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Back from the Brink: Part II

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Gora: First Amendment
BACK FROM THE BRINK: PART II

Judge Leon D. Lazer:

Our afternoon program will cover the First Amendment, then deal with a number of very important cases that do not necessarily fit into one of the Bill of Rights niches. That Bill of Rights section of the program will be covered by Professor Friedman. Then, Professor Eileen Kaufman will speak on employment discrimination and punitive damages. Additionally, Professor Friedman is going to give us a short review of federal jurisprudence dealing in land use planning cases. In the meantime, let us get started. For the past several years, one of the real stars of this annual show has been Professor Joel Gora of Brooklyn Law School, an authority on the First Amendment. He has been general counsel to the New York American Civil Liberties Union, and was National Staff Counsel to the American Civil Liberties Union. He was a pro se clerk at the Second Circuit Court of Appeals and is the co-author of a book entitled "The Right to Protest."¹ It is my pleasure to introduce Professor Gora.

Professor Joel M. Gora:

This is my third year participating in this Symposium to discuss the Supreme Court's First Amendment handiwork, and I am honored to be here. In 1991, I styled my talk, *On the Brink: The First Amendment in the Rehnquist Court*, and I commented balefully on the Court's mixed record in protecting free speech rights.² The second year, however, my mood was more upbeat and I confessed that my previous reports of the death of the First Amendment had been greatly exaggerated. Hence the talk was entitled: *Back from the Brink*, and I happily commented on some powerful First Amendment rulings.³

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

2. Joel M. Gora, *On the Brink: The First Amendment in the Rehnquist Court, 1990-91 Term*, 8 *TOURO L. REV.* 111 (1992).

3. Joel M. Gora, *Back From the Brink*, 9 *TOURO L. REV.* 251 (1993).

I guess this year is the sequel, *Back from the Brink II*, although quantitatively, qualitatively and doctrinally, it seemed like a relatively quiet year. The Court blazed no major new First Amendment trails, but the Term contained some important rulings. If there was any theme that seemed to echo across many of the cases it can be expressed in two words: "Why me?" One of my colleagues, Richard Farrell,⁴ always likes to kid me about constitutional law by remarking that its various doctrines and thousands of decisions can be boiled down to a few manageable phrases. All due process of law is simply the question: "Is it fair?" And all the equal protection cases ever decided can be reduced down to somebody asking: "Why me?"

Well, the First Amendment has a powerful equal protection component, insisting that government treat all comparable speakers in a comparable manner.⁵ The bans against viewpoint discrimination and the insistence on content neutrality in regulation are cornerstones of First Amendment safeguards and their equal protection resonance is clear.⁶ Indeed, in some ways the worst form of censorship is not silencing *all* speakers on a given issue, but silencing only *one side* of the debate. And so the notion of "equality as a central concern of the First Amendment" was manifest in many of the Court's rulings this Term.

This "Why Me?" theme played out in a number of the Court's eight First Amendment cases.⁷ Three dealt with the commercial

4. Professor of Law, Brooklyn Law School.

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

6. See Kenneth B. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

7. *Alexander v. United States*, 113 S. Ct. 2766 (1993); *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993); *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993); *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct.

speech doctrine, three dealt with separation of church and state, one involved the forfeiture sanction for obscenity sales and the final case dealt with imposing stiffer sentences for bias-motivated crimes. The box score was five to three, i.e., in five cases the individual prevailed against government; in three cases the government's position prevailed. Those three cases involved lotteries, pornography and bigotry, and the government's power to deal with those concerns overcame the First Amendment.

COMMERCIAL SPEECH CASES

This was an unusually active year for commercial speech cases. The Court's doctrine in this field goes back, of course, about two decades. In 1975 and again in 1976, the Court ruled for the first time that even purely commercial advertising for goods and services was entitled to significant First Amendment protection.⁸

But persistent issues have remained: Does commercial speech receive "lesser" protection than political speech? If so, what is the dividing line between the two, and what forms may the lesser protection take? What leeway is government regulation to be given in sensitive settings such as solicitation of clients by professionals? Can truthful information about lawful goods or services nonetheless be banned from being advertised? If so, under what kinds of showing? In its 1992-93 Term, the Court revisited many of these issues.

2141 (1993); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).

8. See *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 1817, 1829-30 (1976). The Court held that the Virginia statute could not suppress the flow of prescription drug price information because the commercial speech was protected under the First Amendment. *Id.*; *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975). The Court stated that speech in a commercial advertisement for procuring abortions was not "stripped" of First Amendment protection merely because it reflected commercial interests or because it appeared in commercial form. *Id.*

*Cincinnati v. Discovery Network, Inc.*⁹

The Court's Term got off to a flying start with a case which sharply probed the question of the extent to which commercial speech receives "lesser" protection under the First Amendment. The setting involved Cincinnati's efforts to further its concerns with safe and attractive sidewalks by controlling the presence of freestanding news racks on public streets.¹⁰ The city had approximately 2,000 such news racks, a mere twenty-four of which were used to distribute a real estate newsletter and thirty-eight of which contained the publication of the Discovery Network, an organization which provides adult social, recreational and educational programs.¹¹

Having given these two organizations permission to place their news racks on city streets in 1989, a year later the city notified the two organizations that the permits were being revoked.¹² The response of each was "Why me?" and not the 1,938 news racks left unmolested.¹³ Dusting off an old city ordinance banning the distribution of "commercial handbills,"--although allowing the circulation of newspapers--the city's answer was: "Because you are commercial speech and are entitled to 'lesser' protection under the First Amendment."¹⁴ The Supreme Court's answer, six to three, was: "No, they are not." Justice Stevens wrote the opinion.¹⁵

The case implicates important practical and doctrinal considerations. In *practical* terms, fully 50% of the single copy sales of newspapers in America are news rack sales.¹⁶ Indeed news racks are ubiquitous on our city streets and have become, in effect, a new medium of communication. In *doctrinal* terms, the

9. 113 S. Ct. 1505 (1993).

10. *Id.* at 1508.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1509.

15. *Id.* at 1507.

16. *See id.* at 1509 n.10. The statistical information was obtained from amici curae briefs.

case shed light on two themes of commercial speech law that often seem in dissonance. The 1976 *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁷ case held that commercial speech was entitled to significant First Amendment protection.¹⁸ But the 1980 *Central Hudson Gas v. Public Service Commission* decision,¹⁹ in articulating a four-part formula for measuring the extent of that protection, seemed to water down the general free speech thrust of the *Virginia Pharmacy Board* case.

The first of the four *Central Hudson* factors is that the speech must be lawful and not misleading.²⁰ Here, this part of the test was easily met by both news rack publications. According to Justice Harry Blackmun, the author of the 1976 *Virginia Pharmacy Board* decision, the Court should stop there, period. If speech is truthful and lawful, then any notions of commercial speech having "lesser" protection have spent their force and the speech becomes fully protected under the First Amendment.²¹ Justice Stevens, writing for the Court in the news rack case, said that this issue did not have to be reached and reserved it for another day.²² He reasoned that even if the rest of the *Central Hudson* formula were applied, the Cincinnati ordinance could not pass muster.²³

On the second factor, it was conceded by the publications that sidewalk safety and urban aesthetics were substantial governmental interests,²⁴ so the regulation survived that hurdle,²⁵ as such regulations almost always do. The third factor asked whether the regulation directly advanced those governmental interests.²⁶ The Court did not really focus on this

17. 425 U.S. 748 (1976).

18. *Id.* at 765-73.

19. 447 U.S. 557 (1980).

20. *Id.* at 566.

21. *Discovery Network*, 113 S. Ct. at 1517-18.

22. *Id.* at 1516.

23. *Id.*

24. *Id.* at 1509-10.

25. *Id.* at 1510.

26. *Id.*

prong, though the dissent noted that the ordinance clearly did advance the objectives, at least to the tune of having sixty-two fewer news racks on the streets.²⁷

It was the fourth factor where the battle was joined. That component asked whether there was a "reasonable fit" between the objectives of the regulation and the selective restrictions on commercial speech.²⁸ In other words, the fit required was not between reducing news racks and promoting safety and aesthetics, it was between the means of reducing *only* commercial news racks and promoting the governmental ends of safety and aesthetics. Viewed that way, the City ordinance failed the reasonable fit test for a number of reasons.²⁹

First, the selective regulation was flawed because it only controlled the tip of the iceberg, dealing with only three percent of the problem. A better alternative would be to regulate the size, shape, location, appearance and number of all news racks.³⁰

Moreover, the use of an ineffective means of regulation was not justifiable by reference to the "lesser" status of commercial speech.³¹ The differences between the challengers' publications and the traditional newspapers not subject to the selective ban were not that stark. Newspapers contain lots of ads and these magazines contain some information.³² Equally important, allowing the City Manager to determine whether a publication was "primarily" a newspaper exempt from the ban or a commercial handbill subject to the restraint, was fraught with unacceptable censorship potential.³³

27. *Id.* at 1523.

28. *Id.* at 1511.

29. *Id.* at 1510-11.

30. *Id.* at 1510.

31. *Id.* at 1511. ("In our view, the city's argument attaches more importance to the distinction between commercial and non-commercial speech than our cases warrant and seriously underestimates the value of commercial speech.").

