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Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term

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I. INTRODUCTION

In the old days, speakers in notable First Amendment cases sought to express public opposition to dominant norms, whether from the perspective of anarchists and socialists on the left or Nazis and Ku Klux Klan members on the right, and constitutional protection for such political protest is now mostly uncontroversial. Free speech issues grow more divisive as they move away from paradigm cases of political dissent. Last Term, the speakers who brought First Amendment challenges to the Supreme Court included a Playboy cable channel, a nude dancing establishment called Kandyland, a state political candidate, and sidewalk anti-abortion protestors. All lost except Playboy, which succeeded in invalidating a federal statute requiring the scrambling of sexually explicit programming.[1] The Court rejected free speech challenges to a state public nudity ban that prohibited nude erotic dancing,[2] a state campaign finance regulation that limited the amount of contributions to state political candidates,[3] and a state statute that restricted speakers' unbidden approaches to people entering and exiting health care facilities, including abortion clinics.[4]

First Amendment claimants fared better at vindicating the rights of expressive associations to disassociate from members they would rather not have: The Court upheld the right of the Boy Scouts to eject a gay scoutmaster[5] and the right of California political parties to exclude from their primary elections cross-over voters who were not registered party members.[6] But the Court also held that students at public universities do not have a First Amendment right to disassociate from ideologically controversial student organizations by withholding portions of mandatory student activity fees.[7]

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1. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 826 (2000).
2. City of Erie v. Pap's A.M., 529 U.S. 277 (2000).
3. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).
4. Hill v. Colorado, 120 S. Ct. 2480 (2000).
5. Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2449 (2000).
6. Cal. Democratic Party v. Jones, 120 S. Ct. 2402, 2414 (2000).
7. Bd. of Regents of the Univ. of Wis. v. Southworth, 529 U.S. 217, 221 (2000).

II. THE FREE SPEECH CASES

A. *Cable Smut*

Sexually explicit speech that the Court deems indecent, but not obscene, has long occupied a First Amendment netherworld–it is not formally unprotected, but it does not receive the respect accorded other protected speech. The cases have been complicated by the Court's ambivalent attitude toward speech sent via electronic media such as airwaves and telephone. In prior cases, the Court has suggested that government may effect time-channeling and place-channeling regulations to protect listeners from smut but may not institute a total ban. Thus, the Court upheld the FCC's time limitations on the use of the "seven dirty words" in *FCC v. Pacifica Foundation*[8] but struck down a total ban on indecent but non-obscene "dial-a-porn" services in *Sable Communications v. FCC*.[9] The Court reasoned that radio and television are unusually assaultive, pervasive, and accessible to children,[10] but calling services requiring use of a credit card are not.[11]

Application of these precedents to cable television has been ambiguous. The Court has resisted classifying cable as a form of broadcasting, admitting that viewers have more power to avoid unwanted cable programming than broadcast programming, as well as the power to customize cable content to their own liking. At the same time, the Court has upheld some cable restrictions aimed at indecent sexual content. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* (*DAETC*), for example, a fragmented court, led by Justice Breyer in part, applied *Pacifica* to the medium of cable television, holding that the First Amendment permits government to authorize cable operators to decline to show indecent sexual programming on leased access channels. However, the Court held that the First Amendment permits government neither to authorize cable operators to decline to show indecent sexual programming on public access channels nor to require that if smut is shown on leased access channels, it must be segregated and scrambled so that viewers must affirmatively opt in by requesting to see it.[12] Several justices in *DAETC* would have gone all the way in one direction or the other. Chief Justice Rehnquist and Justices Scalia and Thomas favored upholding all three regulations, reinforcing the speech rights of cable operators,[13] while Justices Kennedy and Ginsburg favored invalidating all

8. 438 U.S. 726 (1978).
9. 492 U.S. 115 (1989).
10. *Pacifica*, 438 U.S. at 748-49.
11. *Sable*, 492 U.S. at 131.
12. Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 755-57 (1996).
13. *Id.* at 812-38 (Thomas, J., concurring in the judgment in part and dissenting in part).

three regulations as violations of the speech rights of cable programmers and viewers.[14]

In *United States v. Playboy Entertainment Group*,[15] the Court tilted in a direction closer to Justice Kennedy's approach in *DAETC* than to that of Justice Breyer. By a vote of five-to-four, the Court in *Playboy* invalidated provisions of a federal telecommunications law that required cable operators either to fully scramble sexually explicit programming or, if they were unable to do so because of "signal bleed,"[16] to confine such programming to late-night hours when children were unlikely to view it.[17] Writing for the Court, Justice Kennedy, joined by Justices Stevens, Souter, Thomas, and Ginsburg, held the law subject to strict scrutiny on the grounds that it was content-based and that its time-channeling requirement significantly restricted cable operators' speech, even though it did not impose a complete prohibition: "The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."[18] Justice Kennedy distinguished as "irrelevant" several earlier zoning cases that permitted regulation of adult theaters,[19] writing that "the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech."[20] Justice Kennedy likewise distinguished earlier broadcasting cases such as *Pacifica*, reasoning that cable systems, unlike broadcasters, "have the capacity to block unwanted channels on a household-by-household basis" and that "targeted blocking is less restrictive than banning . . . ."[21]

Applying strict scrutiny, Justice Kennedy wrote: "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals. The Government has not met that burden here."[22] Justice Kennedy found such an alternative in a different provision of the law requiring cable operators to block undesired channels at individual households upon request and rejected, at least without a better record, a variety of government arguments

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14. *Id.* at 780-812 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

15. 529 U.S. 803 (2000).

16. Signal bleed is a phenomenon in which, because of imprecise or inadequate scrambling, "either or both audio and visual portions of the scrambled programs might be heard or seen . . . ." *Id.* at 806.

17. *Id.*

18. *Id.* at 812.

19. *See infra* notes 38-39.

20. *Playboy*, 529 U.S. at 815.

21. *Id.*

22. *Id.* at 816.

as to why such voluntary blocking might be ineffective. [23]

Justice Scalia dissented on the ground that lesser scrutiny should apply to regulation of commercial exploitation of sexual speech,[24] a proposition that Justice Stevens disputed in a separate concurring opinion.[25] Justice Thomas concurred separately to express the view that the government might regulate much sexual cable programming as obscene under the *Miller* test,[26] but that its attempt to regulate merely indecent sexual speech on cable was not defensible.[27]

Justice Breyer, the author of the pivotal opinion in *DAETC*, dissented in *Playboy*, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. [28] Justice Breyer concluded that the voluntary opt-out provision was not a "*similarly* practical and *effective*[] way to accomplish [the time channeling provision's] child-protecting objective"[29] and argued for applying a First Amendment narrow tailoring standard that would afford "a degree of leeway . . . for the legislature when it chooses among possible alternatives in light of predicted comparative effects."[30]

The core issue in *Playboy* was which default rule should apply when unwilling listeners or viewers might wish to avoid offensive speech: May government require the speaker to ensure that the listener or viewer affirmatively opts in, as a scrambling requirement does, or may the speech be made available unless and until the listener or viewer opts out, as does a law requiring cable operators to scramble a live signal at a viewer's request?[31] In cases involving the mails (*Lamont v. Postmaster General of the United States*[32] and *Bolger v. Youngs Drug Products Corp.*[33]), the Court held opt-in regimes unconstitutional, reasoning that those wishing to avoid Communist propaganda or condom ads should take a "'short, though regular, journey from mail box to trash can'" rather than have the government preempt such mailings in advance.[34] *Playboy*, in one sense, simply extended this principle about home privacy to the cable context: the Court reasoned that the government had the less restrictive alternative of protecting children from cable smut by requiring targeted blocking at viewers' request.[35] In

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23. *Id.*
24. *Id.* at 831 (Scalia, J., dissenting).
25. *Id.* at 828-29 (Stevens, J., concurring).
26. *See* Miller v. California, 413 U.S. 15, 24 (1973) (setting forth a three-prong obscenity test).
27. *Playboy*, 529 U.S. at 829-31 (Thomas, J., concurring).
28. *Id.* at 835-47 (Scalia, J., dissenting).
29. *Id.* at 840 (Breyer, J., dissenting).
30. *Id.* at 841.
31. *Id.* at 806-07.
32. 381 U.S. 301 (1965) (striking down a federal law under which "communist political propaganda" of overseas origin sent through the mail would be destroyed unless the recipient affirmatively requested that the postal service deliver it).
33. 463 U.S. 60 (1983) (striking down a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives).
34. *Id.* at 72 (quoting Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967)).
35. *Playboy*, 529 U.S. at 824-27.

this respect, the reasoning resembled that in the Court's ruling striking down the Communications Decency Act's limitation on indecent speech over the Internet in *Reno v. ACLU*, holding that filtering software or other defensive measures were adequate alternatives to requiring that Internet users take special steps to opt into sexual websites.[36] But the extension of this opt-out default to the cable context was in another sense a surprise, because *DAETC* had suggested that cable resembles traditional broadcast media more than the Internet does: cable involves "push" rather than "pull" technology and is accessible to children over the same box as broadcast television.[37] *Playboy* may signal a trend toward a multimedia First Amendment, in which the Court's historical partial First Amendment dispensation for broadcasting increasingly withers and dies–particularly once future technologies give consumers of on-air broadcasting the capacity to customize their television viewing and to filter out objectionable content more easily.

