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The First Amendment in the Supreme Court: The Future Lies Ahead

Joel Gora

THE FIRST AMENDMENT IN THE SUPREME COURT: THE FUTURE LIES AHEAD

Hon. Leon D. Lazer:

We are now going to return to the consideration of the First Amendment decisions of the Supreme Court of the last term. To discuss those cases, we have the Associate Dean of Brooklyn Law School, who has been a consistent participant in our programs. His presentations, and ultimately the written version of them in the Touro Law Review, have always been of great interest to members of the audience. Professor Joel Gora is general counsel to the American Civil Liberties Union. He has been national staff counsel to the New York Civil Liberties Union, has served as a clerk in the Second Circuit, and has authored a book *The Right To Protest.*[1] He is undoubtedly one of the leading authorities in the country regarding the First Amendment. It is my pleasure now to present to you Professor Joel Gora.*

INTRODUCTION

Dean Joel M. Gora:

Thank you, Judge Lazer. It's a pleasure to be here. I feel that with my colleague, Will Hellerstein, following me in the batting order, I should welcome you to the Brooklyn Law School portion

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* Associate Dean and Professor of Law, Brooklyn Law School.

1. JOEL M. GORA ET AL., THE RIGHT TO PROTEST (1991).

of the program. But we are delighted to be here. Normally, Hellerstein goes first, and then I get to say that he is such a tough act to follow. This time I go first, and I am pleased at the opportunity.

Last year, at this conference, I described the Court's 1994 term as a championship season for the First Amendment,[2] with seven of eight cases[3] resulting in a victory for the constitutional claimant. This year there were fewer cases, five altogether, but with the same basic bottom line. The First Amendment claim completely prevailed in four of the five cases, and won on two out of three issues in the fifth case.[4] It sounds almost like a clean sweep for free speech. Indeed, some commentators have even characterized the Court as "the fiercest defender of the First Amendment in history."[5] Although some friends of the First Amendment have begun to question whether the Court gives too much protection to free speech, I am not in that camp. Rather, I have never met a First Amendment victory that I didn't like. In that regard, there was much to take heart from in this year's

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

3. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995); Rosenberger v. Rector of Univ. of Virginia, 115 S. Ct. 2510 (1995); Capitol Square Review v. Pinette, 115 S. Ct. 2440 (1995); Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995). The Court upheld the First Amendment claims in the first seven cases and denied the claim in the eighth case.

4. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996); Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309 (1996); Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 116 S. Ct. 2342 (1996); O'Hare Truck Service, Inc. v. City of Northlake, 116 S. Ct. 2353 (1996). Denver Area Educ. Telecommunications Consortium, Inc. v. Federal Communications Comm'n, 116 S. Ct. 2374 (1996).

5. Burt Neuborne, *Pushing Free Speech Too Far*, N.Y. TIMES, July 15, 1996, at A13.

term. In the commercial speech case, Justice Stevens wrote a powerful opus condemning governmental paternalism about what information consumers should have,[6] and Justice Thomas wrote an equally uncompromising concurring opinion.[7] In the cable decency case, Justice Kennedy, the Court's foremost First Amendment advocate, wrote a classic opinion urging equal protection for categories of protected speech.[8] In the campaign finance[9] case, Justice Thomas wrote a sweeping opinion

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6. *44 Liquormart, Inc.*, 116 S. Ct. 1495 (holding that a Rhode Island statute that prohibited all price advertising of alcoholic beverages violated the First Amendment because this complete restriction of truthful and non-misleading commercial speech was not the least restrictive means available for achieving the state's goal of promoting temperate alcohol consumption). *Id.* In his opinion, Justice Stevens observed:

> Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.

Id. at 1508.

7. *44 Liquormart, Inc.*, 116 S. Ct. at 1515-20 (1996) (Thomas, J., concurring). Justice Thomas espoused the view that the government may never claim a "legitimate interest" in concealing information about the legal use of a product in order to decrease the sale of it. *Id.*

8. Denver Area Educ. Telecommunications Consortium, Inc. v. Federal Communications Comm'n, 116 S. Ct. 2374, 2404 (1996).

9. *Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2309. In *Colorado Republican Fed. Campaign Comm.*, the Committee ran several radio commercials and published two pamphlets prior to the state Republican nomination alleging inconsistencies in the Democratic senatorial candidate's views and voting records. *Id.* at 2312. The Federal Election Commission, acting on a complaint from the Colorado Democratic party, concluded that one of the radio spots was a "coordinated expenditure" - an expenditure made in behalf of a particular candidate. *Id.* Justice Thomas concluded that a provision that limits political parties' financial support of congressional candidates cannot survive the strict judicial scrutiny mandated for such First Amendment cases. *Id.* at 2311. The Court determined that if the expenditure was in fact independent in nature it would violate the First Amendment to apply the restrictions in this case. *Id.* at 2315.

condemning *all* governmental restrictions of political funding as deplorable violations of the core First Amendment protection of political speech[10] -- a position identical to that advocated by the card-carrying members of the ACLU.

But none of these strong opinions spoke for the Court. Although the First Amendment claimants prevailed by relatively lopsided votes in the five cases, the lopsidedness of the results belied the decided divergence of approaches toward the reasons for the results. Indeed, on only one issue were there opinions for the entire Court: namely, the new recognition of First Amendment rights of independent government contractors. That was a landmark ruling that has powerful implications for local government. Powerful opinions were written reaffirming and extending the Court's unconstitutional conditions doctrine as it limits government's power to penalize employees, beneficiaries, and now, independent contractors, for exercising their freedom of speech and association.

Despite the lopsided free speech victories, however, I wondered why I was not happier and why the term left me with a vague sense of unease about where the Court was going on these issues. It was a little like lite beer: "tastes great, less filling," but still something missing.

My unease flowed from the fact that the dominant middle on the Court seems decidedly unwilling to take hard, categorical approaches to First Amendment doctrine. Instead, the prevailing pluralities seem more comfortable opting for softer, ad hoc adjudications, looking for ways to defer to majoritarian and political branches and accommodate the need to address societal problems with the duty to honor constitutional imperatives, using the First Amendment only as a last resort rather than as a first principle in dealing with governmental restrictions of communication. The three Justices who comprise that center are Justices Souter, O'Connor and Breyer, and my sense is that the emerging leader of that triumvirate is the newest Justice, Justice Breyer. His biography and methodology reinforce each other.

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10. *Id.* at 2326-27.

Having been a Senate Legislative Counsel and an expert on administrative law and government regulation, he eschews categorical resolutions in favor of interim adjudications.[11] One can see that in his plurality opinion in the campaign finance case and, most powerfully, in his plurality opinion in the cable decency case. Indeed, if one compares the interim approach of his opinion with the categorical approach in Justice Kennedy's opinion, one can see a microcosm of the difference between the common law model of adjudication and the administrative law - legal process model of adjudication. If I may be so bold, I think the contrast between these two styles suggest broader themes and implications: for in Justice Kennedy's classic, common law approach we see the confidence of modernism, while in Justice Breyer's more contemporary administrative law approach we see the stance of post-modernism, where certainty is questioned and contingency is expected. But more about that later.

Another theme that I noticed regarding the Court's five First Amendment cases is one that reminds me of a Raymond Chandler novel. In his novels, the plot line usually involves some horrible thing that happened twenty or twenty-five years ago that was covered up and unknown. It emerges now and becomes the basis for the plot. Well, twenty or twenty-five years ago was actually twenty years ago - 1976. In order to understand what the Court did in 1996, one has to go back to 1976. Each of the major First Amendment issues before the Court this past term is a reprise of themes originally sounded twenty years ago, and the Court has struggled with them ever since.

This year's commercial speech case,[12] for example, which invalidated Rhode Island's total ban on advertising of liquor and beer prices, is rooted in the Court's 1976 ruling in *Virginia State*

11. Justice Breyer was a Professor at Harvard Law School from 1967 to 1981. He served as Chief Counsel to the United States Senate Judiciary Committee from 1979 to 1981.

12. *44 Liquormart, Inc.*, 166 S. Ct. 1495 (1996).

Board of Pharmacy.[13] In that case, the Court first recognized broad protection for commercial speech and struck down a Virginia ban on any advertising of prescription drugs by pharmacies. Since then, the Court has wrestled with the issue of how much protection to afford commercial speech. The outcome of this battle is of great importance to state and local governments which seek to regulate commercial advertising in a wide variety of ways.

