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The Free Speech Jurisprudence of the Rehnquist Court

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Introduction

Although the free speech clause has been a part of our Constitution since the Bill of Rights was ratified in 1791, Supreme Court doctrine regarding the contours of that clause has a substantially shorter life span, commencing in the second decade of this century with decisions arising out of the World War I context. The general trend of judicial decisions during most of that period has been toward greater protection for speech, through two interrelated developments: expanded judicial definitions of protectible speech, and stricter judicial scrutiny of measures restricting such speech.[1]

Recently, however, under the leadership of Chief Justice Rehnquist, with the support of his so-called "conservative" block,[2] the tide has begun to turn in important respects. Although these trends have deeper roots, they have most prominently come to the fore during the 1988–89 and 1989–90 Supreme Court terms, the first two in which Justice Kennedy participated throughout, thus consolidating Chief Justice Rehnquist's majority. Accordingly, the present essay concentrates on free speech decisions issued during this period, showing how they have reversed prior patterns of judicial interpretation.

Some observers who criticize the Rehnquist Court's jurisprudence for cutting back on individual rights generally have qualified their criticism by noting that free speech has fared relatively well.[3] To be sure, two of the most heralded decisions of both relevant terms—the two that invalidated statutes prohibiting desecration of the U.S. flag—did adhere to earlier understandings of constitutionally protected expression.[4] However, it should be stressed that both decisions were issued by a narrow 5–4 majority and authored by Justice Brennan,[5] who has since resigned from the Court. Moreover, in terms of both their analysis and their rulings, these two decisions stand sharply apart from many others in the free speech area. Although the recent speech-eroding cases received less attention than the widely publicized flag-burning controversies, their long-range impact on First Amendment jurisprudence is equally significant.

In fundamental—albeit relatively subtle—respects, the Rehnquist Court has reversed the rights-expanding trend of the Warren and Burger Courts regarding freedom of speech, much as it has done regarding other individual rights. Given the often indirect methods by which these decisions have achieved their long-range effect of altering—and truncating—our conceptions of judicially protectible expression, it is especially important to analyze them closely and to contrast them with prior precedents.

As is generally the case regarding the Court's interpretation of constitutional rights, its speech-restricting cases have two dimensions: one of process—*i.e.*, the standards that the

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Court employs in reviewing claims that these rights have been violated—and one of substance. This essay analyzes both sets of speech limiting rulings. Although the Rehnquist Court's substantive holdings more directly and clearly have contracted the scope of free speech, its process rulings have achieved the same effect indirectly.

Process Rulings Restricting Free Speech

As is true regarding many Rehnquist Court holdings constraining individual rights, the Court's recent free speech decisions have been important in terms of not only the particular results reached on the facts at issue, but also the judicial process that led to such results—*i.e.*, the analytical or methodological standards employed.[6] Although Court watchers have decried substantive incursions that recent decisions have made on a spectrum of civil liberties, they have been less alert to this more subtle but ultimately more invidious aspect of the recent rulings.

No doubt the commentators' relatively sanguine attitude toward the Court's recent speech decisions is explained in part by this distinction between the bottom-line disposition of a case and the analysis leading to it. In many recent speech cases, the Court's specific substantive holdings, in terms of resolving particular factual controversies, were substantially less significant—and hence less alarming—than the general analytical processes by which the Court reached such results. Yet the Court's resolutions of process issues will have long-range significance that transcends differing factual contexts. Justice Marshall noted this phenomenon in his dissenting opinion in *Ward v. Rock Against Racism*. There, in the context of upholding regulations on musical performances in a public park, the Court transformed the criteria for permissible "time, place, and manner" regulations on expression generally: "Today's decision has significance far beyond the world of rock music. Government no longer need balance the effectiveness of regulation with the burdens on free speech. After today, government need only assert that it is most effective to control speech in advance of its expression."[7] In addition to being couched in relatively unnoticed language regarding methodological or analytical issues, the adverse long-term impact of many of the Rehnquist Court's speech-restrictive rulings is camouflaged in two additional ways as well. First, these decisions routinely assert that they are not reversing prior decisions that had been more rights-protective.[8] In fact, however, the Rehnquist Court has significantly limited and, in effect, overruled much prior precedent in the free speech area. Often, the Court has achieved this result by relying on distinguishable cases or on *dicta*, concurring opinions, and even dissenting opinions from past cases.[9] By purporting to follow past precedent, the Court masks the actual significance of its new "interpretations."[10]

