 493 U.S. at 245-46 (citations omitted).
130. Id. at 247. Scalia, dissenting in part, would have upheld the ordinance, on completely separate grounds, see discussion at notes 417-21, infra; because he believed “that Dallas could constitutionally have proscribed the commercial activities that it chose instead to license, [he did] not think the details of its licensing scheme had to comply with First Amendment standards.” Id. at 253.
Donment of Freedman's third requirement, in nearly all contexts, would be understandable, since it is strikingly burdensome to government to require it to seek judicial approval of every license or permit denial affecting interests in expression.131 Reasonable or not, the adherence to this requirement by Brennan, Marshall and Blackmun was, again, reflective of their remarkably speech-protective instincts. With only one of that trio still on the Court, however, it is fair to wonder whether even the O'Connor position in FW/PBS would command a majority today.

Wholly outside the realm of pornography, two other decisions of recent years are instructive. One was Ward v. Rock Against Racism,132 in which Marshall, Brennan, and Stevens saw as an impermissible prior restraint, and would have applied the Freedman requirements to, a New York law requiring the use of a city sound technician in certain Central Park concerts. Kennedy, for the majority, did not see it that way at all, remarking that the city regulation "grants no authority to forbid speech, but merely permits the city to regulate volume. . . ."133 The three dissenters thus perceived even governmental "distortion" of a performer's music as a form of advance censorship.134

The other was the 1988 ruling in City of Lakewood v. Plain Dealer Publishing Co.135 Justice Brennan wrote for only four Justices (the others being Marshall, Blackmun, and Scalia), but that group of four constituted a majority in the case, as Rehnquist and Kennedy did not participate in the decision. For the majority it was an easy decision, calling for the application of long-settled law. A Lakewood ordinance gave its mayor the authority to grant or deny applications for annual newsrack permits, relating to the placement of newsracks on city property. The ordinance placed no perceptible limits on the Mayor's dis-

131. While the Supreme Court has never extended Freedman to the parade permit setting, the subject of White's analogy in dissent in FW/PBS, the suggestion has been made, and the logic of the case law would seem to lead to its fulfillment. See Central Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1526-27 (11th Cir. 1985) (Henderson, J., concurring).
133. Id. at 795 n.5.
134. Id. at 808-12. The Justices also differed as to whether the city's Guidelines should be properly understood as granting unbridled discretion to the sound technician.
cretion, and thus ran afoul of the long-standing principle that “a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes [an impermissible] prior restraint.”138 Such a law, furthermore, in Brennan’s view, was (and has always been) an appropriate target of a facial challenge.

But Justice White, joined by Stevens and O’Connor, dissented. White’s theory of the case was less simple. An outright ban on newsracks on city sidewalks, he believed, would be constitutional, because the right to distribute newspapers in a public forum did not encompass the right to appropriate city property, on a virtually permanent basis, for one’s own exclusive use.137 Furthermore, he contended, the doctrine allowing facial challenges to discretionary licensing schemes (with no requirement that the potential licensee even apply for a license) “applies only when the specific conduct which the locality seeks to license is protected by the First Amendment. Because the placement of newsracks on city property is not so protected . . . the exception to our usual facial challenge doctrine does not apply here.”138 Here, the Plain Dealer had not applied for a license under the challenged ordinance; hence, White would have ruled against it.

Brennan justified allowing a facial challenge largely on the ground that the licensing system here “is directed narrowly and specifically at expression or conduct commonly associated with expression: the circulation of newspapers.”139 In contrast, he said, “laws of general application that are not aimed at conduct commonly associated with expression . . . carry with them little danger of censorship.”140 To White, Brennan’s approach was “amorphous” and “vague,”141 and White scored a clear point with his comparison of the newsrack ordinance to an unchallenged companion ordinance giving the City Council unlimited discretion to grant or deny applications for all other exclusive uses of city property:

136. Id. at 757.
137. Brennan had no occasion to address this precise point. Id. at 762 n.7.
138. Id. at 774.
139. Id. at 760.
140. Id. at 760-61.
141. Id. at 787-88.
But what if Lakewood . . . repeals local ordinance § 901.181 (the detailed newsrack permit law) and simply left § 901.18 (the general ordinance concerning “any . . . structure or device” on city property) on the books? . . . . Because this law is of “general application,” it should survive scrutiny under the Court’s opinion — even as applied to newsracks. If so, the Court’s opinion takes on an odd “the-greater-but-not-the-lesser” quality: the more activities that are subjected to a discretionary licensing law, the more likely that law is to pass constitutional muster.142

But Brennan was able to point out problems with White’s reasoning as well: “The key to the dissent’s analysis is its ‘greater-includes-the-lesser’ syllogism. But that syllogism is blind to the radically different constitutional harms inherent in the ‘greater’ and ‘lesser’ restrictions.”143 Content-neutral regulations of speech may well be upheld as valid time, place, and manner restrictions, Brennan continued:

In contrast, a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official. . . . Therefore, even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official’s boundless discretion . . . . Fundamentally, then, the dissent’s proposal ignores the different concerns animating our test to determine whether an expressive activity may be banned entirely, and our test to determine whether it may be licensed in an official’s unbridled discretion.144

The White position in Lakewood (again, joined by O’Connor

142. Id. at 790.
143. Id. at 762-63 (footnote omitted).
144. Id. at 763-64 (citations omitted).
and Stevens) is by no means one that is seriously inhospitable to freedom of expression, and it succeeds in pointing out weaknesses (even from a speech-protective perspective) in the Brennan opinion. Yet it comes as a mild shock that, fifty years after the creation of the Court’s nearly impregnable stand against unbridled discretion in licensing schemes, it should have been questioned at all, however astutely. When all is said and done, the Brennan position must be seen as the more responsive to interests in freedom of speech; yet it is by no means clear that his position would be the majority position, were Lakewood decided today.

The entire Court recently reaffirmed its opposition to laws that confer unbridled discretion upon administrative officials, in Forsyth County v. Nationalist Movement.146 The majority — Blackmun, Stevens, O’Connor, Kennedy and Souter — interpreted the parade permit ordinance in question as doing just that, with respect to the decision to require an advance payment of funds for such a permit “in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed.”146 For the four dissenters, Rehnquist protested that the Court “unnecessarily reaches out to interpret the ordinance on its own . . . even though there are no lower court factual findings on the scope or administration of the ordinance.”147 He would have remanded for an interpretation by the lower courts, but agreed “that the Constitution does not permit a system in which the county administrator may vary fees at his pleasure. . . .”148 Given the ease with which the position of the dissent might have been adopted, the majority’s action can be seen as quite protective of speech.149

146. Id. at 2399.
147. Id. at 2407.
148. Id. at 2407.
149. The dissenters also took the majority to task for not addressing the question on which certiorari had been granted — namely, whether the county could impose a license fee, in the context of a demonstration, for more than a “nominal” sum, in order to recoup the actual expenses of maintaining public order. For the dissenters — Rehnquist, White, Scalia, and Thomas — the answer was “yes”. See id. at 2405-08. How the majority felt about this remained unknown, and, possibly for that reason, the discussion by the dissenters on this point was not developed in detail. Their willingness to impose such potentially large expenses on speakers, however, does not bode well for future demonstrators. Compare Central Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515 (11th Cir. 1985).
There has been no major theoretical campaign launched against any part of the Court's prior restraint doctrine. But resistance to its full application has been demonstrated, notably by Justices White and Rehnquist, and, to a lesser extent, by O'Connor and Stevens. As with its close cousin, the facial overbreadth doctrine, the presumption against prior restraints serves a largely prophylactic function, by invalidating statutes that threaten to prevent protected speech from being heard. To the extent that a Justice is more tolerant of such laws, he or she is, correspondingly, apparently less wary of that potential for deterrence. Only Blackmun remains of the trio that was most concerned about that potential.

III. FOUNDATIONAL PRINCIPLES, ABSENT SPECIALIZED RULES

A. CONTENT-BASED REGULATION

It is now hornbook law that, unless a specialized rule applies, regulation of expression based upon the content of that expression is subject to strict judicial scrutiny, in the usual sense of that term. Although earlier cases occasionally pointed toward such a rule, not until 1972, in Marshall's majority opinion in Police Dep't v. Mosley,\(^{150}\) was it expressly articulated. At that, Marshall's statement of the strict scrutiny formula was indirect and somewhat weak, and was mixed with plainly misleading statements to the effect that content-based regulations are "never permitted".\(^{151}\) Oddly, too, Mosley framed the issue as principally one of Equal Protection rather than as one arising simply under the First Amendment. As late as 1980, in Carey v. Brown,\(^{152}\) the same theoretical approach was put forth, this time by Brennan himself. Subsequently, the rule has been consistently deemed a First Amendment principle, the Equal Protection reference having quietly disappeared. It was, in fact, the decade of the 1980's that produced the crystallization of First Amendment law (to the extent that it is crystallized) that we regard as foundational today. Thus, the period of the early 1980's marked the beginning of the relatively consistent practices, by the Supreme Court, of clearly distinguishing between

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150. 408 U.S. 92 (1972).
151. Id. at 99.
152. 447 U.S. 455 (1980).
content-based and content-neutral regulations of speech, of categorizing public property as “public fora” or not (for purposes of freedom of speech), and of applying fixed rules to each of these situations. Indeed, the development of “public forum” theory — notably in the 1983 decision of Perry Educ. Ass’n v. Perry Local Educators’ Ass’n — did much to anchor the rule of strict scrutiny to content-based regulations of speech. None of these foundational rules seems likely to change in the near future.

Unacknowledged inconsistency in the willingness to apply these rules, however, may not have entirely disappeared. No Justice pointed out, for example, that the FCC order at issue in FCC v. Pacifica Found., in 1978, was content-based, and the same was true in the 1986 decision in Bethel School Dist. v. Fraser, a public school speech case upholding a content-based restriction on student expression. Neither decision expressly invoked a rule of strict scrutiny.\textsuperscript{156}

In Young v. American Mini Theaters, Inc., in 1976, the majority (speaking through Justice Stevens) acknowledged that the Detroit zoning law in question affected theaters based on the content of the films they displayed, yet accepted the city’s justification of the statute without any reference to strict scrutiny. Stevens considered, at length, the misleading language by Marshall in Mosley that had suggested that content-based regulation was never permissible. With that straw man easily knocked down, Stevens pointed out (1) that “government’s paramount obligation” is “neutrality” — an observation that tends to reduce the heaviness of the presumption against content regulation; (2) that the kind of speech being regulated by this law — films featuring “Specified Sexual Activities” — was not deserving of the fullest First Amendment protection; and (3) that “what is ultimately at stake is nothing more than a limitation on

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\textsuperscript{153} 460 U.S. 37 (1983).
\textsuperscript{154} 438 U.S. 726 (1978).
\textsuperscript{155} 478 U.S. 675 (1986). Nor were the regulatory schemes designed to protect privacy interests, at issue in the line of cases beginning with Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), characterized as content-based. See the discussion at notes 369-98, infra.
\textsuperscript{156} Surprisingly, Brennan joined in that theoretical lapse in Bethel, concurring in the judgment.
\textsuperscript{157} 427 U.S. 50 (1976).
\textsuperscript{158} Id. at 70.
the place where adult films may be exhibited, even though the
determination of whether a particular film fits that characteriza-
tion turns on the nature of its content”119 — a comment that
tends to minimize the key distinction between content-based
and content-neutral regulations. White and Rehnquist joined in
this singularly ad hoc bit of First Amendment reasoning, while
Justice Stewart, joined by Brennan, Marshall, and Blackmun,
accused the majority of “rid[ing] roughshod over cardinal princi-
pies of First Amendment law.”180 (Of course, these principles
hadn’t been “cardinal” for very long.)

Ultimately, the failure to apply strict scrutiny in Young was
effectively explained, ten years later, in the remarkably similar
case of City of Renton v. Playtime Theatres, Inc.181 That deci-
sion blurred the fundamental distinction between content-neu-
trality and content-relatedness. As in Young, the ordinance
under review required the scattering of theaters exhibiting films
“‘characterized by an emphasis on ... “specified sexual activi-
ties” ... ’”182 Rehnquist, for the majority, explained why this
ordinance should be viewed as a content-neutral time, place and
manner regulation:

[T]he Renton ordinance is aimed not at the content of the films shown at “adult motion picture
theaters,” but rather at the secondary effects of such theaters on the surrounding community. The
District Court found that the City Council’s “predominate concerns” were with the secondary
effects of adult theaters, and not with the content of adult films themselves . . . .

The District Court’s finding . . . is more than adequate to establish that the city’s pursuit of its
zoning interests here was unrelated to the suppression of free expression. The ordinance by its
terms is designed to prevent crime, protect the

159. Id. at 70-72.
160. Id. at 85-86. Justice Powell concurred separately. Id. at 73-84. White and
Rehnquist had also demonstrated a lack of concern about content discrimination the
previous year, dissenting in Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). Rehn-
quist and Stevens displayed similar insensitivity in the later case of Metromedia, Inc. v.
162. Id. at 44.
city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views . . . .

In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are justi­fied without reference to the content of the regulated speech." . . . . The ordinance does not contravene the fundamental principle that under­lies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds ac­ceptable, but deny use to those wishing to express less favored or more controversial views."163

It was, despite the usual attempt to make an adroit rewriting of doctrine appear to be nothing new, a wholly unprecedented ap­proach to the understanding of content-neutrality. The last-quoted sentence, moreover, has reference to viewpoint discrimi­nation, which has always been treated as worse than, but dis­tinct from, content discrimination.164 The Court went on to up­hold the ordinance.

Only Brennan and Marshall dissented.165 Surprisingly, how­ever, Brennan did not take aim at the questionable doctrinal un­derpinnings of the Rehnquist opinion, but, instead, calmly and succinctly stated his disagreement with the majority's approach, and then took issue, at greater length, with the majority's use of the facts of the case. The ordinance's failure to target bars, mas­sage parlors, and adult bookstores, he contended, "strongly sug­gests that Renton was interested not in controlling the 'secondary effects' associated with adult businesses, but in discriminating against adult theaters based on the content of the films they exhibit."166 Applying strict scrutiny, he would have invalidated the ordinance.

Much of the opinion that Brennan might have written in

163. Id. at 47-49 (citations omitted).
164. See id. at 56 n.1 (Brennan, J., dissenting).
165. Id. at 55-65. Blackmun concurred in the result, saying nothing. Id. at 55.
166. Id. at 57.
Renton he wrote two years later, concurring, with Marshall, in Boos v. Barry.\textsuperscript{167} He wrote separately “to register my continued disagreement with the proposition that an otherwise content-based restriction on speech can be recast as ‘content-neutral’ if the restriction ‘aims’ at ‘secondary effects’ of the speech . . .”\textsuperscript{168}

“The dangers and difficulties posed by the Renton analysis,” he asserted, “are extensive.”\textsuperscript{169} The “secondary effects” rationale, he went on, offers countless excuses for content-based suppression of political speech. No doubt a plausible argument could be made that the political gatherings of some parties are more likely than others to attract large crowds causing congestion, . . . or that speakers delivering a particular message are more likely than others to attract an unruly audience. Our traditional analysis rejects such a priori categorical judgments based on the content of speech, . . . requiring governments to regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce those effects. The Renton analysis, however, creates a possible avenue for government censorship whenever censors can concoct “secondary” rationalizations for regulating the content of political speech.\textsuperscript{170}

The Renton approach, moreover, failed in Brennan’s eyes to provide courts with sufficient guidance:

The traditional approach sets forth a bright-line rule: any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it. . . . The Renton analysis, in contrast, plunges courts into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry . . . .

\textsuperscript{167} 485 U.S. 312 (1988).
\textsuperscript{168} Id. at 334 (citations omitted).
\textsuperscript{169} Id. at 335.
\textsuperscript{170} Id. (citations omitted).
ability to assess the purity of legislative motive
but rather in the requirement that the govern­
ment act through content-neutral means that re­
strict expression the government favors as well as
expression it disfavors.\textsuperscript{171}

The \textit{Renton} definition of content-neutrality is not without
its appeal, given the fact that the absence of content-neutrality
subjects the challenged governmental act to strict scrutiny, a
very difficult test for the government to pass. Arguably, it is no
accident that the cases (including \textit{Young}, \textit{Pacifica}, and even
\textit{Bethel}) in which the Court appeared to ignore the content-based
nature of the regulation (at least as “content-based” was under­
stood, pre-\textit{Renton}) were cases in which the regulation was lim­
ited by some element of time or place as well as by content.
Thus, these cases, like \textit{Renton}, may have “felt” more like “time,
place, and manner” cases (in which something more akin to ad
hoc balancing takes place)\textsuperscript{172} than “content” cases — and they
are cases in which, given the limited impact on speech,\textsuperscript{173} it is
arguable that a test of strict scrutiny demands too much. Still,
Brennan’s powerful critique of \textit{Renton} reveals its potential for
serious mischief, and it once again marks Brennan (along with
Marshall) as perhaps more committed to highly speech-protec­
tive rules than any Justice now sitting.

Thus far, \textit{Renton} has experienced no growth. Its application
in \textit{Boos v. Barry}\textsuperscript{174} was rejected, not only by Brennan and Mar­
shall, but also by O’Connor, writing for herself, Stevens, and
Scalia. One issue in that case was the validity of a section of the
District of Columbia Code making it unlawful to display any
sign “designed or adapted to . . . bring into public odium any
foreign government, . . . or to bring into public disrepute politi­
cal . . . acts, views, or purposes of any foreign government”
within 500 feet of any building in the District of Columbia used
by any foreign government as an embassy or consulate.\textsuperscript{175} A ma­
jority regarded this statute as content-based, and found that it
failed to survive strict scrutiny. The District officials argued that

\begin{itemize}
\item \textsuperscript{171} \textit{Id.} at 335-37.
\item \textsuperscript{172} See discussion at notes 240-80, \textit{infra}.
\item \textsuperscript{173} See \textit{Young}, 427 U.S. at 78-79 (Powell, J., concurring).
\item \textsuperscript{174} 485 U.S. 312 (1988).
\item \textsuperscript{175} \textit{Id.} at 316.
\end{itemize}
the case was governed by Renton, in that “the real concern is a secondary effect, namely, our international law obligation to shield diplomats from speech that offends their dignity,” but O’Connor promptly rejected the contention. “Listeners’ reactions to speech are not the type of ‘secondary effects’ we referred to in Renton,” she stated. Here, unlike Renton, the regulation of speech was justified by reference to its “potential primary impact,” i.e., its “emotive impact” on its audience, and thus it was indisputably content-based.177

Rehnquist, White, and Blackmun dissented, for the reasons stated by Judge Bork, of the D.C. Circuit, below.178 Bork, interestingly, adverted to Renton in a footnote, suggesting that, given Renton, the “display” statute in Boos “may not in fact qualify as a content-based statute. . . . [W]hile differentiating on the basis of the content of the speech, [the statute] is justified by reference to content-neutral values — the need to adhere to principles of international law and to provide sufficient protection to foreign embassies.”179 But he confessed to being “not entirely sure” that this analysis was correct — and, he didn’t need it, since he believed that the statute satisfied strict scrutiny in any event. A majority of the Supreme Court disagreed, as we have seen, but possibly one or more of the three dissenters would have taken Renton as far as Bork suggested.

