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Commentary: Constitutional Law

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CONSTITUTIONAL LAW

COMMENTARY

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One who reviews the Second Circuit's constitutional law work product during any court term finds many of the usual "suspects" on the docket: a number of criminal cases presenting fourth amendment issues,[1] a few right to counsel claims,[2] some procedural due process questions,[3] certain interesting federal jurisdiction questions,[4] some political corruption cases,[5] and at least two or three fascinating first amendment cases.[6] In this re-

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[1] *See, e.g.*, United States v. Johnson, 660 F.2d 21 (2d Cir. 1981) (use of "drug-sniffing" dog does not constitute a search); United States v. Place, 660 F.2d 44 (2d Cir. 1981), *cert. granted*, 50 U.S.L.W. 3963 (U.S. June 7, 1982) (No. 81-1617) (two-hour warrantless seizure of air passenger's luggage held to violate fourth amendment); United States v. Moody, 649 F.2d 124 (2d Cir. 1981) (upholding routine warrantless customs border search); United States v. Taborda, 635 F.2d 131 (2d Cir. 1980) (observation of objects and activities inside a person's home by enhanced viewing through a telescope constitutes a search within the meaning of the fourth amendment).

[2] *See, e.g.*, Camera v. Fogg, 658 F.2d 80 (2d Cir. 1981) (multiple representation of co-defendants violated sixth amendment right to counsel), *cert. denied*, 102 S. Ct. 981 (1981); McKee v. Harris, 649 F.2d 927 (2d Cir. 1981) (failure to appoint new counsel during trial held not to constitute a sixth amendment violation).

[3] *See, e.g.*, Keeler v. Joy, 641 F.2d 1044 (2d Cir. 1981) (procedures afforded tenant prior to eviction complied with due process requirements), *cert. denied*, 102 S. Ct. 390 (1981); Baden v. Koch, 638 F.2d 486 (2d Cir. 1980) (dismissal of Chief Medical Examiner does not constitute a due process violation if dismissal procedurally complied with local regulations).

[4] *See, e.g.*, Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981) (upholding exercise of jurisdiction in suits for breach of contract against foreign sovereigns), *cert. denied*, 102 S. Ct. 1012 (1982); Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320 (2d Cir. 1981) (no jurisdiction to hear suits for breach of contract against foreign sovereign when brought by foreign plaintiff), *cert. granted*, 102 S. Ct. 997 (1982). For a complete discussion of these two cases, see 48 BROOKLYN L. REV. 979 (1982).

[5] *See, e.g.*, United States v. Williams, 644 F.2d 950 (2d Cir. 1981) (upholding indictment against United States Senator accused of "ABSCAM" charges); United States v. Meyers, 635 F.2d 932 (2d Cir. 1980) (upholding indictment against Congressman accused of "ABSCAM" charges), *cert. denied*, 449 U.S. 956 (1980).

[6] *See, e.g.*, International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir. 1981) (religious group that practices ritual of Sankirtan cannot be confined

spect, the 1980-1981 term was no exception and contained few surprises.[7] However, a perusal of the cases decided during this term also discloses a more striking phenomenon: the term produced a large number of *sui generis* cases.[8]

These *sui generis* cases are particularly interesting both in and of themselves, since most lawyers and certainly *all* law teachers love cases that do not fit into any set mold, and with respect to the Supreme Court's subsequent disposition of these Second Circuit decisions. One comes away from these cases with the sense that the Second Circuit, in its willingness to validate novel constitutional claims, is frequently more expansive in its rulings than the Supreme Court.[9] To be sure, in several cases the Second Circuit's disposition foreshadowed the Supreme Court's ultimate rulings on the issue.[10] However, there remains a number of important instances in which the Second Circuit appeared more willing than the Supreme Court to break new constitutional ground.[11]

I.

The proselytizing and solicitation activities of the International Society for Krishna Consciousness (ISKCON) combine a unique and powerful blend of free speech and free exercise claims under the first amendment.[12] The ISKCON organization has been extremely vigorous in asserting first amendment claims in connection with its activities in places or in manners that government officials find impermissible.[13] In *International Society*

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to "fixed booth" location at State Fair); Pico v. Board of Educ., Island Trees Union Free School Dist. No. 26, 638 F.2d 404 (2d Cir. 1980) (summary judgment denied in book-banning case), *aff'd*, 102 S. Ct. 2799 (1982).

[7] *See* notes 1-6 and accompanying text *supra*.

[8] I include in that definition cases presenting novel legal issues or unusual factual situations in a context where Supreme Court rulings provide little guidance for decision. In such situations, a court is writing on a relatively blank slate, largely free from precedential restraints.

[9] *See* notes 12-54 and accompanying text *infra*.

[10] *See* notes 77-136 and accompanying text *infra*.

[11] *See* notes 55-76 and accompanying text *infra*.