Two cases this term involved whether the First Amendment gives independent government contractors the right to be free from political retaliation by government agencies and officials. Those cases trace their origins to another 1976 decision, *Elrod v. Burns.*[14] which was the first case to hold that the time-honored practice of political patronage can violate the First Amendment when it results in the firing of a public employee who belongs to the losing political party.[15] Since then, the Court has relentlessly expanded that ruling and the results this term are a significant watershed in that development. In doing so, the Court has had to decide whether the political speech and association of government employees, workers and contractors were subject to the regulatory regime of control reflected in cases like *Letter Carriers,*[16] which held that civil service employees had less political freedom than average citizens, and *Red Lion Broadcasting Company v. FCC,*[17] which held that broadcasters

13. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). In *Virginia State Bd. of Pharmacy*, consumers of prescription drugs challenged the validity of a Virginia statute that provided that a pharmacist is guilty of unprofessional conduct for advertising the prices of prescription drugs. *Id.* at 749. The Court concluded that commercial speech enjoys First Amendment protections and invalidated the Virginia statute on that basis. *Id.* at 757.

14. 427 U.S. 347 (1976).

15. *Id.* at 348.

16. United States Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973). In *Letter Carriers*, the Court upheld Hatch Act restrictions on active involvement in partisan political campaigns by federal civil service employees.

17. Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367 (1969). In *Red Lion,* a book author, pursuant to the fairness doctrine,

had less editorial freedom than newspaper publishers; or, rather, to the principles of cases like *New York Times v. Sullivan*[18] and *Cohen v. California*,[19] which extolled the values of unfettered free speech by a free press and a free people.

Campaign funding controls pose a very similar foundational First Amendment question. Should those laws be subject to the more forgiving doctrines of cases like *Red Lion* and *Letter Carriers*, on the theory that government can modulate the political funding and regulate the political speech of those who seek government power, or the more unyielding instincts of cases like *Times v. Sullivan* and *Cohen v. California* which are deeply intolerant of government efforts to modulate political speech and communication. Ever since the *Buckley v. Valeo* ruling in

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demanded free air time to reply to personal attacks. *Id.* at 372. The Supreme Court ruled that nothing in the First Amendment prohibited requiring a broadcaster to share its frequency with others to allow them to express the views of the community. *Id.* at 389.

18. 376 U.S. 254 (1964). Respondent alleged that he had been defamed in a full page advertisement published by the New York Times on March 29, 1960. *Id.* Although the advertisement did not mention respondent by name, he contended that the word "police" referred to him as the Commissioner who supervised the police department. *Id.* The Court articulated a standard to determine when to "award damages for libel in actions brought by public officials against critics of their official conduct." *Id.* at 283. Proof of actual malice in publishing the falsehood was deemed necessary for an award of damages for libel. *Id.* The Supreme Court held that the advertisement was an impersonal attack on governmental operations, and to allow a libel cause of action for an official responsible for those operations is constitutionally impermissible. *Id.* at 292.

19. Cohen v. California, 403 U.S. 15 (1971). In *Cohen*, the defendant, as n expression of protest against the Vietnam War, wore a jacket on which the words "Fuck the Draft" were clearly written. *Id.* at 16. He wore the jacket in the hallway of the Los Angeles County Courthouse, were he was consequently arrested. *Id.* The defendant was ultimately convicted of disturbing the peace pursuant to a California statute that prohibited "offensive conduct." *Id.* The Court held that the defendant's right to freedom of expression, as guaranteed by the First and Fourteenth Amendments, was violated. *Id.* It concluded that more compelling reasons are required in order to charge an individual with criminally offensive conduct. *Id.* at 26.

1976,[20] where the Court held that candidates and causes have an unqualified right to spend money to communicate their messages, but only a qualified right to raise money for such communications, the Court has struggled with those issues.[21] This term's *Colorado Republican Federal Campaign Committee* case[22] was no different, and the Court took care of some unfinished business from *Buckley* by holding that campaign expenditures by political parties, which are not made in coordination with the favored party candidate, may not be restricted or restrained.[23]

Finally, the decision in the cable decency case traces its doctrinal heritage to the 1976 decision in *Young v. American Mini-Theatres*,[24] where a divided Court held that sexual speech, though not legally obscene, was nonetheless entitled to lesser constitutional protection and could be subjected to more pervasive government regulation than political speech. That was a case of interest to local governments. It involved whether or not the city government can zone those bookstores and theaters that produce sexually-oriented materials differently under the First Amendment.[25] These were not obscene materials, which could be banned completely, but rather sexually-oriented materials. They would be treated differently under the First Amendment -- the answer in the *Young* case was basically "yes."[26] In essence, you can treat lesser, lower forms of sexually-oriented political speech differently than you could treat other forms, even though they were both theoretically entitled to First Amendment protection.[27] That ruling was, in turn followed two years later in the broadcast decency case, *Pacifica*

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20. 424 U.S. 1 (1976).
21. *Id.* at 28-33.
22. *Colorado Republican Fed. Campaign Comm.*, 116 S. Ct. at 2309.
23. *Id.* at 2315.
24. 427 U.S. 50 (1976).
25. *Id.* at 52.
26. *Id.* at 70-71.
27. *Id.*

Foundation,[28] which was the direct doctrinal predecessor of the cable decency case. Like the commercial speech case, the prominent theme here is whether all "protected" speech is entitled to equal protection. Or to paraphrase that great enemy of political correctness, George Orwell, do we say that all categories of protected speech are equal, but some are more equal than others?[29]

One controversial feature of the 1976 cases was what I would call the expansion-dilution debate. Those who wanted to expand the scope of the First Amendment beyond its core of political speech to encompass commercial and sexual speech, or to expand the nature of First Amendment protection beyond political messages to include the funding of such messages, argued for a unitary concept of the First Amendment. They insisted that a rising tide raised all boats and that the protection of new forms or types of speech would only add to the protection of the traditional political categories. However, others worried that expansion would lead to dilution and that the Court, if it admitted "lesser" kinds of speech into the charmed circle, would, understandably, give that speech "lesser" protection. That "lesser" protection would ultimately become a blight on the First Amendment landscape and be used to justify regulation of political speech as well. If First Amendment protection got spread around, it would soon get watered down.

Let us turn to this term's work product to see who was the better prophet.

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28. Federal Communications Comm'n v. Pacifica Foundation, 438 U.S. 726 (1978) (holding that the Commission's determination that a prerecorded satiric monologue entitled "Filthy Words" was indecent, and therefore, statutorily prohibited did not violate the First Amendment rights of the broadcaster, notwithstanding the fact that the monologue was not "obscene").

29. "All animals are equal, but some animals are more equal than others." GEORGE ORWELL, ANIMAL FARM, ch. 10 (1945).

I. 44 LIQUORMART V. RHODE ISLAND[30]

Twenty years ago, in the landmark *Virginia State Board of Pharmacy*[31] case, the Court ruled that Virginia could not ban the truthful advertising of the prices of lawful prescription drugs,[32] especially when it had the paternalistic purpose of trying to protect people from themselves.[33] In the *44 Liquormart* case this year, the Court had before it a Rhode Island statute which banned the truthful advertising of the price of lawfully sold alcoholic beverages. The statute regulated licensed in-state liquor stores and also controlled in-state advertising for liquor stores in adjacent states like Massachusetts and Connecticut. The liquor store had not even advertised the price of anything, but its newspaper ad did contain pictures of vodka and rum bottles and the word "WOW" in large letters, which the state Liquor Control Administrator concluded was an implied reference to bargain prices for liquor.

One would have thought that *Virginia State Board of Pharmacy* would have controlled the *44 Liquormart* ruling. But the Court's commercial speech doctrine had staggered back and forth a good bit following the Virginia case, so the rationale in the *44 Liquormart* case was anything but a foregone conclusion.

Two cases would stand in the way of a quick victory in *44 Liquormart*: the 1980 *Central Hudson*[34] ruling with its four-part

30. 116 S. Ct. 1495 (1996).

31. 425 U.S. 748 (1976). In *Virginia State Bd. of Pharmacy*, consumers of prescription drugs challenged the validity of a Virginia statute which provided that a pharmacist who advertised the prices of such drugs was guilty of unprofessional conduct. *Id.* at 749. The Court invalidated the statute, concluding that this kind of commercial speech enjoys First Amendment protections. *Id.* at 757.

32. *Id.* at 756.