Justice Kennedy provided evidence, in his majority opinion for the court in 1989’s Ward v. Rock Against Racism,181 that the Renton approach to the determination of content discrimination was acceptable to him. Ward itself surely involved a content-neutral regulation. Still, Kennedy’s dictum is revealing, and questionable: “The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”182 He continued: “The government’s purpose is the con-
trolling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others," citing Renton.\textsuperscript{183} That is the Renton understanding of content-neutrality, not the Brennan understanding.\textsuperscript{184}

The Court’s most recent “expressive conduct” cases, although very different in other ways, have provided further opportunities for disagreement on the question: “Is the law content-based?” An affirmative answer to that question, by Brennan for a bare majority, was apparently crucial to the results in the flag-burning cases of 1989 and 1990,\textsuperscript{185} Texas v. Johnson\textsuperscript{186} and United States v. Eichman.\textsuperscript{186} The dissenters maintained, in Stevens’ words in Johnson, that the content of the flag-burner’s message “has no relevance whatsoever to the case.”\textsuperscript{187} It is perhaps notable that no dissenter relied on (or even mentioned) Renton in these two cases, though doing so would not have been inconceivable.\textsuperscript{188} The flag desecration statutes were by no means the most obvious examples of content-based regulation, yet Scalia and Kennedy joined Brennan, Marshall, and Blackmun in finding that those laws were content-based (and that strict scrutiny was the consequence).

It was otherwise, however, in the post-Brennan nude dancing case, Barnes v. Glen Theatre, Inc.,\textsuperscript{189} where a different bare majority upheld Indiana’s ban on nudity in public places, as applied to nude dancing in barrooms and “bookstores.” Every Justice but Scalia assumed that expressive conduct, within the protection of the First Amendment, was involved. Beyond that minimal area of agreement, however, lay substantial differences.

Consider first the dissenting opinion of Justice White

\textsuperscript{183} Id.
\textsuperscript{184} In a footnote to his dissenting opinion, Marshall — joined by Brennan and Stevens — protested the use of the Renton theory in a case unlike Renton itself, referring to the “serious threat to free expression posed by” that analysis. Id. at 804 n.1.
\textsuperscript{185} 491 U.S. 397 (1989).
\textsuperscript{186} 496 U.S. 310 (1990).
\textsuperscript{187} 491 U.S. at 438. See also id. at 432 (Rehnquist, C.J., dissenting).
\textsuperscript{188} Brennan himself came closest to mentioning Renton, taking time in Johnson to remind his readers that the Court in Boos had rejected the “secondary effect” argument therein. Id. at 412.
\textsuperscript{189} 111 S. Ct. 2456 (1991).
The purpose of the proscription in [the present] contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates . . . . As the State now tells us, . . . the State's goal in applying what it describes as its "content neutral" statute to the nude dancing in this case is "deterrence of prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure" . . . . The attainment of these goals, however, depends on preventing an expressive activity.

This being the case, it cannot be that the statutory prohibition is unrelated to expressive conduct. Since the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition. It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating thoughts, ideas, and emotions is the essence of the communication . . . .

That fact dictates the level of First Amendment protection to be accorded the performances at issue here.\(^\text{190}\)

He then cited *Texas v. Johnson* (despite his having dissented therein), stated that strict scrutiny was called for, and went on

\(^{190}\) *Id.* at 2473-74 (citations omitted).
to find that test unsatisfied in this case. What is notable here, in
addition to the “Brennanesque” sensitivity to freedom of ex­
pression shown by White in this opinion, is the fact that the
content-neutrality argument which he rejected might well have
been embraced as a variant of the “secondary effects” theory of
Renton. White was in the Renton majority, and could probably
provide us with an astute basis for distinguishing Renton from
Barnes, but that distinction is far from obvious.

Also notable, perhaps, is the fact that even Rehnquist, writ­
ing for a plurality of three Justices (the others being O’Connor
and Kennedy), placed no reliance on Renton. Instead, Rehn­
quist, having acknowledged that expressive conduct was in­
volved, simply shifted into an application of the four-part test
from United States v. O’Brien,191 without first addressing the
threshold question of whether the case did or did not involve
content-based regulation of expression. Under the First Amend­
ment regime recognized in Texas v. Johnson (in which Kennedy
joined the majority), to apply O’Brien is to have already con­
cluded that the expression has not been targeted because of its
content. In the course of applying O’Brien, however, the plural­
ity made its key conclusion clear: The state’s interest was unre­
lated to the suppression of free expression, because “[p]ublic
nudity is the evil the state seeks to prevent, whether or not it is
combined with expressive activity.”192

Justice Souter concurred in the judgment, and agreed with
the majority that the O’Brien test was applicable. But whereas
Rehnquist saw the statute as furthering “a substantial govern­
ment interest in protecting order and morality,”193 Souter
preferred to rely “on the State’s substantial interest in com­
bating the secondary effects of adult entertainment estab­
ishments . . . .”194 And in this regard he invoked Renton, tying
that decision to the application of the O’Brien requirement that
the government interest must (to satisfy this particular test) be
“unrelated to the suppression of free expression.”195 In so doing,

192. 111 S. Ct. at 2463. The Scalia concurrence, while theoretically different, shared
that key characterization of the statute with the plurality. Id. at 2464.
193. Id. at 2462.
194. Id. at 2468-69.
195. 391 U.S. at 377, quoted in 111 S. Ct. at 2470.
he found it necessary to rebut the position of Justice White, quoted above. Here is the core of Souter’s response to the dissenters:

To say that pernicious secondary effects are associated with nude dancing establishments is not necessarily to say that such effects result from the persuasive effect of the expression inherent in nude dancing. It is to say, rather, only that the effects are correlated with the existence of establishments offering such dancing, without deciding what the precise causes of the correlation actually are. It is possible, for example, that the higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations results from the concentration of crowds of men predisposed to such activities, or from the simple viewing of nude bodies regardless of whether those bodies are engaged in expression or not. In neither case would the chain of causation run through the persuasive effect of the expressive component of nude dancing.

Because the State’s interest in banning nude dancing results from a simple correlation of such dancing with other evils, rather than from a relationship between the other evils and the expressive component of the dancing, the interest is unrelated to the suppression of free expression. Renton is again persuasive in support of this conclusion.196

He then briefly described Renton, correctly observing that the Court therein made its “secondary effects” correlation “without need to decide whether the cause of the correlation might have been the persuasive effect of the adult films that were being regulated.”197

While the precise issue in Barnes was by no means identical to that in Renton, it appears safe to say that Justice Souter, unlike his predecessor, finds the Renton analysis persuasive, and that he is therefore open to questionable arguments pointing to a conclusion of content-neutrality in the regulation of expres-

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196. Id. at 2470-71.  
197. Id. at 2471.
There have, of course, been cases in which every Justice has agreed that the regulation was based upon the content of speech, and in which there was no dissent from the use of strict scrutiny to invalidate the law. One recent example is *Sable Communications of Cal., Inc. v. FCC*,\(^\text{198}\) decided in 1989, in which the Court (in an opinion written by White) struck down a federal statute barring "indecent" interstate commercial telephone messages. Another was the 1991 decision in *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*\(^\text{199}\) which struck down New York's so-called "Son of Sam" law. It is notable that both the District Court and the Court of Appeals had found the law constitutional, yet the Supreme Court (with Justice Thomas not participating) was unanimous in reaching the opposite conclusion. In contrast to the Court of Appeals majority, Justice O'Connor showed great solicitude for First Amendment concerns, both in defining the State's compelling interest narrowly and in perceiving the statute as "significantly overinclusive" in relation to its (properly-defined) goals.\(^\text{200}\) It should be said, too, that, as a threshold matter, O'Connor properly perceived the law as content-based, a characterization that apparently eluded the District Court.

The *Simon & Schuster* decision provided, in addition, the occasion for a most significant (and unexpected) display of speech-protectiveness by Justice Kennedy, who concurred in the judgment. The core of his concurrence reads as follows:

> The regulated content has the full protection of the First Amendment and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional. In my view it is both unnecessary and incorrect to ask whether the State can show that the statute "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." . . . . That test . . . derives from our equal protection jurisprudence, . . . and has no real or legitimate place when the Court considers the straightforward question whether

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200. Id. at 511.
the State may enact a burdensome restriction of speech based on content only . . . .201

Here, the regulation was based upon the content of speech, in a context to which no “historic and traditional” rule was applicable. Thus, according to Kennedy, “[n]o further inquiry is necessary to reject the State’s argument that the statute should be upheld.”202

One is entitled to wonder why it took Kennedy over two years, during which time he joined in the majority opinions in Texas v. Johnson and Sable Communications, to discover the ostensible error of the Court’s ways in this area of the law, but one can still applaud his inclination to abandon a test which (in his words) has “the capacity to weaken central protections of the First Amendment.”203 Yet the test of strict scrutiny has always been considered a rigorous and highly speech-protective test, and, when it has been applied, there are few examples of laws abridging expression that have survived it; indeed, the problem has been the persistent effort to bypass it. Why, moreover, should a rigorous yet not-inflexible test yield to a rule that, within its assigned domain, is absolute? That the Court may never have openly discussed the adoption of strict scrutiny in the realm of the First Amendment does not necessarily mean that, in Kennedy’s words, it was adopted without “considered

201. Id. at 512.
202. Id. at 513. Kennedy “acknowledged that the compelling interest inquiry has found its way into our First Amendment jurisprudence of late” (“of late?”), but submitted that “the Court appears to have adopted this formulation in First Amendment cases by accident rather than as the result of a considered judgment.” Id. at 513-14. He traced the language of strict scrutiny (in first amendment cases) back to the 1980 decision in Carey v. Brown, 447 U.S. 455 (1980), which, as he correctly observed, had approached what was essentially a first amendment case in terms of equal protection. “Thus,” he concluded, “was a principle of equal protection transformed into one about the government’s power to regulate the content of speech in a public forum. . . .” 112 S. Ct. at 513. To this extent his use of precedent is acceptable, but, surprisingly, he went on to set forth, as evidence of the true governing principle, quotations from the Mosley decision of 1972, 408 U.S. 92 (1972), and the Regan decision of 1984, 468 U.S. 641, supra note 79, both of them misleading at the time they were uttered, to the effect that government “has no power” to restrict expression because of its content. 468 U.S. at 648-49; 408 U.S. at 95 (emphasis added). He regarded that principle, supplemented by “historic and traditional categories” of speech regulation, as “preferable to the sort of ad hoc balancing that the Court henceforth must perform in every case if the analysis here used becomes our standard test.” 112 S. Ct. at 514.
203. Id. at 515.
Kennedy earns plaudits for his instinct here, but, in the short run, it seems extremely unlikely that he will be joined in this radical point of view by any more Justices than joined him in his initial expression of it in *Simon & Schuster*.

Ironically, however, Kennedy joined a plurality in upholding a content-based restriction of speech in the very same term, in *Burson v. Freeman*. *Burson* upheld a Tennessee statute prohibiting the solicitation of votes and the distribution of campaign materials, on an election day, within 100 feet of the entrance to a polling place. Blackmun wrote for the plurality, which included Rehnquist, White, and Kennedy. Blackmun found that the regulation was content-based, applied strict scrutiny, and, “reaffirm[ing] that it is the rare case in which we have held that a law survives strict scrutiny,” found that to be so here. The “obviously” compelling interests were twofold: protecting the right of citizens to vote freely, and protecting “the right to vote in an election conducted with integrity and reliability.” Blackmun underscored the special nature of the case by saying that it called for “a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote — a right at the heart of our democracy.”

This unique confrontation of important interests appears to explain the concurrence of Justice Kennedy, who claimed (for reasons quite unclear) to concur not only in the judgment but in Blackmun’s opinion as well. “As I noted in *Simon & Schuster,*” he wrote, “there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right.” Here, he suggested, the right to vote was involved, and, for that reason, it seems, his general rule against content-based regulation could give way without being given up. The remainder of his concurring opinion, embodying an attempt to modify and fur-

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204. *Id.* at 513.
206. Scalia concurred on other grounds, *id.* at 1859, and Thomas took no part.
207. 112 S. Ct. at 1857.
208. *Id.* at 1851.
209. *Id.*
210. *Id.* at 1859.
ther explain his personal content-regulation theory, was totally elusive to this writer.

The Stevens dissenting opinion, joined by O'Connor and Souter, is one of his finest, and makes mincemeat of the too-deferential Blackmun plurality opinion. The bulk of Blackmun's opinion is devoted to a detailed description of the history of election-day abuses and the evolution of responses thereto; the analysis therefore appears to deserve Stevens' rebuke that "it confuses history with necessity, and mistakes the traditional for the indispensable."\(^{211}\) Blackmun upheld the 100-foot boundary so readily that, as Stevens protested, the plurality's consideration appears "to be neither exacting nor scrutiny."\(^{212}\) Having decided that a restricted zone is necessary, Blackmun went on to conclude that "the minor geographic limitation prescribed" by the Tennessee statute did not even raise "a question of 'constitutional dimension.' "\(^{213}\)

Compare the vigilant Stevens opinion, concerned about preventing states from "unnecessarily hinder[ing] last-minute campaigning"\(^{214}\) (upon which some less affluent candidates rely heavily), and observing "[t]hat some states have no problem maintaining order with zones of 50 feet or less,"\(^{215}\) thus strongly suggesting "that the more expansive prohibitions are not necessary to maintain access and order."\(^{216}\) He was unpersuaded, in fact, that there was any need for regulating speech outside the polling place. Stevens, not Blackmun, showed the greater affinity for traditional strict-scrutiny analysis on this occasion, pointing out significant underinclusiveness in the statute's reach, insisting that it be logically justified, and requiring an evidentiary showing by the state in support of that justification. It is an impressive and heartening statement by Stevens, O'Connor, and Souter.

Three members of the Burson plurality — Rehnquist, White, and the usually-reliable Blackmun — were also together

\(^{211}\) Id. at 1862.
\(^{212}\) Id. at 1866.
\(^{213}\) Id. at 1857.
\(^{214}\) Id. at 1861.
\(^{215}\) Id.
\(^{216}\) Id.
in dissent, with respect to the validity of a content-regulatory statutory provision, in *Boos v. Barry*.\(^{217}\) Again, they stated therein only that they would have upheld the law (banning certain expressive acts within 500 feet of foreign embassies) for the reasons stated by Judge Bork in his opinion for the Court of Appeals. Those reasons, stated in careful detail by Bork,\(^ {218}\) were wholly bound up with foreign policy concerns and aspects of international law.

*Boos* and *Burson*, then, can each be seen as providing special reasons for finding strict scrutiny satisfied. Still, the opposing positions in those cases are so persuasive (while doing no real harm to the values underlying the government’s position) that one must tentatively regard Rehnquist, White, and Blackmun as a bit “soft” in the application of strict scrutiny to content-based regulation of speech.

The alignments have shifted, however, with virtually every issue. At least in some contexts, Stevens, in particular, has been all too ready to overlook the fact of content regulation.\(^ {219}\) But, in *Barnes*, as we have seen, Stevens joined White and Blackmun in finding content-based regulation, while Souter and O’Connor failed to do so.

In three other cases of the past two terms, the signals have continued to be decidedly mixed.

*Cohen v. Cowles Media Co.*,\(^ {220}\) in 1991, joins the list of cases involving content-based regulation that the Court has inexplicably failed to recognize and address as such. Justice White wrote the majority opinion upholding a cause of action for promissory estoppel against a newspaper, based upon publication of facts in breach of a promise of confidentiality. Blackmun, joined in dissent by Souter, O’Connor, and Marshall, came closest to calling

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218. See the discussion at notes 179-80, *supra*.
the restriction content-based.\textsuperscript{221}

\textit{Forsyth County v. Nationalist Movement}\textsuperscript{222} offered a ray of sunshine in 1992. Blackmun's majority decision, invalidating a parade-permit fee provision because it gave unbridled discretion to a county administrator in setting the fee, might have been unremarkable, after one accepted his interpretation of the ordinance (as the dissenters were unprepared to do). But Blackmun went on to observe, as further reason to find the law invalid, that "the ordinance often requires that the fee be based on the content of the speech."\textsuperscript{223} He explained:

In order to assess accurately the cost of security for parade participants, the administrator "must necessarily examine the content of the message that is conveyed, ..." estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content.\textsuperscript{224}

This he would not permit. Furthermore, he rejected, as the Court had done in \textit{Boos v. Barry}, the argument that the ordinance was content-neutral because it was directed only at a "secondary effect" of speech; "[l]isteners' reaction to speech is not a content-neutral basis for regulation."\textsuperscript{225} Blackmun was joined in this highly speech-sensitive opinion by Stevens, O'Connor, Kennedy, and Souter.

Finally, there was \textit{R.A.V. v. St. Paul},\textsuperscript{226} the 1992 head-spinner that invalidated St. Paul's "hate-speech" ordinance, in which both the majority and the dissenters displayed encouraging instincts, even while disagreeing vehemently among them.

\textsuperscript{221} Of course, the whole line of cases, culminating in \textit{Florida Star v. B.J.F.}, 491 U.S. 524 (1989), involving privacy-based restrictions on truthful publication, has proceeded without explicit recognition of the fact that they involved content-based regulation. But it seems that a rule of strict scrutiny has effectively been applied nonetheless. See the discussion at notes 369-98, infra.

\textsuperscript{222} 112 S. Ct. 2395 (1992).

\textsuperscript{223} Id. at 2403.

\textsuperscript{224} Id. (citations omitted). The dissenters did not expressly disagree with the language quoted above. See the discussion at notes 145-49, supra.

\textsuperscript{225} Id.

