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A Balanced Diet of First Amendment Cases

Joel Gora

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Today, I will discuss the First Amendment[2] cases before the Supreme Court last Term.[3] The cases were what I would call a "balanced diet" of First Amendment cases. Two of the cases involved regulation of material with a sexual content;[4] one case involved zoning of places that sell materials having a sexual content;[5] another was a commercial speech case,[6] (there is one of those almost every term). The Court also heard a good old-fashioned park permit case[7] and a good old fashioned door-to-door canvassing case.[8] Another case involved a right to petition the government, including the right to speak through litigation.[9] There was also a campaign speech case.[10] And last, but certainly not least, perhaps the best known First Amendment case of the term, a church-state case.[11] It would be possible to teach an entire First

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[2] U.S. Const. amend. I provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .."

[3] October Term, 2001.

[4] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Ashcroft v. ACLU, 535 U.S. 564 (2002).

[5] Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).

[6] Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002).

[7] Thomas v. Chicago Park Dist., 534 U.S. 316 (2002) (reviewing conditions under which cities can require a permit before you use a park or street for a parade).

[8] Watchtower Bible and Tract Soc'y of N.Y. v. Stratton, 536 U.S. 150 (2002) (reviewing the extent to which local government can regulate door-to door solicitation and activities).

[9] BE & K Construction v. N.L.R.B., 536 U.S. 516, 122 S. Ct. 2390 (2002). This is predominantly a labor regulation case with strong First Amendment consequences.

[10] Republican Party of Minn. v. White, 536 U.S. 765, 122 S. Ct. 2528 (2002) (involving candidates for judicial office running for election to those offices).

[11] Zelman v. Simmons-Harris, 536 U.S. 639, 122 S. Ct. 2460 (2002). In this well-known voucher decision case, the Court upheld in a five to four decision a

Amendment course off the menu of cases that the Court heard this past Term.

The Court showed quite a balance in its decisions. Of the nine cases noted, the First Amendment claimant prevailed five times[12] and the Court rejected or deflected the First Amendment claim four times.[13] Reflecting a similar pattern, there were many five to four decisions, with the Court sharply divided on the specific issue.[14] The conservatives tended to be in favor of political and commercial speech;[15] the liberals tended to be in favor of sexual speech.[16] I invite you to draw your own conclusions from this.

ASHCROFT V. FREE SPEECH COALITION

Ashcroft v. Free Speech Coalition[17] is a sexual free speech case, decided six to three, invalidating a federal statute.[18] As part

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provision of tuition assistance to students and families of students who attend private schools. The effect of the decision, in this Cleveland case, is that almost all the students would be attending religious schools. The Court held that this program did not violate the Establishment Clause. *Id.* at __, 122 S. Ct. at 2473.

[12] *See Watchtower*, 536 U.S. at 165; *Free Speech Coalition*, 535 U.S. at 258; *BE & K Constr.*, 536 U.S. at __, 122 S. Ct. at 2395; *Thompson*, 535 U.S. at 360; *Republican Party*, 536 U.S. at __, 122 S. Ct. at 2542.

[13] *See Thomas*, 534 U.S. at 325-26; Ashcroft v. American Civil Liberties Union, 535 U.S. 566 (2002); *Alameda Books*, 535 U.S. at 429; *Zelman*, 536 U.S. at __, 122 S. Ct. at 2462-63 (2002).

[14] *See Zelman*, 536 U.S. at __, 122 S. Ct. at 2461 (writing for the majority Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy and Thomas, JJ., writing for the dissent Souter, J., in which Stevens, Ginsburg, and Breyer, JJ., joined); *Thompson*, 535 U.S. at 359 (writing for the majority O'Connor, J., joined by Scalia, Thomas, Kennedy and Souter, JJ., writing for the dissent, Breyer, J., joined by Rehnquist, CJ., Ginsburg and Stevens, JJ.); *Republican Party*, 536 U.S. at __, 122 S. Ct. at 2530 (announcing the majority decision of the court, Scalia, J., joined by Rehnquist, CJ., Thomas, Kennedy and O'Connor, JJ., dissenting opinions written by Stevens J., and Ginsburg, J., joined in both by Souter and Breyer, JJ.); *Alameda Books*, 535 U.S. at 428 (delivering the opinion of the majority of the court, O'Connor, J., joined by Rehnquist, CJ., Scalia, Thomas, and Kennedy, JJ., writing for the dissent, Souter, J., joined by Ginsburg, Breyer, and Stevens, JJ.).

[15] Rehnquist, C.J., and O'Connor, Scalia, Kennedy and Thomas, JJ.

[16] Souter, J., Ginsberg, J., Breyer,.J., Stevens, J.

[17] 535 U.S. 234 (2002).

of Congress' ongoing concern with child pornography, Congress passed a statute, the Child Pornography Protection Act, (CPPA),[19] which took the regulation of child pornography to a new level. At the time the statute was passed, it extended federal law against child pornography to virtual child pornography.[20] It was a new concept. Congress was saying that if you digitally create material that depicts youngsters involved in sexual activity, virtual child pornography, you could be punished federally, as if you had photographed real youngsters involved in sexual activity.[21] The Supreme Court said this statute goes too far.[22]

In *New York v. Ferber*,[23] decided almost twenty years ago, the prosecution of those who possessed, distributed, or produced materials where actual underage children were used to create those materials, was based on a theory of child exploitation.[24] The reasoning at that time was that the material was produced by exploiting and abusing children and therefore, in order to prevent that exploitation and abuse, it would be necessary to dry up the market for that material.[25]

The issue was always based on a child abuse rationale.[26] When you do not use children, but you have digitally created or artificially created images, there are no children that have been exploited or abused. Therefore, in *Free Speech Coalition*, the statute went well beyond the rationale of the *Ferber* case and that

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[18] 535 U.S. at 238 ("Kennedy, J., delivered the opinion of the Court, in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined. Thomas, J., filed an opinion concurring in the judgment. O'connor, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Rehnquist, C. J., and Scalia, J., joined as to Part II. Rehnquist, C. J., filed a dissenting opinion, in which Scalia, J., joined except for the paragraph discussing legislative history.").

