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THE SUPREME COURT AND THE FIRST AMENDMENT: THE 1989-90 TERM

by Elliot M. Mincberg*

As America enters the decade of the 1990's, it is particularly important to carefully review the Supreme Court's first amendment decisions. Important public controversies related to the first amendment continue to come before the Supreme Court and lower federal courts. In the 1989-90 Term alone, the Supreme Court considered far-reaching first amendment disputes concerning political patronage systems and flag-burning laws, and witnessed a heated public debate on a constitutional amendment designed to overrule its flag-burning ruling.[1] Lower courts are reviewing controversial first amendment questions ranging from restrictions on grants by the National Endowment for the Arts to schoolbook censorship to obscenity prosecutions against Robert Mapplethorpe photographs and 2 Live Crew, some of which may eventually be heard by the Supreme Court, and all of which will be

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1. *See, e.g.*, Rutan v. Republican Party, 110 S. Ct. 2729 (1990); United States v. Eichman, 110 S. Ct. 2404 (1990).

affected by the Court's first amendment jurisprudence.[2]

As the conservative majority on the Supreme Court, led by Chief Justice Rehnquist, continues to solidify, civil liberties advocates see increasing danger that the Rehnquist Court will restrict first amendment freedoms. The recent resignation of Justice Brennan and President Bush's subsequent nomination of Judge David Souter as his replacement make this danger all the more tangible and real. While Judge Souter's views on many first amendment matters remain unclear, there is little doubt that his view of constitutional liberties is substantially more narrow than Justice Brennan's. During the 1989-90 Term alone, Justice Brennan was part of a narrow 5-4 majority which upheld free speech rights in several cases.[3] It is impossible to predict whether these decisions would have come out the same had Justice Brennan retired one year earlier.

The effects of the Supreme Court's 1989-90 Term first amendment decisions themselves are mixed. While a majority of the Supreme Court still appears willing to protect fundamental first amendment speech and expression rights, the Supreme Court's decisions caused serious harm in other areas. The most significant damage was done this term to freedom of religion in *Oregon v. Smith*,[4] where the Supreme Court effectively reversed decades of precedent by holding that the "compelling government interest" test is inapplicable to many types of governmental infringement on religious liberty.[5] The result may well be to effectively write the free exercise clause out of the first amendment in many cases.

In the area of free speech and expression, a majority of the Court continued to protect individual rights of expression and political

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2. *See, e.g.*, Bella Lewitzky Dance Found. v. NEA, No. 90-3616 (C.D. Cal. filed July 12, 1990) (challenging constitutionality of NEA requirement that grant recipients sign "pledge" not to use NEA funds to create obscene or offensive artworks as precondition to receiving grant funds); Skyywalker Records, Inc. v. Navarro, No. 90-6220 (S.D. Fla. filed June 6, 1990) (ruling on status of 2 Live Crew album under Florida obscenity law and propriety of police conduct pertaining thereto); McCarthy v. Fletcher, 207 Cal. App. 3d 130, 254 Cal. Rptr. (Ct. App. 1989) (challenging school book censorship by Wasco Union school district).

3. *See, e.g.*, *Eichman*, 110 S. Ct. at 2408-09 (striking down federal law prohibiting flag desecration as applied to individual political protesters); *Rutan*, 110 S. Ct. at 2729 (holding that first amendment prohibited the firing and refusal to promote state workers based on political party affiliation).

4. 110 S. Ct. 1595 (1990). *Smith* is discussed in more detail in SECTION IA, *infra* notes 11-50 and accompanying text.

5. *Id.* at 1603-04.

association and to further extend such protection to attorneys in several cases.[6] However, the Supreme Court failed to protect free speech rights in less traditional contexts, and, in fact, restricted first amendment freedoms in some areas. One example of such a restriction is the decision in *Ohio v. Osborne*,[7] where the Supreme Court appeared to cut back significantly on the principle recognized in *Stanley v. Georgia*[8] that the first amendment prevents the state from dictating to individuals what they may possess and read in the privacy of their own homes.[9]

Smith and *Osborne* suggest the potential beginning of a disturbing trend in the Supreme Court's first amendment decisions: rulings which do not expressly overrule prior first amendment holdings, but effectively reverse them by radically reinterpreting and limiting them. Civil liberties advocates and first amendment scholars should take particular care to guard against and to criticize the use of this technique, a technique which has also been used by the conservative Supreme Court majority in other areas in recent years.[10]

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6. *See, e.g.*, *Eichman*, 110 S. Ct. at 2408-09 (overturning federal flag-burning law as applied to several individual protesters); Peel v. Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281 (1990) (striking down Illinois prohibition against lawyers advertising their certification as specialists by bona fide private lawyers' organization); Keller v. State Bar of Cal., 110 S. Ct. 2228 (1990) (holding that mandatory state bar association cannot utilize compulsory dues to finance political and ideological speech and related activities with which individual attorney disagrees); Butterworth v. Smith, 110 S. Ct. 1376 (1990) (holding that Florida could not constitutionally prohibit an individual grand jury witness from disclosing testimony after grand jury term had expired). These decisions are discussed in more detail in SECTION II, *infra* notes 110-347 and accompanying text.

7. 110 S. Ct. 1691 (1990).

8. 394 U.S. 557 (1969).

9. In addition to *Osborne*, see United States v. Kokinda, 110 S. Ct. 3115 (1990) (upholding conviction of members of political advocacy group for soliciting on sidewalk in front of post office); Superior Court Trial Lawyers Ass'n v. FTC, 110 S. Ct. 768 (1990) (holding that group boycott by appointed criminal defense attorneys representing indigent criminal defendants was not expressive in nature so as to warrant first amendment protection). These and other free speech cases are discussed in SECTION II, *infra* notes 110-347.

10. For example, in the civil rights area, the Court in Wards Cove Packing Co., v. Atonio, 109 S. Ct. 2115 (1989), recently undertook what has been described as a "dramatic departure from longstanding precedent" which "overturned [the] long prevailing allocation of the burden of proof of business necessity" to the detriment of plaintiffs in job discrimination cases. *See* S. Rep. No. 586, 101st Cong., 2d Sess. 18. Although the 5-4 majority in *Wards Cove* contended that its rulng was consistent with prior case law, 109 S. Ct. 2124-25, lower courts have recognized the substantial change

The remainder of this article will analyze in more detail each of the Supreme Court's fifteen first amendment decisions issued during the 1989-90 Term. As discussed below, these rulings fall into two broad categories: decisions concerning freedom of religion and decisions concerning freedom of speech, press, and association.

I. THE SUPREME COURT'S DECISIONS ON FREEDOM OF RELIGION

A. Decisions Concerning the Free Exercise of Religion Clause

The Supreme Court's most significant freedom of religion decision in the 1989-90 Term was *Oregon v. Smith.*[11] In *Smith*, the majority substantially reinterpreted previous Supreme Court cases involving the free exercise of religion under the first amendment. The compelling interest test, applied in the past to state actions that infringed upon the rights of individuals, was effectively reduced to a rational basis test. A broad range of first amendment scholars and advocacy groups agree that the opinion dramatically weakened the free exercise clause. As conservative constitutional expert William Bentley Ball stated, the opinion moved religious liberty "to the back of the constitutional bus--maybe off the bus."[12]

Smith involved two members of the Native American Church who used peyote for sacramental purposes.[13] The two men were fired from their jobs with a private drug rehabilitation organization because of their peyote use.[14] When they applied for unemployment compensation benefits, they were declared ineligible.[15] The state argued that the denial

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in employment discrimination law caused by *Wards Cove*. *See, e.g.*, Hill v. Seaboard Coast Line R.R., 885 F.2d 804, 812 n.12 (11th Cir. 1989) (noting that *Wards Cove* "overruled the existing law in this circuit" on burden of proof concerning business necessity); Allen v. Seidman, 881 F.2d 375, 377 (7th Cir. 1989) (explaining that *Wards Cove* "modified the ground rules that most lower courts have followed in disparate impact cases").

11. 110 S. Ct. 1595 (1990).

12. *See* Letter from Representatives Paul Henry and Stephen Solarz to members of Congress (June 27, 1990) (regarding the *Smith* decision).

13. *Smith*, 110 S. Ct. at 1597-98.

14. *Id.*

15. *Id.* at 1598.

of benefits was valid because the use of peyote was a crime in Oregon.[16] The Oregon Court of Appeals and the Oregon Supreme Court disagreed, holding that although sacramental peyote use was prohibited by the state, the prohibition was unconstitutional as applied because it was an infringement on religious freedom and it was not justified by a compelling government interest.[17]

By a 6-3 margin, the United States Supreme Court reversed the Oregon Supreme Court and upheld the state's denial of unemployment benefits.[18] Justice Scalia wrote the majority opinion, in which he acknowledged that the exercise of religion involves not only belief but also performance of physical acts.[19] Justice Scalia also agreed that a state violates the right to free exercise of religion if it seeks to ban conduct specifically because of the religious belief involved.[20] The majority rejected the contention, however, that prior Supreme Court precedent required this rationale to be carried one step further. The majority ruled that Oregon's facially neutral drug law was clearly constitutional as applied, and despite the fact that it conflicted with sincere religious beliefs, Oregon was not required to justify its infringement of religious freedom as necessary to promote a compelling government interest.[21] According to the majority, any other result would allow religious motivation to place an individual beyond the reach of criminal law and would permit individuals to become a law unto themselves.[22]

Although the result in *Smith* was not suprising, the rationale utilized by the majority was unexpected. Prior to *Smith*, cases in which facially neutral government regulations were challenged as violating the free exercise clause were generally analyzed using the compelling interest test of *Sherbert v. Verner*.[23] Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified as necessary to promote a compelling governmental interest.[24] This test

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16. *Id.*

17. *Id.*

18. *Id.* at 1595 (Rehnquist, C.J., White, Stevens, and Kennedy, JJ., joined in the majority opinion; O'Connor, J., wrote a separate opinion concurring in the result; and Brennan, Marshall and Blackmun, JJ., dissented).

19. *Id.* at 1599.

20. *Id.*

21. *Id.* at 1603.

22. *Id.* at 1600.

23. 374 U.S. 398 (1963).

24. *Smith*, 110 S. Ct. at 1602 (citing *Sherbert*, 374 U.S. at 402-03).

effectively accomodated the individual's interest in religious freedom with the government's interest in society-wide regulation. However, the majority in *Smith* ruled that the compelling interest test did not apply at all, and that the Oregon rule could be upheld because it was of general applicability.[25]

Justice Scalia attempted to justify the refusal to apply the compelling interest test. He asserted that it had never been applied to determine whether individuals should be exempted from generally applicable criminal statutes, and that the test had rarely been used outside the scope of unemployment compensation cases like *Sherbert*.[26] Scalia maintained that other than in such cases, the test had been used in cases involving the free exercise of religion only where some other constitutional right was also involved, such as freedom of speech[27] or the parental right to direct the education of their children.[28] The *Smith* case did not involve such a "hybrid situation" concerning free excercise and some other constitutional right.[29] The majority ruled, therefore, that where a case raises only free exercise claims, the compelling interest test is inapplicable and the government essentially has a free hand to regulate.[30]

In her concurring opinion, Justice O'Connor wrote that the majority drastically reinterpreted previous free exercise cases.[31] Justice O'Connor's concurrence explained that under a fair reading of previous Supreme Court precedent, religious conduct motivated by sincere religious belief is presumptively protected by the first amendment.[32] Laws that effectively bar individuals from engaging in religious conduct, even while not explicitly discriminating against religion, prevent the free exercise of religion.[33] As Justice O'Connor explained, few states would enact laws that directly target a religious practice.[34] The majority's test relegates a serious first amendment right to a low level of scrutiny that is already

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25. *Id.* at 1603.

26. *Id.* at 1602-03.

27. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

28. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

29. *Smith*, 110 S. Ct. at 1601-02.

30. *Id.* at 1602.