\textsuperscript{226} 112 S. Ct. 2538 (1992).
selves. Scalia, writing for himself, Rehnquist and all three of the “new kids” (Kennedy, Souter, and Thomas), essentially extended the presumptive invalidity of content discrimination into the previously-irredeemable realm of “unprotected” expression — here, the venerable category of “fighting words”. Accepting for purposes of decision the Minnesota Supreme Court’s interpretation of the ordinance as prohibiting only “fighting words,” Scalia found impermissible content discrimination because the particular “fighting words” banned were only those (according to the ordinance) “which one knows or has reasonable grounds to know [arouse] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”\(^{227}\) Even with regard to “fighting words,” he asserted, “government may not regulate use based on hostility — or favoritism — towards the underlying message expressed.”\(^{228}\) To the argument that bias-motivated speech causes injuries that are “qualitatively different” from other injuries, he responded:

> What makes the anger, fear, sense of dishonor, etc. produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc. produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily.\(^{229}\)

Considering the city’s justification for this discrimination, he found it insufficient, because it was not “necessary” to serve the compelling interests in ensuring “the basic human rights” of members of historically persecuted minority groups.\(^{230}\) It was not necessary, it seemed, because “adequate content-neutral alternatives” existed,\(^{231}\) which apparently meant the simple prohibition of “fighting words” generally — which was slightly odd, because even that is not content-neutral in the usual sense of the term. But it seems that every Justice would find a wholesale prohibition of such “unprotected” words to be acceptable.

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227. Id. at 2541.
228. Id. at 2545.
229. Id. at 2548. Somewhat less convincingly, he even saw viewpoint discrimination at work here. Id. at 2547-48.
230. Id. at 2549.
231. Id. at 2550.
Justice White, joined by Blackmun, O'Connor, and Stevens, concurred in the judgment, because he found that the Minnesota Supreme Court had failed to properly narrow the ordinance to embody a correct understanding of the "fighting words" concept; thus, it was facially overbroad. But he disagreed sharply with the key premise of the Scalia opinion:

It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil . . . ; but that the government may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.\(^{232}\)

That belief, on the part of the Court's veteran centrists — and remaining "liberals" — is understandable, but in fact it is less speech-protective than the Scalia position, quite regardless of what logic might suggest. It is particularly difficult, moreover, to understand why White characterized the majority opinion as embracing "a general renunciation of strict scrutiny review,"\(^{233}\) or why Blackmun asserted that "the Court seems . . . inevitably to relax the level of scrutiny applicable to content-based laws . . . thereby weaken[ing] the traditional protections of speech."\(^{234}\) Blackmun seemed to believe that, by granting some protection to hitherto-unprotected speech, the Court will ultimately dilute its protection of other speech. Why that result will surely follow, however, is far from clear. In protesting as they did, White and Blackmun sounded like the true champions of freedom of speech, but the majority — based simply on this decision — has at least as good a claim to that halo.

Where Scalia seems vulnerable is with respect to his complex scheme of exceptions to his newly-discovered rule; thus, not all content discrimination within a category of "unprotected" speech is presumptively invalid.\(^{235}\) White may be right in con-

\(^{232}\) Id. at 2553 (citations omitted).
\(^{233}\) Id. at 2554.
\(^{234}\) Id. at 2560. Nor is it clear why Stevens took Scalia to task for establishing "a near-absolute ban on content-based regulations of expression." Id. at 2562.
\(^{235}\) Id. at 2545-47. One such exception, it should be noted, represents the Renton "secondary-effects" phenomenon — but, as in Boos v. Barry, it was not deemed applicable here. Id. at 2549.
cluding that Scalia's theory, in its full-blown form, "does not work and will do nothing more than confuse the law."²³⁸

In the part of his separate concurring opinion in which he spoke only for himself, Stevens made clear — probably to the surprise of no one — his profound lack of enthusiasm for decision-making according to categories and general rules. "[I]t is just too simple," he said, "to declare expression ‘protected’ or ‘unprotected’ or to proclaim a regulation ‘content-based’ or ‘content-neutral.’ "²³⁷ He explained at length why he would uphold the ordinance, but for its overbreadth. A revealing part of that discussion shows Stevens' ingenious ability to avoid the content-discrimination problem:

Significantly, the St. Paul ordinance regulates speech not on the basis of its subject matter . . . but rather on the basis of the harm the speech causes . . . . Contrary to the Court’s suggestion, the ordinance regulates only a subcategory of expression that causes injuries based on “race, color, creed, religion or gender,” not a subcategory that involves discussions that concern those characteristics.²³⁸

Scalia called this “word-play.”²³⁹ It is more than that, but it is not a characterization that adds to the protection of speech.

The Justices have truly taken turns in rejecting or accepting content-based regulations of speech. In this branch of the law of freedom of speech, none of them appears to be heir to the mantle of vigilance worn consistently by Brennan and Marshall.

B. TIME, PLACE, AND MANNER REGULATIONS

Justice Marshall, dissenting with Brennan in Clark v. Community for Creative Non-Violence²⁴⁰ in 1984, said it all:

[I]n this case, as in some others involving time, place, and manner restrictions, the Court has dra-

²³⁶. Id. at 2558.
²³⁷. Id. at 2569.
²³⁸. Id. at 2570 (footnote omitted).
²³⁹. Id. at 2548.
matically lowered its scrutiny of governmental regulations once it has determined that such regulations are content-neutral. The result has been the creation of a two-tiered approach to First Amendment cases: while regulations that turn on the content of the expression are subjected to a strict form of judicial review, regulations that are aimed at matters other than expression receive only a minimal level of scrutiny. The minimal scrutiny prong of this two-tiered approach has led to an unfortunate diminution of First Amendment protection. By narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity . . . .

[T]he disposition of this case reveals a mistaken assumption regarding the motives and behavior of Government officials who create and administer content-neutral regulations. The Court's salutary skepticism of governmental decisionmaking in First Amendment matters suddenly dissipates once it determines that a restriction is not content-based. . . . What the Court fails to recognize is that public officials have strong incentives to overregulate even in the absence of an intent to censor particular views.241

Both before and after Marshall wrote those words, the decade of the 1980s was a period in which the fact that a regulation of speech was content-neutral almost always meant that the government would prevail against a First Amendment challenge.242 Prominent examples, prior to the Clark case, were Heffron v. International Soc'y for Krishna Consciousness,243 in 1981, and Los Angeles City Council v. Taxpayers for Vincent244 in 1984. They were followed by Renton245 in 1986, Frisby v. Schultz246 in 1988,

241. Id. at 312-15 (footnotes omitted).
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and Ward v. Rock Against Racism\textsuperscript{247} in 1989. Brennan and Marshall dissented in every one of those cases, sometimes joined by Stevens and/or Blackmun. Rehnquist and White were in the majority in each case, joined by O'Connor, Scalia and Kennedy once those Justices were on the Court.

It was in dictum in the Perry Educ. Ass'n\textsuperscript{248} case, in 1983, that White first articulated the version of the standard that has apparently taken firm root: "The State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."\textsuperscript{249} Overt doctrinal differences have been few in this area.

The primary theoretical battle took place in a 1989 decision, Ward v. Rock Against Racism.\textsuperscript{250} The Court in Ward upheld a New York City law requiring performers in a certain bandshell in Central Park to utilize sound amplification equipment and a sound technician provided by the city. The overriding objective, simply put, was volume control. The Court of Appeals, insisting that a valid time, place, and manner regulation be "the least intrusive means" of accomplishing a significant goal, found that it was not, given the alternatives, and struck down the regulation.\textsuperscript{251} The Supreme Court reversed, with Kennedy writing for

\begin{itemize}
\item \textsuperscript{247} 491 U.S. 781 (1989).
\item \textsuperscript{248} Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
\item \textsuperscript{249} Id. at 45. Earlier formulations, particularly in Heffron, supra note 243, omitted the "narrowly tailored" language, which did appear in the early statement of the governing principle, in Grayned v. City of Rockford, 408 U.S. 104 (1972), and which Brennan used in his Heffron dissent. 452 U.S. at 658. Justice White reverted to the less protective Heffron language in Regan v. Time, Inc., 468 U.S. 641 (1984), and stated, in applying the test to the "color" limitation of the federal ban on reproduction of illustrations of currency, "It is enough that the color restriction substantially serves the Government's legitimate ends." Id. at 657. (White, for a plurality of four that included Rehnquist and O'Connor, treated this color limitation as a time, place, and manner regulation, and upheld it. Stevens concurred in that part of the judgment. Blackmun did not reach the issue, Brennan and Marshall stated that they need not reach the issue, but called the plurality's reasoning into question. Id. at 688-90 n.27.) Rehnquist put forth an apparently unique verbal formulation of the standard in Renton, in 1986, requiring such regulations to be, inter alia, "designed to serve a substantial governmental interest," City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (emphasis added), thus not only omitting the usual "narrow tailoring" requirement, but seeming as well, ironically, to elevate the level of the required governmental justification.
\item \textsuperscript{250} 491 U.S. 781 (1989).
\item \textsuperscript{251} Id. at 789.
\end{itemize}
the five-person majority.252

Quoting White’s plurality opinion in *Regan v. Time, Inc.*,253 Kennedy restated a pronouncement that had engendered no debate at the time of that 1984 opinion, or at any time since: “This ‘less-restrictive-alternative analysis ... has never been a part of the inquiry into the validity of a time, place, and manner regulation.’”254 He elaborated:

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” . . . To be sure, this standard does not mean that a time, place or manner regulation may burden substantially more speech than is necessary to further the government’s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. . . . So long as the means chosen are not substantially broader than necessary to achieve the government’s interest, however, the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative.255

Marshall wrote the dissenting opinion, joined by Brennan and Stevens, and he reacted to the majority opinion with alarm. “Our cases have not,” he wrote, “‘clearly’ rejected a less restrictive alternative test.”256 In practice, Marshall contended, “the

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252. *Id.* at 784. Blackmun concurred in the result, saying nothing more. *Id.* at 803.
254. 491 U.S. at 797.
255. *Id.* at 798-800 (citations omitted) (footnotes omitted).
256. *Id.* at 804.
Court has interpreted the narrow tailoring requirement to mandate an examination of alternative methods of serving the asserted governmental interest and a determination whether the greater efficacy of the challenged regulation outweighs the increased burden it places on protected speech. But, tellingly, he could cite only two cases, each nearly fifty years old, for that proposition. He went on to predict the worst results flowing from Kennedy's formulation:

> The majority requires only that government show that its interest cannot be served as effectively without the challenged restriction. . . . It will be enough, therefore, that the challenged regulation advances the government's interest only in the slightest, for any differential burden on speech that results does not enter the calculus. Despite its protestations to the contrary, the majority thus has abandoned the requirement that restrictions on speech be narrowly tailored in any ordinary use of the phrase.

While Marshall probably overreacted to Kennedy's words, it does seem fair to suggest that those words took too big a step toward inviting judges to demand less in the way of justification for content-neutral restrictions on expression. The debate between Kennedy and Marshall in Ward may well provide the best example in First Amendment law of the difficulty of capturing in a verbal formulation just exactly how a particular kind of determination is to be made. At the heart of this analysis, arguably, has always been a sensitive balancing, blending a serious solicitude for freedom of speech with the recognition that content-neutral regulations that burden speech are both inescapable and relatively non-threatening to core First Amendment values; thus, a lesser justification is demanded than would otherwise be the case. To insist on the "least restrictive alternative," in this context, is arguably to have gravitated into the realm of maximum judicial scrutiny, which is not quite what anyone had in mind. Still, the very act of balancing (much less a requirement of "narrow tailoring," as Marshall properly said) implies a con-

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257. Id. at 805.
259. 491 U.S. at 806 (footnote omitted).
The fact that Marshall had to reach back nearly fifty years to find cases to support his vision of the proper analysis, however, reflects the fact that cases of more recent years had, in actuality, been decided in accordance with the approach now being espoused by Kennedy. Indeed, Marshall and Brennan had regularly, as dissenters, complained that challenged time, place and manner regulations were more restrictive of speech than was necessary.

Frisby v. Schultz,260 decided in 1988, is an example. The majority upheld an ordinance banning picketing directed at a residence, finding it narrowly tailored to achieve the important goal of protecting the tranquility and privacy of the home. Brennan, joined by Marshall, protested that the ordinance was not narrowly tailored, pointing out that:

[F]or example, the government could constitutionally regulate the number of residential picketers, the hours during which a residential picket may take place, or the noise level of such a picket. In short, substantial regulation is permitted to neutralize the intrusive or unduly coercive aspects of picketing around the home. But to say that picketing may be substantially regulated is not to say that it may be prohibited in its entirety.261

Such differences in approach, along with the intrinsic open-endedness of the governing standard — what is required under the heading of “narrow tailoring,” and when are there “ample alternative channels of communication?” — suggest that this is, in truth, the most unguided area of First Amendment law, and thus the one in which Justices most clearly balance interests according to their own proclivities. In performing this balancing, only Brennan and Marshall consistently favored the interests of speech.

Thus, in Renton,262 only Brennan and Marshall felt that the

261. Id. at 494. Stevens dissented separately. Id. at 496-99.
Detroit zoning ordinance left the regulated theaters with less than adequate available geographic opportunities for engaging in business. In *Heffron* and *Clark*, Brennan and Marshall (joined by Stevens in *Heffron*) would have required *evidence* in support of the state’s interests, decrying the majority’s indulgence of “speculative” problems raised by the government. The demand for factual support is, of course, a key component of a genuinely demanding level of review, and has not, at least in recent times, been in any way associated with the review of time, place, and manner regulations.

In *Clark* and *Taxpayers for Vincent*, Brennan and Marshall (joined by Blackmun in *Vincent*), as if to emphasize that the analysis truly embodied a process of balancing, took time to emphasize the nature and significance of the speech interests involved, facts either assumed or cursorily acknowledged by the majority. Thus, in *Vincent*, a decision upholding a municipal ban on the posting of signs on utility poles, Brennan stressed “the critical importance of the posting of signs as a means of communication,” recognizing such signs as “doubtless ‘essential to the poorly financed causes of little people.’” With respect to the availability of alternative channels of communication, Brennan responded to the majority’s treatment of this element by pointing to the absence of any “showing” that the suggested alternatives would serve as well. In this case, as well, he displayed an overt skepticism about the city’s alleged interest in aesthetics, warning that “the inherent subjectivity of aesthetic judgments makes it all too easy for the government to fashion its justification for a law in a manner that impairs the ability of a reviewing court meaningfully to” evaluate such claims. Thus, while the majority (speaking through Stevens) accepted the city’s aesthetic interest as sufficient, Brennan would, again, have

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265. Heffron, 452 U.S. at 661-62; Clark, 468 U.S. at 308-09.
267. Id. at 819-20.
268. Id. at 820.
269. Id. at 822.
required "tangible proof of the legitimacy and substantiality of its aesthetic objective," by insisting upon a showing that the city was pursuing its purported objective "comprehensively."270

Whatever one may think of the Court's disposition of each of the time, place, and manner cases of the 1980's, it is clear that Justices Brennan and Marshall, on occasion joined by Blackmun or Stevens, took an approach to these cases that was markedly less deferential to government than the rest of the Court. Since then, the signals have been mixed.

In a case in which no other Justice addressed the precise point, Justice Kennedy showed himself ready to uphold (what

270. Id. at 828. An oddity of the Taxpayers for Vincent case is the fact that, despite the fact that the ordinance in question clearly fits the description of a content-neutral time, place and manner regulation, Stevens, writing for the Court, chose (without real explanation) to apply the test of United States v. O'Brien, 391 U.S. 367 (1968), rather than the standard generally used to evaluate the validity of time, place and manner regulations; as it turned out, that theoretical departure probably made no difference to the outcome of the case. O'Brien was the first Supreme Court case to confront the issue of "symbolic speech," and Chief Justice Warren resolved the precise issue before the Court by subjecting the government's regulation of what was assumed to be expressive conduct to a brand new four-part test, the thrust of which was to allow such regulation when the government had a sufficiently important interest unrelated to the suppression of speech.

Several weeks after Vincent, the Court decided Clark, supra note 264, a symbolic speech case which might naturally have been resolved under O'Brien. In a triumph of good sense, however, Justice White, after stating both tests, resolved the case under the well-established time, place and manner analysis, and then remarked that "the foregoing analysis demonstrates that the Park Service regulation is sustainable under the four-factor standard of United States v. O'Brien, . . . for validating a regulation of expressive conduct, which, in the last analysis, is little, if any, different from the standard applied to time, place, and manner restrictions." 468 U.S. at 298. In a footnote, he added: "Reasonable time, place, and manner restrictions are valid even though they directly limit oral or written expression. It would be odd to insist on a higher standard for limitations aimed at regulable conduct and having only an incidental impact on speech." Id. at n.8. Some of us felt, on the basis of that prescient observation, that the arguably gratuitous O'Brien test could, and should, have been laid to rest.

But it was not to be. Justice Brennan, of all people, invoked O'Brien, understandably, as the presumptive alternative to the rule of strict scrutiny actually applied in the flag-burning case, Texas v. Johnson, 491 U.S. 397 (1989), and a plurality of the Court has since shown, in the Barnes case, 111 S. Ct. 2456 (1991), that the O'Brien test is alive and applicable to cases involving conduct (such as nude dancing) possibly, but not inevitably, having expressive value. In Barnes, Rehnquist (writing for himself, O'Connor, and Kennedy) alluded to the time, place and manner concept, recalled that "in Clark we observed that this test has been interpreted to embody much the same standards as those set forth in U.S. v. O'Brien," and concluded, with no further explanation, that the O'Brien test would be applied. Id. at 2460. (Scalia, concurring in the judgment, characterized the O'Brien test as "an intermediate level of First Amendment scrutiny," which he contended was inappropriate. Id. at 2467.)
he saw as) a time, place and manner regulation, in the case of United States v. Kokinda in 1990. In voting to uphold the federal ban on soliciting on postal premises, he perceived the government’s interest (in facilitating postal transactions) as significant, and stated, with no elaboration, that the regulation was “narrowly drawn.” The dissenters, Brennan and Marshall, joined by Stevens, did not see the regulation as content-neutral, and argued, characteristically, that the total ban was not narrowly tailored to achieve the interest in preventing disruption of postal business.