Second, as its vehicles for enunciating new, weakened judicial review standards, the Court often employs cases in which the particular speech claims may not be sympathetic to many people: for example, *Ward v. Rock Against Racism* involved the speech rights of rock musicians performing outdoors in a public park, and *Thornburgh v. Abbott*[11] involved prisoners' communications. It is likely that relatively few people are concerned specifically about the free speech rights of either loud musicians or convicted felons. No doubt, more would be concerned if they realized the negative implications that the Court's limitations on these rights will have upon other forms of expression. Justice Marshall described this facet of the *Ward* ruling:

> [T]he majority plays to our shared impatience with loud noise to obscure the damage that it does to our First Amendment rights. Until today, a key safeguard of free speech has been government's

obligation to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference.[12]

The Rehnquist Court's application of a relaxed judicial review standard to speech-limiting measures is squarely inconsistent with the traditional view that free speech is a "preferred freedom,"[13] and consequently that any infringements on it are subject to the most exacting judicial scrutiny.[14] Nevertheless, in several recent speech cases, the Rehnquist Court jettisoned crucial elements of this traditional strict scrutiny and instead deferred to speech-limiting decisions by executive and legislative branch officials.

One key element of the strict judicial scrutiny traditionally applied to speech-abridging measures is the demand that any such measure be *necessary* for promoting the government's countervailing interest.[15] By contrast, the Rehnquist Court has upheld speech-abridging measures that clearly were not necessary to advance the asserted government ends but rather were at most reasonable or desirable. For example, in *Thornburgh v. Abbott*, the Court held that regulations restricting prisoners' receipt of incoming materials would survive a First Amendment challenge so long as they are "reasonably related to legitimate penological interests." The Court further held that a prison may exclude materials even if they are not "likely" to lead to violence, so long as the warden determines that they create an "intolerable risk of disorder."[16] As another example, in *Ward*, the Court held that the government could impose "time, place, and manner" restrictions on speech or expressive conduct so long as they are not "substantially broader than necessary" to achieve the government's interest.[17]

In allowing the government to regulate speech on a ground short of necessity, both *Thornburgh* and *Ward* defied earlier precedents which enforced the necessity requirement generally with respect to any speech regulations. Moreover, both cases defied earlier Supreme Court rulings that had enforced the general necessity requirement in the specific factual contexts at issue.[18]

Closely related to the Court's increasing refusal to demand that speech-limiting measures be necessary to promote a government interest is its growing refusal to enforce the established requirement that the government promote its interest through the measure that least restricts speech.[19] In both *Thornburgh*[20] and *Ward*,[21] the Court expressly disavowed this "least restrictive alternative" requirement, although it previously had been enforced in the specific contexts involved in those cases. Furthermore, the Rehnquist Court expressly repudiated this requirement in two other free speech cases, which also involved contexts in which it previously had been enforced: regulations of commercial speech;[22] and limitations on freedom of association.[23]

The Court's reasoning in all these cases is typified by *Ward*, which ruled that content-neutral regulations on the time, place, or manner of speech should be sustained even if the government's goals could have been served through less speech-restrictive alternatives.[24] *Ward* upheld New York City's regulations requiring that any musical performance at the Central Park bandshell had to use city furnished sound equipment run by a city employed sound technician. The city's asserted justification for this regulation was to control sound volume.[25] The city's sound technician controlled not only the sound's volume, however, but also its "mix," which is an essential aesthetic element of rock music.[26] For this reason, the Second Circuit Court of Appeals invalidated the regulations. Applying the least intrusive alternative approach, the Court of Appeals found that there were various alternative means of controlling volume without also intruding on performers' ability to control the sound mix.[27]

In *Ward*, as in the other cases where the Court discarded the least restrictive alternative test, it substituted a requirement that the challenged measure be "narrowly tailored" to promote the relevant interest. The term "narrowly tailored" suggests a test resembling the least restrictive alternative approach. The Court's explanation of the term, however, makes clear that it is a nebulous, deferential criterion, which will result in upholding most government measures.