33. *Id.*

34. Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980).

test[35] and the 1985 *Posadas*[36] decision with it's "greater/lesser" rationale.[37]

The 1976 *Virginia State Board of Pharmacy* decision sparked a good deal of criticism from both the left and the right. The right charged the Court with judicial activism in extending the scope of First Amendment well beyond the political realm that the Framers understood encompassed within the phrase "the freedom of speech." Who can forget then-Justice Rehnquist's complaint, dissenting in a 1977 decision which extended First Amendment protection to the non-prescription sale of condoms, that the patriots who fought at Bunker Hill and Shiloh to protect and defend the Constitution would be surprised to learn that it protected condom sales at gas stations.[38] Likewise, the left complained that giving serious protection to speech offering the sale of goods and services was a backdoor effort to give constitutional protection to the sale of goods and services themselves, and would herald a return to the discredit days of

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35. *Id.* at 566. The first requirement of the four part test is that the speech at issue "at least must concern lawful activity and not be misleading." *Id.* The second requirement is that "the asserted governmental interest [be] substantial." *Id.* The third requirement is that "the regulation directly advance the governmental interest asserted." *Id.* The fourth requirement is that the regulation "not [be] more extensive than is necessary to serve that interest." *Id.*

36. Posadas de Puerto Rico Assoc's. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (holding that a Puerto Rico statute prohibiting the use of the word "casino" in advertisements was facially constitutional with respect to the First Amendment in light of the Puerto Rico Superior Court's narrow statutory interpretation).

37. *See infra* note 52.

38. Carey v. Population Services Int'l, 431 U.S. 678, 717 (1977) (Rehnquist, J., dissenting). In *Carey*, the Court held that a New York State law that banned the advertising and display of legal, non-prescription contraceptives could not pass First Amendment scrutiny on the claim that such action would serve to embarrass and offend the public and tacitly condone adolescent sexual activity. *Id.* at 617, 700.

Lochner v. New York[39] when the Court used economic substantive due process to frustrate populist legislation.

The Court's approach in the 1980 *Central Hudson*[40] case was a retrenchment from the broader protection of commercial speech staked out in *Virginia State Board of Pharmacy*. Although the Court invalidated a complete ban on promotional advertising by utility companies, the Court did so by fashioning the well-known four-part test to measure the validity of any restraint on commercial speech. First, does the speech promote a lawful product or service in a truthful manner.[41] Second, does the government nonetheless have a substantial interest in preventing the speech.[42] Third, does the regulation "directly advance" the governmental interest asserted,[43] and fourth, is the restriction not more extensive than necessary to serve that interest.[44]

Although the test has been applied to strike many restrictions on commercial speech, its malleability is apparent and outcomes are often in doubt. Thus, for example, the test permitted Puerto Rico to outlaw advertisements for lawful, regulated gambling casinos,[45] Florida to prevent lawyers from contacting accident victims for one month,[46] and Congress to ban radio

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39. Lochner v. New York, 198 U.S. 45 (1905). In *Lochner*, a New York State labor statute prohibited employers from either requiring or permitting employees of bakeries to work in excess of sixty hours in one week. *Id.* at 46. The Court held that the statute was an unconstitutional violation of the rights of employees and employers to enter into contracts for the sale and purchase of labor respectively, as guaranteed by the Fourteenth Amendment. *Id.* at 53.

40. *Central Hudson*, 447 U.S. at 566.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Posadas*, 478 U.S. 328.

46. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995). In *Florida Bar*, an attorney and a lawyer referral service brought suit alleging that a Florida Bar regulation, which prohibited the use of direct mail to solicit potential clients in personal injury and wrongful death matters within thirty days of the incident giving rise to the claim, violated the First Amendment. *Id.* at 2374. The Court deemed the rule constitutional, observing that the Bar had a substantial interest in safeguarding the privacy and well-being of victims and

advertisements for legal state lotteries, where the radio station broadcast from a state which had not legalized lotteries.[47]

On the other hand, last year, in *Rubin v. Coors Brewing Company*,[48] a unanimous Court had struck down another commercial speech/alcoholic beverage restriction, a federal statute which outlawed putting the alcohol content on a can of beer. That is why the stage appeared to be set for a possible reconsideration of the *Central Hudson* formula. However, a majority could not be mustered for that revision. Instead, on most of the key doctrinal issues, Justice Stevens' opinion spoke only for shifting pluralities, rather than for the Court.

First, he sought to break out of the box whereby all commercial speech restrictions are judged by the same *Central Hudson* test by insisting that the Court be more discerning about the nature of and reasons for the restriction at issue:

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family members during this period, as well as in preserving the dignity of the legal profession. *Id.* at 2374-75. The Court concluded that the rule in question would advance these interests substantially and was sufficiently narrow in scope. *Id.* at 2374.

47. United States v. Edge Broadcasting Co., 509 U.S. 418 (1993). In *Edge*, the Court held that federal statutes prohibiting the radio broadcasting of lottery advertising by licensees located in non-lottery states serve to balance the interests of lottery and nonlottery states. *Id.* at 428. This balancing applies even when the radio station is located in a non-lottery state but has signals which reach into the lottery state. *Id.* at 435. The Court held that the prohibitive statutes were not more extensive than necessary in order to enforce the restriction in nonlottery states but not interfere with the policy of the lottery states. *Id.* at 435-36.

48. 514 U.S. 476 (1995). In *Rubin*, a brewer applied to the Federal Bureau of Alcohol, Tobacco and Firearms for approval of proposed beer labels which would display alcohol content. Section 5(e) (2) of the Federal Alcohol Administration Act prohibited beer labels from displaying alcohol content. *Id.* at 1588. The brewer sued on the ground that this prohibition was a violation of the brewer's First Amendment protection of commercial speech. *Id.* The Government's defense of deterring "strength wars" among brewers, although deemed "substantial," was held by the Court to violate the First Amendment by failing to advance that interest in a direct and material way. *Id.* at 1594.

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.[49]

Applying this distinction, the plurality would rule that total bans that target truthful, non-misleading commercial messages rarely protect consumers and usually impede debate over central issues of public policy: "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."[50] Judged by that standard, the plurality insisted that a "blanket prohibition against truthful, nonmisleading speech about a lawful product" must be reviewed with special care, requires greater justification and therefore must be shown to "significantly" achieve its goal of reducing alcohol consumption.[51]

Second, Justice Stevens still only spoke for a plurality in the critical portions of his opinion which declined deference to "legislative judgment" about promoting temperance, rejected any "vice exception" to commercial speech protection and abandoned the "greater/lesser" approach of the *Posadas* gambling casino case.[52] Under that reasoning, since the State has the "greater" power to ban casino gambling (or liquor consumption), it has the "lesser" power to ban or regulate even truthful advertising of the

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49. *44 Liquormart, Inc.*, 116 S. Ct. at 1515.

50. *Id.* at 1515. Justice Thomas, Justice Kennedy and Justice Ginsburg agreed with Justice Stevens' position. *Id.*

51. *Id.* at 1501.

52. *Id.* at 1499-50. *See Posadas*, 478 U.S. at 345-46. In *Posadas*, the Court concluded that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . ." *Id.*

casino gambling (or liquor consumption). Justice Stevens harshly attacked that reasoning as insensitive to the distinction between regulation of conduct and regulation of speech, and indifferent to the well-settled unconstitutional conditions doctrine that bars the State from conditioning a liquor store license on surrender of free speech rights.[53]

Finally, Justice Stevens did pick up a majority of the Court in his rejection of the notion that the Twenty-first Amendment[54] gives States additional substantive power over rights otherwise protected by the First Amendment, and in his conclusion that Rhode Island had failed to "carry its heavy burden of justifying its complete ban on price advertising. . . ."[55] However, since Justices Breyer and Souter defected on most issues, the general effort to elevate the protection of commercial speech to the level of political speech, and to move the law from *Central Hudson* back to *Virginia State Board of Pharmacy*, fell short.[56]

Although Justice Thomas joined key portions of Justice Stevens' opinion, he would have taken an even more stringent view of the state's power to regulate truthful information about lawful products and services. Like Justice Blackmun before him, Justice Thomas insisted that "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible" and urged the Court to abandon the watered-down *Central Hudson* formula and return to the clearer rule of *Virginia State Board of Pharmacy*. Justice Thomas' performance as an advocate of powerful protection for commercial speech was impressive.[57]

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53. *44 Liquormart, Inc.*, 116 S. Ct. at 1512-13.

