



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 6 | Number 1

Article 6

1989

First Amendment

Burt Neuborne

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Courts Commons](#), [First Amendment Commons](#), [Judges Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Neuborne, Burt (1989) "First Amendment," *Touro Law Review*. Vol. 6: No. 1, Article 6.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol6/iss1/6>

This Symposium: The Supreme Court and Local Government Law is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

FIRST AMENDMENT

Judge Leon Lazer:

We now are going to move to the first amendment. Let me introduce Professor Neuborne, though I scarcely need to because all you need do is read *Newsday*,¹ which seems to quote Professor Burt Neuborne daily. He was, for four years, the National Legal Director of the American Civil Liberties Union, and, for two years before that, he was the Assistant Legal Director. He was Staff Counsel for the New York Civil Liberties Union for four years. A graduate of Harvard Law School, he has written three books on political and civil rights. I count ten Law Review articles, and I guess a lot of academic people could be a little bit jealous of that. He has written five essays and participated in eleven major political and civil rights cases. Unquestionably, he is one of the leading constitutional scholars in the country, and he certainly is someone to whom everyone turns when there is a first amendment question. He is, of course, a professor at New York University Law School. Professor Neuborne.

Burt Neuborne:

Thank you. It is a pleasure to be here. Judge Lazer asked me to summarize the first amendment cases in the 1988-89 Term of the Supreme Court. In trying to choose which cases to discuss, I tried to take into account what I thought might be the interests of the audience. So, what I am going to try to do is review seven cases that deal with what I think are the day-to-day responsibilities of local government.

The first case is *Fort Wayne Books, Inc. v. Indiana*,² and it dealt with what appears to be a timeless concern of the suburbs: what to do about sexually explicit speech, the question of the degree to which obscenity and sexually explicit speech can be regulated, and the techniques available to a local govern-

1. *Newsday* is a New York City/Long Island newspaper.

2. 109 S. Ct. 916 (1989).

mental entity trying to deal with what it perceives to be a problem in the community.

Let me start by making clear my own bias. It is an unfortunate waste of governmental resources to expend a great deal of money in trying to prevent one group of adults from deciding what they would like to read when it is sold by another group of adults. I think we are, in some sense, engaged in a self-defeating exercise here, and have been since 1957 when the Supreme Court embarked on this odyssey.³ But, it is a very powerful political issue, an issue to which local government must respond.

So, let me discuss the *Fort Wayne Books* case. It is a case out of Indiana involving an attempt to use the state RICO statute,⁴ which parallels the federal RICO statute.⁵ New York does not yet have a RICO statute. But, there is a good deal of talk in the state legislature about enacting something, so it may well have some very important practical considerations for the government in this state.

The RICO statute, as many of you may know, provides for enhanced criminal penalties for behavior defined as a "pattern of racketeering activity."⁶ The pattern of racketeering activity generally consists of two or more illegal predicate acts that are spelled out in a laundry list in the statute.⁷ Criminal RICO provides that, if you are found to have committed two or more of those illegal acts, there can be a finding that you are engaged in a pattern of unlawful activity. Such a pattern of racketeering activity translates into a more serious crime, the crime of violating the RICO statute.⁸ RICO provides a way to turn a series of misdemeanor acts into a serious felony by linking them together in a series of behavioral events that can be characterized as a pattern of racketeering activity.

3. See *Roth v. United States*, 354 U.S. 476 (1957).

4. IND. CODE § 34-4-30.5-1 (1986 & Supp. 1989); see *Fort Wayne Books*, 109 S. Ct. at 922.

5. See *Fort Wayne Books*, 109 S. Ct. at 923 n.5.

6. 18 U.S.C. §§ 1961-1968 (1982).

7. *Id.* § 1961.

8. See e.g., *id.* § 1962.

Indiana has elected to add violation of misdemeanor obscenity laws to the list of potential predicate RICO acts.⁹ In Indiana, if you commit two or more obscenity violations within a particular period of time, and the prosecutor can persuade the court beyond a reasonable doubt that you are engaged in a pattern or practice of racketeering activity consisting of systematic violation of the obscenity laws, then, even though obscenity is a Class A misdemeanor in Indiana,¹⁰ it can be punished as a Class C felony by use of the RICO statute.¹¹ The RICO violation has the effect of heightening the potential criminal penalty in the obscenity area from misdemeanor to felony through proof of a pattern of violations.

I stress that the violations do not have to have resulted in convictions.¹² They simply have to be fact patterns that are alleged in the indictment, each proved separately and proved beyond a reasonable doubt because, after all, it is a criminal case. But, if those separate fact patterns are proved, and you can prove two or more of them, and you persuade the jury that this is, in fact, a pattern of racketeering activity, then the jury can convict not only on the predicate misdemeanor but also on a Class C felony.¹³

The case went to the Supreme Court and the argument before the Court was whether, because of the inherent vagueness of the definition of obscenity under the *Miller* test¹⁴ (which is the existing standard for obscenity), the penalties posed in Class C felony situations (which in Indiana is up to ten years in jail), when added to the additional uncertainty of

9. IND. CODE § 35-45-6-1 (1986 & Supp. 1989).

10. *See* Fort Wayne Books, Inc. v. Indiana, 109 S. Ct. 916, 925 (1989).

11. *See id.*

12. *See id.* at 926.

13. *See id.* at 926-27.