[12] U.S. CONST. amend. I. The first amendment provides that: "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 to peacefully assemble, and to petition the Government for a redress of grievances." *Id.*

[13] *E.g.*, International Soc'y for Krishna Consciousness, Inc. v. Eaves, 601 F.2d 809 (5th Cir. 1979) (upholding requirement that religious solicitation at airport be conducted

for Krishna Consciousness v. Barber,[14] the ISKCON group, pointing to its religious ritual of Sankirtan, which requires adherents to go into public places to distribute or sell religious literature and solicit donations for its cause, attacked an antisolicitation regulation of the New York State Fair. The officials of the fair had a "booth-only" rule, which limited solicitation activities to fixed booth locations and prohibited any "roving" solicitors.[15] ISKCON filed suit, challenging the effect of this restriction on its practice of Sankirtan as an unreasonable interference with its free exercise of religion.[16] Following an extensive trial, a thoughtful district court judge upheld the rule as a valid "time, place and manner" restriction on solicitation.[17]

The Second Circuit, in an opinion by former Chief Judge Kaufman, reversed the district court.[18] Characteristically[19] beginning his opinion with an eloquent observation that "[t]olerance of the unorthodox and unpopular is the bellwether of a society's spiritual strength,"[20] Judge Kaufman found, based on an extensive record, that the ritual of Sankirtan, and the solicitation of funds it encompassed, was a "religious activity" entitled to free exercise clause protection[21] unless the state could show a compelling justification "of the highest order" for the restriction.[22] Finding the "booth-only" rule a "total limitation on the free exercise of a [S]ankirtan,"[23] the court then examined the justifications offered by the state. Judge Kaufman agreed that the state's goal—the prevention of fraud and harassment by ISKCON solicitators—was a compelling interest and that the

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only in designated booths).

[14] 650 F.2d 430 (2d Cir. 1981).

[15] *Id.* at 434 n.3.

[16] *Id.* at 438.

[17] *See* 506 F. Supp. 147 (N.D.N.Y. 1980).

[18] 650 F.2d 430 (2d Cir. 1981).

[19] *See, e.g.*, Federal Election Comm. v. Hall-Tyner Election Campaign Comm., 678 F.2d 416, 419 (2d Cir. 1982) ("The principle of free expression requires that all groups remain unfettered when expounding their ideologies, regardless of how universally disfavored those opinions may be.").

[20] 650 F.2d at 432.

[21] *Id.* at 443.

[22] *Id.* at 444. The standard adopted by the Second Circuit, demanding a state justification "of the highest order," was first enunciated by the Supreme Court in Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[23] 650 F.2d at 443.

rule was "well-tailored" to achieve that purpose.[24] The rule failed, however, because the state was unable to show that no less restrictive alternatives were available. More particularly, the court concluded that the direct policing of specific acts of fraud and harassment was preferable to the prior restraint inherent in the "booth-only" rule.[25]

Less than three weeks after the Second Circuit's decision in *Barber,* the Supreme Court, in effect, reversed the Second Circuit. In *Heffron v. International Society for Krishna Consciousness, Inc.,*[26] the Supreme Court addressed issues identical to those presented in *Barber* and upheld the "booth-only" rule. Unlike the Second Circuit opinion, which elaborately demonstrated the religious nature of the Sankirtan practice in order to trigger the rigorous compelling interest/least restrictive alternative analysis,[27] the Supreme Court addressed the issue of whether the booth restriction was "reasonable" in terms of time, place and manner, and found the "booth-only" rule justifiable under that less demanding, more deferential standard.[28] Indeed, the Court, in the face of a record stipulation that Sankirtan is a religious ritual,[29] specifically rejected the argument that

> the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor . . . do religious organizations enjoy rights to communicate, distribute, and solicit on the fair grounds superior to those of other organizations having social, political, or other ideological messages to proselytize.[30]

The dissent, agreeing with the Second Circuit's position in

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[24] *Id.* at 445.

[25] *Id.* at 447.

[26] 452 U.S. 640 (1981). *Heffron* involved the Minnesota State Fair and ISKCON efforts to challenge a "fixed location" rule applicable to solicitation and the distribution of literature. Apparently, there was no certiorari petition to seek review of the Second Circuit ruling in *Barber.* Given the ruling in *Heffron,* there was obviously no need to seek Supreme Court review.

[27] *See* notes 21-25 and accompanying text *supra.*

[28] 452 U.S. at 654. The court stated: "we hold that the State's interest in confining distribution, selling and fund solicitation activities to fixed locations is sufficient to satisfy the requirement that a place or manner restriction must serve a substantial state interest." *Id.* at 654.

[29] *Id.* at 659 n.3 (Brennan, J., dissenting).

[30] *Id.* at 652.