31. *Id.* at 1606 (O'Connor, J., concurring).

32. *Id.* at 1608.

33. *Id.*

34. *Id.*

provided by the equal protection clause.[35] Indeed, Justice O'Connor wrote that the majority opinion in *Smith* "dramatically departs from well-settled First Amendment jurisprudence" and is "incompatible with our Nation's fundamental commitment to individual religious liberty."[36]

Justice O'Connor's opinion demonstrated the error in the majority's analysis. The free exercise clause has continually been interpreted by the Supreme Court to forbid general application of an act that infringes upon religious conduct where there is no compelling state interest. *Wisconsin v. Yoder*,[37] Justice O'Connor explained, was a prime example of where the free exercise clause has been used in this manner.[38] Despite Justice Scalia's attempt to maintain that *Yoder* had utilized the compelling government interest because it involved parents' rights to control the upbringing of their children,[39] *Yoder* had relied expressly on the free exercise clause.[40] Justice O'Connor contended that *Yoder* has been regarded as part of the mainstream of free exercise cases, disregarded by the majority in *Smith*, which had held that a regulation neutral on its face may, in its application, offend the free exercise clause.[41]

Finally, Justice O'Connor explained that the same result reached by the majority could also have been reached consistent with established free exercise jurisprudence.[42] Under her analysis, the state had a compelling interest in enforcing laws that control the possession and use of controlled substances by its citizens.[43]

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35. *Id.* at 1606.

36. *Id.*

37. 406 U.S. 205 (1972).

38. *Smith*, 110 S. Ct. at 1609 (O'Connor, J., concurring).

39. *Id.* at 1601.

40. *See generally Yoder*, 406 U.S. at 219-29.

41. *Id.* In addition to *Yoder*, see Hobbie v. Unemployment Comm'n of Fla., 480 U.S. 136, 141-42 (1987) (noting that a minimum scrutiny test for burdens on free exercise of religion has no basis in precedent); United States v. Lee, 455 U.S. 252 (1982) (upholding requirement of payment of social security taxes against free exercise claim based on compelling interest test).

42. *Smith*, 110 S. Ct. at 1613-15 (O'Connor, J., concurring).

43. Justice Blackmun, joined by Justices Brennan and Marshall, dissented in *Smith*, 110 S. Ct. at 1615. The dissent agreed with Justice O'Connor that the application of the compelling interest test ensures fairness to all religions when it is uniformly applied, and that the majority erred by departing from the previous standard. *Id.* at 1616. However, in contrast to Justice O'Connor, the dissent maintained that the state failed to meet the burden established by the compelling interest test because it did not show sufficient harm

Shortly after the decision in *Smith*, a coalition of religious and civil liberties groups, ranging from the ACLU and People For The American Way to the National Association of Evangelicals and the Christian Legal Society, joined Gerald Gunther, Laurence Tribe and some fifty-three other constitutional law professors in filing a petition for rehearing.[44] The petition pointed out that neither side in *Smith* had argued or even considered the rationale adopted by the majority, which flatly contradicted the Supreme Court's previous free exercise decisions. The petition argued that "every religious group in the country will be profoundly disadvantaged by the majority's rule," which could permit government to "outlaw as medically unnecessary all circumcision, including those practiced for religious reasons," or "outlaw all use of alcoholic beverages, including that used for communion and other religious purposes."[45] The Supreme Court denied the petition without comment.[46]

As result of the *Smith* decision, Representatives Stephen Solarz (D. N.Y.) and Paul Henry (R. MI) introduced the Religious Freedom Restoration Act in Congress.[47] Supported by many of the same diverse groups which sought rehearing in *Smith*, the bill would effectively overrule the majority by creating a statutory right to religious freedom, which could only be infringed by the government where it fulfills the compelling interest test.[48] Although the bill could not and would not overrule the Supreme Court's determination of the applicable test under the first amendment, the effect of the bill would be similar, since it would establish a federal statutory right closely resembling the pre-*Smith* free exercise doctrine.[49] The bill has attained bipartisan support, and prospects appear favorable for it to be passed in 1991.[50]

The Supreme Court rendered a less controversial free exercise decision in *Jimmy Swaggert Ministries v. Board of Equalization*.[51] In

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from the use of peyote and it is not enough to speculate that there is potential harm in order to establish a compelling interest. *Id.* at 1621-23.

44. *See* Petition for Rehearing, Oregon v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213).

45. *Id.* at 2-3.

46. Oregon v. Smith, 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990).

47. H.R. 5377, 101st Cong., 2d Sess. (1990).

48. *Id.*

49. *Id.*

50. *See* Moore, *Religious Rights in the Balance*, 22 NAT'L J. 1981 (1990).

51. 110 S. Ct. 688 (1990).

that case, a unanimous Supreme Court upheld a California appellate court ruling that the religion clauses of the first amendment did not prohibit a state from imposing a generally applicable sales and use tax on the distribution of religious materials by a religious organization, Jimmy Swaggert Ministries.[52] The California Sale and Use Tax Law required retailers to pay a sales tax for retail goods that were sold in the state.[53] The tax was imposed on the retailer and collected by the retailer at the time of sale.[54] Religious organizations were not exempted from the sales and use tax.

Justice O'Connor delivered the opinion for a unanimous Supreme Court. Justice O'Connor stated that a regulation neutral on its face may nonetheless burden the free exercise of religion.[55] The free exercise inquiry must ask whether the governmental burden on the right is substantial and, if so, whether the state can justify such a burden under applicable constitutional requirements.[56]

The Supreme Court ruled that the tax did not impose a constitutionally significant burden on Swaggert's free exercise rights.[57] Specifically the Supreme Court rejected Swaggert's broad reading of *Murdock v. Pennsylvania*,[58] where the Supreme Court ruled that a flat tax enacted was an unlawful prior restraint on a minister.[59] *Murdock* was later applied to an ordinance that required all booksellers to pay a flat fee to procure a license to sell books in *Follet v. McCormick*.[60] The Supreme Court in *Swaggert* held that *Murdock* and *Follet* stood for the proposition that a flat license tax cannot act as a precondition to or prior restraint on the exercise of religion.[61]

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52. *Id.* at 697, 699.

53. CAL. REV. & TAX CODE § 6051 (West 1987).

54. *Id.* §§ 6051, 6202-6206 (West Supp. 1989).

55. *Swaggert*, 110 S. Ct. at 693.

56. *Id.* Interestingly, the unanimous court in *Swaggert* stated that in order to justify a "substantial burden" on religous freedom under the free exercise clause, the state must show that a "compelling government interest justifies the burden." *Id.* Less than six months later, in *Smith*, the Court's majority effectively reversed that standard. *Smith*, 110 S. Ct. at 1603-06.

57. *Id.* at 697.

58. 319 U.S. 105 (1943).

59. *Swaggert*, 110 S. Ct. at 694.

60. 321 U.S. 573 (1944).

61. *Swaggert*, 110 S. Ct. at 694-95.

In contrast, the Supreme Court in *Swaggert* explained, the California tax was simply a general sales and use tax on property, not a precondition or tax on the right to the free exercise of religion.[62] The Supreme Court relied on *Follet* to support the proposition that states may impose general taxes on income from religious activities.[63] The government may thus impose personal property and other taxes on the church and is not constitutionally required to grant an exemption.[64] However, the Supreme Court left open the question of whether a general tax with a more "onerous tax rate . . . might effectively choke off an adherent's religious practices," potentially violating the free exercise clause.[65]

B. Decisions Involving the Establishment Clause

In *Swaggert*, the Supreme Court also ruled that the California tax was consistent with the establishment clause of the first amendment.[66] Swaggert alleged that the collection and payment of the tax imposed improper burdens on religion and fostered excessive entanglement between the ministry and the government, violating the Supreme Court's ruling in *Lemon v. Kurtzman*.[67]

Under *Lemon*, government action violates the establishment clause if it has the effect of promoting or impairing religion, fostering excessive government entanglement with religion, or has a non-secular purpose.[68] In applying the *Lemon* test in *Swaggert*, the Supreme Court stated that it was clear that the general sales tax had a secular purpose and neither advanced nor inhibited religion.[69] The nature of the tax was neutral on the question of religious belief.[70] The "core values" of the establishment clause were thus not even remotely called into question by the generally

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62. *Id.* at 696.

63. *Id.* at 694. "[A] preacher is not 'free from all financial burdens of government, including taxes on income . . .' and, 'like other citizens, may be subject to *general* taxation.'" *Id.* (emphasis in original) (citing *Follet*, 321 U.S. at 578).

64. *Id.*

65. *Id.* at 697.

66. *Id.* at 697-98.

67. 403 U.S. 602 (1971).

68. *Id.* at 612-13.

69. *Swaggert*, 110 S. Ct. at 698.

70. *Id.*

applicable sales and use tax.[71]

The Supreme Court also concluded that the state had not violated the third prong of the *Lemon* test.[72] Justice O'Connor explained that generally applicable administrative and record-keeping regulations do not run afoul of the establishment clause.[73] Justice O'Connor explained, for example, that the record-keeping requirements of the Fair Labor Standards Act[74] (FLSA) are more burdensome than the paperwork required in *Swaggert*, and the FLSA was found not to improperly entangle government in religious affairs.[75] The fact that Swaggert bore the cost of collecting and remitting the tax did not impermissibly enmesh the government in religious affairs.[76]

The more controversial case involving the establishment clause during the past term was *Board of Education of Westside Community Schools v. Mergens*.[77] In *Mergens*, high school students brought an action against a school district seeking to require it to permit a student-led religious club to meet on school premises after school hours on the same basis as school-sponsored extracurricular activities.[78] The students contended that the school district's denial of their request violated the federal Equal Access Act[79] and the first amendment. The District Court

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71. *Id.*

72. The establishment clause of the first amendment prohibits Congress from enacting any law respecting an establishment of religion. In determining whether a congressional enactment violates the establishment clause, the Supreme Court has examined three principal criteria: (1) whether the statute has a secular legislative purpose; (2) whether the principal or primary effect of the statute is neither to advance nor to inhibit religion; and (3) whether the statute fosters an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

73. *Swaggert*, 110 S. Ct. at 690.

74. 29 U.S.C. § 211(c) (1965).

75. *See* Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 305-06 (1985).

76. *Swaggert*, 110 S. Ct. at 699.

77. 110 S. Ct. 2356 (1990).

78. *Id.* at 2362.

79. The Equal Access Act of 1984, which was enacted by Congress to resolve the issue of the use of school facilities by religious and political groups, provides in relevant part:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who

ruled for the Board,[80] but the Court of Appeals for the Eighth Circuit reversed on statutory grounds.[81] Eight of the nine Justices agreed that the Board had violated the Equal Access Act and that the Act did not conflict with the establishment clause.[82] The Justices disagreed, however, on the question of what steps school districts like Westside should take in order to administer the Act consistent with the establishment clause.[83]

On the statutory question of whether the Board had violated the Act, the Supreme Court unanimously agreed that a secondary school must permit religious or political clubs to meet if it has a "limited open forum."[84] The Supreme Court also agreed that such a forum exists under the Act whenever such a public school allows one or more noncurriculum related student groups to meet on school premises.[85] Because the Act did not define the term "non-curriculum-related" student group, the Supreme Court was required to do so.[86] The majority ruled that a "non-curriculum-related-student group" properly means any student group that is not directly related to the body of courses taught at the school.[87] Since a chess club and several other groups which were noncurricular according to the Court's definition existed at Westside, the Court ruled that the Act applied and that the school was required to

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> wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a) (1988).

80. *Mergens*, 110 S. Ct. at 2363.

81. *Id.*

82. *Id.* at 2360-61 (Rehnquist, C.J., and Blackmun, Brennan, Kennedy, Marshall, O'Connor, Scalia, and White, JJ., agreed that the school's action violated the Equal Access Act and that the Act did not conflict with the establishment clause; Stevens, J., filed the only dissent).