[19] Pub. L. No. 104-294, 110 Stat. 3501 (1996) (codified as 18 U.S.C. § 2251(2000)).

[20] 18 U.S.C. § 2256 (8) (B), (D). Virtual child pornography is artificially created or digitally created, to look like a person under sixteen, but does not involve the use of any real youngster to create the material. *Id.*

[21] *Free Speech Coalition*, 535 U.S. at 245.

[22] *Id.* at 252-53.

[23] 458 U.S. 747 (1982).

[24] *Id.* at 757.

[25] *Id.* at 760.

[26] *Id.* at 753.

is what the Supreme Court held.[27] The material, by definition, did not meet the famous three-part test of the *Miller* case.[28] Only material that meets the *Miller* test can be punished as obscene.[29] Virtual child pornography deals with sexual content, but it is not hard core pornography or obscenity under the *Miller* test.[30] So in order to justify that statute, having lost on the *Ferber* theory,[31] because there were no children actually being abused, the government argued in the alternative that the use of virtual child pornography would have three effects that the government was entitled to prohibit.[32]

First, virtual pornography would facilitate the seduction of young children.[33] Second, it would incite adults to be interested in abusing young children in a real world sense.[34] Third, because virtual child pornography is so realistic, it would be difficult to tell whether a video was made with a child or made virtually (digitally), therefore, it would be hard to prosecute creators of real child pornography.[35]

To all three claims the Court answered with a variant of the old "clear and present danger" concept,[36] namely, it is necessary to

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[27] 535 U.S. at 256.

[28] Miller v. California, 413 U.S. 15 (1973). The three-part test defining obscenity in *Miller* is: (1) "That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." (2) A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way," and (3) "[T]aken as a whole, [it] do[es] not have serious literary, artistic, political, or scientific value." *Id.* at 24.

[29] *Id.* at 24.

[30] *Free Speech Coalition*, 535 U.S. at 246. The Court reasoned that "The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea -- that of teenagers engaging in sexual activity -- that is a fact of modern society and has been a theme in art and literature throughout the ages." *Id.*

[31] *Id.* at 251. The Court held that "the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Id.*

[32] *Id.* at 250-54.

[33] *Id.* at 251.

[34] *Id.* at 253.

[35] *Free Speech Coalition*, 535 U.S. 254.

[36] *Id.* at 253-54 ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and

show that the use of this material for seduction purposes or for excitement purposes causes people to be more interested in child abuse.[37] Further, it is essential to show that digitally created material poses a sufficient danger in bringing about real harms to real children in order to justify the prohibition of digitally created material.[38]

This is an important First Amendment decision as it once again limits the ability of government to outlaw speech because the government claims that the speech may bring about real world harm.[39] Indeed, the Court cited its current clear and present danger case, *Brandenburg v. Ohio*,[40] a case where the Court held that only where speech incites imminent lawless action and is highly likely to bring that action about, can speech be limited.[41] The Court in the instant case concluded that the rationale for this statute failed those requirements.[42] Therefore the Court held that a ban on the creation of virtual child pornography was offensive to the First Amendment.[43]

ASHCROFT V. AMERICAN CIVIL LIBERTIES UNION

Ashcroft v. American Civil Liberties Union,[44] the second major federal case involving sexual content, caused the Court much more difficulty. This case involved the Child Online Protection Act, (COPA),[45] similar to, but different from the CPPA[46] just discussed in the *Free Speech Coalition* case.

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present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.") (citing Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (quoting Schenck v. U.S., 249 U.S. 47, 52 (1919))).

[37] *Id.* at 252-53.

[38] *Id.*

[39] *Id.*

[40] 395 U.S. 444.

[41] *Id.* at 447.

[42] *Free Speech Coalition*, 535 U.S. at 258.

[43] *Id.*

[44] 535 U.S. 564 (2002).

[45] Pub. L. No. 105–277, 112 Stat. 2681–736 (codified at 47 U.S.C. § 231 (2000)).

[46] 18 U.S.C. § 2251 (including virtual pornography).

The Child Online Protection Act prohibits the use of the worldwide web to communicate information for commercial purposes that would be available to any minor when that information includes material that is harmful to minors.[47] As background to this case, in the mid-1990's, Congress passed the so-called Communications Decency Act,[48] which was an effort to restrict sexual content on the Internet. In a rather resounding defeat for the government, the Supreme Court, in *Reno v. ACLU*, declared that the Communications Decency Act was overbroad; it went well beyond the government's valid areas of concern with obscenity, or with the presentation and location of sexual material and fell short of being prohibited obscenity.[49]

In response to this holding, Congress fashioned a new solution. Congress enacted the new statute, the Child Online Protection Act,[50] which was indeed more narrowly drawn to meet some of the concerns that the Court raised in *Reno* when it struck down the Communications Decency Act.[51] The narrowing features of COPA include: (1) the statute is limited to the worldwide web,[52] (2) the statute only addresses material that would be harmful to minors,[53] and (3) the statute includes a diluted three-part *Miller*[54]

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[47] 47 U.S.C. § 231(a)(1).

[48] *Id.* § 223(a) (d) (Supp II 1996) (repealed 1998). The CDA prohibited displaying or transmitting obscene messages to minor persons and was enacted as part of the Telecommunications Act of 1996.

