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HIGH DRAMA ON THE HIGH COURT: THE FIRST AMENDMENT IN THE 1996 TERM

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"High drama" is perhaps an exaggeration, but the Supreme Court's First Amendment decisions in the 1996 term did provide some extraordinary moments. Foremost in the drama department was undoubtedly *Reno v. ACLU*,[2] the Court's unanimous rejection of a sweeping Internet anti-"indecency" law, a decision that just may spell the beginning of the end for the indecency standard long favored by Congress in legislation restricting sexual speech. In other speech cases, *Turner Broadcasting System v. FCC*,[3] known in the trade as *Turner II*, represented a surprising turnabout from *Turner I* [4] in terms of the deference that at least five justices seem willing to pay Congress when they deem a law to b e a content-neutral economic regulation of speech. *Glickman v. Wileman Brothers & Elliott, Inc.*[5] was even more surprising: a commercial "forced speech" case in which a different majority of five managed to find that no First Amendment issue was involved at all. In addition, there were two religion cases: *Agostini v. Felton*[6] made unprecedented use of a procedural device to overrule an Establishment Clause decision 12 years before in the same case; while *Boerne v. P.F. Flores*[7] sternly slapped Congress' hands for having tried the same trick, only through legislation–that is, for having, through the 1993 Religious

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[2] 117 S. Ct. 2329 (1997).

[3] 117 S. Ct. 1174 (1997).

[4] 512 U.S. 622 (1994).

[5] 117 S. Ct. 2130 (1997).

[6] 117 S. Ct. 1997 (1997).

[7] 117 S. Ct. 2157 (1997).

Freedom Restoration Act [hereinafter "RFRA"],[8] attempted to overrule a Supreme Court Free Exercise Clause precedent set seven years before.[9]

Meanwhile, *Timmons v. Twin Cities Area New Party*,[10] confirmed six members of the Court's relative lack of sympathy for the burdens imposed on independent third parties trying to break into the entrenched two-party electoral system. And *Schenck v. Pro-Choice Network of Western New York*,[11] the Court's latest encounter with the free speech claims of abortion clinic protesters, saw yet another split on more or less ideological lines over what precisely constitutes an unacceptable burden on political speech.

Indeed, the speech decisions can all be seen as variations on this one theme: when and how severely does a law or other government action burden speech, and consequently, what level of judicial scrutiny applies? Deciding whether a challenged action is content-based or content-neutral, for example, usually determines a case's outcome, but the distinction is often far from self-evident, as the justices' disputes over the question in *Turner*, *Schenck*, and *Glickman* illustrated.

Despite the Court's rejection of clearly content-based censorship in *Reno*, the government actually won more speech cases than it lost in the 1996 term: four (or at least 3 2/3) out of five. In *Schenck*, *Turner*, and *Timmons*, the majority deferred to regulatory judgments made by a court, Congress, and a state legislature respectively, despite these judgments' impact on free speech rights. In the religion cases, the Court again deferred to the power of government to strike balances: *Agostini*[12] deferred to Congress' and New York State's judgments about the best way to provide educational aid to disadvantaged students at parochial schools; and *Boerne v. Flores*,[13] though in one sense an activist

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[8] 42 U.S.C. § 2000-bb *et seq.* (1993).
[9] Employment Division v. Smith, 494 U. S. 872 (1990).
[10] 117 S. Ct. 1364 (1997).
[11] 117 S. Ct. 855 (1997).
[12] 117 S. Ct. 1997 (1997).
[13] 117 S. Ct. 2157 (1997).

decision striking down a federal law, was also an act of deference to the 50 states' legislative and police powers, which the *Boerne* majority viewed as dangerously threatened by RFRA's requirement that burdens on free exercise of religion must be justified by a compelling state interest.

RENO V. AMERICAN CIVIL LIBERTIES UNION

To begin with *Reno v. ACLU*:[14] as every computer hacker knows, this landmark decision struck down the 1996 Communications Decency Act,[15] or, more precisely, three sections of it. The first section made it a crime to use a "telecommunications device" to "knowingly" transmit any communication "which is obscene *or indecent*, knowing that the recipient of the communication is under 18 years of age."[16] Only the "indecency" portion of this ban was challenged, and "indecency" was not defined. Of the other two sections, one criminalized the use of "an interactive computer service to send to a specific person or persons under 18 years of age" any communication that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . . ."[17] The third, and by far broadest of the three provisions, criminalized the same "patently offensive" speech if "display[ed]" online "in a manner available to a person under 18 years of age."[18]

That mouthful of words--"patently offensive as measured by contemporary community standards" --derived from the Federal Communications Commission's original definition of "indecency," as approved by the Court almost 20 years ago in *FCC v. Pacifica Foundation*,[19] which upheld the FCC's censorship of the famous George Carlin "seven dirty words"

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[14] 117 S. Ct. 2329 (1997).
[15] Telecommunications Act of 1996 § V, 47 U.S.C. § 223 *et seq.* (1996).
[16] 47 U.S.C. § 223 (a)(1)(B)(ii) (emphasis added).
[17] 47 U.S.C. § 223 (d)(1)(A).
[18] 47 U.S.C. § 223 (d)(1)(B).
[19] 438 U.S. 726, 732 (1978).

