1996

A Championship Season for the First Amendment

Joel Gora

A CHAMPIONSHIP SEASON FOR THE FIRST AMENDMENT

Leon Lazer:

Okay, we are about to start. Everyone please be seated. This afternoon we have one of our regulars to speak to us on the First Amendment. Professor Joel Gora from Brooklyn Law School has always been one of our star participants in this program. He is a very well respected authority on the First Amendment. Apart from being a professor at Brooklyn Law School, he is also the Associate Dean of that institution, a former staff counsel of the American Civil Liberties Union, co-author of a book, *The Right To Protest*.[1] Without further ado, Professor Joel Gora.

Professor Joel Gora:*

INTRODUCTION

Thank you, Judge Lazer. It is a pleasure to be here. I missed the program last year. I was not able to attend or participate. In my absence, the Supreme Court ruled in favor of the First Amendment[2] seven out of eight times. My initial reaction was that maybe I should stay away more often, but I enjoy the program very much, and so I could not resist accepting Judge Lazer's kind invitation for a return engagement. In this season of playoff games and wild card slots, let me give you some statistics. Last year, the First Amendment had a .875 batting average in the Supreme Court. Individual justices also did quite well. Even Chief Justice Rehnquist and Justice Scalia hit .625. Justices Breyer, Ginsburg, Thomas, O'Connor and Stevens hit .750. Justice Souter batted an impressive .875 ruling against the

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

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.*

First Amendment claimant only once and Justice Kennedy, whom I have previously described at this podium as Mr. First Amendment, went eight for eight, batting a perfect 1,000. Justice O'Connor wrote opinions in five of the eight cases.[3] She was the most prolific First Amendment scholar. The new kid on the block, Justice Breyer, authored no opinion in any of these eight cases, still learning the ropes.

This was also a year when deuces were wild. There were lots of things happening in twos. Two cases dealt with classic First Amendment chestnuts, the right of public workers to speak off duty,[4] and the right of someone to hand out a leaflet without putting her name on it.[5] Two of the cases dealt with commercial speech issues. The first case addressed whether Coors Beer could place alcohol content on the label,[6] and the second case addressed whether lawyers could send soliciting letters to accident or injury victims within thirty days of the accident.[7] Two cases dealt with more subtle issues of when private entities can be subject to public accountability in deciding which speakers can use their

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3. *See* Rosenberger v. Rector of Univ. of Virginia, 115 S. Ct. 2510, 2525 (1995) (O'Connor, J., concurring); Capitol Square Review v. Pinette, 115 S. Ct. 2440, 2451 (1995) (O'Connor, J., concurring in part and concurring in the judgment); Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995); United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1019 (1995) (O'Connor, J., concurring in the judgment in part and dissenting in part); Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 975 (1995) (O'Connor, J., dissenting).

4. *National Treasury Employees Union*, 115 S. Ct. at 1003 (holding that a ban which prohibits a government employee from accepting honorariums for speaking and other off-duty activities violates the First Amendment).

5. McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995) (holding that an Ohio statute which prohibits the distribution of anonymous campaign literature violates the First Amendment).

6. Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) (holding that a federal act which prohibits the display of alcohol content on beer labels violates the First Amendment's protection of commercial speech).

7. *Florida Bar*, 115 S. Ct. 2371 (holding that the Florida Bar rules which prohibits personal injury lawyers from sending targeted direct mail solicitations to victims and their relatives for thirty days following an accident violates the First and Fourteenth Amendments).

facilities.[8] In one case, the Court held that Amtrak was not a private entity, but a public agency, subject to First Amendment scrutiny when it decides to reject advertising at Penn Station on political grounds.[9] In another case, the Court ruled that a St. Patrick's Day Parade is a private event, not a public accommodation, and therefore the sponsor can choose what groups to admit and what groups to exclude.[10] Lastly, two cases explored the delicate balance that must be struck between church and state, between what is permitted, and indeed required, by the Free Speech[11] and Free Exercise Clauses[12] of the First Amendment, versus what is prohibited by the Establishment Clause[13] of the First Amendment. In one difficult case, the Court ruled that student religious groups can use student activity funds to run a religious campus newspaper.[14] In the other case, the Court ruled that a religious symbol, a cross, could be placed on public space by an irreligious group, the Ku Klux Klan, without violating the Establishment Clause.[15] Finally, concerning these various cases, two invalidated acts of Congress on First Amendment grounds,[16] and two involved Coors Beer,[17] making

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8. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338 (1995); Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995).

9. *Lebron*, 115 S. Ct. at 961.

10. *Hurley*, 115 S. Ct. at 2338.

11. U.S. CONST. amend. I. The Free Speech Clause states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ." *Id.*

12. U.S. CONST. amend. I. The Free Exercise Clause states: "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ." *Id.* (emphasis added).

13. U.S. CONST. amend I. The Establishment Clause states in pertinent part: "Congress shall make no law respecting an establishment of religion . . . ." *Id.*

14. Rosenberger v. Rector of Univ. of Virginia., 115 S. Ct. 2510 (1995).

15. Capitol Square Review v. Pinette, 115 S. Ct. 2440 (1995).

16. United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995); Rubin v. Coors Brewing Corp., 115 S. Ct. 1585 (1995).

17. *Rubin*, 115 S. Ct. at 1585; Lebron v. National R.R. Passenger Corp., 115 S. Ct. at 961.

this, of course, the first term that the Court has had two cases of Coors.

The church state cases, though difficult and dividing the Court, signaled some of the most powerful themes that I feel pervaded last term's First Amendment cases. The themes can be summed up in two words: autonomy and neutrality. Speakers' autonomy and government's neutrality. Speakers have the right to choose what to say and the government's job is to stay out of the way. I am reminded of the famous story about Diogenes the Cynic who was asked by Alexander the Great if he could help him in any way. "Yes," replied Diogenes, "get out of my light."[18] Well, the Court seemed to be using the First Amendment to tell the government to get out of the people's light. If the old saw that "the Court follows the election returns" has any credence, then the thrust of the Newtonian Revolution last fall—that's Gingrich, not Sir Isaac—is mirrored in the Court's distrust of government. The concept is that government is best which governs least. Of course, in many respects, those themes animate the First Amendment itself, and so the themes of speaker autonomy and government neutrality can be felt in many of the cases that I am now about to discuss.