The Barnes case of 1991 is also instructive, despite the fact that Rehnquist, writing for the plurality, analyzed the Indiana public indecency statute under the test of United States v. O’Brien, rather than characterizing it as a time, place, and manner regulation. Because the O’Brien test has been analogized to time, place and manner analysis, the application of O’Brien is a further indication of a Justice’s approach to the evaluation of content-neutral regulations of speech. Rehnquist found, in Barnes, that the Indiana statute (as applied to nude barroom dancing) “furthers a substantial government interest in protecting order and morality,” and (with minimal discussion) that it was narrowly-tailored to achieve that purpose. Justice Souter, concurring in the judgment, essentially agreed. The dissenters (White, Marshall, Blackmun and Stevens) disagreed that the statute was narrowly tailored, but that conclusion may or may not have been tied to the fact that they were applying strict scrutiny to a regulation that they perceived as content-based.

Finally, in 1992, in Lee v. International Soc’y for Krishna Consciousness (“ISKCON”), four Justices (Kennedy, Souter, Blackmun, and Stevens) applied time, place, and manner analy-

274. See note 270.
275. 111 S. Ct. at 2462.
276. Id. at 2468-71. He relied instead on “the State’s substantial interest in combating the secondary effects” — apparently prostitution, sexual assault, and other crimes — “of adult entertainment establishments of the sort typified by respondents’ establishments.” Id. at 2468-69. Scalia, concurring in the judgment, apparently rejects the O’Brien test, and saw no “speech” implicated here. Id. at 2465-67.
277. See the discussion at notes 190-91, supra.
sis to a prohibition of the distribution of literature in public airport terminals, and found it wanting. With respect to the ban on the solicitation and receipt of funds in those terminals, however, Kennedy voted to uphold it as a reasonable time, place, and manner restriction, while Souter, Blackmun, and Stevens emphatically disagreed. The other five Justices, finding the absence of a "public forum," did not need to even apply time, place, and manner analysis, but O'Connor joined in striking down the distribution ban.

While the result in Lee v. ISKCON offers hope, it is too soon to conclude that Marshall's observations are any less accurate today than they were, in Clark, in 1984.

C. THE "PUBLIC FORUM" LIMITATION

In the course of determining which public properties or governmentally-controlled media of communication are or are not "public fora" presumptively available for expressive activity, the Court has, virtually from the beginning, been consistently reluctant to resolve the issue against the government, once its focus is beyond the "traditional" realm of streets, sidewalks, and parks. Brennan and Marshall were perpetual dissenters in this area of First Amendment law.

The first decision explicitly based on the Court's view that a particular piece of public property could reasonably and validly be withdrawn from First Amendment activity was Adderly v. Florida, in 1966. Not until 1974, in Lehman v. City of Shaker Heights, was the term "public forum" used in an opinion so holding, and not until the Perry Educ. Ass'n decision of 1983 did the Court clarify the legal consequences of the designations "public forum," "limited public forum," and "non-public forum." In each of these cases, the Court held that the govern-

280. See the discussion at note 318, infra.
284. Id. at 45-46.

One early case in which the question was not raised, but surely might have been, with the likely effect of changing the result, was *Cohen v. California*\(^{292}\) in 1971, a landmark decision on "offensive" speech, which happened to occur in a courthouse corridor. Another such instance, also pre-dating the emergence of recognized doctrine in this area, was the pioneering students'-rights decision in *Tinker v. Des Moines School Dist.*,\(^{293}\) which proclaimed, in 1969, that public high school students did not "shed their constitutional rights of freedom of speech or expression at the schoolhouse gate."\(^{294}\) The later-developed "public forum" inquiry was not raised in that decision, in which White joined, and, probably because of the *Tinker* precedent, was not raised in the 1986 high school speech decision, *Bethel School Dist. v. Fraser*\(^{295}\) (whose result would not have been changed even if it had). By 1988, however, the Court was ready to apply the doctrine to the public school setting, in the *Kuhlmeier* case.\(^{296}\) On occasion, notably the *Taxpayers for Vincent*\(^{297}\) decision of 1984, the "public forum" question, while apparently pertinent (there, in connection with public utility poles), has been acknowledged but given inexplicably little weight.\(^{298}\)


\(^{293}\) 393 U.S. 503 (1969).

\(^{294}\) *Id.* at 506.

\(^{295}\) 478 U.S. 675 (1986).


\(^{298}\) Justice Stevens, for the majority, appeared to believe, in *Vincent*, that a utility
In only a few cases was a public property not traditionally open for expression held, by a majority of the Court, to be a “public forum” (more properly, a “limited public forum,” post-
Perry),299 most notably the “Hair” case300 of 1975 and Widmar
v. Vincent301 in 1981. Widmar involved state university facilities
that were “routinely” made available to student organizations;
no one dissented on the public forum issue. The “Hair” case,
Southeastern Promotions v. Conrad,302 involved a municipally-
managed auditorium “designed for and dedicated to expressive
activities.”303 Blackmun wrote for the majority, and White and
Rehnquist dissented, the latter believing that a public audito-
rium could not properly be analogized to a public park.

Those cases aside, Brennan and Marshall disagreed with the
majority in virtually every one of the other decisions in which
the public forum question was considered.303 Stevens joined
their dissenting opinions in Perry and Kokinda (and dissented
on other grounds in Cornelius), while Blackmun did so in Cor-
nelius, Kuhlmeier, and Kokinda. Justices Rehnquist and
O’Connor, in contrast, have rejected every non-traditional “pub-
lic forum” argument which they have considered, and nearly the
same thing can be said of White.304

pole (on which the plaintiffs sought to post their campaign signs) was not a public forum,
a conclusion which, in theory, ought to have been virtually dispositive, on an issue that
should have been a threshold one. In the process, he appeared, for the most part, to be in
tune with the prevailing doctrine. Id. at 813-15. Yet he declined, in effect, to rest the
decision on that point, and, in a footnote, cryptically opined that “it is . . . of limited
utility in the context of this case to focus on whether the tangible property itself should
be deemed a public forum.” Id. at 815 n.32.

301. 454 U.S. 263 (1981). Another such holding was Madison School Dist. v. Wiscon-
sin Employment Relations Comm., 429 U.S. 167 (1976). (See the Brennan concurrence,
at 178-79).
302. 420 U.S. at 555.
303. An exception for Marshall was the Cornelius case, supra note 288, in which he
did not participate. Brennan’s position almost invariably led him to dissent, the except-
ion being his concurrence in the judgment, on other grounds, in the Greenburgh Civic
Ass’ns case, 453 U.S. 114, 134. At times, moreover, their dissenting positions were purely
on other grounds. See Jones, supra note 286; United States v. Albertini, 472 U.S. 675
(1985).
304. The exception for White is his concurrence in the judgment in Postal Serv. v.
Greenburgh Civic Ass’ns, 453 U.S. 114, 141-42 (1981), in which he called the postal sys-
tem “open” to all protected written expression, but went on, uncharacteristically, to sug-
gest that the inquiry was not a useful one.
As opinion writers, the primary architects of the public forum doctrine have been White (in Perry) and O'Connor (in Cornelius and Kokinda). The doctrine they have fostered, which looks first to tradition and then to governmental intent, has been accepted by a majority of the Court. In terms of doctrinal disagreement (as opposed to mere differences in application), Brennan and Marshall initially stood alone, essentially resting their positions, in Greer and Greenburgh, on a competing notion of "compatibility" — i.e., the forum is presumptively open to all First Amendment activity not incompatible therewith — that is ultimately at odds with the underlying premise of the prevailing public-forum theory. That premise is that, subject to minimal constitutional restrictions, government simply does not have to allow expression in non-traditional public settings when it has chosen not to do so.

It was in the Cornelius case that the theoretical debate took on an added dimension, and one that has survived the departure of Brennan and Marshall. Here, O'Connor, for a plurality of four Justices, set forth the highly limiting principle that the existence of a "limited public forum" (in which the usual rules of freedom of speech apply) is to be ascertained entirely by reference to "the government's intent." Blackmun stepped forward, joined by Brennan, to write an outstanding critique of "the Court's circular reasoning." In the process (despite their differing positions in Lehman, Greer, and Perry), he aligned himself with the Brennan view that the proper approach to this aspect of First Amendment analysis should embody an evaluation of "compatibility":

305. In some cases, such as Lehman, supra note 282, the dissenting opinion rested on the contention that the municipal transit system's advertising space had become a public forum. In Perry, supra note 283, the dissenters argued that the government had engaged in viewpoint discrimination, concededly impermissible even in a non-public forum; they suggested, but found unnecessary to pursue, the argument that the school mail system was indeed a public forum. In Kuhlmeier, supra note 289, too, the dissenters declined to take the public forum issue head-on, resting instead on a collection of arguments, embracing viewpoint discrimination, the Tinker precedent, and the absence of sufficient governmental justification.

306. Greer, 424 U.S. at 860 (Brennan, J., dissenting); Greenburgh Civic Ass'n, 453 U.S. at 136 (Brennan, J., concurring), 149-50 (Marshall, J., dissenting).


308. Id. at 802-04.

309. Id. at 813.
Thus, the public forum, limited-public-forum, and nonpublic forum categories are but analytical shorthand for the principles that have guided the Court's decisions regarding claims of access to public property for expressive activity. The interests served by the expressive activity must be balanced against the interests served by the uses for which the property was intended. . . . Where an examination of all the relevant interests indicates that certain expressive activity is not compatible with the normal uses of the property, the First Amendment does not require the Government to allow that activity.

The Court's analysis . . . turns these principles on end . . . [T]he Court simply labels the property and dispenses with the balancing . . . .

. . . The Court offers no explanation why attaching the label “nonpublic forum” to particular property frees the Government of the more stringent constraints imposed by the First Amendment . . . .

. . . .

The Court's analysis empties the limited-public-forum concept of meaning. . . . The Court makes it virtually impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. If the Government does not create a limited public forum unless it intends to provide an “open forum” for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, . . . no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum.310

Justice Stevens, dissenting separately, essentially sidestepped the “scholarly debate” between Blackmun and O'Connor, remarking that he was “somewhat skeptical about the value of this analytical approach in the actual decisional process.”311 By

310. Id. at 820-21, 825.
311. Id. at 833. Recall his opinion for the Court in Taxpayers for Vincent, discussed
standing outside the debate, however, he surely gave evidence that he would not subject himself to the limitations of the plurality’s rigid approach.

The majority opinion in Kuhlmeier\textsuperscript{312} three years later, written by White and joined by Rehnquist, O’Connor, Scalia, and Stevens, seemed to adopt the Cornelius approach, but almost certainly the finding of a non-public-forum in Kuhlmeier did not depend on that approach, since the student newspaper in Kuhlmeier had never truly been “opened” as a forum for uncensored expression.

O’Connor wrote again for a plurality in Kokinda\textsuperscript{313} in 1990, refusing to treat a postal sidewalk as the equivalent of a traditional, ordinary public sidewalk, and utilizing her Cornelius approach to conclude that the government had not intended to open postal premises for expressive activity of the sort in which the defendants had engaged (i.e., “soliciting”). Significantly, Scalia joined the opinion, along with Rehnquist and White. Just as significantly, Kennedy did not, although he concurred in the result. While Kennedy ultimately declined to decide the public forum question in Kokinda, deeming the ban on solicitation on postal premises to be a valid time, place, and manner regulation, he indicated clearly that he could not embrace O’Connor’s pure reliance on tradition and governmental intent:

While it is legitimate for the Postal Service to ensure convenient and unimpeded access for postal patrons, the public’s use of postal property for communicative purposes means that the surrounding walkways may be an appropriate place for the exercise of vital rights of expression. As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place. It is true that the uses of the adjacent public buildings and the needs of its patrons are an important part of a balance, but there remains a powerful argument that, because of the wide range of activities that the Govern-

\begin{footnotes}
\end{footnotes}
This is so even though the Government may intend to impose some limitations on the forum's use. If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case. See, e.g., Cornelius ... (Blackmun, J., dissenting). While it is proper to weigh the need to maintain the dignity and purpose of a public building, ... or to impose special security requirements, see Adderly ... , other factors may point to the conclusion that the Government must permit wider access to the forum than it has otherwise intended.314

Stevens and Blackmun, as well as Marshall, joined the dissenting opinion by Brennan which contended that the postal sidewalk was a traditional public forum, and picked up where Blackmun had left off in Cornelius in castigating the plurality's overall approach to the public forum question. One line from this dissenting opinion merits particular attention here:

Whatever the proper application of public forum doctrine to novel situations like fund-raising drives in the federal workplace ... or the internal mail systems of public schools, ... we ought not unreflectively transfer principles of analysis developed in those specialized and difficult contexts to traditional forums such as streets, sidewalks, and parks.315

The members of the plurality, of course, did not act "unreflectively," nor would they agree that the matter is as simple as Brennan suggested. But his comment underscores the difference between cases in which the “no-public-forum” holding arguably makes sense, and cases in which the rigid application of doctrine, with hairs cleverly split, appears to be little more than that. Not only does a distinction among sidewalks create the likelihood of unnecessary future line-drawing, but the refusal to

314. Id. at 737-38 (citations omitted).
315. Id. at 746-47.
call that sidewalk even a "limited public forum" (when doing so would have been easy, given all the expressive activity permitted thereon) seems reflective of a commitment to maximum feasible resistance to finding open forums for expression.

Justice Scalia recently demonstrated the importance, to him, of the public forum limitation, by arguing, all alone, that the area directly surrounding a polling place is not, by tradition, a "public forum" for speech, even to the extent that such an area encompasses streets and sidewalks. He thus concurred in the judgment in *Burson v. Freeman*,\(^3\) in which Tennessee's ban on electioneering within 100 feet of polling places was upheld. But the plurality, which included Blackmun, Rehnquist, White, and Kennedy, thought that the regulation touched upon speech in "quintessential public forums."\(^3\) That Scalia was unable to attract the support of any other Justice for his point of view suggests just how singular his approach to the "public forum" concept may be.

The division of the Justices in this area of First Amendment law was clearly displayed, once again, in the most recent decision turning on the public forum inquiry, *International Soc'y for Krishna Consciousness, Inc. ("ISKCON") v. Lee*.\(^2\) Five Justices — Rehnquist, White, O'Connor, Scalia, and Thomas — held that a publicly operated airport terminal was not a public forum, either by tradition or designation. Again, the possibility that a non-traditional public forum had been created by designation was tied to the government's intent. (Thomas, then, has aligned himself with this important limitation.) But the four Justices who dissented on this point included Kennedy and Souter, along with the more dependable Blackmun and Stevens. Speaking for those four, Kennedy, building on his *Kokinda* con­currence, placed himself solidly in the tradition of Justice Bren­nan in this ongoing doctrinal debate. Displaying admirable resis­tance to rote acceptance of prevailing dogma, he wrote:

Our public forum doctrine ought not to be a juris­prudence of categories rather than ideas or con­vert what was once an analysis protective of ex-

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317. Id. at 1850. As previously noted, however, they found strict scrutiny satisfied. See the discussion at notes 206-10, supra.
And:

In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.320

Sounding a great deal like Blackmun in his *Cornelius* dissent, Kennedy criticized the majority’s analysis as one that “leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government.”321 The requirements for inclusion in the designated-forum category, he asserted, “are so stringent that I cannot be certain whether the category has any content left at all.”322 In terms highly reminiscent of the departed Brennan, he set forth a promising alternative to the majority’s approach:

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 property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive ac-

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319. *Id.* at 2715.
320. *Id.* at 2717.
321. *Id.* at 2716.
322. *Id.* at 2717.
Strikingly, Kennedy added the corollary that courts should consider the availability of reasonable time, place, and manner restrictions in undertaking this "compatibility" analysis. Possible inconsistencies between expressive activities and the property's uses should not defeat a public-forum finding, he argued, "if those inconsistencies can be avoided through simple and permitted regulations." In the present case, involving "the airport corridors and shopping areas outside of the passenger security zones," he found all of those elements satisfied.

Writing separately, Justice Souter — who was addressing the issue for the first time — indicated his full agreement with Kennedy. Thus, two of the youngest Justices have essentially adopted the positions previously held by Brennan and Marshall with respect to this oft-arising threshold question. Because of their relative youth, the highly speech-protective approach which they espouse has, now, a greater chance of someday becoming law than it has had at any time in the past two decades.

Once the decision is made that a particular public venue is in no way a public forum, the government is, of course, held to a very low standard of review; only if the regulation is "unreasonable," or amounts to viewpoint discrimination, will it be found unconstitutional. Even at this stage, the Justices have somewhat predictably disagreed. In Perry, the majority (speaking through White, and including Rehnquist, O'Connor, and Blackmun) saw the school board's policy of selective access to teachers' mailboxes (allowing access to the teachers' union that had been elected the exclusive bargaining representative but denying access to a rival union) as reasonable and as a policy "based on the status of the respective unions rather than their views." Brennan, however, joined by Marshall and Stevens in dissent, saw the exclusive access policy as viewpoint-discriminatory, with

323. Id. at 2718.
324. Id.
325. Id. at 2715.
326. Id. at 2724.
328. Id. at 49.
“no discernible state interest” being furthered thereby.\textsuperscript{329}

In \textit{Kuhlmeier},\textsuperscript{330} the majority (again speaking through White) found the principal’s censorship of the school newspaper to be quite reasonable, while the dissenters (Brennan, Marshall, and Blackmun) thought it “served no legitimate pedagogical purpose.”\textsuperscript{331}

The \textit{Kokinda} case provides another good example of a setting in which these differing reactions were manifest. Having decided that the postal sidewalk was not a public forum, the plurality went on to rule that the ban on solicitation of money at that location was reasonable, “because solicitation is inherently disruptive of the Postal Service's business.”\textsuperscript{332} “[C]onfrontation by a person asking for money,” wrote O'Connor, “disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information.”\textsuperscript{333} She added that the regulation did not discriminate on the basis of content or viewpoint.\textsuperscript{334}

For the four dissenters, however, Brennan did not see the regulation as content-neutral, demonstrating greater sensitivity concerning that distinction once again.\textsuperscript{335} “If a person on postal premises says to members of the public, ‘Please support my political advocacy group,’ ” Brennan explained, “he cannot be punished. If he says, ‘Please contribute $10,’ he is subject to criminal prosecution. His punishment depends entirely on what he says.”\textsuperscript{336} That contention was significant, again, \textit{only} if the postal sidewalk were viewed as a public forum. Even if it were not, however, Brennan — now joined only by Marshall and Stevens — could not regard the solicitation ban as “reasonable,” for the primary reason that other forms of expression, which he saw as equivalent in their capacity for disruption, were permitted on postal premises. He also felt that restrictions short of a total ban

\begin{itemize}
  \item \textsuperscript{329} \textit{Id.} at 68.
  \item \textsuperscript{330} Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
  \item \textsuperscript{331} \textit{Id.} at 289.
  \item \textsuperscript{333} \textit{Id.} at 734.
  \item \textsuperscript{334} Content discrimination, of course, would not have been impermissible in a non-public forum.
  \item \textsuperscript{335} \textit{Id.} at 753. See generally the discussion at notes 166-85, \textit{supra}.
  \item \textsuperscript{336} \textit{Id.}
\end{itemize}
on solicitation were possible, and that, while the least restrictive alternative was not required in a non-public-forum, "these other approaches to the problem of disruption are so obvious that the no-solicitation regulation can scarcely be considered . . . reasona­
ble . . ." 837 Once again, the Brennan position was maximally speech-protective.

