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HALF-TRUTHS OF THE FIRST AMENDMENT

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Much of the law of free speech is based on half-truths. These are principles or understandings that have a good deal to offer, that have fully plausible origins in history and principle, and that have mostly salutary consequences. But they also have significant blind spots. The blind spots distort important issues and in the end disserve the system of free expression.

In this essay, I deal with the four most important of these half-truths. (1) The First Amendment prohibits all viewpoint discrimination. (2) The most serious threat to the system of free expression consists of government regulation of speech on the basis of content. (3) Government may "subsidize" speech on whatever terms it chooses. (4) Content-based restrictions on speech are always worse than content-neutral restrictions on speech. Taken together, these half-truths explain a surprisingly large amount of free speech law. All in all, they may do more good than harm. But they also obscure inquiry and at times lead to inadequate outcomes.

The four half-truths are closely related, and it will probably be beneficial to understand their many interactions. Above all, I suggest that the doctrinal distinctions embodied in the half-truths are taking on an unfortunate life of their own; it is as if the doctrines are operating for their own sake. In some ways, the distinctions are threatening to lose touch with the animating goals of a system of free expression, prominently including the creation of favorable conditions for democratic government. Indeed, it sometimes seems as if free speech doctrine is out of touch with the question of whether the free speech principle is animated by identifiable goals at all. My effort to challenge the half-truths is spurred above all by a belief that whatever else it is about, the First Amendment is at least partly designed to create a well-functioning deliberative democracy. When free speech doctrine disserves democratic goals, something is seriously amiss.

I. HALF-TRUTH NUMBER ONE: THE FIRST AMENDMENT PROHIBITS VIEWPOINT DISCRIMINATION

It is commonly said that government may not regulate speech on the basis of the speaker's viewpoint.[1] Indeed, viewpoint discrimination may be the defining example of a violation of the freespeech guarantee. Thus, for example, government may not prohibit Republicans from speaking on subways, even though government may be able to prohibit advertising on subways altogether, or even regulate the content of speech on subways if it does so in a viewpoint-neutral way.

If the First Amendment embodies a per se prohibition on viewpoint discrimination, then government's first obligation is to be neutral among different points of view. This principle recently received prominent vindication in R.A.V. v. City of St. Paul,[2] in which the Supreme Court invalidated a "hate-speech" ordinance in significant part because it embodied viewpoint discrimination.[3] The prohibition on viewpoint discrimination has also played a central role in the key modern case on pornography regulation.[4]

As a description of current free speech law, the first half-truth has considerable merit. Upon first examination, there are very few counterexamples, and we can find a good deal of affirmative support for the prohibition on viewpoint discrimination. Whatever its descriptive force, the prohibition on viewpoint discrimination is not difficult to explain in principle. It can be defended by reference to two central constitutional concerns: the removal of impermissible reasons for government action; and the ban on skewing effects on the system of free expression.

The notion that the First Amendment bans skewing effects on public deliberation seems reasonably straightforward, but the prohibition on impermissible reasons is perhaps less clear. It should be connected with the requirement that judges be neutral.[5] A judge in a civil case may not have a personal stake in the outcome, even if that stake would not affect his ruling. This ban on judicial bias operates regardless of whether it affects the outcome. So too, the First Amendment is best understood to mean that government, in its regulatory capacity, may not censor speech on the basis of its own institutional interests.

How might these ideas justify the ban on viewpoint discrimination? Imagine that a law forbids criticism of the current administration. Here the

reasons for government action are most suspicious, for this sort of distortion of debate provides a good reason for distrusting public officials. The free speech clause declares offlimits certain reasons for censorship, and the ban on viewpoint discrimination seems admirably well-suited to ferreting out those reasons.[6]

Quite apart from the issue of impermissible reasons, viewpoint discrimination is likely to impose harmful skewing effects on the system of free expression. The notion that the First Amendment bans skewing effects on public deliberation is connected with the idea that government may not distort the deliberative process by erasing one side of a debate. Above all, government may not distort the deliberative process by insulating itself from criticism. The very freedom of the democratic process depends on forbidding that form of self-insulation.

Thus far I have spoken of government censoring speech about itself, and this is indeed the most disturbing form of viewpoint discrimination. But even if viewpoint discrimination does not have this distinctive feature, there may still be cause for concern. Imagine that government says that speech in favor of the antitrust laws is permitted, but that the opposite message is forbidden; or that state law prevents people from criticizing affirmative action programs; or that a city concludes the pro-life point of view cannot be expressed. In these cases, too, the governmental motivation may be out of bounds and, even more fundamentally, the skewing effects on the system of free expression may not be tolerable.

From both precedent and principle, it is tempting to conclude that viewpoint discrimination is always or almost always prohibited. Indeed, the Supreme Court sometimes acts as if that is the case, and this view may be coming to represent current free speech orthodoxy.[7] But there are many counterexamples, and these greatly complicate matters.

For example, there is a good deal of viewpoint discrimination in the area of commercial speech. Government can forbid advertising that promotes casino gambling,[8] even if it does not simultaneously forbid advertising that is opposed to casino gambling. This prohibition is unquestionably viewpoint-based. Moreover, government can and does forbid advertising in favor of cigarette smoking on television,[9] although government does not forbid television advertising that is opposed to cigarette smoking. On the contrary, there is a good deal of such advertising. Precisely the same is true for advertising relating to alcohol consumption. In commercial speech, then, there is a good deal of viewpoint discrimination.[10]

As another example, consider the area of labor law, where courts have held that government may ban employers from speaking unfavorably about the effects of unionization during the period before a union election if the unfavorable statements might be interpreted as a threat against workers.[11] Regulation of such speech is plausibly viewpoint discriminatory, because government does not proscribe employer speech favorable to unionization.

As a final example, consider the securities laws that regulate proxy statements. Restrictions on viewpoint can be found here, too, as certain forms of favorable statements about a company's prospects are banned, while unfavorable views are permitted and perhaps even encouraged.

Almost no one thinks that there is a constitutional problem with these various kinds of contemporary viewpoint discrimination. The restrictions are based on such obvious harms that the notion that the restriction is "viewpoint based" does not even have time to register. For example, casino gambling, cigarette smoking, and drinking all pose obvious risks to both self and others. Government controls on advertising for these activities are a means of controlling these risks. It is not entirely implausible to think that a liberal society should regulate or indeed ban some of these activities,[12] though this is extremely controversial, and our government has generally not chosen to do so. If government has the power to ban the activity, but has decided instead to permit it, perhaps it can permit it on the condition that advertising about it be banned. This was the Supreme Court's reasoning in the casino gambling case.[13]

One could respond that this reasoning is wrong because it permits a distinctively objectionable form of paternalism. Some people think that the First Amendment is undergirded by a principle of listener autonomy, one that forbids government to ban speech because listeners might be persuaded by it.[14] On this view, the ban on advertising for cigarettes, gambling, and alcohol consumption invades the autonomy of those who would listen to such speech. If we were serious about the principle of listener autonomy, perhaps we would rarely allow government to stop people from hearing messages. This is a reasonable position, but it is not relevant to my current claim, which is purely descriptive: laws that discriminate on the basis of viewpoint are indeed upheld in certain circumstances.

It is here that the first proposition emerges as a half-truth. Viewpoint discrimination is indeed

permitted, and the Court should not pretend that it is always banned.[15] We might conclude from the cases that viewpoint discrimination is not always prohibited and that the Court instead undertakes a more differentiated inquiry into the nature and strength of government justifications in particular cases. What is the nature of that more differentiated inquiry? I suggest that it begins with the view that viewpoint discrimination creates a strong presumption of invalidity. In certain narrow circumstances, the presumption is overcome because (a) there is at most a small risk of illegitimate motivation, (b) low value or unprotected speech is at issue, (c) the skewing effect on the system of free expression is minimal, and (d) the government is able to make a powerful showing of harm. In the commercial speech cases, for example, we are dealing with low-value speech, and the risk of illegitimate motivation is small. In the case of securities regulation, there is no substantial skewing effect on free expression, and there is a highly plausible claim that government is protecting people against deception.

For present purposes, it is not necessary to devote a good deal of attention to these various considerations. My point is only that current law does not embody a flat ban on viewpoint discrimination. Certain forms of discrimination are found fully acceptable. They are not seen in this way only because the presence of realworld harms obscures the existence of selectivity. The pretense embodied in our first half-truth has impaired the analysis of a number of free speech issues, including those raised by hate speech and pornography. Instead of relying on a per se rule, we should decide such cases by inquiring more particularly into the nature, legitimacy, and strength of government justifications. There may be sufficiently neutral justifications for apparent viewpoint discrimination in some such areas. I do not, however, suggest such justifications here.[16]

II. HALF-TRUTH NUMBER TWO: THE REAL THREAT TO THE SYSTEM OF FREE EXPRESSION COMES FROM CONTENT-BASED GOVERNMENT RESTRICTIONS ON SPEECH

The second half-truth is a generalization of the first. It derives from the same basic framework. I think that it is even more misleading; in any case, it is the most important.

Our free-speech tradition, it is commonly said, is especially hostile to content-based restrictions on speech.[17] The principal recent exponents of this view see such restrictions as the most important obstacles to the system of free expression.[18] It is as if the other obstacles are invisible, or not worth attention at all. Indeed, the Court itself treats these restrictions as the defining illustrations of threats to democratic self-governance.[19] Although there is much to be said for this idea as a matter of principle, it is in large part an artifact of our particular history. The free speech tradition in America grows out of the clear-and-present-danger cases featuring the powerful dissenting opinions of Justices Brandeis and Holmes,[20] and culminating in the great case of Brandenburg v Ohio.[21] In all of these cases, the government attempted to censor political speech on the basis of its content.

The image bequeathed to the American legal tradition by these cases is exceptionally pervasive. It suggests that the real threats to free expression are indeed a result of content-based regulation of speech. Outside of the arguably distinctive context of politics, government censorship of literature and the arts also attests to the dangers of content-based regulation. The symbolic power of the great Brandeis and Holmes dissents is unrivalled, but other defining cases involve content-based restrictions as well. Consider in this connection the famous Ulysses litigation[22] and the more recent, highly publicized case involving the work of Robert Mapplethorpe.[23]

The antipathy to content-based regulation thus derives great support from history. Moreover, it is not hard to see the basis for the antipathy. If we are fearful of illegitimate reasons for government regulation, or if we are concerned about skewing effects from regulation, then content-based regulation is especially dangerous.

The basis for these judgments has been spelled out in great and often convincing detail.[24] Throughout the twentieth century, major dangers have come from government regulations designed to impose on the polity a uniformity of opinion, to stifle artistic or literary diversity, and to entrench the government's own self-interest. In an era in which many countries are emerging from communist rule, it is especially salutary to focus on the risks posed by content-based regulation of speech.

But is it correct to say that the greatest threats to free expression stem from content-based regulation of speech? In contemporary America, I believe that an affirmative answer will divert attention from other important issues. Under current conditions, the second half-truth may even have become an anachronism. It renders other problems invisible. It sees the First Amendment through the wrong prism. It focuses attention on comparatively trivial problems--pornography prosecutions, commercial speech, private libel--and loses sight of the large picture.

Consider, for example, a conventional view about freedom of expression. If we were to examine recent books on this topic, we would generally find a firm consensus that the system of free expression is at risk to the extent that government censors sexually explicit speech, purportedly dangerous speech, or commercial speech on the basis of its content.[25] The war against Ulysses is said to have found a modern parallel in the attack on violent pornography. The effort to deter a civil-rights advertisement through use of libel law in New York Times Co. v. Sullivan[26] is said to be fundamentally the same as the continuing application of libel law to falsehoods about private people.[27] The restriction of the speech of political dissidents is said to have a modern analogue in the regulation of false and misleading commercial speech.[28]

Views of this sort are widespread. Moreover, it may even be right to say that the principal threats to free speech come from content-based restrictions; but the claim needs to be evaluated by reference to some sort of criteria. It should not be treated as an axiom. Let me suggest provisionally that we should evaluate any system of free expression at least in part by attending to two matters: the amount of attention devoted to public issues and the expression of diverse views on those issues. Use of these criteria accords well with the original Madisonian vision of the First Amendment.[29] It also draws support from a range of important writings, most prominently those of Alexander Meiklejohn.[30] Many people are skeptical of the idea that the free speech principle should be understood wholly through the lens of democracy.[31] But one need not think that the First Amendment is exclusively or even primarily connected with democratic self-government in order to conclude that something is wrong if the system deals little with public issues and contains little diversity of views.

If these are our governing criteria, I suggest that the principal current problem is not content-based restrictions on speech but rather a speech "market" in which these values are poorly served. It is comparatively unimportant if the government is overzealous in its regulation of child pornography, or if government regulates commercial advertising that is not terribly deceptive. But it is far from unimportant if the system of free expression produces little substantive attention to public issues, or if people are not exposed to a wide diversity of views. If we are interested in ensuring such attention and such exposure, we may not be entirely pleased with the operation of the so-called free market in speech.

In large part, this claim is a factual one. To evaluate the claim, we need to have a very thorough empirical understanding of the free speech "status quo," and here there is a distressingly large gap in the free speech literature. There are few more important tasks for the study of free expression than to compile information on existing free speech fare. But a number of things do seem clear.[32] In most of the broadcasting that people watch, there is exceedingly little attention to public issues. The "soundbite" phenomenon assures that during electoral campaigns, public attention will be focused on marginally relevant matters--the "Murphy Brown" controversy, escalating allegations of various kinds--rather than on the real issues at stake. Such attention as there is often centers on sensationalistic anecdotes, usually with an unwarranted whiff of scandal.

Coverage of public issues often involves misleading "human interest" anecdotes, in which people are asked how they "feel" about policies that appear to have harmed them. Frequently public issues are entirely absent. For example, the local news sometimes consists of discussion about the movie that immediately preceded it. Marketplace pressures, including the desires of advertisers, encourage the press to avoid substantive controversy. Often advertisers affect content, partly by discouraging serious discussion of public affairs, partly by avoiding sponsoring controversial programming, and partly by encouraging a favorable context for their products.[33] In the place of genuine diversity of view, offering perspectives from different positions, most of the broadcasting that people watch typically consists of a bland, watered down version of conventional morality. It would therefore be extremely surprising if commercial television were able to take a firm "pro-choice" or "pro-life" position in a news special or a prime-time movie, or a strong defense or critique of affirmative action.

In these circumstances, some major threats to a well-functioning system of free expression, defined in Madisonian terms, come not from content-based regulation, but from free markets in speech. Market pressures are compromising the two goals of a system of free expression. This is of course only a contingent fact. It is a product of a particular constellation of the current forces of supply and demand. If market forces were different, we might see a great deal of attention to public issues and a large amount of diversity of view. But under current conditions, this is hardly the case.

We might go further. The contemporary problem lies not merely in market forces, as if these were brute natural facts, but more precisely in the legal rules that underlie and constitute those markets. Broadcasters and newspapers are of course given

property rights in their media. Without such government grants, the speech market would be entirely different. It is these rights--generally of exclusive use--that make it possible for owners to exclude people who would like to speak and be heard. If a critic of a war, or of Roe v Wade,[34] cannot get onto network television, it is not because of nature or "private power," but because legal rules prevent him from doing so. Property laws at both the federal and state levels make any efforts to obtain access to television airwaves a civil or criminal trespass.

Market forces are a product of law, including the law that allocates entitlements. That law, like all other, should be assessed for conformity to the First Amendment. The law of property, granting rights of exclusive use, is of course content-neutral rather than content-based. When CBS excludes someone from the airwaves, it is not because government has made a conscious decision to exclude a particular point of view. But it is also untrue to say (as current law perhaps does)[35] that government is not involved, that we have a problem of "private power," or that there is no state action for free speech purposes. There is a content-neutral restriction on speech. The question is whether that content-neutral restriction is helping or harming the system of free expression. To make this assessment, we should compare it with other possible systems. Alternatives might include a "fairness doctrine" that calls for attention to public issues and diversity of view; a point system creating incentives to license applicants who promise to cover important issues; a system of subsidies and penalties designed to increase coverage of important issues; or legal restrictions on the power of advertisers over programming content.[36]

If our current system of free expression is functioning poorly, it is because of the content-neutral law that underlies current markets. I believe that many important problems for the current system of free speech in America lie not in content-based regulation--which generally involves peripheral issues and almost never strikes at what I am taking to be the core of the free speech guarantee--but instead in the operation of the free market and in the legal rules that constitute it. In these circumstances, it is worse than ironic that people interested in the theory and practice of free speech focus on such comparatively trivial issues as commercial speech, disclosure of the names of rape victims, and controls on obscenity. The principal questions for the system of free expression lie elsewhere.[37]

III. HALF-TRUTH NUMBER THREE: GOVERNMENT "PENALTIES" ON SPEECH ARE FUNDAMENTALLY DIFFERENT FROM SELECTIVE FUNDING OF SPEECH

In the next generation, some of the most important free speech issues will arise from selective funding of speech. What if government funds some artists but not others, imposes conditions on what libraries may obtain, or regulates political expression by refusing to pay for the literature of certain causes? On the constitutional question, the Supreme Court's cases are exceptionally hard to unpack. We might distinguish five different propositions, which in concert seem to reflect the current law.[38] Once we have them in place, we will be able to see the key role of the third halftruth.

(A) Government is under no obligation to subsidize speech. Government can refuse to fund any and all speech-related activities. In this sense, it can remain out of the speech market altogether.