83. *Id.* at 2376 (Kennedy, J., concurring); *id.* at 2378 (Marshall, J., concurring); *id.* at 2383 (Stevens, J., dissenting).

84. *Id.* at 2370; *id.* at 2376 (Kennedy, J., concurring); *id.* at 2378 (Marshall, J., concurring); *id.* at 2383 (Stevens, J., dissenting).

85. *Id.* at 2370.

86. *Id.* at 2365-67.

87. *Id.* at 2370.

permit religious groups to meet under the Act.[88]

The Supreme Court went on to determine that the Equal Access Act did not violate the establishment clause.[89] Justice O'Connor's plurality opinion[90] essentially concluded that the issue was determined by the decision in *Widmar v. Vincent*,[91] which held that an "equal access" policy at the university level was consistent with the establishment clause.[92] Applying the three-part *Lemon* test,[93] the plurality explained that the Act's avowed purpose of preventing discrimination against political and philosophical as well as religious speech in public schools was sufficient to satisfy the first prong of the test.[94] The plurality also concluded that as long as schools follow the Act's provisions limiting participation by school officials in religious clubs, there would be no excessive entanglement between government and religion.[95]

The Supreme Court also rejected the school board's contention that the Act had the effect of advancing religion by projecting the image of school sponsorship of religious club activities.[96] The plurality reasoned that there was a significant difference between government and private endorsement of religion.[97] Government endorsement of religion is forbidden by the establishment clause, but private endorsement is protected by the free speech and free exercise clauses.[98] Just as the

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88. In reaching its decision on the proper interpretation of the Act, the Court rejected the argument of the school district and several *amici* that a student group should be considered curriculum-related if it is sponsored or encouraged by the school and is generally related to the school's curricular goals, as well as Justice Stevens's contention that a group should be considered noncurriculum-related only if at least part of its purpose is to advance partisan, political, theological or ethical views. *Id.* at 2368-69. As Justice Stevens pointed out in dissent, the majority's definition is potentially subject to manipulation, is difficult for school districts to apply even in the absence of evasion, and raises establishment clause problems in its implementation. *Id.* at 2387-88 (Stevens, J., dissenting).

89. *Id.* at 2373 (plurality opinion).

90. *Id.* at 2361 (O'Connor, J., was joined by White, Blackmun, JJ., and Rehnquist, C.J.).

91. 454 U.S. 263 (1981).

92. *Id.* at 271-75.

93. *See supra* note 72.

94. *Mergens*, 110 S. Ct. at 2371 (plurality opinion).

95. *Id.* at 2372-73.

96. *Id.* at 2373.

97. *Id.* at 2372.

98. *Id.* at 2371-72.

Court ruled with respect to college students in *Widmar*, the plurality endorsed Congress' view that high school students could distinguish between a neutral equal access policy and state sponsorship of religion.[99] The plurality explained that as long as a school makes clear that permitting a club to meet is not an endorsement of its views, students will understand that the school's attitude is one of neutrality towards religious speech, not endorsement.[100]

It was the question of endorsement which led to disagreement among the Justices. Justices Kennedy and Scalia agreed with the judgment but believed that a different test should be used to determine compliance with the establishment clause.[101] Their concurring opinion suggested that "endorsement" should not be sufficent to violate the establishment clause, since it could well be inevitable that a public high school would endorse religion in the common sense use of the term if a club is allowed on its premises.[102] According to Justices Kennedy and Scalia, the proper test involved looking for coercion.[103] "The inquiry . . . must be whether the government imposes pressure upon a student to participate in a religious activity."[104] Schools would violate the Constitution only if they coerce students to participate in the religious clubs.[105]

Although Justices Marshall and Brennan also agreed with the judgment in *Mergens*, they expressed a significantly different view as to the steps necessary to ensure against violation of the establishment clause.[106] According to Justices Marshall and Brennan, the Act was the codification of a constitutional mandate forbidding discrimination with respect to access to school facilities for expressive purposes not directly related to school curriculum.[107] The inclusion of a religious club in such a forum, they argued, poses a danger that other clubs do not present.[108] Just as the university sought to maintain its neutrality in *Widmar*, maintaining neutrality toward religion will become an issue that

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99. *Id.* at 2372.

100. *Id.* at 2372-73.

101. *Id.* at 2377-78 (Kennedy, J., concurring).

102. *Id.* at 2378.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 2378-79 (Marshall and Brennan, JJ., concurring).

107. *Id.*

108. *Id.* at 2381.

a high school will have to confront. If a school encourages student participation in extra-curricular activities and a religious club is the only "controversial" club on the high school campus, the fine distinction between endorsing the group and following the Act may be lost. Therefore, according to Justices Marshall and Brennan, in order to remain consistent with the establishment clause, a school like Westside must fully dissassociate itself from the club's religious speech and avoid appearing to sponsor or endorse the club's goals.[109]

The Supreme Court's decision in *Mergens* suggests problems for the future. Although the Supreme Court may be able to agree that a high school cannot exclude religious groups from a limited open forum, the Court appears divided on how a school which *includes* such groups should act in order to comply with the establishment clause. If a majority of the Supreme Court were to accept the Kennedy-Scalia coercion test, established principles involving the separation of church and state could become eroded. The *Mergens* decision may well lead to further litigation on this and related church-state issues in the future.

II. THE COURT'S DECISIONS ON FREEDOMS OF SPEECH, PRESS AND ASSOCIATION

A. Decisions Concerning the Application of the First Amendment to Challenged Activities

A number of the Supreme Court's free speech and association decisions this term concerned whether the first amendment applies to particular expressive activities. These rulings by the Court were mixed. Although several of the Court's 1989-90 decisions helped protect first amendment interests, several pose serious dangers for first amendment rights.

Two of the decisions in which the Supreme Court held that the first amendment was applicable involved the rights of individual attorneys to speak, or not to speak, contrary to attempted state bar regulation. In *Peel v. Attorney Registration & Disciplinary Commission*,[110] the Supreme Court addressed some previously unanswered questions

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109. *Id.*

110. 110 S. Ct. 2281 (1990).

concerning the regulation of advertising by lawyers.[111] In a narrow 5-4 decision, the Court ruled that it was improper to completely ban a lawyer's advertising that was not actually or inherently misleading.[112] Additionally, the plurality also suggested that even if it were determined that the advertisement was potentially misleading, a categorical ban on the advertisement is still prohibited by the first amendment.[113]

The advertisement at issue was a statement on an attorney's letterhead that read: "Certified Civil Trial Specialist by the National Board of Trial Advocacy." This was followed directly by the phrase "Licensed: Illinois, Missouri, Arizona." The Illinois disciplinary committee filed a complaint alleging that the advertisement violated the Code of Professional Responsibility.[114] The Illinois Supreme Court held that the letterhead was misleading and therefore not protected by the first amendment.[115]

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111. *Id.* A lawyer's first amendment right to advertise was first recognized in Bates v. State Bar of Ariz., 433 U.S. 350 (1977), which held that a total ban on advertising of prices by private attorneys was invalid. The Court left unanswered the validity of in-person solicitation or advertising claims relating to the quality of legal services. *Id.* at 366. Five years later in *In re* R.M.J., 455 U.S. 191 (1982), the Court again directly addressed the validity of attorney advertising. In an unanimous decision, the Court invalidated three categories of regulations on lawyer advertising: (1) a regulation that allowed only certain subject areas to be listed as specialties; (2) a regulation which forbade listings of admission to the bars of neighboring states and the United States Supreme Court; and (3) a regulation that banned the mailing of announcements of office openings except to clients, friends and relatives. *Id.* at 205-07. The Court's most recent pronouncement in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), held that a lawyer: (1) may place advertisements that are geared to persons with specific legal problems; (2) may not be disciplined for the content of advertisements based on substantial interest justifying a ban on in-person solicitation; and (3) may not be disciplined for advertisements containing truthful and non deceptive information and legal advice. *Id.* at 639-53. However, the Court did not hold that it was valid to require a lawyer who advertises legal counsel on a contingency-fee basis to disclose that the client is required to pay costs.

112. *Peel*, 110 S. Ct. at 2292-93 (Stevens, J., wrote the opinion for the plurality and was joined by Brennan, Blackmun, and Kennedy, JJ.; Marshall, J., wrote a concurring opinion in which Brennan, J., joined; White, J., filed a dissenting opinion, as did O'Connor, J., in which Rehnquist, C.J., and Scalia, J., joined).

113. *Id.*

114. Specifically, the commission alleged that petitioner violated Rule 2-105(a)(3) which stated that: "A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a) no lawyer may hold himself out as 'certified' or a 'specialist.'" *Id.* at 2286. The exceptions were for patent, trademark and admiralty lawyers. *Id.*

115. *Id.*

The Supreme Court reversed, basing its decision on the intermediate scrutiny standard applicable to commercial speech as applied in prior court decisions concerning a lawyer's commercial speech.[116]

The plurality rejected the Illinois court's suggestion that the implied claim as to the "quality" of the petitioner's legal services was so likely to mislead as to warrant a categorical ban and a decision that the first amendment provided no protection to the advertisment, noting that such an analysis "confuses the distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality."[117] In addition, the plurality rejected the Illinois court's

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116. Traditionally, commercial speech has not received the same degree of protection under the first amendment that has been accorded to noncommercial speech. The development of the commercial speech doctrine began with Valentine v. Christensen, 316 U.S. 52 (1942), and was further expanded in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), where the Court held that a categorical ban on a pharmacy's price advertising was a violation of the first amendment. As articulated by the Court in 1982, the commercial speech doctrine provides that in order for a restriction on commercial speech to be valid "the State must assert a substantial interest and the interference with speech must be in proportion to the States's interest served Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest." *In re* R.M.J., 455 U.S. 191, 203 (1982) (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980)). In the context of advertising for professional services, the Court has explained that

> [t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive.

Id.

117. *Peel*, 110 S. Ct. at 2288 (plurality opinion). Although agreeing with the plurality's conclusion, Justice Marshall in his concurring opinion suggested that the lawyer's letterhead was potentially misleading and, thus, the state could enact regulations other than a total ban. Justice Marshall concluded that facts as well as opinions can be misleading when they are not presented with adequate supporting information. *Id.* at 2293 (Marshall, J., concurring).

concern that petitioner's statement about his certification as a "specialist" by an identified national organization necessarily would be confused with formal state recognition.[118] The plurality extended great deference to the consumer's ability to discern between two statements and rejected "the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."[119]

After concluding that the advertising statement was not actually misleading, the plurality addressed the State Bar Commission's claim that the statement was potentially misleading and, thus, still warranted a categorical ban.[120] The plurality explained that even if some consumers would be confused by the advertisement, a categorical ban was broader than necessary to prevent the "perceived evil."[121]

The Supreme Court was respectful of the Commission's desire to protect consumers from sham advertising and suggested that a sham certification would not necessarily be entitled to first amendment protection.[122] The plurality also noted that the Supreme Court's decision did not determine whether a state may impose certain less restrictive disclaimer requirements for certification advertisements.[123] The holding was limited to the declaration that a total ban on potentially misleading commercial speech is unconstitutional if narrower restrictions could be imposed to reach the same goal of protecting the public.[124]

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118. *Id.* at 2289 (plurality opinion).

119. *Id.* at 2290 (citation omitted). Justice O'Connor argued in her dissenting opinion that the plurality had incorrectly abandoned the requirement that a state mentor claim be verifiable by the ordinary consumer of legal services. *Id.* at 2299 (O'Connor, J., dissenting).

120. *Id.* at 2292-93 (plurality opinion). Justice White in his dissenting opinion concluded that the advertisement was potentially misleading. He would only prohibit a categorical ban of an advertisement that did not include a disclaimer that shielded the public from any danger of deception. However, he suggested that the total ban was valid as applied to the particular advertisement at issue because there was no disclaimer. *Id.* at 2297 (White, J., dissenting).