A second surprise in the *Playboy* ruling involved the Court's strict scrutiny and ultimate invalidation of a law that burdened but did not ban sexually explicit but non-obscene speech. In previous "erogenous zoning"[38] cases, such as *Young v. American Mini Theatres, Inc.*[39] and *Renton v. Playtime Theatres, Inc.*,[40] the Court had counted a lesser degree of burden as a mitigating factor, upholding laws that restricted such speech or made it less practical without banning that speech. The majority discounted this distinction in *Playboy*, again subjecting indecent speech to the usual First Amendment default rules.[41] The decision is also noted for coalitions perhaps unexpected in a sexual speech case: President Clinton's appointee, Justice Breyer, joined Chief Justice Rehnquist and Justices O'Connor and Scalia in dissent, while President Bush's appointee, Justice Thomas (who, in the Term's other sexual speech case, discussed below, joined the majority to uphold a ban on nude dancing), here joined the speech-protective majority.[42]

B. Nude Dancing

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36. Reno v. ACLU, 521 U.S. 844, 854 (1997).

37. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 743-45 (1996).

38. This *bon mot* is Laurence Tribe's. *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 954 (2d ed. 1988).

39. 427 U.S. 50, 72-73 (1976) (upholding a Detroit ordinance banning operation of adult theaters and bookstores within 1,000 feet of any other such establishment, or within 500 feet of any residential area).

40. 475 U.S. 41, 54-55 (1986) (upholding a law banning adult theaters within 1000 feet of any residential zone, dwelling, church, park, or school).

41. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 815 (2000).

42. *Id.* at 805.

Does the First Amendment protect the right to dance for an audience sans pasties and G-string? The Court has now twice held that nude erotic dancing counts at least barely as speech, but that it is nonetheless regulable by means of public nudity bans. In *Barnes v. Glen Theatre, Inc.*, the Court upheld an Indiana public indecency statute enforced against go-go dancers at the Kitty Kat Lounge but fragmented messily over the applicable standard of review:[43] Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, applied the intermediate scrutiny of the *O'Brien* test[44] but held the statute adequately justified by an important government interest in public morality.[45] Justice Souter agreed that *O'Brien* applied but found the statute justified instead as preventing "secondary effects" such as prostitution and other vice crimes.[46] Justice Scalia concurred in the judgment, asserting that no First Amendment scrutiny ought apply at all since the statute was aimed at the conduct of nudity, whether expressive or not.[47] Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented in *Barnes*, reasoning that strict scrutiny should have applied because the only possible motive for stopping nude dancing before consenting adults was to short-circuit the communicative impact of erotic titillation. [48]

Barnes was apparently so confusing that the Pennsylvania Supreme Court, in a similar subsequent case, refused to follow any of the *Barnes* opinions, finding "no clear precedent," and "no point on which a majority of the *Barnes* Court agreed."[49] Employing strict scrutiny, the state court upheld the free speech right of an establishment called Kandyland to feature totally nude erotic dancing by women.[50] The state court reasoned that the law was not content-neutral but rather sought to "impact negatively on the erotic message of the dance." [51]

In *City of Erie v. Pap's A.M.*, the Supreme Court reversed and upheld the statute.[52] The Court again fragmented in its reasoning, but this time the vote against nude dancing was six-to-three.[53] Justice O'Connor, writing a plurality opinion joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, found, as had the plurality in *Barnes*, that government restrictions on public nudity should be evaluated under the *O'Brien* test as content-neutral restrictions on symbolic conduct.[54] She rejected any reading of the Erie ordinance as content-

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43. Barnes v. Glen Theatre, Inc., 501 U.S. 560. 567-68 (1991).
44. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (enunciating a four-part test for review of government regulations that have merely an incidental effect on protected speech).
45. *Barnes*, 501 U.S. at 567-68.
46. *Id.* at 582.
47. *Id.* at 572.
48. *Id.* at 593-96.
49. Pap's A.M. v. City of Erie, 719 A.2d 273, 278 (Pa. 1998).
50. *Id.* at 280.
51. *Id.* at 279.
52. City of Erie v. Pap's A.M, 529 U.S. 277, 283 (2000) (plurality opinion).
53. *Id.* at 282.
54. *Id.* at 296.

based, finding it instead aimed at "combat[ing] the negative secondary effects associated with nude dancing establishments,"[55] such as the promotion of "'violence, public intoxication, prostitution and other serious criminal activity.'"[56] Justice O'Connor found this justification sufficient to satisfy *O'Brien*, even in the absence of a specific evidentiary record of such secondary effects within the city of Erie itself.[57]

Justice Scalia, this time joined by Justice Thomas, concurred only in the judgment, reiterating his view that a public nudity law such as Erie's is a "general law regulating conduct and not specifically directed at expression" and thus subject to no First Amendment scrutiny at all.[58] He expressed disdain for the Court's "secondary effects" rationale: "I am highly skeptical, to tell the truth, that the addition of pasties and g-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease."[59]

Justice Souter filed a separate opinion concurring in part and dissenting in part, stating that he would have vacated and remanded for more evidence.[60] He again argued that *O'Brien* was the right test and secondary effects the right justification,[61] but he now insisted that the government should have to prove such effects rather than merely assert them by hypothesis: "[I]ntermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed."[62] He found the evidentiary record in the case "deficient" under this standard, finding not facts but "emotionalism" in the statements made by city council members.[63] Justice Souter took the unusual step of confessing error about his own prior failure to demand an evidentiary basis for the law in *Barnes*, pleading, in the words of Samuel Johnson, "'Ignorance, sir, ignorance.'"[64]

Justice Stevens, joined by Justice Ginsburg, dissented, opposing the plurality's extension of the "secondary effects" test from the Court's earlier erogenous zoning cases to what he characterized as an impermissible "total ban"

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55. *Id.* at 291.
56. *Id.* at 297.
57. *Id.* at 296-302.
58. *Id.* at 307-08 (Scalia, J., dissenting).
59. *Id.* at 310.
60. *Id.* at 310-11 (Souter, J., concurring in part and dissenting in part).
61. *Id.*
62. *Id.* at 313.
63. *Id.* at 314.
64. *Id.* at 316 (citations omitted).

on a medium of expression.[65] Echoing Justice Scalia's hunch, but to opposite effect, he also criticized the plurality's lenient application of that test: "To believe that the mandatory addition of pasties and a G-string will have *any* kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible."[66]

Three observations are worth noting in *Pap's*. First, the Court continues to carve out, de facto, a less-than-fully protected First Amendment status for erotic but non-obscene speech. The Court uses the rationale of content-neutral "secondary effects" to uphold otherwise content-based statutes whose political counterparts would readily be struck down; no one, for example, would sustain a ban on political rallies because they tend to be associated with litter and fistfights. Second, by converging on the secondary effects rationale in *Pap's*, the Court abandoned, apparently as an isolated anomaly, the view that morality alone was a good enough content-neutral reason to uphold a regulation of speech; morality may be a good enough reason to prohibit sex (as in *Bowers v. Hardwick*[67]) but not to stop its arousal through expression. Third, the Court was cavalier toward the empirical record of harm underlying this prohibition of sexual speech, in contrast to other areas such as the regulation of commercial speech, in which it has interpreted even intermediate scrutiny to require strong evidence that the government's justification is powerful and genuine–a point emphasized by Justice Souter in his partial dissent.