(B) Government may speak however it wishes. Public officials can say what they want. There is no free speech issue if officials speak. Speech of this kind "abridges" the speech of no one else.

(C) Government may not use its power over funds or other benefits so as to pressure people to relinquish rights that they "otherwise" have. This is an obscure idea in the abstract, but it can be clarified through some examples. Government could not say that as a condition for receiving welfare, people must vote for a certain political party. Government could not tell people that if they are to have drivers' licenses, they must agree not to criticize the President. In both cases, government makes funding decisions so as to deprive people of rights of expressive liberty that they would otherwise have.

But--and this is an important qualification--government may indeed "condition" the receipt of funds, or other benefits, on some limitation on rights, if the condition is reasonably related to a neutral, noncensorial interest. For example, the government could forbid you from working for the CIA unless you agree not to write about your CIA-related activities, or could prevent you from political campaigning if you work for the federal government.[39] In both cases, the government has legitimate justifications that do not involve censorship. Its limitation on CIA employees is designed to ensure the successful operation of the CIA, which entails a measure of secrecy. Its limitation on government employees is designed to ensure that political campaigning does not

compromise basic government functions. Of course this principle will create some difficult line-drawing problems.

(D) Government may not "coerce" people by fining or imprisoning them if they exercise their First Amendment rights. Fines and imprisonment are the most conventional examples of free speech violations. They do not raise "unconstitutional conditions" issues at all, and may be approached far more straightforwardly.[40]

(E) The government may apparently be selective in its funding choices. In other words, government may direct its resources as it chooses, so long as it does not run afoul of principles (C) and (D) above. Government may give funding only to those projects, including those speaking projects, of which it approves. Thus government may fund art, literature, or legal and medical care and impose limits on the grantees, even on their speech, if the limits regard what may be done with government money.

Rust v. Sullivan, a highly controversial Supreme Court decision, is the source of this last proposition.[41] In Rust, the Court suggested that so long as government is using its own money, and not affecting "private" expression, it can channel its funds however it wishes. The problem arose when the Department of Health and Human Services issued regulations banning federally-funded family-planning services from engaging in (a) counseling concerning, (b) referrals for, and (c) activities advocating abortion as a method of family planning. The plaintiffs claimed, among other things, that these restrictions on abortion-related speech violated the First Amendment. In particular, they argued that the restrictions discriminated on the basis of point of view. The Court disagreed, holding:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[42]

In response to the claim that the regulations conditioned the receipt of a benefit on the relinquishment of a right, the Court held that "here the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."[43]

Rust seems to establish the important principle that government can allocate funds to private people to establish "a program" that accords with government's preferred point of view. In this area, even viewpoint discrimination is permitted. In fact, the Court seems to make a sharp distinction between government "coercion" -- entry into the private realm of markets and private interactions -- on the one hand and funding decisions on the other. Hence we arrive at our third half-truth: Government may not "penalize" speech (propositions (C) and (D)), but it may fund speech selectively however it chooses, by allocating its funds to preferred causes (propositions (A) and (E)).

This view captures an enduring principle, one that will inevitably play a role in the constitutional law of freedom of expression. Often government has legitimate justifications for treating funding decisions differently from criminal punishments. As noted, it may conclude that people who work for the CIA must refrain from speaking on certain matters, on the ground that the speech could compromise national security. Hence government could conclude that if it is to provide people with the benefit of CIA employment, it may condition their speech. So too, the President could conclude that Cabinet-level employees must speak in ways of which the President approves. Without imposing this kind of condition on speech, the President's power to execute the laws would be severely compromised. The condition is therefore acceptable. It can be justified by reference to sufficiently neutral justifications.

But the sharp distinction between penalties and subsidies is inadequate. It is far too simple. It sets out the wrong sets of categories. Most generally, there are no such fundamental distinctions among the law that underlies markets, the law that represents disruption of markets, and the law that calls for funding decisions. All are law, and the First Amendment directs us to assess each in terms of its purposes and effects.

To make the point a bit more dramatically: All constitutional speech cases are in an important sense unconstitutional conditions cases. When the government says that someone will be fined for speaking--our category (D) above--it in effect imposes an unconstitutional condition. It is generally saying that your property--which is, as a matter of fact, governmentally conferred[44] --may be held only on condition that you refrain from speaking. To be sure, a case of this sort is not seen as one of unconstitutional conditions at all. But this is only

because existing holdings of property are seen, wrongly, as pre-political and pre-legal. To support the outcome in category (D), it would be more precise to say that a condition is usually unconstitutional when government is using its power over property that it has created through law to deprive you of something to which you are otherwise entitled--and you are always otherwise entitled to property that you now own. But to put things in this way would be to place funding cases and other cases on the same analytic ground. The sharp split drawn in Rust is therefore misconceived. It is here that the distinction between penalties and subsidies is merely a half-truth.

We may go further. The First Amendment question is not whether there is a subsidy or a penalty. For two reasons, it is wrong to ask that question. First, the question is exceedingly hard to answer; it forces us to chase ghosts. Second, it is essentially irrelevant.[45] We might have a perfectly acceptable "penalty," and we might have an impermissible refusal to subsidize.

The first problem is that in order to decide whether there is a subsidy or a penalty, we need a baseline to establish the ordinary or normatively-privileged state of affairs. When government denies Medicaid benefits to artists, has it penalized speech, or has it refused to subsidize it? We cannot answer that question without saying what it is that artists are "ordinarily" or "otherwise" entitled to have.[46] The Constitution does not really answer that question, and without a textual resolution it is very difficult for courts to resolve it on their own.

More important, the First Amendment does not say that "penalties" on speech are always prohibited and that "subsidies" are always allowed. Even if we could tell the difference between the two, we would not have accomplished very much. Perhaps government can "penalize" speech when it has legitimate justifications for doing so. Perhaps government must sometimes subsidize speech when its failure to do so is grounded on an impermissible reason. The notions of penalty and subsidy seem to truncate analysis at a too early stage.

I do not claim that funding decisions affecting speech should be treated "the same" as other sorts of government decisions that affect speech--whatever this ambiguous claim might mean. The development of constitutional limits on funding that interferes with expression raises exceedingly complex issues. But for now, we have reason to doubt whether our third half-truth, and Rust, would be taken to their logical extreme. Can it seriously be argued that government could fund the Democratic Convention but refuse to fund the Republican Convention? Is it even possible that government could give grants only to academic projects reflecting governmentally-preferred viewpoints? More likely, Rust will come to be understood as a case involving private counselling rather than public advocacy, in the distinctive context in which a ban on abortion counselling is ancillary to a ban on the performance of abortions. It will not be taken to authorize government selectively to subsidize one point of view in a controversy over some public issue.

In short: Adherence to the First Amendment requires an analysis of the effects of selective funding on the system of free expression, and of the legitimacy of the government justifications for selectivity. A sharp split between penalties and subsidies will not do the job; some penalties are acceptable and some selective subsidies are not. The third half-truth is thus rooted in anachronistic ideas about the relationship between the citizen and the state. It poses a genuine threat to free speech under modern conditions.

IV. HALF-TRUTH NUMBER FOUR: CONTENT-BASED RESTRICTIONS ON SPEECH ARE WORSE THAN CONTENT-NEUTRAL RESTRICTIONS ON SPEECH

We arrive finally at the last and most general half-truth. From what has been said thus far, it should be clear that the Supreme Court is especially skeptical of content-based restrictions and especially hospitable toward content-neutral restrictions.[47] Content-based restrictions are presumed invalid. Outside the relatively narrow categories of unprotected or less protected speech--libel, commercial speech, fighting words, and so on--the Court rarely upholds content-based restrictions. By contrast, content-neutral restrictions are upheld so long as they can survive a form of balancing. In undertaking that balancing, the Court is often highly deferential to government judgments about the need for contentneutral restrictions. One of the most striking developments in recent law is the Court's increased hostility to content-based restrictions and its increased deference to content-neutral ones. Indeed, the distinction between the two kinds of restrictions seems to become sharper every term. Thus it is striking to compare the recent invalidation of a relatively narrow content-based restriction--the ban on cross-burning--with the recent validation of a broad content-neutral restriction--the ban on solicitation in airports.[48]

There is much to be said in favor of this fourth half-truth.[49] As noted, it does tend to capture current law. Moreover, it makes considerable sense

as a matter of principle. Generalizing only slightly from the previous discussion of viewpoint-based restrictions, we might conclude that content-based restrictions are peculiarly likely to stem from an illegitimate government reason, and peculiarly likely to have intolerable skewing effects on the system of free expression. A law that forbids AIDS-related advertising on subways, for example, is more objectionable than a law that forbids all advertising on subways. Content-neutral restrictions are far more trustworthy, for the reasons for regulation are apt to be more legitimate and the skewing effects less worrisome. On this basis, a legal system could do far worse than to set out a presumption against content-based restrictions and a presumption in favor of content-neutral ones.

These presumptions should not, however, be pressed too hard. There are cases in which content-neutral restrictions are especially damaging, and cases in which content-based restrictions are not so bad. Suppose, for example, that government forbids all speech in airports, train stations, and bus terminals. Here we will have a fundamental intrusion on processes of public deliberation. Indeed, one of the most effective strategies of tyrants is to limit the arenas in which public deliberation can take place. Surely this sort of intrusion is more severe than what arises when, for example, small public universities ban a narrow category of racial hate speech. The content-neutral restriction may seriously restrict the number of expressive outlets and thus impair the system of democratic deliberation. It may also have content differential effects: when people are prevented from engaging in door-to-door canvassing, or from using public parks, there are severe adverse effects on poorly financed causes. Moreover, some content-based regulation--consider a limited ban on racial hate speech or narrow classes of violent pornography--is at least plausibly a modestly intrusive corrective to an already content-based status quo. Whether or not such contentbased regulations should be upheld, it seems wrong to think that regulations of this sort are automatically more objectionable than regulations that are content-neutral.

I do not suggest that the distinction between content-based and content-neutral regulations is a failure, or that it should be abandoned. The danger arises if the doctrine becomes too rigid and mechanical. There is a risk, for example, that the current Court will become exceptionally receptive to content-neutral restrictions on speech, giving them the strongest presumption of validity. It is possible that something of this kind has already occurred. There is also a risk that outside of a few narrow categories, the Court will invalidate all content-based restrictions without looking seriously at the reasons for regulation in the particular case. But many content-neutral restrictions have extremely harmful consequences and some content-based restrictions are founded on adequate justifications. The fourth half-truth is dangerous above all because in its rigidity, it operates as a substitute for close analysis of particular problems.[50]

CONCLUSION

With any well-elaborated body of legal doctrine, there is a pervasive danger that the doctrinal lines and distinctions will take on a life of their own. The purposes and goals that gave rise to those lines and distinctions sometimes become increasingly remote. This is, I believe, the source of the problem with all four half-truths. The larger goals of free speech doctrine have often been abandoned in favor of continued attention to particular doctrines that serve those goals in only partial and indirect ways.

It is of course possible to debate the content of those larger goals. Much ink has been spilled on that highly-contested question.[51] But we need not enter into especially controversial territory in order to assert that at least a part of the justification for a strong free speech principle is its contribution to the American conception of self-government. This conception--associated with the Madisonian view of free speech--helps explain the persistence of each of our half-truths. All of them can be seen at least in part as efforts to protect against skewing effects on democratic deliberation and illegitimate government efforts at self-insulation. It is for this reason that the propositions I have discussed can fairly be described as half-truths, rather than as simple illusions.

But the four half-truths have indeed taken on a life of their own, and in important ways they disserve the system of free expression. In their generality and abstractness, they distract attention from current threats to the system of free expression and, even worse, they threaten to make those threats invisible as such. One of the extraordinary characteristics of the American system of free expression is its capacity to grow and change over time. If the system is to promote democratic goals in the twenty-first century, I suggest that the four half-truths should be recognized not only for their contributions to human liberty, but also for their limitations and their damaging effects on some of the most important current free speech controversies.

* *Karl N. Llewellyn Professor of Jurisprudence, University of Chicago Law School. Some of the discussion here draws on the more detailed treatment in Cass R. Sunstein, Democracy and the Problem of Free Speech (Free Press, 1993).*

ENDNOTES

1. See, for example, American Booksellers Association v. Hudnut, 771 F2d 323, 332 (7th Cir 1985); R.A.V. v. City of St. Paul, 112 S Ct 2538 (1992); Geoffrey R. Stone, Antipornography Legislation as Viewpoint Discrimination, 9 Harv. J. L. & Pub. Pol. 461 (1986).

2. 112 S. Ct. at 2538.

3. Id at 2547-48. This part of the holding is discussed in Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1992 S. Ct. Rev. 29; Cass R. Sunstein, Democracy and the Problem of Free Speech (Free Press, 1993).

4. Hudnut, 771 F.2d at 332.

5. This analogy is suggested in David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 369 (1991).

6. See Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 227-33 (1983).

7. See R.A.V., 112 S. Ct. at 2545-48.

8. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 US 328, 344 (1986).

9. See Public Health Smoking Act of 1969, 15 USC 1335 (1988) (prohibiting television and radio advertising of cigarettes and cigars after January 1, 1971).

10. It would be possible to say that there is no such discrimination, because there is not quite a category called "advertising against" smoking, or gambling, or alcohol consumption. On this view, messages that oppose these activities are not really "advertising against," and hence there is no discrimination on the basis of point of view. This claim might be supported by the fact that ideological messages arguing for smoking in general are not banned. Perhaps government must be viewpoint-neutral with respect to messages, as it is, and perhaps the ban on advertising does not run afoul of the prohibition. I think that this response is mostly semantic; it redefines categories to claim that there is no discrimination when in fact government is suppressing one side of the debate.

11. See NLRB v. Gissel Packing Co., 395 US 575, 618-19 (1969).

12. See Robert E. Goodin, No Smoking: The Ethical Issues (University of Chicago Press, 1987).

13. Posadas, 478 U.S. at 345-46. The Court said that when the Constitution protects the subject of advertising restrictions, the state cannot prohibit such advertising. Id. at 345. In the case at hand, however, the Court noted that the Constitution does not prohibit the Puerto Rican legislature from banning casino gambling by the residents of Puerto Rico. " The greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." Id. at 345-46.

14. See, for example, Strauss, 91 Colum. L .Rev. at 334 (cited in note 5); T. M. Scanlon, A Theory of Free Expression, 1 Phil & Pub Aff 204 (1972). See also Ronald M. Dworkin, The Coming Battles Over Free Speech, NY. Rev. of Books 55 (June 11, 1992).

15. R.A.V., 112 S. Ct. at 2547-48, seems to state this.

16. I do try to do this in Sunstein, Democracy and the Problem of Free Speech (cited in note 3); Cass R. Sunstein, Neutrality in Constitutional Law, 92 Colum. L. Rev. 1, 13-29 (1992). See also Akhil Reed Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124, 151-60 (1992).

17. See Stone, 25 Wm. & Mary L. Rev. at 196-97 (cited in note 6). See also Harry Kalven, Jr., A Worthy Tradition 6-19 (Harper & Row Publishers, 1988).

18. I draw here upon Stone, 25 Wm. & Mary L. Rev. at 194-233, 251-52 (cited in note 6); Kalven, A Worthy Tradition at 6-19 (cited in note 17).

19. See, for example, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

20. See Abrams v United States, 250 US 616, 628 (1919) (Holmes dissenting) ("It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."); Whitney v California, 274 US 357, 373 (1927) (Brandeis concurring) (The state may not place restrictions on speech "unless such speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent . ").

21. 395 US 444, 447 (1969) ("The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

22. See United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934). See also Edward de Grazia, Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius (Vintage Books, 1993), which recounts the historical saga of the publication of Ulysses in the United States.

23. See Contemporary Arts Center v. Ney, 735 F. Supp. 743 (S.D. Ohio 1990).

24. See Stone, 25 Wm. & Mary L. Rev. at 217-27 (cited in note 6); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 54-57 (1987); Laurence H. Tribe, American Constitutional Law ch. 12 (Foundation Press, 2d ed. 1988); John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1975).

25. See, for example, de Grazia, Girls Lean Back Everywhere (cited in note 22) (discussing government censorship of authors and publishers); Rodney A. Smolla, Free Speech in an Open Society 3-17 (Alfred A. Knopf, 1992); Anthony Lewis, Make No Law (Random House, 1991); Nat Hentoff, Free Speech For Me--But Not For Thee (Aaron Asher Books, 1992).

26. 376 U.S. at 254.

27. See Dworkin, N.Y. Rev of Books at 62-64 (cited in note 14).

28. See Alex Kozinski and Stuart Banner, Who's Afraid of Commercial Speech?, 76 Va. L. Rev. 627, 644 (1990).

29. See, generally, Sunstein, Democracy and the Problem of Free Speech (cited in note 3).

30. Alexander Meiklejohn, Free Speech and its Relation to Self-Government 27 (Harper & Brothers Publishers, 1948)

("The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."). See also Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1 (1971); Owen M. Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405, 1409-10 (1986).

31. See, for example, Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591 (1982).

32. I draw here on Phyllis C. Kaniss, Making Local News (University of Chicago Press, 1991); Sunstein, Democracy and the Problem of Free Speech (cited in note 3). An especially valuable empirical treatment is C. Edwin Baker, Advertising and a Democratic Press, 140 U. Pa. L. Rev. 2097 (1992).