comic monologue.[20] The standard tracks one prong of the Supreme Court's *Miller v. California*[21] test for distinguishing proscribable "obscenity" from other, constitutionally protected speech about sex, but unlike the obscenity test, indecency does not require that the speech appeal predominantly to the "prurient interest," or that it lack "serious literary, artistic, political, or scientific value."[22] Congress had used the indecency standard several times since *Pacifica*, in legislation restricting minors' access to sexual speech through telephone services and cable TV, and even though these laws were in large part struck down, the Supreme Court had not previously questioned either the propriety or lack of precision in a speech restriction turning on such subjective concepts as "patent offensiveness" and "contemporary community standards."[23] For purposes of *Reno,* both the three-judge court that first heard the case, and the Supreme Court, treated "indecent" and "patently offensive" according to "contemporary community standards" as synonymous terms.[24]

The plaintiffs in *Reno* included both for-profit and nonprofit Internet speakers, many of which maintained World Wide Web sites on such subjects as safer sex, gay and lesbian issues, human rights abuses, feminism, censorship, prison rape, and

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[20] *Pacifica*, 438 U.S. at 746.

[21] 413 U.S. 15 (1973). The three-prong *Miller* test is

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

[22] *Pacifica*, 438 U.S. at 758.

[23] *See* Sable Communications v. Federal Communications Comm'n, 492 U.S. 115 (1989); Denver Area Educational Telecommunications Consortium v. Federal Communications Comm'n, 116 S. Ct. 2374 (1996). Four justices said as recently as June 1996 in the *Denver Area* case that government does have a compelling need to "protect children from exposure to patently offensive sex-related material." *Id.* at 2386.

[24] *Reno,* 117 S. Ct. at 2345; American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996).

reproductive rights.[25] Conspicuously absent were cyberpornographers,[26] and although the government throughout the litigation emphasized that the CDA's purpose was to protect children from online smut (of which it inserted a great quantity into the record), the ACLU's approach was to stress the subjectivity and indeterminacy of such terms as "patently offensive" and "contemporary community standards" and the fact that this indecency definition, by omitting the "prurient interest" and "lack of serious value" prongs of the *Miller* obscenity test, included speech that had serious literary, educational, or other value for minors as well as adults.[27] The tree-judge district court held all three provisions of CDA facially overbroad; two of the three judges also found the indecency standard unconstitutionally vague.

Reno v. ACLU was widely viewed as a case primarily about cyberspace – what standard of First Amendment scrutiny would apply to restrictions on speech in this new and complex medium?[28] The deeply flawed CDA was Congress' reaction to a rapidly expanding medium where speech that could reach millions instantly was relatively cheap and very uncensored.[29] The government argued that cyberspace was as intrusive as broadcasting:[30] offensive speech could invade the home without warning; and therefore the same deferential standard of First Amendment scrutiny that the Court had used in *Pacifica* ought to apply.[31] Justice Stevens' opinion for seven members of the Court definitively rejected this argument: the Internet, he said, includes audio, video, text, and pictures; it enables "any person with a phone line" to "become a town crier with a voice that resonates farther than it could from any soapbox"; and "[t]hrough the use of Web pages, mail exploders, and newsgroups," allows "the

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[25] *Reno*, 117 S. Ct. at 2334-41.
[26] *Id.*
[27] *Id.* at 2349-51.
[28] *Id.* at 2334-35.
[29] *Id.* at 2334-36.
[30] *Id.* at 2338-41.
[31] *Id.* at 2341.

same individual" to become a pamphleteer."[32] Because "the content on the Internet is as diverse as human thought," there was "no basis for qualifying the level of" strict First Amendment scrutiny.[33]

Strict scrutiny of course doomed the CDA. For the facts in the record established that there was no way for the great majority of Internet speakers to identify or screen out minors from their Web sites, newsgroups, mail exploders, or chat rooms.[34] The provision banning "display" of indecency "in a manner available" to minors therefore criminalized almost any "indecent" speech online.[35] Thus, even assuming that Congress could ban indecent speech to minors, the display provision was unconstitutionally overbroad under a line of cases starting with *Butler v. Michigan*[36] in 1957, which had established that government cannot under the First Amendment "reduce the adult population ... to reading only what is fit for children."[37]

The two narrower, "knowing transmission" sections of the CDA posed tougher questions for the Court. Here, the extensive evidence that sexually explicit speech can have serious value for minors was critical, for Justice Stevens noted that "[t]he general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or

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[32] *Id.* at 2344.

[33] *Id.*

[34] The Justice Department had argued that affirmative defenses in the CDA—such as using credit card or adult ID systems—saved the law because "indecent" speakers could thereby screen out minors and speak only to adults. *See* 47 U.S.C. § 223(e)(5). The Court disagreed because the facts showed that such methods were not technically or economically viable for the great majority of online speakers. *Reno*, 117 S. Ct. at 2349. Likewise, the government's proposal for "tagging" or self-labeling potentially offensive Web sites -- perhaps a precursor of things to come in this fast-evolving field -- was rejected because there was no uniform system of tagging in place or technology yet developed to read tags and effectively bar minors from labeled sites. *Id.*

[35] *Id.* at 2349.

[36] 352 U.S. 380 (1957) (holding a prohibition on sale to adults of books deemed harmful to children unconstitutional).