32. *Id.*

33. *Id.* at 1511; *see also* *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) ("[A] law or policy permitting communication in a

But even judging the publications as “core” commercial speech, the fit between acceptable ends and content-based means was unreasonable. *All* news racks equally threaten safety and aesthetics, regardless of their content, and therefore treating all news racks equally is the only reasonable fit available. Put bluntly: since the harm is not related to the content of the periodical, the regulation cannot be either. Therefore, the categorical ban on commercial distribution through news racks could not be squared with the dictates of the First Amendment.³⁴

Justice Blackmun concurred to express his oft-stated position that commercial speech can be treated as “lesser” speech only to the extent it is fraudulent, coercive or illegal.³⁵ Otherwise, it is *fully protected* under the First Amendment.³⁶ To the extent that the use of the *Central Hudson* formula suggested otherwise, it simply misled cities like Cincinnati into thinking they could make such unwarranted content-based distinctions.

The dissenters, Chief Justice Rehnquist and Justices White and Thomas, felt such distinctions were perfectly appropriate and faulted the Court for impermissibly sneaking a “least drastic alternatives” analysis into the “reasonable fit” equation.³⁷ The result would be to limit severely municipal choices for dealing with unsightly and dangerous news racks. Licensing is questionable, as is an outright ban. Cities must therefore choose between proliferation of news racks or treating *The New York Times* as no better than the *Learning Annex Newsletter*, a parity not mandated by the First Amendment.³⁸

certain matter for some but not for others raises the specter of content and viewpoint censorship.”).

34. *Discovery Network*, 113 S. Ct. at 1517.

35. *Id.* at 1518 (Blackmun, J., concurring).

36. *Id.* at 1520 (Blackmun, J., concurring) (emphasis added).

37. *Id.* at 1525 (Rehnquist, C.J., dissenting).

38. *Id.* at 1521-22 (“Our jurisprudence has emphasized that ‘commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values’ [and is subject to] ‘modes of regulation that might be impermissible in the realm of non commercial expression.’” (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978))).

The net effect of the *Discovery Network* ruling will be that government will have a harder time targeting commercial speech for second class citizenship and special hardships and burdens.³⁹

*Edenfield v. Fane*⁴⁰

While the *Cincinnati* case dealt with balancing formulas and commercial speech, *Edenfield v. Fane* dealt with another important theme: regulation of commercial speech to prevent fraud, coercion and overreaching.⁴¹ It is clear that government can so regulate, because in certain situations commercial speech is a "lesser" form of speech than political speech.⁴² In the latter arena, regulation of even false and deceptive or illegal advocacy speech is far more problematic.⁴³

39. Further exploration of these issues will likely come before the Court in a pending case involving a municipal ordinance that bans most signs in public. See *Gilleo v. City of Ladue*, 986 F.2d 1180 (8th Cir.), cert. granted, 114 S. Ct. 55 (1993).

40. 113 S. Ct. 1792 (1993).

41. *Id.* at 1799; see also *Central Hudson*, 447 U.S. at 574. The *Central Hudson* Court stated that restraints on commercial speech have been limited to those that protect consumers from "fraudulent, misleading or coercive sales techniques." *Id.*

42. See *Edge Broadcasting Co. v. United States*, 5 F.3d 59, 61 (4th Cir. 1992), *aff'd*, 113 S. Ct. 2696 (1993) (holding that under First Amendment analysis a lesser degree of protection is accorded commercial speech than other constitutionally guaranteed expressions); *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 469 (6th Cir. 1991), *aff'd*, 113 S. Ct. 1505 (1993).

43. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The Court stated that the Constitution guarantees "free speech [and] free press and do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" *Id.*; *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). There is a "national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." *Id.* at 270. This concept may include "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

The cases involving issues of fraud, coercion and overreaching have mostly involved lawyers.⁴⁴ In 1977 in the landmark case of *Bates v. State Bar of Arizona*,⁴⁵ lawyers were allowed for the first time to advertise service and price,⁴⁶ over the bitter opposition of four dissenters who claimed that such advertising would be inherently misleading and deceptive.⁴⁷ One year later, the Court dealt with whether lawyers could engage in direct personal solicitation of clients.⁴⁸ The Court upheld punishment of an ambulance-chasing lawyer, holding that the State may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequence.⁴⁹ In a companion case, however, the Court ruled that not all personal solicitation of clients by lawyers was unprotected, permitting a

44. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 461 (1978). The Court identified the "substantive evils of solicitation: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation and misrepresentation." *Id.*; *In re Primus*, 436 U.S. 412, 432 (1978). The Court described the State's "regulatory program that was aimed at the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients" *Id.*

45. 433 U.S. 350 (1977).

46. *Id.* at 382. The Court found that advertising will allow the public to compare the rates of competitors, thereby deciding for themselves whose rates are reasonable. *Id.*

47. *Id.* at 395-96 (Powell, J., concurring in part and dissenting in part). The dissent observed that although "some" misstatements in other advertising may be immaterial, such misstatements are "quite inappropriate in legal advertising" precisely because "the public lacks sophistication concerning legal services" *Id.*

48. See *Ohralik*, 436 U.S. at 449.

49. *Id.* at 467. In *Ohralik*, an attorney had approached two young accident victims, soon after the accident, when they were "incapable of making an informed decision." *Id.* He visited one victim in her hospital room. He led the victims to believe that because his fee was contingent, the offer of his services was "cost-free." He also induced one victim to sue based on information obtained from the second victim. *Id.* at 468. The Court held that these facts "present a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment." *Id.* at 468.

public interest lawyer to communicate with potential clients.⁵⁰ The Court has since upheld targeted mail solicitation by lawyers.⁵¹

But what about accountants? Are they different, better or worse than lawyers? That was the issue in *Edenfield v. Fane*.⁵²

Scott Fane, a New Jersey C.P.A., moved to Florida where he wanted to use the same business methods that had succeeded in New Jersey. He would call up small businesses and ask for an appointment to discuss rendering service to them.⁵³ But he was met with a Florida Board of Accountancy rule banning "direct, in-person, uninvited solicitation" of clients.⁵⁴ The rule was justified as necessary to safeguard the independence of C.P.A.s and their public accounting responsibilities and to protect consumers against fraud and deception.⁵⁵ Claiming instead that this rule was the rankest economic protectionism, not to mention unconstitutional, Fane filed suit.⁵⁶ The Supreme Court, in an

50. *In re Primus*, 436 U.S. 412 (1978). In *Primus*, the attorney, who worked for the American Civil Liberties Union, gave a speech advising women on public assistance, that if they had been sterilized as a result of medical assistance under a Medicaid program, they may have legal recourse. *Id.* at 415. After the talk, the attorney had been advised that a Mrs. Williams was interested in seeking possible recourse. *Id.* at 416. The attorney wrote to Mrs. Williams informing her of when she would next be in town in case she wanted to sue the doctor who performed the sterilization. *Id.* at 416, n.6. The attorney was brought up on charges of violations of the disciplinary rules because of this letter. *Id.* at 416-18. The Court held that the transmittal of a letter, as opposed to in-person solicitation, did not involve an invasion of privacy; "nor did it afford any significant opportunity for overreaching or coercion." *Id.* at 435.

51. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988). The *Shapero* Court stated that "because targeted, direct mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech" *Id.*

52. 113 S. Ct. at 1797.

53. *Id.* at 1796.

54. *Id.*

55. *Id.* at 1798.

56. *Id.* at 1797.

eight to one opinion written by Justice Kennedy, agreed with Fane.⁵⁷

I have previously commented on Justice Kennedy's impressive free speech and free press commitments and instincts and they were manifest in this opinion.⁵⁸

First he observed that even though the Court had upheld a ban on in-person solicitation by lawyers, not all such solicitation for professional services is impermissible.⁵⁹ Indeed, Justice Kennedy explained, in-person professional solicitation can have very *positive* features by allowing a direct and spontaneous interchange between buyer and seller; a two-way street that lets the buyer of services evaluate the seller who would provide them.⁶⁰ That way, speakers and listeners can decide the value of ideas and information, not government:

The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the

57. *Id.* at 1795. Justice O'Connor was the sole dissenter in this case.

58. See Joel M. Gora, *Back From the Brink*, 9 TOURO L. REV. 251, 254-55 (1993). The author has remarked that Justice Kennedy "has emerged as the Court's most vigorous advocate of the fullest protection of First Amendment rights." *Id.*

59. See *Edenfield*, 113 S. Ct. at 1803 (stating that the nature of the accounting profession differs in significant ways from legal services and their soliciting targets making the imposition of such a ban on C.P.A.s unnecessary); see also *Spencer v. The Honorable Justices of the Supreme Court*, 579 F. Supp. 880, 890 (E.D. Pa. 1984) (stating that the interest in prohibiting the evils of in-person solicitation are not present in the direct-mail context).

60. See *Edenfield*, 113 S. Ct. at 1797-98. The Court stated that "personal interchange enables a potential buyer to meet and evaluate the person offering the product or service, and allows both parties to discuss and negotiate the desired form for the transaction or professional relation."; see also *Ohralik*, 436 U.S. at 458. The Court noted that "in-person solicitation may provide the solicited individual with information about his or her legal rights and remedies." *Id.*

audience, not the government, assess the value of the information presented.⁶¹

Nonetheless, because commercial speech is inextricably intertwined with the commercial transaction it proposes, government interests in regulating the transaction may justify regulating the speech.⁶² That is where the *Central Hudson* standard of review comes in.⁶³ Is the restriction on commercial speech tailored in a reasonable manner to serve a substantial state interest, i.e., does the restriction *directly advance* the substantial interest?⁶⁴

Applying that formula, the Court found the ban on solicitation by accountants unnecessary.⁶⁵ To be sure the state interests were

61. *Edenfield*, 113 S. Ct. at 1798.