33. See Baker, 140 U. Pa. L. Rev. at 2139-68 (cited in note 32).

34. 410 U.S. 113 (1973).

35. CBS v. Democratic Natl Committee, 412 U.S. 94 (1973).

36. For details, see Baker, 140 U. Pa. L. Rev. at 2178-2219 (cited in note 32); Sunstein, Democracy and the Problem of Free Speech (cited in note 3).

37. See Lee C. Bollinger, Images of a Free Press chs 2, 5 (University of Chicago Press, 1991); Commission on Freedom of the Press, A Free and Responsible Press 107-33 (University of Chicago Press, 1947) ("Hutchins Report").

38. Rust v. Sullivan, 111 S. Ct. 1759 (1991) (allowing selective subsidy); Harris v McRae, 448 US 297 (1980) (same); FCC v. League of Women Voters, 468 U.S. 364 (1984) (banning penalty).

39. Snepp v. United States, 444 U.S. 507 (1980).

40. I will question this view below.

41. 111 S. Ct. at 1759.

42. Id at 1772. The Court added:

> To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternate goals, would render numerous government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism.
>
> Id. at 1773.

43. Id. at 1774.

44. This has no normative implications. By saying that property rights are a creation of law, I do not mean in any way to disparage the institution of private property, which is crucially important to, among other things, individual liberty, economic prosperity, and democratic self-government. I mean only to suggest that to have a system of private property, government controls are necessary, as people in Eastern Europe have recently learned very well.

45. See Kagan, 1992 S. Ct. Rev. at 30 (cited in note 3); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989); Cass R. Sunstein, The Partial Constitution ch. 11 (Harvard University Press, 1993).

46. See Robert Nozick, Coercion, in Sidney Morgenbesser, ed., Philosophy, Science and Method: Essays in Honor of Ernest Nagel 440 (St. Martin's Press, 1969).

47. See generally Stone, 54 U. Chi. L. Rev. at 54-117 (cited in note 24).

48. See R.A.V., 112 S. Ct. at 2547-49, discussed in text accompanying notes 2 and 3; Intl Society for Krishna Consciousness, Inc. v Lee, 112 S. Ct. 2701, 2705-09 (1992) (holding that an airport terminal is not a public forum and that the port authority's ban on solicitation was a reasonable means of minimizing inconvenience and disruption of travelers).

49. See Stone, 54 U. Chi. L. Rev. at 54-57 (cited in note 24).

50. Of course, it may sometimes be worthwhile to insist on rules that are crude but that reduce the costs of individualized inquiry. Some of the oversimplification in free speech law might be justified on this ground.

51. See, for example, Scanlon, 1 Phil. & Pub. Aff. at 204 (cited in note 14) (autonomy theory); T. M. Scanlon, Freedom of Expression and Categories of Expression, 40 U. Pitt. L. Rev. 519 (1979) (partial retraction of that theory); Strauss, 91 Colum. L. Rev. at 334 (cited in note 5) (autonomy theory); Kent Greenawalt, Free Speech Justifications, 89 Colum. L. Rev. 119 (1989) (overview of theory of free speech value); Frederick Schauer, Free Speech: A Philosophical Inquiry chs. 2-5 (Cambridge University Press, 1982) (same); Redish, 130 U. Pa. L. Rev. at 591 (cited in note 31) (autonomy theory).

ABORTION ON THE AIR
Broadcasters And Indecent Political Advertising

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INTRODUCTION

In the United States, the statutory regulation of the relationship between broadcasters and candidates for elective office is an example of congressional commitment to democracy. Through Section 315(a) of the Communications Act -- the anti-censorship provision -- Congress has attempted to level the playing field for all legally qualified candidates for office.[1] Section 315(a) allows for the presentation of candidates' unvarnished positions on issues important to the voting public. Democracy, however, is not always pretty.

Often, political issues of public interest and concern are couched in offensive or racially charged language. In fact, broadcasters' concerns over the content of political advertisements are not new. In the late 1950s, the concerns centered on whether licensees could be held liable for defamatory statements made by a candidate in a political ad.[2] Two major cases occurred during the 1970s. In one, a civil rights group asked the Federal Communications Commission (FCC or Commission) to banish the word "nigger" from the airwaves,[3] and another requested that broadcasters eliminate racial slurs from political advertisements.[4] In the 1980s, employees of a radio station were concerned that a candidate's use of the word "bullshit" in the course of a political ad could offend members of the audience.[5]

In the 1990s, the ads that caused the collision between political candidates' interests and those of broadcasters have centered around abortion, perhaps the most divisive social issue of the 1980s and 1990s. Specifically, in 1992, the ads for Republican congressional candidates Michael Bailey of Indiana and Daniel Becker of Georgia contained graphic pictures of aborted fetuses.[6] The abortion ads were broadcast during the early afternoon and prime time. One broadcaster, fearing public outrage, asked the FCC to (1) declare ads containing abortion pictures indecent and (2) allow broadcasters to channel political ads containing pictures of aborted fetuses to hours when children were less likely to be in the audience.[7]

The FCC has defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[8] In order to protect children from indecent material, the FCC has traditionally channeled indecent programs to the late hours of the evening. This period, known as "safe harbor," begins around midnight.[9]

Broadcasters, who for years have been fighting the FCC's attempts to regulate indecency, asked the Commission to declare graphic depictions of aborted fetuses "indecent."[10] The broadcasters' central concern appeared to be that if they showed pictures of aborted fetuses at times when children may be in the audience and those pictures were indecent, the FCC could hold stations in violation of 18 U.S.C. § 1464, the indecency statute.[11]

The controversy over the use of abortion pictures in political ads does not end there. While Section 312(a)(6) of the Communications Act[12] states that a station may lose its license for violating Section 1464 -- which punishes the use of obscene, indecent, or profane language over the airwaves -- Section 315(a) forbids any censorship of political advertisements, and Section 312(a)(7)[13] requires that broadcasters give candidates running for federal office reasonable access to their stations or risk losing their licenses. The conflict between these three statutes has caused confusion and concern among broadcasters and raised questions that have not yet been answered conclusively.

For example, if a federal candidate chooses to use graphic depictions of aborted fetuses in campaign ads and those pictures were declared indecent, would the channeling of the ads be a violation of Section 312(a)(7), 315(a), or both? If the pictures were indecent and broadcasters aired them as required by law, would broadcasters violate Section 1464 and Section 312(a)(6) of the Communications Act? Or does the anti-censorship clause of Section 315 protect them from liability?

Finally, where does the First Amendment stand among these conflicting interests?

These are just some of the questions that the current controversy over political advertising has raised. Although this Article cannot answer all of them, the importance of the issues outlined above requires that an attempt to do so be undertaken.

Part I of this Article will focus on the law governing political advertising, specifically the reasonable access requirement for federal candidates, Section 312(a)(7), and the anti-censorship provisions of the political advertising rules, Section 315(a). Part II will look at the law regulating broadcast indecency, 18 U.S.C. § 1464 and 47 U.S.C. § 312(a)(6), which has been the main weapon broadcasters have used in their attempt to channel abortion political ads to hours when children are least likely to be in the audience. Part III will examine the use of abortion pictures in ads by political candidates and the controversy and reactions such ads have stirred. Finally, Part IV will review the constitutional and statutory implications of the proposed channeling of indecent political advertisements.

I. STATUTES GOVERNING POLITICAL BROADCAST ADVERTISING

Two sections of the Communications Act, Sections 312(a)(7) and 315(a), generally control political advertising over the broadcast media for federal candidates. Section 312(a)(7), known as the "reasonable access rule," allows the FCC to impose the "death penalty," or license revocation, for willful failure to make time available for purchase by federal candidates.[14] The FCC has interpreted the reasonable access rule to require that broadcasters accommodate the requests of individual candidates for airtime to the maximum extent possible.[15] Likewise, the FCC has said that reasonable access requires that broadcasters provide access to candidates during prime time.[16]

In 1981, the United States Supreme Court affirmed the constitutionality of the reasonable access rule. In CBS, Inc. v. FCC,[17] the Court said that once the political campaign began, broadcasters had to consider each request for time from a federal candidate and make a reasonable effort to accommodate it.[18] The case involved a request to the networks from the Carter-Mondale campaign to broadcast a thirty-minute documentary approximately eleven months prior to the election. While CBS offered five minutes of prime time, both NBC and ABC said they were not ready to sell any time for the 1980 campaign at such an early date.[19]

The networks argued that the FCC's decision that the Carter-Mondale campaign had been denied "reasonable access" interfered with the editorial decisionmaking of broadcasters.[20] But the Supreme Court said that broadcasters who adopted blanket policies denying access to candidates were in violation of the reasonable access rule.[21] Thus, while a blanket policy was likely to be more convenient for broadcasters, the Court said compliance with Section 312(a)(7) required that broadcasters take into account the campaign needs of federal candidates.[22]

Once a station has complied with the requirements of Section 312(a)(7) and agreed to make time available, it then faces the strict requirements of the anti-censorship rule of Section 315(a). This section prohibits the broadcast licensee from censoring material submitted for broadcast by the candidate.[23] Even if the material contained in the ad is libelous, the Supreme Court has ruled that a licensee is prohibited from deleting it. In Farmers Educational & Cooperative Union of America v. WDAY, Inc.,[24] the U.S. Supreme Court ruled that WDAY, a small radio station in rural North Dakota, could not delete Union references to certain government officials as "Communists." The Court said that "permitting a broadcasting station to censor allegedly libelous remarks would undermine the basic purpose for which [Section] 315 was passed -- full and unrestricted discussion of political issues by legally qualified candidates."[25] Since broadcasters were legally bound by the anti-censorship provision, the Court affirmed the FCC interpretation that compliance with Section 315(a) granted broadcasters immunity from liability for any statements made by political candidates.[26]

Similarly, if after agreeing to provide a candidate with broadcast time a station learned that the candidate's appearance would involve the expression of highly inflammatory or extremely unpopular points of view, the station could not then refuse to carry the candidate's material. In 1972, the FCC denied a request from the National Association for the Advancement of Colored People (NAACP) that broadcasters be allowed to reject political ads that contained the word "nigger" and other highly offensive language.[27] The NAACP claimed that the ads of J. B. Stoner, a self-proclaimed white supremacist, posed an "immediate threat to the safety and security of the public."[28] The NAACP argued that since stations airing Stoner's ads had allegedly received bomb threats, avoiding the broadcast of racially charged advertisements was the "responsibility of [a] licensee under the public interest standard."[29] The FCC denied the NAACP request, citing Farmers as precedent, and declared that after an investigation there was no evidence that

stations had actually received bomb threats.[30] Thus, said the Commission, there appeared to be no clear and present danger of imminent violence. The FCC concluded by saying that a "contrary conclusion would permit anyone to prevent a candidate from exercising his rights under Section 315 by threatening a violent reaction."[31] The Commission also ruled that "the public interest is best served by permitting the expression of any views that do not involve 'a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest.'"[32]

In 1978, after the U.S. Supreme Court decided FCC v. Pacifica Foundation,[33] Julian Bond, of the NAACP, asked the FCC to declare the word "nigger" obscene, thus preventing the word from being used over the airwaves.[34] In Pacifica, the Supreme Court affirmed an FCC ruling that declared a George Carlin monologue containing the words "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits"[35] indecent. The FCC had defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[36] The Court's decision allowed the FCC to regulate the times at which indecent words could be used on the air in order to protect children.

The NAACP petition erroneously construed the Supreme Court decision to declare Carlin's seven "dirty" words "obscene" rather than "indecent." The FCC denied the NAACP's request, saying the word "nigger" did not fit the definition of indecency advanced in Pacifica.[37] Moreover, the FCC said that "even if the Commission were to find the word 'nigger' to be 'obscene' or 'indecent,' in light of Section 315 we may not prevent a candidate from utilizing that word during his 'use' of a licensee's broadcast facilities."[38]

In a 1980 case, Citizens Party presidential and vice-presidential candidates Barry Commoner and LaDonna Harris asked NBC Radio to air an ad that contained the word "bullshit."[39] Commoner and Harris filed a complaint with the FCC alleging that NBC Radio had violated the anti-censorship provision of Section 315. Commoner and Harris claimed that an NBC employee rejected the ad, and it was not until after the advice of NBC's legal counsel that the station agreed to run the commercial.[40]

Although the FCC found that NBC had not violated Section 315(a), the Commission said the "initial reactions of the NBC staff in rejecting the spot and urging its modification were clearly in error." [41]Thus, the Commission warned NBC to ensure that its staff was aware that political ads could not be censored even if offensive language was used.

II. BROADCAST INDECENCY: A KNOTTY PROBLEM

Section 1464 restricts the broadcast of "indecent" material. If a broadcast licensee violates the indecency statute, Section 312(a)(6) of the Communications Act empowers the FCC to revoke the license.

The standard used to regulate indecency comes from FCC v. Pacifica Foundation.[42] As stated above, in Pacifica the U.S. Supreme Court held that comedian George Carlin's monologue Seven Dirty Words was indecent. For the nine years following the 1978 Pacifica decision, the FCC generally took no action against broadcasters for indecency violations. Meanwhile, broadcasters felt that airing indecent material between 10 p.m. and 6 a.m. was "safe" because there was less risk that children would be in the audience.[43]

In a series of rulings in 1987, however, the Commission revived its regulation of indecent speech and greatly broadened the scope of its applicability.[44] The new indecency policy reached beyond the "seven dirty words" listed in Pacifica, and included material that fit the general definition of indecency. The FCC also ruled that the beginning of the safe harbor should be moved from 10 p.m. to midnight.[45]

On June 1, 1987, the National Association of Broadcasters and other groups filed a petition for clarification of the rulings.[46] On December 29, the Commission acknowledged that the regulation of indecent material was a sensitive task due to the possibility of infringement on the broadcasters' First Amendment rights.[47] The Commission said, however, that it had an obligation to enforce the indecency restrictions, and that by enforcing Section 1464, it was advancing the government interest in protecting children from offensive material and allowing parents to decide what children would see or hear.[48]

In 1988, the U.S. Court of Appeals for the District of Columbia Circuit struck down the "channeling" provision of the FCC ruling. In Action for Children's Television v. FCC (ACT I),[49] the court upheld the Commission's power to prohibit indecent broadcasting during the day and to expand the scope of what constituted indecency. However, the ACT I court held that the FCC lacked evidence to support the change of the 10 p.m. safe harbor.[50]

The reaction from Senate conservatives was swift. Senator Jesse Helms (R-N.C.) pushed a bill through Congress ordering the FCC to draft regulations for a twenty-four-hour ban on indecency.[51] As required, the Commission drew up a regulation to enforce the legislation,[52] but the regulations were quickly challenged by broadcasters and stayed by the courts while the Commission collected public comment.[53] After the comment period, however, the FCC again announced a twenty-four-hour ban, which was challenged by broadcasters.[54] In 1991, the D.C. Circuit Court declared the 'round-the-clock ban unconstitutional in Action for Children's Television v. FCC (ACT II).[55] The ACT II court ordered the Commission to conduct a "full and fair hearing" to determine the times at which indecent material may be broadcast.[56]

In the meantime, Congress was busy drafting another law that would restrict broadcast indecency to the hours between midnight and 6 a.m. on all commercial and most noncommercial stations. Although the midnight to 6 a.m. safe harbor was declared unconstitutional by the ACT I court, President Bush signed the bill funding public broadcasting,[57] which contained the measures restricting broadcast indecency. The FCC was expected to implement the new safe harbor early in 1993,[58] but Action for Children's Television obtained from the U.S. Court of Appeals for the District of Columbia Circuit an order staying the midnight to 6 a.m. safe harbor. In November 1993, the U.S. Court of Appeals for the D.C. Circuit struck down the latest attempt to implement the safe harbor provision, but later vacated the opinion and granted a rehearing en banc.[59]

III. ABORTION ON THE AIR AND IN THE HOME

In the meantime, attention nationwide became riveted on the Bailey antiabortion ads after the Indiana Republican won the May 5, 1992, primary in an upset.[60] Bailey's spots included photos of healthy infants labeled "Choice A" followed by bloody photos of what the ad claimed were aborted fetuses, labeled "Choice B."[61] Fellow Republican congressional candidate Daniel Becker of Georgia aired similar ads later that summer on CNN, ESPN, and during Atlanta Braves games on Superstation WTBS.[62] WTBS Executive Vice-President and General Manager Terry Segal said the station received hundreds of complaints from parents, who were worried their children would see the abortion ads.[63]

In July, Becker submitted his ads to another Atlanta television station, WAGA-TV, a property of Gillett Communications. Gillett resisted running the spots and petitioned the FCC for a ruling that would declare the ads "indecent," allowing WAGA to restrict their broadcast to the midnight to 6 a.m. period.[64] Gillett argued that the depictions of dead fetuses covered with "menstrual gore" constituted "excretory" activity, thus bringing the political ad within the definition of indecency. Gillett then asked the Commission to determine whether Section 1464 of Title 18 was an exception to the application of Section 315(a), and if so, whether channeling ads containing graphic pictures of aborted fetuses would be a violation of Section 312(a)(7).[65]