[37] *Id.* at 382-83; *see also Reno*, 117 S.Ct. at 2346; *Sable*, 492 U.S. at 126.

other value," including "discussions about prison rape or safe sex practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library."[38]

Here, Justices O'Connor and Rehnquist parted company with the majority. O'Connor's partial dissent viewed the CDA as a commendable, albeit flawed, attempt to create "adult zones" on the Internet.[39] She argued that the "specific transmission" provisions were "not unconstitutional in all of their applications," because little "patently offensive" sexual speech is likely to have redeeming value for minors. Thinking perhaps of seven year-olds and not 17 year-olds, Justice O'Connor opined that "while discussions about prison rape or nude art . . . may have some redeeming educational value for *adults*, they do not necessarily have such value for *minors*."[40]

Justice O'Connor's dispute with the majority on this point reflects a deeper conflict over the value of speech about sex to minors of any age; and this conflict increasingly drives laws restricting sexual speech. A major problem with all such legislation, however, is the inevitable vagueness and subjectivity of its definitional terms. For this reason, the *Reno* majority's lengthy discussion of vagueness is highly significant. "Regardless of whether the CDA is so vague that it violates the Fifth Amendment," Justice Stevens wrote:

> the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment. ... Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* decision, or the consequences of prison rape would not violate the CDA?[41]

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[38] *Reno*, 117 S. Ct. at 2347-48.

[39] *Id.* at 2351-53 (O'Connor and Rehnquist, JJ., concurring in the judgment and dissenting in part).

[40] *Id.* at 2356 (O'Connor and Rehnquist, JJ., concurring in the judgment and dissenting in part).

[41] *Id.* at 2344. The *Pacifica* Appendix contains the complete text of comedian George Carlin's "Filthy Words" monologue, which the FCC and the Court had determined to be indecent and therefore proscribable from the

This language was remarkable coming just a year after *Denver Area Educational Telecommunications Consortium v. FCC*,[42] the cable indecency case, in which a plurality had without much analysis rejected a vagueness challenge to an almost identical indecency standard. What the judicial future holds for the indecency test remains to be seen, but Justice Stevens' strong language in *Reno* at least provides encouragement for those who have long insisted that the standard is hopelessly vague.

SCHENCK V. PRO-CHOICE NETWORK OF WESTERN NEW YORK

The Court's second major speech case, *Schenck v. Pro-Choice Network*,[43] like *Reno* involved a hot political conflict: the First Amendment rights of abortion clinic protesters versus the governmental interests in public safety and access to reproductive health care. The injunction challenged in *Schenck* was issued after a lengthy history of disruption and physical interference with access to clinics in upstate New York.[44] All of this was carefully detailed in Justice Rehnquist's opinion for the five-justice majority affirming two but striking down one aspect of the injunction.[45]

The majority upheld a mandatory 15-foot "buffer zone" protecting the clinic doorways, parking lots, and driveways from obstruction.[46] It also approved a "cease and desist" provision requiring those demonstrators acting as "sidewalk counselors" to leave clients entering or leaving the clinics alone after the clients had asked them to do so; the Court found this provision content-neutral even though it was triggered by a client's desire not to hear any more of a "counselor's" message.[47] But the Court

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airwaves during hours when children were likely to be listening. Justice Stevens was the author of *Pacifica*.

[42] 116 S. Ct. 2374 (1996).

[43] 117 S. Ct. 855 (1997).

[44] *Id.* at 859-61.

[45] *Id.* at 859-61, 868.

[46] *Id.* at 868-69.

[47] *Id.* at 870.

invalidated a mandatory 15-foot "floating bubble" that followed patients and clinic escorts wherever they went: this was held to be unworkable and not necessary to serve the relevant government interests.[48]

Some observers were puzzled why the Court had chosen to immerse itself in the technical details of abortion clinic buffer zones and bubbles just two years after it had established the constitutional ground rules in *Madsen v. Women's Health Center*.[49] *Madsen* had held, over the dissent of Justices Scalia, Kennedy, and Thomas, that an injunction directed against abortion protesters was content-neutral even though it did not address the activities of pro-choice demonstrators.[50] The content-neutrality of the order meant that the strict scrutiny reserved for content-based restrictions on speech would not apply; nevertheless, because injunctions carry particular risks "of censorship and discriminatory application," the Court in *Madsen* held that a "more rigorous" standard of review than the intermediate scrutiny usually reserved for content-neutral regulations was needed.[51] "We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[52] Justice Scalia, not one to miss an opportunity for a good one-liner, mocked this new standard by quipping that perhaps "we could call it intermediate-intermediate scrutiny."[53]

Schenck followed the analysis prescribed in *Madsen*, with Scalia, Kennedy and Thomas again partially dissenting.[54] Justice

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[48] *Id.* at 866-69.

[49] 512 U.S. 753 (1994).

[50] *Id.* at 762-64.

[51] *Id.* at 764-68.

[52] *Id.* at 765.

[53] Id. at 791 (Scalia, Kennedy, and Thomas, JJ., concurring in part and dissenting in part).

[54] *Schenk*, 117 S. Ct. at 865-71 (majority opinion); *Id.* at 871 (Scalia, Kennedy, and Thomas, JJ., concurring in part and dissenting in part). Justice Breyer also dissented in part, believing that all of the injunction should be upheld because it could be read as not mandating a "floating bubble" at all, or at least not an unduly burdensome one. *Id.* at 875-78.