54. U.S. CONST. amend. XXI. The Twenty-first Amendment provides in pertinent part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." *Id.*

55. *44 Liquormart, Inc.*, 116 S. Ct. at 1502.

56. *Id.* at 1520. Chief Justice Rehnquist and Justices Breyer and Souter joined in a concurring opinion, delivered by Justice O'Connor. *Id.*

57. *Id.* at 1515-20. (Thomas J., concurring). Justice Thomas espoused the view that the government may never claim a "legitimate" interest in concealing

Finally, however, four Justices (Chief Justice Rehnquist, and Justices O'Connor, Souter and Breyer) saw no need to revisit or question the *Central Hudson* framework. The concurring Justices focused instead on the conclusion that Rhode Island had failed to show that there was a reasonable fit between the means of banning price advertising and the end of encouraging temperance, especially in light of less burdensome alternatives such as increasing sales taxes on liquor.[58]

Last year, in commenting on the beer strength case, I observed that Joe Camel was breathing a sigh of relief. Now that Big Daddy Bill Clinton has sicced his FDA on Joe Camel, what does the *44 Liquormart* decision add to the mix? As you may know, the FDA has imposed a number of regulatory restrictions on the speech of tobacco companies, including regulation of the content and format of advertising (no glossy billboards near schools, but text only; no color ads in magazines read by kids; no logos on hats and horns or party favors, no Virginia Slim tournaments).[59] Apart from the question of the substantive FDA power over tobacco, how will these proposals fare on First Amendment grounds?

Even though there was no commanding majority in the liquor price case, the broad restrictions in the tobacco regulations constitute the kind of blatant content and format controls that would seem to be suspect under either the plurality or concurrence approaches. Even though kids are being protected, under-age drinking was also a concern in the *44 Liquormart* case as well. Otherwise, the government will have to find ways less

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information about the legal use of a product in order to decrease the sale of it. *Id.*

58. *Id.* at 1515.

59. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396, 44582 (proposed 1996). "The agency proposed . . . to prohibit outdoor advertising, including but not limited to billboards, posters, or placards, placed within 1,000 feet of any public playground or playground in a public park, elementary school, or secondary school." *Id.* "The agency is requiring that all permissive outdoor advertising be in a black and white, text-only format." *Id.*

burdensome on speech to encourage kids (and adults) not to smoke. Just Say No.

II. BOARD OF COUNTY COMMISSIONERS, WABAUNSEE COUNTY, KANSAS V. UMBEHR;[60] O'HARE TRUCK SERVICE, INC. V. NORTHLAKE, ILLINOIS[61]

I think it is not an understatement to say that the next pair of cases I will discuss will have far and away the greatest impact on local government of any First Amendment decisions in recent years. These are landmark cases that particularly impact local government. The trend toward downsizing, outsourcing and privatization of government services means that more and more people will relate to government as independent contractors, not as government employees. The two cases this term raised the issue of whether such independent contractors can invoke the protections of the First Amendment in their dealings with government.

I found it very interesting and helpful this morning to think about these cases, as Judge Pratt suggested, not only as First Amendment cases but also in terms of a broader notion of retaliatory mistreatment of people. Singling out somebody for harmful adverse treatment because of his or her status or a protected activity that was engaged in is what was going on in

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60. 116 S. Ct. 2342 (1996). Respondent had been the exclusive trash contractor in Wabaunsee County, Kansas since 1985. *Id.* Mr. Umbehr asserted that his contract was terminated in retaliation for his openly criticizing the County Board's policy with regard to landfill user rates. *Id.* The Court found that "independent contractors appear to lie somewhere between the case of government employees, who have the closest relationship with the government, and . . . persons with less close relationships with the government." *Id.* at 2350. The First Amendment was thus held to protect independent contractors from retaliatory dismissal in the same way that employees are protected. *Id.* at 2352.

61. 116 S. Ct. 2353 (1996).

these cases. You had, in most instances, people who had the status of independent contractors with the government. The issue in the *Umbehr* case[62] was whether a contractor who hauls trash for the county can lose his contract for trashing the county's policies in the public forum.[63] The issue in the *O'Hare* case[64] was whether a contractor who tows wrecks from the highway can lose his contract with the city for refusing to tow the party line.[65] In both cases the Supreme Court held that the contractor was entitled to invoke the protections of the First Amendment against such political retaliation.

These are really, despite the jocularity, very important cases. I almost want to call them "watershed" cases. They involve a mass of important First Amendment law: retaliation issues, the unconstitutional conditions doctrine, the right to belong to whatever political party you choose, and the right to speak your mind on public issues and be free from punishment unless the government has a good reason to punish you. A whole wealth and cluster, about three-hundred pages of case law, is put into a new area and applied. The area is the government's relationship with independent contractors. That has never been done before, and it really is a landmark watershed event. It means that any dealing, in effect, between the government and a contractor involving a possible claim of First Amendment retaliation or of First Amendment victimization or influence becomes a cognizable claim under these two cases.

The story starts a generation ago, in 1968, when the Warren Court was riding high in its protection of political speech, and particularly when it takes the form of citizen criticism of government policies. From *New York Times v. Sullivan*[66] through *Garrison v. Louisiana*[67] and *Keyishian v. Board of Regents,*[68] the

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62. 116 S. Ct. at 2345.

63. *Id.*

64. 116 S. Ct. at 2355.

65. *Id.* at 2356.

66. 376 U.S. 254 (1964).

67. 379 U.S. 64 (1964). A Louisiana criminal libel statute was held to violate the defendant's First Amendment Right to Free Expression by directing

Warren Court had begun to emphasize that individuals, be they public employees or private citizens, could not routinely be punished, criminally or civilly, for their lawful, peaceful criticism of the conduct of government or the actions of its officials. It seemed only natural, therefore, for the Court to hold in *Pickering v. Board of Education*[69] that a public school teacher who was dismissed from his job for writing a letter in the local newspaper criticizing the school board's fiscal policies would be allowed to invoke the First Amendment to challenge such retaliation. Recognizing, however, that the government has a greater interest in the speech and conduct of its employees which differs from its interest in the speech of average citizens, the *Pickering* Court accordingly fashioned a test to balance the off-duty interests of its employees as citizens to comment on matters of public concern and the workplace interest of the government as an employer in promoting the efficiency of the public services it performs through its employees.

In 1976, the Court took the *Pickering* concept, that government workers may not be improperly penalized for otherwise protected, off-duty First Amendment activity and party affiliation, and applied it to a practice as old as the Republic,

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punishment for true statements made with actual malice. *Id.* at 77-78. The defendant District Attorney's criticism of district court judges, who were deemed inefficient, took many vacations, and failed to approve funds for the D.A.'s office to combat crime in the city of New Orleans, was criticism of the official conduct of public officials and criminal libel sanctions would not apply absent actual malice or reckless disregard for the truth. *Id.* at 79.

68. 385 U.S. 590 (1967). In *Keyishian*, faculty members employed by the State of New York were required to follow a New York plan designed to prevent "subversive" persons from obtaining state employment. *Id.* at 591-92. The faculty members were obligated to sign a certificate indicating that they had never been Communists. *Id.* at 592. The Court held that the subsections requiring these signatures were invalid insofar as "they proscribe mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party of the U.S. or of the State of New York." *Id.* at 609-10.

69. 391 U.S. 563 (1968).

namely, political patronage. In *Elrod v. Burns*,[70] the Court held that a newly elected Democratic sheriff could not discharge several Republican employees such as process servers and bailiffs, where such positions were not of a policymaking or confidential nature. The theory was that a public employee's political association was as protected as that employee's political speech and should not be penalized without due cause.

Four years later, in 1980, that protection was expanded to limit patronage dismissals to those few jobs where "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Applying that rule, the Court invalidated the patronage dismissal of two deputy public defenders.[71] Finally, a decade later, the *Elrod* rule was expanded beyond firings of current employees to encompass other forms of personnel decisions, such as hiring, promotion, transfer and recall.[72] Now, in all such circumstances, employees could not be penalized for not belonging to or supporting the party in power.

Moreover, while the *Pickering* "balancing" test is very ad hoc and flexible and contextual, the *Elrod* "political affiliation" test tends to be more categorical and rigid, asking only whether party affiliation is an appropriate requirement for the particular job

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70. 427 U.S. 347 (1976).