In a letter denying Gillett's petition, Roy Stewart, chief of the Commission's Mass Media Bureau, said that restricting commercials like Becker's would violate a candidate's right of "reasonable access" to a broadcast station.[66] Stewart said that "[a]s a general matter, broadcasters may not direct candidates to unwanted times of the day or evening."[67] Stewart said that after reviewing Becker's ad, FCC staff found it was not indecent and that fetal tissue, or fetuses themselves, were not "excrement."[68] To support the FCC decision, Stewart said that Gillett failed to provide any legal precedent that would bring images of aborted fetuses within the definition of "excretory," and therefore, within the definition of indecency. Thus, the Mass Media Bureau chief expressed reluctance to expand that definition. Finally, since the FCC staff did not find the ad indecent, Stewart said it was not necessary to reach the issue of whether Section 1464 overrode Sections 315(a) or 312(a)(7) of the Communications Act.[69]

As the race came down to the last few weeks of the campaign, controversy over Becker's advertising heated up. In late October, Becker campaign workers attempted to schedule a thirty-minute political advertisement called Abortion in America: The Real Story, on WAGA-TV.[70] The campaign wanted to buy time to run the ad between 4 p.m. and 5 p.m. on Sunday, November 1.[71] After reviewing the tape and seeing that it contained about four minutes of graphic footage of an abortion procedure, the station again contended the ad was indecent and should not be run at the time requested.[72]

On Thursday, October 29, 1992, Gillett/WAGA filed suit in the U.S. District Court in Atlanta seeking declaratory and injunctive relief.[73] WAGA asked the court whether it could "channel" the thirty-minute spot to the safe harbor hours -- between midnight and 6 a.m. -- without violating the reasonable access and anti-censorship provisions of the Communications Act. The next day Judge Robert H. Hall declared the ad indecent and allowed WAGA

to channel it as requested.[74] Judge Hall said that Section 1464, which regulates the broadcasting of indecent material, constituted an exception to the reasonable access and anti-censorship requirements of the Communications Act.[75] Judge Hall said his decision did not "significantly undercut" the purpose of the reasonable access and anti-censorship provisions of the Communications Act: "namely to prevent discrimination against candidates and to allow candidates a full opportunity to relate to the public their political stand."[76]

Becker appealed Hall's decision to the Court of Appeals for the Eleventh Circuit, which referred the matter to U.S. Supreme Court Associate Justice Anthony Kennedy, who handles emergency matters in that circuit. Kennedy denied the request without comment on Saturday, October 31, letting stand the lower court's decision.[77]

On October 30, the same day that Judge Hall approved WAGA's plan to channel Becker's ad, Roy Stewart, the FCC's Mass Media Bureau chief, sent a letter to Daniel Becker.[78] The letter informed the candidate of WAGA's concern that the broadcast of Becker's political advertisement would violate Section 1464. Stewart acknowledged that the Commission had never formally considered how the anti-censorship and indecency statutes should be reconciled. However, Stewart noted that in a 1984 letter to Congressman Thomas A. Luken (D-Ohio), then-FCC Chairman Mark Fowler wrote that "the application of both traditional norms of statutory construction as well as an analysis of the legislative evolution of Section 315 militates in favor of reading Section 1464 as an exception to Section 315."[79]

Stewart cautioned that because there were no definitive guidelines, it would be reasonable for broadcasters to rely on the informal opinion that the Commission had given to Congressman Luken. Because of the importance of the controversy, Stewart said the FCC was issuing a public notice seeking public comment on the issues concerning noncensorship of political ads and indecency. In the meantime, Stewart said broadcasters could channel to the safe harbor period political programming that the broadcaster "in good faith believes is indecent."[80]

IV. CONSTITUTIONAL AND STATUTORY CONSIDERATIONS

Over a period of years the courts and the FCC have adhered closely to a position affirming the preeminence of Section 315(a) over several other attractive positions. In refusing to yield a politician's right to broadcast his message in the face of possible civil unrest, the Commission has made it clear that unsettling and even abhorrent political messages have a place in the debate of political issues.[81]

In fact, both First Amendment scholars and the U.S. Supreme Court have acknowledged the paramount position of political speech in the scheme of self-government. For instance, First Amendment scholar Alexander Meiklejohn carried the concept of freedom beyond a simple lack of interference from the government: "The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government."[82] The U.S. Supreme Court echoed that sentiment a few years later, holding that "speech concerning public affairs is . . . the essence of self-government."[83] The Court elaborated on that position and extended it explicitly to political advertising in 1976 with the declaration that "it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day."[84]

Section 315(a) has also triumphed over indecency and obscenity. On the heels of the 1978 FCC v. Pacifica Foundation decision, the Commission turned aside an attempt by Julian Bond of the NAACP to characterize a word at least as offensive as those used in Pacifica as obscene or indecent. The FCC ruled that even if the word "nigger" were indecent or obscene, the anti-censorship language of Section 315 prevented the Commission from taking any action.[85]

This reluctance by the FCC to expand the category of words or materials that fits the definition of indecency was recently affirmed. In its August 21, 1992, letter to legal counsel for WAGA, the Commission refused to expand the definition of indecency to include fetal tissue as "excretory" material. The Commission said that neither the expulsion of fetal tissue nor fetuses themselves constituted "excrement."[86] Had the FCC expanded the scope of what constitutes indecent material, it would have represented a significant departure from the traditional application of the concept.

The issue of abortion pictures in political advertisements has opened a new avenue that requires the FCC to interpret the limits of the definition of indecency. Historically, the FCC has not found indecency outside the realm of pandering, vulgar, or titillating depictions of sexual or excretory activities or organs.[87] Although the Commission has classified certain explicit language as indecent, context has often been a determining factor for finding a violation of Section 1464. For instance, in

a case involving National Public Radio's All Things Considered program, the FCC refused to declare that a segment about organized crime boss John Gotti was indecent. The Commission said that while it recognized that the use of the word "fuck" and "fucking" throughout a segment of a news story was patently offensive, when considered in context the language was an integral part of a bona fide news story. The FCC added that traditionally it had avoided intervening in the editorial judgment of broadcast licensees on how best to present serious public affairs programs.[88] Likewise, the Commission has refused to take action for a violation of the indecency statute when stations have discussed sexual subjects in a serious manner. The FCC found that a frank discussion of sexual techniques in a program entitled Unlocking the Great Mysteries of Sex was not intended to pander or titillate and was not otherwise vulgar or lewd.[89] In another case, however, the FCC found that on-air vulgarities were indecent when used repeatedly by disc jockeys who also solicited audience participation using similar language. The Commission refused to view audience-participation programs as serious news. This finding negated the station's claim that the vulgar language was neither pandering nor titillating.[90]

Given the emphasis the Commission has placed on context -- whether a program is serious or attempts to pander and titillate -- it appears the use of graphic pictures of aborted fetuses in political advertisements does not fit within the pattern of FCC actions for violations of Section 1464. Moreover, the unambiguous posture of the Supreme Court toward Section 315(a) in Farmers weighs heavily in favor of taking the power to regulate offensive political ads out of the hands of broadcasters. In Farmers, the Court recognized that to give broadcasters latitude in determining what should be deleted would undermine the very purpose of Section 315.[91]

The issue in Farmers was whether, despite Section 315(a), broadcasters could censor libelous remarks from a candidate's advertisement. Although the current controversy deals with indecency, the Court's reasoning in Farmers should be applicable. After all, to determine whether a political ad is indecent, a broadcaster must first judge the content of the commercial. The Farmers Court said that:

The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. . . . Yet, under the petitioner's view of the statute [deciding whether a statement is libelous] . . . would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision.[92]

More recently, the FCC has been equally reluctant to rely on broadcasters' good faith judgments to determine what is indecent. In 1987, the FCC rejected a plea from broadcasters who asked that reasonable licensee judgments preclude an FCC finding that material broadcast violated the indecency provision of Section 1464.[93]

On the other hand, the issue of channeling a political ad because it is indecent conflicts with the reasonable access requirement -- Section 312(a)(7) of the Communications Act. In CBS, Inc. v. FCC, Chief Justice Burger said the requirements of Section 312(a)(7) included the accommodation of a candidate's advertising needs, as determined by the candidate.[94] Thus, under CBS, forcing a candidate into undesirable time slots is not an accommodation of the candidate's needs, but a unilateral decision made on other grounds by the broadcaster.

In 1980, the FCC recognized that censorship can take "many forms besides the outright refusal . . . to broadcast a political spot."[95] More recently, in its response to WAGA's request that ads containing pictures of aborted fetuses be declared indecent, the FCC characterized channeling as a form of censorship under Section 315 that violated Section 312(a)(7).[96]

CONCLUSIONS

The law is clear on the power of the FCC to punish broadcasters who violate the indecency statute during entertainment programming.[97] However, when the context of the indecent language is political advertising, broadcasters should be immune from liability under Farmers. In addition, under the standard applied by the Commission in the Julian Bond case[98] broadcasters have traditionally been powerless to prevent a candidate from using offensive material in advertisements.

While Farmers precludes any censorship of an ad's content, CBS requires that broadcasters accommodate the campaign needs of political candidates for federal office. Despite the possible impact that political ads depicting abortions may have on children, Section 315(a) bans any censorship by broadcasters. This prohibition should include channeling because channeling would in fact violate the principles affirmed in both Farmers and CBS.

Taken together, Section 312(a)(6) of the Communications Act and 18 U.S.C. § 1464 allow the FCC to revoke a broadcaster's license if indecency and obscenity are allowed on the air. These statutes conflict directly with the anti-censorship mandate of Section 315(a) of the Communications Act, however, and no appellate

court has addressed the interpretation of the conflicting provisions. To date, the only evidence that has been arrayed against the Farmers precedent is an informal 1984 letter[99] and the district court decision involving Becker.[100] Thus, until an appellate court, or ultimately the U.S. Supreme Court, resolves the conflict, there is no reason to fear the heavy penalties prescribed by Section 312(a)(6) for the violation of Section 1464, particularly given the U.S. Supreme Court's unequivocal position in Farmers.

As the previous discussion has demonstrated, broadcasters' concerns that airing potentially indecent political ads may bring about sanctions for violation of Section 1464 appear to be unwarranted. On the other hand, any expansion of the definition of indecency could lead to future incursions into that category of speech, which broadcasters are likely to abhor.

Even though, in light of the Farmers decision, broadcasters would not be liable for the broadcast of political ads containing pictures of aborted fetuses, in order to be responsive to their audience's concerns, broadcasters may want to implement some kind of warning when political ads containing graphic pictures of aborted fetuses are broadcast. This would allow viewers to exercise their discretion. For instance, broadcasters could have a twenty-second disclaimer that contains both an aural and visual component. Once the warning is given, the picture could fade to black before the political ad appeared on the screen.

Who would bear the cost of the additional twenty seconds is a matter that will likely stir additional debate. Considering that it is the choice of a political candidate to use pictures that have a potentially harmful or disturbing impact on viewers, particularly children, it would not be unreasonable to require candidates to bear the cost of the warning.

+ *First Place, Open Competition Law and Policy Division, Broadcast Education Association, Las Vegas, Nevada (1993).*

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ENDNOTES

1. 47 U.S.C. § 315(a) (1988) provides:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section.

2. See Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525 (1959).

3. See Letter from Wallace E. Johnson, Chief, BC, to Julian Bond, Atlanta NAACP, 69 F.C.C.2d 943 (1978).

4. See Letter from Ben F. Waple, Secretary, to Lonnie King, Atlanta NAACP, 36 F.C.C.2d 635 (1972).

5. See In re Complaint of Barry Commoner and LaDonna Harris Against NBC Radio, Memorandum Opinion and Order, 87 F.C.C.2d 1 (1980).

6. See Joe Flint, Graphic Political Spots Bedevil Stations, BROADCASTING & CABLE, Aug. 31, 1992, at 6.

7. See Letter from Roy J. Stewart, Chief, MM, to Vincent A. Pepper, Esq., Counsel, Gillett Comm. of Atlanta, Inc., 7 FCC Rcd. 5599, 5599 (1992).

8. In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y., N.Y., Memorandum Opinion and Order, 56 F.C.C.2d 94, para. 12 (1975), quoted in FCC v. Pacifica Found., 438 U.S. 726, 732 (1978).

9. The FCC has been involved in an intense anti-indecency campaign since 1987 and the "safe harbor" has been the subject of FCC, congressional, and judicial debate and actions. For an account of the changes in the regulation of indecency since 1987, see John Crigler and William J. Byrnes, Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy, 38 CATH. U. L. REV. 329 (1989).

The period during which it is safe to air indecency is itself the subject of controversy. From 1978 to 1987, it was from 10 p.m. to 6 a.m.; after a series of FCC actions in 1987, the FCC attempted to change the start of safe harbor to midnight. See In re Infinity Brdcst. Corp., Memorandum Opinion and Order, 3 FCC Rcd. 930, 937-38 n.47 (1987). The U.S. Court of Appeals for the District of Columbia Circuit, however, struck down the midnight safe harbor in Action for Children's TV v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) (ACT I). After several other legal maneuvers, see Action for Children's TV v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (ACT II), cert. denied sub nom. Children's Legal Found. v. Action for Children's TV, 112 S. Ct. 1281, and cert. denied, 112 S. Ct. 1282 (1992), it was unclear what time was safe for the broadcast of indecency. In order to avoid problems, the FCC decided not to punish indecent programs from 8 p.m. to 6 a.m. until clear rules that did not conflict with the court decisions in ACT I and ACT II were instituted. In 1992, however, Congress passed the funding bill for the Corporation for Public Broadcasting, which included a midnight safe harbor. See Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954. In November 1993, the U.S. Court of Appeals for the D.C. Circuit, acknowledging the government's compelling interest in protecting children from indecency, ruled that the midnight to 6 a.m. safe harbor

restriction was not sufficiently narrowly tailored to survive constitutional scrutiny, but the decision was vacated when the court granted rehearing. Action for Children's TV v. FCC, 11 F.3d 170 (D.C. Cir. 1993) (ACT III), vacated and reh'g granted en banc, No. 93-1092, 1994 WL 50415 (D.C. Cir. Feb. 16, 1994).

10. Letter from Roy J. Stewart to Vincent A. Pepper, supra note 7, at 5599.

11. 18 U.S.C. § 1464 (1988) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.").

12. 47 U.S.C. § 312(a)(6) (1988).

13. 47 U.S.C. § 312(a)(7) (1988).

14. 47 U.S.C. § 312(a)(7) (1988) (providing for revocation of a license "[f]or willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy").

15. See Political Brdcst. and Cablecasting, Primer, 100 F.C.C.2d 1476, para. 73 (1984) (quoting Use of Brdcst. and Cablecast Facils. by Candidates for Pub. Office, Public Notice, 34 F.C.C.2d 510, 536 ("The Commission will not substitute its judgment for that of the licensee but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling its obligations under this section.")).

16. Id. para. 74; In re Commission Policy in Enforcing § 312 (a)(7) of the Comm. Act, Report and Order, 68 F.C.C.2d 1079, para. 40 (1978).

17. CBS, 453 U.S. 367 (1981).

18. Id. at 387.

19. Id. at 372-73.

20. Id. at 394.

21. Id. at 387-88.

22. Id. at 389.

23. 47 U.S.C. § 315(a) (1988).

24. Farmers, 360 U.S. 525 (1959).

25. Id. at 529-30.

26. Id. at 533.

27. Letter from Ben F. Waple to Lonnie King, supra note 4.

28. Id. at 635. The text of J. B. Stoner's ad was as follows:

> I am J. B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell's civil rights law. Gambrell's law takes jobs from us whites and gives those jobs to the niggers. The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too. Vote white. This time vote your convictions by voting white racist J. B. Stoner into the run-off election for U.S. Senator. Thank you. Id. at 636.

29. Id. at 635.

30. Id. at 636-37 n.1.

31. Id. at 637.

32. Id. (quoting In re Complaint of Anti-Defamation League of B'nai B'rith Against Station KTYM, Inglewood, Cal., Memorandum Opinion, 4 F.C.C.2d 190, 191 (1966), aff'd sub nom. Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169 (D.C. Cir. 1968), cert. denied, 394 U.S. 930 (1969)).

33. Pacifica, 438 U.S. 726 (1978).

34. Letter from Wallace E. Johnson to Julian Bond, supra note 3, at 943.

35. Pacifica, 438 U.S. app. at 751.

36. Id. at 732 (quoting In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y., N.Y., Memorandum Opinion and Order, 56 F.C.C.2d 94, para. 12 (1975)).

37. Letter from Wallace E. Johnson to Julian Bond, supra note 3, at 944.

38. Id.

39. In re Complaint of Barry Commoner and LaDonna Harris Against NBC Radio, Memorandum Opinion and Order, 87 F.C.C.2d 1 (1980).

> Man: Bullshit.
>
> Woman: What?
>
> Man: Carter, Reagan and Anderson. It's all bullshit.
>
> Barry: Too bad people have to use such strong language. But isn't that what you think, too? That's why we started an entirely new political party. The Citizens Party. The truth is we've got to break the power of the big corporations. Profit-oriented corporate decisions have left the rest of us with high inflation, nuclear insanity, and a poisoned environment. This is Barry Commoner. I'm the Citizens Party candidate for President, along with LaDonna Harris, our Vice-Presidential candidate. We'll be on the ballot in 30 states. If we can poll just 5% in this election, we'll get millions in federal funding to organize for the next election. Why not vote for us, Barry Commoner and LaDonna Harris.

Id. app. A at 7.

40. Id. para. 3.

41. Id. para. 11.

42. Pacifica, 438 U.S. 726 (1978).

43. Young listeners or not, the broadcast of obscene material is prohibited at all times. The basic guidelines followed in identifying obscenity are set out in Miller v. California, 413 U.S. 15 (1973):

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

Id. at 24.