Scalia's dissent zeroed in on the majority's approval of the cease and desist provision, which all agreed had been originally based on the district court's incorrect view that people "approaching and entering the facilities [have a right] to be left alone" and shielded from unwanted messages.[55] Justice Scalia accused the majority of trying to bury this unacceptable justification and replace it with a public safety and clinic access rationale that in fact had not been considered by the district court.[56] He also argued that the state trespass law on which the injunction must be based did not justify equitable relief,[57] the clinics' constitutional claim having been eliminated by a 1993 Supreme Court holding that interference with reproductive health did not constitute sex discrimination in violation of federal civil rights law.[58] Justice Scalia was strangely silent about the violence and obstruction that had necessitated the injunction in the first place.

TURNER V. FCC

If the next major free speech case was less heated politically, it had big stakes economically, and once again, the issue of what constitutes content discrimination divided the Court.[59] *Turner v. FCC* upheld the so-called "must carry" provisions of the 1992 Cable Television Act,[60] which required that cable operators reserve a certain percentage of their channel capacity for local broadcast stations that they would not otherwise choose to carry on their cable systems.[61] *Turner I* [62] three years earlier had

[55] *Id.* at 871-74 (Scalia, Kennedy, and Thomas, JJ., concurring in part and dissenting in part).

[56] *Id.* at 873 (Scalia, Kennedy, and Thomas, JJ., concurring in part and dissenting in part).

[57] *Id.* at 873-75 (Scalia, Kennedy, and Thomas, JJ., concurring in part and dissenting in part).

[58] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993).

[59] Turner Broadcasting System, Inc. v. Federal Communications Comm'n, 117 S. Ct. 1174 (1997).

[60] Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534, 535 (1992).

[61] *Id.*

[62] 512 U.S. 622 (1994).

vacated and remanded a lower court decision rejecting a First Amendment "forced speech" attack on "must carry;"[63] the majority there determined that even though forcing cable systems to turn over significant channel capacity to broadcast stations was a content-neutral economic regulation intended to help preserve broadcasting and curb the monopolistic tendencies of cable companies, further fact development was needed on whether the law satisfied the intermediate First Amendment scrutiny applicable to content-neutral regulations of speech.[64] That is, were the restrictions "no greater than is essential to the furtherance" of an important governmental interest?[65] Justices O'Connor, Scalia, Ginsburg, and Thomas had dissented in *Turner I*, arguing that must carry *was* content-based because it reflected Congress' expressed desire to foster "a diversity of views" in television programming, including the local public affairs and educational programming that local broadcast stations supplied.[66]

On remand from *Turner I*, a three-judge court had duly followed the Supreme Court's command to compile a factual record on the actual peril that local broadcasting faced as a result of the rising hegemony of cable; and on the possible alternatives to must carry. On the question of actual peril, it was notable that cable companies generally *wanted* to carry major network broadcast stations, so that only marginal local broadcasters really needed the protection of the law. On the question of alternatives to must carry, so-called "leased access" space was available on most cable systems, and consumers could use A/B switches to receive both antenna-based broadcast signals and cable feeds, thereby eliminating the need for mandatory cable transmission of

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[63] *Id.*

[64] *Id.* at 649.

[65] *Id.* at 662. The intermediate scrutiny standard, derived from United States v. O'Brien, 391 U.S. 367 (1968), asks whether the regulation "furthers an important governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* (quoting *O'Brien*, 391 U.S. at 377).

[66] 512 U.S. at 675-80 (O'Connor, Scalia, Ginsburg, and Thomas, JJ., concurring in part and dissenting in part).

broadcast channels.[67] On this latter point, both the district court and the *Turner II* majority accepted what I call the couch potato theory of the First Amendment: that is, because TV viewers are simply too lazy to use A/B switches, such devices are not an adequate alternative means of assuring the survival of local broadcasting.

What was remarkable about *Turner II* was not so much the result as the tone. As in *Turner I*, Justice Kennedy wrote for the majority of five. But *Turner I* had emphasized that when Congress regulates in the area of speech, its predictive judgments are not "insulated from meaningful judicial review."[68] On the contrary, in First Amendment cases, deference to legislative findings cannot "foreclose our independent judgment on the facts bearing on an issue of constitutional law."[69] In *Turner II*, this limit on congressional power seemed nearly forgotten. The question, said the majority, is not whether Congress "was correct to determine must-carry is necessary," but whether "the legislative conclusion was reasonable and supported by substantial evidence in the record before Congress."[70] Courts "are not to 'reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own.'"[71]

The same four dissenters as in *Turner I* could be forgiven for expressing some confusion here.[72] As Justice O'Connor protested:

> Although we owe deference to Congress' predictive judgments and its evaluation of complex economic questions, we have an independent duty to identify with care the Government interests supporting the scheme, to inquire into the reasonableness of

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[67] *See Turner II*, 117 S.Ct. at 1186-89 (Congress' reasonable fear of risk to broadcasting); *id.* at 1200-02 (alternatives to must carry).

[68] *Turner I*, 512 U.S. at 666 (citing Sable Communications v. Federal Communications Comm'n, 492 U.S. 115, 129 (1989)).

[69] *Id.*

[70] *Turner II*, 117 S. Ct. at 1196.

[71] *Id.* at 1201 (quoting *Turner I*, 512 U.S. at 666).