The plurality responded to the dissent, in part, in a way that seems revealing. Purporting to address the "reasonableness" question, but perhaps having in mind the threshold public forum question, O'Connor said:

[I]t is anomalous that the [Postal] Service's allow­ance of some avenues of speech would be relied upon as evidence that it is impermissibly suppress­ing other speech. If anything, the Service's generous accommodation of some types of speech testifies to its willingness to provide as broad a forum as possible, consistent with its postal mis­sion. The dissent would create, in the name of the First Amendment, a disincentive for the Govern­ment to dedicate its property to any speech activ­ities at all.888

O'Connor responded further to Brennan by stating: "Even if more narrowly tailored regulations could be promulgated, . . . the Postal Service is only required to adopt reasonable regulations, not 'the most reasonable or the only reasonable' regulation possible." 339 O'Connor, fairly clearly, would invest the "reasonableness" requirement with less meaning than would the Kokinda dissenters.

But inISKCON, O'Connor demonstrated that she did not regard the "reasonableness" requirement as toothless. The dispute inISKCONinvolved a New York Port Authority prohibi­tion of distribution of written material and "[s]olicitation and receipt of funds" in the interior areas of air terminals.840 The majority, which found no public forum present, had little trouble concluding that, as inKokinda, the solicitation ban was reasonable. Justice Kennedy — who, again, did view the termi-
nal as a public forum — joined the majority in this result, seeing the ban on “[s]olicitation and receipt of funds” as a reasonable time, place, and manner restriction.\textsuperscript{341}

But O’Connor joined Kennedy and the three dissenters to form a different majority, in what was technically a companion case arising from the very same dispute.\textsuperscript{342} That majority held, in a brief \textit{per curiam} ruling, that the ban on distribution of literature in the airport terminals was unconstitutional. O’Connor deemed the prohibition unreasonable, emphasizing the failure of the Port Authority to provide any independent justification for this restriction; moreover, she could not “see how peaceful pamphleteering is incompatible with the multipurpose environment” of the airports.\textsuperscript{343} Kennedy, joined by the Souter group, applied time, place, and manner analysis to this prohibition, and found it wanting. Rehnquist, White, Scalia, and Thomas dissented; invoking concerns about congestion, passenger delays, and safety hazards, they found even the distribution ban reasonable.

The Justices remain deeply divided over the concept of the public forum, and the longstanding trend in favor of governmental restrictiveness has yet to be reversed. But, because of Kennedy and Souter, there is now hope for the future in this area of First Amendment law.

IV. INDIVIDUAL CONTENT-BASED CATEGORIES

A. DEFAMATION

There has been no indication that anyone on the Court — other than Justice White — wishes to repudiate the general rule of \textit{New York Times v. Sullivan},\textsuperscript{344} imposing the “actual malice” requirement on defamation lawsuits brought by “public officials” (and, by virtue of later case law,\textsuperscript{345} “public figures” as well). Further developments in this field, however, have been accompanied by constant disagreement. Might any of the detailed

\begin{itemize}
\item \textsuperscript{341} \textit{Id.} at 2715.
\item \textsuperscript{343} 112 S. Ct. at 2714.
\item \textsuperscript{344} 376 U.S. 254 (1964).
\item \textsuperscript{345} Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
\end{itemize}
rules of the present First Amendment law of defamation be in imminent danger of modification?

After New York Times, the most important Supreme Court libel case was Gertz v. Robert Welch, Inc.,\(^3\) decided in 1974. Of the five Justices who joined the majority opinion (authored by Powell), only Blackmun and Rehnquist remain. Marshall joined that majority as well, but Brennan did not. The case held, first, that private-figure plaintiffs in defamation cases must demonstrate fault (presumably negligence), but not “malice,” in order to prevail, and, second, that such plaintiffs cannot receive presumed or punitive damages unless they show “malice.” Justice White dissented at length, taking the position that the Court had no sound basis for rejecting the approach of the common law (allowing liability and presumed damages upon a showing of mere falsity) in the case of a private-figure plaintiff. He was concerned about the impact of the Court’s ruling on private citizens; he was not worried that preserving the common law to this extent would likely pose any serious threat to the vitality of the press.

That White has not abandoned his opposition to Gertz was demonstrated eleven years later, in his separate concurrence in Dun & Bradstreet v. Greenmoss Builders, Inc.\(^4\) Powell wrote the plurality opinion, joined only by Rehnquist and O’Connor, holding that, in private-figure defamation suits in which the false statement is not on a matter of “public concern,” presumed and punitive damages are available even without a showing of “actual malice.”\(^5\) (The plurality said nothing regarding the Gertz standard for proof of liability in a private-figure defamation case; White asserted that that rule must also be inapplicable in a no-public-concern case, but the dissenters maintained that the liability requirement had not been questioned.)\(^6\) The fourth and fifth votes for affirmance in Dun & Bradstreet came from White and Chief Justice Burger, who would have simply overruled Gertz, thus permitting awards of presumed and punitive damages on no special showing.

\(^3\) 418 U.S. 323 (1974).
\(^5\) Id. at 761.
\(^6\) Id. at 781.
Not only did White urge that *Gertz* be overruled, he now felt that the basic ruling of *New York Times* was unwarranted:

In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized . . . or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited, as in *Gertz*. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered. He might also have recovered a modest amount, enough perhaps to pay his litigation expenses.350

It must be emphasized that he stood alone in these views. Brennan, joined by Marshall, Blackmun, and Stevens, dissented, objecting both to the plurality's general rule and to its application here. Remaining from that decision, then, are two Justices (Rehnquist and O'Connor) from the plurality; one (White) who concurred, on radical grounds; and two (Blackmun and Stevens) who dissented, urging no deviation from *Gertz*. The question could thus be decided wholly afresh.

Another aspect of *Dun & Bradstreet* is important to note. Although the Vermont Supreme Court had based its ruling in the case on a distinction between “media” and “non-media” defendants,351 the plurality totally sidestepped that point. White and Brennan agreed that the law of defamation should embody no such distinction.

The only other decision that speaks to fundamental rules, in this area of the law, is the 1986 decision in *Philadelphia Newspapers, Inc. v. Hepps*.352 O'Connor wrote the majority opinion,

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350. *Id.* at 771.
351. *Id.* at 752-53.
holding that a private-figure plaintiff in a defamation suit must, like a public-figure plaintiff, bear the burden of proving that the allegedly defamatory statement was false, at least when the speech is on a matter of public concern and when the suit is brought against a “media” defendant. Why O’Connor chose to speak in such narrow terms is not clear, but it is true that she adhered to the precise situation before the Court, adding in a footnote: “Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant . . . .”363 By doing so, however, she quickly revived the debate over whether the identity of the defendant should matter, for any purpose, in the First Amendment law of libel. Brennan, briefly concurring with Blackmun, wrote separately only to try to dispel, once again, any suggestion that it should. Only O’Connor and Blackmun remain from the Hepps majority.

Stevens dissented, joined by White and Rehnquist. In sharp contrast to O’Connor — who showed impressive sensitivity to the deterrent effect of the common law rule placing on the defendant the burden of proving the truth of a defamatory statement — Stevens, tapping heavily into the Gertz rationale, would have given much heavier weight to the interest in protecting the reputation of a private citizen.364 Emphasizing the fact that a private-figure plaintiff was already obliged to prove “fault” on the part of a defendant, he remarked that libels “contribute little to the marketplace of ideas,”365 and that “the public’s interest in an uninhibited press is at its nadir when the publisher is at fault . . . .”366 He expressed concern about “[t]he danger of deliberate defamation by reference to unprovable facts,”367 and captured perfectly the difference between his approach and O’Connor’s with this pronouncement:

The Court’s result is plausible . . . only because it grossly undervalues the strong state interest in redressing injuries to private reputations.

353. Id. at 779 n.4.
354. Indeed, while he limited his comments to the interests of private-figure plaintiffs, he indicated, in a footnote, that he “would be inclined to the view that public figures should not bear the burden of disproving the veracity of accusations made against them with ‘actual malice’ . . . .” Id. at 788 n.10.
355. Id. at 782.
356. Id. at 784.
357. Id. at 785.
The error lies in its initial premise, with its mistaken belief that doubt regarding the veracity of a defamatory statement must invariably be resolved in favor of constitutional protection of the statement.\textsuperscript{358} The O'Connor position, in \textit{Hepps}, is thus clearly the more speech-protective one.

On fairly slim evidence, then, with respect to the rules of defamation law post-\textit{Gertz}, these observations can be made: White would favor a radical rewriting, Rehnquist is prepared to maximize the position of private plaintiffs (short of rewriting \textit{Gertz}), O'Connor and Stevens have staked out “mixed” positions, and Blackmun has taken the most consistently speech-protective position.

Cases since \textit{Hepps} have not really yielded any further clues.

In 1989, in \textit{Harte-Hanks Communications, Inc. v. Connaughton},\textsuperscript{360} a unanimous Court upheld a libel judgment in favor of a public figure plaintiff against a media defendant; thus, no basic rules were called into question.

In \textit{Milkovich v. Lorain Journal Co.},\textsuperscript{360} decided in 1990, all but Brennan and Marshall joined in a Rehnquist majority opinion that declined to recognize, in the law of defamation, “an additional separate constitutional privilege for ‘opinion’.”\textsuperscript{361} But, using the \textit{Hepps} decision to bolster his conclusion, Rehnquist gave assurance that “\textit{Hepps} stands for the proposition that a statement on matters of public concern” — including an “opinion” — “must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved.”\textsuperscript{362} Concerning his reference to a “media defendant,” he added, in a footnote, that “[i]n \textit{Hepps} the Court reserved judgment on cases involving nonmedia defendants, . . . and accordingly we do the same.”\textsuperscript{363}
No subsequent case has involved a nonmedia defendant.

The Court remanded *Milkovich* because the Ohio courts had erroneously recognized an “opinion” exception under the First Amendment. It may be worth noting, however, that the Ohio Supreme Court had also decided that Milkovich was a private figure, yet no Supreme Court Justice reached out, in this case, to suggest rewriting any of the rules (from *Gertz* to *Hepps*) applying to private-figure defamation suits. Admittedly, however, this appeal was by no means the most appropriate context in which to do so.

In the most recent Supreme Court decision in the libel field, 1991’s *Masson v. New Yorker Magazine, Inc.*,364 White and Scalia showed themselves to be more inclined than their colleagues to impose liability, albeit in a special setting. The plaintiff, a public figure, accused the media defendants of knowingly misquoting him. The District Court granted summary judgment to the defendants, finding that the alleged inaccuracies did not raise a jury question concerning the required “actual malice,” but the Supreme Court reversed. For the majority, Justice Kennedy “reject[ed] any special test of falsity for quotations,” concluding “that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity ... unless the alteration results in a material change in the meaning conveyed by the statement.”365 The Court reversed the grant of summary judgment with respect to all except one of the quoted passages at issue; that one, said Kennedy, “did not materially alter the meaning of [Masson’s] statement.”366 But White, joined by Scalia, was less tolerant of knowing misquotations, believing that the mere fact that the reporter wrote things that she knew Masson had not said amounted to “knowing falsehood,”367 and, therefore, “actual malice” within the meaning of the rule of *New York Times*.

The four most junior members of the Court have thus revealed little in terms of their thinking on the large, general issues in the First Amendment law of defamation. With their el-

365. Id. at 2432-33.
366. Id. at 2436.
367. Id. at 2437-38.
bers in disagreement, almost anything could happen.

B. PUBLICATION OF TRUTHFUL INFORMATION

Although the Court has not singled out, as a special category, the power of government to penalize the publication (typically, but not necessarily, by the press) of truthful information, in a non-commercial setting raising no other well-established basis for suppression, it is arguably appropriate to do so. Over the past two decades, the Court has decided a line of cases generally upholding the right of the press to publish facts, over the objections of public and private parties asserting interests in privacy or confidentiality. That nearly unbroken string of press victories entitles one to ask: Will the press always enjoy the right to print the truth? A few cases that do not fit the prevailing pattern may shed some light on this issue as well.

In 1975, Cox Broadcasting Corp. v. Cohn initiated the core pattern of cases in which the press has consistently prevailed. Justice White wrote the opinion for the Court, avoiding broader-than-necessary pronouncements, but asserting that the First Amendment commands “that the States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection.” Three more cases of the late 1970’s essentially followed Cox, in situations involving somewhat varied facts. None involved unlawful acquisition of the published information, but in one, Landmark Communications, Inc. v. Virginia, it did not appear that the confidential information was in any way available to the public. By the last of these decisions, Smith v. Daily Mail Publishing Co., in 1979, it appeared that strict scrutiny was being applied to these laws. No Justice dissented, on the merits, in any of these four cases, but, in the Daily Mail case, Rehnquist showed that

368. Compare, e.g., cases in which the government interest in national security was invoked as a basis for suppressing the publication of truthful information. E.g., New York Times v. United States, 403 U.S. 713 (1971).
370. Id. at 495.
he was not truly in accord with his colleagues. In *Daily Mail*, the Court held unconstitutional a West Virginia statute prohibiting publication by newspapers of the names of minors subject to juvenile court proceedings, finding that the law did not appear to achieve its purposes. Only Rehnquist, concurring in the judgment, made clear that he considered the state’s interest in preserving the anonymity of such juveniles to be compelling, and that, absent the limitation to newspapers, he would have upheld the statute.  

Ten years later, the fundamental issue pervading these cases returned to the Court, in *Florida Star v. B.J.F.* Justice Marshall wrote the opinion, upholding the right of a newspaper to publish the name of a rape victim which it had obtained from a publicly released police report. Significantly, White, Rehnquist, and O’Connor would have allowed the State to prohibit such a publication. In keeping with the earlier precedents, Marshall eschewed sweeping propositions, expressly declining “appellant’s invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment.” His approach, however, was not *ad hoc*; rather, he adopted this governing principle from the *Daily Mail* case: “[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a State interest of the highest order.” Again, this sounds like strict scrutiny, which should be the standard applicable to the content-based regulations involved in cases of this kind. Note, however, the three potential limitations upon the applicability of strict scrutiny that are suggested by the *Daily Mail* formulation: (1) the defendant must be a “newspaper” — or, more sensibly, a representative of the communications media; (2) the published fact must be “about a matter of public significance”; and (3) the information must have been lawfully obtained. Treating each of these elements as though it might be
a condition precedent to a First Amendment victory, Marshall found each of them satisfied in this case, including, most notably, the conclusion that the news article concerned "a matter of public significance." "That is," he wrote, "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime . . . ."379 His apparent lack of concern about whether the victim’s name itself was "a matter of public significance" can be seen as seriously weakening whatever limiting force this element of the analysis might have, and must therefore be seen as reflective of a speech-protective approach.

Marshall went on to find that the state’s interests were "highly significant," but that the statute was not necessary to the achievement of those privacy interests.380 The state had more limited means of maintaining the confidentiality of the information, the negligence per sé standard swept too broadly (apparently in contrast to the typical common law cause of action for invasion of privacy), and the statute was fatally underinclusive in applying its prohibition only to "instrument[s] of mass communications."381 Given the majority’s premises, finding these flaws in the Florida law required no departure from standard judicial analysis. In addition to Brennan, the majority included Blackmun, Stevens, and Kennedy.

White, dissenting with Rehnquist and O’Connor, distinguished all prior cases, and took issue with each of the majority’s bases for finding the Florida law insufficiently tailored to achieve its goals. Perhaps most significantly, the dissenters, unlike the majority, felt that the state had done virtually all it could to keep the victim’s name confidential, notwithstanding the fact that the government itself had inadvertently provided the name to the newspaper. Although the dissenters quibbled with the authoritativeness of the Daily Mail formulation adopted by Marshall, they put forth no competing standard of review. Apparently they would have performed a balancing of sorts, and they showed themselves ready, for the first time in a case of this kind,

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379. Id. at 536-37.
380. Id. at 537.
381. Id. at 539-40. Justice Scalia concurred on the basis of the majority’s third ground for invalidation. Id. at 541.
to rule against a publisher of truthful information, at least under certain circumstances.

The following year the Court reverted to form with a unanimous decision in an easy case, Butterworth v. Smith,\textsuperscript{382} striking down a Florida statute banning a grand jury witness from ever disclosing testimony he gave before that body. Rehnquist, writing for the Court, reiterated the \textit{Daily Mail} standard. But the opinion resolved the dispute narrowly, finding an insufficient state interest to justify "a permanent ban" on disclosure, even after the grand jury has been discharged — but taking no express position on the validity of the ban prior to that discharge. Perhaps it is significant that not even Brennan or Marshall wrote separately to reject such an implicit distinction.\textsuperscript{383}

It is true, of course, that no contemporary Justice has insisted that there is an absolute right to publish truthful information. In 1984, in Seattle Times Co. v. Rhinehart,\textsuperscript{384} a unanimous Court upheld a trial court’s protective order, granted in connection with an order compelling extensive pre-trial discovery implicating privacy interests, which had the effect of barring the publication of facts. As Justice Powell’s majority opinion seemed to recognize, however, the setting was "unique."\textsuperscript{385}

Two other cases that depart from the basic pattern may also be instructive. In Zacchini v. Scripps-Howard Broadcasting Co.,\textsuperscript{386} in 1977, a majority of the Court, speaking through White, held that a circus performer could bring a "right of publicity" claim against a television station which had broadcast in a news program a film of his "entire act."\textsuperscript{387} White likened the suit to those involving claims of copyright infringement, which had

\textsuperscript{382} 494 U.S. 624 (1990).
\textsuperscript{383} The Court also seemed to assume the validity of another part of the statute, which bars a witness from disclosing the testimony of another witness before the grand jury — a point admittedly not before the Court. And Scalia, concurring, took an even narrower view of precisely what the state was prohibiting, suggesting a commensurately greater willingness than his colleagues to uphold a prohibition on the disclosure of truthful information. \textit{Id.} at 636-37.
\textsuperscript{385} \textit{Id.} at 34. Brennan and Marshall, concurring, wrote separately to emphasize the importance of the competing interests — "in privacy and religious freedom" — involved. \textit{Id.} at 38.
\textsuperscript{386} 433 U.S. 562 (1977).
\textsuperscript{387} \textit{Id.} at 575.
never been thought to create First Amendment problems. But Brennan and Marshall joined the dissenting opinion of Justice Powell, who demonstrated a strong commitment to the protection of the broadcasting of "newsworthy" information: "[H]aving made the matter public — having chosen, in essence, to make it newsworthy — [the performer] cannot, consistent with the First Amendment, complain of routine news reportage."  