62. *See Primus*, 436 U.S. at 438. The *Primus* Court stated that “the State’s special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing or involves other features of deception or improper influence.” *Id.*; *Ohralik*, 436 U.S. at 449, stating that the State may constitutionally “discipline a lawyer for soliciting clients in person for pecuniary gain under circumstances likely to pose dangers that the State has a right to prevent.”

63. *See Central Hudson*, 447 U.S. at 566. The *Central Hudson* Test provides in pertinent part:

- (1) whether the speech concerns lawful activity and is not misleading;
- (2) whether the asserted governmental interest is substantial; [and if the answer to number one and number two are yes, then] determine, (3) whether the regulation directly advances the asserted interest, and (4) whether it is not more extensive than is necessary to serve that interest.

Id.

64. *See Bates v. State Bar*, 433 U.S. 350, 378 (1977). The *Bates* Court overturned an “advertising prohibition that was designed to protect the ‘quality’ of a lawyer’s work,” holding that these restraints were “an ineffective way of directly deterring shoddy work.” *Id.*; *see also Central Hudson*, 447 U.S. at 564. The Court noted that it has declined in the past to “uphold regulations that only indirectly advance the state interest involved.” *Id.*

65. *See Edenfield*, 113 S. Ct. at 1800. The Court held that simply because the asserted interests are substantial, does not mean that a blanket prohibition on solicitation serves them. *Id.* at 1801-02. “The Board’s ban on CPA [sic] solicitation as applied to the solicitation of business clients fails” to meet the third prong of the *Central Hudson* Test. *Id.* at 1800.

important: guarding against fraud, overreaching and vexatious solicitation; maintaining professional standards and independence.⁶⁶ The problem is the ban does not directly serve those interests as applied to the solicitation of *business* clients.⁶⁷ The government has the burden of persuasion to show that the “harms it recites are real and that its restriction will in fact alleviate them *to a material degree*.”⁶⁸ Pointing to the absence of evidence of harm in the more than twenty states without such a ban on accountant’s solicitation, the Court ruled the burden of proof had not been discharged.⁶⁹

Nor could the deficit be remedied by the asserted need for a prophylactic rule to protect against situations with the potential for fraud or overreaching.⁷⁰ In contrast to lawyers, the Court reasoned, accountants are not trained as advocates and persuaders who might overwhelm a vulnerable client;⁷¹ most businesses are not vulnerable to such pressures anyway;⁷² and there is time to reflect and respond to the accountant’s overtures.⁷³ For that

66. See *Ohralik*, 436 U.S. at 464. The Court stated that in situations which are “inherently conducive to overreaching and other forms of misconduct the State has a strong interest” in protecting the public from harmful solicitation by the attorneys that were licensed by that state. *Id.*

67. See *Edenfield*, 113 S. Ct. at 1800. In *Edenfield*, the Florida Accountancy Board presented no studies or anecdotal evidence to support its concern about the dangers of personal solicitation by C.P.A.’s in the business context. Not even the defendant’s conduct justified the Board’s concerns. *Id.* at 1800.

68. *Id.* at 1795 (emphasis added).

69. *Id.* at 1800.

70. *Id.* at 1802.

71. *Id.* at 1802-03. The *Edenfield* Court concluded that a C.P.A.’s training is in objectivity and independence, not in advocacy or persuasion. *Id.*

72. *Id.* at 1803. The Court reasoned that a C.P.A.’s prospective clients are “sophisticated and experienced business executives” who understand what a C.P.A. has to offer. *Id.* Generally, the potential client has an accountant and therefore, has a basis for evaluating the proposal of a C.P.A. seeking work. *Id.* The manner in which a C.P.A. solicits business is conducive to rational decision-making by the client unlike the “uninformed acquiescence” of a young accident victim to any attorney immediately following a tragic accident. *Id.*

73. *Id.* The Court reasoned that because the clients a C.P.A. wishes to “manipulate” meet the C.P.A. in their own offices at their own convenience,

reason the imprecise and overbroad approach of a flat ban on in-person business solicitation is impermissible.⁷⁴

The implication for more broadly allowing in-person solicitation by lawyers of business clients would seem to be clear: Such contacts are probably protected as well, since the difference between business lawyers and certified public accountants is slim.⁷⁵ That is why Justice O'Connor, the lone dissenter, bemoaned what the Court had done.⁷⁶ Indeed, she claimed that the Court was wrong from the very beginning in *Bates*⁷⁷ by allowing the listener's interest in commercialism to overcome the state's interest in professionalism.⁷⁸ "I see no constitutional difference between a rule prohibiting in-person solicitation by attorneys, and a rule prohibiting in-person solicitation by certified public accountants"⁷⁹ And she may be right. The

if they are not interested in what the C.P.A. has to say they need not meet with the C.P.A. at all. Generally, the prospective client will make their decision with caution, they will check references and deliberate before hiring a new C.P.A. *Id.*

74. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988), stating that a categorical ban of all direct mail solicitation is impermissible.

75. *Edenfield*, 113 S. Ct. at 1805. The Court stated that an attorney's power over potential clients does not come solely from the threat of persuasion but also comes from their complex knowledge of a subject matter -- the law. C.P.A.'s might be found to have a similar power over potential inexperienced clients, stemming from their broad knowledge of accounting. *Id.* at 1805.

76. *Id.* at 1804 (O'Connor, J., dissenting).

77. *Id.* (O'Connor, J., dissenting). Justice O'Connor asserted that the Court, "took a wrong turn with *Bates v. State Bar of Arizona*." *Id.*

78. *Id.* at 1803; see also *Shapero*, 486 U.S. 466; *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). In Justice O'Connor's view, cases such as *Shapero* and *Zauderer* incorrectly and consistently focused on "whether the challenged advertisement directly harm[ed] the listener." Justice O'Connor's dissent suggests that the states should be prohibiting commercial speech that is "inconsistent with the speaker's membership in a learned profession, and therefore damaging to the profession and society at large." *Id.* at 1804.

79. *Edenfield*, 113 S. Ct. at 1805 (O'Connor, J., dissenting).

Court's decision may remove most of whatever broad restraints remain on in-person solicitation by lawyers.⁸⁰

*United States v. Edge Broadcasting Co.*⁸¹

Finally, there was one commercial speech case last Term that the government won. It involved a third doctrinal strand, namely, whether truthful information, about a legal service or product, involving no fraud or coercion, can ever be suppressed. And if it can, what does that do to First Amendment values?

The case involved federal statutes that prohibit the broadcast of lottery advertising by a broadcaster licensed to a state that does *not* have a lottery, while allowing such ads to be carried by a broadcaster licensed to a state that sponsors a lottery.⁸² The statutory disparity was challenged by Edge Broadcasting—suitably named—which operates a radio station located at the northeast edge of North Carolina, within hailing distance of the

80. See *Ibarez v. Florida*, 114 S. Ct. 751 (1994). The Court may give a further answer to some of these questions in a case where certiorari was recently granted. In *Ibarez*, the Court agreed to hear a case involving whether an accountant, who is also a lawyer, may use certain letterhead designations. *Id.*

81. 113 S. Ct. 2696 (1993).

82. The pertinent statutes at issue in this case were 18 U.S.C. §§ 1304, 1307 (Supp. 1988). 18 U.S.C. § 1304 provides in pertinent part:

Broadcasting Lottery Information. Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, . . . any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, . . . shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Id.; 18 U.S.C. § 1307 provides in pertinent part:

Exceptions relating to certain advertisements and other information and to State conducted lotteries.

(a) The provisions of §§ 1301, 1302, 1303 and 1304 shall not apply to -- (1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is --

Virginia border.⁸³ Indeed, ninety-two percent of the broadcaster's audience is in Virginia, which has a state-run lottery, but the station is licensed in North Carolina, which does not.⁸⁴ As a result, Edge's Virginia-licensed competitors can run the very profitable lottery ads, but Edge cannot.⁸⁵ "Why me?" Edge asked. "Here is why," the Supreme Court responded: Because Congress said so, in an attempt to balance the interests of lottery states versus non-lottery states.⁸⁶

The opinion for a seven to two Court was written by Justice White,⁸⁷ who never met an Act of Congress he did not like. This act had roots in the nineteenth century when Congress enacted, and the Supreme Court upheld, bans on mailing of lottery information or interstate transportation of lottery tickets.⁸⁸ More recently, Congress had enacted a total ban on broadcasting lottery

(b) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery.

Id.

83. *Edge Broadcasting Co.*, 113 S. Ct. at 2702.

84. *Id.* at 2702.

85. *Id.*

86. *Id.* at 2704. The Supreme Court in *Edge Broadcasting*, found that the "congressional policy of balancing the interests of lottery and nonlottery States is the substantial governmental interest that satisfies the [third prong of the] Central Hudson [test]." *Id.* Congress was found to support the anti-gambling policy of North Carolina by forbidding stations licensed by this state from airing lottery advertisements, even if such stations were to be heard in states allowing the lottery. On the other hand, Congress was found not to have interfered with the policies of Virginia, in that stations licensed in this state could advertise lotteries, even if such advertisements were heard in states not allowing the lottery. This rule was found to advance the governmental purpose of supporting states to not sponsor gambling. *Id.*

87. *Id.* at 2700. Justice White wrote the opinion for the majority. Justice Stevens wrote the dissent joined by Justice Blackmun. *Id.* at 2708.