14. The current test, derived from *Miller v. California*, 413 U.S. 15 (1973), states:

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

whether you were committing a pattern of acts by simply engaging in two or more violations, resulted in such a high level of both uncertainty and severity of penalty that the statute had to be struck down as unconstitutionally vague.¹⁵

The Supreme Court rejected the argument rather vigorously saying that, if the underlying obscenity statutes are drafted with sufficient precision so that they are not void for vagueness, then there is nothing wrong with a legislature choosing to enhance the criminal sanctions imposed in such a situation by increasing the penalty for engaging in a pattern of behavior.¹⁶ This means that a single prosecution can, in effect, allege a series of acts that ordinarily would only have been misdemeanors and ordinarily would have received, almost certainly, a single sentence and make the series of acts potentially punishable by a much higher and a much more significant penalty.

No doubt we are going to see RICO used in criminal prosecutions of obscenity in the years to come. The last report on obscenity by the United States Attorney General urged local officials to consider enacting RICO statutes and to use RICO statutes as a way of dealing with obscenity.¹⁷ It seems to me that such a maneuver escalates a war that we should not be fighting. But, it is something that you, as local officials, ought to be looking at very closely.

The second part of *Fort Wayne Books* concerned the civil aspects of RICO. RICO is both a civil and a criminal statute. Civil RICO provides for the forfeiture of all proceeds derived from a pattern of racketeering activity.¹⁸ RICO, initially, was aimed at organized crime in an attempt to break up legitimate Mafia businesses that were formed from the proceeds of systematic, illegal activity.¹⁹

Indiana has the civil analog of the RICO statute as well.²⁰ In *Fort Wayne Books*, Indiana filed a civil RICO action

15. *Fort Wayne Books*, 109 S. Ct. at 924.

16. *Id.* at 924-25.

17. *Id.* at 938 n.28.

18. 18 U.S.C. § 1964 (1982).

19. P. BATISTA, CIVIL RICO PRACTICE MANUAL 17 (1987) (citing S. REP. NO. 617, 91st Cong., 1st Sess. 76 (1969)).

20. IND. CODE § 34-4-30.5-1 (1986 & Supp. 1989).

against a store selling sexually explicit books, alleging that the book store was engaged in a pattern of racketeering activity consisting of systematic violations of the obscenity laws.²¹ Indiana tried to use this pattern to trigger civil RICO and then use RICO as the means of forfeiting the entire store.²² In other words, they padlock the store, close it down, and cart off everything in it. Obviously, if that is available as a weapon, it is an enormously powerful tool to use against adult book stores.

There are very serious constitutional problems here. I should tell you right off the bat that the Court declined to deal with the constitutionality of the use of civil RICO in this type of situation. Three members of the Court, Justices Brennan, Stevens, and Marshall, dissented rather vigorously and said that the use of RICO under these circumstances, as a ruse to close down the book store, was in violation of the first amendment.²³ The rest of the Court said it was not necessary to pass on the question.²⁴

The majority found that the use of civil RICO was not ripe because Indiana had jumped the gun. Indiana had done something that I think was rather foolish procedurally; local authorities should take heed if they are thinking about something like this. Indiana engaged in a prejudgment seizure.²⁵ Indiana filed the civil RICO action, got a finding from a local judge of probable cause that a RICO violation had taken place, then drove the truck up, emptied the book store, and padlocked it.²⁶ But, there had never been an adversarial determination on the question of obscenity, nor on the question of whether a RICO violation had taken place.

The Supreme Court, in *Fort Wayne Books*, re-enforced a line of cases that said prejudgment seizure of allegedly obscene material violates the first amendment.²⁷ You cannot take things out of circulation until there has been a judicial deter-

21. *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916, 920-21 (1989).

22. *Id.* at 921.

23. *Id.* at 939 (Stevens, J., concurring in part and dissenting in part).

24. *Fort Wayne Books*, 109 S. Ct. at 926.

25. *Id.* at 921.

26. *Id.*

27. *Id.* at 929.

mination of obscenity. You simply cannot have a massive seizure in connection with pretrial activity and eliminate presumptively protected first amendment material from circulation. Indiana failed to show the required quantum of RICO activity and that there was some form of causation between the prior obscenity violations and the proceeds that then were used to build up the bookstore.²⁸

It seems to me that what the majority did in *Fort Wayne Books*, and I find it rather troubling, was to paint a road map for those communities that wish to use RICO in this way, warning these communities not to jump the gun. If, in fact, RICO is going to be used against bookstores, it may be used only after a full-scale judicial hearing and determination that the proceeds of the pattern of illegal activity have been invested in the bookstore.

In order for *Fort Wayne Books* to be relevant in New York, two things will have to happen. First, the state legislature will have to pass a RICO statute, since we still do not have one, and, second, the legislature will have to add to the usual list of RICO predicate acts the applicable obscenity sections. Both of these, it seems to me, raise some very serious policy questions. Again, this is something with which local officials should be concerned.

The second case dealing with the regulation of sexually explicit speech is *Sable Communications of California, Inc. v. FCC*.²⁹ At issue was an attempt by Congress to deal with the dial-a-porn industry that has grown up in the last dozen years. When I was Legal Director of the ACLU, I went out to Salt Lake City for a conference. When I got there, the headline in the local Salt Lake City paper said that the single, most often dialed number in the entire State of Utah was a number in Washington, D.C. This number was the leading dial-a-porn number, and it was dialed twenty-five or thirty percent more frequently than any other number in the state. Now, if that is coming out of Utah, you can imagine how this business is doing in New York City.