In *Ward*, the Court said that the narrow tailoring requirement would be satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.[28] In other words, the regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests."[29] But, as the dissent noted, "this means that only those regulations that 'engage in the gratuitous inhibition of expression' will be invalidated."[30] Moreover, even this attenuated tailoring requirement probably would not be enforced under the majority's analysis, because the majority criticized the Second Circuit for evaluating the comparative efficacy and intrusiveness of the alternative means for achieving noise reduction.[31]

Until recently, the fact that a challenged government measure was the least restrictive alternative for pursuing a government goal did not insulate it from invalidation. In addition, the extent to which the measure advanced the relevant government goal had to be proportional to and not outweighed by the extent to which it inhibited individual freedom. In other words, the government's end did not necessarily justify its rights-infringing means.[32]

Now, however, the Rehnquist Court has inverted these previous holdings: A challenged measure need not be the least intrusive alternative for advancing the government's goal; if it effectively promotes the goal, that alone validates it. Nor is the government required to show that its interest is promoted proportionately to and not outweighed by the curbing of individual rights. Justice Marshall captured this point in *Ward* when he said, "the majority enshrines efficacy but sacrifices free speech."[33]

This inversion also characterized the Court's 1990 decision in *United States v. Kokinda*,[34] which upheld a U.S. Postal Service regulation that banned all solicitation on public sidewalks adjoining Post Office buildings. *Kokinda* repeatedly stressed that "[t]he purpose of the [sidewalk] . . . is to enable the postal service to accomplish the most efficient and effective postal delivery system."[35] According to *Kokinda*, not only is the government entitled to utilize the most efficient and effective measures for pursuing its goals, but also individuals have no rights to government measures that are less restrictive of their free speech.[36]

Ward, *Kokinda*, and other Rehnquist Court decisions constitute striking reversals of classic principles governing speech on public property. Under the established approach, the government could be required to make some sacrifice in the efficiency with which it pursued its goals, because it had to utilize the measures that least restricted individual expression. For example, in the venerable decision of *Schneider v. State*,[37] the Court held that the government could not pursue its goal of maintaining litter-free streets by banning leafletting. Rather, the Court held, the government had to utilize a measure that was less intrusive on speech, such as punishing those who engaged in littering, even if that measure was less effective in accomplishing the government's goal. In short, free speech was deemed more important that government efficiency.

Another aspect of the Rehnquist Court's drift toward relaxed scrutiny of government action curtailing speech is its failure to require that any such action be undertaken pursuant to clearly delineated standards, in order to circumscribe official discretion. In two recent cases, the Court expressly permitted the government to limit speech pursuant to open-

ended, broadly worded standards that left much room for the exercise—and hence for the abuse—of governmental discretion.

In *Ward*, the Court upheld New York City's guidelines for regulating outdoor music performances even though it recognized that the standards were "undoubtedly flexible," and that "the officials implementing them will exercise considerable discretion."[38] As Justice Marshall noted in dissent, this broad discretion was particularly problematic for two reasons. First, it would afford officials leeway to engage in content-based regulation under the guise of making ostensibly neutral judgments about volume.[39] He pointed out that, throughout history, newer styles of music generally have been perceived as "noisier" than older styles, with the result that content could be censored on the pretext of regulating volume.[40]

A second reason why the detailed legal standards requirement should have been enforced especially zealously in *Ward*, Justice Marshall explained, is that the guidelines constituted a prior restraint on expression.[41] Prior restraints long have been considered especially threatening to free speech values. Thus, they are viewed as presumptively unconstitutional and upheld only if they satisfy several prerequisites that the Court has enunciated. These prerequisites are so strictly enforced that almost no prior restraints have passed constitutional muster.[42]

Yet, despite the fact that the regulations upheld in *Ward* imposed prior restraints on expression, the Rehnquist Court did not subject them to the strict scrutiny appropriate for such serious invasions of First Amendment liberties. In particular, it failed to enforce one established prerequisite for validating a prior restraint: that it regulate speech only pursuant to "narrowly drawn . . . and definite standards for the [administering] officials to follow."[43] Notwithstanding the general and vague terms of the *Ward* guidelines, however, the Court upheld them.[44] The Court did not insist that the regulations themselves explicitly limit official discretion. Instead, it was content to rest its approval upon the officials' testimony that, in practice, they interpreted the regulations' broad standards relatively narrowly.[45] This rationale is at odds with the Court's established stance toward prior restraints. It had consistently ruled that a regulation whose terms were insufficiently narrow could not be saved by allegedly limiting interpretations that were consigned to the discretion of official enforcers.[46]

Thornburgh v. Abbott also abandoned the previous requirement that government action limiting speech may be undertaken only pursuant to specific, detailed standards. There, the Court upheld regulations that gave prison officials broad discretion to control prisoners' receipt of publications and other materials if they determined that such materials might be "detrimental to the security, good order, or discipline of the institution or if they might facilitate criminal activity."[47] As the dissent noted, these "standards" are so ambiguous that they give prison officials virtually free rein to censor incoming materials.[48]

Yet another aspect of the strict scrutiny that the Court traditionally has applied to speech-infringing measures, which it recently has jettisoned, is the requirement that the government interest promoted by such measures must be very important. To capture this concept, the Court has said that such an interest must be of "compelling" significance.[49] Recently, however, the Rehnquist Court has displayed a tendency to approve speech infringements on the rationale that they advance government interests that are merely "legitimate" rather than "compelling."