121. *Id.* at 2291 (plurality opinion). This position is in line with the principle enunciated by the Supreme Court in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 455 U.S. 478 (1976), that disclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information.

122. *Peel*, 110 S. Ct. at 2292 (plurality opinion).

123. *Id.*

124. *Id.* The plurality thus agreed with Justice Marshall's concurring opinion that the decision may not preclude a state from regulating commercial speech in a less restrictive manner. *Id.* at 2292 n.17. Justice Marshall, with whom Justice Brennan

The remaining unanswered question concerns what types of less restrictive regulations will pass constitutional muster.

The second case concerning attorneys involved the right of an individual attorney not to be compelled to finance activities of an ideological or political nature, as a member of a state bar.[125] In *Keller v. State Bar of California*,[126] Chief Justice Rehnquist wrote for a unanimous Court reversing the California Supreme Court and holding that the first amendment prohibited an integrated state bar from using membership dues to finance such activities.[127]

Petitioners in *Keller* were members of the State Bar of California who sued alleging that the state bar unconstitutionally used mandatory dues payments to finance ideological and political causes in violation of their first amendment rights.[128] Pursuant to its holding in *Lathrop v. Donohue*,[129] the Supreme Court agreed with California's requirement that attorneys who are admitted to practice law in the state must join and pay dues to the State Bar.[130] In *Keller*, the Court looked to the scope of permissible dues-financed activities in which the bar could engage.[131] This issue had been left open in *Lathrop*.

The Supreme Court rejected the bar's argument that its classification as a "state agency" meant that the first amendment did not apply at all and that there were no constitutional restrictions on the use of

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joined, concluded that the statement was potentially misleading on the basis that the name "National Board of Trial Advocacy" could be misinterpreted as a governmental agency. In addition, Justice Marshall placed emphasis on the fact that the statement of certification was juxtaposed with the listing of states in which petitioner is licensed. *Id.* at 2294 (Marshall, J., concurring).

125. Keller v. State Bar of Cal., 110 S. Ct. 2228 (1990).

126. *Id.*

127. *Id.* at 2238.

128. *Id.* at 2231. Some of the activities challenged by petitioners included the state bar's involvement in lobbying either for or against state legislation (1) prohibiting state and local agency employers from requiring employees to take polygraph tests; (2) prohibiting possession of armor piercing handgun ammunition; (3) creating an unlimited right of action to sue any entity causing air pollution; and (4) requesting Congress to refrain from enacting a guest worker program or from permitting the importation of workers from other countries. *Id.* at 2231-32 n.2.

129. 367 U.S. 820 (1961).

130. *Keller*, 110 S. Ct. at 2236.

131. *Id.*

its dues.[132] The Supreme Court distinguished the state bar from other traditional governmental agencies on the grounds that its financing is not from appropriations made by the legislature, but rather from dues levied on its members by the Board of Governors.[133]

In rejecting the use of compulsory dues to finance activities of an ideological or political nature, the Supreme Court analogized the bar's activities to those of the public employee labor union in *Abood v. Detroit Board of Education*.[134] In *Abood*, the Supreme Court held that although the Constitution will not prohibit a public employee union from spending "funds for the expression of political views, . . . the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment."[135] Specifically, mandatory dues could only be used to finance activities that were germane to the purpose for which compelled membership was justified.[136] The Supreme Court concluded in *Keller* that compelled association in the bar, which is justified by the state's interest in regulating and improving the quality of the legal profession, is similar to the compelled association in the labor union which is necessary for collective bargaining.[137] The Supreme Court thus held that the state bar is limited to using its mandatory dues to

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132. At trial, petitioners sought an injunction restraining respondents from using mandatory bar dues or the name of the State Bar of California to advance political or ideological causes or beliefs. The trial court granted respondents' motion for summary judgment on the basis that the State Bar is a state agency and thus permitted under the first amendment to engage in the challenged activities. When the Supreme Court of California reversed the court of appeals, it also held that "the state bar, considered as a governmental agency, may use dues for any purpose within the scope of its statutory authority." Keller v. State Bar of Cal., 47 Cal. 3d 1152, 1168, 767 P.2d 1020, 1030, 255 Cal. Rptr. 542, 552 (1989) (with the exception of certain election campaigning, the Court concluded that all of the challenged activities fell within respondent's statutory authority).

133. *Keller*, 110 S. Ct. at 2234-35. In addition, the Court held that the specialized characteristics of the State Bar serves to further distinguish it from a "state agency." For example, the Supreme Court noted that the bar's members are lawyers and that the ultimate responsibility of the bar is to govern the legal profession, not to partake in the general government of the state. *Id.* at 2235.

134. 431 U.S. 209 (1977).

135. *Id.* at 235-36.

136. *Id.*

137. *Keller*, 110 S. Ct. at 2236.

fund activities that are germane to those goals.[138] The Supreme Court thus ruled that the state bar may make expenditures using mandatory dues only where "the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the state.'"[139] The Supreme Court recognized the possible difficulties in discerning between the different classifications of activities. However, the Supreme Court ruled that the activities which petitioners complained of in *Keller* were clearly outside the realm of activities that could be financed through compulsory dues.[140]

Despite the Supreme Court's unanimous ruling in *Keller*, one question remained unanswered. The petitioner in *Keller* also asserted that the bar's use of its name to advance causes or beliefs which could not be funded by mandatory dues violated their first amendment rights.[141] The attorneys thereby contended that the first amendment prohibits any compelled association with an organization that engages in political or ideological activities.[142] The Supreme Court refrained from answering that question because the California Supreme Court did not address the issue. Since the Supreme Court clearly upheld mandatory bar membership in *Railway Employees' Department v. Hanson*,[143] and also ruled in *Abood* that a union could spend non-mandatory dues funds to express political views,[144] it seems unlikely that the Supreme Court will recognize a first amendment right not to associate with a mandatory state bar association.

In several other decisions this term, the Supreme Court ruled that the first amendment was inapplicable, even though expressive activity was arguably involved in two of these cases. In *FTC v. Superior Court Trial Lawyers Association*,[145] Justice Stevens wrote the majority opinion, holding that a group boycott by criminal defense lawyers seeking to obtain a compensation increase for representing indigent criminal defendants was not expressive in nature so as to warrant first amendment protection.[146]

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138. *Id.*
139. *Id.* (quoting *Lathrop*, 367 U.S. at 843).
140. *Id.* at 2237.
141. *Id.* at 2238.
142. *Id.*
143. 351 U.S. 225 (1956).
144. *Abood*, 431 U.S. at 235.
145. 110 S. Ct. 768 (1990).
146. *Id.* at 770.

The case involved lawyers in private practice who were appointed and compensated pursuant to the District of Columbia Criminal Justice Act (CJA) to defend indigent criminal defendants.[147] Beginning in 1982, the Superior Court Trial Lawyers Association (SCTLA), as well as other bar groups, sought to increase the rates of compensation to at least $35 per hour.[148] In 1983, after a failed legislative effort, the CJA lawyers formed a "strike committee" at a SCTLA meeting and agreed "'that the only viable way of getting an increase in fees was to stop signing up to take new CJA appointments . . . .'"[149] Approximately one hundred CJA lawyers accordingly stopped accepting new assignments.[150]

Fearing a virtual collapse of the criminal justice system, the District of Columbia mayor offered to support an immediate fee increase.[151] The CJA lawyers accepted the offer and implementing legislation was passed unanimously.[152] But the FTC then filed a complaint against SCTLA alleging a conspiracy to fix prices in violation of the Sherman Act and to engage in unfair methods of trade practice in violation of the FTC Act.[153] Among their other defenses, the CJA lawyers contended that the boycott was a form of political expression protected by the first amendment.[154] Although the FTC Administrative Law Judge dismissed the case on the ground that the effect of the boycott was beneficial, the FTC ruled that the lawyers' "'concerted refusal to deal' had the 'purpose and effect of raising prices' and was illegal *per se*" under the antitrust laws, without any analysis of whether the boycott actually had an anti-competitive effect.[155]

The Court of Appeals, however, vacated the FTC's decision.[156] The court accepted the defense that the boycott contained an element of

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147. *Id.* at 770-71.

148. *Id.* at 771.

149. *Id.* (quoting *In re* Superior Court Trial Lawyers Ass'n, 107 F.T.C. 510, 538 (1986)).

150. *Id.*

151. *Id.* at 772.

152. *Id.* at 771.

153. *Id.* at 772-73.

154. *Id.* at 773.

155. *Id.* (quoting *In re SCTLA*, 107 F.T.C. at 573).

156. *Id.*

expression that should be protected by the first amendment.[157] Applying the test enunciated in *United States v. O'Brien*,[158] the court ruled that a restriction on boycotts, which have historically been a means of expression, could not be justified unless it is no greater than essential to an important governmental interest.[159] The court concluded that the FTC's use of the *per se* rule against a boycott with a significant expressive component was erroneous and that the FTC must "'prove rather than presume that the evil against which the Sherman Act is directed looms in the conduct it condemns.'"[160] The appellate court accordingly remanded the case to the FTC to determine whether the trial lawyers actually had "significant market power" and thus whether the boycott actually had an anti-competitive effect.[161]

The Supreme Court reversed.[162] Although the Supreme Court conceded that the boycott may well have served a worthwhile cause and produced better legal representation for indigent defendants, the Court rejected all of the lawyers' defenses, including the first amendment claim.[163] The SCTLA contended that their activity deserved first amendment protection similar to that granted to petitioners in *NAACP v. Claiborne Hardware*.[164] The Supreme Court distinguished the boycotters in *NAACP* from those in *SCTLA* on the basis that the boycotters in *NAACP* were not motivated by any desire to lessen

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157. Superior Court Trial Lawyers Ass'n v. FTC, 856 F.2d 226, 250 (D.C. Cir. 1988).

158. 391 U.S. 367 (1968).

159. *SCTLA*, 110 S. Ct. at 774.

160. *Id.* (quoting *SCTLA*, 856 F.2d at 296).

161. *Id.*

162. *Id.*

163. The Supreme Court echoed the long-standing position that the statutory policy underlying the Sherman Anti-Trust Act "'precludes inquiry into the question whether competition is good or bad.'" *Id.* at 775 (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978)). Similarly, the Supreme Court held that the reasonableness of the fees set was irrelevant and that the lawyers' boycott was not immune from anti-trust liability simply because its goal was favorable legislation. *Id.*

164. 458 U.S. 886 (1985). In *NAACP*, black citizens had boycotted white merchants. *Id.* at 889. The white merchants then sued under state law to recover the losses they had sustained. *Id.* The Supreme Court concluded that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914. The Supreme Court held that "nonviolent elements of petitioners' activities are entitled to the protection of [the] First Amendment." *Id.* at 914-15.

competition, but rather sought equality and racial justice.[165] According to the Supreme Court, the CJA lawyers were motivated solely by the desire to lessen competition and stood to benefit personally from an increase in the fees.[166]

The Supreme Court explicitly rejected the rationale of the court of appeals and suggested that the lower court had exaggerated the boycott's expressive component and underestimated the perniciousness of price-fixing agreements.[167] The Supreme Court refused to accept the CJA lawyers' claim on the basis that any concerted refusal to deal could be interpreted as having an expressive component.[168] The Supreme Court, in upholding the use of the *per se* rule, emphasized the belief that "the administrative efficiency interest in antitrust regulation are unusually compelling."[169]

Justices Brennan and Marshall dissented.[170] The dissent stressed the importance of determining whether the effects of the boycott were caused by political or economic forces.[171] It may well have been, the dissent suggested, that the boycott had more of a political than an economic force because of the persuasiveness of its message.[172] Applying the *per se* rule to such a complex situation precluded the Court from analyzing the possibility that the voter support for the boycott gave political leaders the confidence to raise CJA rates during a time of fiscal austerity.[173]

Although the existence of an expressive component alone would not render the boycott immune from the *per se* rule, the dissent argued where such an expressive component is present and where there is a

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165. *SCTLA*, 110 S. Ct. at 777.