Barber, believed that less drastic, more narrowly drawn restrictions were available to achieve the state's legitimate concerns.[31]

A similar sequence can be found in two other related Second Circuit/Supreme Court cases dealing with the first amendment's speech and religion clauses.[32] In *Brandon v. Board of Education,*[33] the Second Circuit, again with Judge Kaufman writing the opinion, held that a public high school's refusal to allow a student religious group to use school facilities for a preschool prayer meeting not only did not violate the students' free exercise and free speech rights, but that such a refusal was mandated by the first amendment's establishment clause.[34]

One year after *Brandon,* the Supreme Court, affirming an Eighth Circuit decision, reached an opposite result in *Widmar v. Vincent.*[35] In *Widmar,* a group of college students wished to use a public university facility for religious worship and discussion. The university refused the students' request and the Eighth Circuit held that the university's regulation constituted content-based discrimination against religious speech, that no compelling justification was available, and that the establishment clause did not bar a policy of equal access.[36] Viewing the case primarily as a free speech, public forum issue, the Supreme Court ruled that the university's prohibition interfered with the students' free speech rights and that the establishment clause would not be violated by allowing a group equal access to a university-created public forum.[37]

Both the Second Circuit and the Supreme Court purported to distinguish the principles enunciated in the opposing circuit courts' opinions. The Second Circuit, in distinguishing the Eighth Circuit ruling permitting the religious activity, pointed to the differences between the high school and college setting, reasoning that high school students were better able to exercise religious freedom off-campus than college students and, conversely, were more vulnerable to the establishment dangers of

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[31] *Id.* at 659.

[32] *See* note 12 *supra.*

[33] 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 102 S. Ct. 970 (1981).

[34] *Id.* at 979. *See* note 12 *supra.*

[35] 102 S. Ct. 269 (1981).

[36] 635 F.2d 1310 (8th Cir. 1980).

[37] 102 S. Ct. at 273.

on-campus activities.[38] In *Widmar,* the Supreme Court distinguished *Brandon* on this latter ground, but also stated that the facilities in *Brandon* had not been made available to other student groups and thus, no "public forum" had been created.[39] A careful reading of *Brandon,* however, indicates that the student plaintiffs *did* claim that other student groups had been allowed to use the facilities for meetings. In other words, a "public forum" claim had been made and the Second Circuit had rejected it when it noted that "other organizations are permitted to use school facilities, but their use does not raise serious problems of the establishment of religion. Moreover, since all religious groups are equally denied access to school facilities, any equal protection argument lacks merit."[40]

The Second Circuit's reasoning in *Brandon* directly conflicts with the ultimate analysis of the Supreme Court in *Widmar.* Therefore, the Second Circuit's attempt to safeguard the delicate principles of the separation of church and state was effectively undercut by the Supreme Court.

Turning from Second Circuit decisions concerning the first amendment to decisions involving the eighth amendment,[41] one finds another example of the Second Circuit being, at least slightly, ahead of the Supreme Court. In *Lareau v. Manson,*[42] the Second Circuit considered a prisoners' suit challenging the overcrowded conditions at the Hartford Community Correctional Center in Connecticut. In the context of a broad and systematic remedial order, designed to alleviate this gross overcrowding, the district court prohibited the "double-bunking" of inmates.[43] The Second Circuit, although modifying the order to prohibit the "double-bunking" of a pre-trial detainee for more than 15 days[44] and a sentenced prisoner for more that 30 days,[45] basically ruled that beyond those time periods, the use of

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[38] 635 F.2d at 977.

[39] 102 S. Ct. at 276 n.13.

[40] 635 F.2d at 980.

[41] U.S. CONST. amend. VIII. The eighth amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

[42] 651 F.2d 96 (2d Cir. 1981).

[43] 507 F. Supp. 1177 (D. Conn. 1980).

[44] 651 F.2d at 105.

[45] *Id.* at 109.

"double-bunking" was impermissible.[46]

The court reached this result despite a recent Supreme Court ruling in *Bell v. Wolfish,*[47] in which Justice Rehnquist stated that there is no "one man, one cell principle lurking in the Due Process Clause . . . ."[48] Moreover, in *Lareau,* the Second Circuit entered its decision restricting "double-bunking" knowing that the Supreme Court was about to hand down its first eighth amendment ruling on that issue. Indeed, Judge Friendly, dissenting on that point alone,[49] urged the panel to withhold its decision until the Supreme Court's ruling.[50]

Two weeks after the Second Circuit's decision, the Supreme Court, in *Rhodes v. Chapman,*[51] ruled, eight to one, that the "double-celling" of inmates did not constitute "cruel and unusual" punishment in violation of the eighth amendment.[52] Admittedly, the Supreme Court indicated that the constitutional validity of "double-celling" could not be considered in isolation from the general conditions at the particular facility.[53] Nevertheless, the general conditions at the Connecticut facility did not appear so much worse than the conditions at the Ohio facility considered by the Supreme Court in *Rhodes,* so as to justify the difference in results.[54] Rather, once again, the Second Circuit took a more expansive view of constitutional rights than the Supreme Court.