28. *Id.*

29. 109 S. Ct. 2829 (1989).

Congress's response to dial-a-porn was the classic mistake that a legislature makes when dealing with a situation like this. Afraid to make hard judgments, they simply passed a blunderbuss statute that forbade obscene phone calls and indecent phone calls.³⁰ You have two standards in this statute. One standard forbade dial-a-porn when the content of dial-a-porn was obscene under the *Miller* obscenity test.³¹ The other forbade indecent commercial dial-a-porn telephone calls under a standard, again, equally vague (who knows what indecent means) but obviously covering a great deal more than the *Miller* concept of obscenity.³² The Supreme Court had very little difficulty with the case. The provision forbidding obscene phone calls was upheld.³³ Three members of the Court dissented, principally because those three members, Justices Brennan, Stevens, and Marshall, thought that it is self-defeating to get into the business of trying to regulate what adults can hear and say to each other.³⁴ Therefore, they simply would take the government out of the obscenity business entirely.³⁵

But, the other six members of the Court remained committed to the *Miller* test, and, therefore, the Court upheld the obscenity provisions of the statute by a six-to-three vote.³⁶ However, the Court unanimously struck down the indecency provisions of the statute saying that *Miller* is as far as it will go in trying to regulate sexually explicit speech.³⁷ In order to regulate sexually explicit speech, you must bring the speech within the *Miller* definition of obscenity that currently is used by the Supreme Court.³⁸

The importance of *Sable*, in terms of doctrine in the area, is that the Court rejected the argument that it was necessary to go beyond obscenity in order to protect children.³⁹ The issue

30. *Id.* at 2831-32.

31. *See id.* at 2836.

32. *See id.*

33. *Id.* at 2831.

34. *Id.* at 2840-41 (Brennan, J., concurring in part and dissenting in part).

35. *Id.* at 2840.

36. 109 S. Ct. at 2831.

37. *Id.*

38. *See id.* at 2836-39.

39. *Id.* at 2837.

that the Court was looking at in the *Sable* case was whether the ostensible need to protect children could be used as a justification for significantly interfering with sexually explicit speech that would be protected if directed at adults. There have been a number of attempts over the years to use the child protective rationale as a device to cut back on sexually explicit speech.⁴⁰ The Court, generally, has rejected the argument. The Court has said that you cannot reduce the adult population to reading only material that is fit for children.⁴¹ Therefore, you cannot use children as the benchmark and then regulate everybody else based upon that standard.

But, the Court also has held, generally in the context of radio or television regulation, that offensive speech that would not be prohibited by the first amendment can, nevertheless, be regulated and directed so that it limits the likelihood that children will come in contact with it.⁴²

The Court, in *Sable*, found that there may come a point in the nation's future when we will have to bend the first amendment to protect children, but we will not do so simply upon an assertion by Congress that it is necessary, unless Congress lays out a factual determination indicating that there is no other way of protecting children but by censorship directed at the adult population.⁴³ Since, in *Sable*, there were so many other obvious ways of insulating children from the dial-a-porn calls, for example, by requiring that it be done by credit card, putting some sort of scrambler on the phone, or putting some sort of personal identification code on the phone, etc., the case was an easy one for evaluation. The FCC has a host of regulations designed to screen calls and to try to keep dial-a-porn to a minimum in dealing with children.⁴⁴

Sable Communications really was no surprise. It was merely a reassertion of existing law. It reaffirmed commitment to the

40. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Butler v. Michigan*, 352 U.S. 380 (1957).

41. *Butler*, 352 U.S. at 383.

42. See *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978).

43. See *Sable*, 109 S. Ct. at 2836-39.

44. See *id.* at 2833-34.

Miller obscenity test; it reaffirmed the refusal to go beyond it, and it reaffirmed the notion that, yes, children can be a concern, but they cannot be a cover. You cannot wave children as a justification for the suppression of speech. You must make a factual showing of the necessity to protect them.

That leads me to the next set of cases. From the standpoint of local government, probably the most important case decided last Term was *City of Dallas v. Stanglin*.⁴⁵ The *Stanglin* Court upheld the practice, which is rather widespread in many parts of the country, although I am not sure it is widespread in the metropolitan areas, of having non-alcoholic dance halls that are exclusively for teenagers.⁴⁶ These ordinances allow teenagers into these dance halls while barring all adults except for parents, guardians, employees, and police officers. It is interesting because, if you think of an eighteen-year-old woman married to a twenty-one-year-old man, and they like to go dancing, they cannot go to that place.

Because the ordinance singled out that particular age group, it was challenged on associational grounds.⁴⁷ The owner of the dance hall alleged that the first amendment created an associational right that guaranteed young teenagers the right to associate with people older than eighteen.⁴⁸ Therefore, you could not segregate them into their own age groups in such a way because there was some sort of first amendment right that allowed them to cross over into an older setting.

Stanglin is the most recent in a series of attempts to use the first amendment's associational clause as a device to ward off regulation. The last few cases in this line dealt with attempts to forbid discrimination in certain kinds of private clubs, including the New York City Private Club ordinance⁴⁹ and some

45. 109 S. Ct. 1591 (1989).

46. *Id.* at 1597. Originally, the Dallas ordinance was applicable to teenagers ages fourteen to seventeen. While the case was being appealed, the ordinance was amended to include teenagers ages fourteen to eighteen. *Id.* at 1593.