C. *Campaign Finance*

As controversy about political money swirled around the election year, the Court gave no comfort to those who would deregulate campaign finance through the force of the First Amendment, but also made no new law to encourage those who would seek permission to enact additional campaign finance reform. Recall that in its decision in *Buckley v. Valeo*, the Court split the difference between treating campaign spending as more like voting, in which case government may intervene to promote equality among citizens, or more like speech, in which case it may not.[68] The Court applied strict scrutiny to invalidate limits on political expenditures by candidates or their supporters acting independently of their campaigns[69] but used modified heightened scrutiny to uphold ceilings on the dollar amounts of campaign contributions.[70] The Court reasoned that the only plausible justification for expenditure limits was sheer redistribution of speaking power, which it deemed impermissible in the marketplace of ideas, even if such

65. *Id.* at 319 (Stevens, J., dissenting).
66. *Id.* at 323.
67. 478 U.S. 186 (1986).
68. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).
69. *Id.* at 39-59.
70. *Id.* at 23-36.

governmentally induced transfers are permissible in other markets.[71] However, the Court also suggested that contribution limits could permissibly be justified as limiting the actuality or appearance of "corruption," by which the Court meant disproportionate influence or the exchange of a political quid pro quo.[72]

Buckley steered between two poles of the policy debate: whether to treat all restrictions on political money as restrictions on speech and invalidate them unless justified by empirically powerful demonstrations that they avert serious harm, or to defer to all restrictions on political money as mere market regulations. The last time the Court reviewed a campaign finance law before the October 1999 Term, it invalidated an expenditure limit. In *Colorado Republican Federal Campaign Committee v. FEC*, by a vote of seven-to-two, the Court held that political parties, like individuals, candidates, and political action committees, have a First Amendment right to make unlimited expenditures so long as their actions are independent of any candidate's campaign.[73] In that case, only Justices Stevens and Ginsburg would have permitted broad expenditure limits to "level the electoral playing field";[74] Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas would have held a party's campaign expenditures constitutionally protected whether independent of a campaign or frankly coordinated with it,[75] while Justices Breyer, O'Connor, and Souter viewed independent expenditures as protected, suggesting, without deciding, that coordinated expenditures might well be subject to permissible regulation as de facto contributions.[76]

This Term, in *Nixon v. Shrink Missouri Government PAC* , the Court upheld a contribution limit against First Amendment challenge.[77] The majority strongly adhered to its *Buckley* methodology, reinforcing its distinction between expenditures and contributions, over the dissent of three Justices who would have abandoned that distinction in favor of greater First Amendment scrutiny of all government efforts in this area, whether regulations of expenditures or contributions.[78] The case involved a challenge to Missouri's limits on contributions to candidates for state office.[79] A candidate for state auditor challenged the $1,075 limit on any individual contribution for that office, arguing that even if the $1,000

71. *Id.* at 48-49.
72. *Id.* at 26-27.
73. Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 608 (1996).
74. *Id.* at 609 (plurality opinion by Breyer, J.) (describing the Federal Election Campaign Act of 1971 as designed "to level the electoral playing field by reducing campaign costs").
75. *Id.* at 626-31 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 631-44 (Thomas, J., concurring in the judgment and dissenting in part).
76. *Id.* at 623-26 (plurality opinion).
77. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).
78. *See id.*
79. *Id.* at 381.

contribution limits on contributions to federal candidates that were upheld in *Buckley* were constitutional, inflation had eroded the value of such a sum in the quarter century that had elapsed, and such a limit was too restrictive to be constitutional today.[80] The Court rejected his argument.[81]

Writing for the six-Justice majority, Justice Souter, joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, Ginsburg, and Breyer, reiterated that contribution limits are subject to considerably greater deference than expenditure limits when challenged under the First Amendment and will survive if "closely drawn" to a "sufficiently important interest,"[82] such as prevention of corruption and the appearance of corruption.[83] He went on to reject the challengers' argument that the state must adduce strong and particularized empirical evidence of such corruption or its appearance in order to withstand First Amendment review: "The state statute is not void . . . . for want of evidence . . . . *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." [84]

Justice Souter also rejected the argument that the $1,075 limit was too low in terms of real purchasing power to be constitutional under *Buckley*: "In *Buckley*, we specifically rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate . . . . We asked [instead] whether the contribution limitation was so radical in effect as to render political association ineffective,"[85] which Justice Souter subsequently found not to be true of Missouri's regulation.[86] Justices Stevens and Breyer filed separate concurrences.[87]

Justice Kennedy dissented, emphasizing that Buckley's "wooden" distinction between contributions and expenditures has had "adverse, unintended consequences" that perversely drive political money away from candidates who are accountable to the electorate and toward secondary and tertiary speakers who are not.[88] He explained that *Buckley* "has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits, limits which take no account of rising campaign costs," citing "soft money" that may be contributed to political parties in unlimited amounts, and "issue advocacy," or advertisements that promote or attack a candidate's positions without specifically urging his or her election or defeat, as two examples, concluding that *Buckley* "has given us covert speech.

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80. *Id.* at 381-84.
81. *Id.* at 394-96.
82. *Id.* at 387-88.
83. *Id.* at 388-89.
84. *Id.* at 391.
85. *Id.* at 397.
86. *Id.*
87. *Id.* at 398-99 (Stevens, J., concurring), 399-405 (Breyer, J., concurring).
88. *Id.* at 406-07 (Kennedy, J., dissenting).

This mocks the First Amendment."[89] He would have overruled *Buckley* and "free[d] Congress or state legislatures to attempt some new reform . . . ." [90]

Justice Thomas also dissented, joined by Justice Scalia.[91] He described as a "curious anomaly" the majority's willingness to give less protection to campaign contributions than to other forms of speech less central to the political process, such as flag-burning and smut.[92] He questioned Buckley's contribution-expenditure distinction, stating that "the Constitution leaves it entirely up to citizens and candidates to determine who shall speak, the means they will use, and the amount of speech sufficient to inform and persuade."[93] Finally, he criticized the majority for, in effect, lowering the standard of scrutiny applied to contribution regulations, suggesting that it had "permit[ted] vague and unenumerated harms to suffice as a compelling reason for the government to smother political speech," and argued that the Missouri law should have been subject to strict scrutiny, which it could not survive.[94]

Nixon makes clear that there is no majority on the current Court to shift toward either pole of the campaign finance debate: Justices Kennedy, Scalia, and Thomas evidently lack the two additional votes they would need to invalidate contribution limits as free speech violations–even losing the Chief Justice's vote this time round–and there is no sign that Justices Stevens or Ginsburg have picked up three additional votes for lifting First Amendment strictures on expenditure limits. The Chief Justice and Justices O'Connor, Souter, and Breyer appear content to leave the expenditure-contribution distinction intact.

Nixon also suggests that the degree of scrutiny the Court will give to government justifications for contribution limits is more deferential than in other areas where it applies heightened review. Whereas the Court has tightened the demand for strong empirical demonstration of government interests in other areas, such as review of commercial speech regulations[95] or market-structuring regulations like cable must-carry rules,[96] the majority in *Nixon* accepted without the slightest further inquiry the state's recordless assertion that campaign donors who contributed the equivalent of $383 in 1976 dollars could be counted as political fat cats or apparent fat cats for purposes of limiting disproportionate political influence.

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89. *Id.* (citations omitted).
90. *Id.* at 409.
91. *Id.* at 410-30 (Thomas, J., dissenting).
92. *Id.* at 412.
93. *Id.* at 420.
94. *Id.* at 424-25.
95. *See, e.g.*, Fla. Bar v. Went for It, Inc., 515 U.S. 618 (1995).
96. *See, e.g.*, Turner Broad. Sys., Inc., v. FCC, 520 U.S. 180 (1997).

Justice Souter's readiness in *Nixon* to accept a legislative judgment unsupported by particular empirical evidence is particularly striking given his vocal skepticism towards the majority's empirical justification for the "secondary effects" rationale used to uphold the City of Erie's nude dancing ban, considered in the same Term. His willingness to accept regulations on political money with less skepticism than regulations on sexual speech cannot be based on valuing the former speech less than the latter. Perhaps what Justice Souter is really acting on is a belief that a requirement of empirical evidence is useful, not for evaluating the technical wisdom of a legislative judgment on speech regulation, but rather for smoking out improper motives behind the statute In that case, given a corresponding hunch that restrictions on sexual speech are more likely to be spurred by hostility to the speech itself than for political speech in general, Justice Souter's positions seem less incongruous.