71. Branti v. Finkel, 445 U.S. 507 (1980). In *Branti*, the respondents, assistant public defenders, sought a temporary restraining order to prevent their dismissal because of party affiliation. *Id.* at 508. When the Democratic Party took control of the legislature, six of the nine assistants received notices of termination. *Id.* at 509-10. The Court held that the respondents are protected from discharge due solely to their political beliefs pursuant to the First and Fourteenth Amendments. *Id.* at 67.

72. Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990). Requests for exceptions from the governor's executive order prohibiting state officials from making decisions concerning the hiring of an employee were granted or denied based on who supported the Republican Party. *Id.* at 65-66. The Court found that the First Amendment precluded government from making these decisions on the basis of political belief and held the policy unconstitutional. *Id.* at 78.

categories at issue. Public employers prevail more frequently and easily in *Pickering* contests than in *Elrod* disputes.

In one fell swoop, this year's cases took both the *Pickering* balancing test and the *Elrod* political affiliation rule *beyond* the area of government employees and into the uncharted realm of independent contractors. The Court held that such individuals and businesses are presumptively protected by the First Amendment from adverse contract action taken in retaliation for their free speech activities or partisan political affiliations. The facts in both cases cried out for some kind of redress, the opinions marched through the issues impressively, and the methodology utilized was classic common law making. But some troubling issues must be addressed.

The Kansas case *Wabaunsee County, Kansas v. Umbehr*[73] was a classic instance of political punishment for the exercise of free speech. Umbehr had a contract to collect trash and refuse for the County for several years. The contract provided for automatic renewal unless one side gave notice of termination 60 days before the end of the year. According to Umbehr, after he appeared at County Board meetings to criticize county policy on landfill user rates and other public matters and published letters to the same effect in local newspapers, the county served notice of termination.

The contractor claimed that he had the same rights of free speech as an ordinary citizen and that the government could not penalize him unless it could meet the very demanding showing of the compelling interest test. The County, on the other hand, argued that there was an even greater need for discretion in the case of an independent contractor than for an employee whose work could be supervised close hand. As a consequence, the county should be free to contract with people it trusted and to terminate an independent contractor at will.

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73. Bd. of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 116 S. Ct. 2342 (1996).

The Court took the middle ground. Strongly reaffirming the unconstitutional conditions doctrine, which holds that the government cannot deny a benefit or opportunity to a person on a basis that infringes his constitutionally protected freedom of speech, even if he has no entitlement to that benefit, and noting that it has been repeatedly applied to protect public employees and beneficiaries from penalty for their protected speech and association. Justice O'Connor, speaking for a seven to two Court, nonetheless concluded that the independent contractor was sufficiently analogous to a public employee for most critical purposes so as to invoke the *Pickering* rule and measure the issues by the balancing test. The Court noted that the balancing test was sufficiently flexible to protect the contractor's free speech interest yet accommodate the county's concerns and recognize whatever relevant differences might exist between an employee and an independent contractor.

Moreover, the Court went out of its way to assuage the concern of local government that every adverse contracting decision would potentially become a First Amendment *cause celebre* by noting that Umbehr, like a *Pickering* claimant public employee, had a number of hurdles to clear in order to prevail: (1) "[t]o prevail, Umbehr must show that the termination of his contract was motivated by his speech on a matter of public concern, an initial showing that requires him to prove more than the mere fact that he criticized the Board members before they terminated him. . . ;[74] (2) [i]f he can make that showing, the Board will have a valid defense if it can show, by a preponderance of the evidence, that in light of their knowledge, perceptions and policies at the time of the termination, the Board members would have terminated the contract regardless of his speech . . . " [citation omitted]; (3) [t]he Board will also prevail if it can persuade the District Court that the County's legitimate interests as contractor, deferentially viewed, outweigh the free speech interests at stake . . . ; (4) if Umbehr prevails, evidence that the Board

74. *Id.* "To prevail, an employee must prove that the conduct at issue . . . was a substantial or motivating factor in the termination." *Id.*

members discovered facts after termination that would have led to a later termination anyway;[75] and (5) evidence of mitigation of his loss by means of his subsequent contracts with the cities, would be relevant in assessing what remedy is appropriate.[76]

Furthermore, the Court noted that its ruling was limited to termination of pre-existing contracts: "Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship."[77] But, as the dissent pointed out, this has been an area of large leaps and slippery slopes. The *Elrod* doctrine, fashioned to protect against firing from employment for one's political affiliations, had become expanded to cover claimed refusals to hire and promote as well, and now to cover terminating or refusing to renew independent contracting relationships also.

Additionally, in the companion case involving our Illinois tow truck operator who refused to tow the party line, the Court applied *Elrod* to an *Elrod* case, namely penalizing a person for political affiliation. In the *O'Hare* case, the Court had to decide whether an independent contractor who has a contract terminated or is removed from an official list of authorized contractors in retaliation for refusing to comply with demands for political support has a valid First Amendment claim.[78] The answer was yes, the protections of *Elrod* and *Branti* extend to an instance where government retaliates against a contractor or a provider of services for the exercise of rights of political association or the expression of political allegiance. The contractor had refused to make campaign contributions to the incumbent major, and indeed

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75. *Umbehr*, 116 S. Ct. at 2347. "The government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct." *Id*

76. *Id.* at 2352.

77. *Id.*

78. O'Hare Truck Service, Inc. v. City of Northlake, 116 S. Ct. 2353, 2356 (1996).

displayed his opponent's campaign posters at his place of business. That allegation, assumed to be true, was deemed sufficient to state a claim of political retaliation for political affiliation.

However, the Court spent most of its time trying to decide how the case should be categorized. If the termination of the contract were viewed as retaliation for the contractor's overt or open exercise of free speech, the more flexible balancing test of *Pickering* would apply. But if the matter was viewed as retaliation for political affiliation alone, then the rather more rigid *Elrod-Branti-Rutan* rule would apply. More specifically, the raw test of political affiliation would suffice to show a constitutional violation, with the only defense being a showing that political affiliation was appropriate for the employment in question. This is a very difficult standard for government to meet. Where political affiliation alone is concerned, the Court observed, "one's beliefs and allegiances ought not to be subject to probing or testing by the government."

The problem is, however, categorizing an "intermixed" case, i.e., where the free speech at issue is a manifestation of political affiliation: a sign in the office window supporting the losing candidate or a bumper sticker on the tow truck to the same effect? Is that a *Pickering* case or an *Elrod* case? The answer is: a *Pickering* case, subject to a reasonableness, case-by-case balancing analysis. Finally, even if it were viewed as an *Elrod* political affiliation case, there would still have to be an inquiry into the "reasonableness" of requiring a political affiliation for the function. The Court remanded for further development and consideration of the factual record.

Finally, I would make two observations about the case. First, it may be a good example of the problem of stretching the constitutional fabric to cover new situations, and making it thinner and thinner in the process. Second, the new regime of *Umbehr* and *O'Hare* will have some challenging applications right out of today's headlines. I am speaking about the so-called X-Men, an affiliate of the black Muslim organization, the Nation of Islam. The X-Men has a contract to provide security in public

housing projects. From all accounts, they do so successfully. Can the Governor order that the contract not be renewed because of the ideology of the organization? Because they hand out controversial leaflets on the premises? Can a county in a Western State terminate the contract of a trash hauler if they find out he weekends with the local Militia organization? Before this term, those questions did not have to be addressed; now they may become endemic.

III. COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE V. FEDERAL ELECTION COMMISSION[79]

Campaign finance is a constitutional and political and public policy issue that has been on the front burner of the national agenda for twenty years now. It was two decades ago, in *Buckley v. Valeo*,[80] that the Court addressed the profound questions of the power of Congress to ration and control political funding, and thereby the political speech it sustains.[81] And we have been struggling with those issues ever since.[82] This year the Court had to decide an issue not reached in *Buckley*: whether political expenditures by political parties are subject to limitation and control.

The requirements of full disclosure require me to reveal that I was one of the attorneys for the plaintiffs in *Buckley* who challenged the post-Watergate campaign finance reforms as systematically violative of core First Amendment principles and

79. 116 S. Ct. 2309 (1996).

80. 424 U.S. 1, 2 (1976).