47. *Id.* at 1594.

48. *Id.* *Stanglin* also challenged the ordinance on substantive due process and equal protection clause grounds under both the United States and Texas Constitutions. *Id.*

49. *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225 (1988).

private club cases in the Midwest.⁵⁰ The Supreme Court, in those cases, laid out a very interesting definition of first amendment associational values. There is nothing in the first amendment about freedom of association.⁵¹ If you look at the first amendment, it does not use the word "association" at all.⁵² But, for many years, we have been quite confident that there must be some core of associational protection that is included in the first amendment. The Court, over the last couple of years, has tried to define that core. It has defined it in two ways.

It said, first, that there is a core of political and, I think it will add, religious association, which guarantees that people can gather together for the advancement of political and religious goals.⁵³ In order for the state to prohibit this association, the state must show some overwhelming "social necessity," however one wants to define it.⁵⁴ Then, there is also a parallel kind of associational value that deals with association needed to advance intimate human relationships.⁵⁵ This includes very close friends and family; almost always involves a relatively small number; and concerns a relatively closed geographical space.⁵⁶ And the Court, I think, is most unwilling to go beyond those two currents.

In *City of Dallas v. Stanglin*, the Court, in an opinion by Chief Justice Rehnquist, explicitly rejected the notion that there is a general right of social association, a general right to associate, to dance, to make friends, or to talk to somebody.⁵⁷ Interestingly enough, both Justices Brennan and Marshall

50. See, e.g., *Board of Directors of Rotary Club Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

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

52. See *id.*

53. See *City of Dallas v. Stanglin*, 109 S. Ct. 1591, 1594 (1989) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984)).

54. *Id.*

55. *Id.*

56. For an excellent discussion of the parallel of association, see *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

57. *City of Dallas v. Stanglin*, 109 S. Ct. 1591, 1595 (1989).

joined in the opinion.⁵⁸ This means that a statute like the Dallas ordinance does not get tested under the compelling state interest test but under the most permissive test we know, the rational basis test. Is the statute rationally related to some legitimate governmental interest? If so, it will be upheld. The Court said there is an obvious, rational basis for trying to provide more secure settings for teenage recreation in ways that do not expose them to the potential temptations of the adult world.⁵⁹ The Court upheld the ordinance. It was a nine-zero vote.⁶⁰

I have only one quibble, and I think it may well be an important doctrinal quibble, though not so in the practical sense. Justices Stevens and Blackmun said they believed that there was a social right of associational freedom, and that we should not be so quick to close off this area of constitutional protection, but that, even if such a right existed, it should be treated under the substantive due process clause.⁶¹ It is a substantive due process right, they suggested, and, therefore, the state only has to show a relatively minor degree of justification before it can be sustained.⁶² The state had done so in the *Stanglin* case.

Now, it seems to me that, for communities that are troubled by the lack of recreational facilities for teenagers, and this is something that is a major problem throughout the metropolitan area, this case eliminates one very significant barrier that people thought had existed: the inability to use age segregation as a way to create places where kids can go and enjoy themselves without the fear that they will be dealing with potential alcohol and drug problems, as well as other types of potentially harmful behavior.

The other related case involving kids concerned rock concerts. Rock concerts make noise. One of the funniest arguments of the Term was in a case called *Ward v. Rock Against Racism*.⁶³ Unfortunately, the result was not so funny because I

58. *Id.* at 1592.

59. *Id.* at 1595-97.

60. *Id.* at 1592.

61. *Id.* at 1597 (Stevens, J., concurring in the judgment).

62. *Id.*

63. 109 S. Ct. 2746 (1989).

think it hurts free speech doctrine. But, one of the more amusing arguments was to watch the Justices being persuaded that loud rock music is speech, that it is protected under the first amendment, and that it is great art.

There is a band shell in Central Park, which is available to almost anybody who wants to use it for a concert on a first-come, first-serve basis. *Rock Against Racism* dealt with a provision of the New York City Parks Department Code that says that, if you are going to use the band shell in Central Park, you must do two things. First, you must use the city's sound equipment.⁶⁴ The city has installed an excellent set of sound equipment. Everybody who has used it has praised it, from the New York City Opera all the way through to the rock groups.⁶⁵ Second, you must use the city's mixer.⁶⁶ This is something that illustrates a real generational gap. If I had all of you tell me what you thought a mixer was, we would all be wrong. I did not know until I read the briefs. The mixer is the person who figures out which amplifier plays which instrument. When you are dealing with massive reamplified sound, the mixer has more to do with the final sound than anybody playing one of the instruments. So, it is the mixer who is the ultimate artist, the one who puts all the noises together and creates bigger noise.

The argument in *Rock Against Racism* was that, when New York required the rock musicians to use New York sound equipment and the New York City mixer, the city essentially was imposing on the audience a bureaucratic definition of what the sound should be like.⁶⁷ Only because of generational concerns does that argument seem counterintuitive to us. But, when you think about it, if New York decided they were going to have a "Painter General," and the Painter General would decide what colors were really supposed to be on all those paintings in the Metropolitan Museum of Art and then tone them down so they would be a little more acceptable to the general public, we would immediately know that we had seri-

64. *Id.* at 2751 n.2.

65. *Id.* at 2752.