166. *Id.* at 777 n.10.

167. *Id.* at 779.

168. *Id.*

169. *Id.*

170. *Id.* at 768.

171. *Id.* at 785.

172. *Id.*

173. In addition, Justice Blackmun, concurring in part and dissenting in part, disagreed with the court of appeals decision to remand for a determination of market power. He suggested that the CJA lawyers really had no economic power because the District government had the power to terminate the boycott at any time. Thus, Justice Blackmun explained, the increase in fees was a result of political forces, not the result of any economic power. Justice Blackmun agreed with the court of appeals' application of the *O'Brien* analysis to prohibit the Supreme Court's use of the *per se* rule. *Id.* at 791-92.

genuine issue as to whether the boycott involved any economic coercion, there must be a showing of market power, as the court of appeals ruled, before categorically condemning the boycott.[174] The dissent maintained that the administrative efficiency interest in the *per se* rule was insufficient, noting that "[t]he First Amendment does not permit the State to sacrifice speech for efficiency."[175]

The dissent buttressed its analysis by relying on the traditional rule that a presumption of illegality of a broad prophylactic rule in the area of expressive activity is unacceptable.[176] Specifically, in the area of the first amendment, the dissent explained that there must be a more particularized analysis of the circumstances surrounding the alleged antitrust violations.[177] The dissent suggested that "the FTC cannot ignore the particular factual circumstances before it by emphasizing a presumption of illegality in the guise of a *per se* rule.[178]

The decision rendered in *SCTLA* presents a potential danger to expressive activity. The majority showed an extreme reluctance to recognize first amendment interest in non-traditional speech activity. In addition, *SCTLA* could lead to the erosion of *Claiborne Hardware*, which is crucial to the protection of the expressive component of boycotts.

In addition to *SCTLA*, the Supreme Court rendered another decision in which a traditional form of expressive activity received considerably less protection. In *United States v. Kokinda*,[179] the

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174. *Id.* at 778.

175. *Id.* at 783 n.2.

176. *See* NAACP v. Butler, 371 U.S. 415, 438 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

177. *SCTLA*, 110 S. Ct. at 784 (Brennan, J., dissenting).

178. *Id.* at 785. The dissent also rejected the majority's attempt to distinguish between the lawyers' boycott and the boycott in *NAACP*. The dissent quoted Justice Stevens' statement in *Claiborne* that "'[t]he established elements of speech, assembly, association, and petition, 'though not identical, are inseparable'' when combined in an expressive boycott." *Id.* at 789 (Brennan, J., concurring in part and dissenting in part) (quoting *Claiborne*, 458 U.S. at 911 (citation omitted)). In addition, the dissent suggested that even if there was a different purpose for the lawyers' boycott, that should not have rendered it any less expressive. Further, Justice Brennan rejected the Court's conclusion that the broad media coverage of the boycott indicated that the boycott itself was not expressive. Rather, Justice Brennan claimed that the boycott was an attempt to convey a message and that by sacrificing their income, the lawyers wanted to demonstrate their commitment to achieving higher compensation. Justice Brennan stressed the historic importance of boycotts, especially to the "'poorly financed causes of little people.'" *Id.* at 790 (quoting Martin v. Struthers, 319 U.S. 141, 146 (1943)).

179. 110 S. Ct. 3115 (1990).

Supreme Court upheld a regulation which banned in-person solicitation at federal post offices.[180] Respondents, volunteers for the National Democratic Policy Committee and Lyndon LaRouche, had set up a table on the sidewalk near the entrance of a Maryland post office to solicit contributions and distribute literature concerning various political issues.[181] The respondents were convicted for in-person solicitation.[182] The Fourth Circuit Court of Appeals reversed the conviction, however, holding that the postal sidewalk was a public forum and that the government had demonstrated no compelling state interest in prohibiting expression in such a forum.[183]

In a 5-4 decision, the Supreme Court reversed and upheld the conviction.[184] The Court recognized that solicitation is a form of speech protected by the first amendment.[185] However, a plurality of four Justices wrote that the postal sidewalk constituted government property which was not a public forum and had not been available for expressive activity.[186] According to the plurality, therefore, the first amendment was of only limited applicabilty, and the government's regulation was valid if it was reasonably related to a legitimate government interest according to *Perry v. Local Educational Association*.[187]

In defining the nature of the postal sidewalk, the Supreme Court suggested that the sidewalk leads only from the postal parking area to the front door and was thus distinguishable from the traditional public sidewalk referred to in *Perry*.[188] The plurality noted that a public street

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180. *Id.* at 3117.

181. *Id.*

182. *Id.* at 3118.

183. *Id.*

184. *Id.* at 3115.

185. *Id.* at 3118.

186. *Id.* at 3121.

187. 460 U.S. 37 (1983). In an effort to make a distinction between different types of forums on government property, the Supreme Court in *Perry* set out a three part framework to determine how first amendment rights should be analyzed with respect to government property. First, regulation of speech on government property that has traditionally been open to the public is subject to strict scrutiny. Second, regulation of speech on government property that has been expressly dedicated for such activity is also subject to strict scrutiny; and third, regulation of speech activity where the government has not dedicated its property to such first amendment activity is subject to the rational relationship test. *See Kokinda*, 110 S. Ct. at 3119-29; Lehman v. Shaker Heights, 418 U.S. 298, 301-04 (1974).

188. *Kokinda*, 110 S. Ct. at 3120.

is considered a public forum because it is "continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment."[189] The Supreme Court rejected this characterization of the postal sidewalk.[190]

In light of its conclusion that the sidewalk was not a traditional public forum, the plurality reasoned that the government could control access based on subject matter and speaker identity as long as the regulation was reasonable in light of the purpose served by the forum and was viewpoint neutral.[191] The postal service asserted that the governmental interest was to ensure the most efficient and effective postal service system.[192] Following this logic, the government contended, and the plurality agreed, that it was reasonable to restrict solicitation because solicitation is "inherently disruptive of the postal services business."[193]

Although agreeing with the plurality's conclusion, Justice Kennedy did not agree with its analysis. In a separate concurring opinion, Justice Kennedy wrote that the sidewalk might be considered a public forum, but that the post office rule was nevertheless constitutional as a time, place and manner restriction.[194] Applying this standard, Justice Kennedy concluded that the regulation merely prohibited personal solicitations on postal property for the immediate payment of money.[195] Justice Kennedy stated that the regulation was justified because it made no reference to content and was narrowly tailored to serve a significant governmental interest.[196] Additionally, alternative means of communicating information were available.[197] Justice Brennan, writing for the dissent, objected to the plurality's use of the analysis in *Perry*, which involved internal mail services of public schools, in the context of

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189. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 651 (1981).

190. *Kokinda*, 110 S. Ct. at 3120.

191. *Id.* at 3121-22.

192. *Id.* at 3122.

193. *Id.* at 3123.

194. *Id.* at 3125-26 (Kennedy, J., concurring).

195. *Id.* at 3126.

196. *Id.*

197. Justice Kennedy noted that the nation's similar judgments have been made with respect to classic public forums in the capital, where solicitation of money is banned on the mall. *Id.* (citing 36 C.F.R. § 7.96(h) (1989)).

traditional public forums such as sidewalks.[198] Rejecting the plurality's conclusions that the "proprietary" nature of the post office renders the sidewalk less of a public forum, Justice Brennan suggested that the plurality was confusing the sidewalk with the interior of the post office.[199]

Justice Brennan pointed out that there was no indication that the solicitors interfered in any way with the post office's business.[200] There is a distinction between solicitation that blocks the entrance to the post office or is disruptive of business and solicitation which merely takes place on the sidewalk.[201] There already existed regulations prohibiting the obstruction of the entrance or disrupting the business of the post office.[202]

The dissent contended that it is not important that the sidewalk runs only between the parking lot and the post office entrance.[203] Explaining that the "existence of a public forum does not turn on a particularized factual inquiry into whether a sidewalk serves one building or many or whether a street is a dead end or a major thoroughfare," the dissent rejected the plurality's narrow view of what constitutes a public forum.[204]

Even under the reasonableness standard applicable to non-public forums, the dissent contended that the regulation was not reasonable because the postal service permits other potentially disruptive speech on a case-by-case basis.[205] The dissent also disagreed with the conclusion that the regulation was content neutral.[206] Justice Brennan pointed out that if a solicitor says "please support my political advocacy group," he would not be punished.[207] However, if he says "please contribute $10," he is subject to prosecution.[208] The plurality placed a great deal of emphasis on the fact that the post office received complaints and that

198. *Id.* at 3127 (Brennan, J., dissenting).
199. *Id.* at 3130-31 n.4.
200. *Id.* at 3136.
201. *Id.*
202. *Id.*
203. *Id.* at 3129.
204. *Id.*
205. *Id.* at 3131 n.5.
206. *Id.* at 3134.
207. *Id.*
208. *Id.*

solicitation can be coercive.[209] However, speech should not be subjected to regulation "simply because it may embarrass others or coerce them into action."[210]

Kokinda is potentially troubling for first amendment rights. Although a majority did not support the forum rationale relied on by the plurality, it would take only one more vote to adopt this analysis. As the dissent argued, the result may well be to severely limit first amendment rights in what have traditionally been considered public or limited public forums.[211]

In its final decision focusing on the application of the first amendment, the Supreme Court properly refused to apply the first amendment so as to protect a university from disclosure of information that might have revealed employment discrimination.[212] In *University of Pennsylvania v. EEOC*,[213] the Supreme Court unanimously refused to allow the first amendment right of "academic freedom" to shield university tenure review files in an EEOC investigation of alleged discrimination in a denial of tenure.[214]

In making its first amendment claim, the University specifically focused on a previous statement by Justice Frankfurter that a university possesses, under the first amendment, the right to "determine for itself on academic grounds who may teach."[215] The University contended that the tenure review process was part of its first amendment right to decide "who may teach."[216] To ensure the proper functioning of the tenure system, the University argued, peer review files must remain completely confidential.[217] The University also claimed that subjecting tenure review files to disclosure would have a "chilling effect" on candid evaluations and will thereby result in less qualified persons achieving tenure.[218]

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209. *Id.*

210. *Id.* (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

211. *Id.* at 3126-27.

212. University of Pa. v. EEOC, 110 S. Ct. 577 (1990).

213. *Id.*

214. *Id.* at 579.

215. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).

216. *University of Pa.*, 110 S. Ct. at 586.

217. *Id.*

218. *Id.*

The Supreme Court rejected the University's claim.[219] The University's reliance on prior case law was misplaced, the Court explained, noting that the cases in which the Court protected a first amendment right of "academic freedom" involved protecting the content of speech at universities.[220] In addition, the Court expressed doubt that the peer review process is any more essential in exercising the right to decide "who may teach" than is the availability of money.[221] In short, the first amendment does not apply.

The Supreme Court also noted that not all peer review systems are done in confidence, and that possible disclosure of peer review files would not undermine the tenure review process.[222] Rather, the Court suggested that in the future, evaluators in the tenure review process will simply ground their evaluations in specific examples so as to deflect any claims of discrimination.[223]

B. Decisions Concerning the Validity of Particular Restrictions on Free Expression

The Supreme Court's remaining first amendment decisions during the 1989-90 Term concerned efforts by state and federal authorities to restrict forms of expression clearly entitled to at least some protection under the first amendment. The results in these cases were mixed. The court struck down free speech restrictions in three cases, including two decided by 5-4 margins. In four other decisions, however, the Court

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219. *Id.* at 578-79.

220. The Court explained that the decisions upon which the University relied concerned content regulation of University expression. *Id.* at 586. In *Sweezy*, for example, the Court protected a person's right not to answer questions about a speech he had given at a state university. *Id.* However, the Court explained, a subpoena requesting disclosure of peer review materials is not a content regulation. *Id.* The subpoena is part of a larger process to eliminate discrimination in the workplace as well as in academic institutions. The EEOC was only attempting to control the criteria the University used in that process, to the extent permitted by federal fair employment laws, which the Court has held is clearly lawful. *Id.* at 587.