[49] 521 U.S. 844, 874 (1997).

[50] 47 U.S.C. § 231.

[51] *Reno*, 521 U.S. at 874. The Court stated:

> We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

Id.

[52] 47 U.S.C. § 231(e)(1). This statute did not include, for example, communications on e-mail. It also only pertained to commercial speakers, which would exclude most academic or personal communications.

[53] *Id.* § 231(e)(6).

[54] *Miller*, 413 U.S at 24.

test, ("*Miller*-lite"), that has to be met in order to allow punishment.[55]

The feature that drew the most interest was the use of the three-part "*Miller*-lite" formula, now run through the filter of community standards.[56] The last of these narrowing features would present the greatest problem. A web site could be located on 42nd Street in Manhattan, but can be accessible from Greenville, South Carolina and any other place where access to the Internet is available. For the material to fall within the meaning of the statute, the material would have to have sexual content, but whether it violates community standards, in terms of the sexual material, and is thus harmful to minors, would depend on which community is the measuring community? Is it Manhattan, Greenville, or some abstract or hypothetical *national* community?

Essentially, the Third Circuit held in this case that the use of any community standards test would violate the First Amendment because web publishers have no way of avoiding liability under current technology, so they must engage in self-censorship.[57] The lower court also noted the chilling effect that that kind of standard would evoke.[58] The Supreme Court reversed the lower court's decision.[59] Although there was no majority opinion for the Court, there are four different points of view that can be found through various plurality,[60] concurring,[61] and one dissenting opinion.[62]

What the Court agreed upon, or at least most of the Justices[63] agreed upon, was that there could be a community standards' filter through which material found on the world wide web, that might be harmful to children, could be judged.[64] The

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[55] 47 U.S.C. § 231(e)(6).
[56] *Id.*
[57] ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 1999).
[58] *Id.* at 177.
[59] *Ashcroft*, 535 U.S. at 586.
[60] *Id.*
[61] *Id.* at 586-602.
[62] *Id.* at 602-12.
[63] *Id.* at 566. Thomas, O'Connor, Breyer, Kennedy, Souter, Ginsburg, Rehnquist, and Scalia, JJ.
[64] 535 U.S. at 581 (citing Sable Comm. V. FCC, 492 U.S. 115 (1989)).

Court concluded that it was not a First Amendment violation *per se* to use a community standards' test.[65]

The central issues that the Court disagreed on were: should there be a local community standard or a national community standard?;[66] how should a community standard be measured?;[67] and most significantly, what effect in the real world would this community standard have on speakers and communicators on the Internet?[68] To address these concerns, the Court remanded the entire matter to the Third Circuit to pursue all of the factual questions and to apply the First Amendment to this situation.[69]

Justice Stevens was the only justice who thought that the statute was an absolute violation of the First Amendment.[70] He filed the only dissent. He expressed concern that the community standards' notion had been created as a shield to protect the First Amendment.[71] Justice Stevens reasoned that if your community was Manhattan, New York, then you had more latitude to produce material appropriate for that community.[72] The community standard was designed to enhance freedom of speech standards.[73] Its purpose was to be a shield, not a sword.[74] Justice Stevens further reasoned that communities such as Greenville, South Carolina, are less liberated than, perhaps, Manhattan, however, the lowest common denominator of those community standards might

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[65] *Id.* at 580 (stating that there is no violation when the statute's scope is narrowed by a "serious value" prong as well as a "prurient interest" prong). The primary opinion that supports this position was a plurality opinion written by Justice Thomas. Justices O'Connor and Kennedy joined in the opinion. *Id.*

[66] *Id.* at 583.

[67] *Id.* at 579.

[68] *Id.* at 583.

[69] 535 U.S. at 586. This case has not been decided as of this writing.

[70] 535 U.S. at 612 (Stevens, J., dissenting).

[71] *Id.* at 603.

[72] *Id.* at 607-08. The Third Circuit, on remand, decided on March 6, 2003 that COPA restricted free speech because the statute barred Web page operators from posting information inappropriate for minors unless they limited the sites to adults. Relying on the hypothetcial approach used in *Ashcroft v. ACLU*, the court reasoned that in seeking to define material harmful to minors, the law made no distinction between things inappropriate for a 5-year old and things harmful to someone in their early teens. *ACLU*, No. 99-1324, 2003 U.S. App. LEXIS 4152, at *38 (3d. Cir. Pa. Mar. 6, 2003).

[73] *Id.* at 603.

[74] *Id.*

apply to all materials, and that would be a deprecation of First Amendment values.[75]

CITY OF LOS ANGELES V. ALAMEDA BOOKS

The case of *City of Los Angeles v. Alameda Books*[76] also involved sexual material, but in the context of a local ordinance, in contrast to the above-cited cases[77] that involved federal statutes. In *Young v. American Mini Theaters*,[78] the Court held that stores or places which purvey sexual material that is not obscene[79] but is only sexual in nature, can be regulated by the use of zoning laws.[80] Zoning laws do not violate the First Amendment rights of such establishments when the community has concern about the secondary effects of such places: crime, prostitution, drug use and the like.[81] Many communities, such as New York City,[82] passed zoning laws, which state that places that deal with adult material can not be within five hundred feet of each other[83] or within five hundred feet of a school or a religious facility.[84]

The issue in the case was what happens when a city utilizes zoning laws based on a study of bad effects from the concentration of adult-only facilities and then later becomes cognizant that many of those facilities have, in fact, moved under one roof.[85] One of the issues in this case is, can the community pass a new ordinance, which would limit the number of such facilities to one per

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[75] 535 U.S. at 608-09.