44. See In re Infinity Brdcst. Corp., Memorandum Opinion and Order, 2 FCC Rcd. 2705 (1987); In re Regents of the Univ. of Cal., Memorandum Opinion and Order, 2 FCC Rcd. 2703 (1987); In re Pacifica Found., Inc., Memorandum Opinion and Order, 2 FCC Rcd. 2698 (1987); New Indecency Enforcement Stds. to Be Applied to All Brdcst. and Amateur Radio Licensees, Public Notice, 2 FCC Rcd. 2726 (1987).

45. In re Infinity Brdcst. Corp., Memorandum Opinion and Order, 3 FCC Rcd. 930, 937-38 n.47 (1987).

46. Id. para. 30.

47. Id. paras. 7, 10.

48. Id. at 937-38 n.47.

49. Action for Children's TV, 852 F.2d 1332 (D.C. Cir. 1988).

50. Id. at 1341-44.

51. See Dennis McDougal, Broadcasters May Protest New Indecency Ban, L.A. TIMES, Oct. 7, 1988, Calendar Section, at 1; see also Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988).

52. 47 C.F.R. § 73.3999 (1992).

53. Action for Children's TV v. FCC, 932 F.2d 1504, 1507 (D.C. Cir. 1991) (citing Action for Children's TV v. FCC, No. 88-1916 (D.C. Cir. Jan 23, 1989)), cert. denied sub nom. Children's Legal Found. v. Action for Children's TV, 112 S. Ct. 1281, and cert. denied, 112 S. Ct. 1282 (1992).

54. Id.

55. Id. at 1509.

56. Id. at 1510 (quoting Action for Children's TV, 852 F.2d at 1344).

57. Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (codified at 47 U.S.C. § 396 (West Supp. 1993)).

58. Id. § 16(a), 106 Stat. at 954.

59. Action for Children's TV v. FCC, 11 F.3d 170 (D.C. Cir. 1993), vacated and reh'g granted en banc, No. 93-1092, 1994 WL 50415 (D.C. Cir. Feb. 16, 1994); see also Joe Flint, Indecency Rules Under Fire in Courts at FCC, BROADCASTING & CABLE, Mar. 1, 1993, at 44.

60. Steven W. Colford, More Fetus Ads Are Coming, ADVERTISING AGE, May 18, 1992, at 18, 18.

61. Anti-Abortion TV Ads Catch on in Campaigns, WASH. POST, July 20, 1992, at A1.

62. Id.

63. Russell Shaw, Graphic Political Ads Vex Local TBS Viewers, ELECTRONIC MEDIA, July 20, 1992, at 8.

64. See Letter from Roy J. Stewart to Vincent A. Pepper, supra note 7.

65. Id. at 5599.

66. Id.

67. Id.

68. Id. at 5600.

69. Id. n.3.

70. Gillett Comm., Inc. v. Becker, 807 F Supp. 757, 759 (N.D. Ga. 1992), appeal dismissed, 5 F.3d 1500 (11th Cir. 1993).

71. Id.

72. Id.

73. Id. at 760.

74. Id. at 761.

75. Id. at 762.

76. Id.

77. High Court OKs Ban on TV Ads Showing Abortions, CHI. TRIB., Nov. 2, 1992, at 8.

78. Letter from Roy J. Stewart, Chief, MM, to Daniel Becker, 7 FCC Rcd. 7282 (1992).

79. Id. (citing Letter from Mark S. Fowler, Chairman, FCC, to Hon. Thomas A. Luken (Jan. 19, 1984)).

80. Id. On October 30, 1992, the FCC issued a Public Notice Request for Comments asking about the rights or obligations a broadcaster may have to channel political advertisements he or she believes, in good faith, to be indecent. The FCC also asked for comment on the issue of whether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children. The deadline for public comment was January 22, 1993. Reply comments could be filed until February 23, 1993. See In re Petition for Declaratory Ruling Concerning § 312(a)(7) of the Comm. Act, Request for Comments, 7 FCC Rcd. 7297 (1992).

81. See, e.g., Letter from Ben F. Waple to Lonnie King, supra note 4, at 637.

82. Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 252.

83. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

84. Buckley v. Valeo, 424 U.S. 1, 52-53 (1976).

85. Letter from Wallace E. Johnson to Julian Bond, supra note 3, at 944.

86. Letter from Roy J. Stewart to Vincent A. Pepper, supra note 7, at 5600.

87. See, e.g., In Re Applications of Palmetto Brdcst. Co., Decision, 33 F.C.C. 250 (1962), recon. denied, 34 F.C.C. 1011 (1963), aff'd sub nom. Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964), cert. denied, 379 U.S. 843 (1964). This case, known as the Charlie Walker case, involved the use of offensive language by a disc jockey at Station WDKD in Kingstree, South Carolina. Among the subjects requiring the Commission's action was whether Walker had broadcast material that violated § 1464. At the time this decision was issued, the FCC had not clearly defined indecency, but the Commission dealt with the issue by saying that Walker had broadcast language that was "coarse, vulgar, suggestive or susceptible of indecent double meaning." Id. para. 23.

In Sonderling Broadcasting Corp., 27 Rad. Reg. 2d (P & F) 285, recon. denied, 41 F.C.C.2d 777 (1973), aff'd sub nom. Illinois Citizens Committee for Brdcst. v. FCC, 515 F.2d 397 (D.C. Cir. 1975), the FCC issued a forfeiture against a radio station that aired a program that dealt largely with sexual topics. This was the first time that the FCC said that the discussions of sex were handled in a "titillating and pandering fashion." Id. at 290.

88. Letter from the FCC to Peter Branton, 6 FCC Rcd. 610 (1991); All Things Considered Segment on John Gotti Found to Be Not Indecent, FCC Rpt. No. MM-520, 1991 FCC LEXIS 469 (Jan. 25, 1991). In June 1993 the Court of Appeals for the D.C. Circuit held that Branton lacked standing to challenge the FCC's decision. Branton v. FCC, 993 F.2d 906, 908 (D.C. Cir. 1993).

89. In re Liability of Sagittarius Brdcst. Corp., Memorandum Report and Order, 7 FCC Rcd. 6873, para. 7 (1992) (citing Letter from Roy J. Stewart, Chief, MM, to Mel Karmazin, Pres., Sagittarius Brdcst. Corp., 5 FCC Rcd. 7291, 7294 n.3 (1990)).

90. In re Liability of Goodrich Brdcst., Inc., for a Forfeiture, Memorandum Opinion and Order, 6 FCC Rcd. 7484, para. 6 (1991).

91. Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525, 529 (1959).

92. Id. at 530.

93. In re Infinity Brdcst. Corp., Memorandum Opinion and Order, 3 FCC Rcd. 930, paras. 25-27 (1987).

94. CBS, 453 U.S. 367, 386-90 (1981).

95. In re Complaint of Barry Commoner and LaDonna Harris Against NBC Radio, Memorandum Opinion and Order, 87 F.C.C.2d 1, para. 10 (1980).

96. Letter from Roy J. Stewart to Vincent A. Pepper, supra note 7, at 5600.

97. See FCC v. Pacifica Found., 438 U.S. 726 (1978); Action for Children's TV v. FCC, 852 F.2d. 1332 (D.C. Cir. 1988).

98. Letter from Wallace E. Johnson to Julian Bond, supra note 3.

99. Letter from Mark S. Fowler, Chairman, FCC, to Hon. Thomas A. Luken (Jan. 19, 1984), noted in Letter from Roy J. Stewart to Vincent A. Pepper, supra note 7, at 5600 n.3.

100. Gillett Comm., Inc. v. Becker, 807 F. Supp. 757 (N.D. Ga. 1992), appeal dismissed, 5 F.3d 1500 (11th Cir. 1993).

HIGH COURT DECLINES FREE SPEECH CHALLENGE

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The Supreme Court refused yesterday to limit the authority of government-sponsored events such as fairs, festivals and parades to bar "inappropriate" groups from participating.

The Court, over a dissent by Justice Sandra Day O'Connor, refused to hear the appeal of an advocacy group opposing abortion that said its free-speech rights were violated when it was excluded from the 1990 "Great Pumpkin Festival" in Frankfort, Ky., Capital Area Rights to Life v. Downtown Frankfurt Inc., 93-1201.

The case had involved issues raised in the dispute involving New York City's annual St. Patrick Day Parade.

For several years, the parades sponsors have refused to allow homosexual rights groups from marching. In 1992, a federal judge ruled that city officials could not force the sponsor to allow participation by such groups.

The Kentucky dispute stemmed from the refusal of the sponsors of a civic festival promoting the revitalization of Frankfort, the state's capital, to allow Capitol Area Right to Life (CARTL) to participate by having a booth. At a similar festival a year earlier, the group drew complaints by giving plastic fetuses to children.

Last July, the Kentucky Supreme Court ruled that while the sponsor was a government agent because the city was delegated contol of the festival to it, no constitutional violation occurred.

"It is a critical fact . . . that CARTL's counterparts, the National Organization for Women and the Religious Coalition for Abortion Rights, were also denied booths," Kentucky's highest court ruled. Members of all three groups are still free to attend the festival and talk about their causes, the court said.

Fired Workers' Suits

In a second case, the Justices gave public employers added protection from lawsuits by workers fired for making statements later found to be constitutionally protected, Waters v. Churchill, 92-1450. It ruled in all Illinois case that public employers cannot be forced to pay damages if, at the time of the firing, they reasonably believed the worker simply was being insubordinate.

The decision yielded four separate opinions, and none commanded a majority. But in the main opinion, Justice O'Connor wrote for herself and three other Justices that employees can be fired for making insubordinate statements even if they made other statements that would be constitutionally protected.

The case involved a nurse, Cheryl Churchill, fired a hospital district after another nurse reported Ms. Churchill had criticized her supervisor and said the obstetrics department was a bad place to work. The fired nurse contended she actually had been criticizing her supervisors' policy of using nurses inexperienced in obstetrics to make up a staffing shortage in the department. The ruling set aside a Seventh Circuit Court of Appeals decision allowing the suit.

ALBANY IN ACCORD ON SCHOOL DISTRICT FOR HASIDIC GROUP

The New York Times
July 2, 1994, Saturday, Late Edition Final
James Dao, Special to The New York Times

Just four days after the United States Supreme Court ruled that a public school district created specially for ultra-Orthodox Jews was unconstitutional, Gov. Mario M. Cuomo and legislative leaders reached agreement today on a bill that would allow the district to continue operating.

The legislation is intended to address constitutional issues raised by the high court when it struck down the Kiryas Joel Village School District in Orange County, which was created by the Governor and Legislature in 1989 to serve about 200 Satmar Hasidic children with disabilities.

The Hasidic parents did not want to send their children to the local public schools but wanted to receive Federal and state aid to pay for special education.

Critics of the arrangement contend that it fragments education at a time when the state is trying to consolidate school districts. They argue that the Legislature is responding to the political power of the Hasidim, a charge that lawmakers deny.

The Supreme Court majority had ruled that establishing the district amounted to improper favoritism toward religion in general and one sect in particular. But in drafting their bill, the Legislators seized on an opening they believed was supplied by Justice Sandra Day O'Connor, who said in a concurring opinion that the district might have been permissible if it had been created through legislation applicable to any municipality, not just Kiryas Joel, a village about 50 miles northwest of Manhattan whose residents are all Satmar Hasidim.

The lawmakers said their new bill would meet that standard by allowing all municipalities that fit specific criteria to establish new school districts. Currently, only state education officials can create new districts, something that rarely happens.

Legislative aides said that between 20 and 60 towns in addition to the village of Kiryas Joel, could create new school districts under the new bill.

"It's right on point with Justice O'Connor's decision," said Assembly Speaker Sheldon Silver, a Manhattan Democrat who sponsored the bill. "It's mentioned in the ruling that if it's done this way, it would be fine."

But critics of the legislation said it addressed the concerns of only one justice and not necessarily the court's majority. And they charged that the Governor and Legislature had rushed to help the 12,000-resident Satmar community because they are thought to vote and give political contributions in a bloc.

"I'm personally disappointed in the utter disrespect and disregard the Governor and Legislature have for the Supreme Court," said Louis Grumet, executive director of the New York State School Boards Association. "This law would encourage the very balkanization I thought everyone was moving against."

Mr. Grumet, who brought the original court challenge against the Kiryas Joel district, said the School Boards Association as a group and he as an individual taxpayer would challenge the new legislation in court.

Intent to Move Quickly

But supporters of the bill said they had to act quickly because the legislative session is scheduled to end this week. And they said there is little evidence that the Satmars have the political clout to make an entire Legislature act.

"It is offensive to say we are helping the Jewish community because they vote and participate in the political process," said Assembly Jules Polonetsky, a Brooklyn Democrat who co-sponsored the bill.

Mr. Grumet and other critics also contended that Mr. Cuomo, who has spoken passionately about the importance of keeping church and state separate, had used legal technicalities to sidestep a Supreme Court ruling on that very issue.

'A Duty to Protect'

Mr. Cuomo could not be reached for comment this afternoon. But earlier this week he said he had signed the Kiryas Joel legislation in 1989 because "I believe government has a duty to protect

and serve all its citizens, regardless of their religious beliefs."

He added, "I believe that while the Constitution, thankfully, bars government from forcing anyone to be religious, it does not mandate that we punish people for being religious."

The Legislature was expected to pass two bills that would deal with Kiryas Joel. The first would abolish the existing school district, but allow existing educational services to continue until a new school district is formed, possibly this summer.

The second would establish criteria for creating new districts: Municipalities must have at least 2,000 students and come from established districts with at least 4,000 students. New districts would have to be at or above the state average in wealth and leave behind districts whose wealth would be essentially unchanged.

Those measures were designed to prevent small towns from creating new districts and to insure that wealthy villages could not secede from school districts that include poor areas.

A Three-Step Process

A new district would require three steps of approval: first from the municipal council, then from the local electorate and finally from two-thirds of the existing school district's board of education.

When told of the legislative agreement, residents of Kiryas Joel responded ecstatically. "For my child, it means the difference between a nice life and nothing, barrenness," said Judith Gluck, whose six-year-old son attends the school district. "Every time I talk about it, my tears well up."

ATTACKING RELIGIOUS ACCOMMODATION

The Washington Times
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Last Monday, the U.S. Supreme Court perversely employed the doctrine of church-state separation as a sword against laudatory government accommodation of religion.

Writing for the majority in Board of Education of Kiryas Joel Village School District vs. Grumet, Justice David Souter decried the creation of a special school district to facilitate the receipt of secular educational services for handicapped Hasidic Jews. But the Constitution should celebrate, not chastise, such enlightened government sensitivity.

Incorporated in 1977 and holding a population approximating 8,500 today, the village of Kiryas Joel is overwhelmingly inhabited by Hasidic Jews. They scrupulously resist encounters with modernity, although seclusion is not mandated by their creed. As Justice Souter elaborated: "They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools."

A pair of 1985 Supreme Court decisions forced the government to withdraw special educational services for handicapped children of Kiryas Joel provided on private religious school premises. The educational services remained available at public schools outside the village, but were generally shunned by Hasidic parents. Their handicapped children suffered "panic, fear and trauma" from immersion in a public school culture that warred with their own.

In 1989, to accommodate the Hasidic culture, the New York legislature constituted the village as a separate school district with an elected board of education empowered to operate a secular public school system. The district, however, chose to confine itself to a secular special educational program for handicapped children because the nonhandicapped preferred their parochial schools. The school superintendent, a non-Hasidic, was a 20-year veteran of the New York public school system possessing bilingual, bicultural, and special educational expertise. Teachers and therapists resided outside the village, and no religion was smuggled into the purely secular curriculum. In sum, the school district operated without offending even the most ardent church-state separationist.

Justice Souter, however, insisted that the creation of the school district itself affronted the establishment clause of the First Amendment. To reach that astonishing conclusion, he conjured up reasons that might be likened to interpretive thaumaturgy.

The establishment clause inarguably prohibits government from favoring one religion over another, or religious adherents generally over nonadherents. According to Justice Souter, New York transgressed that neutrality by drawing a school district boundary that would inevitably eventuate in Hasidic control of the board of education. But that should have been constitutionally irreproachable. The boundaries were intended to accommodate the special educational needs of handicapped children and Hasidic culture, not to champion or emblazon the Hasidic creed. And it was happenstance that the former would be accomplished through a public school district inhabited virtually exclusively by a particular religious group, a happenstance comparable to the Mormon political juggernaut in Utah that was foreordained when Utahwas admitted as a state. Since government officeholders are required to act with religious neutrality, their religious affiliations should be of no constitutional moment. Indeed, the Supreme Court declared in McDaniel vs. Paty (1978) that constitutionally protected religious freedom prohibits government from handicapping individuals in the electoral process based on their religion or nonreligion.

Justice Souter also faulted the New York legislature for failing to ensure that non-Hasidic groups would be equally accommodated. He fretted: "[W]e have no assurance that the next similarly situated group [to the Hasidic Jews] seeking a school district of its own will receive one." But until such a request is denied, there is no justification for constitutional reproach. Not an iota of evidence suggested the legislature was recalcitrant toward a non-Hasidic supplication during the five years postdating creation of the special school district, or

would be so in the future. Nor were the Hasidics politically daunting with their puny 8,500 village population. Roman Catholics would seem to wield substantially more clout.