Hustler Magazine, Inc. v. Falwell is not, of course, a case that truly involves the publication of factual information. But, in a sense, the Court's disposition of the case, unanimously disallowing a claim for intentional infliction of emotional distress, proceeds on the effective assumption that Hustler's statements about Falwell were not false, the jury's rejection of Falwell's defamation claim having taken out of the case any basis for recovery based upon falsity. Perhaps more importantly, the Court articulated a standard that would disallow such claims generally (at least where "public figures" were concerned), unless the claim arose from a provably false statement satisfying the "malice" requirement of New York Times. As such, this case should also be counted among the decisions upholding the right of "truthful" publication against tort-based claims.

Against this background, the Court's 1991 opinion in Cohen v. Cowles Media Co. is not encouraging. Granted, Cohen was not a tort case, nor did it concern interests in privacy or confidentiality. It did, however, by permitting a claim against a newspaper based on a theory of promissory estoppel, allow for the possibility of civil liability on the part of the press based upon the publication of truthful information. Cohen claimed that the newspaper had published information about him, in breach of a promise of confidentiality, that caused him to lose his job. The Minnesota Supreme Court ruled that the First Amendment
barred such a claim, but the United States Supreme Court reversed.

Justice White, for the majority, began by stating that the case was not controlled by the *Daily Mail-Florida Star* line of cases, “but rather by the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”393 This was arguably the key to the majority’s ruling, because, for them, it took strict scrutiny out of the case. But, as Blackmun pointed out in dissent, the First Amendment argument in this case was “premised, not on the identity of the speaker, but on the speech itself.”394 The “laws-of-general-application” cases cited by White, he observed, were inapposite because “these cases did not involve the imposition of liability based upon the content of speech.”395

To the suggestion of content discrimination, White responded by saying that, in cases like *Daily Mail* and *Florida Star*:

> [T]he State itself defined the content of publications that would trigger liability. Here, by contrast, Minnesota law simply requires those making promises to keep them. The parties themselves ... determine the scope of their legal obligations and any restrictions which may be placed on the publication of truthful information are self-imposed.396

This rationale for the decision is a bit more satisfying, and should make the case highly distinguishable from any case lacking the “self-imposed” limitation made actionable here. Still, was there no need for a consideration of the strength of the State interest in imposing liability on a newspaper in these cir-

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393. *Id.* at 2518.
394. *Id.* at 2520.
395. *Id.* at 2521. He conceded that *Zacchini* was the “only arguable exception,” but properly distinguished that case, too. *Id.*, n. 1. Blackmun also wondered how this holding could be squared with *Hustler*, which involved a tort of general applicability. *Id.* at 2521-22.
396. *Id.* at 2519. White added, most unhelpfully, a suggestion that the information might not even have been “lawfully” obtained, since it was obtained “only by making a promise which [the newspaper] did not honor.” *Id.*
cumstances? Apparently, the majority thought not. Rehnquist, Stevens, Scalia, and Kennedy joined the White majority opinion.

Justice Souter, joined in dissent by Marshall and O'Connor as well as Blackmun, did feel the need to evaluate the strength of the state interest at hand. Rejecting the “self-imposed”-loss theory of the majority, Souter reminded them that First Amendment rights are not limited to “the speaker alone,” but are shared by the reading public as well.397 In this case, he found a strong public interest in receiving the information (which was relevant to a gubernatorial election), and the state interest in enforcing the newspaper’s promise insufficient to outweigh that interest in publication. He added that he could conceive of striking the balance differently, where, for example, “the injured party is a private individual, whose identity is of less public concern than that of the petitioner.”398

After Cohen, the Court is farther than ever from a position of protecting all truthful publication from governmentally-imposed sanctions. An absolutist position was probably never realistic or appropriate, but Cohen (along with the dissent in Florida Star) suggests that the Court’s collective instinct in this area is presently less than ideal. Individually, on the basis of admittedly slim evidence, Blackmun is the most speech-protective in this respect, with Souter making a promising debut. White and Rehnquist have been the least protective, with O'Connor, Stevens, Kennedy, and Scalia splitting their votes in the two major cases.

C. OBSCENITY

There is no reason to think that the Court is likely to change its basic direction with respect to obscenity. Three Justices — White, Blackmun, and Rehnquist — were in the majority that adopted the Miller v. California399 formulation, and none has since shown any inclination to disavow fealty to that approach.400 O'Connor has consistently joined in decisions for

397. Id. at 2523.
398. Id.
400. See the pertinent Miller-based opinions by Rehnquist in Hamling v. United States, 418 U.S. 87 (1974); Blackmun in Smith v. United States, 431 U.S. 291 (1977); and
which Miller provides the clear foundation, such as Brockett v. Spokane Arcades in 1985 and Pope v. Illinois in 1987. Justices Scalia and Kennedy joined opinions in Fort Wayne Books, Inc. v. Indiana and Sable Communications v. FCC, both in 1989, which were also (although less directly) premised on Miller.

In Pope, however, Scalia, while concurring, indicated "the need for reexamination of Miller," observing that the Court was not asked to reconsider Miller at that time. Unlike the majority, he correctly perceived problems with the adoption of an objective approach to Miller's "value" prong, but deemed that resolution "the most faithful assessment of what Miller intended." Scalia could thus be expected to take the initiative in modifying the Miller standard, but it seems quite unlikely that he would seek to alter its essence.

Now that Brennan and Marshall are gone, Justice Stevens remains the only Justice who is known to oppose the Court's basic approach to the issue of obscenity. Beginning with his partial dissent in Marks v. United States in 1977, he has been a consistent dissenter in cases involving obscenity. His basic position, set forth at length in his dissenting opinion in Smith v. United States in 1977, is that criminal sanctions (as opposed to civil remedies) represent a constitutionally unacceptable response to obscenity. He was particularly troubled by the uncertainty and illusoriness of "community standards," and he concluded:
In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by predictable application of rules of law.

... In my judgment, the line between communications which "offend" and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment.\(^4\)

He restated those objections, ten years later, in dissent (with Marshall) in *Pope v. Illinois*, continuing to object to the criminalization of "mere possession or sale of obscene literature, absent some connection to minors, or obtrusive display to unconsenting adults."\(^5\) This was, of course, the Brennan position as well, from 1973 onward.\(^6\) Stevens seems no more likely to move a majority of the Court toward acceptance of his views than was Brennan during the period from 1973 to 1990, when three or four Justices stood ready to revolutionize the law of obscenity.\(^7\) Now, Stevens probably stands alone.

At least the Court has shown itself unwilling to expand the concept of obscenity, by summarily affirming, in 1986, the decision in *American Booksellers Ass'n v. Hudnut*\(^8\) which invalidated a sweeping ordinance embodying a radical expansion of proscribable sexually explicit expression.

The only other recent development of note in this area again involves Scalia — and the venerable concept of "pandering." This alternative basis for a finding of obscenity was first recognized in 1966, in *Ginzburg v. United States*,\(^9\) and was endorsed by the Court, post-Miller, in 1977 in *Splawn v. California*.\(^10\) In *Splawn*, Stevens, along with Brennan and Marshall,

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40. Id. at 316.
41. 481 U.S. at 513. In a footnote, he reiterated his distinction of "civil regulation of sexually explicit material, an area in which the States retain substantial leeway." Id. at 516-17 n.11.
43. Justice Stewart joined the Brennan dissent in *Paris, id.*, and Douglas (Stevens' predecessor) disagreed as well.
44. 771 F.2d 323 (7th Cir. 1985), aff'd, 106 S. Ct. 1172 (1986).
protested. The point emerged anew (albeit in the shadow world of partially dissenting opinions) in 1990 in *FW/PBS, Inc. v. Dallas.*417 That decision, again, struck down a city licensing scheme pertaining to "sexually oriented businesses" because the law did not contain the requisite procedural safeguards.

On this point, Scalia dissented, and in the process he put forth an expansive and surprising theory of "the business of obscenity."418 Taking note of the spate of recent governmental attempts to deal with pornography through creative means (e.g., zoning laws), he asserted:

> It does not seem to me desirable to perpetuate such a regime of prohibition by indirection. I think the means of rendering it unnecessary is available under our precedents. . . . That means consists of recognizing that a business devoted to the sale of highly explicit sexual material can be found to be engaged in the marketing of obscenity, even though each book or film it sells might, in isolation, be considered merely pornographic and not obscene.

> [A] merchant who concentrates upon the sale of such works is engaged in the business of obscenity, which may be entirely prohibited and hence *(a fortiori)* licensed as required here.419

The inspiration for this theory, clearly, was *Ginzburg* — but *Ginzburg* dealt with the obscenity of individual works, and not the potential illegality of entire businesses. "*Ginzburg, read together with Miller,*" continued Scalia, "establishes at least the following: The Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity."420 That his theory was addressed to businesses, rather than individual works, he saw as a virtue:

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418. Id. at 256.
419. Id. at 253, 256.
420. Id. at 258. He then went on, somewhat questionably, to read the Dallas ordinance in question as capable of fitting his "pandering" theory. Id. at 259.
The basis of decision I have described . . . entails no risk of suppressing even a single work of science, literature, or art — or, for that matter, even a single work of pornography. Indeed, I fully believe that in the long run it will expand rather than constrict the scope of permitted expression, because it will eliminate the incentive to use, as a means of preventing commercial activity patently objectionable to large segments of our society, methods that constrict unobjectionable activity as well.21

Only Stevens responded to him on this point. *Ginzburg*, he said, “was decided before the Court extended First Amendment protection to commercial speech,” and thus cannot survive.422 “If conduct or communication is protected by the First Amendment, it cannot lose its protected status by being advertised in a truthful and inoffensive manner.”423 Given the evolution of the Court’s commercial speech doctrine, the conclusion that such advertising cannot be banned is in fact far from clear.424 But the notion that a bookstore or theater could be shut down simply because it holds itself out as offering sexually provocative material is a major departure from fundamental First Amendment principles — and, judging from Scalia’s aloneness in putting forth such a suggestion, one may presume that the other Justices thought so, too.

D. Non-Obscene Speech That Offends

Speech is often regulated because of its capacity to offend, for a variety of reasons. It is — or at least, has been — hornbook law that the fact that particular expression may give offense, or cause anger, is not a sufficient ground for its suppression.425 The commitment of the Justices to that proposition, however, does not appear to be universal or absolute. In exploring the present status of that commitment, it may prove useful to proceed according to categories of cases, each involving (in ways that are

421. *Id.* at 264.
422. *Id.* at 249.
423. *Id.*
424. See the discussion at notes 468-79, *infra*.
roughly related within each category) a different reason why a listener or viewer might be offended.

1. **Pornography, Nudity, and Sex**

Although there are no special rules applicable to regulations bearing upon non-obscene expression involving nudity or sexual explicitness, regulation in this realm has generally been upheld, in the absence of facial overbreadth or the omission of crucial procedural safeguards. The major problem has been the failure, on several occasions, to recognize or treat such regulations as content-based (and, accordingly, to apply strict scrutiny). The cases exemplifying this failure are *Young* (1976), *Renton* (1986), and *Barnes* (1991), each of which has already been discussed in the section on content discrimination. Thus, zoning restrictions of “adult” theaters and bookstores were upheld, as was a ban on nude dancing in similar establishments. (As has already been noted, White, Blackmun, and Stevens dissented, along with Marshall, in *Barnes*, the most recent such case.)

When content discrimination has been recognized (explicitly or implicitly), as in *Sable Communications v. FCC* (1989) (involving “indecent” “dial-a-porn” telephonic messages), and *Erznoznik v. City of Jacksonville* (involving nudity on drive-in theater screens), the results have been different. Justice Powell’s majority opinion in the 1975 *Erznoznik* case seemed, too, to reject the contention that a public display of nudity could be prohibited on the ground that unwilling spectators might be offended; but Rehnquist and White, in dissent, appeared to disagree.

*Young*, decided a year after *Erznoznik*, deserves further mention because Stevens, writing for a plurality that included Rehnquist and White, asserted therein that society’s interest in

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431. See the discussion at notes 157-66 and 189-97, supra.
433. 422 U.S. 205 (1975).
434. Id. at 209-12, 220-21 (Burger, C.J., dissenting), 224 (White, J., dissenting).
protecting "erotic materials that have some arguably artistic value ... is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate ..."435

But a mere focus on matters sexual, in and of itself, has not sufficed to sustain regulation of non-pornographic literature on the ground that recipients may be offended. Thus, in Bolger v. Youngs Drug Products Corp.,436 in 1983, the entire Court struck down a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives, even while applying the less demanding level of scrutiny applicable to commercial speech. As in Erznoznik, the majority (which included White, Blackmun, and Stevens) rejected the "offensiveness" rationale as insufficient to justify suppression of speech; Rehnquist and O'Connor, however, while concurring in the judgment, would not have dismissed that justification out of hand.437

2. Profanity

But for stare decisis, would Cohen v. California,438 the landmark free speech decision of 1971, be decided the same way today? Consider that neither of the two remaining Justices from that Court — White and Blackmun — joined the majority in Cohen. Of course, White did not reach the merits of the case, and it was a very different Justice Blackmun that dissented more than twenty years ago; would he vote today as he did then? As much as he has evolved over the years, nothing that Blackmun has said or done in later decisions provides a clear basis for concluding otherwise.

Dissenting in 1972's Gooding v. Wilson,439 a case decided on facial overbreadth grounds but involving a man who cursed at
police officers during an altercation, Blackmun invoked Chaplin­sky v. New Hampshire440 (the quintessential “fighting words” case), and stated: “For me, Chaplinsky . . . was good law when it was decided and deserves to remain as good law now . . . . But I feel that by decisions such as this one and, indeed, Cohen v. California . . . the Court, despite its protestations to the contrary, is merely paying lip service to Chaplinsky.”441

Later that same year, Blackmun dissented again, along with Rehnquist, when the Court summarily vacated and remanded a trio of decisions for reconsideration in light of Cohen and Good­ing. In one of those cases, Rosenfeld v. New Jersey,442 the appel­lant had used profanity while addressing a public school board meeting attended by children as well as adults. Blackmun joined a dissenting opinion by Justice Powell, who would have upheld the conviction. That opinion contained these significant passages:

But the exception to First Amendment protection recognized in Chaplinsky is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience.

[C]ertainly the State has an interest — perhaps a compelling one — in protecting nonassenting citizens from vulgar and offensive verbal assaults.443

Rehnquist added a dissenting opinion, with respect to all three cases, which Blackmun also joined, in which he indicated displeasure with Cohen and basic agreement with the Powell view of Chaplinsky.444

440. 315 U.S. 568 (1942).
441. 405 U.S. at 536-37 (citations omitted).
443. 408 U.S. at 905, 907.
444. Id. at 912.
The following year, in *Papish v. Board of Curators*, the Court upheld the right of a graduate student at a state university to use profane and vulgar material in a newspaper distributed on campus. Blackmun and Rehnquist dissented. They dissented again, in 1974, when *Lewis v. New Orleans* returned to the Court, this time meeting with outright reversal on facial overbreadth grounds. The dissenters viewed the appellant’s profane outburst (directed at a police officer) as a species of punishable “fighting words.”

In 1978, those two Justices were, along with Stevens, part of the majority that upheld the famous FCC order in the “George Carlin case,” *FCC v. Pacifica Foundation*. As he had done earlier in *Young*, Stevens (joined in this part of his opinion by Rehnquist) relied in part on a characterization of the speech at issue (here, Carlin’s vulgar monologue) as speech of relatively low value. Blackmun joined Powell’s concurrence, largely distinguished by its refusal “to decide on the basis of its content which speech protected by the First Amendment is most ‘valuable’ and hence deserving of the most protection, and which is less ‘valuable’ and hence deserving of less protection.” They relied instead on the combination of the intrusion of radio into the home and the consequent potential effect upon children.

No subsequent Supreme Court case has involved restriction of speech on similar grounds, with the highly distinguishable exception, in 1986, of *Bethel School Dist. v. Fraser*, a case involving a sexually suggestive campaign speech by a public high-school student at an assembly. Only Marshall and Stevens dissented, and the latter did so on due process grounds. The fact that even Brennan concurred in the judgment, however, suggests

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448. Id. at 744-48.
449. Id. at 761.
how relatively weak a case it was for protection of the student’s speech.

At present, four members of the Court (and O’Connor as well if one puts Bethel aside) have had no meaningful occasion to either apply the “fighting words” concept455 or to address the question of how profane or vulgar (but non-obscene) speech should be treated under the First Amendment. This is an area, in any event, in which even the “liberals” (Blackmun and Stevens) have not been liberal.

3. Beyond Pornography and Profanity

Here is where the modern Court has protected speech to the greatest extent. Beyond the realm of the profane or the pornographic, the Court has, in recent years, consistently rejected governmental attempts to justify restrictions of expression on the grounds that some listeners or viewers may be offended by what they see or hear.

The flag-burning cases of 1989 and 1990, Texas v. Johnson453 and United States v. Eichman,454 stand in part for that proposition. The majority in those cases, of course, refused to uphold the flag desecration laws on that basis. It will, of course, surprise no one to point out that, with Brennan and Marshall gone, the 5-4 majorities of those decisions might not be replicated, should the precise issue resurface. But it is appropriate to quote from Stevens’ dissent in Eichman, speaking for himself, Rehnquist, White, and O’Connor: “Of course ‘the Government may not prohibit the expression of an idea simply because society finds that idea itself offensive or disagreeable.’ . . . None of us disagrees with that prohibition.”455 Rehnquist said much the same thing in his dissent in Johnson.456 The dissenters urged that it was the flag-burner’s “use of this particular symbol, and

452. In Texas v. Johnson, 491 U.S. 397 (1989), the majority easily and quickly rejected the suggestion that the burning of an American flag could fit the longstanding definition of “fighting words” as “a direct personal insult.” Id. at 409. None of the dissenters suggested otherwise.
455. Id. at 319.
456. 491 U.S. at 432.
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not the idea that he sought to convey by it" for which he was punished.487 Their position, in these presumably unique cases, did not seem to rest on the likelihood of offensiveness to witnesses, but that element was not entirely missing from the Rehnquist dissent in Johnson. Speaking for himself, White, and O'Connor, he said, analogizing to Chaplinsky: "Here it may equally be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace."488 Laudably resisting such a characterization, in addition to Brennan and Marshall, were Blackmun, Scalia, and Kennedy.