[72] *Id.* at 1205 (O'Connor, Scalia, Thomas, and Ginsburg, JJ., dissenting).

> congressional findings regarding its necessity, and to examine the fit between its goals and its consequences.[73]

The dissenters also reiterated their view that must carry, premised as it was on congressional concerns about diversity, quality, and preservation of local programming, was fundamentally content-based.[74]

In a sense, the Court in *Turner* was stuck in the rigidity of its own content-based/content-neutral dichotomy. As in the abortion clinic cases, so in *Turner*, the majority's insistence that the must carry legislation was content-neutral seemed primarily driven by its desire to uphold what it viewed as practical, not ideological, regulation. The dissenters were surely right that seeking to foster local programming and a diversity of views *is* content-based, but as a practical matter such a legislative goal is not ideologically repressive; it merely seeks to enhance diverse voices that may otherwise be frozen out of the marketplace.

What was conspicuously absent from either the majority opinion or the dissent in *Turner II* was any acknowledgment that cable operators, although they are providers of editorial content, may also be viewed as conduits for the speech of others. There is nothing in the Constitution that prohibits government, when franchising what amounts to monopoly control over a vital medium of communication, from reserving some portion of the cable system for speech not chosen by the monopolist. The separate concurrences of Justices Stevens and Breyer came closest to this perception by emphasizing the importance of congressional action "intended to forestall the abuse of monopoly power,"[75] and untangle the "bottleneck that controls the range of viewer choice"[76] on cable systems.

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[73] *Id.* (O'Connor, Scalia, Thomas, and Ginsburg, JJ., dissenting).
[74] *Id.* at 1205-06 (O'Connor, Scalia, Thomas, and Ginsburg, JJ., dissenting).
[75] *Id.* at 1203 (Stevens, J., concurring).
[76] *Id* at 1204. (Breyer, J., concurring in part).

GLICKMAN V. WILEMAN BROTHERS & ELLIOTT, INC.

The Court's deference to what it perceives as economic regulation also drove the result in *Glickman v. Wileman Brothers & Elliott, Inc.*,[77] which rejected a First Amendment challenge by California growers and processors of nectarines, peaches, and plums to Agriculture Department marketing orders that forced them to pay for generic advertising.[78] What was surprising in *Glickman* was the analysis, which defined the First Amendment issue out of existence despite the plaintiffs' claimed disagreement with the content of the generic advertising, and their expressed desire to spend their funds on advertising of their own.[79]

Justice Stevens, for a majority of five, described the advertising assessments as simply part of a larger scheme of economic regulation that, in exchange for exemption from antitrust laws, "displaced competition in a number of discrete [agricultural] markets" with collective research, development, inspection, packaging, and marketing.[80] Moreover, the marketing orders did not compel anybody to "engage in any actual or symbolic speech."[81] He distinguished away the Court's line of cases invalidating "forced speech," from flag salutes in public schools to compelled contributions to labor union activities, and concluded that the assessments in the present case are simply not "comparable to [cases] in which an objection rested on political or ideological disagreement with the content of the message."[82] The Court found even the intermediate scrutiny balancing test it had set forth in 1980 in *Central Hudson Gas & Electric Co. v.*

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[77] 117 S. Ct. 2130 (1997).

[78] *Id.* at 2134.

[79] *Id* at 2137.

[80] *Id* at 2134, 2138.

[81] *Id.* at 2138. In fact, said Justice Stevens, "it is fair to presume that [the plaintiffs] agree with the central message of the speech that is generated by the generic program." *Id.*

[82] *Id.* at 2140. *See* West Virginia Board of Ed. v. Barnette, 319 U.S. 624 (1943); Wooley v. Maynard, 430 U.S. 705 (1977); Pacific Gas & Electric Co. v. Public Util. Comm'n, 475 U.S. 1 (1986); Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977).

Public Service Commission,[83] to review restrictions on commercial speech, too rigorous for the agricultural marketing program, which was merely "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress."[84]

Justice Souter's dissent, joined by Rehnquist and Scalia and in part by Thomas, took sharp issue with the majority's avoidance of First Amendment scrutiny:[85] the legitimacy of economic regulation, Souter said, "does not validate coerced subsidies for speech that the government cannot show to be reasonably necessary to implement the regulation."[86] First Amendment protection is not limited to political speech, and there is no reason why the forced speech doctrine should be so limited either.[87] Applying the *Central Hudson* test, Justice Souter found the Agriculture Department's compelled advertising program "so random and so randomly implemented . . . as to unsettle any inference that the Government's asserted interest is either substantial or even real."[88] Justice Thomas, in a separate dissent, reiterated his view that the *Central Hudson* balancing test does not sufficiently protect commercial speech rights.[89]

What *was* going on here? In light of decisions highly protective of commercial speech in the Court's preceding two terms,[90] why did five justices refuse to find not only content-based discrimination in the forced advertising program, but any speech interest at all? *Reno v. ACLU* shows that the justices are certainly ready to strike down content-based censorship legislation when it comes along; but, as in *Turner II*, they may be getting impatient

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[83] 447 U.S. 557 (1980) (holding unconstitutional a regulation that completely banned an electric utility from any advertising that promotes the use of electricity).

[84] *Glickman*, 117 S. Ct. at 2142.