Alternatively, the Court achieves the same result by conclusorily labeling as "compelling" government interests that traditionally have not been considered to rise to that level of importance. For example, in *Thornburgh*, the Court sustained prison regulations that significantly abridged prisoners' speech rights on the basis of administrative convenience,[50]

a government interest that never before had been deemed sufficiently important to justify limiting speech.[51] Indeed, the Court previously had ruled that administrative convenience did not justify limiting even less fundamental rights.[52]

The foregoing specific respects in which the Rehnquist Court has reduced the strict degree of judicial scrutiny traditionally applied to speech-limiting measures constitute manifestations of its general proclivity to defer broadly to the challenged determinations of executive and legislative branch officials who adopt such measures. The Court essentially presumes such decisions to be correct and imposes substantial burdens of proof upon individuals who challenge them. As previously noted, the two recent flag-burning decisions reaffirmed traditional free speech principles and thus stand as important counter-examples to the other cases discussed in this essay as well. In holding that legislation criminalizing flag desecration violates free speech principles regardless of the fact that a majority of Americans apparently support such legislation, Justice Brennan's majority opinions rejected Chief Justice Rehnquist's dissenting view of the Court's appropriate role. In urging judicial deference to majoritarian decisions, the Chief Justice declared: "Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people. . . ."[53]

This statement is starkly inconsistent with prior Supreme Court pronouncements regarding the Court's role in reviewing speech-abridging measures.[54] Nonetheless, it is consistent with the weakened judicial scrutiny that the Court recently has applied to other speech-restricting measures, aside from statutes banning flag desecration, Such a deferential stance was maintained, for example, in *Kokinda*, which upheld regulations of speech on public property adjoining Post Offices;[55] in *Thornburgh*, which upheld prison regulations of inmates' correspondence and their receipt of publications;[56] in *Ward*, which upheld municipal regulations controlling the volume and sound mix of musical performances in a public park;[57] and in *Board of Trustees of the State University of New York v. Fox*, which upheld a public university's regulations on commercial speech.[58] This aspect of the foregoing decisions was aptly summarized by Justice Marshall when he stated that "the majority replaces constitutional scrutiny with mandatory deference."[59]

Substantive Rulings Restricting Free Speech

Paralleling its invocation of weakened judicial review standards in free speech cases, the Rehnquist Court's substantive holdings have diminished the scope of protectible free speech. One important way in which the Court achieves this reduction is that, construing the free speech clause, it increasingly overemphasizes notions of formal equality. The Court reads this constitutional provision as securing for every individual opportunities to engage in expressive activities that are formally equal to other persons' opportunities. The Court has retreated from previous readings of the clause as absolutely guaranteeing the right to engage in some expressive activities.

The equal protection clause bars governmental discrimination regarding specific constitutional rights, including freedom of speech. Therefore, to read those guarantees as merely assuring non-discrimination is to render them superfluous, devoid of independent, substantive content.

The tendency of the Rehnquist Court's free speech jurisprudence to exaggerate egalitarian concepts of relative protection, at the expense of libertarian concepts of absolute protection, is graphically illustrated by its decisions concerning the "public forum doctrine," governing speech on public property. This essay will focus on one such decision

from the Court's 1989–90 term, *United States v. Kokinda*.[60] The *Kokinda* case construes the First Amendment as guaranteeing only that invasions of free speech will not be made on an overtly or intentionally discriminatory basis. It does not, however, construe the First Amendment either as prohibiting all such invasions outright or as prohibiting any such invasions that are discriminatory in effect.

In *Kokinda*, the Court continued its recent application of the public forum doctrine to allow the government to deny access or to terminate previously granted access to public property for expressive purposes. The only limitation on the government's prerogatives in this area is that it must not deny or terminate the expressive use of its property solely for reasons that overtly discriminate against particular speakers or messages.[61]

To be sure, the free speech clause protects against discriminatory as well as unjustified denials of expressive opportunities. Yet, in its public forum decisions, the Rehnquist Court has overemphasized the First Amendment's relative guarantee of equal access to public property for expressive purposes and ignored its absolute guarantee of some such access. In effect, the Court has said that the *only* right an individual has is not to be given *less* protection than other individuals, but that all may be equally unprotected.[62] Furthermore, the Court employs a formalistic notion of equality, which prohibits facially discriminatory government regulations but tolerates other regulations that are discriminatory in effect. Therefore, the Court does not even ensure *equal* non-protection, let alone equal *protection*, of free speech rights on public property.