D. Abortion Protests

The Court has now dealt thrice with free speech challenges to efforts to limit protest outside abortion clinics. The Court has long accepted the protection of orderly movement on public streets as a sufficient justification for time, place, and manner regulations of speech in the public forum.[97] It has also accepted that the protection of privacy and repose may also be a sufficient content-neutral justification for limiting speech in the public forum–for example, upholding a ban on stationary picketing of residences in *Frisby v. Schultz*.[98]

Using variations on standard time, place, and manner analysis, the Court has found such interests sometimes sufficient and sometimes insufficient to sustain injunctions against protestors engaged in counseling and advocacy outside abortion clinics. In *Madsen v. Women's Health Center*, the Court upheld an injunction's restrictions on how close protestors could be to the front of a clinic and how much noise they could make nearby, while striking down as excessively broad the buffer zone as applied to the back of the clinic, a limitation on the display of signs, a 300-foot no-approach zone around the clinic, and a similar buffer zone around the residences of clinic staff.[99] Chief Justice Rehnquist, writing for the Court, suggested that intermediate scrutiny should be somewhat sharper for injunctions than for statutes because "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances."[100] In *Schenck v. Pro-Choice Network of Western New York*, the Court upheld the portion of an injunction creating a fixed 15-foot buffer zone around a clinic but invalidated a "floating buffer zone" that required speakers outside the clinic to

97. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941).
98. 487 U.S. 474 (1988).
99. Madsen v. Women's Health Ctr., 512 U.S. 753, 762-63 (1994).
100. *Id.* at 764.

retreat 15 feet from unwilling listeners when requested.[101] Justices Scalia, Kennedy, and Thomas dissented from both decisions insofar as the majority upheld any aspects of the challenged injunctions.[102]

In *Hill v. Colorado*, the Court for the first time reviewed a statute, as opposed to an injunction, challenged for limiting the speech of abortion protestors outside abortion clinics, and upheld it by a vote of six-to-three.[103] The statute made it unlawful for anyone within the vicinity of a health care facility to "'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . . .'"[104] Justice Stevens delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Souter, Ginsburg, and Breyer.[105] He found the statute to be a valid, content-neutral time, place, and manner regulation.[106] It was content-neutral, Justice Stevens wrote, because it regulated not speech but "the places where some speech may occur," it was not adopted because of disagreement with a message, and it was justified by interests in access and privacy that were unrelated to ideas.[107] Justice Stevens declined to find a content basis in the distinction between approaches for "protest, education or counseling" and for other purposes, such as "pure social or random conversation."[108] He concluded that the statute "applies to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands."[109] He went on to hold that the statute was narrowly tailored to important interests in privacy and access and left protestors adequate alternative means of getting their message across.[110] Justice Souter filed a concurring opinion, joined by Justices O'Connor, Ginsburg, and Breyer, emphasizing that the statute addressed "not the content of speech but the circumstances of its delivery," and suggesting that it thus was properly evaluated as content-neutral.[111]

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101. Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 378-80 (1997).
102. *See Madsen*, 512 U.S. at 784 (Scalia, J., dissenting); *Schenck*, 519 U.S. at 385 (Scalia, J., dissenting).
103. Hill v. Colorado, 120 S. Ct. 2480, 2491 (2000).
104. *Id.* at 2484 (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).
105. *Id.*
106. *Id.* at 2494.
107. *Id.* at 2491.
108. *Id.* at 2492.
109. *Id.* at 2494.
110. *Id.* at 2494-95.
111. *Id.* at 2500 (Souter, J., concurring).

Vigorous dissents were filed (and read aloud from the bench in emotional perorations that created visible tension among the Justices)[112] by Justice Scalia, who was joined by Justice Thomas, and by Justice Kennedy.[113] Justice Scalia argued that the floating buffer zone around oral communication was "obviously and undeniably content-based," because "[w]hether a speaker must obtain permission before approaching within eight feet–and whether he will be sent to prison for failing to do so–depends entirely on *what he intends to say* when he gets there."[114] He would have applied strict scrutiny, which the statute could not survive:

> Suffice it to say that if protecting people from unwelcome communications (the governmental interest the Court posits) is a compelling state interest, the First Amendment is a dead letter. And if forbidding peaceful, nonthreatening, but uninvited speech from a distance closer than eight feet is a "narrowly tailored" means of preventing the obstruction of entrance to medical facilities (the governmental interest the State asserts) narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker.[115]

Justice Scalia bitterly accused the Court of distorting First Amendment law in order to "sustain this restriction upon the free speech of abortion opponents":[116] "Does the deck seem stacked? You bet."[117] Justice Kennedy likewise would have found the law content-based due to its restrictions on particular topics, denying that "citizens have a right to avoid unpopular speech in a public forum."[118] He added that, in his view, the statute interfered with an important First Amendment interest in "immediacy":[119] "The Court tears away from the protesters the guarantees of the First Amendment when they most need it," that is, "at the very time and place a grievous moral wrong, in their view, is about to occur."[120]

The abortion protest decisions are not ordinary time, place, and manner decisions. Both *Madsen* and *Schenck* involved greater judicial intervention than usual in this area, in contrast to the Court's tendency in other public forum cases to give nearly plenary deference to the managerial decisions of government when

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112. *See* Edward Walsh & Amy Goldstein, *Supreme Court Upholds Two Key Abortion Rights; 'Partial Birth' Ban Struck Down, 5-4; Clinic Protest Restrictions Upheld, 6-3*, WASH. POST, June 29, 2000, at A1.
113. *Hill*, 120 S. Ct. at 2503-15.
114. *Id.* at 2503 (Scalia, J., dissenting).
115. *Id.* at 2507.
116. *Id.* at 2509.
117. *Id.* at 2515.
118. *Id.* at 2519 (Kennedy, J., dissenting).
119. *Id.* at 2530.
120. *Id.*

the time, place, and manner justification appeared genuinely content-neutral.[121] *Hill* is unusual in the other way, with the Court giving greater than usual deference to a law permitting a listener preclearance requirement on speech in the public forum–a holding inconsistent with the usual rule that, in the public forum, speakers may take what initiative they wish toward listeners, while offended listeners must simply turn the other cheek.[122] The law in *Hill* arguably has a viewpoint-discriminatory effect: requiring listeners affirmatively to consent to speech will inevitably have the effect of discriminating in favor of popular or widely accepted messages and against those that are unorthodox or unpopular.[123] The *Hill* dissenters also raised serious questions whether the Court here had selectively departed from speech-protective principles out of cultural affinity for abortion seekers over abortion protestors–a mirror image of the Court's selective expansions of First Amendment protections for civil rights protestors during the 1960s.[124]

The real question in the abortion protest cases is not whether, as content-neutral restrictions, such injunctions and statutes are adequately narrow, but whether they are properly understood as content-neutral at all. *Hill* was notable for the Court's unwillingness to pierce the veil of the law's apparent facial content- neutrality. This approach was consistent with the Court's deference to the apparent neutrality of the nudity regulation in *Pap's A.M.*, discussed above,[125] but inconsistent with the ruling from the same Term in *Santa Fe Independent School District v. Doe* that an apparently neutral invitation to student speech at the opening of public high school football games violated the Establishment Clause, because it was truly a thinly veiled effort to showcase student-led prayer.[126] As that decision showed, Justice Stevens has no blanket rule against peeking behind a rule's facade of neutrality to show its bias. Yet, *Hill* showed a striking readiness to accept the Colorado legislature's effort to draw a facially neutral statute to achieve goals clearly targeting particular content. After all, the

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121. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (upholding prohibition on sleeping in national parks against challenge by anti-homelessness demonstrators); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (upholding regulation of concert sound volume in public park).

122. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (invalidating breach-of-peace conviction for wearing in public a jacket condemning the draft in vulgar terms).

123. In *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981), the Court rejected a similar argument against a rule requiring literature distribution and solicitation of funds to be confined to a fixed rented booth at a state fair. *See id.* at 649 n.12 (holding that the argument that "the regulation is not content-neutral in that it prefers listener-initiated exchanges to those originating with the speaker . . . is interesting but has little force").

124. *See Hill*, 120 S. Ct. at 2503.

125. *See infra* Part II.B.

126. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302-07 (2000).

motivation for this facially neutral law had to do with its effect in shielding patients (abortion patients) known to be the recipients of a particular kind of speech (anti-abortion speech). But the inconsistency runs the other way as well–what of Justice Kennedy's willingness to accept a similarly weak pretense of neutrality when deployed in *Erie*, where the naked legislative motivation to limit nude dancing was held adequately covered by the fig leaf of the "secondary effects" rationale that Justices Stevens and Scalia alike found scarcely plausible?

III. THE FREE ASSOCIATION CASES

In cases involving First Amendment claims by the Boy Scouts, a group of California political parties, and students at public universities, the Court last Term reinforced the principle that the right to speak includes the right not to speak, and the corollary right to associate for expressive purposes includes the right to disassociate. Specifically, the Court upheld the right to avoid government-compelled membership in a group if inclusion of that unwanted member would alter that group's expressive message.[127] But not every collective activity implicates expression, and where it does not, government may compel association that is unwanted. The Court has held in previous cases that civil rights laws may compel innkeepers and restaurant owners to admit blacks,[128] and the Jaycees and Rotary Club to admit women,[129] for an inn, a restaurant, or a commercial networking organization do not have any intrinsic mission that would be compromised by the admission of women or minorities. The case would be different, the Court implied, if a white or male supremacist society were the organization in question, and indeed the Court later held, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, that civil rights law may not be used to force admission of an openly gay marching contingent (GLIB) to a privately sponsored St. Patrick's Day parade.[130]

Which are the Boy Scouts more like, an inn or a parade? In *Boy Scouts of America v. Dale*, a closely divided Court upheld the First Amendment expressive association right of the Boy Scouts to exclude an otherwise distinguished scoutmaster, James Dale, on the ground that he had spoken publicly about his homosexuality, thus suggesting that the parade analogy was the more apt one.[131] Writing for the five-to-four majority, Chief Justice Rehnquist held that New

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127. *See* Boy Scouts of Am. v. Dale, 120 S. Ct. 2446 (2000).

128. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (inns); Katzenbach v. McClung, 379 U.S. 294 (1964) (restaurants).

129. *See* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) (Jaycees); Bd. Of Dirs. Of Rotary Int'l. v. Rotary Club of Duarte, 481 U.S. 537 (1987) (Rotary Clubs). *See also* N.Y. State Club Assoc. v. City of New York, 487 U.S. 1 (1988) (private clubs providing services to nonmembers and to business entities).

130. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 567-77 (1995).

131. *Boy Scouts*, 120 S. Ct. 2446, 2449-51 (2000).

Jersey may not constitutionally apply its public accommodations law, which bars discrimination on the basis of sexual orientation, to require the Boy Scouts to admit Dale.[132] To support the conclusion that the Boy Scouts' membership decisions were constitutive of its expression, he cited the organization's governing statements:

> [The Mission Statement Provides:] "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential. The values we strive to instill are based on those found in the Scout Oath and Law:"
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> [The Scout Oath reads:] "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight."
>
> [The Scout Law provides:] "A Scout is: Trustworthy Obedient Loyal Cheerful Helpful Thrifty Friendly Brave Courteous Clean Kind Reverent."[133]

The Chief Justice deferred to the Boy Scouts' own interpretation of these statements as entailing the exclusion of outwardly gay scoutmasters.[134] While acknowledging that the terms "morally straight" and "clean" are by no means self-defining, and that "different people would attribute to those terms very different meanings," Chief Justice Rehnquist wrote that some people "may believe that engaging in homosexual conduct is contrary to being 'morally straight' and 'clean'" and found it decisive that "[t]he Boy Scouts says it falls within th[at] latter category."[135] Overriding the New Jersey court below, he stated that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent" and accepted the Boy Scouts' assertion that "it does 'not want to promote homosexual conduct as a legitimate form of behavior.'"[136]

Finally, the Chief Justice found that Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' expression; here, as with GLIB in *Hurley*, he asserted, "Dale's presence in the Boy Scouts would, at the very

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132. *Id.* at 2449-51, 2454-55.
133. *Id.* at 2451-52.
134. *Id.* at 2452-53.
135. *Id.* at 2452 (citation omitted).
136. *Id.* at 2452-53 (alteration in original) (citations omitted).

least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior,"[137] a position contrary to its own interpretation of its beliefs. The Chief Justice distinguished the Jaycees and Rotary cases as cases in which enforcement of civil rights statutes "would not materially interfere with the ideas that the organization sought to express."[138]

In dissent, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, denied that the Boy Scouts had proclaimed any anti-gay philosophy: "It is plain as the light of day that neither [of the] principles–'morally straight' and 'clean'–says the slightest thing about homosexuality"[139] Nor did he find any clear statement of such a principle by the Boy Scouts prior to Dale's dismissal.[140] "A State's antidiscrimination law does not impose a 'serious burden' or a 'substantial restraint' upon the group's 'shared goals' if the group itself is unable to identify its own stance with any clarity."[141] He found the parade case fully distinguishable: "Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any fact sheet; and he expressed no intent to send any message."[142] Justice Stevens concluded, in pointed words reminiscent of the *Hill* dissenters' accusation of ideological bias on the part of the majority in that case: "The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone–unlike any other individual's–should be singled out for special First Amendment treatment."[143] Justice Souter filed a separate dissent joined by Justices Ginsburg and Breyer.[144]

The *Boy Scouts* case turned on the question of how to allocate the discretion to determine the mission of a group, and the Court rested that discretion not with the government but with the group. The Court held that government may not second-guess a group's definition of its expressive mission in relation to its membership, nor may it put a group to a prior comprehensive notice requirement that would force it to disclose all potential exclusionary practices in advance.[145] Ex post self-definition was found sufficient.[146]

How one views the decision normatively will turn on how one regards a private sphere that deviates from public constitutional values of tolerance and equality: as a desirable safeguard against centralized homogenization and orthodoxy like the protection of abstinence from flag salutes in *West Virginia*

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137. *Id.* at 2454.
138. *Id.* at 2456.
139. *Id.* at 2461 (Stevens, J., dissenting).
140. *Id.* at 2461-62.
141. *Id.* at 2470.
142. *Id.* at 2475.
143. *Id.* at 2476.
144. *Id.* at 2748.
145. *Id.* at 2454-55.
146. *Id.*

State Board of Education v. Barnette,[147] or as a dangerous backwater likely to undermine the public values that depend upon the alteration of social norms. The desegregation of the public schools, for example, might arguably have been impeded had the civil rights acts not extended integration to inns and housing and barbecues and lunch counters, as well. The answer may turn on context; in a world where this decision has prompted both increased membership and decreased public subsidies and charitable donations to the Boy Scouts, is it closer to lunch counters or to *Barnette*? There is a good argument that the extension of equal protection to gay men and lesbians need not extend all the way down into every private association in New Jersey in order to be effective and that the right of expressive gay organizations to exclude homophobes is an important implicit corollary of the decision.

Political parties, unlike the Jaycees or the Boy Scouts, are funny creatures; sometimes they are treated like state actors because of their role in the electoral system (as in the decisions barring parties from operating white-only primaries[148]), and sometimes they are treated like private associations. *California Democratic Party v. Jones* treated them robustly as the latter.[149] In that decision, the Court, by a vote of seven-to-two, struck down a California initiative entitled Proposition 198, which had changed California's partisan primary from a closed primary to a blanket primary.[150] Under the new system, any voter could vote for any candidate regardless of party affiliation, and the candidate of each party winning the largest number of votes became the party's nominee.[151] The blanket primary was challenged by the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party, each of which sought to restrict voting in its party primaries to its own members.[152] Writing for the Court, Justice Scalia, who had earlier praised the associative function of parties in his vigorous dissents from First Amendment decisions protecting civil servants against patronage dismissals,[153] rejected the argument that primaries are "wholly public affairs that States may regulate freely."[154] He proceeded to invalidate the blanket primary system as a violation of parties' right

147. 319 U.S. 624 (1943).

148. *See* Smith v. Allwright, 321 U.S. 649 (1944) (holding that Congress has the right to regulate primary, as well as general, elections, where primaries are by law made integral part of the election process); Terry v. Adams, 345 U.S. 461 (1953) (prohibiting, under the Fifteenth Amendment, the denial of a citizen's right to vote on the basis of race or color).

149. Cal. Democratic Party v. Jones, 120 S. Ct. 2402, 2412-13 (2000).

150. *Id.* at 2414.

151. *Id.* at 2405-06.

152. *Id.* at 2406.

153. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 94 (1990) (Scalia, J., dissenting).

154. *Jones*, 120 S. Ct. at 2407.

of expressive association under the First Amendment:

> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.
>
> . . . .
>
> . . . Proposition 198 forces political parties to associate with–to have their nominees, and hence their positions, determined by–those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival.
>
> . . . .
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> . . . Proposition 198 forces petitioners to adulterate their candidate-selection process–the 'basic function of a political party'–by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome–indeed, in this case the *intended* outcome–of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.[155]

Applying that standard, Justice Scalia found the state's proffered justifications wanting. He rejected as inadmissible any interest in "producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns" or in drawing in "disenfranchised" voters, suggesting that such interests "reduce to nothing more than a stark repudiation of freedom of political association."[156] He also found constitutionally inadequate any supposed government interest in promoting fairness, affording voters greater choice, increasing voter participation, or protecting privacy by means of the blanket primary device.[157] Even if such interests were compelling, he noted, the state could further them in a less restrictive manner by operating a nonpartisan blanket primary, in which voters could pick nominees regardless of party affiliation, so long as those nominees did not advance to the general election as any party's nominees.[158]

Justice Stevens, joined by Justice Ginsburg, dissented, suggesting that "[a] State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty,"[159] and that, accordingly, "the associational rights of

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155. *Id.* at 2408-12 (citations omitted).
156. *Id.* at 2412.
157. *Id.* at 2412-14.
158. *Id.* at 2414.
159. *Id.* at 2416 (Stevens, J., dissenting).

political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations."[160] He insisted that the right not to associate "is simply inapplicable to participation in a state[-run and state-financed primary] election."[161] He also would have given more deference to the state's proffered interests, ranking them "substantial, indeed compelling."[162]

How one views this case will turn on how one views the function of parties. The Court takes a libertarian or pluralist view, seeing parties as serving to aggregate and more effectively express the political opinions of their members. If one views parties instead as boss-driven oligopolies that inhibit the expression of individual electoral choice through entrenchment or capture or mere delegates of state power who may be subject to any restriction the state likes as a condition of use of the polls, then of course the dissent's deference to California's political innovation would appear more appropriate.