221. *Id.* at 588. The Court was referring to Buckley v. Valeo, 424 U.S. 1, 19 (1976), where the Court discussed how money is sometimes necessary in exercising first amendment rights. For instance, the Court suggested that the University could not claim a violation of its first amendment rights as a result of taxes that deprive the University of revenue to bid for professors. *University of Pa.*, 110 S. Ct. at 588.

222. *University of Pa.*, 110 S. Ct. at 588.

223. *Id.*

upheld limitations on expression or issued conflicting rulings with potentially troubling implications for the first amendment.

In *Butterworth v. Smith*,[224] the Court unanimously ruled that a state could not make it criminal for grand jury witnesses to disclose information about their own testimony after the grand jury has been discharged.[225] A Florida statute generally prohibited grand jury witnesses from ever disclosing testimony of any witness before the jury.[226] Butterworth was a reporter who was called to testify and warned by the prosecution that any revelation of his own testimony was a violation of the law.[227] However, he wanted to write a news story about his experiences, and sued for an injunction in federal court to prevent the state from prosecuting him.[228] The district court granted summary judgment for the state, but the Eleventh Circuit reversed.[229]

The Supreme Court affirmed, finding that the state had no compelling state interest in prohibiting witnesses from making statements that they would have been perfectly free to make if they had not first testified to the same effect before a grand jury.[230] If anything, the Court reasoned, such a law would discourage such testimony, and thus impede the search for truth, the ultimate goal of the grand jury.[231] The Court upheld those parts of the statute which prohibited disclosure of any matters before the proceedings are completed, and of testimony of other witnesses after the grand jury has finished, because such secrecy exists in all jurisdictions and serves the state interests of encouraging witnesses and jurors to perform their functions without fear of outside influence and retribution that public exposure could cause.[232]

The Supreme Court relied on the precedent of *Landmark Communications, Inc. v. Virginia*,[233] which overruled a Virginia statute that criminalized the disclosure of information regarding proceedings before the state judicial review commission.[234] The Court in

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224. 110 S. Ct. 1376 (1990).
225. *Id.* at 1378.
226. FLA. STAT. § 905.27 (1989).
227. *Butterworth*, 110 S. Ct. at 1378.
228. *Id.* at 1379.
229. *Id.*
230. *Id.* at 1383.
231. *Id.* at 1380.
232. *Id.*
233. 435 U.S. 829 (1978).
234. *Butterworth*, 110 S. Ct. at 1380.

Butterworth also distinguished *Seattle Times Co. v. Rhinehart*,[235] which upheld a prohibition on a newspaper revealing information obtained in discovery proceedings, since the witness in *Butterworth* knew the information before attending the proceedings and was free to reveal what he knew if he did not testify, while the reporter in *Seattle* knew the information only because of and through the judicial proceeding.[236]

A closer victory for the first amendment resulted from the Court's decision in *United States v. Eichman*.[237] In *Eichman*, the Court addressed essentially the same issue that it did in *Texas v. Johnson*:[238] Whether the first amendment prohibits the government from barring citizens from burning or desecrating an American flag.[239] The primary difference between the cases was that *Eichmann* involved a federal rather than a state law, which was enacted by Congress in a specific attempt to respond to and get around the decision in *Johnson*.[240] Regardless, the Court's opinion was terse, relying heavily on *Johnson*, with all justices voting the same as they did in that case.[241]

The government argued in *Eichman* that the federal law was on its face content neutral compared to the Texas statute struck down in *Johnson*, which stated that the only acts prohibited were those "that the actor knows will seriously offend onlookers."[242] The Court ruled that this purported distinction was not relevant, holding that "it is nevertheless clear that the Government's asserted *interest* is related to the supression of free expression."[243] Thus the Court found the Act substantively indistinguishable from its Texas counterpart, despite the differences in form.

The only dissenting opinion in *Eichman* was written by Justice Stevens.[244] The dissent was composed and restrained, in contrast to the

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235. 467 U.S. 20 (1984).

236. *Butterworth*, 110 S. Ct. at 1381. The Court noted further that neither the federal courts nor a majority of states find a restriction like Florida's necessary to the functioning of their grand juries. *Id.* at 1382.

237. 110 S. Ct. 2404 (1990).

238. 109 S. Ct. 2533 (1989).

239. *Eichman*, 110 S. Ct. at 2406.

240. *Id.* at 2407.

241. *Id.* at 2406.

242. *Id.* at 2408.

243. *Id.* (emphasis in original) (quoting *Johnson*, 109 S. Ct. at 2547).

244. *Id.* at 2410 (Stevens, J., dissenting).

vigorous and pointed dissents in *Johnson*.[245] Perhaps in explicit recognition of the extent to which flagwaving and flagburning had become so politicized, Stevens specifically noted that:

> the integrity of the [flag as a] symbol has been compromised by those leaders who seem to advocate compulsory worship of the flag even by individuals whom it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan disputes about meaner ends.[246]

Justice Stevens' dissent argued that the law did not restrict any form of speech other than the act of flagburning, and whatever flagburners are attempting to say by their actions they are free to verbalize.[247] Protesters were not being punished for the content of their speech, Stevens suggested, but only for their means of saying it, and the government is completely indifferent to the message being conveyed.[248] As the majority recognized, however, flagburning is an internationally recognized method of dramatically expressing disagreement with government.[249] Thus, while the Act did not, like a traditional sedition law, ban all speech criticizing a policy or the government, it did ban a particular means of expessing criticism of the government generally, albeit a means which does not itself clearly state what exactly the protester is for or against.[250]

The immediate effect of the decision in *Eichman* was an unsuccessful attempt to reverse the decision by passing a constitutional amendment to empower the government to outlaw flagburning.[251] The Flag Protection Act had been passed quickly amidst the outcry after *Texas*

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245. *Johnson*, 109 S. Ct. at 2548-55. Chief Justice Rehnquist's dissent, for example, included the words and a brief history of the "Star Spangled Banner," a short history of the battle of Iwo Jima, Ralph Waldo Emerson's *Concord Hymn* ("the shot heard round the world"), and John Greenleaf Whittier's Civil War poem "Barbara Frietchie" ("Peace and order and beauty draw/ Round thy symbol of light and law;/ And ever the stars above look down/ On thy stars below in Frederick town!").

246. *Eichman*, 110 S. Ct. at 2412 (Stevens, J., dissenting).

247. *Id.* at 2411.

248. *Id.*

249. *Id* at 2411-12.

250. *Id.* at 2409, 2411.

251. *See* Denniston, *Flagburning Cases Tip First Amendment Scales*, AM. LAW., Sept. 1990, at 89.

v. Johnson. Some members of Congress who voted for the Act, however, refused to vote to amend the Bill of Rights.[252] Justice Stevens' admonishment against partisan abuse of the flag was widely quoted and may well have encouraged members of Congress to vote according to their consciences rather than their political fears. In any event, the proposed constitutional amendment failed to win support of two-thirds of either the House or the Senate.[253]

Another 5-4 decision in favor of free speech was *Rutan v. Republican Party of Illinois*,[254] where the issue was whether previous Court decisions prohibiting governments from firing low-level, non-policy making employees solely on the basis of their political affiliation should be extended to promotion, transfer, recall, and hiring determinations as well.[255] The Court ruled that the answer was yes.[256]

Illinois Governor Thompson issued a hiring freeze in 1980, which prohibited hiring any employee, filling any vacancy, creating a new position or taking similar action without the governor's express permission.[257] All those requesting approval for employment were examined for whether they voted recently in Republican primaries, gave financial support to the party and its candidates, did campaign work, and had the support of local party officials.[258] Suit was brought by several state workers denied jobs, promotions, transfers, or recalls after layoffs.[259] The Seventh Circuit dismised the hiring discrimination claim and remanded the others for a determination of whether the practices constituted the "substantial equivalent of dismissal," defined as that which would lead a reasonable person to resign.[260] The Supreme Court granted *certiorari* on the issue of whether existing first amendment prohibitions against politically motivated firings extends to decisions on hiring, recall, transfer, and promotion.[261]

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252. *Id.*
253. Parloff, *Struck Down but Effective*, MANHATTAN LAW., Sept. 1990, at 19.
254. 110 S. Ct. 2729 (1990).
255. *Id.* at 2732.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.* at 2733.
261. *Id.* at 2732.

In *Elrod v. Burns*[262] and *Branti v. Finkel*,[263] the Court ruled that only if party affiliation was an appropriate requirement for the position in question could an employee be fired for partisan reasons.[264] None of the Justices in *Rutan* contended that the difference between firing an employee for his party affiliation and refusing to promote, transfer or hire was of constitutional significance. The real issue was not whether to extend the precedent, but whether *Elrod* and *Branti* should be overruled altogether.[265] No Justice disputed that the political patronage system pressures employees to support, in fact and in deed, causes and candidates that they may not actually support in mind.[266] Neither did any Justice disagree with the general proposition that the government may not condition a public benefit upon a sacrifice of first amendment rights. At issue was whether the government interests in maintaining a patronage system outweigh the first amendment rights subordinated by the system.[267]

The dissent maintained that compelling government interests existed in stabilizing political parties, preventing excessive political fragmentation, maintaining party discipline, fostering the two-party system, fostering social and political integration of excluded groups, and increasing government efficiency and effectiveness.[268] The dissent discussed at great length the positive impacts of the patronage system on political parties and the American political system, including praising the virtues of machine politics.[269] On the issue of government efficiency and effectiveness, the dissent declared that because it is uncertain whether a patronage system or a civil service system based on merit is superior, as long as the state can rationally contend that the patronage system is superior, it is up to the electorate to decide which system to use.[270]

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262. 427 U.S. 347 (1976).

263. 445 U.S. 507 (1980).

264. *Branti*, 445 U.S. at 518; *Elrod*, 427 U.S. at 363.

265. *Rutan*, 110 S. Ct. at 2737.

266. "It is undeniable, of course, that the patronage system entails some constraint upon the expression of views, particularly at the partisan-election stage, and considerable constraint upon the employee's right to associate with the other party." *Id.* at 2755 (Scalia, J., dissenting).

267. *Id.* at 2749 (Scalia, J., dissenting).

268. *Id.* at 2753-56.

269. *Id.*

270. *Id.* at 2755-57.

The majority, however, correctly found protection of the political party system to be an inappropriate state interest to justify state action taken not as a lawmaking body, but as an employer.[271] It also found that the interest of preserving effectiveness of the government can be obtained without the burden on first amendment rights caused by making political loyalty a governing criterion for hiring, firing, or promoting workers.[272] This failure to narrowly tailor the policy to the desired end rendered the practice unconstitutional.[273]

A more ambiguous result was reached in *Milkovich v. Lorain Journal Co.*,[274] where the Court addressed the issue of whether the first amendment provides blanket immunity from state libel laws for an opinion that neither states nor implies any fact about an individual that can reasonably be proven true or false.[275] Although the case produced two different opinions, the Court unanimously agreed that such immunity already existed pursuant to its earlier first amendment precedents, despite the fact that it had never been so enunciated.[276] In the application of the

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271. *Id.* at 2734-35 (majority opinion).

272. *Id.* at 2735-38.

273. *Id.* The dissent also objected to the Court ruling that a practice such as the patronage system unconstitutional when it is supported by long tradition and is not expressly prohibited by the Constitution. *Id.* at 2748 (Scalia, J., dissenting). This ignores the fact that until recently, no property right in government employment was recognized at all, and thus an employee had no reasonable constitutional objection to a completely groundless dismissal, much less for partisan reasons. Such reasoning also ignores the fact that constitutional guarantees are necessarily general in nature, and very few actual practices are expressly forbidden. The dissent's rationale could just as easily have been employed in 1954 to uphold state-mandated school segregation, a practice then supported by long tradition and not explicitly prohibited in the Constitution or the equal protection clause.