Ironically, the public forum doctrine—which the Rehnquist Court has applied to diminish speech rights—initially was introduced into First Amendment jurisprudence as a vehicle for expanding expressive liberties.[63] The basic idea was that on certain types of public property, such as streets, parks, and sidewalks, the government had to grant access to speech and other expressive activities. As originally enunciated, the public forum doctrine encapsulated a basic libertarian proposition: *i.e.*, that all individuals have an absolute right of access to certain government property for expressive purposes (subject to neutral "time, place and manner restrictions").[64] Early on, the Court recognized an egalitarian corollary to that basic libertarian proposition: that the government could not deny access to its property, for expressive purposes, on the basis of the speaker's identity or message.[65]

Recently, the Court has distorted the public forum doctrine into guaranteeing not *any* absolute, minimal degree of free speech access to government property, but instead only an *equal* or *relative* degree of access. The government has no absolute obligation to make its property available for expressive purposes to any speaker, the Court says. Rather, the government's sole obligation arises only if it voluntarily chooses to open a particular piece of property for some expressive purposes. Then and only then, says the Court, does government incur the obligation not to discriminate among speakers or messages. In other words, the government must simply treat all would-be speakers alike. If it grants access to some, it must not deny access to others on a manifestly discriminatory basis. But it need not grant access to any.[66] Moreover, government may deny access on a basis that effectively discriminates against certain speakers or ideas.

The Court's regression in construing the public forum doctrine can be schematically outlined as follows:

Libertarian proposition: The government must grant access to its property for expressive purposes.

Egalitarian corollary: The government must not deny access to its property for expressive purposes on discriminatory bases.

Reductionist redefinition: The government may deny access to its property for expressive purposes on non-discriminatory bases.

Kokinda epitomizes the Court's "equal non-protection" approach to the public forum doctrine. In what Justice Brennan aptly labelled a "farce" of the intendedly speech-protective public forum doctrine,[67] the *Kokinda* opinion twisted that doctrine into a basis for denying speech rights on a type of government property that—along with streets and parks—traditionally had been deemed a "quintessential" or "inherent" public forum: a public sidewalk.[68]

In a model of a boot-strapping argument, the Court "reasoned" that because the U.S. Postal Service had issued a regulation prohibiting any solicitation on sidewalks adjoining Post Office buildings, such sidewalks should be classified as "nonpublic forums," where the government could freely enforce almost any restriction on access for expressive purposes. In other words, the government *could* deny access to speech because it *had* denied such access![69]

The *Kokinda* Court imposed only two minimal limitations on the government's power to impose speech restrictions on sidewalks adjoining Post Offices or other public property classified as nonpublic forums: such restrictions had to be "reasonable," and they could not constitute "an effort to suppress expression *merely* because public officials oppose the speaker's view."[70] Thus, the government apparently *may* "suppress expression" on such property "because public officials oppose the speaker's view," so long as that is not the officials' *only* motivation.

Not only did the *Kokinda* opinion relegate the precious free speech liberty to the minimal degree of protection afforded by rational basis review, but also, even worse, it applied that standard in a particularly lackluster fashion, manifesting substantial deference to the determinations of the U.S. Postal Service and effectively presuming those determinations to be constitutionally correct. Thus, *Kokinda* also demonstrates the integral interconnection between the Court's weakened review standards and its diminished substantive concept concerning free speech.

As the *Kokinda* dissent noted, even assuming *arguendo* that the Postal regulations were appropriately reviewed under a rational basis standard, it still should have been invalidated, because it was unreasonable. Of particular significance, the regulation was unreasonable in its discrimination among types of speech and speakers. In contrast with its categorical ban on solicitation, the Postal Service "does not subject to the same categorical prohibition many other types of speech presenting the same risk of disruption . . ., such as soapbox oratory, pamphleteering, distributing literature for free, or even flag-burning."[71] In fact, as the dissent observes, those who solicit money may well be less likely to cause disruption in the Post Office Services than those who engage in permitted types of speech.[72]

This irrational inconsistency in the Postal Service rule upheld in *Kokinda* illustrates how the Court's sterile overemphasis on formal equality strips constitutional guarantees of real meaning. The Court purports to preserve in the public forum doctrine at least the protection against the discriminatory exclusion of *some* speech, if not a more absolute protection against the exclusion of *any* speech. Yet, by deferring to government regulators and presuming their speech restrictions to be "reasonable," the Court approves restrictions that, in actual effect, *do* discriminate against certain categories of speakers and certain types of messages, without any rational justification.