[76] 535 U.S. 425.

[77] *Ashcroft*, 535 U.S. 564; *Reno*, 521 U.S. 844.

[78] 427 U.S. 50 (1976).

[79] *See* Roth v. United States, 354 U.S. 476, 484-85 (1957) (stating that if material is obscene, it could be made a crime to purvey and the establishment could be shut down).

[80] *Young*, 427 U.S. at 62.

[81] *Id.* at 71 n.34.

[82] New York City, N.Y., Commercial District Regulations, Art. III § 32-01(2002) *available at* http://www.nyc.gov/html/dcp/pdf/zone/art03.pdf (last visited April 29, 2003).

[83] *Id.* § 32-01(c).

[84] *Id.* § 32-01(b).

[85] *Alameda Books*, 535 U.S. at 431.

building?[86] What kind of proof would be needed to prove that that kind of "mini-mall" phenomenon has caused new secondary effect problems?[87]

The Supreme Court, in a five-four opinion[88] held that (1) a community could rely on the original report that was the basis for the zoning of sexually-oriented places and (2) a community could rely on anecdotal reports and evidence of the harm that was created.[89] This opinion is significant in that a city or county attorney who is seeking to resist a summary judgment motion striking down an ordinance like this on First Amendment grounds is only required to present the concerns that prompted the community to enact ordinances like this in the first instance.[90]

A five justice majority held that a minimum of evidentiary support is needed to justify, or at the least, require, that a trial be held to determine if the dispersal of multiple uses within one facility is something that is justified under the First Amendment.[91] The four dissenters, Justices Souter, Ginsberg, Stevens, and Breyer held that this kind of low level scrutiny of the justifications that local government had put forward to sustain this zoning ordinance, was not the kind of scrutiny that should be required even when regulating sexually-oriented material.[92] This decision can be seen as a loss for First Amendment rights.

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[86] *Id.* There is one building that had an adult bookstore, a video store, and perhaps a massage parlor, sort of a tri-fecta.

[87] *Id.* at 433.

[88] *Id.* at 428. O'Connor, J. wrote an opinion in which Rehnquist, C.J. and Thomas, J. joined. Scalia, and Kennedy, JJ. filed concurring opinions. Souter, J. dissented, joined by Stevens, Ginsburg, and Breyer, JJ.

[89] *Id.* at 442.

[90] *Alameda Books*, 535 U.S. at 442.

[91] *Id.*

[92] *Id.* at 465-66. The dissent stated:

> Whereas *Young* and *Renton* gave cities the choice between two strategies when each was causally related to the city's interest, the plurality today gives Los Angeles a right to "experiment" with a First Amendment restriction in response to a problem of increased crime that the city has never even shown to be associated with combined bookstore-arcades standing alone. But the government's freedom of experimentation cannot displace its burden under the intermediate scrutiny standard to show that the restriction on

THOMPSON V. WESTERN STATES MEDICAL CENTER

In *Thompson v. Western States Medical Center*,[93] the decision was also five-four, but in reverse.[94] This case involved a federal statute[95] restricting the advertising by pharmacists of certain types of compound drugs.[96] Congress allowed the dispensing of these customized drugs without the normal experimental phase, but, in exchange, banned the advertisement of these drugs or the dissemination of information that the pharmaceutical industry is willing to create such drugs.[97] The rationale behind this agreement was that Congress did not want the demand for customized drugs to become a large-scale market, although Congress did want the drugs to remain available. The legislative intent was to keep use of customized drugs as an avenue of last resort, by keeping the advertising of the availability of such drugs to a minimum.[98]

Pharmacists and others who wanted the ability to inform the public, both doctors and patients, of their ability to create customized individual prescriptions and compound prescriptions, challenged this restriction.[99] In a five to four decision the Supreme Court held that the restriction violated the First Amendment.[100]

For many years, there has been a concerted effort to get the Court to not use the so-called four-part formula of the *Central Hudson*[101] case for judging the validity of a restriction on

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> speech is no greater than essential to realizing an important objective, in this case policing crime.

Id. (Souter, J., dissenting).

[93] 535 U.S. 357 (2002).

[94] *Id.* at 360 (holding that the statutory provision was an unconstitutional restriction of protected First Amendment commercial speech).

[95] 21 U.S.C. § 353(a) (2000).

[96] 535 U.S. at 360. Compound drugs are drugs that are customized by pharmacists to meet the individual needs of individual patients.

[97] *Id.* at 364-65 (articulating the consequences of 21 U.S.C. § 353a(c)).

[98] *Id.* at 366.

[99] *Id.* at 365.

[100] *Id.* at 360.

[101] Central Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (announcing the four part test as follows: whether the expression is protected by the First Amendment; whether the asserted government interest is

commercial speech, as opposed to political speech.[102] In this case, the Court recognized no need to examine that issue. The Court held that, by simply using the four-part test, the restriction violated the First Amendment.[103] The Court validated Congress' goal to insure that untested combinations of drugs are not to be prescribed indiscriminately.[104] Further, the Court saw the need for pharmacists to be able to communicate to doctors and patients.[105] In turn, if there is some risk that doctors will want to prescribe such drugs, that is a reasonable choice, so long as patients are informed. Just because doctors and patients can make a bad choice or a wrong choice is not enough reason to withhold information.[106] The Court focused on the regulatory issues[107] and apparently was not convinced that the means, a total ban on advertising of compound drugs, chosen by the legislature, was properly tailored to the valid goal of prescription drug safety.[108] The dissenters included Justice Breyer, a former Senate chief legislative counsel,[109] who tends to be partial toward Congressional regulations, particularly those affecting business, and who would have upheld the regulation.[110] Two justices who are normally liberal, Justices Ginsburg and Stevens, joined Justice Breyer.[111] The fourth dissenter, Chief Justice Rehnquist, is a long-time opponent of strong protection for commercial speech.[112] In the

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substantial; whether the regulation directly advances the governmental interest; and whether it is not more extensive than is necessary to serve that interest).