In the three decisions just discussed, the Second Circuit's approach was ultimately rejected by the Supreme Court in subsequent cases. The next two cases discussed, both involving the constitutional rights of criminal defendants in unusual settings, resulted in direct Supreme Court reversals of the Second Circuit rulings.

Rivera v. Harris[55] involved what Judge Newman character-

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[46] *See* 651 F.2d 96.

[47] 441 U.S. 520 (1979). In *Bell,* the Supreme Court reversed another Second Circuit prisoner rights ruling. *Id.*

[48] *Id.* at 542.

[49] 651 F.2d at 111-16 (Friendly, J., dissenting).

[50] *Id.* at 115-16.

[51] 452 U.S. 337 (1981).

[52] *Id.*

[53] *Id.* at 352.

[54] Descriptions of the facilities in question in *Rhodes* and in *Lareau* can be found at 452 U.S. 336, 339-44 (1981) and 651 F.2d 96, 98-101 (2d Cir. 1981), respectively.

[55] 643 F.2d 86 (2d Cir.), *rev'd sub nom.,* Harris v. Rivera, 102 S. Ct. 460 (1981) (per

ized as "interesting issues concerning the constitutionality of inconsistent verdicts rendered by a judge in a multi-defendant criminal trial without a reasoned explanation of the basis for the disparate results."[56] The rather complicated facts of the case involved the sharply conflicting testimony of the complainant and one of the co-defendants. The state trial judge acquitted the testifying defendant on certain charges, but convicted the other defendants.[57] On federal habeas corpus review, Judge Newman's careful opinion detailed the trial testimony, pointed to the settled Second Circuit rule against "irrationally inconsistent" verdicts in federal criminal bench trials,[58] and concluded that there was no rational basis upon which to square the petitioner's conviction with the co-defendant's acquittal.[59] Finally, the court addressed the novel question of whether such unexplained inconsistency rises to a constitutional due process violation. Drawing on a wide variety of constitutional and procedural sources, the court concluded that, at least with respect to facially inconsistent judgments in non-jury cases, due process of law requires an explanation for the discrepancy in result so as to minimize error and to reduce arbitrariness.[60]

In a *per curiam* opinion, without full briefing or argument, and with only Justice Marshall dissenting, the Supreme Court reversed.[61] The brief opinion criticized the Second Circuit's interpretation of its own "settled rule" against irrationally inconsistent verdicts in federal criminal cases, and lectured the court on the permissible scope of federal habeas courpus review.[62] The court tersely held that the Second Circuit had "plainly erred,"[63] stating that:

> there is no federal requirement that a State trial judge explain his reasons for acquitting a defendant in a state criminal trial; even if the acquittal rests on an improper ground, that error would not create a constitutional defect in a guilty verdict that is supported by sufficient

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curiam).

[56] 643 F.2d at 87.

[57] *Id.*

[58] *Id.* at 90-91 (citing United States v. Maybury, 274 F.2d 899 (2d Cir. 1960)).

[59] *Id.* at 97.

[60] *Id.* at 96.

[61] 102 S. Ct. 460 (1981).

[62] *Id.* at 462-66.

[63] *Id.* at 463.

evidence and is the product of a fair trial.[64]

The Supreme Court was "not persuaded that an apparent inconsistency in a trial judge's verdict gives rise to an inference of irregularity in his finding of guilt that is sufficiently strong to overcome the well-established presumption that the judge adhered to basic rules of procedure."[65] The Court then speculated on the various possible explanations for the inconsistency and found them all constitutionally tolerable.[66] In so ruling, the Supreme Court gave embarrassingly short shrift to the due process ruling that Judge Newman had so painstakingly fashioned.

In the other due process case, *Smith v. Phillips*,[67] the Supreme Court, while giving somewhat more respectful attention to the Second Circuit's opinion than it had in *Rivera*, again reversed. In *Smith*, the issue was whether the state court murder conviction of a former New York City police officer was tainted by the fact, known only to the prosecution, that during the trial one of the jurors had been actively seeking employment in the prosecutor's office.[68] The district court, relying on venerable precedent requiring impartiality by judges,[69] found a due process violation.[70]

The Second Circuit affirmed, relying on a different rationale: namely, that the prosecution's failure to disclose this information during the trial denied the defendant "fair treatment" and thereby violated due process considerations. In reaching this result, the court relied on cases forbidding the knowing use of perjured testimony and the wrongful withholding of exculpatory evidence.[71] The court concluded: "To condone the withholding

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[64] *Id.*

[65] *Id.* at 465.

[66] *Id.* at 465-66.