It speaks volumes, moreover, that the constitutionality of the school district was assailed by citizen-taxpayers, not by a religious adherent or group alleging a denial of equal accommodation. And it is commonplace for government to create legislative exceptions with reference to particular religious practices without anticipating what might be legislatively required in the future by the constitutional mandate of religious evenhandedness. Federal law, for instance, permits the "use of peyote in any form in connection with the religious practices, sacraments or services of the Native American Church." And the National Prohibition Act legalized "wine for sacramental purposes."

If New York, in fact, ever strayed from the constitutional obligation of religious neutrality in establishing special school districts, the activist jurisprudence of Justice Souter would find no difficulty in slaying the heresy. Further, Justice Souter's neutrality worry seems contrived; he nowhere hints that New York's objective could be saved by authorizing an administrative body to create special school districts at request, coupled with an injunction of evenhandedness among religious groups.

Something is rotten in the state of constitutional law when legislatures are instructed to display religious callousness. The sermonizing of Grumet should evoke lamentations, not hallelujahs.

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JUSTICES UNITE FOR EXPRESSION VIA A YARD SIGN

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It is a simple idea: putting a sign on the lawn or a banner in the window to announce one's politics or the baby's arrival. But the city of Ladue, Mo., an exclusive suburb of St. Louis, was concerned about appearances and said no such signs were allowed.

Yesterday, free speech prevailed.

In a broadly written opinion, the Supreme Court ruled 9 to 0 that cities may not prohibit residents from putting political or personal signs in their yards. The decision confirmed the rights of people to use their property to express themselves, whether it be to say, "For Peace in the Gulf" (which the city forbade) or "Dear Santa, Julie lives here" (which escaped enforcement).

The court stressed the venerable tradition of communicating through signs and banners at one's home.

"A special respect for individual liberty in the home has long been part of our culture and our law," Justice John Paul Stevens wrote for the court, "That principle has special resonance when the government seeks to constrain a person's ability to speak there."

Stevens added that signs are an unusually cheap and convenient form of communication, "especially for persons of modest means or limited mobility."

The ruling, plainly showing the First Amendment limits that municipalities face in trying to control visual blight, casts doubt on numerous sign ordinances throughout the country.

"Our sincere concern from this decision is that the Supreme Court has broken new ground that strikes at the very core of local land use and zoning ordinances," said Jordan B. Cherrick, who represented Ladue.

Ladue's ordinance generally prohibited all signs within its 8.5 square miles. However, exemptions were allowed for real estate signs, road and safety hazard signs, health inspection signs, public transportation markers and commercial signs in commercially zoned or industrial districts.

Officials said that since its founding in 1936, Ladue has tried to protect the aesthetics of the leafy, insular community.

The ordinance was challenged by Margaret Gilleo who, in late 1990 as the U.S.-led war with Iraq was imminent, put a small antiwar sign in the second-floor window of her colonial-style home. The sign said "For Peace in the Gulf."

Lower courts ruled for Gilleo, saying Ladue was wrongly favoring some speech "content" over others by allowing real estate signs but forbidding political protest.

Yesterday, the Supreme Court agreed, but rather than saying that the ordinance discriminates on the basis of the signs' message as the appeals court had, the high court said it simply prohibits too much speech.

"Ladue has almost completely foreclosed a venerable means of communication that is both unique and important," Stevens said. "It has totally foreclosed that medium to political, religious, or personal messages. Signs that react to a local happening or express a view on a controversial issue both reflect and animate chance in the life of a community."

Being able to speak from one's home is often critical to the message, he said, rejecting the city's arguments that people could use letters, handbills, fliers, telephone calls and other media to communicate. "A sign advocating 'Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile."

Stevens acknowledged that cities have good reasons to be concerned about some signs. "Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation."

The ruling does not affect cities' ability to regulate the size and number of home signs, and Stevens suggested residents themselves, trying to keep up property values, likely are a check on sign proliferation.

The justices' unanimity in the case was unusual. Typically, disputes over municipal regulations have produced splintered opinions on what First Amendment test should be used. Only Justice Sandra Day O'Connor wrote separately in City of Ladue v. Gilleo. She said in a concurring statement that the court should have used its traditional analysis of looking at whether the city was trying to stifle the content of certain messages, rather than approaching the case so broadly.

Gilleo was elated. A community activist, she already had announced she was running for Congress to represent Missouri's 2nd District. She said yesterday that she now would put up a campaign sign in her front yard.

Several municipal organizations, including the National League of Cities and U.S. Conference of Mayors, had sided with Ladue. They contended that Ladue was not trying to exclude certain messages but rather deal with the problem of sign proliferation.

SUPREME COURT CONNECTS CABLE TV TO FREE SPEECH PROTECTIONS OF PRESS

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Joan Biskupic, Washington Post Staff Writer

The Supreme Court unanimously said for the first time yesterday that cable television is entitled to nearly the same constitutional guarantees of free speech as newspapers and magazines.

The ruling will have no immediate impact on cable television viewers, but it will give cable systems, telephone companies and other "Information Age" communications systems new protection against government interference and an advantage over broadcasters who are subject to more regulation.

The ruling left unresolved the dispute that was at the heart of the case: whether Congress can require cable systems to devote up to one-third of their channels to retransmitting the signals of local television stations.

Bruce Collins, C-SPAN general counsel, said yesterday he was disappointed that the court did not strike down the "must carry" regulations which require the cable systems to carry some local programming instead of other television programs available nationally, for example, C-SPAN.

Even so, Collins said, the case was important for its "defining statement about the First Amendment rights of cable. In the old days, cable was considered ancillary to broadcasters."

Congress adopted "must carry" provisions in a 1992 cable rate law to offset what it saw as a competitive imbalance between the cable industry and over-the-air broadcasters. Sixty percent of all TV viewers subscribe to cable. Members of Congress feared that advertisers would lose interest in locally based commercial and educational channels if the government did not require cable to carry them.

Cable operators attacked the regulations as a violation of their free speech rights. Meanwhile some cable viewers complained that channels that were personal favorites were dropped to make room for local broadcasts.

While there was unanimity for enhanced constitutional protection for cable, a narrow five-justice majority refused to strike down the "must carry" regulations, as the cable industry had sought. The majority said the regulations may be constitutional because they were intended to preserve access to free television rather than control the content of cable programs. With Justice Anthony M. Kennedy writing for the court, the majority said the regulations "are not designed to favor or disadvantage speech of any particular content," rather "to protect broadcast television from ... unfair competition."

Dissenting justices, led by Sandra Day O'Connor, countered that the regulations were impermissibly aimed at program "content" and should be rejected as a violation of free speech. The Kennedy majority sent the case back to a lower court for additional findings.

Most significantly, the ruling set up new legal ground rules for cable television and wire-based communications systems. The justices said for the first time that such communications should have more protection from governmental interference under the First Amendment than broadcasters, who traditionally have been subject to more regulation because of the scarcity of channels.

"Cable television does not suffer from the inherent limitations that characterize the broadcast medium," Justice Anthony M. Kennedy wrote in a section of the opinion joined by all the justices. "Indeed, given the rapid advances in (technology), soon there may be no practical limitation on the number of speakers who may use the cable medium."

Kennedy, joined by all of the justices, said a cable regulation should be upheld only if it furthers an "important or substantial" government interest. That speech standard is not quite as high as protections traditionally accorded newspapers, but it is greater than protections for broadcasters.

Yet even with a new standard, yesterday's decision will not necessarily allow cable companies to escape from federal regulations that force them to carry local broadcasting.

Kennedy, writing in this portion for five justices, said a D.C. federal court now must determine how financially burdened the broadcast

industry would be without the "must carry" requirement. He said it was "significant" that no evidence that local broadcast stations have fallen into bankruptcy had been presented in an earlier hearing. The U.S. District Court here upheld the regulations last year.

O'Connor, writing a partial dissent, said the regulations ensure that cable programmers will be dropped in favor of broadcasters.

They "are an impermissible restraint on the cable operators' editorial discretion as well as on the cable programmers' speech," O'Connor wrote. "For reasons related to the content of speech, the rules restrict the ability of cable operators to put on the programming they prefer, and require them to include programming they would rather avoid."

For television watchers, the ruling suggests that cable companies will continue to be required to offer local commercial and educational broadcast stations such as Washington's Channel 50, or Howard University Television's Channel 32.

The trade-off, according to cable spokesmen, is that in some areas, C-SPAN or the Discovery Channel, for example, will not offered.

Broadcasters, cable companies and the government accentuated the positive yesterday.

Daniel Brenner, of the National Cable Television Association, lauded the new legal standard for cable and contended the industry would be able to show a lower court that the congressional regulations were not justified because "the economic state of broadcasting is robust."

But Reed Hundt, chairman of the Federal Communications Commission, and Jack Goodman, of the National Association of Broadcasters, asserted that the regulations are necessary to keep some local broadcasters in business.

Joining Kennedy were Chief Justice William H. Rehnquist and Justices Harry A. Blackmun and David H. Souter. Justice John Paul Stevens, who said he wanted to uphold the "must carry" rule, agreed to become the crucial fifth vote.

O'Connor was joined in the dissent by Justices Antonin Scalia, Ruth Bader Ginsburg and Clarence Thomas.

The case is Turner Broadcasting Corp. v. Federal Communications Commission.

Staff writer Paul Farhi contributed to this report.

ADVERTISING AND THE FIRST AMENDMENT
A Practical Test for Distinguishing Commercial Speech from Fully Protected Speech

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Because of the substantially greater amount of regulation that is allowed under the First Amendment for commercial speech compared with fully protected speech, it is important to be able to distinguish between the two consistently, correctly, and simply. This task is complicated by the increasing merging of traditional product advertising and corporate image advertising. The author reviews what little guidance the Supreme Court and commentators have provided on making this distinction and then proposes a simple method for accomplishing this task. If people are likely to be influenced by the speech in their role as consumers of goods and services, the speech should be deemed commercial. If they are likely to be influenced in their capacity as members of the electorate, or in some other nonconsumer capacity, the speech should be considered fully protected. This model can be readily applied by marketing managers and is consistent with Supreme Court cases.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." This prohibition has been applied to branches of the federal government other than Congress. It also has been applied to state and local governments. Its basic purpose was to ensure free debate on political issues [Rome and Roberts 1985].

As summarized by Cohen [1978] and detailed by Linn [1988] and Eberle [1992], the United States Supreme Court initially held that commercial speech was not entitled to First Amendment protection. It reversed this holding in Virginia Board of Pharmacy v. Virginia Citizens Consumer Council [1976], in which a citizens group challenged a Virginia state law that declared it "unprofessional" for a pharmacist to advertise the price of its prescription drugs. The Court held that speech that "does no more than propose a commercial transaction" is entitled to some First Amendment protection.

The Court based its holding on the fact that "society also may have a strong interest in the free flow of commercial information." It stated [p. 765]:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable.

Though holding that commercial speech is protected by the First Amendment, the Court specifically noted the propriety of (1) reasonable "time, place, and manner" regulation; (2) possibly regulating commercial speech in the electronic media because of problems unique to that media; (3) prohibiting commercial speech that proposes illegal transactions; and (4) restrictions of false or misleading commercial speech. It justified these limits to the First Amendment protection of commercial speech because of this type of speech's objective nature (more easily verifiable than other types of speech) and its profit-driven durability-the Court labelled commercial speech the "sine qua non of commercial profits."

In Central Hudson Gas & Electric v. Public Service Commission of New York [1980], the Court clarified, over rigorous dissent by Justice Blackmun, that all commercial speech is entitled to less First Amendment protection than fully protected speech. Justice Blackmun disagreed with this dichotomous treatment of speech and argued that both types of speech are entitled to full protection generally, subject to the exceptions noted in Virginia Board. Despite his dissent and similar arguments by commentators [e.g., Eberle 1992; Shiffrin 1983], the Court currently allows greater regulation of commercial speech than it allows for fully protected speech.[1]

The government cannot regulate such fully protected speech unless the regulator advances a compelling state interest and the means used to regulate speech is closely related to advancing that interest [Bates v. Little Rock 1960]. Moreover, for fear of "chilling" valuable speech, the Supreme Court has decided that false statements made in political speech receive First Amendment protection unless the false statement was deliberately and knowingly made [New York Times v. Sullivan

1964]. It also generally condemns any restraint of fully protected speech prior to its dissemination, even if that speech could be regulated after its expression [Bantam Books. Inc v. Sullivan 1963].

The Supreme Court allows greater government regulation of commercial speech. In addition to the Virginia Board exceptions discussed previously, the Court repeatedly has stated that false or misleading statements in commercial speech and proposals for illegal transactions can be prohibited [e.g., Zauderer v. Office of Disciplinary Counsel 1985, p. 638]. Similarly, commercial speech that is subject to abuse, such as in-person solicitation by attorneys after accidents when the victim is vulnerable and may be pressured into representation, may be banned [In re R.M.J. 1982, p. 2031.

Furthermore, in a recent 5-4 decision, the Supreme Court decided that truthful commercial speech can be completely prohibited if the product or service it concerns could be banned [Posadas de Puerto Rico Assoc. v. Tourism Co. 1986]. This extends the concept that speech proposing illegal transactions is not protected to include speech proposing transactions that the government could choose to make illegal even if it has not decided to do so. In United States v. Edge Broadcasting Co. [1993], the Court followed this concept by upholding a federal statute that prohibited broadcasters located in states with no state lottery from accepting advertising for lotteries run by other states. The Court refused simply to find that the advertising could be banned as a lesser included power to prohibit lotteries themselves. Rather, it applied a Central Hudson analysis and found that the statute directly advanced and reasonably fit the government interest of balancing the interests of lottery and non-lottery states. Though the 127,000 North Carolina residents that listened to Edge were exposed to lottery advertising from the nearby Virginia media, the Court held that reducing their exposure to such advertising by 11% (the proportion of radio listening time accounted for by Edge) was significant and directly advanced the government's interest.[2]

However, there are limits to the amount of acceptable regulation of commercial speech. In-person solicitation by certified public accountants is not subject to the same sorts of abuse as attorney solicitation and cannot be banned [Edenfield v. Fane 1993]. In addition, commercial speech that is not actually or inherently misleading, but only potentially misleading, can be regulated but not completely prohibited [Peel v. Attorney Registration and Disciplinary Commission of IL 1990, p. 4687].

In 1980, the Supreme Court established a four-part test for analyzing the acceptability of governmental regulation of commercial speech under the First Amendment [Central Hudson Gas & Electric v. Public Service Commission of New York 1980]. First, did the speech concern lawful activity and was it not misleading? If so, it is protected by the First Amendment. Second, was the asserted governmental interest substantial? Third, did the regulation directly advance the governmental interest? Finally, was the regulation no more extensive then necessary to serve the government interest? [Central Hudson Gas & Electric v. Public Service Commission of New York 1980, p. 566]. The Court recently clarified that its requirement that commercial speech regulation be no more extensive than necessary to advance the state interest is a less stringent requirement than the "closely related" requirement for fully protected speech [Board of Trustees of the State University of New York v. Fox 1989].

Therefore, as the Board of Trustees decision emphasizes, the Supreme Court allows more government regulation of commercial speech than fully protected speech. This distinction is of critical importance for those companies engaging in communications other than product advertising.

For example, Schumann, Hathcote, and West [1991] suggest that expenditures on corporate advertising, that is, advertising that describes or identifies the corporation itself and/or its activities or views, are significant. They suggest that between 40% and 60% of reasonably large companies employ corporate advertising. It accounts for about 1% of all advertising expenditures, which may sound minimal, but amounts to over $100 million. Individual companies may spend tens of millions of dollars on corporate advertising.

According to Schumann, Hathcote, and West [1991], the purposes of corporate advertising vary and have changed over time. Initially, it was employed to obtain goodwill and portray a positive company image. During the troubled 1970s, it became more of a platform for advocacy on important public issues. Today, it is often viewed as a support function to promote the products or services offered by the company.

Contrary to Schumann, Hathcote, and West [1991], a recent survey of corporate advertisers by the Association of National Advertisers [1990] suggests the primacy of corporate advertising's original goal of obtaining good will and portray a positive company image. Approximately three-quarters of the respondents in both the 1990 and the 1988 surveys indicated that one objective of their corporate advertising was to provide a level of awareness about the company and enhance its

reputation. Support for product and service marketing efforts declined from nearly 60% in 1988 to less than 33% in 1990. Informing and educating the public on issues of importance to the company increased slightly as an objective from 20% of the respondents in 1988 to 25% in 1990.

The modest estimates of the amounts of corporate advertising do not necessarily include the "hybrid" advertising that is now emerging [Hartigan and Finch 1986]. Such advertising informs about the company, possibly a public issue, and the company's products or services. Thus, with corporate advertising and "hybrid" advertising, the line between product advertising and other types of communication that might be characterized as fully protected speech appears ever blurring.

This article assists managers considering corporate or hybrid advertising by presenting a simple model for determining whether a particular campaign will be deemed commercial speech subject to regulation or fully protected speech under the First Amendment. This model also could be used by the courts in deciding such cases.

The remainder of this article first examines how the Supreme Court says it distinguishes commercial speech from fully protected speech. The proposed model is then explained and compared with proposals of other commentators. Finally, a series of "close cases" are examined as applications of the proposed model.