[102] *Thompson*, 535 U.S. at 377 (Thomas, J., concurring). This movement, led by Justice Thomas, seeks to give commercial speech almost the same amount of protection as political speech.

[103] *Id.* at 360.

[104] *Id.* at 369.

[105] *Id.* at 375 (citing Va. Bd. of Pharmacy v. Va. Citizens Commuter Council, 425 U.S. 748, 770 (1976)).

[106] *Id.* at 374.

[107] *Thompson*, 535 U.S. at 375-76.

[108] *Id.* at 370-71.

[109] *See* Justice Breyer's biography *available at* http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited on April 29, 2003).

[110] *Thompson*, 535 U.S. at 389.

[111] *Id.* at 378.

[112] *See, e.g.*, City of Erie v. Pap's A.M. 529 U.S. 277 (2000); Los Angeles Police Dep't v. United Reporting Pub., 528 U.S. 32 (1999); Greater New Orleans Broadcasting v. United States, 527 U.S. 173 (1999).

dissent, liberals and conservatives joined in their desire to uphold this government regulation of commercial speech.[113]

There is an old joke that "The problem with commercial speech is that liberals do not like it because it is commercial, and conservatives do not like it because it is speech." Despite this adage, there was a majority opinion that protected commercial speech.

THOMAS V. CHICAGO PARK DISTRICT

Thomas v. Chicago Park District,[114] was the only unanimous vote on the First Amendment docket last term. This case is an example of the limitations in reasoning by analogy.

In this case, the Chicago Park District instituted a rather elaborate, but careful, permit scheme;[115] a statute that necessitated those who intended to have a rally, march, or parade had to apply for a permit.[116] It appears that one would be hard pressed to find any sort of content basis for denying a permit. It definitely appeared to be a classic time, place, and manner concern.[117]

Nonetheless, a group that had been denied a permit to hold rallies protesting laws against marijuana use challenged the denial of a permit.[118] The group filed an action challenging the park permit statute. The action relied on a line of cases associated with *Freedman v. Maryland*,[119] which held that if a municipality formed a governing unit which licensed and censored movies, and there was a need to obtain a permit prior to showing the movie, the municipality must provide procedural safeguards designed to

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[113] *Thompson*, 535 U.S. at 378 (Breyer, J., dissenting, joined by Rehnquist, CJ., Stevens and Ginsburg, JJ).

[114] 534 U.S. 316 (2002).

[115] *Id.* at 318.

[116] *Id.*

[117] *Id.* at 323 (citing Cox v. New Hampshire, 312 U.S. 569 (1941)). The public forum doctrine empowers municipalities to give consideration, without unfair discrimination, to time, place, and manner in relation to the other proper uses of the streets. *Id.*

[118] *Thomas*, 534 U.S. at 319-20.

[119] Freedman v. Maryland, 380 U.S. 51 (1965).

obviate the dangers of a censorship system.[120] The challengers to the Chicago Park District statute said the same is true of a park permit scheme.

The Court rejected this analogy.[121] Justice Scalia differentiated censoring movies and the denial of a park permit.[122] When censoring movies, the essence of the prior permit scheme is censorship.[123] The scheme for denial of a permit to show a movie is content based. With movies, we do not want the censors to have the last word, we want quick and fair judicial procedures. In the instant case, there is no censorship law.[124] Therefore, the movie censorship board case[125] is really inapposite and this is a valid classic time, place, and manner regulation.[126] The only possible free speech question that will remain would be whether in the enforcement of this valid regulation there is a pattern of unlawful favoritism.[127] The Court suggested that if the petitioners could prove that dissenting points of view never get a permit, but main street points of view always get a permit, then there would be evidence of a "pattern of unlawful favoritism," and that would be an appropriate issue to bring before the Court.[128] In terms of this facial challenge to the park permit statute, however, it failed, and the statute was upheld as valid under the First Amendment.[129]

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[120] *Id.* at 58. The necessary safeguards would include strict time limits to insure judicial review. Furthermore, "[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Id.* at 59.

[121] *Thomas*, 534 U.S. at 322.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Freedman*, 380 U.S. 51.

[126] *Thomas*, 534 U.S. at 322.

[127] *Id* at 323.

[128] *Id* at 325.

[129] *Id.*

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK V. VILLAGE OF STRATTON

The case of *Watchtower Bible and Tract Society of New York v. Village of Stratton*,[130] can be classified as a great old chestnut of First Amendment law. Watchtower Bible and Tract Society is a Jehovah's Witness religious group.[131] As a person who works in downtown Brooklyn, I can attest to their prominence within our community. They are also extremely prominent in Supreme Court First Amendment jurisprudence.[132] The Court actually mentions in the opinion the role that Jehovah's Witnesses have played in First Amendment rights' litigation.[133] Their religious doctrine requires them to proselytize, go door-to-door, or go out in the public arena to proclaim their religion.[134]

As a result of this religious requirement, for almost a century they have run afoul of various local ordinances designed to restrict speech on the streets,[135] restrict the distribution of leaflets on the streets,[136] and restrict the going of door-to-door, home-to-home.[137] The Jehovah Witnesses have consistently challenged these ordinances. They have received favorable rulings by the courts. In this case, the city required that any person or group, religious, political, selling pots and pans, or magazine subscriptions had to obtain a permit from the mayor's office.[138] The Supreme Court held, surprisingly, that it would be impermissible for a municipality to require a permit for going door-to-door.[139] The Court said that in each of the previous cases there was some flaw in the regulation, therefore each particular

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[130] 536 U.S. 150 (2002).