[67] 102 S. Ct. 940 (1982), *rev'g* Phillips v. Smith, 632 F.2d 1019 (2d Cir. 1980). For extensive discussions of *Phillips*, see 48 BROOKLYN L. REV. 901 & 1147 (1982).

[68] 632 F.2d at 1020-22.

[69] *See, e.g.*, Tumey v. Ohio, 273 U.S. 510 (1927) (practice of remunerating inferior judicial officers only when the defendant is convicted provides the judge with a direct, personal, substantive, pecuniary interest in holding against the defendant, and therefore, violates due process).

[70] 632 F.2d at 1022.

[71] *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (prosecution's failure to produce evidence requested by defendant violated due process where the evidence was material to guilt or punishment regardless of whether the prosecution acted in good faith); Napue v. Illinois, 360 U.S. 264 (1959) (prosecution's failure to correct testimony he knew to be

by the prosecutor of information casting substantial doubt as to the impartiality of a juror . . . would not be fair to a defendant and would ill serve to maintain public confidence in the integrity of the judicial process."[72]

The Supreme Court reversed.[73] On the impartiality claim, Justice Rehnquist ruled that actual bias could not be implied or imputed to the juror and had not been proven in the state court hearings after the trial. Accordingly, the opinion stated that "due process does not require a new trial everytime a juror has been placed in a potentially compromising situation."[74] With respect to the prosecutorial nondisclosure, the Supreme Court faulted the Second Circuit's reading of the relevant case law, stating that "the touchstone of due proces analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."[75] Although not "condon[ing] the conduct of the prosecutors," the Court concluded that because the juror's job search did not impair his ability to render an impartial verdict, the prosecutor's failure to disclose that information did not deprive the defendant of a fair trial.[76]

II.

Lest it be thought that the Second Circuit is dominated by card-carrying civil libertarians, it should be noted, of course, that in a number of cases presenting novel constitutional issues the court's treatment of those questions has foreshadowed and anticipated the resolution of those same issues by the Supreme Court. Several cases decided during the 1980-1981 Second Circuit term are illustrative.

In recent years, many communities, alarmed at the increase of drug use by young people, passed so-called "head-shop" laws designed to regulate stores that sold "drug paraphernalia." Typically, those ordinances defined drug paraphernalia as items

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false violated due process). *See generally* United States v. Agurs, 427 U.S. 97 (1976) (there is no constitutional violation where there is no knowing use of perjured testimony, no specific request for the evidence, and the evidence omitted by the prosecution was not so material as to have created a reasonable doubt which did not otherwise exist).

[72] 632 F.2d at 1023.

[73] 102 S. Ct. 940 (1982).

[74] *Id.* at 946.

[75] *Id.* at 947.

[76] *Id.* at 948.

"designed," "marketed," or "intended" for use with proscribed drugs.[77] Obviously, since the items themselves, such as small pipes, rolling paper and tiny spoons, were not illegal, the applicability of the regulations turned on the meaning of terms such as "designed for use with" and posed considerable vagueness problems.[78]

One such ordinance,[79] enacted in Westchester County, New York, was before the Second Circuit in *Brache v. County of Westchester*.[80] The provision made it a misdemeanor to sell drug paraphernalia, and local merchants, whose stores sold "smoking accessories," filed suit contending that the definition of drug paraphernalia was unconstitutionally vague.[81] Although the storeowners conceded that the ordinance could validly be applied to "single-use" items (i.e., items whose only use was in connection with illegal drugs), the district court ruled that they could still challenge the facial validity of the ordinance because of its potential application to "multi-use" items.[82] Since the ordinance failed to give sufficient notice as to which multi-use items were proscribed, the district court held that it was unconstitutionally vague.[83]

The Second Circuit reversed, reasoning that "[a] statute is unconstitutionally vague on its face only when it cannot be applied to any conduct."[84] Conversely, the court stated, "if a statute has a core meaning that can reasonably be understood, then

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[77] *See* note 78 *infra*.

[78] Such ordinances have been challenged as impermissibly vague in violation of the due process clause. *See, e.g.*, Hejira Corp. v. MacFarlane, 660 F.2d 1356 (10th Cir. 1981) (vagueness challenge denied); The Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981) (vagueness challenge denied); High Ol' Times, Inc. v. Busbee, 621 F.2d 135 (5th Cir. 1980) (vagueness challenge upheld); Geiger v. City of Eagan, 618 F.2d 26 (8th Cir. 1980) (vagueness challenge upheld).

[79] The ordinance provided, in pertinent part, that it shall constitute a misdemeanor for "any merchant or other person to knowingly sell, offer for sale, or display any cocaine spoon, marijuana pipe, hashish pipe, or any other drug-related paraphernalia." Brache v. County of Westchester, 658 F.2d 47, 49 (2d Cir. 1981). The ordinance defines "drug paraphernalia" as "all equipment, products and materials of any kind which are used, intended for use, or desi[gn]ed for use in . . . growing . . . preparing, testing, . . . [or] ingesting . . . a controlled substance," including, but not limited to, more than a dozen specified items ranging from drug test kits to "ice pipes or chillers." *Id.*

[80] 658 F.2d 47 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1643 (1982).