88. *See Champion v. Ames*, 188 U.S. 321 (1903). In *Champion*, the defendant was indicted for conspiracy to violate the Federal Lottery Act. The law prohibited importing, mailing or transporting from one state to another any lottery ticket. *Champion*, the defendant, challenged the constitutionality of the act. *Id.* at 323-25. The Court held that, just as a state can forbid all sales of lottery tickets within its limits to guard the morals of its citizens, Congress can prohibit transporting lottery tickets in interstate commerce in order to protect the public's morals and interstate commerce. *Id.* at 330.

information,⁸⁹ but in the mid-1970's relaxed that restriction in favor of the selective prohibition at issue here.⁹⁰ The lower courts found the ban ineffectual: so much lottery information is lawfully available within North Carolina that Edge's extra dollop would not harm the state's interests in any marginally significant way.⁹¹

Justice White asserted, however, that the lower courts had looked at the wrong state interest.⁹² While the ban does serve the Congressional purpose of giving substantial incremental protection against lottery information to North Carolina, the more important federal interest is in balancing the concerns of lottery versus non-lottery states *nationwide*.⁹³ And that interest is served by the state-based variations in the broadcasting ban.⁹⁴

Applying the *Central Hudson* four-part balancing formula, the Court noted that since lottery ads were promoting the "vice" of gambling, and since government could ban the vice itself, then it could take the "lesser" step of banning the advertising.⁹⁵ This

89. See *United States v. King*, 834 F.2d 109, 111 (6th Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). In 1890, Congress legislated against the use of the postal service for delivery of lottery paraphernalia. In 1895, Congress extended this ban to all interstate commerce. *Id.*

90. See *Edge Broadcasting*, 113 S. Ct. at 2704 (stating that those states which permit lotteries may advertise lotteries but states that do not permit lotteries may not advertise).

91. *Id.* at 2702. The district court held that as, applied to *Edge Broadcasting*, the statutes did not directly advance the asserted governmental interest and therefore failed the *Central Hudson* Test. A divided court of appeals affirmed in all respects. *Id.*

92. *Id.* at 2704. The Supreme Court found that the lower courts had applied the wrong inquiry. The majority held the proper inquiry would have been whether the "regulation directly advances the governmental interest asserted." *Id.* (quoting *Central Hudson*, 474 U.S. at 566). Therefore, the lower courts should not have limited the governmental interest to a single person or entity, instead it needs to be applied to all other radio and television stations country wide. *Id.* The Court held that the statutes in this case directly advanced the governmental interest at stake. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 2707. The Court determined that the broadcast of promotional advertising of lotteries undermines a state's policy against gambling, and if

theory comes from a much-criticized decision which upheld a ban on advertising legal casino gambling in Puerto Rico.⁹⁶ But passing that controversial issue, the Court ruled that the law could be sustained as a “reasonable fit” between means and ends.⁹⁷

If Virginia’s lottery policy and the advertising thereof could control broadcasting at the edge of North Carolina, then the latter State’s interests would be improperly subordinated to the former State’s policies. The statute, however, lets North Carolina prevent the broadcast of lottery information from within North Carolina and reduce, even though only slightly, the amount of such information that its citizens receive.⁹⁸ Thus, as a general matter, the ban manifests a reasonable fit between means and ends, which could not be achieved quite as effectively without the ban. That being so, and the general approach of the statute being valid, it can be applied generically, even in specific situations where its particular application might be very questionable.

The two dissenters, Justices Stevens and Blackmun, were quite upset by the ruling. First, they thought the decision was flatly inconsistent with *Bigelow v. Virginia*,⁹⁹ the 1975 case which upheld the right to advertise in one state services illegal there,

there is an immediate connection between advertising and demand, “and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand . . . is correspondingly advanced.” *Id.*

96. *Posados De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). The operator of a Puerto Rican gambling casino filed suit claiming that a Puerto Rican statute and regulations restricting advertising of casino gambling violated its commercial free speech rights under the Constitution. *Id.* at 331. The Court held that based on the four prong test of *Central Hudson* the restrictions in question directly advance the government’s asserted interest and were no more extensive than was necessary to serve the government’s interest. *Id.* at 343.

97. *See Edge Broadcasting*, 113 S. Ct. at 2705. The Court held that there was “no doubt that the fit in this case was a reasonable one.” In other words, it was reasonable to require Edge to comply with the restriction against carrying lottery advertising. *Id.*

98. *Id.*

99. 421 U.S. 809 (1975).

but legal in another, to wit, abortion. More broadly, they rejected the majority's entire approach to control of lawful information:

[T]he Federal Government has not regulated the content of such [lottery] advertisements, to ensure that they are not misleading, nor has it provided for the distribution of more speech, such as warnings or educational information about gambling. Rather, the United States has selected the most intrusive, and dangerous, form of regulation possible—a ban on truthful information regarding a lawful activity imposed for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens. Unless justified by a truly substantial governmental interest, this extreme, and extremely paternalistic, measure surely cannot withstand scrutiny under the First Amendment.¹⁰⁰

That it did withstand scrutiny is a function of deference to Congressional legislative judgments and watered down black letter law about the “lesser” protection of commercial speech. Indeed, there is a noticeable tension between *Edge Broadcasting* and the news rack and accounting solicitation cases.¹⁰¹ Lotteries are clearly here to stay, despite the Court's ruling. But the real test of what the law is will come when Congress tries to ban Joe Camel ads.

OBSCENITY SALES CASE

*Alexander v. United States*¹⁰²

While we are on the subject of the sin of gambling, let us turn to the sin of pornography and the government's continuing war on smut.

We are all familiar with “RICO,” the Racketeer Influenced and Corrupt Organizations Act, passed two decades ago to deal with

100. *Edge Broadcasting*, 113 S. Ct. at 2710 (Stevens, J., dissenting).

101. See *Edenfield*, 113 S. Ct. 1792 (accounting solicitation); *Discovery Network*, 113 S. Ct. 1505 (news racks).

102. 113 S. Ct. 2766 (1993).

organized crime.¹⁰³ The Act's unprecedented arsenal of criminal and civil penalties and punishments has been before the courts on numerous occasions. On the criminal side, once a pattern of racketeering activity has been found,¹⁰⁴ additional penalties can be imposed on the defendant in the form of forfeiture of the assets, proceeds and tools of the criminal enterprise.¹⁰⁵

But what if the predicate RICO crimes are not loan sharking or extortion, but selling obscene magazines and movies? And what if the assets forfeited and destroyed are *non*-obscene books and movies *protected* by the First Amendment? Does the First Amendment have anything to say about that? Not much, said a sharply divided Supreme Court. In an opinion written by Chief Justice Rehnquist, a narrow five to four majority¹⁰⁶ held that a conviction for obscenity is no more a bar on the forfeiture of

103. 18 U.S.C. §§ 1961-1968 (1988 & Supp. III 1991).

104. *See* 18 U.S.C. § 1961(5) (stating that a "pattern of racketeering activity" requires at least two acts of racketeering activity within a ten year period).

105. Section 1963(a) of the RICO statute provides in pertinent part: an individual convicted of a racketeering offense under § 1962 shall be fined or imprisoned or both, and shall forfeit to the United States these types of assets:

- (1) any interest the person has acquired or maintained in the violation of section 1962;
- (2) any
 - (A) interest in ;
 - (B) security of;
 - (C) claim against; or
 - (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, participated in the conduct of, in violation of section 1962; and
- (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of Section 1962.

Id.

106. *Alexander*, 113 S. Ct. at 2769. Justices White, O'Connor, Scalia and Thomas joined in the judgment. *Id.* Justice Souter filed an opinion which concurred in judgment in part and dissented in part. *Id.* at 2766. Justice Kennedy filed a dissenting opinion in which Justices Blackmun and Stevens joined, and in which Justice Souter joined as to part II. *Id.*

related assets than a conviction for any other criminal charge.¹⁰⁷ Put another way, (1) you can seize the entire corner newsstand if the owner takes illegal bets under the counter, and (2) you can impose heavy punishments if the owner sells obscenity there, then (3) so, too, can you seize the entire newsstand if the owner sells obscenity there. The dissenters claimed that this third wrinkle was a lethal and impermissible combination of the first two because of the chilling effect that would come from the mere possibility that *all* of one's First Amendment assets might be forfeited upon an obscenity conviction based on *one* or just a few publications.¹⁰⁸ What was unprecedented, they asserted, was the seizure of protected First Amendment material as a penalty for a First Amendment-related expressive crime like obscenity.¹⁰⁹

The context of the case was not as sympathetic as the corner newsstand. But the First Amendment is for scoundrels also. Here it was a big-time, long-time porn dealer, with several outlets in the Minneapolis area. Several items sold at the stores were found legally obscene, turning the string of stores into a RICO enterprise.¹¹⁰ As a result, the RICO sentence included forfeiture of millions of dollars of books and films as materials related to that RICO enterprise, either as an interest in, assets and proceeds of, or property that gave the defendant control over the enterprise.¹¹¹

The defendant, Ferris Alexander, mounted two First Amendment challenges to the unprecedented massive forfeiture of presumptively protected material: first, that it effectively

107. *Id.* at 2773. The "First Amendment does not prohibit either stringent criminal sanctions for obscenity offenses or forfeiture of expressive materials as punishment for criminal conduct." *Id.*

108. *Id.* at 2783 (Kennedy, J., dissenting).