[131] *Id* at 153.

[132] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[133] *Watchtower*, 536 U.S. at 160.

[134] *Id* at 160-61.

[135] *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943).

[136] *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[137] *See, e.g.*, Schneider v. State, 308 U.S. 147 (1939).

[138] *Watchtower*, 536 U.S. at 156.

[139] *Id.* at 169.

scheme was held to be unconstitutional.[140] In this case, the Court simply held that you could not have a permit requirement for going door-to-door.[141]

First, the Court reasoned that it would deter speakers.[142] Justice Stevens, who has a real soft spot for the little guy, once wrote a very strong First Amendment opinion upholding a right to put a sign on your front lawn proclaiming your political position.[143] Second, in another case, Justice Stevens viewed the Internet as a little guy's medium.[144] Third, Justice Stevens also believed that going door-to-door was a little guy's method of communication.[145] He did concede there was no censorship issue in requiring that one complete a form to get a permit, but he did opine that this permit requirement was too much of a strain on First Amendment values of anonymous speech, spontaneous speech, and the medium of door-to-door speech.[146]

Thus, the Court held that the gain to the homeowner and the community in terms of safety and freedom from fraud was just not worth the price of putting this blanket permit requirement on a pristine form of First Amendment activity.[147] By a vote of eight to one, the Court struck down a prior approval permit requirement for door-to-door canvassing.[148] The Court did express its concern for safety and fraud, but offered that there are other ways to deal with those issues.[149] The lone dissenter was Chief Justice Rehnquist, who appeared very upset with the decision. He cited the terrible tragedy that occurred to the Dartmouth College professor and his wife, who were murdered by two young teenagers who came to their door pretending to be conducting a survey and came into their

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[140] *See, e.g., Marsh*, 326 U.S. at 504-05; *Martin*, 319 U.S. at 144; *Cantwell*, 310 U.S. at 303; *Murdock*, 319 U.S. at 111.

[141] *Watchtower*, 536 U.S. at 166.

[142] *Id.*

[143] *See* City of Ladue v. Gilleo, 512 U.S. 43 (1994).

[144] *Reno*, 521 U.S. at 850 (stating that the internet "enables tens of millions of people to communicate with one another and to access vast amounts of information from around the world.").

[145] *Watchtower*, 536 U.S. at 163 (quoting *Martin*, 319 U.S. at 144-46).

[146] *Id* at 162-63.

[147] *Id* at 165.

[148] *Id* at 152.

[149] *Watchtower*, 536 U.S. at 168-69 (quoting Schaumburg v. Citizens for a Better Environment, 494 U.S. 620, 639 (1980)).

home and murdered them.[150] Chief Justice Rehnquist almost implied that the Court would have blood on its hands from this holding.[151] He appeared almost obsessed with this issue when he mentioned the Dartmouth murders three times in his dissent.[152] In any event, Justice Stevens writing for the majority thought it was too remote a risk to be overly concerned about and, more importantly, to justify this blanket restriction of First Amendment rights.[153]

BE&K CONSTRUCTION CO. V. NLRB

BE&K Construction v. NLRB[154] is mostly a labor regulation case, but it is also a First Amendment case. What had occurred was a company in dispute with a labor union filed a lawsuit against the union charging various unfair labor practices.[155] The union then filed an unfair labor charge against the company for having filed the lawsuit.[156] The National Labor Relations Board (NLRB) sustained the union's charge.[157] The issue of this case was: is going to court a First Amendment protected right?[158] The Court had long held that to petition the government for redress, as in litigation, is part of your right to petition as well as your right to speak.[159] Therefore, a company or business that goes to court and

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[150] *Watchtower*, 536 U.S. at 172-73 (Rehnquist, C.J., dissenting) (referring to Pamela Ferdinand, *Dartmouth Professors Called Random Targets; Indictment: Teens Sought Bank Codes*, WASH. POST, February 20, 2002, at A2).

[151] *Id.* at 173.

[152] *Id* at 172-73, 177, 179.

[153] *Id* at 167-68.

[154] 536 U.S. 516, 122 S. Ct. 2390 (2002).

[155] *Id.* at __, 122 S. Ct. at 2393.

[156] *Id.* at __, 122 S. Ct. at 2394.

[157] *Id.* at __, 122 S. Ct. at 2395.

[158] *Id.* at __, 122 S. Ct. at 2395.

[159] *BE & K Constr.*, 536 U.S. 516, __, 122 S. Ct. 2390, 2396 ("We have recognized this right to petition as one of the 'most precious of the liberties safeguarded by the Bill of Rights.'") (quoting Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222 (1967)). The Supreme Court held that freedom of speech, assembly, and petition guaranteed by First and Fourteenth Amendments gave a union a right to hire an attorney on a salary basis to assist its members in assertion of their legal rights with respect to processing of worker's compensation claims. *Id.*; *see also* United States v. Cruikshank, 92 U.S. 542, 552 (1876).

asserts a nonbaseless claim against a competitor, or against someone they are in an adverse context with, cannot be subject to regulatory punishment because of filing a valid, even though ultimately, unsuccessful lawsuit against their adversary.[160]

This holding expands the First Amendment right to petition to now include the right to speak through litigation in the context of a labor dispute.[161]

REPUBLICAN PARTY OF MINNESOTA V. WHITE

Republican Party of Minnesota v. White[162] and *Zelman v. Simmons-Harris*[163] are the most significant decisions of this Term of the Supreme Court. I predict that in future years, these two cases will have the most impact on our country.