66. *Id.* at 2751 n.2.

ous questions of artistic freedom. The argument that the rock groups made in the Supreme Court was that the imposition of a government sound mixer on a rock concert essentially plays the same role of censorship, by imposing a government definition of good sound on the group.⁶⁸

The Supreme Court ruled, in what I think will be a very important doctrinal case, though less important on the facts because I think the facts were doomed from the beginning, that the city's Use Guidelines were constitutional.⁶⁹ This was seen as a legitimate attempt to control noise pollution on the rim of Central Park, and large numbers of people in the community were complaining that the noise from these concerts was so loud that the concerts had become a nuisance.⁷⁰ I think it is inconceivable that the Court could say that there is not a legitimate basis for regulating the sound when the sound is really interfering with the rights of quiet and privacy of other people in the community. So, I think the case was going to have only one outcome; legitimate noise regulations were going to be upheld.

What makes the case very interesting, though, is the analytic approach that the Supreme Court chose in dealing with the case. The Second Circuit had struck down the New York regulation as unconstitutional saying, look, we do not have any trouble at all with the concept of noise reduction.⁷¹ If you want to put a decibel limit on it, that is fine.⁷² If you want to engage in whatever legitimate regulation of noise you think you have to engage in, that is okay.⁷³ But, what you must use is the method of regulating noise that is the least intrusive, the one that gets in the way of the speech as little as possible.⁷⁴ Using the government mixer is a good way to make sure that the music does not get too loud, but why not just put an absolute

68. *Id.*

69. *Id.* at 2760.

70. *Id.* at 2750, 2752.

71. *Id.* at 2752-53.

72. *Id.*

73. *Id.*

74. *Id.*

decibel level on it?⁷⁵ Or, why not impose some form of noise regulation that would keep the noise level down but would not insert the government into the actual production of the artistic event?⁷⁶

The Second Circuit, to everybody's surprise, had struck the ordinance down as unconstitutional.⁷⁷ The Supreme Court reversed, finding that the Second Circuit had used the wrong standard.⁷⁸ The court of appeals had used the very traditional "least drastic means test," saying that music is protected by the first amendment and that the government was interfering with the production of the music.⁷⁹ Therefore, government had to use the least drastic means for achieving their important social end, which was noise control.⁸⁰ But, the Supreme Court called that test too stringent.⁸¹

The Court said that regulation of the first amendment generally is divided into two fundamental categories.⁸² One is content-based regulation, which is aimed at regulating speech because we do or do not like what the speech says.⁸³ The other category is time, place, or manner regulation, which is content-neutral. We are not regulating speech because we care about the content, but because we are nervous about the time of day, or how loud it is, or other regulation of the activity that has nothing to do with content.⁸⁴

The Court said that, for content regulations, you have to use the least drastic means.⁸⁵ Thus, for content regulation, you have to use the most dramatic first amendment test you can find because we are suspicious of content-based regulations in a society committed to intellectual freedom.

75. *Id.* at 2753.

76. *Id.*

77. *Rock Against Racism v. Ward*, 848 F.2d 367, 372 (2d Cir. 1988), *rev'd*, 109 S. Ct. 2746 (1989).

78. *Rock Against Racism*, 109 S. Ct. at 2757.

79. *Rock Against Racism*, 848 F.2d at 369-71.

80. *Id.* at 370.

81. *See Rock Against Racism*, 109 S. Ct. at 2757.

82. *See id.* at 2754.

83. *See id.*

84. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-18 (2d ed. 1988).

85. *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2758 n.6 (1989).

But, when dealing with time, place, or manner restrictions, which are not content-based and which are not driven by hostility to the speech or by a desire to help one particular point of view, then we have a much more permissive test. This test has four parts, and it is important because every local ordinance that regulates a parade, the sale of newspapers, or a diffusion of speech in the community will have to be thought of as either content-based or time, place, or manner-based in order to decide what the governing test is going to be for that regulation. If it is a time, place, or manner regulation, it is governed by a four-part test.⁸⁶

First, the regulation cannot be related to content. It must be content-neutral.⁸⁷ Second, it has to be narrowly tailored,⁸⁸ but the Court did not tell us what narrowly tailored means. To me, the old language of narrowly tailored always meant the least drastic means.⁸⁹ It now obviously means something else, something a little less constraining. It has to be narrowly tailored, which means, I think, that it cannot be substantially broader than necessary to achieve its purpose,⁹⁰ whatever that means. But, I think that is the language that the Court is going to use. Third, the regulation has to advance a “significant” government interest,⁹¹ adding again to the wonderful semantic mix with which we have to work. Finally, there has to be adequate alternatives for the communication.⁹² You cannot use a time, place, or manner restriction to snuff out an entire form of communication. But, if the regulation satisfies the test: if it has no relation to content, if it is narrowly tailored, if it advances a significant interest, and if there are adequate alternatives, then the Court will uphold the time, place, or manner regulation.⁹³

If you look at the analysis of the Second Circuit in *Rock Against Racism* and then compare it to the Supreme Court’s

86. See *Frisby v. Schultz*, 108 S. Ct. 2495, 2500 (1988).

87. *Rock Against Racism*, 109 S. Ct. at 2758 n.6.

88. *Id.* at 2757-58.

89. *Frisby*, 108 S. Ct. at 2502.

90. *Rock Against Racism*, 109 S. Ct. at 2758.

91. *Id.* at 2753.

92. *Id.* at 2760.