In other recent public forum cases, the Court even has gone so far as to sustain restrictions that discriminated against certain viewpoints, the central evil that the free

speech clause guards against.[73] For example, in *Cornelius v. NAACP Legal Defense and Educational Fund*,[74] the Court held that an annual charitable fund-raising drive conducted in the Federal workplace during working hours was not a limited public forum, although for almost 20 years it had been open to any tax-exempt, nonprofit, charitable organization that was supported by public contributions and provided direct health and welfare services to individuals. The Court therefore applied only minimal scrutiny to a 1983 Executive Order, which for the first time excluded from the fund-raising drive "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves."[75] The Court held that the exclusion of advocacy groups survived the low-level scrutiny it deemed applicable, reasoning that the avoidance of controversy is a valid ground for restricting speech in a nonpublic forum.[76] As the *Cornelius* dissenters maintained, this exclusion was patently viewpoint-based.[77]

Another case in which the Court permitted the government to discriminate against particular viewpoints in regulating speech on public property is *Perry Education Association v. Perry Local Educators' Association*.[78] In *Perry*, the Court held that public school mail facilities did not constitute a limited public forum, even though they were open to a union that had been certified as the teachers' exclusive bargaining representative, had previously been open to a rival union, and had periodically been open to civic and church organizations.[79] Because of its conclusion that these facilities constituted a nonpublic forum, the Court held that the school could bar the rival union from using them. Yet, as the dissenters noted, this selective exclusion constituted viewpoint discrimination which should be prohibited even in a nonpublic forum.[80]

It seems incredible that the intendedly speech-protective public forum doctrine was applied in the two foregoing cases, which allowed the government to restrict speakers' access to government property based on their viewpoints. This dramatically demonstrates the Court's recent distortion of the doctrine. Although the Rehnquist Court has reduced the public forum doctrine to a guarantee of formal non-discrimination or equality, the Court is not even adequately protecting equality values. It tolerates arbitrary and discriminatory restrictions on speech as well as unjustified restrictions.

Conclusion

"Not with a bang, but a whimper,"[81] the Rehnquist Court has reversed the momentum of previous Courts toward expanded protection for speech. To be sure, the Court has issued some significant decisions that are consistent with that previous protective trend, and its speech-restricting decisions have received relatively little attention. Nevertheless, it is important to analyze the rulings that undermine free speech precisely because so many are issued in contexts designed to obscure their import.

These speech-limiting rulings have far reaching consequences beyond the factual settings directly involved, since they have eviscerated the strict scrutiny traditionally applied to measures encroaching on speech. Eschewing the Supreme Court's established role as the guarantor of individual liberties—including the paramount liberty of free expression—the Rehnquist Court increasingly has deferred to judgments of majoritarian governmental branches in support of speech-limiting measures.

Paralleling its deferential scrutiny—or, more accurately, "non-scrutiny"[82]—of government measures abridging speech, the Rehnquist Court has constricted its conception of

the scope of protected speech. *Kokinda* and other recent public forum decisions abandon established views of the free speech clause as ensuring some absolute level of protection for expression. Rather, they espouse a diminished view of this constitutional provision as ensuring only that individuals will not be subjected to patent, intentional discrimination in the level of protection—or lack of protection—they receive. Thus, after *Kokinda*, none of us has the right to engage in expressive activity on government property. Instead, we must be content in the knowledge that the government may not single us out in denying expressive access to its property *solely* because it disagrees with our ideas.

Notes

1. *See generally* K. Greenawalt, *Speech, Crime, and the Uses of Language* (1989) 186–218.

2. The term is in quotation marks to signify both its indeterminacy and also the fact that basic canons of judicial restraint, an approach usually associated with judicial conservatism, are not consistently followed by Chief Justice Rehnquist and the Justices who often vote with him (Justices White, O'Connor, Scalia, and Kennedy). *See* Strossen, *Introduction to Symposium on Recent Supreme Court Civil Rights Decisions*, N.Y.L.S. J. Hum. Rts. (1990) (forthcoming).