Republican Party of Minnesota v. White is a case involving elections for judicial office and the restriction of speech that can be uttered by judicial candidates during judicial elections.[164] The Minnesota Supreme Court adopted a canon of judicial conduct that prohibits a "'candidate for a judicial office' from 'announc[ing] his or her views on disputed legal or political issues.'"[165] A candidate for Associate Justice challenged this canon and petitioned the United States Supreme Court for *certiorari*.[166] The issue presented was whether such a restriction on the speech of judicial candidates for elective judicial office is a violation of the First Amendment.[167] The Court held in a conservative-liberal, five-four split that this restraint was a violation of the First Amendment.[168]

The reasoning of the Court, as expressed in an opinion delivered by Justice Scalia, was that if there are going to be

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[160] *BE & K Constr.*, 536 U.S. at __, 122 S. Ct. at 2401.

[161] *Id.* The right to litigate is protected by a number of amendments. *See, e.g.*, U.S. Const. amend. VII; U.S. Const. amend. XIV § 1.

[162] 536 U.S. 765, 122 S. Ct. 2528 (2002).

[163] 536 U.S. 639, 122 S. Ct. 2460 (2002). *See* discussion *infra* at notes 181-212.

[164] *Republican Party*, 536 U.S. at __, 122 S. Ct. at 2531.

[165] *Id.* at __, 122 S. Ct. at 2531.

[166] *Id.* at __, 122 S. Ct. at 2532.

[167] *Id.* at __, 122 S. Ct. at 2531.

[168] *Id.* at __, 122 S. Ct. at 2542.

elections it is imperative that the candidates talk about the issues of the election.[169] The opinion points to a tension between Minnesota's law requiring elections of judges rather than appointing them and such a First Amendment restriction.[170] The Court did recognize the impropriety and conflict of interest of a judge asserting promises of how he or she would decide a specific case.[171] Nonetheless, beyond that, discussions of views on areas of law or issues of law cannot be banned in an election context.[172]

One might ask for the rationale behind such a decision. The Court offered that the people who are making the ultimate decision in an election, the voters, have a right to know what the candidates feel about pertinent issues.[173] If a candidate chooses to run a campaign critical of the court or run on a platform supportive of the court, the voters have a right to know what kind of candidate is asking to be elected and what kind of views that candidate has on general constitutional issues.[174] The basic premise of the Court's opinion is that under the First Amendment, you cannot have an election without allowing the candidates to discuss the issues of the election.[175]

The dissenters argued that this concept of an open dialogue between candidates for political offices, executive and legislative offices, is imperative, but elections for judicial offices are different.[176] Justice Stevens observed that it is better to have elections for judges with some restrictions, than to have wholly appointed justices, where there is no democratic input, or conversely, elections with no restrictions whatsoever.[177] Thus, the

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[169] *Republican Party*, 536 U.S at __, 122 S. Ct. at 2538.

[170] *Id.* at __, 122 S. Ct. at 2541.

[171] *Id.* at __, 122 S. Ct. at 2537.

[172] *Id.* at __, 122 S. Ct. at 2542.

[173] *Id.* at __, 122 S. Ct. at 2545 (Kennedy, J., concurring).

[174] *Republican Party*, 536 U.S. at __, 122 S. Ct. at 2541. Ironically, New York's liberal Senator Charles E. Schumer has quoted Justice Scalia in order to justify the Senator's attempt to ascertain the views of President George W. Bush's appointees for the federal bench.

[175] *Id.* at __, 122 S. Ct. at 2542.

[176] *Id.* at __, 122 S. Ct. at 2551 (Stevens, J. dissenting). Stevens was joined in this opinion by Justices Souter, Ginsburg, and Breyer. Justice Ginsburg also filed a dissenting opinion, in which Justices Stevens, Souter, and Breyer joined. *Id.* at __, 122 S. Ct. at 2546.

[177] *Id.* at __, 122 S. Ct. at 2548.

dissenters concluded that this focused restraint on a candidate not being able to talk about her views on disputed legal or political issues is a good price to pay for continuing to hold elections for judicial offices.[178]

This case is pivotal in that it clearly sets forth the Court's view on political speech restrictions. In the coming term, the Court will probably grant review of a case involving a challenge to the new campaign finance law.[179] *Republican Party of Minnesota*[180] gives us some indication of how some of the Justices view restrictions on political campaign speech.

ZELMAN V. SIMMONS-HARRIS

Zelman v. Simmons-Harris[181] was a closely watched case involving school vouchers in the City of Cleveland. It was previously before the Sixth Circuit.[182] The issue raised relates closely to President Bush's interest in "faith-based" organizations involving themselves in traditional government programs and services.[183] The thought in some circles and concern in other circles is that this opinion may open the door to more "faith-based" traditional government programs and services.[184]

The Cleveland school voucher program is a program whereby the state appropriates funds to be used by parents to pay for tuition for children attending private schools, including parochial schools.[185] Indeed, most of the parents who took

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[178] *Republican Party*, 536 U.S. at __, 122 S. Ct. at 2557-58 (Ginsburg, J., dissenting).

[179] McConnell v. Federal Election Committee, No. 02-0582 (D. D.C. Mar. 27, 2002) (involving a wholesale constitutional challenge to the provisions of the McCain-Feingold law).

[180] 536 U.S. 765, 122 S. Ct. 2528.

[181] 536 U.S. 639, 122 S. Ct. 2460 (2002).

[182] Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000).

[183] The author extrapolates a connection between *Zelman* and President Bush's platform on faith-based initiatives. *See, e.g.*, Laurie Goodstein, *The Supreme Court: Religious Programs; Voucher Ruling Seen as Further Narrowing Church-State Division*, N.Y. TIMES, June 28, 2002, at A24. *Zelman*, 536 U.S. at __, 122 S. Ct. at 2462.