Finally, the right to disassociate suffered one defeat last Term, in a case involving not compelled membership, but rather compelled financial exactions for use by organizations the contributor would not want to join. The structure of analysis here was established in *Abood v. Detroit Board of Education*, which held that agency shop members could be compelled to contribute dues to support compulsory bargaining by a public employee labor union, but not to support ideological union activities that were "not germane" to its central mission of overcoming collective action problems in labor negotiations.[163] This distinction was applied in later cases to restrict the use of compulsory state bar dues to expenditures for bar discipline and legal services, but not other bar activities such as advancing gun control or nuclear freeze. The Court's most recent application of *Abood* was in *Glickman v. Wileman Brothers & Elliott, Inc.*, in which the Court upheld the government's exaction of compulsory fees to support generic advertisement of stone fruits, reasoning that this exaction was germane to the purpose of agricultural marketing boards and not likely to "engender any crisis of conscience."[164]

In the latest First Amendment challenge to a mandatory fee requirement, the Court upheld a public university's requirement that students contribute to a student activity fund used in part to support student organizations engaging in political or ideological speech. In *Board of Regents of The University of Wisconsin v. Southworth*, the Court rejected students' attempt to analogize their

160. *Id.* at 2418.
161. *Id.* at 2419.
162. *Id.* at 2422.
163. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).
164. Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 472 (1997).

fee requirement to the one invalidated in *Abood* and the bar cases.[165] Justice Kennedy wrote for a unanimous Court that *Abood*'s "standard of germane speech as applied to student speech at a university is unworkable,"[166] because the academic freedom mission of the university is so Catholic and broad:

> The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.[167]

However, Justice Kennedy cautioned that "[t]he University must provide some protection to its students' First Amendment interests . . . . The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support."[168] While upholding the fee program in most respects, he accordingly remanded the portion of the university's program that allowed activity funding by referendum for further review regarding viewpoint neutrality.[169] Justice Souter, joined by Justices Stevens and Breyer, concurred only in the judgment, cautioning that too rigid an approach to viewpoint neutrality in the university setting might ultimately conflict with principles of academic freedom.[170]

This decision, which in effect requires religious fundamentalists to subsidize feminist and gay rights groups on campus and vice versa, was foreshadowed by *Rosenberger v. Rector and Visitors of the University of Virginia*, in which, by holding that an evangelical Christian magazine could not be denied support from mandatory student fees, the Court conceived of the universe of extracurricular student expressive activities as a metaphysical public forum rather than as a single private interest group.[171] According to that view, students paying a fee are simply paying a tax for support of diversified expression, with no strand of which they are likely to be branded by association. And, of course, none of us has an *Abood* right to demand opt-out from our taxes, even if we do not like the parades and marches that they may help to support in the public square. The decision may also have reflected an unwillingness to have courts enter the thicket of administration of pro rata refunds, headache enough for union and bar accountants. Indeed, had the Court gone the other way, the administrative nightmare might have led many

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165. Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 231 (2000).
166. *Id.*
167. *Id.* at 232.
168. *Id.* at 233.
169. *Id.* at 235-36.
170. *Id.* at 236-43.
171. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).

public universities to abandon fee-funded student activities, so the most important practical outcome of the decision might well be that groups dependent on this kind of support will continue to exist on campus at all.

IV. CONCLUSION: FIRST AMENDMENT TRENDS IN THE 1999 TERM

The 1999 Term's most surprising feature can perhaps be seen by viewing the cases in the aggregate: while First Amendment claims are often seen as liberal, justices frequently labeled "conservative" tended to side, overall, with the speaker in First Amendment side of cases more often than did many of their so-called "liberal" counterparts. Indeed, in the Term's seven First Amendment cases, Justices Kennedy and Thomas amassed the most consistent record of supporting private speakers' claims against government infringement: each voted against the government in five cases, namely *Playboy*, *Nixon*, *Hill*, *Boy Scouts* and *California Democratic Party*. Justice Scalia was the runner-up for the most frequent support of First Amendment claims, siding with the speaker in four of seven cases, namely *Nixon*, *Hill*, *Boy Scouts*, and *California Democratic Party*.

In contrast, Justices Stevens and Ginsburg each voted to uphold alleged government infringements on speech in five of the seven cases, namely *Nixon*, *Hill*, *Boy Scouts*, *California Democratic Party*, and *Southworth*. This overall record matched that of Chief Justice Rehnquist and Justice O'Connor, although their scorecard differed as they voted for the speaker in *Boy Scouts*, and *California Democratic Party* and the government in *Pap's A.M.* and *Playboy*. And Justice Breyer held the record for the least support for First Amendment claims, voting to uphold government regulation in every case but *California Democratic Party*.

What accounts for this reversal in roles over the First Amendment, long associated with "liberal" legal ideology? None of the Term's cases concerned government crackdowns on politically subversive speech; in the 1990s, with the nation less threatened by security issues than arguably at any time since World War I, governments may have been less inclined to blatantly test the First Amendment in order to enforce political orthodoxies. Instead, the values that government litigants posed as countervailing or trumping the First Amendment considerations in these cases were frequently those derived from government's traditional responsibilities and efforts to protect the vulnerable (*Hill*), regulate nuisances (*Erie* and *Playboy*), and redistribute power either by democratizing politics (by equalizing political spending) or by promoting a social ethic of tolerance or nondiscrimination. Where government itself champions liberal values such as equality, it is perhaps unsurprising that Justice Breyer would find himself in rough alignment in all but one case (*Boy Scouts*) with the Chief Justice, who

generally takes a very broad view of governmental regulatory power. And where litigants advocating strong First Amendment constraints on government are associated with socially conservative ideological movements (*Boy Scouts* and *Hill*) or with monied commercial interests (*Nixon*), it is perhaps unsurprising that so-called conservatives would champion their rights.

This is not to say that the Justices either consciously or inevitably subsumed free speech interests to background political sympathies. Note, for instance, that among the Justices voting with the majority to uphold speech-avoiding protections for abortion patients in *Hill* was Chief Justice Rehnquist, who has been a vocal foe of the Court's pro-choice jurisprudence since his dissent in *Roe v. Wade* itself.[172] On the other hand, voting to strike down the protest-restrictions was Justice Kennedy–co-author of the plurality opinion preserving abortion rights in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[173]

In other words, a scorecard of votes cannot show First Amendment values to be inherently liberal or conservative; indeed, free speech is obviously critical to those across the political spectrum. In shaping First Amendment law, as in shaping other areas of law, the Supreme Court responds to opposing commitments–free speech among them–that cannot be arrayed along a single ideological axis.

172. 410 U.S. 113 (1973).
173. 505 U.S. 833 (1992).

PROFESSOR MICHAEL W. MCCONNELL'S RESPONSE

PROFESSOR McCONNELL: I'd like to pick up on Kathleen's last point about ideological drift. Her basic idea here is that vigilance for free speech may have become a conservative principle rather than a liberal principle. I really don't think that is right, and the truth is much more alarming than that. I think the free-speech principle ten or fifteen years ago used to be fairly robust. And I consider the high point of this the flag burning cases, where very solid majorities of the Court, including some of the most conservative Justices, voted–correctly, in my view–that laws against flag burning are unconstitutional. I consider this to be kind of a high point where people across the spectrum were able to agree upon a way of analyzing free-speech claims. And they would stick to those principles without regard to the political complexion of the case. And I think this term suggests that that coherence of free-speech doctrine has truly broken down, and it's broken down in a way we should be extremely worried about–*Hill v. Colorado*[1] being the centerpiece of this.

I want to compare *Hill* with the football prayer case, the *Santa Fe*[2] case, as Kathleen did, in a little more detail. But first I want to emphasize the point here. Kathleen described *Hill v. Colorado* as a very, very difficult case. I think she should have gone farther than that. I think she should have said that *Hill v. Colorado* is a case that is inexplicable on standard free-speech grounds and that it is shameful the Supreme Court would have upheld this piece of legislation on the reasoning that it gave. And on so many doctrinal points, those who voted to uphold that statute did so when, in another context not involving abortion protest, there is not a chance that legislation of this sort would be upheld. And I was delighted with very much of Kathleen's presentation, but I would have been very much happier if instead of saying this is a "very, very difficult case," she had gone one step further. She and I disagree very much about the underlying question of abortion rights. But I do not believe that free-speech law should be affected whether you agree with the speaker or not. And when the Court lines up on free-speech cases according to whether they agree with the speakers or not, I think we're in very serious trouble.