The Supreme Court's Approach to Distinguishing Types of Speech

Despite the well-articulated difference in levels of First Amendment protection for commercial and political speech, the Supreme Court has provided less guidance on how to distinguish one from the other. It has stated that it relies on a "common sense" approach and defined commercial speech as that which does "no more than propose a commercial transaction." [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 1976, p. 785]. In Central Hudson Gas & Electric v. Public Service Commission of New York [1980, p. 561], the Court suggested a somewhat broader category of commercial speech: "expression related solely to the economic interests of the speaker and its audience." It also has noted [p. 562] that advertising that "links a product to a current public debate" is not political speech.

The most definitive guidelines are provided by Bolger v. Youngs Drug Product Corp. [1983], which involved a pamphlet on venereal disease and the use of condoms as a preventive measure. It identified the advertiser as a producer of a particular brand of prophylactic. The Court recognized that the pamphlets were not merely proposals to engage in commercial transactions. It did, however, note that the pamphlets (1) were produced as traditional advertisements (not public service announcements), (2) referred to specific products, and (3) were prepared with a profit motive. On balance, it decided that the combination of all three of these factors made the pamphlet commercial speech.

The Court then limited the usefulness of this ruling by announcing that all of these characteristics were not necessary for speech to be commercial and refused to comment on whether reference to a particular product was necessary. It did suggest that in cases in which reference to a particular brand of product was not made, the speech may still be characterized as commercial if the message made generic reference to the product and the speaker was either the dominant firm in the industry or a trade association [Bolger v. Youngs Drug Product Corp. 1983, pp. 466-67].

Thus, though the Supreme Court has not articulated a single, clear method for distinguishing political and commercial speech, it consistently has examined one or more of three factors: (1) the commercial nature of the content (e.g., proposing a commercial transaction or reference to a product), (2) the motivation of the speaker (economic or political), and (3) the format of the message (e.g., paid-for advertising).

Recently, the Supreme Court has stated that in Fox, it had described the proposal of a commercial transaction as "the test for identifying commercial speech" [City of Cincinnati v. Discovery Network, Inc. 1993, p. 12]. The Court had previously held that the profit motive of speech by itself does not automatically relegate the speech to the commercial level [Harte-Hanks Communications, Inc. v. Connoughton 1989, p. 2685; City of Lakewood v. Plain Dealer Publishing Co. 1988, p. 756, n. 5]. Indeed, in Central Hudson [1980, p. 561], Justice Stevens criticized this factor as overly broad and the majority decision in City of Cincinnati appears to agree with this criticism by noting that this factor was not relied on in Bolger or Fox. Similarly, the Court also has held that the format of the message is not very useful in determining whether speech is commercial or political. Most political messages are paid advertisements. For example, in New York Times v. Sullivan [1964], the Supreme Court found that notices in the New York Times denouncing police retaliation against civil rights demonstrators in the South to be fully protected speech, despite the fact that the statements were paid-for advertising. Thus, today it seems

clear that the proposal of a commercial transaction is the definitive test for determining if speech is commercial.

An Audience Impact Model

Unfortunately, the Supreme Court has given little guidance on how to determine whether speech proposes a commercial transaction. For this reason, defining commercial speech may be analogous to Justice Stewart's celebrated comment on how he defines obscenity: "[I] know it when I see it" [Jacobellis v. Ohio 1964, p. 197]. This article proposes a more objective methodology by examining the likely effect of the speech on the audience. Is the audience influenced or potentially interested in the speech in their capacity as consumers or as members of the electorate? If the audience is influenced predominantly in their capacity as consumers, then the speech should be deemed commercial. If the ads would exert greater influence over the audience in its capacity as members of the electorate or the general populace, then the ads are fully protected speech.

Four types of evidence are relevant to this inquiry. First and most obvious is the message itself. Judges viewing the message will form an opinion as to how it is likely to influence people. Communications experts can be called to assist in evaluating the likely impact of the message. Product advertising often explicitly proposes a commercial transaction by describing price, financing terms, availability, or attributes of the product that consumers would value. Second, the intent of the speaker is important. Again for product advertising, even that which promotes product image, the documented intent is to sell the product. Advertising effectiveness is ultimately judged by how well it will likely sell a product even if other variables are measured, such as effect of the advertising on product beliefs, attitudes, or intention to purchase. Third, in situations in which the commercial speech itself and the intent behind it are ambiguous, audience testing may be conducted to determine if consumers are influenced by the message in their capacity as consumers. Fourth, in some cases there may be evidence that sales of a particular product increased after the dissemination of the challenged message. Increased sales suggests that people were influenced in their capacity as consumers.

Though deceptive advertising is outside the scope of First Amendment protection, the audience impact model is similar to current practice of advertising regulation. The first step in an advertising challenge, whether by industry self-regulation, the Federal Trade Commission (FTC), or a competitor under the Lanham Act, is to interpret the advertising [Petty & Kopp 1993]. In this step, explicit claims in the advertising are identified. Implicit messages are typically established by evidence showing the advertiser intended to make such claims or marketing studies of audience interpretation of the advertising. The marketing studies seek to determine what messages are communicated to consumers.

In attempting to determine whether speech is commercial or fully protected, the marketing studies typically used in advertising challenges would be modified. Instead of determining the advertising message or claims, studies used as evidence under the audience impact model would attempt to determine whether the communication interests people as consumers or in some other capacity. Because it is difficult to establish a communication's likely effect on behavior, determining the attitudes targeted by a communication may be an acceptable surrogate. Are the targeted beliefs likely to influence people's behavior as consumers or citizens? If this model were adopted by the courts, this would be an important area of further research and refinement by marketing researchers.

This proposal is consistent with Supreme Court definitions of commercial speech. Obviously, speech that is likely to influence people in their capacity as consumers is explicitly or implicitly proposing a commercial transaction. The speech necessarily has commercial content. As noted previously, the other two Supreme Court factors, motivation and format, recently have been relegated to a minor role in determining whether speech is commercial or fully protected.

The model proposed here, though simple in its application, is innovative because it examines the content of the message, by not only analyzing the message per se and the intent behind the message, but also attempting to determine its likely interest to the audience. The question is not so much what the speech says as how it is likely to interest people, influence their beliefs, and motivate them to take action.

When applying this model it is important to distinguish speech as a product from speech that may be trying to sell a product. Books, posters, and artwork are all examples of types of speech products that may be sold. Consumers may see a framed inspirational poem or a political protest bumper sticker and be moved to buy it. Yet the poem and bumper sticker are not commercial speech because people want to buy them. The commercial motivation comes from an appreciation of the speech product itself, not from commercial speech about the product.

In contrast, a print advertisement that pictures the poem or bumper sticker would be commercial speech because the advertisement is trying to persuade people to buy the speech product. If people appreciated the advertisement for its own sake, they might simply tear it from the magazine and display the ad itself rather than purchase the speech product. For this reason, speech products such as novels or computer software are not commercial speech even though the creator seeks to sell them for commercial gain.

Other Commentator Suggestions and Their Deficiencies

The proposed audience impact model is related to suggestions of several legal commentators. Farber [1979] asserts that regulations concerning speech should be examined to see if they relate to the informational or contractual function of speech. The former would be fully protected under the First Amendment; the latter only protected as commercial speech. Whelen [1987] provides a specific test for this approach. He proposes that speech, which contract law would hold establishes an express warranty, would constitute commercial speech. Though these suggestions are interesting, both appear to provide an extremely narrow definition of commercial speech. Speech can propose a commercial transaction and influence people in their capacity as consumers without making representations that are sufficiently factual and specific to constitute an express warranty of the product.

In contrast to these narrow definitions of commercial speech, some have suggested very broad definitions. Alderman [1982] proposes that any speech by a commercial entity be deemed commercial speech. Woglom [1983] suggests simply that if speech contains factual statements related to the speaker's area of business expertise, it should be deemed commercial. These broad definitions directly contradict past Supreme Court holdings. In First National Bank of Boston v. Bellotti [1978], the Supreme Court held that Massachusetts could not prohibit political speech simply because it was communicated by a business corporation. It stated that the First Amendment also protects the rights of listeners to receive political speech. In that case, the speech in question was related to the speaker's area of business expertise, so the Supreme Court has effectively rejected both Alderman's and Woglom's proposed definitions. The audience impact model proposed here is consistent with First National Bank of Boston because it evaluates the listener's interest in the speech to determine whether the speech is commercial or fully protected.

McGowan [1990, p. 401] proposes a definition of commercial speech similar to that derived from the audience impact model: "speech that does no more than propose the sale of a specific named good or service." This proposal goes beyond Supreme Court precedent by requiring that a specific good or service be named. McGowan's proposal also is flawed because it fails to address implied proposals for commercial transactions in which intent of the speaker or effect on the audience clearly establishes the commerciality of the message.

Similarly, Simon [1984-85] examines the intended effect of the speech and whether the resulting action (purchase) results in individual or societal harm. Simon broadly defines commercial speech to include false or misleading commercial speech, contrary to repeated Supreme Court holdings that such speech is outside First Amendment protection. His proposal also suffers from its exclusive focus on the intended effect, rather than the likely actual impact the speech has on its audience.

In contrast to these legal commentators, suggestions from marketing scholars tend to be multi-faceted and complex beyond usefulness. Heath and Nelson [1983, 1985], suggest five factors should be examined: (1) content, (2) purpose, (3) context (e.g., level of political controversy), (4) audience, and (5) channels. Cutler and Muehling [1989] propose seven factors to determine whether the speaker is likely a competitive advantage through the speech: (1) topic, (2) identification of sponsor including brand names and trademarks, (3) what other industry members are doing, (4) whether the campaign is deducted from taxes as a business expense, (5) whether the sponsoring firm is dominant in the industry, (6) media used for dissemination, and (7) amount and percentage of advertising budget devoted to the speech in question. When pressed by Middleton [1991] for not relating their factors to the criteria announced by the Supreme Court, Cutler and Muehling [1991] suggested that their factors should be used in addition to other information to help determine the third (now discredited) Bolger criterion of economic motivation.

The simplicity of Cutler and Muehling's idea to focus on competitive advantage is marred by two problems. First, when attempting to apply this simple test, they derive four categories of speech that are impossible to reconcile with the Supreme Court's dichotomous characterization. Second, the competitive impact of the speech is simply the wrong criterion from a public policy perspective. By examining whether speech proposes a commercial transaction, the Supreme Court is suggesting implicitly that consumer impact be analyzed.

Examining consumer impact is also consistent with current policy for regulating deceptive advertising. Though the FTC does challenge advertising bans as anticompetitive, it regulates advertising itself to see if it is deceptive or unfair to consumers. Most courts have interpreted section 43(a) of the Lanham Act to allow only competitors, not consumers, to sue for misleading advertising. However, the competitor plaintiff must first prove that the ads have the capacity to mislead consumers and only then may it prove that it was likely to be injured [Petty and Kopp 1993].

The apparent record for number of factors to be analyzed goes to a legal commentator rather than one from marketing. Linn [1988] urges the balancing of nine public policy rationales: (1) the likelihood of false belief, (2) the seriousness of resulting injury, (3) the concentration of the harm from the erroneous statements, (4) the strength of the ideological (non-commercial) motives for speaking, (5) the ease of review, (6) the objective verifiability of the message, (7) the strength of the speaker's motive (likelihood of "chilling"), (8) the severity of regulatory penalties, and (9) the likelihood the penalties will be incorrectly applied to true speech. Similarly, Posner [1986] suggests balancing the costs with the benefits to determine what regulation is appropriate. He suggests several factors to examine in applying his test.

These factor-oriented approaches [Cutler and Muehling 1989; Heath and Nelson 1985; Heath and Nelson 1983; Linn 1988; Posner 1986] all suffer from the same deficiency as the current Supreme Court approach-they lack specificity and predictability. These models tell both marketers and the courts what factors to evaluate, but not how to measure each factor, what value for each factor is sufficient to indicate either fully protected or commercial speech, or how to weigh each factor in making an overall determination. Because individual courts will evaluate and weigh each factor differently, a speaker using these models cannot tell whether its speech will be deemed fully protected.

Application of the Audience Impact Model

The true measure of this proposal's value is whether it accurately predicts both past and future court decisions. This model not only agrees with the Supreme Court's decision in Bolger, but also predicts two similar FTC cases. In National Commission of Egg Nutrition v. FTC (N.C.E.N.) [1977], the Seventh Circuit Court of Appeals affirmed the FTC holding that advertisements by a trade association of egg producers were commercial speech and false or misleading. Contrary to generally accepted scientific thinking, the advertisements claimed that consumption of eggs had not been proven to be detrimental to health because of the high cholesterol content of eggs. Similarly, in R. J. Reynolds Tobacco Co. [1988], the FTC challenged advertising suggesting that the alleged deleterious connection between smoking and heart disease has not been proven scientifically. In all three of these cases, the likely effect of these campaigns was to sell more of the featured products.

The utility advocacy advertising cases provide a challenge for any method of analysis because decisions regarding the production of electricity largely are made politically, not by the free market process. Therefore, if people are misled by the communications about electric power production, they are misled as voters. They are not misled into an incorrect purchase decision as consumers because they do not "shop" for electricity in the normal marketplace. For this reason, the audience impact model would hold that speech concerning the production of electric power should be deemed fully protected and not commercial speech. This result is consistent with Supreme Court precedent. In Consolidated Edison Co. of NY v. Public Service Commission of NY [1980], the Supreme Court held that utility company billing inserts asserting the desirability of nuclear power were political speech. In Pacific Gas & Electric Co. v. Public Utilities Commission of CA [1986], it held that a newsletter commenting on pending legislation also was political speech.

Consistent with these cases, the Supreme Court also has held that the economic interest of the speaker does not change what would otherwise be fully protected speech into commercial speech. In First National Bank of Boston v. Bellotti [1978], the speech in question was opposition to a graduated income tax. The speech was held to be fully protected because of its value to the electorate. This holding appears consistent with the proposed audience impact model because people likely would be influenced by this speech in their capacity as voters, not as consumers of banking services.

Several interesting examples outside actual Supreme Court cases can be used to illustrate the application of the audience impact model. For example, Linn [1988] suggests a possible advertising campaign by a seller of artificial fur products decrying the killing of living animals. This example, like the Bolger, N.C.E.N., and R. J. Reynolds Tobacco Co. cases discussed previously, is a case in which political speech is used to sell a product. The Supreme Court has consistently held that advertising that merely "links a product to a current public debate" is still only commercial speech [Central Hudson 1980, p. 562; Bolger 1983, p. 68]. Though

the regulation of animal "harvesting" is a political concern, the exact nature of the ads would determine whether people are potentially influenced more in their capacity as consumers (i.e., to buy fake furs) or as members of the electorate (i.e., to support new laws).

Similarly, "green" advertising appears likely to be deemed commercial speech. Advertising recyclable packaging does raise the debate about the merits of recycling, but like the fake fur example, any linking of public issues with a sales message to buy a product is likely to influence audience members first in their capacity as consumers. Therefore such mixed messages likely are commercial speech.

A tougher case would be a situation in which a charitable organization dedicated to fighting AIDS urges people to use condoms. The Audience Impact model makes the controversial prediction that such advocacy should be deemed commercial speech. Even though the charity has no financial interest in selling condoms, the impact on people is the same as the Bolger case, in which the message sponsor did have such a financial interest.

What if a charity offered a product as a reward for a donation? An unrewarded solicitation would be fully protected, but the question of whether people are influenced in their capacity as consumers or as benevolent citizens would depend in part on the reward being offered. If people contribute to the Easter Seals organization primarily to get stamps, the Audience Impact Model would label an Easter Seals solicitation as commercial speech. However, this result seems unlikely given the relatively small intrinsic value of the seals. Consumer evidence would more likely find that people are motivated to contribute to the charity, not purchase the stamps.

At some point, however, a charitable solicitation that promised a reward would be found to be commercial speech. Do people buy Girl Scout cookies because they like the cookies or the organization? Without actual survey evidence, this answer is difficult to predict. In contrast, consumers who buy light bulbs or trash bags from charitable organizations may be primarily purchasing the product and only incidentally contributing to the organization. If that proves to be the case, then the solicitations should be treated as commercial speech, just as advertisements for those products.

A final example of not-for-profit business organization would be a consumer product testing organization that publishes its results (e.g., Consumer Reports). The effect on people reading Consumer Reports may well be to purchase one of the rated products, but the magazine is not commercial speech because it is a speech product and entitled to full protection.

A for-profit corporation might decide to use the Consumer Reports ratings in its promotional literature. At that point, the speech becomes commercial because advertising is not a speech product.

If Consumer Reports or some other organization condemns a particular product, the company may engage in public rebuttal to bolster sales diminished by public controversy. When consumer groups urged the boycott of tuna because tuna fishing often killed dolphins, tuna companies responded by changing and then touting their dolphin-safe fishing methods. Similarly, General Motors responded to the NBC filming of a GM truck bursting into flames from an impact to its side by announcing it had evidence that the demonstration was "rigged."

In both situations, the exact response will determine whether the speech is commercial or fully protected. If a press conference is held solely to present the new evidence without trying to persuade consumers to buy the product, the likely impact would appear to be on the public debate, not product purchases. If the press conference included exhortation to purchase the product, it might then become commercial speech. Again, in close cases, the speech, the documented intent behind the speech, and the impact of the speech on the audience as determined through testing could all be examined to decide whether such mixed speech is fully protected or commercial.