Themes were played out in several motifs. Government cannot tell speakers what to say and how to say it. Nor can government use its power over resources to control speakers who use those resources: where government has set aside its funds, facilities and forums for speech, it cannot broadly control the way speakers use those opportunities. Rather, government's basic obligation is neutrality and "hands off" freedom of speech, press, and religion. Finally, that required neutrality does not constitute complicity or endorsement or ratification of the speech, press, or religious activity that the government is allowing or permitting. This is especially true in the two religion cases where the Court ruled that honoring free speech and free exercise claims does not constitute establishing religious support, thereby reflecting the

18. JOHN BARTLETT, FAMILIAR QUOTATIONS 86 (15th ed. 1980) (citation omitted). When asked by Alexander if he wanted anything, Diogenes replied, "stand a little out of my sun." *Id.*

Court's willingness to require greater accommodation of religious use of forums and facilities.

Let us now see how those themes played out in the specific cases.

I. *UNITED STATES v. NATIONAL TREASURY EMPLOYEES UNION*

First, let me talk about those two old chestnuts, the off duty rights of public employees and the free speech rights of lonely pamphleteers. In *United States v. National Treasury Employees Union*,[19] Justice Stevens wrote the first of his two powerful First Amendment opinions of the term.[20] I am always thankful for the Supreme Court custom that permits the most senior Justice in the majority to assign the opinion in cases where the Chief Justice is in the dissent. And so, Justice Stevens assigned himself to the opinion in this case, and wrote a very strong First Amendment opinion, as he did in the next case as well.

A century ago, Justice Holmes wrote that a policeman may have a right to talk politics, but he does not have a right to be a policeman, and can be fired for talking politics.[21] Our First Amendment doctrine has improved somewhat in the century since then. The issue in the *National Treasury Employees Union* case was, if a policeman gives a speech about politics or poetry to the PBA, or any other outside group, can the government prohibit the policeman from getting paid for that speech?[22] Put another way, is moonlighting by public employees and officials protected

19. 115 S. Ct. 1003 (1995).

20. Justice Stevens also wrote the opinion for McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995).

21. McAulliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892) ("[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

22. *National Treasury Employees Union*, 115 S. Ct. at 1008. The respondents are not literally policemen, but are "[t]wo unions and several career civil servants" employed by the federal government. *Id.* at 1010.

by the First Amendment? Congress said no, but the Supreme Court ruled that it was protected.[23]

The case is also an interesting object lesson in the difficulties of legislative drafting. Congress had a perfectly sensible objective in mind: to try to keep high level federal officials from being subtly wooed or influenced at all by business and private interests who might give fat honorariums for five minute speeches to trade conventions.[24] Somehow the task of translating that perfectly sensible concept into acceptable legislative language and policy proved insurmountable.

The ban on receiving honorariums for speeches, articles, or outside activities, was enacted in 1989, and it provided that no federal official or employee of any branch or at any level could receive any honorariums, i.e., any compensation for an appearance, speech or article.[25] That seemed to be doubly problematic. It covered all officials and employees, high or low, from cabinet secretaries to letter carriers, and it applied to speeches, writings, or outside activities on all kinds of topics and in all kinds of settings, whether or not it related to the person's nine-to-five federal responsibilities.[26] Under complaints that this was too broad, Congress enacted an amendment two years later exempting certain activities from the ban of honoraria. Any series

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23. *Id.* at 1018. The Court held that "the speculative benefits the honoraria ban may provide the Government are not sufficient to justify this crudely crafted burden on respondents' freedom to engage in expressive activities." *Id.*

24. *See id.* at 1009 ("[M]any members of Congress are supplementing their official compensation by accepting . . . 'honoraria' for meeting with interest groups which desire to influence their votes . . . . [T]he practice of accepting honoraria also extends to top officials of the Executive and Judicial Branches.") (quoting FAIRNESS FOR OUR PUBLIC SERVANTS: REPORT OF THE 1989 COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES VI (1988)).

25. Ethics in Government Act of 1978, Pub. L. No. 101-194, 103 Stat. 1760 (1989) (codified as amended at 5 U.S.C.A. app. 7 §§ 501-05 (1995)).

26. *See National Treasury Employees Union*, 115 S. Ct. at 1009. The honoraria ban "define[s] 'officer or employee' to include nearly all employees of the Federal Government. . . ." *Id.* In addition, "[t]he 1989 Act defined 'honorarium' to encompass *any* compensation paid to a Government employee for 'an appearance, speech or article.'" *Id.* (emphasis added) (citation omitted).

of appearances, speeches, or articles that were unrelated to an employee's official duties were excluded.[27] Therefore, one could lecture in a course if it did not have anything to do with what you did in the daytime, otherwise, the honorarium ban still applied. Although by administrative regulation, it was narrowed further so that you could, for example, sing, act, dance or teach a course. Those were permitted activities, but giving a speech to a trade association was a prohibited activity.

The very fact that the law wound up being a hodgepodge was one of the reasons why I think that it was thrown out. The ban was challenged by mid-level federal executive employees who had very wholesome outside moonlighting activities: a postal employee who lectured on Quakers, a NASA engineer who lectured on black history, and an IRS auditor who wrote articles about the environment.[28] In addition, it permitted Justice Stevens to point out that the honorarium ban might have dried up the creative juices of such famous federal employees as Nathaniel Hawthorne, Herman Melville, Walt Whitman and Bret Harte.[29] Obviously, a law which would do that is not long for this world, and the Supreme Court, by a six to three vote, so held, applying a number of the relatively settled principles in this new context.

The first principle is that an employee's speech on the job or related to job matters can be subject to greater regulation than the speech of a private citizen on those same topics.[30] However, when an employee speaks on public issues, the employee's speech as a citizen, and not as an employee, is entitled to greater First Amendment protection.[31] Here, the government, rather than

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27. Ethics in Government Act of 1978, Pub. L. No. 102-90, §§ 314(b), § 505(3), 105 Stat. 469 (1991) (codified as amended at 5 U.S.C.A. app. 7 § 505(3) (1995) states: "Section 505(3) of the Ethics in Government Act of 1978 is amended by inserting '(including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government)' before 'by a Member.'" *Id.*

28. *National Treasury Employees Union*, 115 S. Ct. at 1010-11.

29. *Id.* at 1012.