Let me mention some of the ways in which *Hill v. Colorado* departed from standard First Amendment free-speech analysis. First let me describe the case. It involved a statute that makes it a criminal violation for people to engage in entirely peaceful, non-coercive, non-obstructive, quiet speech in a quintessential public forum; namely, discussing an issue of undoubted public importance on the public street and sidewalks. We are talking about the ability to walk up to a person quietly and respectfully and offer them a leaflet. They don't have to take it. But the question is whether you have an opportunity to offer them a leaflet or to carry a sign. That's what it's about.

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1. Hill v. Colorado, 530 U.S. 703 (2000).
2. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

I do not dispute for a minute that the state has the authority to protect women and anyone else entering healthcare facilities from coercive activity, from obstruction, and even loud and noisy and abusive things that may be upsetting. I have no doubt at all of that. And I was not upset by some of the earlier abortion protest cases in which, in the context of an injunction, the Court issued restrictions on protesters whom courts found abused the right of free speech to engage in coercive and abusive and obstructive tactics. Those injunctions went beyond what ordinary citizens have to put up with, but that's because these people had already shown themselves and been proven in court to be abusing the right. *Hill v. Colorado* is about people who have never done that. We're talking about entirely peaceful people who are simply trying to communicate an idea to someone on a public street about an issue of importance.

Now Kathleen covered very well one of the ways in which *Hill v. Colorado* inverted ordinary free-speech principles, that is by rejecting the principle that it is the person–it's the unwilling listener–who has the burden of action, and not the speaker. In this case, if I'm eight feet away, and that's approximately my distance here from Professor Kmiec, I have to get affirmative permission from him before I can move forward and offer him a leaflet. Ordinarily it is my right as a speaker to speak, and it is Doug's obligation if he doesn't want to hear me to go the other way. This is the first major case that I can think of that rejects that. It says the state can presume that Professor Kmiec does not want to have my leaflet and prevents me from offering it to him without express particular permission.

Second is the extraordinary breadth of this law in comparison to its legitimate objectives. Again, the state has an absolutely legitimate purpose in making sure that women who are going into these facilities are able to do so while not obstructed and not harassed. But look how much farther the statute goes than that legitimate objective. If there's any tailoring requirement at all, this statute is grossly overbroad.

A third problem, and it seems to me this is so clear, is the abuse of the idea of content neutrality. The Court said that this statute is content-neutral. I just literally cannot see how they could possibly come to that conclusion. If I walk up to Professor Kmiec and I ask him "what time is it" or "what do you think the weather is like," that's permitted under the statute. If I walk up to him and say, "do you know what you're getting into in that clinic," then it is prohibited. You cannot tell, other than by the content of what I say, whether the law is being violated or not. Now if that is not content-based, I just do not know what "content-based" could possibly mean.

Now what the Court does is quote, and here I want to agree with Akhil about precedent being distorted, *Ward v. Rock Against Racism,*[3] a case in

3. Ward v. Rock Against Racism, 491 U.S. 781 (1989).

which content didn't matter. The Court says in sloppy language that the question of content neutrality has to do with whether the government is suppressing speech because of disagreement with its message. But that turns content neutrality into viewpoint neutrality. Now maybe there might be some arguments about moving in that direction. I mean, I'd like to see them. If the Court wanted to move in that direction, they could perhaps make some arguments, but they didn't do that. The Court simply elided the difference between content and viewpoint and pretended that this was a statute which was content-neutral. And then finally, the Court had an extremely naive attitude toward the formal neutrality of this law. And here I would like to draw the contrast more sharply between *Hill v. Colorado* and the *Santa Fe* case, the football prayer case, because the two cases are so similar but come out exactly opposite. Both of them involve formally neutral laws. In *Hill*, you have a restriction on speech. In *Santa Fe*, you have a permission for speech. Neither case specifies what the message is. In *Hill* they refer to signs and leaflets and protest, counseling and education. Now that could be about anything. Just as in the football prayer case, a message or invocation could be about anything. If the Court accepts that formal neutrality in both cases, that's fine. Or if it looks behind the formal neutrality in both cases, that's acceptable. But it is not acceptable for the Court to look behind the formal neutrality when it approves of the law and disapproves of the speech and does not look behind the formal neutrality in the other.

Let's look further at the comparisons. In *Santa Fe*, the Court made a great deal of the fact that the words used suggested prayer. Invocation was a hint of prayer. Now it says *invocation or message*, but they said the only specific word used was *invocation*. That means what they really had on their mind was prayer. In *Hill*, the Court refers to protest, counseling, or education. The word "protest" is as suggestive of the viewpoint of being against something as the word "invocation" is of prayer. Similarly, in *Santa Fe* they made a great deal about the purpose of the law having to do with solemnizing the football game. That's kind of a sham for prayer, right? But there was a purpose statement in *Hill v. Colorado* as well, and the purpose referred to a balancing of a person's right to protest against certain medical procedures with another person's right to obtain medical counseling and treatment.

So the very purpose statement enacted in *Hill* specifically refers to people who were protesting against certain medical procedures. How many medical procedures are there that there are protests about? It's obvious that this is a statute about one and only one thing: namely, an abortion protest. And yet the majority says in *Hill* that this law "applies equally to used car salesmen,

animal rights activists, fundraisers, environmentalists, and missionaries. Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so."[4] Contrast that to the Court's statement in *Santa Fe*: "The District nonetheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly–that this policy is about prayer."[5] Well, I say every person on the street at the abortion clinic understands that the *Hill* statute is about abortion protest, just as much as the high school students in *Santa Fe* understood.

My preference is to resolve both of these cases in favor of the free speech right. But I could put up with almost either rule. What I can't put up with, and what I do think we shouldn't put up with, what I think is deeply shameful, is when a different rule is applied to one kind of speech than another, simply because of the political preferences of the Justices.

PROFESSOR KMIEC: Jan Crawford Greenburg of the Jim Lehrer Newshour now has questions for you both.

MS. GREENBURG: I'd like to stay on *Hill* because I think this discussion is just fascinating and really helpful. Obviously, in *Hill* Scalia says basically, "the deck is stacked and we're going to look at regulations differently where abortion is concerned." Kennedy, as you noted, said their predecessors surely would never have agreed with restrictions on protests at lunch counters. And Justice Kennedy said that if this grave error in analysis persists, it will greatly reduce free and open discourse in public forum. So I would like to open this up and continue this discussion. Do you all agree that perhaps this is the most blatantly erroneous case of the term? Do the other panelists agree with Professor McConnell's very strong remarks?

PROFESSOR TRIBE: Well, I don't know. There are quite a few candidates for most blatantly erroneous, but it's right up there. I thought Kathleen's remarks were brilliant and wonderful, but I thought she was milder than she should have been on *Hill*, because I don't think it was a difficult case. I think it was slam-dunk simple and slam-dunk wrong.

Now while I have the floor for a second, let me just say I don't think it's quite right that this is the first case where the Court, in a free-speech context, got it backwards in terms of opt-in and opt-out. Unfortunately, I lost the first such case, and Kathleen worked on it with me. It was a case called *Heffron v. ISKCON*[6] and it was not as blatant as this one, but basically there was a rule that said that if you wanted to distribute literature in the state fair in Minnesota, and it was mostly about religious distribution, you had to do it from a fixed booth. And I made the argument that the rule meant that you

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4. 530 U.S. at 723.
5. 530 U.S. at 316.
6. Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

had to, in effect, get permission. That is, if people didn't want to be seen going into these booths, they'd never get this literature. So you had to let these people walk around and just hand it out.

This put the burden the other way, as in *Lamont*,[7] where you had to virtually say, you know, "Hello, I'm a commie. I want to get that information." The Court gave very short shrift to our argument. Indeed, the entire treatment of that argument–which was, I thought, the whole argument in the case–was in one footnote by Justice White in which he said, "the argument is interesting, but it lacks force."

DEAN SULLIVAN: Which we thought was bad at the time, but years later when we lost *Bowers v. Hardwick*[8] and Justice White said, "your argument is facetious at best," we kind of longed for the days of "interesting but has little force."

PROFESSOR McCONNELL: But at least in that case the government's justification was not that the person didn't want to receive the literature. They had other justifications.

PROFESSOR TRIBE: They had other ones, but the dominant one was that people don't want to be bothered. But I do agree this is worse.

MS. GREENBURG: In light of that, when we're talking about the most erroneously decided case of the term, is this, as Justice Kennedy raises the fear, potentially the most grievous in the impact on the law in a free and open discourse? What's the effect of this going to be?