93. See *id.* at 2757-60.

analysis, you see that, under both analyses, the noise regulation will ultimately be upheld. But, I think the Supreme Court's interpretation upholds far more of the regulation than would the Second Circuit's, and, I think, that is a major shift in doctrine for this Court. If this Court does not think that you are regulating on the basis of content, and if it thinks that you are truly attempting to deal with a content-neutral social problem and not attempting to use it as a disguised mechanism to stamp out disfavored speech, then the Court seems to be reaching to give local government more latitude to try to experiment with different ways of coping with non-content-related social problems caused by speech. I think that *Rock Against Racism* will turn out to be one of the most important cases of the Term, principally because it now is going to be cited in every single time, place, and manner case. It is now the dominant test for time, place, and manner.

The Court then moved to the next case, which is very important and interesting from the standpoint of local government. They took the time, place, or manner test that they developed in *Rock Against Racism* and applied it to commercial speech as well.⁹⁴ The Court said that we have been experimenting for years now with protecting commercial speech. It has been protected as a first amendment matter since 1976.⁹⁵ We have gone back and forth on what the test should be. We now believe that the appropriate test for substantive regulation of commercial speech should be the test that we use in the time, place, or manner cases.

The essential thing that the Court did in *Fox* was to take away the requirement that you use the least drastic means and replace it with a requirement that the regulation be narrowly tailored and not be substantially broader than necessary.⁹⁶ That is a very important practical change because, under the old test, local government was obliged to find the least intrusive means of regulating and, if another less intrusive means could be suggested to the court, the local government regula-

94. Board of Trustees v. Fox, 109 S. Ct. 3028, 3033-34 (1989).

95. Virginia Pharmacy Bd. v. Consumer Council, 425 U.S. 748, 770 (1976).

96. Fox, 109 S. Ct. at 3033-34.

tion was invalid on its face.⁹⁷ In *Ward v. Rock Against Racism* and *Sable Communications of California, Inc. v. FCC*, the test is not “is this the least drastic means,” but “is it narrowly tailored and not substantially excessive?” I think that between those tests lies a very significant ground for experimentation on the part of local communities.

That leads me to the last of the free expression cases, the one that got all the publicity. As I have laid these cases out for you, I think you can see that the fundamental message of the Term was not a resounding victory for free speech. The fundamental objective of the Term in the free speech area was to find doctrinal ways to give local authorities more discretion in dealing with speech-related behavior, as long as that discretion does not turn into censorship.

But, *Texas v. Johnson*,⁹⁸ which is the flag-burning case, is the point at which the Court drew the line and said: look, we are willing to give local authorities a little more rope in the attempt to deal with time, place, and manner restrictions; with commercial speech regulations; with regulation of teenage dance halls; with regulation of rock concerts; with the use of RICO to deal with obscenity; and we are prepared to allow that kind of local experimentation. But, when local governments attempt to shut down speech because of its content, the first amendment absolutely takes over, even in a context as emotionally charged as burning the flag.

As a younger lawyer with the ACLU many years ago, I litigated the first wave of flag cases: *Street v. New York*,⁹⁹ which involved the use of a verbal assault against the flag, and *Spence v. Washington*¹⁰⁰ and *Long Island Vietnam Moratorium Committee v. Cahn*,¹⁰¹ both dealing with the placing of peace symbols on the flag. In those days, when there was a truly activist liberal Court, we were never able to persuade the Court that flag burning was protected activity. The issue was

97. *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980).

98. 109 S. Ct. 2533 (1989).

99. 394 U.S. 576 (1969).

100. 418 U.S. 405 (1974).

101. 437 F.2d 344 (2d Cir. 1970).

lost several times on summary affirmances and dispositions by the Supreme Court in the 1970's.¹⁰²

The extraordinary and very important message in *Texas v. Johnson*¹⁰³ is that the two swing votes that created the majority in the case were Antonin Scalia and Anthony Kennedy.¹⁰⁴ It shows that the first amendment is not the preserve of a particular political enclave. It is not a liberal doctrine. It is not a conservative doctrine. It is an American doctrine. The free speech clause is our most precious heritage. Conservatives and liberals understand that the one thing we cannot do as a society is experiment with content-based censorship. That premise overrides tremendous visceral concerns. What Justice Brennan said in the case is so true. He said that the flag is ultimately ennobled by symbolizing a society where there is no such thing as a sacred political totem to which everybody has to pay allegiance.¹⁰⁵ That is a level of sophistication that very few societies have ever been able to achieve.

That is why the flag burning case was such an important victory for first amendment doctrine. It is an important analogical launching pad, an educational tool: if it cannot be said that burning the flag is illegal, then it follows that no other political form of censorship is going to be upheld either. It becomes the baseline that is used as the educational vehicle for locking political freedom into the system in a very strong way. On the other hand, if the case goes the other way and the government can ban flag burning, then it follows that it is legitimate under certain circumstances to compel a certain form of political orthodoxy. As a matter of principle, the question then is not whether you can have freedom, but where it stops. And, where it stops is a function of political power at a particular point in time. So, the very important lesson in *Texas v. Johnson* is that we cannot start down the road of curtailment because it is a road that does not have a principled stopping point. The only

102. See, e.g., *Smith v. Goguen*, 415 U.S. 566 (1974).

103. 109 S. Ct. 2533 (1989).

104. *Id.* at 2536.