30. *Id.*

31. *Id.* The Court stated that "Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if

punishing a single instance of misconduct by one employee, passed a ban that prohibited all employees from speaking on all topics in virtually all circumstances. The Supreme Court felt that this law did not properly adjust the balance between employee's speech and the needs of the government as an employer.[32]

The Court determined that whatever concerns with propriety or the appearance of impropriety exist when government workers or federal officials give speeches and receive fees for those speeches, the government could not attempt to deal with that problem through such an overbroad approach as a ban of this kind on honorarium.[33] The only problem the majority found was a question of remedy.[34] Should the ban be struck down in all of its applications or only those circumstances where there was a "nexus" or a connection between the speech, the article, or the venue in which it was given, and the person's job?[35] The government suggested that the Court should draft a nexus exception or connectedness exception onto the statute.[36] The Court stated that it would really be doing Congress' work, and they were not prepared to do that, therefore, the Court basically invalidated the ban on its face in its application to all employees below the range of GS-16.[37]

In this case, there were three and one-half dissents. Justice O'Connor agreed with invalidating the ban where there is no nexus to one's official status, but would have upheld it where there was a connection. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, felt the Court had slighted the

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applied to the public at large." *Id.* However, "the Government bears the burden of justifying [an] adverse employment action" when the speech of public employees involves public concern. *Id.*

32. *Id.* at 1013.

33. *Id.* at 1016. The Court saw little harm resulting from a federal employee "accepting pay to lecture on the Quaker religion or to write dance reviews." *Id.*

34. *Id.* at 1019. The Court affirmed the granting of an injunction against the enforcement of the honorarium ban, but only against the parties before the Court. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

government's concerns, inflated the ban's impact on just a few employees, and improperly ignored the long-standing judicial approval of efforts to combat impropriety and the appearance of impropriety by federal officials.

In a way, the case is a bit of payback for a 1994 decision, *Waters v. Churchill*,[38] where the Court seemed to take a more restricted view of workplace speech by public employees. The majority, in the *National Treasury Employees Union* case, tended to come from the dissenters in the *Churchill* case, which was opposite in its approach.[39] The *Treasury Employees* Court left open the question of whether an honorarium ban on speeches that relate to one's job, where there is a nexus or a connection between the fee one receives and the work one does on the government's payroll, is a permissible restriction.[40] The Court did not have to resolve this because the restriction here was not so limited.[41] So chalk one up for the free speech rights of public employees to engage in a wide variety of moonlighting.

II. *McINTYRE v. OHIO ELECTIONS COMMISSION*

The other more traditional kind of First Amendment case involved another indirect but potent restraint on speech. In the honorarium case, the restraint was that one could give a speech, but one could not get any money for it, and the Court rightly assumed that this would discourage people from giving a speech.

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38. 114 S. Ct. 1878 (1994) (holding that a public employer may dismiss a public worker for speech provided that the employer reasonably believes that the speech is unprotected).

39. *See id.* at 1898 (Stevens, J., dissenting) ("The First Amendment . . . demands that the Government respects its employees' freedom to express their opinions on issues of public importance.").

40. *National Treasury Employees Union*, 115 S. Ct. at 1018-19. The Court stated that "[t]he process of drawing a proper nexus . . . would likely raise independent constitutional concerns whose adjudication is unnecessary to decide this case." *Id.* at 1019.

41. *Id.* at 1012 ("Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to [respondent's] employment.").

In the *McIntyre v. Ohio Elections Commission*[42] case, the restriction on speech was that one must put one's name on a leaflet being handed out.[43] It really did involve a lonely anonymous pamphleteer, a sort of a staple of First Amendment lore. A woman named Margaret McIntyre handed out flyers to people as they were entering a school board meeting opposing a new additional tax for school activities.[44] It was a very simple flyer. It just encouraged people to vote against the tax and it was signed, "Concerned Parents and Taxpayers."[45] There was not a whiff of false, misleading or defamatory fact or opinion. There was no mudslinging and no character assassination. It was just a statement of her opinion.[46] A school official came over to her

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42. 115 S. Ct. 1511 (1995) (considering whether an Ohio statute prohibiting the distribution of unsigned campaign literature is violative of the First Amendment right to free speech).

43. *Id.* at 1514-15.

44. *Id.* at 1514.

45. *Id.*

46. The text of Mrs. McIntyre's leaflet was as follows:

VOTE NO
ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.
Now we find out there is a 4 million dollar deficit - WHY?
We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed-WHY?
A magnet school is not a full operating school, but a specials school.
Residents were asked to work on a 20 member commission to help formulate the new boundaries. For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded-WHY?
WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. WASTE CAN NO LONGER BE TOLERATED.

PLEASE VOTE NO
ISSUE 19

THANK YOU.
CONCERNED PARENTS
AND

and said, in effect, "it's illegal to hand out unsigned leaflets," but she continued to hand them out.[47]

A few months later, after the tax proposal was finally passed, and after being defeated a few times by the voters, the same official that had not liked Mrs. McIntyre's position in the first instance, filed a complaint against her with the Ohio Elections Commission.[48] She was charged with handing out unsigned leaflets.[49] Indeed, almost every state, Ohio included, has a broadly worded law that outlaws anonymous political leaflets and requires that all political leaflets, pamphlets, flyers and the like, must state names and addresses for the group or person responsible for them.[50] The election board found that Mrs. McIntyre violated the ban by handing out leaflets without her name on them, and fined her one hundred dollars.[51] The Ohio courts upheld that position on the grounds that Ohio had an interest in voter protection, and that electoral purity outweighed the minor burden on the speaker's rights of having to put a name on the pamphlet.[52]

TAX PAYERS

Id.

47. *Id.*

48. *Id.*

49. *Id.*

50. OHIO REV. CODE ANN. § 3599.09(A) (1988) provides:

> No person shall write, print, post or distribute, or cause to be written, printed, posted or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.

Id. at 1514-15.

51. *Id.* at 1514.

52. *Id.* at 1515.

Mrs. McIntyre died pending the appeal to the Supreme Court. The Supreme Court seemed to be so interested in this case that it allowed her husband to be substituted as her executor and litigant in the Supreme Court in order to continue the challenge of the one hundred dollar fine.[53] And, indeed, by a seven to two vote, the Court reversed the fine and held that the First Amendment protects the distribution of anonymous political campaign literature against being subject to an across-the-board ban on such leaflets.[54] In making this ruling, Justice Stevens, again in a very powerful First Amendment decision, pointed to the important historic role that anonymous leaflets and pamphlets played in American history from the federalist papers[55] to the writings of Mark Twain under a pseudonym,[56] to the leaflet handed out by Margaret McIntyre.[57] The Court found, "a respected tradition of anonymity in the advocacy of political causes."[58] And indeed, Justice Stevens pointed out that the very secret ballot itself, the cornerstone of American democracy, is the embodiment of the right of political anonymity.[59] That being so, Ohio could not justify intruding upon that traditional historic right of political anonymity by claiming that the law was like a regulation of the ballot or the area around an election booth.[60] This was not a case of ballot or electoral mechanics, rather, it was a case of core political speech being subject to government regulation.