DEAN SULLIVAN: I don't think so at all. The Court has created a kind of curtilage rule for houses and abortion clinics which it doesn't really apply elsewhere in the public forum. Go back to *Frisby v. Schultz*,[9] which upheld a law the Court construed to be a ban on targeted picketing by people who were on public forum property, the streets and sidewalks, but who were standing stationary outside of homes yelling at the owners. It happened to be a case in which part of the yelling was abortion protest, but that was just an accident. The Court has not accepted targeted picketing outside a home. And similarly, in the line of abortion protest cases, it's created a kind of curtilage. It's almost a property rule that says that in the physical vicinity of certain places where people have this interest in privacy and repose–and maybe the justices are sympathetic, as Nina Totenberg suggested, to an interest in privacy– this curtilage is protected. And maybe that did drive *Reno v.*

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7. Lamont v. Postmaster Gen. of U.S., 381 U.S. 301 (1965).
8. Bowers v. Hardwick, 478 U.S. 186 (1986).
9. Firsby v. Schultz, 487 U.S. 474 (1988).

Condon,[10] which held that it's okay for Congress to stop states from selling your driver's licenses to commercial vendors.

It seems to me that's very palatable, and the Court hasn't extended this sort of opt- in rather than opt-out principle to any other part of the public forum. So it may be that it's spawned by the abortion controversy, but it doesn't have that much generative power for the rest of the public forum or the First Amendment. Usually the Court goes the other way. Look at *Reno v. ACLU*,[11] which says that you have to opt out of bad speech on the Internet by hiring Cyber Patrol or some other filter software instead of having government keep the indecent speech from coming into your home.

PROFESSOR TRIBE: With all due respect, I don't think this position will immediately be generalized. I agree the problem is under-inclusivity, not over-inclusivity, and it might be limited to homes and hospitals, and maybe only certain kinds of hospitals. But I think, in terms of the civil peace that was brilliantly exemplified by the union of right and left in the flag burning cases, and in terms of the way in which that kind of agreement, notwithstanding different ways of viewing the substance of the speech involved, could generate nearly a decade or more of consensus about free-speech cases, that's what may begin to break down as a result of the feeling of bad faith that a case like this generates.

PROFESSOR CHEMERINSKY: I'm a dissenting voice on the panel here because I think the result was correct in this case, but I'm troubled by the rationale that was given. I think that there is something unique about the area outside abortion clinics when you look at what goes on there. There is a need to protect women who are entering these facilities. There's a need to protect entrances and exits to the facilities, and I think all of the Supreme Court cases in the last ten years about abortion clinics access have been about this.

Now I wish the Court had written it more explicitly that way, in terms of compelling interest. Where I become concerned is where the Court tried to find a content-neutral regulation, and the problem is the whole doctrine of content neutrality right now is quite confused. You can say that this law is facially content-neutral. It doesn't specifically identify the topic of the speech. It doesn't identify viewpoint so it fits as content-neutral. But the Court is not consistent in saying that you look only at the face of the law. Think of *City of Renton v. Playtime Theatres*[12] or *Erie v. Pap's A.M.*[13] where the Justices say "even though the law is facially content-based, if it has some other purpose, it will be treated as content-neutral." You could do the same thing here, but it doesn't make much sense. So I think this case further adds

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10. Reno v. Condon, 528 U.S. 141 (2000).
11. Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).
12. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).
13. City of Erie v. Pap's A.M., 529 U.S. 277 (2000).

to the confusion about content neutrality, but it's the right decision about a need to protect people in a very unique environment.

PROFESSOR AMAR: And note the link, Jan, between what Erwin just said about watering down the meaning or confusing the meaning of content-based regulation and what Larry said much earlier about reasonable suspicion. Larry says instead of basically saying reasonable suspicion means something different in this place, it is much better to say we've got different rules for schools, and the suggestion was we might have different rules for hospitals. But once you hear Kathleen saying it's kind of privacy-based, and she invoked a Fourth Amendment word, curtilage, broader contexts and ideas of privacy come into play. The Court should have simply said there are special rules for special places, like hospitals where very vulnerable people are about to have a very serious procedure and you shouldn't basically add insult to their injury. Maybe they don't want to actually have this procedure, but it's medically necessary. You know, there are all sorts of tragedies that people have, and there are places basically where they have this right to be left alone. Don't call it content-neutral though.

A final thought. I do think that just as it may be difficult to actually regulate the entirety of the world under the Fourth Amendment by insisting that all searches and seizures have warrants or even probable causes or even individualized suspicion--think about metal detectors at airports and in courtrooms and border searches and a million other things--I think it's actually quite hard to insist on content neutrality, especially because the Supreme Court's rules themselves are not content-neutral and can't sensibly be so. So there may be actually something to be said for moving to viewpoint neutrality as the over-arching standard, to which Michael suggested he was at least open.

PROFESSOR KMIEC: But I think, as Michael's comments illustrated, this statute would have a hard time even under a viewpoint-neutrality basis, given the preamble of that statute which was clearly directed at *protests* against a highly controversial medical procedure. Presumably, gathering in praise of the procedure is all right. Perhaps we're struggling here to devise special rules for medical clinics and houses, when the Court in this instance does not deserve the benefit of the doubt.

MS. GREENBURG: Another thing that was picked up in *Hill*, and it's something that Nina mentioned at lunch and various commentators have said, is that *Roe*[14] is now hanging by one thread and abortion could be in the balance.

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14. Roe v. Wade, 410 U.S. 113 (1973).

And several people have pointed to Justice Kennedy's language, not only in the *Stenberg*[15] case but also in his dissent in *Hill*, in which he accuses the majority of basically violating the spirit of *Casey* that, where the machinery of the state is not operative in early term, that it's a moral discussion. And now the majority in *Hill* basically said moral debates aren't that important, even where someone wants to pass out a little leaflet. So do you see Kennedy's comments in *Hill* as evidence that he may be wanting or willing to rethink his position in *Casey*, or is Justice Kennedy, as Dean Sullivan said, just the most pro-First Amendment Justice on the Court now and he's just outraged by these developments?

DEAN SULLIVAN: Well, I'll take a flier. I think there's almost no chance the Court will reverse *Roe v. Wade* in the near future, no matter what happens to the appointments. It's not going to go there. It's not going to revisit that. It's not going to reopen that, understanding *Roe* to mean the criminalization of abortion procedures under statutes that would allow women to be sent–pregnant women to be sent–to jail will not be accepted by the Court.

That doesn't mean that the future Court won't uphold more regulations of abortion. And after all, Justice O'Connor, who provides the crucial vote in *Stenberg*, said you could write a partial-birth abortion ban that she would uphold, as long as it had enough of an exception for the health of the mother. So I think that opponents of abortion may get some more victories of a kind in which the state can have a law actually survive the undue-burden test. Remember *Casey*, of course, overruled a whole line of cases invalidating regulations, but I think the permit-but-discourage-regulation-but-don't-ban regime is probably the compromise that's here to stay no matter what happens to the Court. So at most, there can be sort of a marginal shift toward the anti-abortion side. That's my prediction. I don't know if you agree.

PROFESSOR McCONNELL: I do have a sense that Justice Kennedy may be desperately trying to be a voice of genuine compromise on the issue of abortion where the state's power is not being wielded to prevent it, but on the other hand, where the genuinely serious moral question of abortion is one which can be fully ventilated in our society without having it shut down. That seems to me to be a tremendously honorable position.

PROFESSOR TRIBE: I think Kathleen is being too optimistic from the point of view of a pro-choice person and too pessimistic from the point of view of a pro-life person. I think one loads the dice when one says "allowing pregnant women to be sent to jail for having abortions." No, we're not going there. I do think, with a new Justice replacing somebody like Stevens with views something like where Kennedy's are right now, we would have a world in which vastly more restrictions on abortion would be routinely upheld, and the compromise of *Casey* is extremely delicate.

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15. Stenberg v. Carhart, 530 U.S. 914 (2000).

PROFESSOR JAMES: The comments have tracked remarkably well with the questions, except for one for Professor Sullivan on the *Playboy*[16] case. What effect would worldwide broadband access to information have on free speech law, specifically the government's interest in limiting access to sexually-oriented speech?

DEAN SULLIVAN: Okay. That's a really important question, and I think that this is a Court where they don't write with quill pens anymore, but they didn't start putting URLs in their opinions until very recently. And yet in *Reno v. ACLU*, the Court understood the Internet creates an environment in which the barriers to entry and the cost of transmission of information are dramatically lowered. This is democratizing. This is a world in which free speech abounds and in which we should be very slow to recognize any government power to limit speech here, because there are all these means of self-help in this kind of metaphysical world of freedom of speech that extends around the globe. It should be up to the listener to control household by household what he or she or his or her children listen to, and not up to the government. If that holds from *Reno v. ACLU,* it suggests it's going to be very difficult for the government to put preemptive regulations into place. So I think that so far the Court's view is going to be somewhat Libertarian in this domain.

PROFESSOR KMIEC: We turn now to our final panel. It is an excellent one. It is the panel presentation by Dean Varat at U.C.L.A. with regard to the Dormant Commerce Limitations and the Law of Preemption.

16. United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).