109. *Id.* at 2783-84 (Kennedy, J., dissenting). The dissenters expressed concern as follows: "What is happening here is simple: Books and films are condemned and destroyed not for their own content but for the content of their owner's prior speech. Our law does not permit the government to burden future speech for this sort of taint." *Id.* (Kennedy, J., dissenting).

110. *Id.* at 2769-70.

111. *Alexander*, 113 S. Ct. at 2769-70; *see also* 18 U.S.C. § 1963(a)(2) (the RICO forfeiture provision).

constituted a prior restraint,¹¹² and second, that the penalties were overbroad and chilling because the punishment far exceeded the First Amendment-related crime.¹¹³

The prior restraint defense was turned aside on the ground that the forfeiture did not constitute a traditional prior restraint, i.e., an administrative or judicial order that prohibits speech from going forward without official approval, the classic essence of censorship.¹¹⁴ Here, there were no legal restraints on further speech by Alexander, assuming he amassed new assets.¹¹⁵ Finally, the Court conceded that wholesale seizures of books and films without a hearing can constitute a prior restraint,¹¹⁶ but ruled that here there was a trial which found obscenity in some materials. To be sure, the bulk of the materials seized were not found illegal, but they were being seized not because they were obscene, but because they were related to RICO violations.¹¹⁷ You will forgive the suggestion that this is a rather obtuse distinction.

The overbreadth and chilling effect assertions were rejected on the basis of the corner newsstand reasoning I suggested earlier:

112. *Alexander*, 113 S. Ct. at 2771. The Court stated that the term "prior restraint is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Id.* (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-14 (1984)) (emphasis in original).

113. *Id.* at 2774. The Court explained that the "overbreadth" doctrine allowed defendant to challenge, on its face, an overly broad statute that restricted speech, even if defendant had engaged in speech which could have been effectively regulated by a more narrowly tailored statute. *Id.*

114. *Id.* at 2770-71.

115. *Id.* at 2771.

116. *See, e.g.*, *Roaden v. Kentucky*, 413 U.S. 496 (1973); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964); *Bantum Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Marcus v. Search Warrant*, 367 U.S. 717 (1961). The Court in *Alexander*, stated that the "constitutional infirmity" in almost all of its prior restraint cases dealing with obscene material, was that the government had seized materials that were suspected of being obscene, without prior determination that the seized items were in fact obscene. *Alexander*, 113 S. Ct. at 2771-72.

117. *Alexander*, 113 S. Ct. at 2772.

Punishments and forfeitures of obscene materials are permissible;¹¹⁸ forfeitures of non-obscene materials linked to related criminal conduct like prostitution are permissible; therefore, forfeitures of non-obscene materials as punishment for selling obscene materials are permissible as well. As the Court put it: the whole is *not* greater than the sum of the parts.¹¹⁹ Prostitution convictions and pornography convictions can equally serve as predicates for forfeiture of protected materials.¹²⁰

But the case was remanded for consideration of the Eighth Amendment issue of whether the wholesale forfeiture was an unconstitutionally excessive fine.¹²¹

The dissenters, led by Justice Kennedy, saw no need to reach the Eighth Amendment issue since the forfeitures so clearly violated the First.¹²² They declared the majority's holding "a deplorable abandonment of fundamental First Amendment principles."¹²³ While conceding that the wholesale forfeitures were not technically a prior restraint, they were certainly effectively one because they put the owner and his entire bookstore out of business. In both purpose and effect the

118. See *Arcara v. Cloud Books, Inc.* 478 U.S. 697, 707 (1986) (sustaining a court ordered forfeiture of adult bookstore used as a place for prostitution and lewdness).

119. *Alexander*, 113 S. Ct. at 2775. The Court noted that petitioner's argument expressed the belief that both stiff criminal penalties for obscenity offenses and forfeiture of expressive materials, as punishment for criminal conduct were consistent with the First Amendment. However, the Court rejected petitioner's "counter-intuitive conclusion" that a combination of these two premises violates the First Amendment. "[I]n effect," the Court stated, "[petitioner's conclusion] would say that the whole is greater than the sum of the parts." *Id.*

120. See *supra* note 105.

121. *Alexander*, 113 S. Ct. at 2776.

122. *Id.* at 2786 (Kennedy, J., dissenting). Justice Kennedy stated that the "Court's failure to reverse this flagrant violation" of the First Amendment effectively abandons these principles of free speech and expression. *Id.*

123. *Id.* at 2786 (Kennedy, Blackmun, Stevens & Souter J.J., dissenting).

government was allowed to achieve an impermissible prior restraint through the RICO back door.¹²⁴

CHURCH AND STATE CASES

Moving from the profane to the profound--as well as closer to home--I would like to discuss the Court's three closely-watched church/state cases.¹²⁵

The proper relations between church and state have long been a staple of American constitutional law and history.¹²⁶ The First Amendment strikes that "delicate balance" by barring government from making laws "respecting an establishment of religion," but requiring government to respect "the free exercise thereof."¹²⁷

The debate has long ensued over whether the purpose of these provisions is to protect religion against government, or protect

124. See *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 805 (1994) (holding in civil suit against anti-abortion group that application of the RICO statute contains no requirement of an economic motive).

125. *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141 (1993).

126. See *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984))); *School Dist. of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). The Court stated that the First Amendment is "more than a pledge that no single religion will be designated as a state religion" and "more than a mere injunction that governmental programs discriminating among religions are unconstitutional." *Id.* at 381. "The Establishment Clause instead primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973)); *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion was intended to erect 'a wall of separation between church and State.'" (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878))).

127. See *supra* note 5 and accompanying text.

government against religion, or both? Recently, for example, Professor Steven Carter at Yale has suggested that we have unfortunately bent over backwards to exclude religious faith from public discussion.¹²⁸

Some of these themes and tensions were played out in the three cases this Term. Though the government lost all three cases, and though the votes in two of them were nine to zero,¹²⁹ there was considerable disagreement about how to strike that “delicate balance.”

*Lamb’s Chapel v. Center Moriches School District*¹³⁰

The easiest of the three cases was the one closest to home. This case involved *both* a Free Speech and a Free Exercise claim.¹³¹ Lamb’s Chapel, an evangelical church group, wanted to use public school property, after school hours, for a series of films and discussions, as dozens of civic, political and social groups had done in that school district in the past. The film series would show “family-oriented movies from a Christian perspective.”¹³² School officials refused permission on the ground that the sponsoring group was “church related.” They justified their action by pointing to a provision of the New York Education Law that limited the outside use of school property to “social, civic or recreational purposes”¹³³ and to administrative and

128. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW & POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

129. *Lamb’s Chapel*, 113 S. Ct. 2141 (1993); *Church of Lukumi Babalu Aye*, 113 S. Ct. 2217 (1993).

130. 113 S. Ct. 2141.

131. *Id.* at 2145.

132. *Id.* at 2144.

133. See N.Y. EDUC. LAW § 414 (McKinney 1988 & Supp. 1993). The statute states in relevant part:

The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any

judicial interpretations that religious purposes were to be excluded.¹³⁴

As the litigation developed, school officials additionally claimed that permitting the group's proposed use of school property would violate the Establishment Clause as well.¹³⁵

The church group said, of course, "Why us?" The Second Circuit--without Judge Pratt on the panel¹³⁶--gave these reasons: 1) The school is not a public forum or a designated public forum, but is only a limited public forum, i.e., limited to certain purposes and religious uses are not among them;¹³⁷ and 2) Since the school board had not allowed other religious groups to gain access, the refusal was viewpoint-neutral and reasonable.¹³⁸

The Supreme Court unanimously reversed, holding that it violated the Free Speech Clause to exclude the group and would not violate the Establishment Clause to include them.¹³⁹

First, the Court referred to its complex public forum taxonomy--public forum/ designated public forum/ limited public forum/ non-public forum.¹⁴⁰ Justice White made no effort to clarify the boundary lines between the categories and instead, the Court assumed that this was a limited public forum. In that setting, government *can* distinguish on the basis of speaker

of the following purposes: '(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.'

Id.

134. *Lamb's Chapel*, 113 S. Ct. at 2144. Pursuant to § 414, the Board of Center Moriches Union Free School District issued its own regulations limiting the use of school property outside of school purposes. One of those rules, Rule 7, which was consistent with judicial interpretation of state law, prohibited any group from using school premises for religious purposes. *Id.*

135. *Id.* at 2145.

136. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 383 (2d Cir. 1992), *rev'd*, 113 S. Ct. 2141 (1993). This appeal was presented before Circuit Judges Cardamone, Pierce and Miner. *Id.*

137. *Id.* at 386.

138. *Id.* at 387-88.

139. *Lamb's Chapel*, 113 S. Ct. at 2141.