105. *Id.* at 2547-48.

principled stopping point is that of the *Johnson* majority, which permits no flag desecration statutes at all.¹⁰⁶

Now, let me comment on the reaction. The fact that it was so vigorous surprised some of us. You would have thought that what the ACLU went through in the 1988 campaign would have wised us up as to the popularity of the flag. But, the reaction to the *Johnson* case surprised me. I was very disappointed at the President's reaction. He had a chance to be an educator, and he turned out to be a cheerleader.

The reaction developed along three lines: first, a constitutional amendment to create a flag burning exception to the first amendment; second, congressional statutes; and, third, the consideration of some local ordinances. Let me lay out the way things stand. The amendment appears to be stalled in both the Senate and the House because of one very important thing. The American Bar Association came out against the amendment and the statutes, saying that *Johnson* is right, leave it alone.¹⁰⁷ So did the intellectual wing of the conservative movement. Therefore, the constitutional amendment appears to be stalled at this point.¹⁰⁸

But, the House has just passed a flag desecration statute, which is worse than the one that was knocked down in *Johnson*. It is the statute that Laurence Tribe drafted, which essentially says that any destruction of the flag is forbidden unless you are destroying a soiled flag to be thrown away.¹⁰⁹ The hope is that such reasoning and language will make it constitutional because it is no longer content-related. I think that is a blind hope. I think it is impossible. To the extent that prosecutions take place, they are going to take place in the context of political demonstration or where somebody burns a flag as an expression of a political idea. If the supporters of that statute think they can avoid the constitutional question by simply making a flat prohibition on burning, I think they are fooling

106. *See id.* at 2545.

107. *See Annual Meeting of the American Bar Association*, 58 U.S.L.W. 2108 (U.S. Aug. 22, 1989).

108. *See Above the Dirt Arena, Bush Keeps the Score*, N.Y. Times, Oct. 31, 1989, at A20, col. 5.

109. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777.

themselves, and the statute will be struck down. I suspect that the reason so many people like this statute is that it is a way to buy time until pressure for the constitutional amendment dies down. The statute will be passed, and Congress assumes the Supreme Court will strike it down, and they hope that no one will be watching when that happens. I think it is a foolish scenario, but that is what they are playing out.

An alternative scenario is the one that some other people and I have suggested: we should not have any flag statute at all. It is not necessary. Who needs it? But, if we are going to have one, then let us focus in on a flag statute that has a chance of being upheld as constitutional, one that will not do real damage to first amendment rights, a statute that zeroes in on the fighting words doctrine¹¹⁰ and recognizes that there are certain circumstances where the burning of the flag is so likely to lead to a breach of peace that the conduct can be outlawed. This type of statute invokes the fighting words doctrine and prohibits the burning of the flag under the narrow circumstances where it is reasonably likely that the burning would lead to a breach of the peace.

For example, if one burned a flag at a veteran's funeral, that strikes me as the kind of behavior which is reasonably likely to lead to a breach of the peace. It is an expressive act, but just because things are expressive does not mean that they are automatically protected under all circumstances. If one took a flag to a veteran's funeral and burned it there in a way that inflicted that kind of pain on the family, I think that such conduct would trouble even a strong first amendment advocate. So, it seems to me that, if we drafted a narrow statute, we could deal with the political demand that the flag be protected without doing real harm to first amendment doctrine. But, so far, all of those balls are in the air.

The last set of cases starts with the creche case out of Pittsburgh.¹¹¹ When I was a litigator in the ACLU, we litigated the first wave of creche cases, including the 1984 case out of Paw-

110. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Fighting words are "the face-to-face words plainly likely to cause a breach of the peace by the addressee." *Id.* at 573.

111. *County of Allegheny v. ACLU*, 109 S. Ct. 3086 (1989).

tucket, Rhode Island.¹¹² When that case was over, we had lost it five-to-four. Our argument was that government-sponsored displays of a creche were a violation of the establishment clause because it was government-sponsored support of religion, and that is what the establishment clause was designed to prevent.¹¹³

After we lost the case, I sent out a memo to the ACLU affiliates trying to explain to them what the law was in the case. I thought I was being very funny. The memo said that the law now is called the “two-plastic-animal rule.” The law now is that any great religious symbol can be displayed by the government as long as it is surrounded by two or more plastic animals of sufficiently bad taste. On the other hand, if the religious symbol is displayed with the respect that great religious symbols deserve, you can stamp them out. I wrote that while in the throes of having lost a case, just trying to cheer myself up. I thought, for a while, it was going to make me rich. In those days, we had creche litigation going in a dozen cities, principally throughout the Midwest, and I wrote to the mayors of those cities after the Pawtucket case came down and told them that we could guarantee that their creche would not be disturbed if they would buy their plastic animals from us. The ACLU would go into the business of manufacturing plastic animals. One of the mayors reported me to a prosecutor for trying to shake him down. I mean, where is his sense of humor? I persuaded the prosecutor that I really was not selling plastic animals, but that, if he wanted to buy some, we could talk.

The problem is that establishment clause doctrine has reached such a level of complexity that it is very close to being a two-plastic-animal rule. The Pittsburgh case involved two displays. It involved an unadorned creche in the stairway of a local courthouse and, two blocks down the street, a display consisting of three things: a Menorah, a Christmas tree, and a sign that the mayor of Pittsburgh put up saying that “[d]uring this holiday season, the City of Pittsburgh salutes liberty. Let

112. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

113. *See id.* at 697 (Brennan, J., dissenting).

these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom."¹¹⁴

The court of appeals said that the Menorah is a religious symbol of Chanukah and the creche is a religious symbol of Christmas.¹¹⁵ You are putting them both out there in a way that appears to endorse religion, and that is a violation of the establishment clause.¹¹⁶ Find some other way to express your religious needs.