Hustler Magazine, Inc. v. Falwell,489 decided without dissent in 1988, is another case which demonstrates the Court's refusal to let the offensiveness of non-profane, non-obscene speech serve as adequate justification for its suppression. Granted, the holding of Hustler can be quite narrowly stated. Given an obviously fictitious printed parody of a public figure (suggesting incest, no less), as to which a defamation claim had been rejected by a jury, the Court essentially ruled that a claim for damages under a theory of intentional infliction of emotional distress was constitutionally impermissible. That the plaintiff was a public figure may well have been crucial to the result. It was, moreover, a situation in which a violent response was virtually inconceivable. Nonetheless, the decision reflects a high degree of protectiveness of expression on the part of the Court. For the majority, Rehnquist quoted Stevens, from the Pacifica case: "'[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it'".490 If that pronouncement, and the Court's unanimity in making it, seems unremarkable, that simply shows how deeply embedded certain fundamental principles of freedom of expression have become.

The 1992 decision in R.A.V. v. St. Paul461 reaffirmed this commitment to the protection of highly offensive speech. Consider first the position of the four concurring Justices, speaking through Justice White, finding the St. Paul "hate-speech" ordi-

457. Id.
458. Id. at 430.
460. Id. at 55.
nance facially overbroad. Focusing on the Minnesota Supreme Court's interpretation of the law as limited to a subset of "fighting words," White understood that court to say

that St. Paul may constitutionally prohibit expression that "by its very utterance" causes "anger, alarm or resentment."

Our fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.462

White was joined by Blackmun, Stevens, and O'Connor in applying that reasoning to the St. Paul Ordinance, despite its limitation to speech inflicting emotional harm on the basis of race, religion, or gender.

A question that will undoubtedly be explored by many is: What would this group of Justices allow? In the section of his opinion rejecting the theory of the majority, White made reference to "the social evil of hate speech,"463 and criticized the majority for "legitimat[ing] hate speech as a form of public discussion."464 But White's logic and language point strongly to the conclusion that only "fighting words" (traditionally, a direct personal insult likely to produce an immediate violent response465) which provoke "on the basis of race, color, creed, religion or gender" can validly be punished as a means of deterring "hate speech."466

The majority in R.A.V., speaking through Scalia, probably surprised nearly everyone by stating that "fighting words," de-
spite their “unprotected” status, have some expressive value after all, and that content discrimination within that category was presumptively invalid.\textsuperscript{467} The city’s attempt to justify the distinction met with no encouragement by this group of five Justices. Does that mean that they would look favorably upon no regulation of this kind other than a “fighting words” statute of general applicability? It may well mean that.

The Court has thus been vigilant in rejecting the contention that an offending idea may justify suppression of speech. The Justices have largely been far less vigilant when non-obscene material of a sexually suggestive nature has been involved, and it is far from clear that the Court would adhere to the protection afforded profane speech more than twenty years ago in \textit{Cohen v. California}.

E. Commercial Speech

1. Generally

The Court has not decided a commercial speech case (outside the rather specialized area of attorney advertising) since 1989, prior to the arrival of Justices Souter and Thomas. The Court did not, of course, extend First Amendment protection to commercial advertising until 1976, in the \textit{Virginia Bd. of Pharmacy}\textsuperscript{468} case. Justice Rehnquist seemed quite troubled by that extension from the beginning, as his dissenting opinion in \textit{Virginia Pharmacy} demonstrated,\textsuperscript{469} and he made his opposition plain in his dissent in the first attorney advertising decision, \textit{Bates v. State Bar of Arizona}.	extsuperscript{470} No one else has taken that position, however, and Rehnquist has not publicly adhered to it.\textsuperscript{471}

\textsuperscript{467}. \textit{Id.} at 2547-49. Note, too, that none of these Justices raised any question as to the continuing viability of the half-century-old “fighting words” concept, which is premised on the notions that, first, a speaker may be held responsible for the anticipated violence of a listener, and, second, that “an average addressee” can be expected to react to certain insults with violence.


\textsuperscript{470}. 433 U.S. 350 (1977).

\textsuperscript{471}. Compare his dissent in \textit{Central Hudson} to his majority opinion in \textit{Posadas de
But what the Court gave in *Virginia Pharmacy* it has, in significant part, taken away in its decisions of the 1980s. Powell's opinion for the Court, in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n* in 1980, was justifiably challenged by Blackmun (joined by Brennan) in his concurring opinion. Powell, of course, set forth a four-part test for evaluating restrictions on commercial advertising, and found the New York regulation wanting only with respect to the fourth part of the test; the state's interest in minimizing demand for electricity was an acceptably "substantial" reason for barring advertising promoting the use of electricity. Blackmun, the author of the groundbreaking *Virginia Pharmacy* opinion, saw the implications:

> I do not agree ... that the Court's four-part test is the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.

> ... [T]he Court ... leaves open the possibility that the State may suppress advertising of electricity in order to lessen demand for electricity. I, of course, agree with the Court that ... energy conservation is a goal of paramount ... importance. I disagree with the Court, however, when it says that suppression of speech may be a permissible means to achieve that goal.\(^{473}\)

He continued:

> I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to "dampen" demand for or use of the product. Even though "commercial" speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct

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473. Id. at 573-74.
Concurring separately, Stevens indicated a similar reaction. Stevens indicated a similar reaction.  

The theoretical division of Central Hudson became genuine disagreement as to result in the 1986 decision, Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico. Rehnquist wrote for the majority in upholding a Puerto Rico restriction on advertising of casino gambling. Observing that Puerto Rico could have prohibited casino gambling by residents of Puerto Rico altogether, he asserted: “In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.”

Brennan, Marshall, Blackmun, and Stevens dissented. Writing for himself, Marshall, and Blackmun, Brennan restated the philosophical basis of the Blackmun concurrence in Central Hudson, and asserted that “where the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities, for fear that recipients will act on the information provided, such regulation should be subject to strict judicial scrutiny.” In keeping with that high degree of suggested protection for commercial speech, he went on to criticize the majority for not requiring Puerto Rico to prove the substantiality of its purported interests and the absence of less restrictive means for the accomplishment thereof. The differences in approach between the Justices were thus quite sharp. Of the dissenters, only Blackmun and Stevens remain. From the majority, Rehnquist, White, and O'Connor remain.

In the Court's most recent commercial speech case, Board of
Scalia wrote for a majority which included Kennedy and Stevens, as well as Rehnquist, White, and O'Connor. The majority held that it was not part of the test for the validity of regulation of commercial speech to require that the government utilize the “least restrictive means” of achieving its goal. That decision reveals little or nothing about how Scalia or Kennedy would have voted in, for instance, the Posadas case, but it is certainly inconsistent with Brennan’s invocation of strict scrutiny (at least some of the time) in commercial speech cases. Although they did not emphasize their apparent disagreement with the majority on the “least-restrictive-means” issue, Blackmun, Brennan, and Marshall dissented, once again, in Fox.

2. Attorney Advertising

With respect to the constitutionality of state bar rules regulating advertising by attorneys, the battle lines have been clearly drawn — and the future of most such advertising depends upon the views of Justices Souter and Thomas. Rehnquist, O’Connor, and Scalia stand ready to change the rules in this area. Kennedy and White, along with Blackmun and Stevens, do not.

Rehnquist, of course, dissented at his first opportunity, in the seminal Bates case of 1977. He, as well as O’Connor, joined in the unanimous decision in 1982’s In re R.M.J., but by 1985 those two Justices had registered the first of three significant dissents to rulings invalidating restrictions of attorney advertising. That 1985 decision was Zauderer v. Office of Disciplinary Counsel, in which Justice White, for the majority, struck down an Ohio rule forbidding attorney ads containing advice regarding a specific legal problem. Everyone had agreed, in the Ohralik case of 1978, that case-specific in-person solicitation could be banned, but the Court in Zauderer felt that a newspaper advertisement was quite distinguishable. O’Connor’s dissent suggested far-reaching disagreement with the majority’s approach, and that suggestion blossomed into a major pronounce-

In 1988, the Court held, in *Shapero v. Kentucky Bar Ass’n*, that the use of direct mail by an attorney, even when addressed to a potential client known to be facing a particular legal problem, was protected commercial speech. The majority, speaking through Brennan and including Kennedy, saw neither the letter nor the comparable newspaper advertisement as inherently misleading or overreaching. O’Connor, joined now by Scalia as well as Rehnquist, disagreed:

Applying [the *Central Hudson*] test to attorney advertising, it is clear to me that the States should have considerable latitude to ban advertising that is “potentially or demonstrably misleading,” . . . as well as truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession.

Advertising the price of an initial consultation might be acceptable, she continued, but:

As soon as one steps into the realm of prices for “routine” legal services . . . however, it is quite clear to me that the States may ban such advertising completely. The contrary decision in *Bates* was in my view inconsistent with the standard test that is now applied in commercial speech cases.

*Bates* was wrong, she explained, because of the impossibility of knowing in advance of consultation whether a legal problem is or is not truly “routine”; hence, such price advertising is inherently misleading. Solicitation practices are even worse, because they are misleading and have “a tendency to corrupt the solicitor’s professional judgment.” The Court’s decision in *Shapero*, she concluded, “confirmed the need to reconsider *Bates* . . . .”

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484. *Id.* at 485 (citations omitted).
485. *Id.*
486. *Id.*
487. *Id.* at 486.
488. *Id.* at 487.
In 1990, those three Justices dissented once more, this time accompanied by White, in *Peel v. Attorney Regist. and Disc. Comm'n*,\textsuperscript{489} from a ruling upholding an attorney's right to hold himself out as "certified" by a national organization. Stevens, writing for a plurality that included Brennan, Blackmun, and Kennedy, rejected the argument that Peel's letterhead was misleading by virtue of the certification announcement, but the O'Connor group of dissenters disagreed. Marshall and White each thought the letterhead announcement to be "potentially misleading" and thus subject to regulation, but were led in different directions as to the disposition of Peel's particular case; Marshall concurred in the judgment, while White dissented.\textsuperscript{490}

Thus, O'Connor, Rehnquist, and Scalia not only want to overrule *Bates*, but have also been most apt to perceive advertising and promotional devices employed by attorneys as inherently misleading. Stevens, Blackmun, and Kennedy, on the other hand, have been least inclined to think so.

F. THE RIGHTS OF PUBLIC EMPLOYEES

1. Freedom of Speech

The setback in this area has already occurred, in the form of the highly deferential 1983 decision in *Connick v. Myers*.\textsuperscript{491} Justice White wrote that opinion, which changed the law in this area by imposing a threshold requirement that, in order for the employee's job-related speech to be protected, it must bear upon "a matter of public concern."\textsuperscript{492} The majority (which included Rehnquist and O'Connor) then displayed great deference to the government in deciding both that most of Ms. Myers' operative speech was not on a matter of public concern (even though it involved the operation of a district attorney's office) and that the subsequent balancing of interests favored the government employer. Said White, most candidly and significantly:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropri-

\textsuperscript{489} 496 U.S. 91 (1990).

\textsuperscript{490} Id. at 111-17 (Marshall, J., concurring), 118-19 (White, J., dissenting).

\textsuperscript{491} 461 U.S. 138 (1983).

\textsuperscript{492} Id. at 146.
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ate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.\[493\]

The actual effect of Ms. Myers' speech upon the agency was minimal, as Brennan observed in dissent. He was joined by Marshall, Blackmun, and Stevens.

The Court considered only one other case of this kind after \textit{Connick}, that being the unusual matter of \textit{Rankin v. McPherson}\[494\] in 1987. By virtue of Justice Powell's vote in favor of the public employee, the \textit{Connick} dissenters were able to form a bare majority in \textit{Rankin}, applying \textit{Connick} in a way that was highly protective of speech. Although her speech was fairly outrageous, the plaintiff was a low-level employee who had minimal contact with either the public or the official who presided over the office, and the speech at issue occurred in a private conversation with a co-worker. To Powell, who concurred with the Marshall majority opinion, this last fact was apparently the key. Nonetheless, Scalia dissented, joined by Rehnquist, White, and O'Connor. Those Justices felt that the right of the public employee (a deputy sheriff of sorts) to privately express the hope that the President be assassinated was outweighed by "Constable Rankin's interest in maintaining both an esprit de corps and a public image consistent with his office's law enforcement duties."\[495\] They also rejected the conclusion that her statement addressed a matter of public concern.

While the Scalia position in \textit{Rankin}, had it prevailed, would not in itself have threatened a great deal of speech by public employees, it is a position less protective of speech than that of the \textit{Rankin} majority. How Justices Kennedy, Souter, or Thomas would rule in such a case is unknown.

2. \textit{Freedom of Association}

It is questionable whether the Court's jurisprudence in the

\[493\] Id. at 151-52 (footnote omitted).
\[495\] Id. at 401.
realm of public employees' rights of political affiliation will survive the departures of Brennan and Marshall. In a trilogy of cases extending from 1976 to 1990 — *Elrod v. Burns*,496 *Branti v. Finkel*,497 and *Rutan v. Republican Party of Ill.*498 — those two Justices, joined by White, Blackmun, and Stevens, voted consistently to apply First Amendment principles to the venerable patronage practices of hiring and firing public employees according to political party membership. In *Branti* in 1980, Stevens put forth the governing principle: “The question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”499 In the case of an assistant public defender, the majority's answer was negative. Justice Rehnquist joined the dissent of Justice Powell, whose disagreement with the majority was fundamental; the Court erred, in their view, by ignoring “the substantial governmental interests served by patronage.”500

In *Rutan* in 1990, Brennan extended the reasoning of *Elrod* and *Branti*, which dealt with dismissals, to patronage hiring and promotions, toughening the rhetoric of these decisions, in fact, by stating that only “vital government interests” could justify these practices.601

This time Scalia wrote the dissenting opinion, in which he made it clear, on behalf of himself, Rehnquist, O'Connor, and Kennedy, that he would overrule *Elrod* and *Branti* as well. The use of strict scrutiny, he asserted, was unprecedented and uncalled for in this area. Assuming for purposes of discussion the propriety of some sort of balancing test, these four Justices would strike the balance in favor of governmental power to utilize a patronage system, not even seeing the restrictive effect on public employees (or potential public employees) as “a significant impairment of free speech or free association.”602 Elrod and Branti should, at a minimum, be distinguished and not ex-

499. 445 U.S. at 518.
500. Id. at 523.
501. 497 U.S. at 74.
502. Id. at 110.
tended, Scalia argued, but in fact they should be overruled:

Even in the field of constitutional adjudication, where the pull of *stare decisis* is at its weakest, one is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice, then all reluctance ought to disappear. In my view that is the situation here.  

Scalia then proceeded to demonstrate the conflicting results (in the lower courts) and consequent uncertainty that have flowed from *Branti*.

Scalia's reference to tradition provided the basis for a wholly independent rationale for opposing the Court's handiwork in this area, but in this he was joined only by Rehnquist and Kennedy. The provisions of the Bill of Rights, he wrote:

> did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.

> ... Given that unbroken tradition ..., there was in my view no basis for holding that patronage-based dismissals violated the First Amendment.  

If either Justice Souter or Justice Thomas were to agree with these dissenting Justices, the reign of *Rutan* could be short, and the Court could seize the opportunity to overrule this entire line of cases.

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503. *Id.* at 110-11 (citations omitted).
504. *Id.* at 95, 97 (footnote omitted).
G. THE RIGHTS OF PUBLIC SCHOOL STUDENTS

Again, a major blow has already been struck, this time in the 1988 case of *Hazelwood School Dist. v. Kuhlmeier*.\(^{506}\) A majority consisting of Justices White, Rehnquist, Stevens, O'Connor, and Scalia upheld the power of a public high school principal to effectively censor the content of a student newspaper linked to a journalism class. For the first time in a public school case, the Court invoked the “public forum” doctrine, and found that the newspaper was *not* a public forum. Of the three dissenterers, only Blackmun remains. (Kennedy was not yet aboard.)

*Kuhlmeier* arguably did nothing to undermine the power of the classic *Tinker* decision of 1969,\(^{506}\) which upheld the right of students to engage in non-school-sponsored speech on school grounds, as long as that speech does not substantially interfere with the operation of the school or the rights of others. Only White, the author of the *Kuhlmeier* majority opinion, remains from the *Tinker* Court, where he also joined the majority. But *Tinker* predated the development of the “public forum” doctrine, which, if applied to public schools in accordance with its most recent use generally,\(^{507}\) could wholly eviscerate the force of *Tinker*.

Even without applying “public forum” analysis, the Court in 1986, in *Bethel School Dist. v. Fraser*,\(^{508}\) rejected a student’s right to be free from discipline for making a sexually suggestive campaign speech at a high school assembly. Chief Justice Burger, writing for the majority, adverted to the *Tinker* standard, but really relied on a new (and unstructured) rationale, namely that government had the power, through the schools, to inculcate values of civility in students. Only Marshall dissented on First Amendment grounds, while Stevens’ dissent rested, essentially, on due process grounds. Blackmun silently concurred in the result. Brennan, somewhat surprisingly, concurred separately, coming close to sharing in Burger’s reasoning while mak-

507. See the discussion at notes 307-13, supra.
ing more pointed references to the student’s “disruptive” language, and cautioning that “[t]he authority school officials have to regulate such speech by high school students is not limitless.” The Fraser decision surely modified Tinker to a significant extent.

In Kuhlmeier, White expressly distinguished the Tinker situation:

The question whether the First Amendment requires a school to tolerate particular student speech — the question that we addressed in Tinker — is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Accordingly, we conclude that the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

509. Id. at 687-90.
510. Id. at 689.
511. 484 U.S. at 270-71.
512. Id. at 272-73 (footnotes omitted).
This appears to be a highly deferential standard, within its appointed realm. Blackmun, with Marshall, joined the far less deferential dissenting opinion by Brennan.