Therefore, what happens in this situation is that it is not an election case anymore, but a First Amendment case, and exacting scrutiny is required. The Court found that the exacting scrutiny test could not be met by this legislation.[61] Whatever interests

53. *Id.* at 1516.

54. *Id.* at 1524 (holding that pursuant to the Court's interpretation of the First Amendment, the practice of "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.").

55. *Id.* at 1517 n.6.

56. *Id.* at 1516 n.4.

57. *Id.* at 1514.

58. *Id.* at 1517.

59. *Id.*

60. *Id.* at 1518.

61. *Id.* at 1519.

there were in disclosing campaign funding or combating fraud, libel, or corruption, could be dealt with by laws directly regulating those matters, rather than laws requiring every speaker to put his or her name on pamphlets that are handed out. Indeed, in concluding, Justice Stevens pointed out that anonymous pamphleteering and anonymity, generally, "is a shield from the tyranny of the majority."[62]

> It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.[63]

Thus, here too, the Court found that the law had dealt with a difficult and sensitive issue in much too broad and sweeping a fashion.

There are one or two other interesting points about this decision. Justice Stevens relied partly on history, but in addition, on the values of the First Amendment and the important role of political anonymity in contributing to the values of the First Amendment.[64] Justice Thomas wrote a concurring opinion in which he sharply disagreed with the latter tack.[65] In his view, it was entirely too subjective to determine that the values of the First Amendment required protection for political anonymity.[66] One looked to history to see what the framers in 1791 of the Bill of Rights thought about the issues.[67] He surveyed history quite exhaustively and concluded that yes, indeed, the right to speak one's mind anonymously about political matters was a central feature of the political culture of 1791.[68] Therefore, it was

62. *Id.* at 1524.
63. *Id.*
64. *Id.* at 1516.
65. *Id.* at 1525 (Thomas, J., concurring in the judgment).
66. *Id.*
67. *Id.*
68. *Id.* at 1530.

properly recognized as an essential element of protecting the First Amendment. This was not because of values concerning the First Amendment, but because of the understanding of it by those who wrote it. It is a good example of Justice Thomas' interest in originalism, or looking at how the Constitution would have been read by the people who wrote these provisions two centuries ago.

For himself and Chief Justice Rehnquist, Justice Scalia agreed with Justice Thomas that there was a strong belief in and practice of anonymous political speech by the Framers, but that the almost universal political practice and tradition since then has been to uphold bans on anonymous political speech.[69] In a particularly troublesome application of his search for traditions as a guide to constitutional interpretation, Justice Scalia concluded that, since anonymity is not of the essence of the First Amendment, the deep popular tradition of outlawing anonymous political speech and requiring disclosure of the identity of the speaker trumps First Amendment concerns.[70] Finally, in his view, cases that protect political anonymity are exceptions designed to guard against harassment of identifiable unpopular speakers and groups and not general application of a right of anonymous speech.[71]

In terms of its impact on future cases, the *McIntyre* case is a sweeping and extravagant First Amendment opinion that will play an interesting role in whatever efforts political and lobbying reform legislation will take in Congress, or on the state or local level. This is because it is a strong reaffirmation of the right to engage in political discourse without having to put your name on it. However, much of the efforts to pass political and legislative reform bills are efforts to bring greater disclosure and a greater identification of speakers, supporters, and contributors into the process. The *McIntyre* case may put restraints on the ability to pass some reform measures.

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69. *Id.* at 1531-34.
70. *Id.* at 1534.
71. *Id.*

III. *RUBIN v. COORS BREWING COMPANY*

The next two cases that I will discuss are commercial speech cases. In one case, the speaker wanted to say more than the government wanted it to. The government tried to restrict what could be said and the Supreme Court stated that the restriction was impermissible.[72] Coors wanted to put "alcohol content" on its labels on beer and in its advertising. However, there is an Act of Congress dating back to 1935 which prohibits this type of labeling.[73] The Supreme Court held that in the application of commercial speech doctrine, a ban on truthful, lawful information, such as the alcohol content of beer, although aimed at achieving an important or substantial governmental purpose, which was to deter the consumption of beer and alcoholism generally, did not directly advance that purpose.[74] Thus, in applying the balancing test that is used in the commercial speech area, the Supreme Court felt there was an imbalance. A ban of

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72. Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995).

73. *See* 27 U.S.C.A. § 205(e)(2) (West Supp. 1995). Section 205(e)(2) provides in relevant part that labels of alcoholic beverages:

> will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per cent of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the product.

Id.

74. *Rubin*, 115 S. Ct. at 1593. The Court stated that the "Government here has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs." *Id.* at 1591. However, the Government offered no "convincing evidence that the labeling ban has inhibited [brewers from competing on the basis of alcohol] strength . . . ." *Id.* at 1593. The Court found that less restrictive alternatives than a labeling ban are available, including "directly limiting the alcoholic content of beers, prohibiting marketing efforts emphasizing high alcohol strength . . . [and] limiting the labeling ban only to malt liquors . . . ." *Id.*

the statement on the labels of the alcohol content of beer could not pass First Amendment muster.[75]

I believe that the beer content case has two interesting ramifications. First, the government claimed that it has much broader leeway to regulate speech which promotes "socially harmful activities," such as alcohol, and, indeed, the government claimed that the commercial speech doctrine really should not even apply where the speech is about socially harmful activities.[76] Justice Thomas, for the Court, wrote a rather powerful footnote in which he rejected that argument, distinguishing two cases which allowed more regulation of certain forms of commercial speech.[77] Justice Thomas, in effect, stated that harmful products are not First Amendment stepchildren.

The sound of rushing air you heard was Joe Camel breathing an audible sigh of relief. That footnote seems to speak directly to the question of whether, because of the socially harmful effects of cigarette smoking, and particularly on young people, the government somehow has greater leeway to regulate the advertising of cigarettes on the ground that it is socially harmful, though lawfully available. The Coors Beer case seems to suggest otherwise.

IV. *FLORIDA BAR v. WENT FOR IT, INC.*

The other commercial speech case this past term was one close to home in that it involved written solicitation of clients by lawyers.[78] The Court was divided sharply five to four, and

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75. *Id.* at 1594.

76. *Id.* at 1590-91.

77. *Id.* at 1589 n.2. The two cases, both involving the advertising of gambling, distinguished by Justice Thomas are: United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993) (upholding a federal statute prohibiting radio broadcasts of lottery advertising by a broadcaster located in a state that does not allow lotteries); Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (upholding a statute restricting casino advertising aimed at Puerto Rican residents).

78. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995).

upheld Florida's thirty day ban on written targeted contact with accident victims after an accident or a disaster.[79] This was the first time in more than fifteen years that a restriction on professional advertising or professional solicitation was upheld by the Supreme Court, and the swing justice was Justice Breyer.[80] The four more conservative justices also supported the ban.[81] The four more liberal justices opposed the ban, and Justice Breyer sided with the conservatives and provided the fifth vote for upholding this thirty day restriction on contacting accident or disaster victims.[82]

In a way, this is almost Chief Justice Burger's revenge, for the late Chief Justice had long railed against the Court's decision in *Bates v. State Bar of Arizona*,[83] the first case to allow lawyer advertising.[84] He had always insisted that lawyer advertising would lead to ambulance chasing and unprofessionalism, and in that regard, Justice O'Connor took up the battle and wound up writing the Court's opinion in this first case in many years that restricts advertising and solicitation by professionals.[85]

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79. *Florida Bar*, 115 S. Ct. at 2374. The Florida Bar rules, which the Court upheld, "create a brief 30-day blackout period after an accident during which lawyers may not, directly or indirectly, single out accident victims or their relatives in order to solicit their business." *Id.*

80. Justice Breyer joined in the opinion of the Court, delivered by Justice O'Connor. *Id.* at 2373.

81. In addition to Justice Breyer, Chief Justice Rehnquist and Justices Scalia, and Thomas also joined in the majority opinion, delivered by Justice O'Connor. *Id.*

82. Justice Kennedy filed a dissenting opinion and was joined by Justices Stevens, Souter, and Ginsburg. *Id.* at 2381.

83. 433 U.S. 350 (1977).

84. In *Bates*, the Court held that under the First Amendment, a state may not restrain "the publication in a newspaper of [a lawyer's] truthful advertisement concerning the availability and terms of routine legal services." *Id.* at 384. Chief Justice Berger stated that "I fear that [allowing legal advertising] will be injurious to those whom the ban on legal advertising was designed to protect – the members of the general public in need of legal services." *Id.* at 386 (concurring in part and dissenting in part).

85. *Florida Bar*, 115 S. Ct. at 2371. The Court stated that "[n]early two decades of cases have built upon the foundation laid by *Bates*." *Id.* at 2375.

The basis of the decision was a public opinion survey which showed that people in Florida thought very ill of lawyers and perceived many of them to be ambulance chasers.[86] I wonder how much the Florida bar paid for that survey. Based on that survey, Florida enacted a thirty day ban on certain kinds of solicitations in order to protect the privacy of victims, and to help counter the public perception of the bar as a lot of sharks.[87] Based on those two rationales, the Supreme Court upheld the Florida restriction based on protecting the privacy of an accident or disaster victim from being assaulted, if you will, by lawyers or representatives, within thirty days of an accident.[88] In addition, the restriction improves the baleful image of the bar that was caused by an effort to solicit clients who might be vulnerable to overbearing solicitation.[89] For those two reasons, the Court sustained the ban. To reach that result, the Court had to distinguish precedent left and right -- cases which had upheld in-person solicitation by accountants, targeted written solicitation by lawyers, public policy mailings by utility companies, and even mailed advertisements for condoms.[90]

To the argument that victims needed access to counsel as soon as possible, Justice O'Connor suggested that a victim could always look up a lawyer in the yellow pages.[91] It was precisely on this point that the dissent, written by Justice Kennedy, focused.[92] He stated that if you are not allowed to be told by a lawyer that you have rights, particularly within the critical first month after an event when evidence could be gathered and witnesses could be interviewed, in effect, it is like having no rights at all.[93] Therefore, he viewed the restriction as a violation of the free speech rights of lawyers, the free speech rights of their clients and potential clients to hear them out, and the rights

86. *Id.* at 2377-78.
87. *Id.* at 2379.
88. *Id.* at 2381.
89. *Id.*
90. *Id.* at 2376-79.
91. *Id.* at 2380.
92. *See id.* at 2381.
93. *Id.* at 2385 (Kennedy, J., dissenting).

of those clients to petition the courts for redress of grievances.[94] It is difficult to tell whether this decision is an overreaction to a particularly questionable form of solicitation, or whether it is the beginning of an attack on *Bates v. State Bar of Arizona* itself. Time will tell.

V. *LEBRON v. NATIONAL RAILROAD PASSENGER CORPORATION*

The next two cases deal with a little more complex situation. That is, whether choices about which speakers can use facilities be subject to public control, constitutional control, statutory control, or otherwise. Let me see if I can flesh out those concepts by discussing two cases. I'm dealing here with the Amtrak case[95] and the St. Patrick's Day parade case.[96]

In the Amtrak case, the issue was whether Amtrak, because of its connection to the federal government, should be considered a government actor and therefore subject to the restraints of the First Amendment.[97] The Court analyzed this question in response to a claim by Michael Lebron, a well-known political artist, that Amtrak had violated the First Amendment in finding his proposed advertisement unsuitable for display in Penn Station.[98] The billboard display contained a political attack on the Coors brewing family and was rejected by Amtrak as "political advertising." The Second Circuit held that Amtrak was not to be considered a government actor or a government entity, and thus, it was not subject to First Amendment restrictions.[99]

However, the Supreme Court, in an eight to one decision written by Justice Scalia, held otherwise. In a long opinion surveying the history and status of government-created

94. *Id.* (Kennedy, J., dissenting).

95. *See* Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961 (1995). The National Railroad Passenger Corp. is commonly referred to as Amtrak.

96. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S. Ct. 2338 (1995).

97. *Lebron*, 115 S. Ct. at 964.

98. *Id.*

99. *Id.*

corporations, Justice Scalia stated that whenever there is a public institution, created by an act of Congress for purposes that are important to the federal government, and the government appoints a majority of the members of the governing board of that corporation, then the corporation is a government entity.[100] This is not a question of whether Amtrak is similar to the government. The Court stated that Amtrak is the government. It is an agency of the federal government and, therefore, it is subject to the protections of the First Amendment.[101]

The Amtrak decision is interesting, and I believe that it will have significant implications for local government. This is because under the principle of the Amtrak case, many Amtrak policies, such as removing homeless people from Penn Station, or restricting people from loitering or vagrancy, will now be subject to constitutional control. The rationale is based on the theory that Amtrak, in its operation of Penn Station, is the government and is therefore limited in the same way that the government is limited.