140. *See id.* at 2146-47.

identity and topic subject matter, so long as the distinctions are viewpoint neutral and reasonable.¹⁴¹ But the ban on religious use is not viewpoint neutral since it permits all other viewpoints on a topic, while excluding only the religious point of view. If other perspectives on family values can use the forum, government cannot exclude speakers with the religious perspective.¹⁴² In other words, if a Marxist study group can hire the hall to say that religion is the opiate of the people, a religious group can hold a meeting to say no we are not. Likewise, if a group can meet to discuss family values from the sexual diversity perspective, a group that wants to discuss family values from the religious perspective cannot be excluded.

To sum up: the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.¹⁴³ The only thing that could possibly justify such an exclusion of some points of view is if the exclusion were *required* by the Establishment Clause.¹⁴⁴ Relying on a 1981 ruling that allowed a religious student group to use a

141. *See id.* at 2145-47. The Supreme Court accepted the lower court's limited public forum classification of the school district's property and adopted the "reasonable" and "viewpoint neutral" standard as well. *Id.* at 2142-43. The Court disagreed, however, with the conclusion that Rule 7 had satisfied this test and reversed the Second Circuit judgment. *Id.*

142. *See, e.g.,* *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985):

Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id. (citations omitted).

143. *See* *Members of the City Council of Los Angeles v. Taxpayers For Vincent*, 446 U.S. 789, 804 (1984).

144. *See, e.g.,* *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986). The court stated that discriminating against a particular point of view would "flunk the test" set forth in *Cornelius* provided that defendants lack a defense based upon the Establishment Clause. *Id.*

college meeting room without offending the Clause,¹⁴⁵ the Court extended that principle to allow a religious community group to use a high school meeting room after school hours.¹⁴⁶ Applying the much-criticized three-part formula of *Lemon v. Kurtzman*,¹⁴⁷ the Court decided that since there was no school sponsorship of the event and it was not on school time, there could be no perception that the school board was “endorsing” the group’s religion or meeting:¹⁴⁸ “The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.”¹⁴⁹

Concurring, Justice Kennedy took issue with the need to rely on *Lemon* or employ the “endorsing religion” concept, which he views as too stringent a test of proper accommodation of church by state.¹⁵⁰ Likewise, Justice Scalia, joined by Justice Thomas, took the occasion to have some fun at the expense of the malleable *Lemon* test, comparing it to a ghoul in a late-night movie “that repeatedly sits up in its grave and shuffles abroad, after repeatedly being killed and buried.”¹⁵¹ They too complained that the majority’s “endorsing religion” concept was too restrictive an approach to the permissible government acknowledgment and accommodation of religion.¹⁵²

I would note one significant Free Speech Clause by-product of the *Lamb’s Chapel* case. The Court was clear that government’s allowing a group to use its facilities to meet or speak does not constitute government endorsement or sponsorship of that

145. See *Widmar v. Vincent*, 454 U.S. 263, 278 (1981). The Court held that the State’s interest in maintaining strict separation of church and State was not “sufficiently ‘compelling’ to justify content-based discrimination against . . . religious speech.” *Id.*

146. *Lamb’s Chapel*, 113 S. Ct. at 2143.

147. *Widmar*, 454 U.S. at 275-78.

148. *Lamb’s Chapel*, 113 S. Ct. at 2148.

149. *Id.* (applying the *Lemon v. Kurtzman* three-part test).

150. *Id.* at 2149 (Kennedy, J., concurring).

151. *Id.* (Scalia, J., concurring).

152. *Id.* at 2150-51 (Scalia, J., concurring).

speech.¹⁵³ Thus, when New York City lets the Hibernians have a St. Patrick's day parade and exclude a gay contingent, that is not the City acting, it is the Hibernians.¹⁵⁴ Likewise, when a public university permits bigoted speech by students, the university is not endorsing or sponsoring the speech, merely allowing it.¹⁵⁵ But, finally, as schools increasingly become used as general community centers after school, there may be lots of frictions and tensions as extremist or very controversial groups seek equal access to those premises and facilities.

*Zobrest v. Catalina Foothills School District*¹⁵⁶

Although the *Lemon* test¹⁵⁷ received a bit of workout in *Lamb's Chapel*, surprisingly, it was barely mentioned in the Term's other Establishment Clause case, which was the flipside of the *Lamb's Chapel* case. Rather than the right of a religious group to access to *public facilities*, the next case involved whether a disabled student at a religious school was entitled to require that *public benefits* be provided to him on religious school premises.

James Zobrest, who has been deaf since birth, asked his local Tucson, Arizona school district to supply him with a sign language interpreter to go with him to classes at a Roman

153. *Id.*

154. See *Otway v. City of New York*, 818 F. Supp. 659, 664 (S.D.N.Y. 1993). In *Otway*, the court held that allowing the Ancient Order of Hibernians to hold a St. Patrick's Day parade on Fifth Avenue, did not equal a governmental attempt at establishment of religion. Judge Duffy remarked that "religious speakers have the same right of access to public forums as others." *Id.* at 663.

155. See *Doe v. University of Michigan*, 721 F. Supp. 852, 868 (E.D. Mich. 1989) The court held that speech codes violated the First Amendment, but rejected the argument that by permitting racist speech on campus, the public university ratified that speech.

156. 113 S. Ct. 2462 (1993).

157. *Lemon*, 403 U.S. at 612-13. In utilizing the *Lemon* test, government action is not violative of the Establishment Clause only if its purpose is secular, its primary effect neither advances nor inhibits religion, and it does not foster excessive government entanglement with religion.

Catholic high school, the same service he had had as a public school student before he transferred to parochial school.¹⁵⁸ His request was based on the Individuals with Disabilities Education Act.¹⁵⁹ When the school board refused, he and his parents filed suit.¹⁶⁰ The lower courts rejected his claim on the ground that providing such assistance would violate the Establishment Clause.¹⁶¹ The courts felt it would be a sponsorship of religion by having a public employee, the interpreter, in parochial school, and it would manifest an impermissible “symbolic union” between government and religion.¹⁶² One dissenting opinion held that since the interpreter would be provided through a general welfare program neutrally available to all children, and the benefits would be diffused across the country, the request should have been granted.¹⁶³

A sharply divided Supreme Court agreed with the Ninth Circuit dissent.¹⁶⁴ First, the Court, per Chief Justice Rehnquist, rejected the attempt to dispose of the case on the non-constitutional ground that the Act itself and the implementing regulations did not require or authorize the provision of an interpreter in private schools.¹⁶⁵

Turning to the merits, the Court observed that the Establishment Clause does not prevent religious organizations

158. *Zobrest*, 113 S. Ct. at 2464.

159. 20 U.S.C. § 1400 (1994). The action was also based upon Arizona State law. *See* ARIZ. REV. STAT. ANN. § 15-761 (1991 & Supp. 1992).

160. *Zobrest*, 113 S. Ct. at 2464. The petitioners instituted this action under 20 U.S.C. § 1415(e)(4)(A), which gives the district court jurisdiction over disputes regarding services for disabled children under the Individuals with Disabilities Education Act. *Id.*

161. *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190 (9th Cir. 1992), *aff’d*, 113 S. Ct. 2462 (1993).

162. *Id.* at 1194.

163. *Id.* at 1199 (Tang, J., dissenting).

164. *Zobrest*, 113 S. Ct. at 2463-64. Chief Justice Rehnquist delivered the opinion of the Court in which Justices White, Scalia, Kennedy and Thomas joined. Justice Blackmun filed a dissenting opinion in which Justice Souter joined and Justices Stevens and O'Connor joined in part. Justice O'Connor also filed a dissenting opinion in which Justice Stevens joined.

165. *Id.* at 2466.

from receiving social welfare benefits as part of a general governmental program neutrally available to all eligible recipients.¹⁶⁶ In that regard, two cases were particularly apt. In one, *Meuller v. Allen*,¹⁶⁷ the Court had upheld a state tax deduction for educational expenses, even though ninety percent of those who took the deduction sent their children to religious schools.¹⁶⁸ Even more relevant was *Witters v. Washington Department of Services for the Blind*,¹⁶⁹ which had sustained state vocational financial aid to a blind student attending divinity school. The theme in both cases was that any financial assistance benefiting religious schools was the result of private decisions of the recipients of the aid,¹⁷⁰ there were no monetary incentives to go to religious schools, and the program helped all students, public and private, religious and secular.¹⁷¹ The final objection—that the program would require a public employee to be on sectarian premises—was turned aside with the observation that the mere physical presence of such an employee on religious premises was not enough to constitute an Establishment Clause violation.¹⁷² The presence of a teacher or a guidance counselor would be impermissible, but the public employee here would only interpret, not indoctrinate.

The dissenters insisted that a doctrinal Rubicon had been crossed with the allowance of a public employee on religious school premises to relay religious messages, even as an interpreter. “Until now, the Court never has authorized a public employee to participate directly in religious indoctrination.”¹⁷³ Since religious messages infuse the education, both explicitly and implicitly, the interpreter would be participating in such sectarian

166. *Id.* at 2463.

167. 463 U.S. 388 (1983).

168. *Id.* at 397.

169. 474 U.S. 481 (1986).

170. *Id.* at 488; *Meuller*, 463 U.S. at 397.

171. *Witters*, 474 U.S. at 488 (discussing monetary incentives); *Meuller*, 463 U.S. at 397 (discussing the benefit to the general population).

172. *Zobrest*, 113 S. Ct. at 2469.