In 1982, the Court flirted, inconclusively, with the related issue of removal of controversial books from school libraries, in *Board of Educ. v. Pico*. A plurality, including Marshall, Blackmun, and Stevens, joined Brennan in finding “that the First Amendment rights of students may be directly and sharply implicated by” such acts on the part of a school board. The Brennan opinion went on to suggest some difficult and questionable distinctions that, in his view, guided analysis in this troublesome area. White provided the necessary fifth vote for affirming the Court of Appeals’ reversal of summary judgment for the school board, while not committing himself to any approach to the merits of the dispute. Among the four dissenters, Rehnquist and O’Connor saw no First Amendment rights at issue, and spoke, along with Chief Justice Burger (in a fashion that presaged the *Fraser* decision) of the “inculcative” role of the public schools.

In light of both the *Fraser* and *Kuhlmeier* decisions (recalling, once more, that the latter decision brought “public forum” analysis to bear upon the public school setting), it seems quite hard to believe that the Brennan position in *Pico* — finding even a potential violation of First Amendment rights when schools make book selections — would prevail today. White and Scalia, in particular, seem most unlikely to embrace any such approach.

The Court has occasionally addressed the First Amendment rights of university students, each time favorably. Most notably, the Court’s *per curiam* decision in *Papish v. Board of Curators*, in 1973, upheld the rights of a student at a state university who distributed an independent newspaper thought to be “indecent” by virtue of its vulgarity. Rehnquist and (the early) Blackmun dissented. Presumably, but by no means certainly, this decision survives *Fraser* and *Kuhlmeier*, given the factual

514. Id. at 866.
515. Id. at 889 (Burger, C.J., dissenting), 913-15 (Rehnquist, J., dissenting).
distinctions, especially the ages of the students. But if Blackmun maintained his original position in Papish, this suggestion would be considerably more questionable.\textsuperscript{517}

Justices Kennedy, Souter, and Thomas have yet to rule in a case involving freedom of speech in the public school setting.

V. BURDENS ON SPEECH

Finally, the Justices have differed with respect to their readiness to perceive certain governmental actions as significantly burdening the exercise of freedom of speech. It is, of course, the rare case in which this threshold issue has arisen, most often in connection with the attachment of strings to the receipt of government funding. The entire Court agreed “that a legislative decision not to subsidize the exercise of [First Amendment rights] does not infringe the right” in Regan v. Taxation with Representation of Wash., in 1983,\textsuperscript{518} a decision upholding the denial of tax-exempt status to an organization engaged in substantial lobbying activities. The next year, in FCC v. League of Women Voters,\textsuperscript{519} however, the majority found that freedom of speech was denied by the federal prohibition on “editorializing” by noncommercial educational broadcasters receiving federal funds. Brennan, for the majority, rejected the government’s argument analogizing the case to Regan,\textsuperscript{520} but Rehnquist and White, dissenting, embraced it; in their eyes, the government was “simply exercising its power to allocate its own public funds,”\textsuperscript{521} and was entitled to do so. Stevens dissented on other grounds. From the majority, only Blackmun and O’Connor remain.

In 1991, Rehnquist and White had their way, joined by Scalia, Kennedy, and Souter, in the celebrated case of Rust v.

\textsuperscript{517} In the far easier case of Widmar v. Vincent, 454 U.S. 263 (1981), the Court struck down a content-based discrimination by a state university against religious speakers, the school’s Establishment Clause-based defense being found misguided. See also Healy v. James, 408 U.S. 169 (1972), upholding a freedom of association claim by a campus political group. The concurring opinion by Rehnquist, at 201-03, however, was less encouraging.

\textsuperscript{518} 461 U.S. 540 (1983).

\textsuperscript{519} 468 U.S. 364 (1984).

\textsuperscript{520} Id. at 399-401.

\textsuperscript{521} Id. at 407.
Sullivan, which rejected a First Amendment challenge to the federal ban on abortion counseling by family planning projects receiving federal funding. Rehnquist, for the majority, distinguished the League of Women Voters case, rejected the suggestion of viewpoint discrimination, and found, once more, that “the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.” Blackmun, joined by Marshall and Stevens in dissent, saw the restriction as an “unconstitutional condition” and as viewpoint-discriminatory. O’Connor dissented on purely statutory grounds.

With Brennan and Marshall gone, Blackmun appears to be the Justice least likely to dismiss an argument that government has impermissibly burdened speech, with Stevens and O’Connor somewhat less dependable in this regard. While the harmful precedent — the Rust decision — is limited and potentially distinguishable, it appears to mark a turning point, and to bode ill for future challenges to speech-limiting conditions upon the receipt of government funds.

VI. CONCLUSION

A. THE JUSTICES, INDIVIDUALLY

With respect to the First Amendment issues addressed in this Article, the following summations regarding the propensities of each of the Justices now on the Court (listed in order of seniority) can be fairly made:

1. Byron White

Justice White is 75 years old and has been on the Court since 1962. He is protective of attorney advertising, and of public employees’ rights of association. From the standpoint of speech-protectiveness, however, his weak points are as follows:

523. Id. at 1774.
524. Id. at 1780-82.
525. See also Meese v. Keene, 481 U.S. 465 (1987), in which the Stevens majority opinion concluded that the Foreign Agents Registration Act’s “political propaganda” provision placed no burden on speech; Blackmun, Brennan, and Marshall disagreed.
He has always upheld time, place, and manner regulations, and virtually always refuses to find the existence of a public forum; he would radically revise the First Amendment law of defamation, altering the principle of New York Times v. Sullivan\(^{526}\) and overruling Gertz v. Robert Welch, Inc.,\(^{527}\) he has not been receptive to extending the procedural requirements of Freedman v. Maryland\(^{528}\) in the area of prior restraint; he often favors placing limits upon the availability of facial overbreadth challenges; he has not been consistently protective of the right of the press to publish truthful information; and he has often been weak in responding to content discrimination, as in the flag-burning cases (but see his impressive dissenting opinion in Barnes v. Glen Theatres, Inc.\(^{529}\)). Low points include his opinions for the Court in Connick v. Myers,\(^{530}\) reducing protection for public employees, and in Hazelwood School Dist. v. Kuhlmeier,\(^{531}\) reducing protection for public high school students.

2. Harry Blackmun

Justice Blackmun is 84 years old, and has been on the Court since 1970. He has been extremely critical of the Court's public forum doctrine, and highly protective of commercial speech, the rights of public employees, and the right of the press to publish truthful information. He has been vigilant with respect to eliminating prior restraints (but see his early dissent in the Pentagon Papers\(^{532}\) case), intolerant of "unconstitutional conditions," and fairly resistant (in recent years) to placing limits on the availability of facial overbreadth challenges. He has voted to strike down some time, place, and manner regulations, and has been fairly protective of speech in the defamation area. Highlights include his opinions for the Court in the Virginia Pharmacy\(^{533}\) and Forsyth County\(^{534}\) cases, along with his dissenting opinions in Cornelius\(^{535}\) and Rust v. Sullivan.\(^{536}\)

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532. 403 U.S. 713 (1971).
Any assessment of Justice Blackmun’s First Amendment jurisprudence must take into account the dramatic difference between his early years on the Court (extending roughly into the mid-1970s) and the more extensive period of time since then. Blackmun’s first five years on the Court were marked, persistently, by an apparent hostility to the facial overbreadth doctrine and a clear tolerance of government suppression of profane speech. Since 1975, there has been virtually no evidence that Blackmun has adhered to those views. In recent years, he can be faulted only for intermittent “softness” with respect to content discrimination; despite his positions in the flag-burning cases and Barnes v. Glen Theatres, he approved of content discrimination in Burson v. Freeman, probably his least persuasive majority opinion in the realm of freedom of expression.

3. William Rehnquist

Justice Rehnquist is 68 years old, and has been on the Court since late in the year 1971. His opinion for the Court in Hustler Magazine v. Falwell stands alone as a highly speech-protective majority opinion authored by him. In all other respects, Rehnquist’s positions on the matters addressed by this Article stamp him clearly as the Justice most likely to uphold a governmental regulation of speech. He has always rejected challengers’ attempts to portray public property as public forums, and he has virtually always upheld time, place, and manner regulations and regulations of commercial speech. More than any other Justice, he has resisted the use of the facial overbreadth device, and favored imposing limitations on its use. He has often resisted the application of the Freedman requirements in the prior restraint area, and has been soft on content discrimination. He has consistently opposed placing limits on defamation claims, and has been quite tolerant of regulation of profanity. He would overrule the cases protecting attorney advertising and public employees’ rights of association, and has not been very protective of the right of the press to publish truthful information. Low points include his majority opinions in Renton, Rust, and

Posadas de Puerto Rico, along with his dissenting opinion in Texas v. Johnson.

4. John Paul Stevens

Justice Stevens is 72 years old, and has been on the Court since late in the year 1975. He has been extremely critical of the Court's approach to obscenity, and has generally rejected its public forum doctrine as well. He has been highly protective of commercial speech, and of the rights of public employees. Of the present Justices, he seems most likely to find substantial facial overbreadth, unless the case involves what he views as "low value" speech. He has opposed "unconstitutional conditions," at least where he perceives viewpoint discrimination, and has shown some sensitivity concerning prior restraints (but with less than total consistency). He has voted against some time, place, and manner regulations, and shown some strength (although not dependably) in the area of content discrimination. Highlights include his dissent in Burson and his partially dissenting opinion in Fort Wayne Books v. Indiana. His willingness to brand some speech "low value," on the other hand, is a weakness, and, as noted, it has led him both to an acceptance of content discrimination and a rejection of facial overbreadth challenges in such cases. He has, quite characteristically, displayed a clear indifference at times to the "theory" of content discrimination. Finally, he has demonstrated a solicitude for the interests of defamation plaintiffs that has led him to reject some First Amendment limitations on such claims. Low points for Stevens include his opinions in Young v. American Mini Theatres and FCC v. Pacifica Found., as well as his dissent in Philadelphia Newspapers v. Hepps.

5. Sandra Day O'Connor

Justice O'Connor is 62 years old, and has been on the Court

since 1981. She has displayed some sensitivity with respect to the facial overbreadth doctrine (but see Massachusetts v. Oakes\textsuperscript{546}), the requirements of Freedman v. Maryland in the realm of prior restraint, the need for limits on defamation claims, and, at times, content discrimination (but see the flag-burning cases and Renton). She has also shown herself willing, despite the absence of a public forum, to pronounce a regulation "unreasonable." High points include her opinions for the Court in Jews for Jesus\textsuperscript{547}, Philadelphia Newspapers v. Hepps, and the Simon & Schuster\textsuperscript{548} case. On the other hand, she has always rejected challengers' public forum arguments, and virtually always upheld time, place, and manner regulations. She would overrule the cases protecting attorney advertising and public employees' rights of association. She has often favored limitations on the availability of facial overbreadth challenges. Her lowest points were her majority or plurality opinions on the public forum issue, Cornelius and Kokinda.\textsuperscript{549}

6. Antonin Scalia

Justice Scalia is 56 years old, and has been on the Court since 1986. He has demonstrated some sensitivity to the appropriateness of facial overbreadth challenges, and some vigilance in striking down content-based regulations. He joined the Brennan majority in the flag-burning cases. He also joined Brennan's solid rejection of "unbridled discretion" in City of Lakewood v. Plain Dealer,\textsuperscript{550} rejecting the doctrinal tinkering of Justice White's dissenting opinion. Scalia's high points have included his majority opinion in R.A.V.\textsuperscript{551} and his concurring opinion in Massachusetts v. Oakes. On the other hand, he has always rejected challengers' public forum arguments (even reaching out alone to do so in Burson), and would overrule the cases protecting attorney advertising and public employees' rights of association. He has favored the placing of limits on facial overbreadth challenges. He joined the majority in Hazelwood School Dist. v. Kuhlmeier. His absolute low point was his partially dissenting

\textsuperscript{546} 491 U.S. 576 (1989).
\textsuperscript{547} 482 U.S. 569 (1987).
\textsuperscript{549} 497 U.S. 720 (1990).
\textsuperscript{550} 486 U.S. 750 (1988).
\textsuperscript{551} 112 S. Ct. 2538 (1992).
opinion in *FW/PBS, Inc. v. City of Dallas*, in which he put forth a theory of “pandering” of pornography which would be truly dangerous if it attracted any support.

7. **Anthony Kennedy**

Justice Kennedy is 56 years old, and has been on the Court since early 1988. He has rejected the Court’s public forum doctrine, and has taken a unique position that is highly intolerant of content discrimination (but see his concurrence in *Burson v. Freeman*); he joined the Brennan majority in the flag-burning cases and the Scalia majority opinion in *R.A.V.* (but seemed to accept the questionable theory of the *Renton* case, in his opinion in *Ward v. Rock Against Racism*). He also joined the majority opinions in the *Forsyth County* case and *Florida Star v. B.J.F.*, and has been protective of attorney advertising. He has also shown himself (in *International Soc’y for Krishna Consciousness, Inc.* ("ISKCON") *v. Lee*) to be willing to strike down a time, place, and manner regulation. High points for him surely include his two opinions on the public forum issue, concurring in *Kokinda* and partly dissenting in *ISKCON*. On the other hand, he would overrule the cases protecting public employees’ rights of association, and he authored the majority opinion in *Ward*, which unhelpfully modified the analysis of time, place, and manner regulations.

8. **David Souter**

Justice Souter is 53 years old, and has been on the Court since 1990. He has rejected the Court’s public forum analysis, and shown strength in rejecting content-based regulations in *R.A.V.* and *Burson v. Freeman* (but see his concurrence in

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556. Kennedy also authored a highly speech-protective plurality opinion in *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991), a case that involved first amendment issues not addressed in this article, namely the right of an attorney to make extra-judicial comments concerning pending cases. Along with O’Connor and Souter, he has also demonstrated, outside the first amendment context, a reluctance to overrule prior decisions. See their joint opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992).
Barnes v. Glen Theatre, in which he accepted the Renton approach to this issue). He also joined the majority in the Forsyth County case. His dissenting opinions in ISKCON v. Lee (in which he not only repudiated prevailing public forum doctrine but also showed his readiness to strike down a time, place, and manner regulation) and Cohen v. Cowles Media Co. in which he would have upheld the right of the press to publish truthful information) are promising high points. Only his concurrence in the Barnes case, which upheld a content-based regulation of expression, is cause for serious concern thus far.

9. Clarence Thomas

Justice Thomas is 44 years old, and has been on the Court since 1991. He has participated in only three of the decisions discussed in this Article. Of those three decisions, the only one in which Thomas took a speech-protective position was R.A.V. v. St. Paul, in which he joined the Scalia majority opinion. In doing so, he presumably demonstrated a heartening intolerance of content discrimination (in a factual setting, it is worth adding, in which he might well have been expected to rule otherwise) as well as a willingness (along with every other member of the Court, in this case) to embrace the facial overbreadth concept without apparent reservation. On the other hand, Thomas also joined the majority in ISKCON v. Lee, thereby presumably signing on to the Court's rigid and restrictive approach to the definition of a public forum (and joining in upholding the challenged regulations as "reasonable"). Finally, he joined Rehnquist's dissenting opinion in the Forsyth County case, a position from which no negative inferences can clearly be drawn. (Joining the Blackmun majority in that case, on the other hand, would have been a positive sign.)

B. THE COURT OVERALL

Freedom of expression remains vibrant and strong in America, and there is little reason to fear that the present Court is likely to retreat from what has been, during the past three

558. But see Gentile v. State Bar of Nevada, supra note 556, in which Souter joined an opinion by Rehnquist that was less than maximally protective of attorneys' speech.
decades, a largely speech-protective position. Admittedly, the Court has not had occasion, since formulating the “test” of Brandenburg v. Ohio\(^{559}\) in 1969, to revisit the core First Amendment question of the extent to which one is constitutionally entitled to advocate crime or revolution; assumptions that the Court remains (or, indeed, has ever been) fully committed to that “test” may therefore not be warranted.\(^{560}\) Obscenity remains an unprotected category of speech, but that is nothing new. These areas aside, the differences among the Justices, while important, should not lead anyone to overlook their apparently shared commitment to a system of fundamental and presumptive freedom of expression. Nonetheless, some changes may await us in the post-Brennan era.

Some very positive aspects of the law of freedom of speech appear to be quite stable. Sharing the top of this list are the key principles that content discrimination is presumptively invalid and that government cannot prohibit speech on the ground that its message is potentially offensive to listeners. Safe and settled, too, is the axiom that administrative officials cannot be given unfettered discretion to decide who shall speak and who shall not. There is little evidence to suggest that the First Amendment rules of defamation law are about to be altered. Despite all of the complaining and ostensible tinkering that have accompanied its use, the facial overbreadth doctrine also appears to be in good health.

Some other, less positive aspects of the law appear to be stable as well. As has been noted, the law of obscenity does not appear to be about to change. Time, place, and manner regulations are almost always upheld, and the line between content-neutrality and content-discrimination has been blurred by the theory of the Renton case, a theory that no sitting Justice has opposed. Protection of commercial speech has already been weakened, as has protection of public employees’ freedom of speech. While a single decision may be too slender a reed on which to base a generalization, Rust v. Sullivan appears to have substantially undermined the longstanding judicial resistance to

“unconstitutional conditions” upon the receipt of government funds.

In some other areas of First Amendment law, the prospect of diminished judicial protection, while uncertain, is real. Four Justices have gone on record as ready to overturn the Court’s precedents protecting public employees’ rights of political association, and three Justices have announced their desire to reverse the Court’s protection of attorney advertising. The logic of the Kuhlmeier decision would seem to point toward even further erosion of the First Amendment rights of public high school students. The Court’s commitment to uphold the freedom to publish truthful information, in the face of competing interests in privacy or confidentiality, may well be about to weaken dramatically. So, too, may its adherence to the procedural requirements of Freedman v. Maryland, stubbornly applied to so many “prior restraints” by Justices Brennan and Marshall. Finally, it is by no means clear that the present Court, if given the opportunity, will maintain the view of suppression of profanity embodied in the classic case of Cohen v. California. In only one of the areas discussed in this Article is the Court visibly poised to possibly broaden its protection of freedom of expression, that being the issue of what government property constitutes a “public forum” in which speech is presumptively free. Thanks to Justices Kennedy and Souter, this is the one aspect of the law of freedom of speech in which liberalization looms as a distinct possibility in the future.

In the meantime, those of us who care deeply about freedom of expression will never cease to be grateful to Justices Brennan and Marshall. Like their forebears Black, Douglas, Brandeis, and Holmes, their commitment was truly extraordinary. They need not be the last ones about whom that can be said.