[85] *Id.* at 2142 (Souter, Rehnquist, Scalia, and Thomas, JJ., dissenting).

[86] *Id.* (Souter, Rehnquist, Scalia, and Thomas, JJ., dissenting).

[87] *Id.* at 2147 (Souter, Rehnquist, Scalia, and Thomas, JJ., dissenting).

[88] *Id.* at 2150 (Souter, Rehnquist, Scalia, and Thomas, JJ., dissenting).

[89] *Id.* at 2155 (Thomas and Scalia, JJ., dissenting).

[90] 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996); Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995).

with challenges to what they view as fundamentally economic regulation, gussied up in free speech garb.

TIMMONS V. TWIN CITIES AREA NEW PARTY

The last speech decision of the term, *Timmons v. Twin Cities Area New Party*,[91] again turned on perceptions of how seriously a burden imposed by government infringed on First Amendment rights, and accordingly, what degree of scrutiny should apply. Minnesota, like most states, bans so-called fusion tickets in which an individual can be listed as the candidate for office of more than one party.[92] The New Party challenged the restriction on the ground that it undermined the party's ability to build a power base in the face of the formidably entrenched major parties;[93] if people can endorse the platform of an independent party while still casting a vote for a candidate who actually might win, the independent party will have a far better chance of building support.[94]

Five justices, however, thought the rule against fusion too insignificant a burden on the minor party's First Amendment associational rights to trigger strict scrutiny.[95] The majority opinion by Justice Rehnquist dismissed the court of appeals' conclusion that "without fusion-based alliances, minor parties cannot thrive" as a "predictive judgment which is by no means self-evident."[96] More important, said Rehnquist, "the supposed benefits of fusion to minor parties does not require that Minnesota permit it."[97] The New Party's desire to use the ballot to communicate that it supports a particular candidate was irrelevant because "[b]allots serve primarily to elect candidates, not as fora for political expression."[98] Because the associational

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[91] 117 S. Ct. 1364 (1997).
[92] *Id.* at 1367.
[93] *Id.* at 1368-69.
[94] *Id.*
[95] *Id.* at 1370.
[96] *Id.* at 1371.
[97] *Id.*
[98] *Id.* at 1372.

burdens were not severe, said Rehnquist, the court below had been wrong to apply strict scrutiny; "the State's asserted regulatory interests need only be 'sufficiently weighty to justify the limitation.'"[99] Those regulatory interests included "avoiding voter confusion and overcrowded ballots, [and] preventing party-splintering and disruptions of the two-party system."[100] Although Justice Rehnquist acknowledged that the latter interest does not permit states to squelch minor parties completely, it does, he maintained, allow them "to enact reasonable election regulations" that in practice "favor the traditional two-party system."[101]

Because, as the majority conceded, the judgment about undue burden is malleable, it was not surprising that three justices, Stevens, Ginsburg, and Souter, disagreed with the majority's assessment.[102] Stevens argued that the burden of the anti-fusion rule was obviously severe – the "political reality" is "that the dominance of the major parties frequently makes a vote for a minor party or independent candidate a 'wasted' vote"[103] – and that the only state interest directly served by the anti-fusion rule was protection of the two-party system, which he identified as "the true basis for the Court's holding."[104] This interest was dubious at best, illegitimate at worst, since it was evident that legislatures dominated by the major parties passed anti-fusion laws in order to solidify their own power.[105]

Let me turn now to the religion cases. Only one, *Agostini v. Felton* actually turned on either of the First Amendment's religion clauses, but the other, *Boerne v. Flores*, in striking down RFRA, obviously had large consequences for free exercise.

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[99] *Id.*

[100] *Id.* at 1372.

[101] *Id.* at 1374.

[102] *Id.* at 1375 (Stevens, Ginsburg, and Souter, JJ., dissenting).

[103] *Id.* at 1376 n. 1 (Stevens, Ginsburg, and Souter, JJ., dissenting).

[104] *Id.* at 1379 (Stevens, Ginsburg, and Souter, JJ., dissenting).

[105] *Id.* (Stevens, and Ginsburg, JJ., dissenting). Stevens noted that "[t]he fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality." *Id.*

AGOSTINI V. FELTON

Agostini v. Felton[106] involved one easy and one hard question. The easy one was whether caselaw subsequent to the Court's 1985 decision in *Aguilar v. Felton*[107] had undermined *Aguilar's* holding that the Establishment Clause prohibited the expenditure of government funds to send public school teachers into parochial schools to provide educational enrichment under Title I of the 1965 Elementary and Secondary Education Act.[108] Given changes in Court personnel, holdings subsequent to *Aguilar* allowing government money to assist in the process of religious education, and the statement of five justices in the 1994 *Kiryas Joel* case[109] that *Aguilar* should be overruled, the answer was a pretty clear yes.[110] The harder question was whether *Agostini* was a procedurally proper vehicle for overruling *Aguilar*.[111]

The petitioners in *Agostini* were still bound, 12 years later, by the *Aguilar* injunction requiring them, at significant cost, to provide services off the premises of parochial schools, either by transporting the students to public schools or by using leased sites or mobile vans converted into classrooms.[112] Having read *Kiryas Joel* and having attorneys who obviously could count to five, they devised the ingenious strategy of moving under Federal Rule of Civil Procedure 60(b)(5)[113] for relief from the *Aguilar* judgment

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[106] 117 S. Ct. 1997 (1997).