173. *Id.* at 2471 (Blackmun, J., dissenting).

communications. Nor is the defect cured because the program is a general one, the dissenters insisted.¹⁷⁴ Lots of general educational assistance has been disallowed to parochial schools. While the cases draw some fine distinctions between allowable and disallowable services--busses are good, field trips are bad; textbooks are good, slide projectors are bad--there is, or was, a bright line rule: Government crosses the line of separation when it furnishes the *medium* for the communication of the religious *message* as it would be doing here.¹⁷⁵ The distinction between the provision of funds and the provision of a person is at the heart of the Establishment Clauses's concerns. Finally, what of the religious freedom rights of the interpreter? The dissent concluded that intermingling of government and religion tends to destroy government and degrade religion.¹⁷⁶

The final two cases that I will discuss were the two most closely-watched of the Term; they both dealt with bias and persecution.¹⁷⁷

*Church of the Lukumi Babalu Aye v. City of Hialeah*¹⁷⁸

The final church/state case was the only Free Exercise case of the Term and the first in three years. Although the vote was nine to zero, the disarray of approaches was dramatic, producing four separate opinions. The case involved ritual animal sacrifice by adherents of the Santeria religion, which has its roots in Africa and Cuba, blending traditional African religion with Roman Catholicism.

The doctrinal roots of the case go back to 1963 and a case called *Sherbert v. Verner*,¹⁷⁹ where the Court held that a law which, *in its effects*, burdens the free exercise of religion--even

174. *Id.* at 2473 (Blackmun, J., dissenting).

175. *Id.* at 2474 (Blackmun, J., dissenting).

176. *Id.* (Blackman, J., dissenting) (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

177. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993); *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

178. 113 S. Ct. 2217 (1993).

179. 374 U.S. 398 (1963).

though not so intended—requires a compelling governmental interest to justify such application.¹⁸⁰ In that case, the result was that government could not deny unemployment benefits to a worker whose religion prevented her from working on Saturday.¹⁸¹ Justice Brennan authored the decision, a classic example of the liberal Warren Court. A generation later, a new Court decided *Employment Division v. Smith*,¹⁸² holding that a law which unintentionally burdens religious practice is *not* subject to strict scrutiny if it is a neutral law of general applicability.¹⁸³ Therefore, drug counselors can be fired for drug use even though allegedly required by their religious beliefs.¹⁸⁴ Justice Scalia wrote that opinion,¹⁸⁵ over powerful dissents written by Justice Blackmun and joined by Justice Brennan.¹⁸⁶ The ritual sacrifice case was as much about those constitutional doctrines as about religious doctrines.

The case itself was pretty easy to decide because it was so atypical. When the Santeria group made known their plans to set up a church in Hialeah Florida, the City Council almost immediately passed various resolutions outlawing the “sacrifice” or “ritual” killing of animals.¹⁸⁷ But effectively exempt from the laws were hunting and fishing, Kosher practices and almost all other killings.¹⁸⁸ Calling this a “religious gerrymander,”¹⁸⁹ the Court found the City’s very purpose was religious persecution—banning a religious practice—and not protecting animals from abuse.¹⁹⁰ Accordingly, the law was not a neutral law of general

180. *Id.* at 406.

181. *Id.* at 410.

182. 494 U.S. 872 (1990).

183. *Id.* at 885.

184. *Id.* at 890.

185. *Id.* at 874.

186. *Id.* at 907. Justice Blackmun wrote the dissent in which Justices Brennan and Marshall joined.

187. *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2223-24.

188. *Id.* at 2228.

189. *Id.* (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

190. *Id.*

applicability, but was targeted on one religious practice. The strictest scrutiny would be applied and the ordinance voided.¹⁹¹ To the question "Why us?," the city had no meaningful answer.

The significant part of the case was the analysis of how to define neutrality and general applicability. Neutral laws are those which on their face and/or in their obvious operation are not targeted against religion. Similarly, general applicability means that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief. Conversely, "a law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."¹⁹² But, under *Smith*, if a law is found neutral and generally applicable, then the Free Exercise claim loses. That is the rub.

That is what Justice Souter, donning the mantle of his predecessor Justice Brennan, concurred, in order to condemn. His target was the rule that a neutral, generally applicable law is valid even though it burdens a religious practice. In his mind, neutrality must be substantive, as well as formal.¹⁹³ For example, a ban on the use of alcohol is formally, but not substantively, neutral since it burdens religious practices.¹⁹⁴ The distinction is much like the difference between *de jure* and *de facto* illegality. If a law is not substantively neutral, then religious practices must be accommodated through exemption unless the law serves a compelling interest. In his view, the *Hialeah* case was the sport, the case of real persecution. But the questionable *Smith* rule applies in most typical cases. Yet it is in tension with earlier cases like *Sherbert*, which are still on the books. The solution: reconsider (and presumably overrule) the *Smith* case.¹⁹⁵

191. *Id.* at 2234.

192. *Id.* at 2233.

193. *Id.* at 2241.

194. *Id.*

195. *Id.* at 2240.

There were only three votes for this position,¹⁹⁶ but with Justice Ginsburg there may now be a fourth. While on the Circuit Court she sided with an Orthodox Jewish Air Force captain who claimed a Free Exercise right to wear a yarmulke on duty.¹⁹⁷ Though the ban on unauthorized headgear was religiously neutral and of general applicability, its impact rendered it defective. That approach is in flat contradiction to *Smith*.¹⁹⁸

BIAS CRIMES

*Wisconsin v. Mitchell*¹⁹⁹

From the religiously-biased city legislature we turn to a racially-biased criminal defendant. Can the sentence of such a defendant for a crime like assault be doubled or tripled because bigotry motivated his choice of victim. "Why me?" says the defendant. "Why *me*?" says the victim. The answer came in the

196. The votes were cast by Justice Souter, concurring and Justices Blackmun and O'Connor, dissenting.

197. *Goldman v. Secretary of Defense*, 739 F.2d 657, 658 (1984) (en banc), *aff'd*, 475 U.S. 501 (1986).

198. See 42 U.S.C. § 2000bb-4 (1993). The actual outcome and reasoning in *Smith* have been rendered largely moot by the Religious Freedom Restoration Act of 1993, signed into law by President Clinton last year. The statute legislatively codifies and applies the *Sherbert* compelling interest approach to all laws that burden religious practices, effectively overruling the *Smith* case. Interesting questions about the power of Congress to manage the content of the First Amendment in that fashion will surely be raised. Of comparable significance may be the Court's decision to hear an unusual New York case where the New York Court of Appeals found a violation of the Establishment Clause in legislation reconfiguring a rural school district so that its boundaries coincided almost exactly with an Orthodox Jewish community. See *Grumet v. Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 81 N.Y.2d 518, 618 N.E.2d 94, 601 N.Y.S.2d 61, *cert. granted*, 114 S. Ct. 544 (1993). Although the school district did not engage in sectarian activities, the Court of Appeals found a prohibited legislative purpose to help the Jewish group. The case, which may well reconsider the approach of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), will be decided later this year.

199. 113 S. Ct. 2194 (1993).

shortest and most perfunctory First Amendment opinion of the Term.

The constitutional story starts a year earlier in *R.A.V. v. St. Paul, Minnesota*.²⁰⁰ There, the Court invalidated a hate speech ordinance which selected certain forms of bigoted, hateful fighting words for punishment, while exempting other comparable insults.²⁰¹ The Court found that such content-based targeting of disfavored speech was tantamount to censorship of one point of view.²⁰² Though the result in *R.A.V.* was unanimous, only a bare majority subscribed to this reasoning.²⁰³ Four Justices thought the State could punish only certain bigoted fighting words, as long as the definition of fighting words was precise and not overbroad.²⁰⁴

R.A.V. dealt with bigoted speech and found it protected by the First Amendment.²⁰⁵ *Wisconsin v. Mitchell*²⁰⁶ involved bigoted conduct, and the outcome was the opposite. Like almost all states, Wisconsin law allows the sentence for many kinds of crimes to be dramatically increased or "enhanced" where the defendant intentionally selects the target of his crime "because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."²⁰⁷ The facts of the case

200. 112 S. Ct. 2538 (1992).

201. *Id.* at 2547.

202. *Id.* at 2548.

203. *Id.* at 2541. Justice Scalia delivered the opinion of the Court, and was joined by Chief Justice Rehnquist and Justices Kennedy, Souter and Thomas. Justice White filed a concurring opinion, in which Justices Blackmun and O'Connor joined, and in which Justice Stevens joined, except as to Part I-A. Justice Blackmun filed an opinion which concurred in the judgment. Justice Stevens also filed an opinion concurring in the judgment, and in which Justices White and Blackmun joined as to Part I. *Id.*

204. *Id.*

205. *Id.* at 2550.

206. 113 S. Ct. 2194 (1993).