3. *See, e.g.*, American Civil Liberties Union, *The 1989 Supreme Court Term: Mixed Signals*, June 28, 1990, at 1 ("The Court's decisions on free speech . . . can best be described as a mixed bag."); Supreme Court Watch, *Good News, Bad News: The Supreme Court's 1989–1990 Term*, July 1990, at 11 ("Supreme Court decisions this term gave strong protection to the right of free speech for individuals while rendering a troubling decision on freedom of the press.").

4. *See United States v. Eichman*, 48 U.S.L.W. 4744 (1990); *Texas v. Johnson*, 109 S. Ct. 2533 (1989).

5. Justice Brennan also authored the other major free speech victory of the past two Terms: *Rutan v. Republican Party of Illinois*, 58 U.S.L.W. 4872 (1990) (holding that promotions, transfers, and recalls based on political affiliation or support constitute an impermissible infringement on public employees' First Amendment rights).

6. For a discussion of this aspect of the Court's individual rights decisions beyond the free speech sphere, *see* Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 Hasting L.J. 805, 866–67 (1990).

7. 109 S. Ct. 2746, 2762, 2765 (1989) (Marshall, J., dissenting).

8. Regarding this aspect of the Rehnquist Court's individual rights jurisprudence more generally, *see* Strossen, *supra* note 7, at 876–77.

9. For examples of the Rehnquist Court's reliance on previous dissenting opinions in a case cutting back on free speech, *see Ward*, 109 S. Ct. at 2753; *id.* at 2755. *Ward* also provides an example of the majority's reliance on distinguishable cases. *See id.* at 2761 n. 1(Marshall, J. dissenting).

10. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3077 (1989) (Blackmun, J., concurring in part and dissenting in part):

> Never in my memory has a plurality . . . gone about its business in such a deceptive fashion. At every level of its review . . . the plurality obscures the portent of its analysis. With feigned restraint, the plurality announces that its analysis leaves *Roe* "undisturbed" . . . But this disclaimer is totally meaningless. The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly. . .

Thus, "not with a bang, but a whimper," the plurality discards a landmark case of the last generation.

11. 109 S. Ct. 1874 (1989).

12. 109 S. Ct. 1746, 1760 (Marshall, J., dissenting) (1989).

13. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77, 88, 93 (1949); *Saia v. New York*, 334 U.S. 558, 561, 562 (1948).

14. *See, e.g., Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 17, 19, 21 (1986); *Widmar v. Vincent*, 454 U.S. 263, 270 (1981); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 787, 792, 795 (1978).

15. *See, e.g., Widmar*, 454 U.S. at 270 (government "must show that its [speech] regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

16. 109 S. Ct. 1874, 1876, 1883 (1989).

17. 109 S. Ct. at 2578.

18. *See Procunier v. Martinez*, 416 U.S. 396, 413 (1974) (censorship of prison mail would be permitted only if "the limitation of First Amendment freedoms [was] no greater than . . . necessary or essential").

19. *See, e.g., Martin v. City of Struthers*, 319 U.S. 141, 147 (1943).

20. *See* 109 S. Ct. at 1880–81. *Compare Procunier v. Martinez*, 416 U.S. 396, 413 (1974).

21. *See* 109 S. Ct. at 2758. *Compare, e.g., Frisby v. Schultz*, 487 U.S. 474 (1988); *Boos v. Barry*, 485 U.S. 312, 329 (1988); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

22. *See Board of Trustees of the State University of New York v. Fox*, 109 S. Ct. 3028, 3033–34 (1989). *Compare, e.g., Shapero v. Kentucky Bar Association*, 486 U.S. 466, 472 91988); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 539 (1987).

23. *See Dallas v. Stanglin*, 109 S. Ct. 1591, 1596, 1597 (1989). *Compare Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

24. 109 S. Ct. 2746, 2757 (1989).

25. *Id.* at 2756.

26. *Id.* at 2751–52 & n. 1.

27. *See id.* at 2752–53. The Second Circuit opinion is reported at *Rock Against Racism v. Ward*, 848 F. 2d 367 (2d Cir. 1988).

28. 109 S. Ct. at 2758 (quoting *United States v. Albertini*, 472 U.S. 677, 689 (1985).

29. *Id.*

30. *Id.* at 2762 (Marshall, J., dissenting) [quoting Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1485 (1975)].

31. *Id.* at 2757.

32. *See, e.g., Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face").

33. 109 S. Ct. at 2763 (Marshall, J., dissenting).

34. 58U.S.L.W. 5013 (1990).