[81] *Id.* at 49. *See* note 79 *supra*.

[82] 507 F. Supp. 566, 574-81 (S.D.N.Y. 1981).

[83] *Id.* at 581.

[84] 658 F.2d at 50.

it may validly be applied to conduct within the core meaning, and the possibility of such a valid application necessarily means that the statute is not vague on its face."[85] Moreover, under traditional standing rules,[86] one to whom a statute may validly be applied may not challenge the possible vagueness of its application to third parties.[87] The Second Circuit held that this principle could be extended to deny vagueness "standing" to a challenger who engages in some core activity but who also engages in other kinds of activity as to which the regulation is arguably vague.[88] In effect, the plaintiffs were thereby denied standing to challenge the vagueness of the statute as applied to some of their very own activities. This curious result was justified on the additional federalism ground that until the ordinance was enforced, it could not be ascertained whether it would be applied to "single-use" items, which would be a permissible application of the ordinance, or "multiple-use" items, which would be a questionable application.[89]

Several months later, the Supreme Court, in a unanimous decision, basically validated this approach. In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[90] the Court rejected a vagueness attack on a similar "head-shop" ordinance.

In another area, a Second Circuit decision also paralleled a subsequent Supreme Court ruling on a related issue. In *Signorelli v. Evans*,[91] a New York State judge, wishing to run for Congress, challenged the constitutionality of an article of the New York State Constitution[92] and other restrictions[93] that re-

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[85] *Id.* at 51.

[86] *See, e.g.*, United States v. Raines, 362 U.S. 17 (1960). In *Raines*, the Supreme Court established the standing rule that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Id.* at 21.

[87] United States v. Powell, 423 U.S. 87, 93 (1975); United States v. National Dairy Prods. Corp., 372 U.S. 29, 32-33 (1963); Williams v. United States, 341 U.S. 97, 100-02 (1951).

[88] 658 F.2d at 52-53.

[89] *Id.*

[90] 102 S. Ct. 1186 (1982).

[91] 637 F.2d 853 (2d Cir. 1980).

[92] N.Y. CONST. art. VI, § 20(b). This provision essentially provides that upon nomination to any public office (other than a judgeship), a judge must resign from his position.

[93] *See* RULES GOVERNING JUDICIAL CONDUCT, 22 NYCRR § 33.7 (which prohibits a

quire a judge to resign from judicial office in order to be a candidate for election to any non-judicial office. The plaintiff claimed that the prohibitions violated the Qualifications Clause of the United States Constitution,[94] which sets forth three requirements to be a member of Congress,[95] by adding the additional requirement of not being a judge.[96] The Second Circuit rejected this contention, holding that the restrictions were a valid state regulation of state judicial officers.[97] The court drew support for this conclusion from the policy embodied in the Incompatibility Clause[98] of the United States Constitution.[99] The Second Circuit stated: "By requiring state judges to resign from their positions if they seek election to Congress, New York adopts its own incompatibility principle, protecting the integrity and independence of the judicial branch from the conflicting activities of seeking and holding Congressional office."[100]

The Supreme Court, in *Clements v. Fashing*,[101] considered a

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state judge from participation in a political campaign except a campaign for reelection); CODE OF JUDICIAL CONDUCT Canon 7A(3) (1977) (which requires a judge to resign from his office upon becoming a candidate for a non-judicial position).

[94] U.S. CONST. art. I, § 2, cl. 2.

[95] The qualifications clause provides that: "No person shall be a Representative who shall not have attained to the Age of twenty five Years and have been a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen." *Id.*

[96] 637 F.2d at 856.

[97] *Id.* at 862-63.

[98] U.S. CONST. art. I, § 6, cl. 2. The incompatibility clause provides that: "no person holding any Office under the United States, shall be a member of either House during his Continuance in Office." *Id.*

[99] 637 F.2d at 859-62. The Second Circuit examined the framers' debates concerning their consideration of the scope of congressional members' ineligibility for appointive office and concluded that "it was clear that all sides accepted the principle of incompatability: no one should be allowed to hold Congressional and other federal office at the same time." *Id.* at 860. The court found that the policy underlying the adoption of the Incompatability Clause was "to secure the principle of separation of powers and reduce an opportunity for undue influence by the Executive Branch upon Congress." *Id.* at 861 (citing THE FEDERALIST No. 76, at 459 (A. Hamilton) (C. Rossiter ed. 1961) ("The [Incompatability Clause of the] Constitution has provided some important guards against the danger of executive influence upon the legislative body."). The court determined that the framers did not intend the Incompatability Clause to be exclusive of additional state remedies, 637 F.2d at 862, and concluded that "New York can properly disqualify its judges from holding other offices, paralleling the federal structure, and not offend the Qualifications Clause because the analogous constitutional provision, the Incompatibility Clause, was not intended to preempt similar state regulation." *Id.*

[100] *Id.* at 861.