[107] 473 U.S. 402 (1985).

[108] 20 U.S.C. § 6301 *et. seq.* (1965).

[109] Bd. of Ed. v. Grumet, 512 U.S. 687 (1994) (finding a violation of the Establishment Clause when a separate school district was carved out of an existing district to service a religious enclave of Satmar Hasidim).

[110] *Id.* at 718 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 731 (Kennedy, J., concurring in the judgment); *id.* at 750 (Scalia, Rehnquist, and Thomas, JJ., dissenting).

[111] Also at risk was the companion case to *Aguilar*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (holding unconstitutional two programs in which public school teachers provided curricular instruction at pervasively sectarian schools).

[112] *Agostini*, 117 S. Ct. at 2005.

[113] FED. R. CIV. P. 60(b)(5). Rule 60(b)(5) provides in pertinent part:

on the ground that, in the words of the rule, the judgment "is no longer equitable."[114] The district court denied the motion, as *Aguilar* was still the law – certainly the law of this particular case.

The Supreme Court's opinion by Justice O'Connor for a majority of five focused on two recent decisions from which she concluded that *Aguilar* was no longer good law. These were *Zobrest v. Catalina Foothills School District*,[115] which rejected an Establishment Clause challenge to the provision of a government-paid translator for a hearing-impaired student at a religious school; and *Witters v. Washington Department of Services for the Blind*,[116] similarly rejecting a challenge to a state tuition-assistance program that a student chose to use for religious training. Since *Zobrest* and *Witters* dispensed with the Court's earlier bright-line rule that government-funded instruction could not take place on parochial school premises, it followed that the Title I program in *Agostini* was permissible.[117]

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons . . . the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Id.

[114] *Id.*; *see Agostini*, 117 S. Ct at 2006.

[115] 509 U.S. 1 (1993).

[116] 474 U.S. 48 (1986).

[117] Justice O'Connor evaluated the Title I program under the familiar Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), three-part Establishment Clause test: that is, whether it involved "a secular legislative purpose;" a "principal or primary effect . . . that neither advances nor inhibits religion; and no excessive government entanglement with religion." *Id.* The result was at this point a foregone conclusion: she found the program plainly had a secular purpose and contained sufficient safeguards against religious indoctrination by the public school teachers. *Agostini*, 117 S. Ct. at 2008-14. The majority gave no independent weight to the third, "excessive entanglement" criterion, in essence merging it with the second, "impermissible effect" test. *Id.* at 2014-16.

Justice O'Connor then reasoned, in circular fashion, that Rule 60(b)(5) was an appropriate vehicle for formally overruling *Aguilar* because "[o]ur general practice is to apply the rule of law we announce in a case to the parties before us."[118] But she also made an impassioned practical argument that "[i]t would be particularly inequitable for us to bide our time waiting for another case to arise while the City of New York labors under a continuing injunction forcing it to spend millions of dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance of success in life by means of a program that is perfectly consistent with the Establishment Clause."[119]

Justices Souter, Stevens, Ginsburg, and, in part, Breyer dissented, maintaining that the program struck down in *Aguilar* had impermissibly promoted religion, first, because state-paid teachers might express sympathy for the school's religious aims; second, because government aid "produced a symbolic union of church and state"; and third, because the subsidies relieved the sectarian schools of educational costs they would otherwise have to bear.[120] Nothing in *Zobrest* or *Witters*, which involved much more limited types of aid, undermined a decision striking down a broad curriculum program that spent tax money to serve about 22,000 students on parochial school premises.[121]

Justice Ginsburg, in a separate dissent, protested the majority's unprecedentedly activist use of Rule 60(b)(5).[122] Ordinarily, the denial of relief under Rule 60(b) is reviewed only for the abuse of discretion, and here, as everyone agreed, the district court had had no choice but to deny the motion because *Aguilar* was still law. Justice Ginsburg warned that Rule 60(b) was not an

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[118] *Agostini,* 117 S. Ct. at 2017.

[119] *Id.* at 2018-19.

[120] *Id.* at 2019 (Souter, Stevens, Ginsburg, and Breyer [in part], JJ., dissenting).

[121] *Id.* at 2021-22 (Souter, Stevens, Ginsburg, and Breyer [in part], JJ., dissenting).

[122] *Id.* at 2026 (Ginsburg, Stevens, Souter, and Breyer, JJ., dissenting).

alternative to a petition for rehearing and should not be "bent" to this purpose.[123]

High drama here indeed. For those schooled in traditional Establishment Clause jurisprudence, what had seemed like one of the eternal verities was now breached: government-paid teachers could conduct curricular education at church schools. The rule prohibiting such direct aid had at least established a bright line in a notoriously murky area of constitutional law.[124]

But five is not exactly an overwhelming majority. Which leaves predictions about the future course of Establishment Clause jurisprudence still very much a poker player's occupation.