First, municipally-controlled transportation facilities will now become part of the municipality and be subject to the limitations of the First and Fourth Amendment protections.[102] Second, sports arenas where the local government appoints or is significantly involved in the establishment of the entity that runs the sports arena, may now become treatable as a government agent.[103] Thus, a whole host of questions about who gets to put up what billboard on the outdoor fence or around the arena become First Amendment questions. Those implications are significant.

Finally, Justice Scalia adverted to the point that to some extent there is a movement to privatize government; to form corporate entities out of governmental agencies. But, as Justice Scalia noted, the Constitution will safeguard it.[104] One may not take what are otherwise public functions, such as education and law

100. *Id.* at 972.
101. *Id.*
102. *Id.*
103. *Id.* at 974.
104. *Id.* at 971.

enforcement, turn them over to publicly responsible corporations, and then claim that they are private. The Constitution will still follow the government: the First Amendment will follow, the Equal Protection Clause will follow, and the Fourth Amendment will follow as well.[105] Thus, this is an important decision because it will set the bearing on issues of local government as to when the Constitution and the First Amendment will limit choices that are made by the local government and its surrogates.

VI. *HURLEY v. IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON*

The Amtrak case was about whether Amtrak was a "public agency" that had to accept unwanted speech. A similar issue was confronted in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,*[106] The question was whether a parade, the St. Patrick's Day parade in Boston, was a "public accommodation", and therefore a governmental agent which must open its door to unwanted speech or speakers.[107]

In the *Hurley* case, the Court's unanimous answer in an opinion written by Justice David Souter was a resounding "no."[108] Justice Souter stated that to treat a parade like a public accommodation, one must open its doors to groups with an unwelcome message, that would be destructive and violative of First Amendment rights.[109] Put another way, the government cannot rain on, rein in, or reign over the St. Patrick's Day parade.

The controversy happened to occur in Boston, but of course, we have been experiencing it for a number of years in New York as well. The controversy was whether the St. Patrick's Day parade organizers could be restrictive in their choice of what groups or contingents to include in their parade, particularly,

105. *Id.*
106. 115 S. Ct. 2338 (1995).
107. *Id.* at 2347.
108. *Id.*
109. *Id.*

whether they could exclude groups that identify themselves as gay, lesbian, bisexual or a similar category.[110] The Supreme Court determined that putting together groups in a parade is similar to a decision about putting together articles in a newspaper.[111] It is as protected by the First Amendment as is editorial discretion.[112] A parade may be a different kind of First Amendment medium, but it is historically and doctrinally a recognized First Amendment medium. The government's power to tell speakers what to say, what not to say, what points to make, and what points not to make, is certainly restricted by the First Amendment.[113] The opinion makes this point in a number of important and powerful ways.[114]

In addition to stating that a parade would not be a public accommodation which could be forced open to groups in order to enforce an antidiscrimination principle, the Court basically stated

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110. In *Hurley*, the Court began its analysis by noting that Boston has a long tradition, dating back to 1737, of holding a St. Patrick's Day celebration on March 17th. *Id.* at 2341. In 1947, Boston ended its formal sponsorship of the parade and "granted authority to organize and conduct [the parade] to the petitioner South Boston Allied War Veterans Council . . . .". *Id.* In 1992, "a number of gay, lesbian, and bisexual descendants of the Irish immigrants joined together . . . to form respondent organization . . . to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals . . . ." *Id.* After being denied permission to march in the 1992 parade, respondent obtained a "state-court order to include its contingent . . . ." *Id.* In 1993, respondent again brought suit alleging both constitutional and state public accommodations law violations. *Id.* The Court reversed the decision of the Massachusetts Supreme Judicial Court in favor of respondent and held that the "requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment" rights of the petitioner. *Id.* at 2343 (citation omitted).

111. *Id.* at 2346.

112. *Id.*

113. *Id.* at 2347.

114. *Id.* The Court stated that outside the context of commercial advertising, which sometimes requires "'purely factual and uncontroversial information,' [the State] . . . may not compel affirmance of a belief with which the speaker disagrees." *Id.* (citations omitted). Moreover, this right "applies not only to expressions of value, opinions, or endorsement, but equally to statements of fact the speaker would rather avoid. . . ." *Id.* (citation omitted).

that generating the right thinking about issues is something that is a decidedly fatal objective under the First Amendment.[115] That is, if the point of public accommodation law is not to protect against harmful conduct but to discourage bad ideas, this is something that under the First Amendment, government cannot coerce.[116] Thus, the Court almost went out of its way to comment on the political correctness issue by suggesting that the First Amendment guards against government efforts to tell people how they ought to think about something. Therefore, the issue has been resolved, for the most part, of whether municipalities have control over parades in terms of who is going to participate in them. The answer is no. There is no constitutional warrant or public accommodation warrant for telling parade organizers whom to include.[117] Can you require permits? Sure. Can you regulate the time, place and manner? Sure. But to regulate inclusiveness, the Court said, is to regulate content, and that's impermissible.[118]

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115. *Id.* at 2350. The Court recognized "that the ultimate point of forbidding acts of discrimination towards certain classes is to produce a society free of the corresponding biases." *Id.* However, "if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective." *Id.*

116. To wit, "[t]he very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Id.*

117. *Id.* at 2351. The Court, in emphasizing "the Nation's commitment to protect freedom of speech" concluded that "[d]issaproval of a private speaker's statement does not legitimize use of the Commonwealth's [public accommodation law] to compel the speaker to alter the message by including one more acceptable to others." *Id.*

118. *Id.* at 2347.

VII. *CAPITOL SQUARE REVIEW BOARD v. PINETTE*; *ROSENBERGER v. UNIVERSITY OF VIRGINIA*

Finally, content was also at the center of the last two cases I want to talk about.[119] Here the content was both speech and speech of a religious nature. The question was whether government must permit its facilities and its resources to be used for speech which has a religious message.[120] And if the government does permit that, does the very allowance or support of that religious speech violate the Establishment Clause?[121] One of the themes of the St. Patrick's Day Parade case was that government does not necessarily endorse speech that it permits. Is the same true here?

Whenever I think about this case, I think about a New England traffic circle. The Free Speech, Free Exercise and the Establishment Clause principles enter the intersection where they swirl madly around and they emerge heading in a direction that they did not know when they first entered the traffic circle. I think that's what happened in some of these cases. Let me just describe each one of them for you.

One involved the placing of a cross by the Ku Klux Klan on a plaza in front of the Ohio State Capitol.[122] The other involved subsidizing a student religious publication as part of campus life, and in both cases, the plaintiffs claimed that the government was violating their free speech or free exercise of religious rights by

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119. Rosenberger v. Rector of University of Virginia, 115 S. Ct. 2510 (1995); Capitol Square Review Board v. Pinette, 115 S. Ct. 2440 (1995).