The case went up to the Supreme Court and the Supreme Court fragmented. I think those of you who get involved in the establishment clause rather closely realize that there are now three segments in the Court in this area. There are Justices Blackmun and O'Connor, who are following one test; Justices Brennan, Marshall, and Stevens, who are following another test; and Justices Kennedy, Scalia, White, and Rehnquist, who are urging the reinterpretation of the establishment doctrine all the way back to 1973, advocating the creation of a very, very permissive test.

Let me just take a moment to lay the tests out and then apply them to these two displays. The O'Connor/Blackmun test is a kind of a reasonable person test. O'Connor articulated the test for the first time in her concurrence in *Lynch*.¹¹⁷ She said that the real reason for the establishment clause is to make sure people do not feel that, just because they have a particular religious belief or disbelief, they are an outsider in their own land.¹¹⁸ And, when government acts to endorse either a particular religion, or religious doctrine in general, that must tell the people who are not adherents, either to that religious orthodoxy or to religion generally, that they are outsiders and that the government really is siding with the religious people to

114. *County of Allegheny*, 109 S. Ct. at 3095.

115. *ACLU v. County of Allegheny*, 842 F.2d 655, 662 (3d Cir. 1988), *aff'd in part and rev'd in part*, 109 S. Ct. 3086 (1989).

116. *Id.*

117. *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *see also Aguilar v. Felton*, 473 U.S. 402, 421 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring in the judgment).

118. *See Lynch*, 465 U.S. at 688.

the exclusion of non-religious people.¹¹⁹ Justice O'Connor says that the Constitution is designed to forbid that notion, and Justice Blackmun buys into that very strongly. The two of them are using a fact-specific test. That is what is meant by the two-plastic-animal rule. You must look at every single display and ask whether a reasonable person viewing that display would see it as an endorsement of religion¹²⁰ or a message of pluralism, brotherhood, and liberty.¹²¹

Take the O'Connor/Blackmun test and apply it to the creche in the courthouse in Pittsburgh; then apply the test to the Christmas tree, Menorah, and sign down the street at City Hall; the results are different. The creche is a clear endorsement of Christianity, and, therefore, gets struck down under the O'Connor/Blackmun test.¹²² The Christmas tree, Menorah, and sign, together, are an expression of secular concern with toleration and brotherhood, and, therefore, they get upheld.¹²³ Of course, the danger is that no two people see it the same way. So, it becomes a very troublesome and subjective test. It requires a good deal of concentration on the specifics of the particular case. It also means that local government officials planning these displays have to pay very careful attention to the message that the display is likely to give to the community. If the message is planned carefully, if it is a message of brotherhood and toleration, and not a message of sectarian adherence to a particular group or to religion generally, it will be upheld under the Blackmun/O'Connor test. At the local level, there is now a tremendous premium on crafting messages that talk in terms of toleration, rather than in terms of religious doctrine.

Justices Brennan, Marshall, and Stevens hark back to an older test.¹²⁴ They say that the real question is whether the

119. *Id.*

120. *County of Allegheny v. ACLU*, 109 S. Ct. 3086, 3102 (1989).

121. *Id.*

122. *Id.* at 3105.

123. *Id.* at 3112.

124. Justice Brennan still adheres to his views in *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (Brennan, J., dissenting), where he reiterated the pure three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). O'Connor transformed the *Lemon*

government's conduct shows favoritism towards religion in a manner not compatible with the constitutionally mandated separation between church and state embodied in the establishment clause.¹²⁵ Both of the Pittsburgh displays fail under their test because the Menorah/Christmas tree/sign display advances religion and the creche advances religion.¹²⁶ The Rehnquist/Kennedy test would go all the way to "accommodation" and say that virtually anything, as long as it is not active government proselytization, should be upheld.¹²⁷

Let me say just one last thing about that with which the Court does not deal. The Court does not deal with the very troubling problem that I am sure many of you have to deal with every Christmas, the problem of privately sponsored religious displays in the parks. In the *Allegheny County* case, the displays were clearly on government property. One was in the courthouse and one was right in front of City Hall. There was no possibility of saying that these were neutral places, that anybody could come and anybody could put things up.

The harder case, and the case with which the Court has not yet grappled, is how one deals with private religious displays that are in a public forum. If there is a place in one of your local parks where anybody can have a demonstration for anything, and somebody, around Christmas time, says they would like to put a creche there, then we still do not have any guidance because that situation came to the Court out of Scarsdale about three years ago,¹²⁸ and the Court split on it four-to-four.¹²⁹

Thank you very much.

test into the "endorsement" test, and her test was "endorsed" by Blackmun in *County of Allegheny*.

125. See *Lynch v. Donnelly*, 465 U.S. 668, 697-98 (1984) (Brennan, J., dissenting); *County of Allegheny*, 109 S. Ct. at 3124 (Brennan, J., concurring in part and dissenting in part).

126. *County of Allegheny*, 109 S. Ct. at 3124 (Brennan, J., concurring in part and dissenting in part).

127. *Id.* at 3146 (Kennedy, J., concurring in the judgment in part and dissenting in part).

128. *Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985).

129. *Id.* at 85.