274. 110 S. Ct. 2695 (1990).

275. *Id.* at 2707.

276. In Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), the Supreme Court held that a statement by a media defendant on a matter of public concern must be provable as false before liability can be assessed, and that the burden of proving falsity was on the plaintiff. In Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970), the Supreme Court held that statements that cannot reasonably be interpreted as stating actual facts are protected from libel suits in order to assure public debate does not suffer from a lack of imaginative expression or rhetorical hyberbole. In that case, the defendant had referred to a real estate developer as a "blackmailer," and the court found that in the context that it was used, plaintiff was not being accused of extortion in the criminal sense. This reasoning was followed in the case of Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), in which the Supreme Court held that an ad parody could not be reasonably interpreted as stating or implying that the plaintiff had actually

privilege to the actual case, however, the Court divided on the issue of whether or not the statements implied any facts. The Court ruled seven to two that the statements did imply facts, and that the defendent could thus be subject to liability for libel.[277] The case involved an article by a newspaper columnist with a regular "opinion" column in the sports section of an Ohio newspaper. The article involved Milkovich, a wrestling coach, whose team was disciplined by athletic authorities for extracurricular violence at a meet, which the author of the article blamed Milkovich for inciting.[278] The punishment was reversed for due process violations in the proceeding resulting in the suspension, and while the article stated that fact, the tone of the article nonetheless suggested that Milkovich perjured himself on the merits to obtain that result.[279]

Several aspects of *Milkovich* are troubling from the perspective of the first amendment. The majority devoted very little attention to the question of whether the article implied factually that Milkovich perjured himself.[280] In fact, however, the majority opinion fails to discuss several factors suggesting that the article did not truly imply facts. As the dissent noted, the article was written in the county in which the high school students that were assaulted during the meet was located, a fact which would alert any reader that the author was highly biased on the issue.[281] Also noted by the dissent was that the "'reasonable reader who

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had intercourse with his mother in an outhouse; and in Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974), in which the Supreme Court held that the use of the word "traitor" for a union "scab" could not reasonably be interpreted as accusing the plaintiff of treason.

277. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2708 (1990).

278. *Id.* at 2698-99.

279. *Id.* at 2698.

280. Indeed, the entire extent of the Court's analysis was as follows:

> As the Ohio Supreme Court itself observed, "the clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth.'" This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

Id. at 2707 (citation omitted) (quoting Scott v. News-Herald, 25 Ohio St. 3d 243, 251, 496 N.E.2d 699, 707 (1986)).

281. *Id.* at 2713 (Brennan, J., dissenting).

peruses [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not 'hard' news like those printed on the front page or elsewhere in the news sections of the newspaper.'"[282] The column, a regular opinion column in the sports section, was even headlined, "*Maple beat the law with the 'big lie'*"[283] and subheadlined, "*Diadiun says Maple told a lie.*"[284] The impact of the case on editorial freedom in more political matters is a very significant concern, as the dissent suggested:

> Did NASA officials ignore sound warnings that the Challenger Space Shuttle would explode? Did Cuban-American leaders arrange for John Fitzgerald Kennedy's assasination? Was Kurt Waldheim a Nazi officer? Such questions are matters of public concern long before all the facts are unearthed, if they ever are. Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more.[285]

The majority's failure even to address such points in its analysis is disturbing, regardless of the propriety of the actual decision.

Another disturbing aspect of the decision is its potential impact on responsible journalism. Editorials with no factual basis that simply "sling mud" and add little to intelligent discourse on an issue of public concern are protected under the Court's analysis; in fact, the less relevant information the editorial adds, the more protected it is. More "responsible" editorials, however, which voice suspicions, but include statements potentially provable as false, must be printed at greater risk after *Milkovich*.

Another case which produced mixed results was *FW/PBS, Inc. v. City of Dallas*,[286] where the Court considered the constitutionality of a Dallas ordinance which provided that sexually oriented businesses must submit to inspections whenever ownership changes or an application is filed for an annual permit renewal. In contrast, the city required that other businesses undergo such inspections only when they move to a new

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282. *Id.* (quoting Ollman v. Evans, 750 F.2d 970, 986 (1984)).

283. *Id.* at 2698 (majority opinion).

284. *Id.* at 2712-13 (Brennan, J., dissenting).

285. *Id.* at 2714.

286. 110 S. Ct. 596 (1990).

location or the building use changes.[287] The chief of police was required to issue the license within thirty days of receipt of an application under the Dallas scheme, but the issuance was conditioned on approval by other municipal agencies that had no time limits within which inspections must occur.[288]

The Supreme Court held that because the licensing scheme creates the potential for prior restraint of constitutionally protected speech, procedural safeguards are necessary to provide protection.[289] Since the case of *Freedman v. Maryland,*[290] three requirements have been considered necessary with respect to prior restraints on activities which may be protected by the first amendment: 1) any restraint prior to judicial review can be imposed only for a specified, brief period during which the *status quo* must be maintained; 2) expeditious judicial review of that decision must be available; and 3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.[291]

Although the Justices in *Dallas* wrote a number of opinions, the majority appeared to reach some consensus on the first amendment standards applicable to ordinances regulating sexually oriented businesses. A plurality, including Justices O'Connor, Kennedy, and Stevens, held that the first two *Freedman* requirements apply to such ordinances, that the third requirement does not apply, and that the Dallas ordinance was unconstitutional because it failed to comply with the two applicable *Freedman* requirements.[292] Justices Brennan, Marshall, and Blackmun concurred, but claimed that all three *Freedman* requirements had to be met for the statute to be considered constitutional.[293] Justices White, Rehnquist and Scalia dissented, claiming that none of the three requirements need be met because the ordinance was not a licensing scheme with prior restraint potential, but a time, place, and manner

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287. Blount v. Rizzi, 400 U.S. 410 (1971).

288. *FW/PBS*, 110 S. Ct. at 605.

289. *Id.* at 603.

290. 380 U.S. 51 (1965).

291. *Id.* at 58-59, *followed in* Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) (involving another motion picture censorship ordinance); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (city's refusal to rent municipal facilities because of musical's content).

292. *FW/PBS*, 110 S. Ct. at 603, 604.

293. *Id.* at 611 (Brennan, J., concurring).

restriction.[294] A majority of the Justices thus appeared to hold that at least the first two requirements of *Freedman*, but not the third, apply to ordinances regulating sexually oriented businesses.

The plurality in *Dallas* justified the inapplicability of placing the burdens of proof and going to court on the city which promulgated the ordinance by stating that the rationale behind this requirement is that "'[t]he exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation.'"[295] They reasoned that in the case of a whole shop being closed, as in the case of a Dallas-type ordinance, the greatly increased incentive to sue warranted relieving the city of bearing the burden of going to court to effect the denial and the burden of proof once in court.[296] Brennan's concurrence differed, stating that the reason the burdens are on the city or the censor is "'the transcendent value of speech,'"[297] not the incentive to sue.

The plurality opinion creates potentially significant uncertainties for future cases. Under its analysis, the question in future cases of who bears the burden of proof and whether a given licensed business in question will be closed or open during the time of judicial review may depend upon the vague and uncertain question of how much incentive exists for the business owner to sue. Although this may not be a difficult determination in some cases, the opinion fails to provide a clear basis for drafters of ordinances and licensing schemes in other matters. Some businesses may be closed, the victims of prior restraint, perhaps until the

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294. *Id.* at 614-17 (White, J., concurring in part and dissenting in part); *id.* at 617-25 (Scalia, J., concurring in part and dissenting in part). "Time, place, and manner restrictions are not subject to strict scrutiny [but are constitutional] if they are content neutral, designed to serve a substantial governmental interest, and do not unreasonably limit alternative means of communication." *Id.* at 614 (White, J., concurring in part and dissenting in part) (citation omitted). The dissent suggested that the decision in Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), in which an ordinance was upheld that required adult theaters be a certain distance from houses, churches and schools, was upheld, permitted *FW/PBS* type ordinances as well. *FW/PBS* is distinguishable from *Renton*, however, because the ordinance fails to serve a substantial state interest. It is obvious that an adult theater could substantially reduce property values in a residential neighborhood, while a general audience theater would not. It is not apparent, once a business is established, why a sexually oriented business would require more fire and building code inspections than a similar non-sexually oriented business. Furthermore, the *O'Brien* test has never been applied in a prior restraint situation.

295. *FW/PBS*, 110 S. Ct. at 606 (plurality opinion) (quoting *Freedman*, 380 U.S. at 59).

296. *Id.* at 606, 607.

297. *Id.* at 613 (Brennan, J., concurring) (quoting *Freedman*, 380 U.S at 58).

Supreme Court decides that inadequate incentives to sue existed to warrant saddling the burdens on the business owner.

The plurality opinion also appears inconsistent with *Blount v. Rizzi*.[298] That decision held unconstitutional a statute which permitted the Postmaster General to stamp as unlawful and return to the sender all letters and postal money orders addressed to a person whom he has found is using the mails to distribute obscenity.[299] This scheme was held unconstitutional in *Blount* because it failed to meet the three *Freedman* requirements.[300] Even though a censored distributor would have every incentive to sue because his livelihood would be at stake as a result of such a decision by the Postmaster, the Supreme Court several times criticized the statute repeatedly because a distributor could only obtain full judicial review on his own initiative.[301] In the interim, the Supreme Court held, "'the prolonged threat of an adverse administrat[ive] decision . . . will have a severe restriction on the exercise of . . . First Amendment rights . . . .'"[302]

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298. 400 U.S. 410 (1971).

299. *Id.*; *see also* 39 U.S.C. § 4006 (1960) (now 39 U.S.C. § 3006 (1970)).

300. *Blount*, 400 U.S. at 417-18.

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> The scheme has no statutory provision requiring governmentally initiated judicial participation in the procedure which bars the magazines from the mails, or even any provision assuring prompt judicial review. . . . This, however, does not redress the fatal flaw of the procedure in failing to require that the Postmaster General seek to obtain a prompt judicial determination of the obscenity of the material . . . .

Id. at 417-18. "[T]he section does not satisfy the requirement that the [licensors] assume the burden of seeking a judicial determination . . . . '[I]t is vital that prompt judicial review . . . be assured on the Government's initiative . . . .'" *Id.* at 420 (citation omitted).

302. *Id.* at 421-22 (quoting United States v. Book Bin, 306 F. Supp. 1023, 1028 (N.D. Ga. 1969)). The plurality opinion also appears to contradict Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988). In *Riley*, the Court held unconstitutional a licensing scheme that required professional fundraisers to obtain a license prior to fundraising because of lack of definite time limits for issuance of the license, and because in the interim, the "delay compel[led] the speaker's silence." *Id.* at 802. A professional fundraiser's livelihood is as much at stake by a denial of such a license as the shop owners in *FW/PBS*; they all have just as much incentive to sue. Nevertheless, in *Riley*, the Court never suggested that any less than all the *Freedman* requirements need be met.

The Supreme Court's creation in *Dallas* of a partial *Freedman* review, which makes the burden of going to court and bearing the burden of proof subject to a factual determination regarding incentive to sue, does not appear sound. The decision disregards several previous precedents, seperates procedural requirements that should be inexorably intertwined, provides no clear basis for drafters of ordinances to use, and creates the potential for prior restraints on the basis of content, which have been traditionally regarded as among the most onerous restrictions on free speech.