120. In *Rosenberger*, the issue was whether the University of Virginia violated the First Amendment rights of a student group by not subsidizing the group's religious publication as a part of campus life. *Rosenberger*, 115 S. Ct. at 2513. In *Capitol Square*, the issue was whether the government violated the First Amendment rights of the Ku Klux Klan by not permitting them to place a religious symbol, a Latin cross, on a plaza in front of the Ohio State Capitol. *Capitol Square Review Board*, 115 S. Ct. at 2444-45.

121. *Rosenberger*, 115 S. Ct. at 2521 (stating that certiorari was granted to answer the Establishment Clause question); *Capitol Square Review Board*, 115 S. Ct. at 2444-45 (stating that the Establishment Clause issue "is the sole question before us to decide").

122. *Capitol Square Review Board*, 115 S. Ct. at 2445.

refusing them access.[123] The government insisted that its refusal was compelled by the need to avoid violating the Establishment Clause by granting access.[124] In both cases, the Court upheld the speaker and ruled that the permitting of religious speech or religious symbolism did not entail violating the Establishment Clause.[125]

A. The Klan Cross Case

Now the Klan cross case.[126] Capitol Square is a ten-acre site owned by the state and which surrounds the state capitol building in Columbus, Ohio.[127] It has long been used as a public forum for a variety of speakers and groups.[128] After the placement of an unattended Christmas tree and an unattended menorah was approved by the park board, the Ku Klux Klan, not surprisingly, asked to put up a cross in the plaza.[129] The park board said no, and two lower federal courts said yes.[130] The Supreme Court agreed with those courts; however, there was sharp disagreement about the appropriate rationale.[131]

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123. *Rosenberger*, 115 S. Ct. at 2515.

124. *Id.* at 2520-21. Although the Establishment Clause issue was "no longer presse[d]" by the University on its brief on the merits, the Court stated that "it must be addressed." *Id*; *Capitol Square Review Board*, 115 S. Ct. at 2446. Petitioners alleged that their sole ground for refusal of the display of the cross is "the State's interest in avoiding official endorsement of Christianity, as required by the Establishment Clause." *Id.*

125. *Id.* at 2524. The *Rosenberger* Court held that "[t]o obey the Establishment Clause, it was not necessary for the University to deny eligibility [for funding] to student publications because of their [religious] viewpoint." *Id*; *Capitol Square Review Board*, 115 S. Ct. at 2450. The *Capitol Square* Court held that "[r]eligious expression cannot violate the Establishment Clause where it . . . occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Id.*

126. *Capitol Square Review Board*, 115 S. Ct. at 2440.

127. *Id.* at 2444.

128. *Id.*

129. *Id.* at 2445.

130. *Id.*

131. *Id.* at 2450 (discussing the procedural posture in the lower courts). The judgment of the Court and an opinion with respect to three of its four parts was delivered by Justice Scalia. *Id.* at 2444

Justice Scalia spoke for a majority in holding that a public forum cannot exclude religious speech or speakers based on content and that granting permission to use a public forum does not necessarily constitute a sponsorship of the religious message.[132] But he only spoke for a plurality in further holding that the rule was no different, just because some observers might reasonably perceive that the government was endorsing the message embodied in the cross.[133] Here, Justice Scalia's opinion took a categorical approach. Any use of a public forum by private groups with a religious message will not constitute a violation of the Establishment Clause.[134] In effect, he would have created a public forum exception to the Establishment Clause. When government makes available a public forum to all comers, to all people, all sizes and shapes, the fact that religious groups use that place as well, he said, can never constitute a violation of the Establishment Clause.[135]

The opinion of Justice O'Connor, joined by Justices Breyer and Souter, the three other justices who made up the seven-Justice majority, took a much more contextual, fact-based, nuanced approach. To them, the question was whether a reasonable observer would perceive the government endorsing religion by permitting the religious display?[136] Would a reasonable observer feel the placement of this cross, in its proximity to the state capitol, was an official endorsement of the religious message that the cross embodied? The majority felt that in this case, the answer was no.[137] The reasonable observer, knowing anything at all about the history of that place and the function of it as a public forum, would not find that the government was supporting

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132. *Id.* at 2447.

133. *Id.* at 2447-50.

134. *Id.* at 2450.

135. *Id.* at 2449.

136. *Id.* at 2456 (O'Connor, J., concurring in part and concurring in the judgment).

137. *Id.* at 2448 ("Surely some [members of the community,] hearing of religious ceremonies on [state] premises, and not knowing of the premises' availability and use for all sorts of other private activities, *might* leap to the erroneous conclusion of state endorsement.").

the message, but rather that the government was neutrally providing a public forum to all messages, religious as well.[138] Seven justices together formed the majority, four for the Scalia flat rule public forum exception to the Establishment Clause, three for the more fact-based contextual approach.[139] The two dissenters, Justices Stevens and Justice Ginsburg, felt that the facts here made it so clear that unattended crosses on public property would convey the impermissible message that the public was endorsing the religious view embodied in that cross and, therefore, a violation of the Establishment Clause was clearly shown.[140] But the majority said no, the government does not adopt what it allows.[141] It does not prescribe what it permits, and neutrality towards religious does not constitute endorsement of religion.[142]

B. The School Paper Case

This same principle persuaded the majority of justices in the college newspaper funding case, *Rosenberger v. Rector of the University of Virginia*.[143] The Justices felt that the same

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138. *Id.* at 2456 (O'Connor, J., concurring in part and concurring in the judgment).

139. Chief Justice Rehnquist and Justices Kennedy and Thomas joined Justice Scalia in the fourth part of the opinion discussing the "public forum exception." *Id.* at 2444, 2447. Justices O'Connor, Souter, and Breyer did not join in the fourth part of the opinion. *Id.* at 2451 (O'Connor, J., concurring in part and concurring in the judgment).

140. Justice Stevens' dissent stated that "[s]ome might have well perceived the [the cross] as a message of love, others as a message of hate, still others as a message of exclusion -- a Statehouse sign calling powerfully to mind their outsider status." *Id.* at 2465. Justice Ginsburg, in her dissent, stated that the Klan's disclaimer "appended to the foot of the cross was unsturdy: it did not identify the Klan as a sponsor; it failed to state unequivocally that Ohio did not endorse the display's message; and it was not shown to be legible from a distance." *Id.* at 2475 (footnote omitted).