81. *Id.*

82. *Id.* at 2. In *Buckley*, the appellants brought an action challenging the constitutionality of the Federal Election Campaign Act on the grounds that this limitation on individual expenditures and by contributions to campaigns violated the candidates' rights to freedom of speech. *Id.* at 6. The Court held that such restrictions were constitutional, but that expenditure limits were not *Id.* at 8.

values. Further, I was of counsel to the ACLU amicus curiae brief in the Colorado case this year. Perhaps even more influential on my thinking was the fact that much earlier, as a college summer intern, I worked for a California politician named Jesse Unruh, who actually coined the phrase that "Money is the mother's milk of politics."[83] So, you will have to take my biases into account in assessing my assessment of this term's campaign finance case.

In *Buckley* the Court carved two basic distinctions that have driven the debate over campaign finance ever since. First, is the distinction between "issue-oriented" political speech and "express advocacy" of electoral results. The Court ruled that core First Amendment principles protecting citizen speech about government and politics totally prohibit government controls on "issue-oriented" speech, even if the issue has to do with the conduct and character of candidates for political office. Thus, the message: "Smith is pro-choice, and that's good," cannot be regulated or restrained by campaign finance laws. Only the funding of messages of "express advocacy" of election or defeat of a candidate - "Smith is pro-choice, vote for Smith" can validly be subject to campaign finance laws.[84]

Second, the Court drew a distinction between "expenditures" and "contributions." The Court held that government controls on expenditures, i.e. the spending of funds for partisan speech are likewise unconstitutional as a direct abridgement of political communication. Thus, candidates, campaign committees, independent political committees, industry groups, trade associations and labor organizations can spend as much as they can raise on getting their partisan message out to the voters. Any attempts to restrict such "expenditures" violate the First

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83. Jesse Unruh, TIME, Jan. 5, 1968, at 44.

84. The first distinction is between issue-oriented speech and express advocacy. Judge Pratt and I were talking about a case that I had in front of him many years ago that involved precisely this issue. If you say "Smith is for lower taxes," stop. That's issue speech. If you say "Smith is for lower taxes, vote for Smith", that's express advocacy. Issue speech is totally free from federal, state, or local regulation. I am proud I helped achieve that.

Amendment as well. But, the Court reasoned, limitations on contributions to political candidates and committees, can be subject to restriction in order to safeguard against the corrupting effect that large contributions might have on political candidates elected to office. Thus, political spending cannot be controlled, but the political funding that sustains the political spending may be subjected to reasonable limitations, such as $1,000 per individual donor and $5,000 from political committees or PACs.

The *Colorado* campaign finance case[85] involved an attempt by the government to blur both of those distinctions: to treat issue speech about candidates as though it were express advocacy of their election or defeat, thereby subject to controls, and to deem all expenditures by a political party as though they were "coordinated with" and therefore contributions to its candidates, thereby subject to sharp limits. The Court bypassed the first issue, and ruled against the government on the second one.

The case arose in the spring of 1986, when the Colorado Republican campaign committee ran a series of radio spots[86] criticizing the voting record of Representative Tim Wirth, the likely Democratic candidate for an open U.S. Senate seat.[87] The Republicans had not even nominated their candidate yet,[88] and the ads did not even mention any election.[89] But the Democrats complained to the Federal Election Commission that the ads were express advocacy. The Democrats further complained that payment for them by the Republican party constituted not a protected "expenditure" but an illegal contribution to the Senate campaign of the yet-to-be-chosen Republican candidate because it was made "in connection with" the Senate Campaign, and therefore was to be treated as a contribution by the law.[90] The

85. Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309 (1996).

86. *Id.* at 2312.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 2314.

Federal Election Commission agreed with the Democrats on both fronts and took the Republicans to federal court.[91] The District Court ruled, as a matter of statutory interpretation, that the ads did not contain "express words of advocacy of election or defeat" and therefore could not be deemed to be either "expenditures" or "contributions" made "in connection with" the Senate campaign.[92] They were pure free speech, not subject to any controls, and the Commission's complaint had to be dismissed without reaching any constitutional issues. The Tenth Circuit reversed. It ruled that the ads could be construed as containing an "electioneering message" and thereby subject to controls and further, as a constitutional matter, that treating all party expenditures as though they were coordinated with the party's candidate and thus subject to limitation as though they were contributions was valid under the First Amendment.[93]

The Supreme Court reversed, seven to two, but with an array of different approaches.[94] The plurality opinion by Justice Breyer concluded that party expenditures, which are in fact "independent" and not made in coordination or cooperation with the candidate, are protected by the First Amendment and cannot be limited. Although many have attacked the *Buckley* ruling, Justice Breyer, reaffirmed the soundness of the basic *Buckley*

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91. *Id.*

92. Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 839 F. Supp. 1448, 1455 (D.C. 1993). "The advertisement does not contain any words which expressly advocate action. At best, as plaintiff suggests, the Advertisement contains an indirect plea for action." *Id.*

93. Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm., 59 F.3d 1015, 1024 (10th Cir. 1995). The court observed:

> The Committee, stressing the benefits of party discipline and the broad interests of party success, argues that the dangers of domination of candidates by large individual donors do not apply to party expenditures. But party expenditures, particularly pre-primary, often are controlled by incumbent officeholders. We cannot say that the dangers of domination that underlay the Supreme Court's acceptance of the constitutionality of contribution limits are not present in political party expenditures.

Id.

94. Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n, 116 S. Ct. 2309, 2321 (1996).

distinction between expenditures and contributions. He found that the ads were more like an "independent" expenditure than an indirect campaign contribution and thus entitled to enjoy the privileged status of the former rather than the circumscribed status of the latter.

Quite significantly, in this regard, Justice Breyer rejected the claim that there were "special dangers of corruption" associated with expenditures by political parties that would tip the constitutional balance in a different direction. This is the same argument that appears repeatedly in editorial columns condemning "slush money" or "sewer money" given by wealthy individuals or even corporations to political parties. Justice Breyer squarely confronted the arguments that because of such unregulated and unlimited amounts of "soft money" contributions to parties for a wide variety of other electoral actives, unrestrained party spending posed the danger of corruption and could be restrained. Justice Breyer concluded that "the opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated."[95] The law basically restrains the ability to earmark or focus these contributions on particular federal campaigns, and in any event, there is no showing that a limit on expenditures by parties, particularly ones made independent of any candidates, is a necessary measure to control whatever problems may be posed by large contributions to parties. The plurality's conclusion: "We therefore believe that this Court's prior case law controls the outcome here. We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties."[96]

That having been said, there was only one issue left to resolve and that was whether the expenditure could be viewed as "independent." The government maintained that as a matter of

95. *Id.* at 2316.
96. *Id.* at 2317.

law, any and all party spending had to be viewed not as an independent expenditure, but as a coordinated expenditure, which the law has treated as a contribution. The Court rejected the argument finding no justification for it in the statute and no warrant for it in the First Amendment. Accordingly, the Court ruled that "independent" party expenditures, like the one here, were protected by the First Amendment. As a result, the Court deflected the party's broader argument that, in the special circumstances of political parties, the First Amendment forbids congressional efforts to limit coordinated expenditures, as well as independent expenditures. Justice Breyer thus declined to confront the broader issues of whether all party expenditures, truly independent or in fact coordinated, were protected by the First Amendment.

Three other Justices, led by Justice Kennedy, would have reached that issue and held that all expenditures by political parties were completely protected against any restriction, thereby invalidating the statute on its face.[97] In their view, the *Buckley* protection for political expenditures, coupled with the historic role of parties as speaking for their candidates, means that all party spending to support its candidates, be it independent of or coordinated with that candidate, is entitled to the same high level of constitutional protection:

> We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity; we also have a practical identity of interests between the two entities during an election. Party spending 'in cooperation, consultation, or concert with' a candidate is indistinguishable in substance from expenditures by the candidate or his campaign committee. We held in *Buckley* that the First Amendment does not permit regulation of the latter . . . , and it should not permit this regulation of the former."[98]

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97. *Id.* at 2321. Justice Kennedy delivered a concurring opinion, in which Justice Rehnquist and Justice Scalia joined. *Id.*

98. *Id.* at 2323.