35. *Id.* at 5016. *Accord, Id.* at 5017 (Postal Service restrictions on speech may "ensure the most effective and efficient distribution of the mails.").

36. *See* 58 U.S.L.W. at 5016 (citation omitted) ("'The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.'") (emphasis in original).

37. 308 U.S. 147, 162 (1939).

38. 109 S. Ct. at 2755.

39. *Id.* at 2764 (Marshall, J., dissenting).

40. *See id.* at 2764 n. 7 (Marshall, J., dissenting).

41. *Id.* at 2763.

42. *See* Tribe, L., *American Constitutional Law* (1988) sec. 12–34.

43. *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

44. 109 U.S. at 2760.

45. *Id.* at 2756.

46. *See* Tribe, L., *supra* note 43 at sec. 12–38, 1056–57.

47. 28 C.F.R. sec. 540.71(b) (1985).

48. 109 S. Ct. at 1889 (Stevens, J., concurring in part and dissenting in part).

49. *See, e.g., Pacific Gas & Electric Co.*, 475 U.S. at 17, 19, 21.

50. 109 S. Ct. at 1884; *see id.* at 1891–92 (Stevens, J., dissenting).

51. *See Bullock v. Carter*, 405 U.S. 134, 149 (1972) (administrative convenience or cost savings

cannot justify burdens on fundamental rights); *Shapiro v. Thompson*, 394 U.S. 518, 633–34 (1969) (same); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1948) ("freedom of speech . . . is . . . protected . . . unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.").

52. *See Craig v. Boren*, 429 U.S. 190, 198 (1976) (involving right to non-discrimination on the basis of gender, which the Court treats as less important than "fundamental" right such as free speech; measures invading the latter are subject to strict judicial scrutiny, whereas measures invading the former are subject to "intermediate" scrutiny).

53. *Texas v. Johnson*, 109 S. Ct. 2533, 2555 (1989) (Rehnquist, C.J., dissenting).

54. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943): "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's . fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

55. *See* 58 U.S.L.W. at 5016–18.

56. *See* 109 S. Ct. at 1883–84.

57. *See* 109 S. Ct. at 2759 (1989).

58. *See* 109 S. Ct. at 3035 (1989).

59. *Ward*, 109 S. Ct. at 2760 (Marshall, J., dissenting).

60. 58 U.S.L.W. 5013 (1990).

61. *See, e.g., Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983) (outside public property that the government voluntarily opens to expressive use, government may impose on its property any speech-restrictive regulations that are reasonable and that are "not an effort to suppress expression merely because public officials oppose the speaker's view").

62. *See Kokinda*, 58 U.S.L.W. at 5016.

63. Justice Brennan noted this development in his *Kokinda* dissent, 58 U.S.L.W. at 5019.

64. This notion is eloquently expressed in Justice Roberts' oft-quoted dictum in *Hague v. CIO*, 307 U.S. 496, 515 (1939):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

65. *See, e.g., Police Department of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972): "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

66. *See Kokinda*, 58 U.S.L.W. at 5016.

67. 58 U.S.L.W. at 5025 (Brennan, J., dissenting).

68. *See Frisby v. Schultz*, 487 U.S. 474, 480 (1988); *United States v. Grace*, 461 U.S. 171, 177, 180 (1983).

69. *See* 58 U.S.L.W. at 5016 (citations omitted): "The Postal Service has not expressly dedicated its sidewalks to any expressive activity. . . To be sure, individuals or groups have been permitted to leaflet, speak, or picket on postal premises . . but . . a practice of allowing some speech activities on postal property do[es] not add up to the dedication of postal property to speech activities. We have held that '[t]he government does not create a public forum by . . . *permitting* limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'"

70. 58 U.S.L.W. at 5016, *quoting Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 47 (1983) (emphasis supplied).

71. 58 U.S.L.W. at 5024 (Brennan, J., dissenting).

72. *See id.*

73. *See, e.g., First National Bank v. Bellotti*, 435 U.S. 765, 785 (1985); *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175–76 (1976).

74. 473 U.S. 788 (1985).

75. *Id.* at 795.

76. *Id.* at 811.

77. *See id.* at 814 (Blackmun, J., dissenting); *id.* at 835 (Stevens, J., dissenting).
78. 460 U.S. 37 (1983).
79. *Id.* at 47–48.
80. *See id.* at 65 (Brennan, J., dissenting).
81. *See supra* note 11.
82. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3077 (1989) (Blackmun, J., concurring in part and dissenting in part).