141. *Id.* at 2447 ("'[A]n open air forum . . . does not confer any imprimatur of state approval on religious sects or practices.'") (citation omitted).

142. *Id.* at 2446-47.

143. 115 S. Ct. 2510 (1995).

principles were applicable when the government provides either a public forum or public funding for a religious speech.[144] In *Rosenberger*, an interesting irony existed. That is, the University of Virginia was created by Thomas Jefferson, one of the framers of the Constitution who was most concerned with the separation of church and state. Due to this relationship, the opinions in the Court contained much quoting and counterquoting of Jefferson's and James Madison's views regarding this comparable issue. The Court, via a sharply divided five to four vote, stated that the same principles of equal access which were applied with the cross in the plaza case, applied equally to the issue of school funding.[145]

The Court held that providing students with equal access for religious speech does not constitute impermissible endorsement or sponsorship of that speech.[146] This case was one where the division of the court seemed to be sharpest on the conservative/liberal spectrum. Chief Justice Rehnquist, Justices Kennedy, Scalia, Thomas and O'Connor each supported the religious student speakers.[147] Justices Stevens, Souter, Ginsburg and Breyer each dissented and saw an impermissible support for religion.[148]

Despite the sharp division, the majority stated that this was an easy case. The Court had previously established that schools and colleges had to make facilities available for religious groups on an evenhanded basis, and that such a Free Speech requirement does not violate the Establishment Clause.[149] Thus, in *Widmar v. Vincent*,[150] the Court held that if meeting rooms are made

144. *Id.* at 2522.

145. *Id.* at 2523. The Court stated that, "[i]n this case, 'the government has not willfully fostered or encouraged' any mistaken impression that the student newspapers speak for the University." *Id.* (quoting Capitol Square Review Board v. Pinette, 115 S. Ct. 2440, 2448 (1995)).

146. *Id.* (stating that "[i]t does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis. . . .").

147. *Id.* at 2513.

148. *Id.* at 2533.

149. *Id.* at 2523. *See* Widmar v. Vincent, 454 U.S. 263 (1981).

150. 454 U.S. 263 (1981).

available to student groups on a college campus, a student religious group cannot be excluded from also using the rooms.[151] In another case, *Lamb's Chapel v. Center Moriches School District,*[152] the Court held that if a high school makes rooms available after school to community groups on a first-come, first-serve basis, they can not specifically exclude a community group because they are of a religious nature.[153] Based on this precedent, the majority of the Court found that the same principle of equal access to facilities should also apply to funds collected for student activities as well.[154]

In *Rosenberger*, the University of Virginia collected a student activity fee of fourteen dollars per semester from all students, and then used that money to subsidize a wide range of student activities.[155] The Court held that the school cannot, constitutionally, deny access to the fund to subsidize those activities which promote a religious point of view.[156] Thus, in *Rosenberger*, the issue was whether a religiously-oriented student newspaper could seek and receive funds out of the student activity fund.[157] The majority's decision was based on the same two points that have been swirling around that traffic circle: First, it would violate the Free Speech Clause to prohibit access to those funds because of the viewpoint of the student group.[158] Second, the Establishment Clause does not prohibit access to those funds even if the viewpoint of the student group happens to be religious, provided that the funds are made available to all student groups that meet certain neutral criteria.[159] Therefore, student groups whose viewpoint or message is of a religious nature, or from a religious source, cannot be excluded.[160] The

151. *Id.*
152. 113 S. Ct. 2141 (1993).
153. *Id.*
154. *Rosenberger*, 115 S. Ct. at 2518-19.
155. *Id.* at 2514.
156. *Id.* at 2520.
157. *Id.* at 2521.
158. *Id.* at 2517.
159. *Id.* at 2523.
160. *Id.* at 2525.

majority stated that to find otherwise would put the government in the wrong business of examining each point of view to determine whether it was religious or secular, and admitting the secular views but excluding the religious.[161] The Court stated that the better approach would be the evenhanded subsidy of all student groups and activities which meet otherwise neutral criteria.[162] Therefore, by a five to four vote, the Court concluded, as it had with the cross in the plaza case, that both the Free Speech and Free Exercise clauses require and the Establishment Clause does not prohibit the availability of these facilities and these funds for religious speakers.[163]

I think it is clear that both of these cases significantly open the door to a greater accommodation of private religious speech in the public marketplace of ideas. Furthermore, this seems to square with the current mood of the country. Ironically, however, the Court's slight easing of restrictions on publicly subsidized religious activity may dampen the ardor of those who seek to achieve that type of result via constitutional amendment. We will have to wait for the future to see how these principles play out.

For example, one issue is whether you can have a religious speaker at a high school graduation event where the students, not the school officials, have chosen that speaker. Two years ago, the Court, in *Lee v. Weisman*,[164] stated that a violation of the Establishment occurred when a school chooses a religious person to participate in a high school graduation and scripts the sermon.[165] Since then, many high schools, particularly in the South, have tried to circumvent this decision by allowing the

161. *Id.* at 2524.

162. *Id.* at 2523.

163. *Id.* at 2525.

164. 505 U.S. 577 (1992).

165. *Id.* at 599. The Court considered the question of "whether a religious exercise may be conducted at a graduation ceremony . . . where . . . young graduates who object are induced to conform." *Id.* The Court held that it would be violative of the Establishment Clause of the First Amendment for a school to "persuade or compel a student to participate in a religious exercise." *Id.*

students to decide whether to have a religious speaker of their choosing and the only role the school has is to provide the microphone. Is this a violation of the Establishment Clause? When the Court gets to this particular issue, we will have to see how it gets resolved in light of the two cases we have just discussed.

To conclude, there is one final important case that was not decided on First Amendment grounds, or not explicitly decided on First Amendment grounds. I'm thinking of *U.S. Term Limits Inc. v. Thornton,*[166] where the Supreme Court decision invalidated state-enacted term limits on congressional offices.[167] Although the Court invalidated those restrictions on separation of powers grounds, the Court might have decided the case on Diogenes' theory as well: Get out of the people's light. If voters want to return representatives to Washington time after time, the job of the government is to get out of the way and let the voters decide. Thank you.

166. 115 S. Ct. 1842 (1995). This case involved a challenge to an amendment to the Arkansas State Constitution limiting potential candidates for election to Congress to those people who have served less than "three terms in the House of Representative or two terms in the Senate." *Id.* at 1845. The Court ruled that this amendment violated the "fundamental principle of our representative democracy," and was therefore unconstitutional. *Id.* (citation omitted).

167. *Id.*