207. *See* WIS. STAT. § 939.645 (1989). Section 939.645(1)(b)(a) provides: [I]f a person does all of the following, the penalties for the underlying crime are increased [if one] intentionally selects the person against whom the crime is committed . . . under par. (a) . . . because of . . .

seemed ideal to mount a serious challenge to such enhancement statutes. Most of these bias-crime laws have been passed primarily to protect racial, religious and sexual minorities and women against hate-filled violence.²⁰⁸ Yet, the facts in this case involved a victim who was white and a defendant who was black.²⁰⁹

A group of young black men had been standing and discussing a movie about racial strife.²¹⁰ Mitchell, the defendant, said to the group: "Do you feel all hyped up to move on some white people?"²¹¹ A white teenager happened by and Mitchell said: "There goes a white boy. Go get him."²¹² The group did and beat the victim unconscious.²¹³ Though he did not actually join in inflicting the beating, Mitchell was convicted of aggravated battery,²¹⁴ which carries a two-year sentence.²¹⁵ However, once the crime was found to have been bias-motivated, the sentence could have more than tripled to seven years²¹⁶ (four years was the actual sentence).²¹⁷

The Wisconsin Supreme Court, though deploring the crime, held that the sentence enhancement was a violation of the First Amendment under the reasoning in the *R.A.V.* case.²¹⁸ The Court reasoned that the statute impermissibly criminalizes

the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property

Id.

208. 113 S. Ct. at 2197.

209. *Id.* at 2196-97.

210. *Id.* at 2196. The Court explained that a group of young black men and boys discussed a scene from "Mississippi Burning" in which a white man beat a young black boy who was praying.

211. *Id.*

212. *Id.* at 2197.

213. *Id.*

214. *Id.*

215. See WIS. STAT. §§ 940.19(1m), 939.50(3)(e) (1989-90).

216. See WIS. STAT. § 939.645 (1989-90).

217. *Mitchell*, 113 S. Ct. at 2197.

218. *Id.* at 2197-98 The *Mitchell* Court held that under *R.A.V.*, "the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees" *Id.*

offensive thought by more harshly penalizing crime flowing from motives and attitudes of bigotry.²¹⁹ Moreover, the law was overbroad and chilling because it would allow evidence of a defendant's thoughts, speech and association to be the basis of extra punishment.²²⁰

In reversing this ruling, Chief Justice Rehnquist, for a unanimous Court, gave surprisingly short shrift to these contentions.

First, although the Court conceded that the same criminal conduct indeed may be punished more severely because of the defendant's discriminatory "point of view," this was merely a sentencing issue. Courts have long been allowed to consider a defendant's motive as part of punishment.²²¹ Second, pointing to anti-discrimination laws in the area of employment and housing, the Court ruled that selecting a victim for harmful treatment because of race or similar characteristics could be specially punishable.²²² The *R.A.V.* case was distinguished as a hate speech case, not a hate conduct case.²²³ The government could conclude that bigoted conduct was so harmful to society as to merit increased punishment.²²⁴ Finally, the chance that people would stifle their own bigoted thought or speech for fear that

219. *Id.* at 2197. The Court held that "[t]he statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection" *Id.* (emphasis in original).

220. *Id.* at 2198. The Court found that the penalty-enhancement was unconstitutionally overbroad and expressed concern that "this evidentiary use of protected speech" would have a "chilling effect" *Id.*

221. *Id.* at 2199 ("[M]otives are most relevant when the trial judge sets the defendant's sentence" (quoting 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.6(b), at 324 (1986))).

222. *Id.* at 2200. The opinion explained that Title VII "makes it unlawful for an employer to discriminate against an employee 'because of such individual's race, color, religion, sex or national origin.'" *Id.* (citation omitted).

223. *Id.* at 2199.

224. *Id.* ("[D]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished" (quoting *Tison v. Arizona*, 481 U.S. 137 (1987))).

such expression might some day be used against them to enhance criminal punishment was viewed as too remote and speculative to constitute an impermissible chilling of protected bigoted expression.²²⁵

Somewhat surprisingly, there was not even a concurrence, let alone a dissent.²²⁶ One might have expected one at least from Justice Scalia, the author of the *R.A.V.* opinion.²²⁷ Such a separate opinion might have pointed out that, as in *Mitchell*, bias penalties can be a double-edged sword, as readily available against minority defendants as to protect minority victims.²²⁸ Moreover, despite the Court's dismissing the concern, there is no clear reason why a defendant's past speech or association could not routinely be used to enhance punishment in any case where the defendant and the victim were of different backgrounds. Finally, the fact remains that a defendant who has expressed biased opinions or views, either contemporaneously with the crime or otherwise, suffers more than one who keeps silent. That reward for silencing of thoughts, however hateful those views and opinions, should make us at least somewhat uncomfortable under the First Amendment.

The brief experience with prosecutions under bias crime laws does not give one a sense of confidence. In several cases there is the distinct impression that a defendant was given an enhanced penalty, not for committing a bias crime, but for being a bigoted person. As one scholar has observed:

Except for its result which correctly affirmed the facial validity of the Wisconsin penalty enhancer, the *Mitchell* decision is unsatisfactory. In blithely affirming the validity of penalty enhancement for bias crimes, the Court seems to have given the

225. *Id.* at 2201. The Court found no merit in the contention that the statute "impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should in the future commit a criminal offense covered by the statute." *Id.*

226. *Id.* at 2196.

227. *R.A.V.*, 112 S. Ct. at 2541.

228. 113 S. Ct. at 2196-97 (noting a black group attacked a white boy who then remained in a coma for four days).

green light to legislatures to enact hate crime laws without seriously assessing the need for them; to prosecutors to apply these laws to 'speech crimes' as well as to cases in which the only evidence of bias is the use of the offensive language; and to state courts to uphold evidentiary use of protected speech if the usual evidentiary standards are met, regardless of the impact that such use of speech may have on free expression.²²⁹

Looking back on this year's First Amendment Term, I think I felt more secure this time last year. This Term, there were few decisions that clearly and uncompromisingly stood for First Amendment freedoms. That may be a vulnerable position from which to confront the difficult issues on the Court's agenda this coming season. Rap music's lewd patter,²³⁰ sexually obnoxious workplace comments,²³¹ abortion protester's ugly tactics²³²--these are hardly inspiring champions of First Amendment values. I hope when the dust settles on the coming Term, the title for next year's talk will not be *Back to the Brink, Part III*.

Judge Leon D. Lazer:

I do not know how I feel about that. In the meantime, we have our selective questions.

Professor Gary M. Shaw:

One comment, one question. Looking at *Alexander*, it seems to me the problem that you talked about, is that the Center is concerned about a chilling effect. The problem does not really arise from RICO, the problem arises from the difficulties in

229. James Weinstein, *Hate Crime and Punishment: A Comment on Wisconsin v. Mitchell*, 73 OR. L. REV. (forthcoming 1994). Not all post-*Mitchell* courts have been indifferent to free speech concerns in this context. See *United States v. Lee*, 6 F.3d 1297 (8th Cir. 1993) (en banc) (remanding for new trial in cross-burning case prosecuted as civil rights violation).

230. *Acuff-Rose Music v. Campbell*, 972 F.2d 1429 (6th Cir. 1992), cert. granted, *Campbell v. Acuff-Rose Music, Inc.*, 113 S. Ct. 1642 (1993).

231. *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993).

232. *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994).

determining what is obscene. It really would not matter whether we are dealing with something as chilling and as harsh as RICO, because the problem is that the real chilling effect lies not within RICO itself, but rather in the difficulties in determining what is obscenity and what is not.

Professor Joel M. Gora:

Well, it may be the combination of the two. The RICO punishments combined with the obscenity uncertainties create the chilling effect.

Professor Gary M. Shaw:

The question would be, do you think that *Zobrest*²³³ is an order for overruling *Meek v. Pittinger*.²³⁴ In terms of the material aids, the educational materials that the court was concerned with could be subverted in quotes to sectarian use, do you think *Zobrest* may serve as a precedent for overruling that aspect of *Meek v. Pittinger*?²³⁵

Professor Joel M. Gora:

I think the court is going to be relaxing some of the restrictions on the provision of neutral services to all schools including sectarian schools. Frankly, it seems to me -- I cannot understand why letting all schools, private and public, religious or secular, have State supplied movie projectors or video cameras is an establishment of religion in a church-oriented school but not a problem in a private school or public school. I think some of those distinctions -- it is one thing to provide doctrinal instruction; it is another thing to provide these mechanics that all kids need and all kids ought to get, whichever school they attend.

233. 113 S. Ct. (1993).

234. 421 U.S. 349 (1975).

235. *Id.*

Judge Leon D. Lazer:

Are there any other questions?

Audience Member:

I have one brief comment and a question pertaining to the *Witters* case.²³⁶ You might not know that on remand, the Washington State Supreme Court upheld the Washington constitutional provision and refused to award a scholarship to the blind student who wanted to study in the seminary.²³⁷ All the United States Supreme Court held was that the scholarship was not precluded by the Establishment Clause, not that it had to be provided as a ground of free exercise, but otherwise. My question is about commercial speech and, in particular, lawyer's solicitation. You know about the *Ohralik* case where a lawyer went to a hospital where two patients lay prostrate?

Professor Joel M. Gora:

That is the *Ohralik* case.²³⁸

Audience Member:

Were you suggesting that *Ohralik* might be endangered?

Professor Joel M. Gora:

No. I think what will happen is this: What is now the basic rule is that there cannot be in-person solicitation unless it is for a public interest organization where there is no pecuniary gain in the lawyer's mind. That is how you deal with those two cases. I think it will ultimately reach the point where you can engage in in-person solicitation unless you are an "*Ohralik*" visiting an

236. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

237. *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash. 1989).

238. 436 U.S. 447 (1978).

accident victim in the hospital room. So it will be a general permission but an exclusion for those highly charged or vulnerable situations.