[184] *See, e.g.*, Jason S. Marks, *What Wall? School Vouchers and Church-State Separation After Zelman v. Simmons-Harris*, 58 J. MO. B. 354 (2002).

[185] *Zelman*, 536 U.S. at __, 122 S. Ct. at 2463.

advantage of this program did have children who attended parochial schools.[186] Benefits were also provided to students attending certain public schools.[187] This feature of the school voucher program or tuition subsidy program, made it more palatable to the five Majority Justices, and certainly to Justice O'Connor's crucial vote.[188]

The Court utilized a bifurcated test to decide whether this government program constitutes an improper establishment of religion.[189] The first arm of the test, is what is the *purpose* of the program; is it to benefit religion?[190] The second arm of the test is whether the *effect* of the program is to benefit religion?[191] In *Zelman* the Court held that the purpose of the voucher program is to benefit children who are suffering in one of the worst educational systems in the country, a system that was taken over by the state legislature by Federal court order.[192] Therefore, the purpose of the program is a critical one, to improve education.[193] As to the effect of this program on the establishment of religion, the Court held that this program does not have a religious effect for two reasons. First, because it is neutral as to religion; it provides benefits of tuition assistance, regardless of what kind of private school a child goes to.[194] The program also provides subsidies or benefits for children who attend public schools in the suburban areas surrounding Cleveland.[195] Thus, the Court held that the program itself is neutral as to religion and therefore undercuts the notion that its effects are to benefit religion.[196] Second, parents exercise free choice.[197] This is a program where it is the individual parents, not the government, who are directing the benefits of the

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[186] *Id.* at __, 122 S. Ct. at 2464.
[187] *Id.*
[188] *Id.* at __, 122 S. Ct. at 2473 (O'Connor, J., concurring). Justice Thomas joined this opinion.
[189] *Id.* at __, 122 S. Ct. at 2467.
[190] *Zelman*, 536 U.S. at __, 122 S. Ct. at 2466.
[191] *Id.* at __, 122 S. Ct. at 2466.
[192] *Id.* at __, 122 S. Ct. at 2467-68.
[193] *Id.*
[194] *Id.* at __, 122 S. Ct. at 2468.
[195] *Zelman*, 536 U.S. at __, 122 S. Ct. at 2468.
[196] *Id.*
[197] *Id.*

available resources toward a religious, secular, or public school education.[198]

The Court cited three cases to support this proposition. About twenty years ago, in *Mueller v. Allen,* the Court upheld a program providing a tuition tax deduction for education expenses of all parents.[199] There were two other cases involving special education benefit funding; in *Witters v. Washington Department of Services for the Blind*, vocational training,[200] and in *Zobrest v. Catalina Foothills School District*, training for a disabled student.[201] In both cases government funding was used to enable a student to attend a religious institution.[202] The Court upheld those benefits on the ground that they were both neutral toward religion and involved free choice by the individual who was the beneficiary of the program, not a compulsion or a direction by the government.[203]

Relying on this reasoning in *Zelman*, the Supreme Court conservative majority held that the voucher program did not violate the Establishment Clause despite its result that the State paid money to private schools as well as religious schools.[204] The Court further considered that the funds were paid as part of a larger education program.[205]

The four dissenters, Justices Stevens, Souter, Ginsburg, and Breyer thought otherwise.[206] They proposed that the new standard of neutrality and free choice were too minimal in terms of protecting Establishment Clause values.[207] The dissent was particularly taken by the fact that fifty years ago in a case called *Everson v. Board of Education*,[208] the Court held that the Establishment Clause prohibits the use of public funds to support

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[198] *Id.* at __, 122 S. Ct. at 2464.
[199] 463 U.S. 388, 390 (1983).
[200] 474 U.S. 481, 482 (1986).
[201] 509 U.S. 1, 3 (1993).
[202] *See Zobrest*, 509 U.S. at 3-4; *Witters*, 474 U.S. at 482.
[203] *Zobrest*, 509 U.S. at 13-14, *Witters*, 474 U.S. at 487-88.
[204] *Zelman*, 536 U.S. at __, 122 S. Ct. at 2467-68 (majority opinion); *id.* at __, 122 S. Ct. at 2473 (O'Connor, J., concurring).
[205] *Id.* at __, 122 S. Ct.at 2482.
[206] *Id.* at __, 122 S. Ct. at 2485.
[207] *Id.* at __, 122 S. Ct. at 2490.
[208] 330 U.S. 855 (1947).

religious education.[209] Now, in effect, the Court sustained the use of public funds to support religious education and that is a violation both of the *Everson* principle and the Establishment Clause on which it is based.[210] What concerned the dissenters the most was that, of the children who benefited from this program, an overwhelming number of them were children who were attending faith-based institutions.[211] Moreover, there was the sense that those children in effect were coerced into doing so by the tuition subsidy because they could not obtain anything resembling a decent education in Cleveland public schools.[212]

When the Court upheld this voucher program, it set the battlefield for future wars over government funding of faith-based welfare programs. Future Courts will determine the final outcome.

CONCLUSION

This term witnessed a closely balanced and sharply divided Court. A five–to–four schism for the First Amendment and a lot of five–to–four decisions resulting. That delicate, difficult balance may remain in the current Term as well.

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[209] *Zelman,* 122 S. Ct. at __, 122 S. Ct. at 2485 (Souter, J., dissenting) (citing *Everson*, 330 U.S. at 16).

[210] *Id.*

[211] *Id.* at __, 122 S. Ct. at 2494.

[212] *Id.* at __, 122 S. Ct. at 2495.

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