BOERNE V. P.F. FLORES

If *Agostini* seemed like a seismic crack in the wall of church-state separation, *Boerne v. Flores*[125] was a reminder that the Court is not always necessarily willing to accommodate asserted religious needs. The background to *Boerne* is the Court's 1990 decision in *Employment Division v. Smith*,[126] which rejected a Free Exercise Clause challenge to the State of Oregon's denial of unemployment benefits to members of the Native American Church who had been fired from their jobs because they joined in their religion's sacramental use of peyote.[127] *Smith* held that generally applicable laws (there, against drug use) that imposed a burden on religious practice need not be justified by a compelling government interest, and in the process substantially narrowed the application of Free Exercise precedents that had required this sort of showing by the state.[128]

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[123] *Id.*

[124] Just two years earlier, the same five justices who decided *Agostini* had breached another apparently unbreakable rule: that taxpayers' money could not be directly given to support religious proselytizing. Rosenberger v. Rector & Visitors of the Univ. of Virginia, 115 S. Ct. 2510 (1995).

[125] 117 S. Ct. 2157 (1997).

[126] 494 U.S. 872 (1990).

[127] *Id.* at 884.

[128] *See* Sherbert v. Verner, 374 U.S. 398 (1963) (holding that denial of unemployment benefits to a worker who was dismissed as a result of not being

Congress responded to *Smith* in 1993 with RFRA,[129] which reinstated the compelling state interest test. St. Peter Catholic Church in the City of Boerne, Texas, brought suit under RFRA challenging the city landmark commission's denial of a building permit to enlarge the church.[130] The federal district court rejected the claim, finding that with RFRA Congress exceeded its power under §5 of the Fourteenth Amendment. The Supreme Court, 6-3, agreed.[131]

The Fourteenth Amendment, of course, provides that no state shall deprive any person of the privileges and immunities of citizenship, of due process, or of the equal protection of the laws.[132] Section 5 gives Congress "power to enforce, by appropriate legislation, the provisions" of the Amendment.[133] The Court had previously addressed the meaning of "enforce" in the context of voting rights legislation, upholding Congress' §5 power to pass laws that went beyond what the Constitution required, in order to remedy longstanding patterns of discrimination that had deprived ethnic minorities of the franchise. Thus, in *Katzenbach v. Morgan*[134] and *South Carolina v. Katzenbach*,[135] the Court had upheld voting rights legislation as "remedies aimed at areas where voting discrimination has been most flagrant."[136]

No such remedial purpose, however, saved RFRA. There was neither the kind of pervasive national record of discrimination that justified Congress' exercise of its §5 powers in the voting cases, nor, more importantly, the predominantly *remedial*

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available to work on Saturday due to religious belief was a violation of the Free Exercise Clause).

[129] *See supra* note 8.

[130] *Boerne*, 117 S. Ct. at 2160.

[131] *Id.*

[132] U.S. CONST. amend. XIV, § 1.

[133] *Id.* at § 5.

[134] 384 U.S. 641 (1966).

[135] 383 U.S. 301 (1966).

[136] *Boerne*, 117 S. Ct. at 2167 (quoting South Carolina v. Katzenbach, 383 U.S. at 315).

purpose of the voting rights legislation.[137] Instead, RFRA amounted to a congressional attempt to reinterpret the Free Exercise Clause, a function that since *Marbury v. Madison*[138] has been the prerogative of the judiciary. Moreover, according to Justice Kennedy's opinion for the majority, RFRA's "[s]weeping coverage insures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[139]

Three justices dissented but interestingly, none took issue with the §5 holding. Justices O'Connor and Breyer argued that *Smith* was "gravely at odds with our earlier free exercise precedents" and should be overruled.[140] Only Justice Stevens, concurring, thought it necessary to point out that RFRA raised not only §5 but also Establishment Clause problems.[141] He explained that if the historic landmark in *Boerne* had happened to be a museum owned by a group of atheists rather than a church, they could not have taken advantage of RFRA.[142] RFRA thus "provided the Church with a legal weapon that no atheist or agnostic can claim. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment."[143]

That only one of the nine justices saw fit even to mention this apparently fundamental point is a good indication of the Court majority's current disinterest in strict church-state separation.

Conclusion

What conclusions can be drawn from this tumultuous First Amendment term? Despite the drama, the Court was generally

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[137] *Boerne*, 117 S. Ct. at 2169-71.

[138] 5 U.S. (1 Cranch) 137 (1803).

[139] *Boerne*, 117 S. Ct. at 2170.

[140] *Id.* at 2178 (O'Connor and Breyer, JJ., dissenting). Justice Souter, in essence, agreed, but thought that the writ of certiorari should be dismissed because there had not been a full briefing on the propriety of overruling *Smith*. *Id.* at 2186 (Souter, J., dissenting).

[141] *Id.* at 2172 (Stevens, J., concurring).

[142] *Id.* (Stevens, J., concurring).

[143] *Id.* (Stevens, J., concurring).

deferential to government prerogatives; it struck down only one law on First Amendment grounds, the plainly content-based and draconian Communications Decency Act. Its understanding of content discrimination in *Turner*, *Schenck*, and *Glickman* was narrow. Similarly, the majority in *Timmons*, *Turner*, *Boerne*, and *Agostini* took an unexpansive view of what constituted a significant burden on First Amendment rights.

On the other hand, *Reno* indicates that the Court may be willing to revisit some earlier assumptions about sexually explicit speech: that it is necessarily harmful to minors, that it is generally of low constitutional value, that it can be proscribed without insurmountable vagueness problems. The justices may well be anticipating the first online obscenity case to reach the Court—it can't be far off. What will be considered "patently offensive" according to the "contemporary community standards" of cyberspace is anybody's guess.