While the Breyer plurality would protect independent party expenditures, and the Kennedy concurrence would protect any party expenditures, Justice Thomas took the most absolute First Amendment position, namely, he would equally and fully protect all political funding, contributions or expenditures under the First Amendment.[99] In his view, *Buckley* was wrong to draw any constitutional distinction between contributions and expenditures. Both sides of the coin of political funding -- giving to a candidate or cause or spending by a candidate or cause -- are direct manifestations of the core essence of political speech and association:

> in sum, unlike the *Buckley* Court, I believe that contribution limits infringe as directly and as seriously upon freedom of political expression and association as do expenditure limits. The protections of the First Amendment do not depend upon so fine a line as that between spending money to support a candidate or group and giving money to the candidate or groups to spend for the same purposes. In principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy.[100]

To Justice Thomas, federal bribery laws and campaign disclosure laws are more focused and less drastic ways to deal with the issues of improper access and undue influence "to make donors and donee accountable to the public for any questionable financial dealings in which they may engage."[101] Coincidentally, that is the same position taken by the ACLU then in *Buckley* and now as well.

Finally, the opposite view was taken by Justice Stevens, joined by Justice Ginsburg, namely, that "all money spent by a political party to secure the election of its candidate for the office of United States Senator should be considered a "contribution" to

99. *Id.* at 2321.
100. *Id.* at 2327-28.
101. *Id.* at 2329.

his or her campaign. Like Justice Thomas, these two Justices also questioned *Buckley's* distinction between contributions and expenditures. But, unlike Justice Thomas, they would uphold limitations on both on the ground that "the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns."[102]

Despite the fact that only two Justices, Stevens and Ginsburg, dissented favoring greater restraints on campaign funding, there continues to be a drumbeat of editorial and political condemnation of big giving and spending by parties and candidates. The Federal Election Commission sues the Christian Coalition, complaining that their voter guide materials constitute "electioneering" and should be subject to statutory controls. That is a frightening First Amendment prospect, which would jeopardize the free speech of almost every issue group in America that comments on candidates and officeholders. President Clinton, who is in favor of campaign finance reform, rakes in millions of dollars at Hollywood celebrity fund-raisers. And Ross Perot spends $100,000,000 to put out the message that there is too much money in politics.

The Court's Colorado ruling is important for local government elections and campaigns because it makes it clear that party spending is a separate and protected aspect of campaign expenditures. That means that federal, state, or local efforts to enact greater campaign funding restraints on candidates are rendered even more likely to be futile, because there can not be any caps on party spending. Since other groups, such as labor unions, are also free to use their considerable resources to influence the outcome of elections, the only people left restrained will be candidates themselves, which hardly seems like the proverbial level playing field.

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102. *Id.* at 2332.

IV. DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM V. FEDERAL COMMUNICATIONS COMMISSION[103]

The last case I will discuss involved the intersection of two of the most intractable doctrinal problems in the First Amendment area: (1) how to characterize and treat cable television as a new communications medium, and (2) to what extent to permit government to regulate "indecent" communications, i.e. those that are not quite legally obscene, and therefore are barely within the ambit of First Amendment protection. As one Justice once put it, the kind of stuff that "few of us would march our sons and daughters off to war to preserve the citizen's right to see . . . ."[104] That latter quote is from the last of those 1976 cases that still haunt us today. That divided case, *Young v. American Mini-Theaters*,[105] upheld municipal zoning directed at "adults only" books and magazines, material that was constitutionally protected, but barely so. Two years later the zoning case was the basis for applying similar concepts of variable, contextual First Amendment protection to offensive language on the radio - George Carlin's famous monologue about "seven dirty words you definitely couldn't say on the radio." And

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103. 116 S. Ct. 2374 (1996).

104. *See* Young v. American Mini Theatres, Inc. 427 U.S. 50, 70 (1976).

105. 427 U.S. 50. In *Young*, a Detroit zoning ordinance prohibited adult theatres from being used within 1000 feet of any two other "regulated uses" or within 500 feet of a residential area, unless there was a special waiver. *Id.* at 52. Cabarets, bars, hotels, and taxi dance halls are examples of "regulated uses." *Id.* at 52. In violation of the ordinance, respondent Young operated adult theatres that were located within the prescribed limits. *Id.* at 55. The Court held that utilizing an ordinance in order to disperse sexually-oriented businesses was not a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 72-73. The Court reasoned that distinguishing adult theatres from other theatres was constitutional in that it was an attempt by the city to preserve the moral integrity of the community. *Id.*

this year, that *Pacifica Foundation*[106] case was the direct precedential justification for the prevailing opinion in the cable indecency case.[107]

The cable issues in the cable decency case are as pressing as today's headlines about the efforts of New York City to compel Time Warner to include Rupert Murdoch's 24-hour all news cable network on their cable system and threatening franchise penalties as a sanction for refusal. Are cable operators like bookstores or telephone companies, like Barnes and Noble or AT&T?[108] The decency issues in the cable decency case are as momentous as those in the Internet decency case which the Court will hear this term. And both sets of issues, although emanating from federal law, have powerful consequences for state and local government as well.

One final thing to note about the cable decency case. It was a showcase for quite dramatically different judicial styles toward the legal process of developing the law and addressing new and perplexing questions. The approach and methodology of Justice Breyer was a classic example of the legal process school associated with the classic set of course materials of the same name by Hart and Sachs. The emphasis is less on the abstract contours of legal doctrine and more on the processes and agencies for resolving legal issues, with a good deal of willingness to defer to the administrative and political branches and an instinct to fashion flexible legal doctrine which permits such deference. Contrast that with the classic common law style reflected in Justice Kennedy's opinion, with an emphasis on categorization, characterization, analogic reasoning, logical analysis and relatively hard rules. That approach has been the hallmark of most First Amendment doctrine in recent years and it has been thought to be an advance in protection for speech and press. But in the two areas that intersect in the cable decency

106. Federal Communications Comm'n v. Pacifica Foundation, 438 U.S. 726 (1978).

107. Denver Area Educ. Telecommunications Consortium, Inc. v. Federal Communications Comm'n, 116 S. Ct. at 2380 (1996).

108. *Id.* at 2320.

case, cable and decency, the Court has had a harder time employing this classic approach and has yielded more to the legal process methodology. The result has been a decision which one First Amendment advocate has called: "the nadir of the Court's First Amendment jurisprudence."[109]

The case involved provisions of the 1992 Cable Television Consumer Protection and Competition Act. Federal law requires cable operators to set aside certain channels for commercial lease (leased access); and municipal franchise requirements frequently require cable operators to set aside certain channels for "public, educational, and governmental" use (public access or "PEG" channels).[110] For many years, federal law barred cable operators from exercising *any* editorial control over the content of programs transmitted on both kinds of channels.[111] That meant that, so long as the material was not legally obscene and thus subject to complete prohibition, it could not be censored.[112] As a result, in New York, we were regularly treated on leased access to a diet of Al Goldstein's *Midnight Blue* and *The Robin Byrd Show* who are, by the way, back on TV, as well as some pretty raunchy stuff on "PEG" channels too. In the 1992 law,[113] Congress addressed this situation in three ways. First, in Section 10 (a) Congress let cable operators prohibit transmission on leased access channels of any program that the operator

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109. James Goodale, *Caught in Breyer's Patch*, N.Y. L.J. July 23, 1996, at 216.

110. *Denver Area Educ. Telecommunications Consortium*, 116 S. Ct. at 2381.

111. *Id.*

112. *Id.*

113. 47 U.S.C. § 531 (1992). This section provides:

> The Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

Id.

"reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary standards."[114] That watered down test would allow cable operators to ban the transmission of a wide variety of legally protected sexual material, with an exceptionally vague "patently offensive" standard. If cable operators wish to carry such programs, Section 10(b) of the law said they must "segregate and scramble" the programming, i.e. segregate the programming on one particular channel and scramble the picture unless viewers request it be unscrambled in writing and wait thirty days for the service.[115] Finally, section 10(c) would allow operators to ban indecent communications on PEG channels without imposing a segregate and scramble requirement if they allowed such programs. The new statute was challenged by programmers and cable operators, and the Court in shifting votes, upheld Section 10(a), giving operators power to censor leased channels, by a vote of seven to two;[116] struck down Section 10(b), the segregate and scramble provision, by a vote of six to three,[117] and struck down the PEG channel restrictions by a vote of five to four.[118] In the plurality's words:

> [w]e conclude that the first provision -- that permits the operator to decide whether or not to broadcast such programs on leased channels -- is consistent with the First Amendment. The second provision, that requires leased channel operators to segregate and to block that programming, and the third provision, applicable to public, educational, and governmental channels, violates the

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114. 47 U.S.C. § 532(h), *amending* 47 U.S.C. § 612(h)(2).