In *Austin v. Michigan Chamber of Commerce*,[303] the issue before the Supreme Court was whether the first amendment right of corporations to use general funds to endorse or oppose candidates in elections was outweighed by the interest of the state in prohibiting such expenditures.[304] The Michigan Campaign Finance Act[305] prohibited both profit and non-profit corporations, excluding media corporations, from using general funds for endorsing or opposing candidates in state elections.[306] Under that law, corporations are permitted only to use segregated funds earmarked for political purposes.[307] The Michigan Chamber of Commerce sought an injunction against the Act because it wished to use general funds to endorse a candidate.[308] The Supreme Court found that the Act did not violate the first amendment because compelling state interests outweighed the constitutional rights of corporations.[309] Justices Scalia, O'Connor, and Kennedy dissented.[310]

Prior to *Austin*, the only government interest compelling enough to restrict campaign spending has been "[p]reventing corruption or the appearance of corruption. . . ."[311] The majority in *Austin* ruled that this interest justified the Michigan statute by suggesting that it was aimed at "the corrosive and distorting effects of immense aggregations of wealth

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303. 110 S. Ct. 1391 (1990).

304. Corporations are entitled to protection of freedom of speech. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

305. MICH. COMP. LAWS § 169.254(1) (1979).

306. *Austin*, 110 S. Ct. at 1395.

307. *Id.*; *see also* MICH. COMP. LAWS § 169.255(1).

308. *Austin*, 110 S. Ct. at 1395.

309. *Id.* at 1396.

310. *Id.* at 1408 (Scalia, J., dissenting); *id.* at 1417 (Kennedy and O'Connor, JJ., dissenting).

311. *Id.* at 1397 (majority opinion) (quoting FEC v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985)).

that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[312] The Supreme Court stressed that the "unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures."[313]

The Supreme Court distinguished *Austin* from *FEC v. Massachusetts Citizens For Life, Inc.*[314] (*MCFL*), in which an almost identical federal statute was held unconstitutional as applied in *MCFL*, involving a non-profit corporation devoted to political advocacy.[315] The three distinguishing characteristics in the *MCFL* opinion were: 1) the non-profit corporation "'was formed for the express purpose of promoting political ideas, and cannot engage in business activities'";[316] 2) the "absence of 'shareholders or other persons affiliated so as to have a claim on its assets or earnings,' [which] 'ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity'"; and 3) MCFL's "independence from the influence of business corporations" and its policy of not accepting contributions from businesses, so that it could not "serv[e] as [a] condui[t] for the type of direct spending that creates a threat to the political marketplace."[317] The Michigan Chamber of Commerce, on the other hand, was founded to, and does, participate in both political and non-political activites.[318] Thus a member could disagree with the political expenditures but continue to pay dues in order to enjoy the non-political benefits and make business contacts. In addition, over three-quarters of its funds came from business corporations; the Chamber could thus serve to funnel funds from for-profit corporations should the Supreme Court hold the act applicable only to for-profit corporations and not to non-profit ones, such as the Chamber.[319]

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312. *Id.* at 1397.

313. *Id.* at 1398.

314. 479 U.S. 238 (1986).

315. *Austin*, 110 S. Ct. at 1396-97.

316. *Id.* at 1399 (quoting *MCFL*, 479 U.S. at 264).

317. *Id.* at 1399-400 (quoting *MCFL*, 479 U.S. at 264).

318. *Id.* at 1399.

319. The logic of the funneling of funds argument may be undermined, however, by the differing nature of profit and non-profit organizations. The primary reason for membership in the Chamber may well be business contacts completely unrelated to the endorsements, and withdrawal from the Chamber because of the endorsements could have a negative impact on a member's position in the business community. The primary reason for membership in a for-profit corporation, however, is profit, and great

A key portion of the Supreme Court's decision was premised on the notion that the state's regulatation of political expenditures is justified by the advantages the state has conferred by creating a corporate structure conducive to amassing capital. The Supreme Court stated that while individuals and unincorporated unions may amass large treasuries, they do it without significant state-conferred advantages, while corporations are "'by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth.'"[320] The State's compelling interest in this case is "to counterbalance those advantages unique to the corporate form."[321]

This argument, however, has potentially troubling implications for future first amendment cases. As Justice Scalia observed in his dissent, "the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."[322] For example, in *FCC v. League of Women Voters of California*[323] the Supreme Court held unconstitutional a ban on editorializing by noncommercial broadcasting stations that receive federal funds.[324] It was significant that the stations were barred from using even wholly private funds because a small percentage of its overall income came from federal grants.[325] Yet in *Austin*, all corporate assets are barred because some are achieved via state-conferred "special advantages" or because some small portion may represent the profits of someone who objects to the expenditure somewhat, but not enough to divest from the corporation.[326]

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deference is given to corporate directors in their decisionmaking. If the directors believe an expenditure is in the company's interest, and the shareholders do not, the directors can be removed, or the dissenting shareholder may reinvest his money in a corporation which does not dissipate its money but instead invests in the company or pays it to shareholders.

320. *Id.* at 1400 (quoting *MCFL*, 479 U.S. at 258 n.11).

321. *Id.*

322. *Id.* at 1408 (Scalia, J., dissenting) (citing Pickering v. Board of Educ., 391 U.S. 563 (1968); Speiser v. Randall, 357 U.S. 513 (1958)).

323. 468 U.S. 364 (1984).

324. *Id.* at 366, 373.

325. *Id.* at 386-87.

326. The decision in *Austin* does not appear fully consistent with Buckley v. Valeo, 424 U.S. 1 (1975), which held a law limiting campaign expenditures to $1,000 unconstitutional for the reason that expenditures by individuals and associations do not raise a sufficient threat of corruption to justify prohibition, although it upheld a limitation on *contributions* to campaigns, which did raise a sufficient threat. The Court in *Buckley* suggested specifically that "legislative restrictions on advocacy of the election or defeat

The *Austin* Court correctly characterized as very great the burden on an individual shareholder to discover and contest the corporate directors' decision to endorse a candidate that the shareholder opposes instead of utilizing that money for dividend payments.[327] Furthermore, the Michigan law does permit the use of segregated funds, so that a corporation's free expression is not wholly limited, and the resultant expression will more accurately reflect the individual shareholders' support for candidates.[328] The state's interests in regulating corporate spending in political campaigns are also very important. Nevertheless, some of the analysis employed in the decision remains potentially problemtatic from a first amendment perspective.

One of the Supreme Court's most troubling free speech decisions this term was *Osborne v. Ohio*.[329] At issue was an Ohio law which prohibited the possession or viewing of "any material or performance that shows a minor who is not the person's child or ward in a state of nudity," unless the possessor has a valid artistic, medical, or scientific reason for possession, or knows that the child's parents or guardians have consented in writing to the "photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred."[330] The statute as written appears overbroad and unconstitutional, for it would make it a crime for a person to have a photograph of his own grandchild without clothes on unless he had the parent's written permission. The Court noted, however, that the Ohio Supreme Court had narrowly interpreted the statute to apply only to "depictions of nudity involving a lewd exhibition or graphic focus on a minor's genitals."[331] Osborne was arrested for possession of photographs depicting nude male adolescents in "sexually explicit

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of political candidates are wholly at odds with the guarantees of the First Amendment." *Buckley*, 424 U.S. at 50. The Court in *Austin* sought to distinguish *Buckley* by suggesting that the Michigan statute was aimed at "a different type of corruption" consisting of the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 110 S. Ct. at 1397. In contrast to *Buckley*, however, the government in *Austin* did not adduce specific evidence concerning the dangers actually posed by corporate political spending.

327. *Austin*, 110 S. Ct. at 1405 n.5.

328. *Id.* at 1398.

329. 110 S. Ct. 1691 (1990).

330. OHIO REV. CODE ANN. § 2907.323(A)(3)(b) (Anderson 1989).

331. *Osborne*, 110 S. Ct. at 1695 (citing State v. Young, 37 Ohio St. 3d 249, 525 N.E.2d. 1363 (1988)).

positions" and his conviction was upheld by the Ohio Supreme Court.[332] Although the United States Supreme Court unanimously held that the convictions could not stand for procedural reasons, six Justices voted to remand for a new trial, and ruled that the statute was constitutional as interpreted by the Ohio Supreme Court.[333]

Prior to *Osborne*, the Supreme Court had ruled that the first amendment freedom to receive information protected all individuals' rights to view anything they wish in the privacy of their own homes.[334] *Stanley v. Georgia*[335] held that citizens have the right to possess obscenity in the privacy of their own homes, despite the fact that obscenity enjoys no constitutional protection, and that the state's interest in protecting the minds of its citizens from being poisoned by obscenity was not compelling enough to impinge upon that right.[336] The *Osborne* Court sought to distinguish the Ohio law from the Georgia law on the basis that the state's compelling interest to protect the children used in production of the pornography, not the viewer.[337] The Supreme Court reasoned that criminalization of possession, by presumably reducing the market for child pornography, would serve to protect such children.[338] As the dissent pointed out, however, the same argument was rejected in *Stanley*, because the criminalization of private possession of such materials, while greatly infringing a fundamental liberty, does exceedingly little to solve the problem.[339]

The *Osborne* decision was a major expansion of the Supreme Court's ruling in *New York v. Ferber*,[340] which upheld a statute outlawing the distribution of child pornography.[341] The important first amendment question arising from *Osborne* is whether the decision will

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332. *Id.*

333. *Id.* at 1703, 1705.

334. *Id.* at 1695 (citing Stanley v. Georgia, 394 U.S. 557 (1969)).

335. 394 U.S. 557 (1969).

336. *Id.* at 565.

337. *Osborne*, 110 S. Ct. at 1696.

338. *Id.*

339. *Id.* at 1714 (Brennan, J., dissenting). The majority evaded this issue by reason of the weak state interests in *Stanley*. Even assuming, however, that *Stanley* did not create an absolute right, and Ohio's interest was compelling, the Court cited no evidence that the Ohio law would in fact reduce the market, and, thus, exploitation, which was the issue. A law abridging a fundamental right must actually serve a state interest, not simply espouse one.

340. 458 U.S. 747 (1982).

341. *Id.*

provide the precedent for effectively overruling *Stanley*, despite the Court's attempt to distinguish it. It is certainly arguable that the process of producing obscene materials results in the victimization of some of the participants, even though some victims are adults, presumably participating of their own free will. Whether in the future the Supreme Court will find a state interest in protecting adults from obscenity production compelling enough to overrule *Stanley* is impossible to determine. The Supreme Court has classified the value of child pornography as "exceedingly modest, if not *de minimis*,"[342] a conclusion reaffirmed in *Osborne*.[343] Certainly, no court would find any difficulty in classifying the value of obscenity, which by definition has no literary, artistic, political, or scientific merit, as *de minimis*. *Ferber*, according to Brennan's dissent, "did nothing more than place child pornography on the same level of First Amendment protection as *obscene* adult pornography, meaning that its production and distribution could be proscribed."[344] *Osborne*, however, may have placed child pornography on an even lower level of first amendment protection. Only so long as the Supreme Court believes that child pornography is substantially worse than adult obscenity, and that adults freely contracting to depict obscenity need no protection from the law, will the decision in *Stanley* survive *Osborne*. The results could pose risks to first amendment interests extending far beyond the facts of *Osborne* and *Stanley*.[345]

In the final anaylsis, only one thing is certain: it is no longer true that, as the Supreme Court persuasively declared in *Stanley*, "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[346] The crucial question now is how much such business the state has retained. In *Osborne*, the Supreme Court stated that its decision in *Stanley* should not be read too broadly.[347] It would have

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342. *Id.* at 762.

343. *Osborne*, 110 S. Ct. at 1695.

344. *Id.* at 1713 (Brennan, J., dissenting) (emphasis in original).

345. For example, the Court could also reexamine its decision in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), which protects the right of newspapers to publish the identity of crime victims. Although there appears to be a much greater public interest in publishing and receiving such information than child pornography or obscenity, the publication of such information exacerbates the victim's injury and increases the likelihood of non-reporting. The Court's concern for victims is laudable, but it must be careful in weighing those interests against first amendment rights.

346. *Stanley*, 394 U.S. at 565.

347. *Osborne*, 110 S. Ct. at 1695.

been better if the Supreme Court had suggested that its decision in *Osborne* should not be read too broadly either.