[101] 102 S. Ct. 2836 (1982).

similar provision in the Texas Constitution, requiring that judges resign from their office in order to run for the state legislature. Since, unlike the situation in *Signorelli,* the Texas provision did not affect candidates for the United States Congress, no qualifications clause argument was available to the challenger.[102] Instead, the plaintiff claimed that the statutory classifications of the provision, barring some officials but not others from running for the legislature, deprived him of equal protection with respect to access to the ballot.[103] A closely divided Supreme Court rejected the claim, reasoning, as had the Second Circuit in *Signorelli,* that the state's interest in regulating the conduct of judges was sufficient to sustain the restriction.[104]

The Supreme Court also upheld the Second Circuit in *Blum v. Bacon,*[105] a welfare regulation case, but did so on grounds that had been rejected by the court of appeals. The case involved a challenge, brought by recipients of benefits under New York's Aid to Families with Dependent Children programs (AFDC), to a 1977 state statute which excluded AFDC recipients from eligibility for certain kinds of emergency assistance.[106] The state emergency assistance program receives substantial federal funding under the Social Security Act.[107] The challengers claimed that the restrictions were inconsistent with the federal funding statutes and thus, violative of the supremacy clause,[108] and, alternatively, that the classifications embodied in the state statute had no rational basis and consequently violated the equal protection clause.[109]

The Second Circuit rejected the former argument, but accepted the latter.[110] Relying on a 1978 Supreme Court decision,[111] the court found that Congress intended the states to have substantial flexibility in determining the scope of emergency assistance programs, and that the exclusion of AFDC re-

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[102] *Id.* at 2842.

[103] *Id.*

[104] *Id.* at 2846.

[105] 102 S. Ct. 2355 (1982), *aff'g* Bacon v. Toia, 648 F.2d 801 (2d Cir. 1981).

[106] N.Y. Soc. Serv. Law § 350 (McKinney 1981 Supp.).

[107] 42 U.S.C. § 603(a)(5) (1976).

[108] U.S. Const. art. IV, § 2.

[109] 648 F.2d at 803-04.

[110] *Id.* at 803.

[111] Quern v. Mandley, 436 U.S. 725 (1978).

cipients was not inconsistent with congressional intent.[112] The court found that the exclusions did, however, violate equal protection principles because the state could supply no basis for justifying the disparate treatment for emergency assistance purposes of different categories of welfare recipients.[113]

The Supreme Court unanimously affirmed, but it did so on the basis of the supremacy clause argument that the Second Circuit had rejected.[114] The Court relied heavily on implementing regulations promulgated by the Secretary of Health, Education and Welfare, which disapproved of provisions like New York's.[115] The Second Circuit had viewed those regulations as beyond the scope of federal statutes,[116] but the Supreme Court disagreed, holding the New York exclusions inconsistent with those federal regulations and thus invalid under the supremacy clause.[117] Accordingly, there was no need to address the Second Circuit's equal protection ruling.

The final case in this group is probably the most well-known decision of the Second Circuit's 1980-1981 term: *Pico v. Board of Education, Island Trees Union Free School District No. 26*[118]—the "book-banning" case. In terms of governing Supreme Court precedent, the issues were clearly of "first impression." Consequently, the Second Circuit was deeply and sharply divided on its resolution.[119]

In 1976, following pressure from parents, a number of books were ordered removed from the library shelves in the Island Trees, New York school district. The books were characterized by school board officials as "anti-American, anti-Christian, anti-Semitic, and just plain filthy."[120] The plaintiffs, a group of students, as well as others, filed suit challenging the removal on first amendment grounds. The district court granted summary judgment for the school officials, finding that the school board's motives were not censorial but, rather, were based on "its belief

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[112] 648 F.2d at 804-06.

[113] *Id.* at 809.

[114] 102 S. Ct. 2355, 2357 (1982).

[115] *Id.* at 2359-64.

[116] 648 F.2d at 807-08.

[117] 102 S. Ct. at 2360-64.

[118] 638 F.2d 404 (2d Cir. 1980), *aff'd*, 102 S. Ct. 2799 (1982). The *Island Trees* case is extensively discussed elsewhere in this issue, see 48 BROOKLYN L. REV. 869 (1982).

[119] *See* notes 122-36 and accompanying text *infra*.