115. *See* 47 U.S.C. § 532(j)(1)(A); § 532(j)(1)(B). This section provides in pertinent part: "[t]he Commission shall promulgate regulations designed to limit the access of children to indecent programming . . . by - - A) requiring cable operators to place on a single channel all indecent programs . . . ;(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing . . . ." *Id.*

116. Denver Area Educ. Telecommunications Consortium, 116 S. Ct. at 2384, 2390.

117. *Id.* at 2380. Justices Rehnquist, Thomas and Scalia filed an opinion, delivered by Justice Thomas, concurring and dissenting in part.

118. *Id.* at 2397.

> First Amendment, for they are not appropriately tailored to achieve the basic, legitimate objective of protecting children from exposure to 'patently offensive' material.[119]

Further, the different doctrinal approaches were as varied as the votes. Justice Breyer wrote the prevailing plurality opinion. As in the campaign finance case, he "eschewed a broad approach in favor of a more ad hoc disposition of the case."[120]

It was a battle of dueling analogies. The conservative Justices (Thomas, Rehnquist, and Scalia) thought the cable operator was like the owner of a bookstore and, as a matter of free speech and private property rights, under few circumstances could government tell him what books to shelve or what programs to carry. The operator's paramount rights had to prevail over the programmers who wanted to use the operator's facility against his wishes, and the law simply recognized and embodied that right. Thus, sections 10(a) and 10(c) were valid protections of the right of operators to exercise editorial discretion and choice over what gets put out on their communication media.[121] Section 10(b), on blocking and scrambling, was a content-based limitation on cable operators, by saying that if they chose to show indecent programming, they would have to segregate and scramble it. But, the conservatives felt that the need to protect unsuspecting children from unwitting access to such material satisfied strict scrutiny and justified the restraint on cable operators.[122]

The two most liberal Justices on this issue, Justices Kennedy and Ginsburg, took a diametrically opposed tack and would have struck down all three provisions. As I have observed here on previous occasions, Justice Kennedy has emerged as the Court's most vigorous champion of free speech rights against government interference and restraint, although this Term, Justice Thomas' concurring opinions in the liquor advertising and the campaign

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119. *Id.* at 2391.

120. Review of Supreme Court's Term, 65 U.S.L.W. 3104 (U.S. Aug. 13, 1996).

121. *Denver*, 116 S. Ct. at 2396.

122. *Id.*

finance cases give Justice Kennedy a pretty good run for his money in terms of vigorous and powerful protection of free speech rights. Drawing heavily on the Court's First Amendment categories and standards, Justice Kennedy condemned the prevailing Justices opinion for being "adrift" and containing a "flight from standards" and "an evasion of any clear legal standard." In his mind, the Court's cases had established that cable broadcasters were entitled to full First Amendment protection, that indecency was a protected category of free speech, but that cable companies, with respect to access channels, could not properly be treated as private owners of communication media but as publicly-sanctioned providers of media of communication.[123] Thus, in this limited context, the analogy for cable operators was not the bookstore, but the common carrier, providing in the public and leased access channels, literally and metaphorically, an avenue of communication. Moreover, the avenue of communication is a "public forum" which cannot exclude speakers because of the content of their speech unless the strict scrutiny test is applied and satisfied, namely, unless the exclusion is necessary to achieve a compelling governmental interest and is narrowly tailored to do so. Finding the goal of protecting children against indecent speech on cable television to be compelling, thus warranting some government regulation, Justice Kennedy concluded, however, that the statute was not narrowly tailored to achieve that goal. For Justice Kennedy, this result was straightforward and readily derived from reasoning by analogy to existing doctrine.

However, Justice Breyer, for himself and Justices Stevens, O'Connor and Souter, steered what appeared to be a middle course between these two polar positions.

First, citing the rapid changes taking place in communications technology, he refused to pick one analogy or precise First Amendment formula to measure government regulation in this emerging area or resolve the plethora of issues that he felt were

123. *Id.* at 2397.

unresolved by the existing doctrinal framework. Instead, he adopted an ad hoc test at every turn:

> Rather than decide these issues, we can decide this case more narrowly, by closely scrutinizing sec[tion] 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech. The importance of the interest at stake here--protecting children from exposure to patently offensive depictions of sex; the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in *Pacifica*, supra; and the flexibility inherent in an approach that permits private cable operators to make editorial decisions, lead us to conclude that sec 10(a) is a sufficiently tailored response to an extraordinarily important problem.[124]

Surveying the various reasons why the statute satisfied this approach and especially focusing on the regulatory history and reasoning, his conclusion was similarly specific and fact-based:

> The existence of this complex balance of interests persuades us that the permissive nature of the provision, coupled with its viewpoint-neutral application, is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress, while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of the editorial control that Congress removed in 1984.[125]

Applying this same sort of "semi-strict" scrutiny, the plurality found that, on balance, the other two provisions could not pass muster. Raising the kinds of questions that one might hear at an administrative or legislative hearing, Justice Breyer viewed the "segregate and scramble" provision as an excessive and unnecessary imposition on those cable operators who wanted to carry sexual material on their leased channels, on those

124. *Id.* at 2387.
125. *Id.* at 2385.

programmers who wanted to supply it and on those adult viewers who wanted access to it. Finally, the provision restricting indecency on PEG channels, unlike that on leased channels, was found to be unnecessary in light of the different "institutional background," the relatively scant history of problems with such materials on such channels and the greater network of local licensing control and supervision.

Though presenting itself as tentative and interim, the prevailing opinion, by declining to employ traditional categories and doctrines, did in effect stake out new ground. It fashioned a watered down formula for dealing the issues - a kind of strict scrutiny "lite." It invoked the *Pacifica* case as its guiding precedent, despite material differences between free radio broadcast and subscription cable television where the parental ability to protect unsuspecting children is concerned, and undercut the relatively robust protection previously afforded to cable operators. One First Amendment advocate said that the standard is a nadir for First Amendment jurisprudence. It is so watered down. It is so without content, character, and integrity. If the government could win any First Amendment case by using that standard, there would not be much of the First Amendment left standing. But that was the prevailing standard in the case. It was used, as I said, to uphold the provision that let cable operators get certain kinds of materials off of leased access stations and then strike down the other two portions of the law. The bottom line for this case is that greater control is given to cable operators, but not too much censorship control is given in terms of blocking and scrambling. Justice Souter's concurring opinion supported this "go slow" approach because "all of the relevant characteristics of cable are presently in a state of technological and regulatory flux." And, more importantly:

> As cable and telephone companies begin their competition for control over the single wire that will carry both their services, we can hardly settle rules for review of regulation on the assumption that cable will remain a separate and useful category of First Amendment scrutiny. And as broadcast, cable and the cyber-technology of the Internet and the World Wide Web

> approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.[126]

CONCLUSION

Which brings me back to the future. On the Court's docket right now is round two on the issue of whether cable operators "must carry" broadcast stations and other channels. In its 1992 *Turner Broadcasting* decision, the Court remanded the matter for further proceedings, which have now come back.[127] But lurking beyond the cable case is the Mothership of them all - the Internet and the Internet decency case.[128] This year's cable decency case was watched closely not just because of its actual effect on cable programming, but, as well, for its precedential impact on the Internet case. Earlier this year, two separate federal courts ruled unconstitutional the Communications Decency Act of 1996, which restricts "indecent" computer transmissions on the Internet, where the communicator would know or have reason to know that minors would have access to the transmission. Since many view the Internet as the ultimate 21st century technological realization of the Framers' 18th century visionary promise of freedom of speech and of the press, the Court's decision may well be of monumental significance. The cable decency decision is not much of a guide as to how the Court will deal with the

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126. *Id.* at 2402.

127. Turner Broadcasting System, Inc. v. Federal Communications Comm'n, No. 95-992, 1995 WL 769992 (1996). In *Turner*, the District Court, by a 2-1 vote, upheld on remand the challenged statutory provisions, which require cable companies to carry broadcast stations. The case was argued again before the United States Supreme Court on October 7, 1996).

128. Reno v. American Civil Liberties Union, No. 96-511, 1997 WL 74378 (1997) (arguing that the Communications Decency Act of 1996, which imposes criminal penalties upon anyone who, via on-line computer communications, transmits to minors any material that is "indecent" or "patently offensive," is unconstitutional).

Internet case. Therefore, in the words of that great legal philosopher Mort Sahl, "[t]he future lies ahead." Thank you.