[120] 102 S. Ct. at 2803.

that the nine books removed . . . were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students."[121]

A panel of the Second Circuit reversed, but the three Judges each filed a separate opinion.[122] District Judge Sifton, sitting by designation, found that, notwithstanding the broad deference required to be afforded to school officials in the daily operation of schools, a different approach was required when, as here, a "*prima facie* First Amendment violation" was evidenced in the "irregular and apparently arbitrary intervention in the daily operation of secondary school affairs . . . ."[123] In such a case, the school officials must carry the burden of establishing that their actions did not violate the first amendment. Judge Sifton concluded that, in the instant case, they had failed to do so and that the plaintiffs were entitled to judgment.[124]

On the other hand, Judge Mansfield, vigorously dissenting and relying on an "indistinguishable" earlier Second Circuit ruling,[125] charged that a reversal was "an unwarranted interference" with the rational exercise by school board officials of their duty to prescribe appropriate materials.[126]

The dispositive vote came from Judge Newman. While Judge Sifton thought the record was sufficient to find a *prima facie* first amendment violation,[127] Judge Newman's opinion focused on the need for a trial probing the school officials' motivations before it could be decided that such a violation had occurred.[128] Accordingly, the final disposition by the Second Circuit was to reverse the district court's grant of summary judgment for the defendants and to require that the matter go

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[121] *Id.* at 2804.

[122] 638 F.2d 404 (2d Cir. 1980).

[123] *Id.* at 415.

[124] *Id.* at 418-19.

[125] President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972) (finding no basis for federal court scrutiny of school officials' library decision).

[126] 638 F.2d at 419. Judge Mansfield concluded that it was within the discretion of the school board to remove books containing "indecent matters, vulgarities, profanities, explicit sexual descriptions or allusions, sexual perversions, or disparaging remarks about Blacks, Jews and Christ . . ." *Id.*

[127] *See* text accompanying note 123 *supra*.

[128] 638 F.2d at 432.

to trial.[129] On the petition for rehearing *en banc,* the Second Circuit could not possibly have been more closely divided: a rehearing was denied by a vote of five to five.[130]

The Supreme Court affirmed, but it was as deeply divided on the issue as the Second Circuit had been.[131] Justice Brennan's plurality opinion, joined by Justices Marshall and Stevens and partly by Justice Blackmun, took the same approach that had linked Judges Newman and Sifton:

> [W]hether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, . . . then petitioners have exercised their discretion in violation of the Constitution. . . . On the other hand, . . . an unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar . . . . [or] if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible."[132]

Accordingly, the plurality concluded that a trial was required to probe those issues.

Chief Justice Burger, and Justices Powell, Rehnquist and O'Connor, all filed dissents which, in one fashion or another, tracked the approach of Judge Mansfield's dissenting opinion in the Second Circuit. The Supreme Court dissenters expressed the same concern that the dissent in the Second Circuit had voiced: namely, that the ruling would invite intrusion into school board decisions.[133] The dissenters also questioned whether any prior first amendment holdings required such a result.[134]

Finally, Justice White provided the crucial "swing" vote for affirmance, much as Judge Newman had at the circuit level;[135] Justice White's vote was narrow indeed:

> The unresolved factual issue, as I understand it, is the reason or rea-

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[129] *Id.* at 419.
[130] 646 F.2d 714 (2d Cir. 1981).
[131] 102 S. Ct. 2799 (1982).
[132] *Id.* at 2810.
[133] *Id.* at 2819-22, 2829-30, 2835.
[134] *Id.* at 2817-35.
[135] *See* text accompanying notes 127-29 *supra.*

> sons underlying the school board's removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues.
>
> The Court seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no necessity for doing so at this point.[136]

CONCLUSION

The *Island Trees* case is an appropriate place to conclude this commentary, for it reflects the tensions inherent in the role of an intermediate appellate court like the Second Circuit. A case like *Island Trees* has always been a difficult one in terms of finding a persuasive and acceptable first amendment theory for challenging the school board's actions, which is also sufficiently discrete and limited so that its adoption would not open the door to federal court scrutiny of every curricular, textbook or library decision made by a local school board. Faced with a case like that, an appellate court must reconcile the conflict between its responsibility to apply settled Supreme Court doctrine and its obligation, where binding precedent is not to the contrary, to reach out and fashion new constitutional protection. A court that takes the narrower view of its responsibilities decides a case like *Island Trees* in a cautious fashion. A court with a more robust sense of its role in constitutional adjudication approaches such a case in a more ambitious manner. Obviously, in *Island Trees,* the tension between these conflicting judicial instincts was profound.

This same tension is present in the other constitutional law rulings that highlight the Second Circuit's 1980-1981 term. In some cases, the court took the more cautious approach and had its views vindicated by a similarly restrained Supreme Court. In other instances, the Second Circuit strived to fashion new constitutional rights, only to have its work rejected by the Supreme Court. The lesson that a prudent court might learn from these observations would be to avoid the risk-taking associated with

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[136] 102 S. Ct. at 2816.

these latter cases. One would hope, however, that the Second Circuit would continue, on occasion, to opt for the bolder course.