Linn [1988, p. 471-2] suggests another example of a for profit company contributing to a public debate: an insurance industry advertising campaign decrying the high level of liability awards and the resulting cost to consumers and business [Woglom 1983]. Because the campaign urges tort reform rather than additional insurance purchases, it would be political speech under the audience impact model. As discussed previously, this simple resolution should dominate over other factors that the Supreme Court has recently discounted, such as the economic motive of the speaker, the mode of speech, and paid-for advertising.

Similarly, in contrast to the typical "green" advertising touting a brand as safe for the environment discussed previously, if a company advocates against regulation of certain aerosol propellants used in its products, such speech might be deemed fully protected. This could be true even if the advertising mentioned brand names. To be

fully protected, the primary impact of the advertising must be to persuade citizens that such regulation is not needed rather than persuade consumers to buy the product. In this example, it is useful to examine the political context of the message as well as the message itself.

Corporations frequently sponsor public service activities. For example, Philip Morris was the principal sponsor of the National Archives commemoration of the Bill of Rights. In the paid-for television and print advertising, the Philip Morris logo, company name, and names of its three subsidiaries -- Kraft General Foods, Miller Brewing Company, and Philip Morris USA -- appeared at the end of the advertising [Klein and Greyser 1990b]. A number of tobacco critics argued that Philip Morris was attempting to use this campaign to reassert the right to smoke and advertise tobacco products. It was even suggested that this sponsorship violated the ban on television advertising of cigarettes because the company name was included in the advertising [Klein and Greyser 1990a].

The audience impact model predicts that Philip Morris's legal exposure was minimal. The Bill of Rights sponsorship should be characterized as fully protected speech. The advertising did not mention any products beyond company names, it only touted the significance of the Bill of Rights. Unless careful audience impact testing reveals otherwise, there is no reason to believe this sponsorship would particularly influence people to buy Philip Morris products.

Of course, to a small degree, any corporate image advertising might be said to influence people to buy more of the corporation's product, but this is an indirect result. The primary effect is an attempt to establish a favorable corporate image. No court has held that identified corporate sponsorship of a message is sufficient to make that speech commercial. In fact, in First National Bank of Boston v. Bellotti [1978], the Supreme Court virtually ignored the corporate sponsorship issue.

Of course, if corporate sponsorship is a commercial sham, the audience impact model will still find commercial speech. For example, when Italian shoemaker Salvatore Ferragamo sponsored an art exhibit featuring its own shoes, sales climbed 20% in a nearby Ferragamo shoe boutique [Consumers Union 1992]. The impact on the audience of this sponsorship appears commercial.

Conclusion

The desirability of a simple model for distinguishing commercial from fully protected speech is beyond question. The recent Supreme Court decision in City of Cincinnati [1993] suggests that the Court is trying to simplify its analysis by emphasizing the importance of the "proposal of a commercial transaction" test. The audience impact model presented here is a practical application of this test. It focuses on whether people are potentially influenced more as consumers or in another capacity by the speech in question. The model's usefulness to both businesses and courts lies in not only its simplicity, but also its ability to predict the results of past Supreme Court cases.

This article has attempted to apply the Audience Impact model to a number of different types of speech to illustrate how the model would be applied. However, none of these examples included empirical evidence of the intent behind the speech or, most importantly, the audience reaction to the speech. Though the formulation of this model appears promising, the development of such evidence in real cases will ultimately determine the model's usefulness and predictive ability.

ROSS D. PETTY holds the Roger A. Enrico Term Chair and is Associate Professor of Law at Babson College. *This article continues the development of some ideas presented in his book Advertising Law: Its Impact on Business and Public Policy (Quorum Books, 1992). The author thanks the Babson College Board of Research for financial support of this research.*

ENDNOTES

1. It is beyond the scope of this article to debate whether commercial speech should be entitled to full First Amendment protection, no First Amendment protection, or some intermediate level of protection. Rather, I assume, without endorsing, that the current Supreme Court approach of distinguishing commercial speech from fully protected speech will continue and offer a model to enable marketing managers to make this distinction.

2. It is interesting to compare the 11% reduction in lottery messages held to be significant in Egde with the 3-4% reduction in the "clutter" of newsracks found to be "minute" and "paltry" in City of Cincinnati v. Discovery Network, Inc. [1993], issued only three months before Edge.

JUDICIAL SABOTAGE OF CHILD PORN LAW

The Washington Times
March 9, 1994, Wednesday, Final Edition

Bruce Fein

Last week, the U.S. Supreme Court agreed in United States vs. X-Citement Video Inc., to review a decision of the 9th U.S. Circuit Court of Appeals holding unconstitutional two provisions of the Protection of Children Against Sexual Exploitation Act (PCASE) of 1977. In the 2-1 panel ruling now under examination, the court of appeals held that the First Amendment "mandates that a statute prohibiting the distribution, shipping or receipt of child pornography require as an element knowledge of the minority of at least one of the performers who engage in or portray the specified conduct," but that the federal law neglected to so stipulate.

That sabotage of the federal child pornography law insulted Supreme Court precedents, as the panel dissent highlighted. It also underscored the prominence of philosophy, and personal prejudice in the interpretation of the Constitution and federal law by many judges, and thus the need for the public and press to consider carefully all of a president's judicial appointments.

The federal child pornography law prohibits the knowing transportation, shipment, receipt or distribution of visual pornographic depictions of children, i.e., persons under the age of 18. In New York vs. Ferber (1982), the Supreme Court sustained a New York prohibition of child pornography against First Amendment attack. Writing for the court, Justice Byron White noted that the prohibition was confined to the depiction of minors in acts of sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals. He further emphasized the trivial free speech value of child pornography, but its acute detrimental effects on the physiological, emotional and mental health of the exploited children. The interest of the government in preventing the sexual exploitation and abuse of children, Justice White lectured, is "of surpassing importance."

The Supreme Court again addressed child pornography in Osborne vs. Ohio (1990). At issue was a state law criminalizing the possession of child pornography where the defendant either knew the sexual performers were youths or was recklessly heedless of that fact. Proof of recklessness, the court reasoned, plainly satisfied the constitutional command of Ferber that criminal responsibility for those who traffic in child pornography not be imposed unless a defendant's wrongful purpose is established.

The court of appeals in X-Citement Video insisted that the federal anti-child pornography law created strict criminal liability for distributors in violation of the Ferber requirement that some type of guilty knowledge be made an element of the offense. Moreover, the appeals court concluded, any correcting amendment to the federal statute must require proof of a defendant's actual knowledge of the underage status of sexual performers, to satisfy the First Amendment. Otherwise, the appellate court fretted, the magnificent benefits of sexually explicit materials might be curbed because distributors, sellers or receivers would be burdened with learning the ages of the actors involved to insure against criminal culpability.

The appeals court decision is wrongheaded on several counts. The Supreme Court has repeatedly instructed subordinate federal tribunals to interpret ambiguous federal statutes to avoid, not to invite, constitutional collisions. Thus, Ferber lectured: "When a federal court is dealing with a federal statute challenged as over-broad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." And in United States vs. Thirty-seven Photographs (1971), the Supreme Court read into a federal obscenity law procedural protections that Congress had overlooked to save its constitutionality.

Whether the knowledge requirement of the PCASE Act applied both to the contents of the sexually explicit materials and to the ages of the performers was debatable. The court of appeals defied the many unambiguous teachings of the Supreme Court in resolving the statutory ambiguity to create a constitutional conflict.

As the dissent pointed out, Congress often enacts criminal prohibitions that neglect to specify the mental states of the defendant that must be proven for each element of the offense, and courts routinely shore up the omissions by reasonably inferring a legislative intent to require some type of

guilty knowledge. Congress is generally presumed to embrace the teaching of Justice Oliver Wendell Holmes in "The Common Law": "A law which punishes conduct which would not be blame-worthy in the average member of the community would be too severe for that community to bear."

The panel majority in X-Citement Video seemed intent on wrecking the PCASE because of enthrallment with First Amendment claims. That suspicion is substantiated by the majority's gratuitous advice that a requirement of actual knowledge of underage was indispensable to the constitutionality of the Act, despite the Supreme Court's refusal to rule out reckless or negligent ignorance of youth as constitutionally adequate. Instead of discharging its duty to heed Supreme Court precedents, the majority blithely charted its own course.

It speaks volumes concerning the importance of philosophy and predilections to judicial rulings that the panel majority comprised appointees of President Jimmy Carter (William Canby) and President George Bush (Ferdinand Fernandez), whereas the dissent was authored by an appointee of President Ronald Reagan (Alex Kozinski).

Only a tiny fraction of federal appellate decisions are reviewed annually by the Supreme Court, and thus the influence of appellate judges in shaping constitutional and statutory law is strong. Their appointments deserve serious scrutiny and evaluation by the media and public, not the yawning indifference that at present prevails.

Bruce Fein is a lawyer and free-lance writer specializing in legal issues.

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COURT TO TAKE ON MALT LIQUOR CASE

Proprietary to the United Press International 1994
June 13, 1994, Monday, BC cycle

Michael Kirkland

The Supreme Court agreed Monday to review a government ban on labels that list the alcohol content of malt liquor and some beers, but the government contends such labels could result in ''strength wars,'' with breweries using the information to entice more customers.

In a Justice Department brief filed with the Supreme Court, the administration cited congressional passage of the Federal Alcohol Administration Act after the 21st Amendment repealed Prohibition.

The act included restrictions on the disclosure of alcohol content on malt beverages in order to curb the ''strength wars'' among brewers, who tried to woo customers with claims that their malt product was more powerful than their competitors'.

In 1987, the Adolph Coors Co. asked the Bureau of Alcohol, Tobacco and Firearms for approval of labels and advertisements for its Coors and Coors Light brand beer that would list the alcoholic content.

The ATF denied the request and Colorado-based Coors sued, charging that the prohibitions of alcohol content in ads and on labels violated the free speech provisions of the First Amendment.

In the first hearing in U.S. District Court in Denver, the Bush administration's Treasury and Justice departments conceded that the bans were unconstitutional.

In an unusual move, however, the Democratic-controlled House of Representatives intervened, in order to defend the constitutionality of the statute.

The House and Coors each filed a cross motion, and Coors eventually won, with the judge ruling the ban on alcohol content in ads and on labels was unconstitutional.

The 10th U.S. Circuit Court of Appeals reversed, citing a substantial consumer interest at stake, and sent the case back to district court.

This time, on the eve of the 1992 election and a Democratic victory, Justice Department lawyers offered evidence they said proved breweries were boasting about the ''punch'' of their malt liquors, as opposed to other types of beer.

The district court ruled that the ban on alcohol content in ads was constitutional, but the ban on labels was unconstitutional. The judge said consumers could use the listed alcohol content to limit their intake.

Another panel on the 10th Circuit affirmed in August 1993, and the Clinton administration Justice Department asked the Supreme Court for review.

Argument in the case will probably be heard by the justices early next year. (No. 93-1631, Lloyd Bentsen et al vs. Adolph Coors Co.)

POLITICAL ADS IN TRANSIT STATIONS TO BE DECIDED BY SUPREME COURT

Business Publishers, Inc
Urban Transport News, Vol 22, No. 12
June 9, 1994

The rights of transit agencies to restrict political advertising could be diminished by a case now pending before the U.S. Supreme Court. Two weeks ago, the Supreme Court agreed to decide whether Amtrak can reject certain political messages from its train stations. The case involves a New York City artist who tried to rent a billboard in Pennsylvania Station for his political art.

A main issue is whether Amtrak is defined as a private corporation not bound by the First Amendment or whether it is a government entity. A federal district judge ruled that Amtrak was a government entity but a federal appeals court ruled that it was a private corporation. Many urban transit agencies have elements of both a corporation and a government entity. The Port Authority Trans Hudson, for example, is both a public commuter rail agency and landlord of the World Trade Center.

If the Supreme Court rules that Amtrak is a government entity and must accept the ads, the ruling might also lessen transit agencies' discretion in accepting or rejecting political ads. Chip Bishop, spokesman for the American Public Transit Association, said, "Most transit systems set their own criteria on whether to accept these ads. By and large, it's a local decision."

Content Neutral Ads Preferred

Pat Lambe, spokesman for the Washington Metropolitan Area Transit Authority said, "In general, our policy on accepting ads is that they must be content neutral and not offensive." Emotionally charged political ads that advocate a controversial position are rejected.

The New York artist, Michael Lebron, whose political murals have appeared in subway stations, signed a two-month lease two years ago to display his art on Pennsylvania Station's prime display space, a 103-foot-wide billboard called the Spectacular. He was told obscenity or scenes of violence were prohibited. When he submitted a photograph of his proposed display - a montage with messages attacking Coors Brewing Company for supporting conservative causes - he was told by an Amtrak vice president that political advertising was prohibited.

Sue Martin, an Amtrak spokesman, refused to comment.

A similar case last December over ads promoting condom use ended in a defeat for public transit agencies that reject the ads. A federal judge in Boston ruled a Massachusetts Bay Transportation Authority policy banning ads that are "racy" was unconstitutional.

Lebron's mural for Pennsylvania Station is a parody of a Coors beer advertisement. Coors promotes its beer with the slogan, "It's the right beer now." Lebron's mural says, "Is it the right's beer now?" One photographic image shows a beer can flying at a family of Nicaraguan villagers, a reference to the Coors family's support for the Contra rebels during the Nicaraguan civil war.

Lebron agreed to pay $16,500 a month to rent the space. He sued Amtrak early last year and won in federal district court. The court ruled Amtrak violated Lebron's First Amendment rights to express his political viewpoint. The federal judge ordered Amtrak to display the mural.

Corporations Have More Choice

Last December, a U.S. Court of Appeals overturned the ruling in a 2-to-1 decision. Amtrak was a corporation and not a "state actor," the appeals court said. The constitutional limits on government restrictions do not apply to private corporations.

In his appeal to the Supreme Court, Lebron argues that Amtrak is a government entity. It was created by the federal government in 1970, guaranteed its loans, owns its preferred stock and holds mortgages on its major properties, including Penn Station. In lower court employment decisions, Amtrak was consistently held to be a private corporation. But Lebron's lawyer argues that the constitutional issue here makes the case different. Employment issues are handled by local managers. A policy against political advertising must be approved by Amtrak's board, which would mean the presidentially-appointed board was acting like a government entity, Lebron argues.

The Supreme Court is scheduled to hear the case next fall. If the justices rule the First Amendment applies, the case is likely to be sent back to the appeals court to decide whether Amtrak's policy is unconstitutional.

HIGH COURT TO RULE ON AMTRAK BAN ON POLITICAL SIGN

The New York Times
May 24, 1994, Tuesday, Late Edition - Final

Linda Greenhouse, Special to The New York Times

Accepting an appeal from an East Village artist who tried to rent a billboard in Pennsylvania Station for his political art, the Supreme Court agreed today to decide whether Amtrak can exclude particular political messages from its train stations.

The Justices will decide whether Amtrak is a private corporation that is not bound by the Constitution, as a Federal appeals court ruled in dismissing the artist's suit five months ago, or whether it functions as a Government entity that must abide by the First Amendment, as a Federal District Judge initially held.

The artist, Michael A. Lebron, whose political murals have appeared in subway stations here and in New York, signed a two-month lease two years ago to display his art on Pennsylvania Station's prime display space, a curved, lighted, 103-foot-wide billboard called the Spectacular. He was told that obscenity or depictions of violence were off-limits.

When he submitted a color photograph of the work he proposed to display, a photo montage with inscriptions that attacked the Coors Brewing Company for its support of conservative causes, he was told by an Amtrak vice president that political advertising was also unacceptable.

Mr. Lebron's mural is a parody of a Coors beer advertisement. While Coors advertises its light beer with the slogan, "It's the right beer now," Mr. Lebron's mural asks: "Is it the right's beer now?"

Mr. Lebron, who had agreed to pay $16,500 a month to rent the space, sued Amtrak early last year and won before Judge Pierre N. Leval of Federal District Court, who found that Amtrak had unconstitutionally discriminated against Mr. Lebron's political viewpoint. Judge Leval ordered Amtrak to display the mural.

But the United States Court of Appeal overturned that ruling in December finding that because Amtrak was not a "state actor," the First Amendment did not apply. The Constitution imposes limits on the behavior of Government, not of private parties.

In his appeal to the Supreme Court, Mr. Lebron is arguing that Amtrak is essentially a creature of the Federal Government, which not only created Amtrak in 1970 but guaranteed its loans, owns all its preferred stock, and holds the mortgages on its major properties, including Penn Station. Amtrak also has the right to condemn private property through the power of eminent domain and is exempt from state and local taxes.

If the Justices agree after they hear the case next fall that the First Amendment applies, they are likely to send the case back to the appeals court with instructions to decide whether Amtrak's policy is unconstitutional.

93-1631 BENTSEN v. ADOLPH COORS CO.

Malt beverage labels—Alcohol content—First Amendment.

Ruling below (CA 10, 2 F.3d 355, 62 LW 2143):

Provision in 1935 Federal Alcohol Administration Act that prohibits statements of alcohol content on malt beverage labels unless required by state law, 27 USC 205(e)(2), restrains commercial speech in violation of First Amendment.

Question presented: Does Section 5(e)(2) of Federal Alcohol Administration Act, 27 USC 205(e)(2), which prohibits statements of alcohol content on labels of malt beverage containers unless such statements are required by state law, violate First Amendment?

Petition for certiorari filed 4/15/94, by Drew S. Days III, Sol. Gen., Frank W. Hunger, Asst. Atty. Gen., Edwin S. Kneedler, Dpty. Sol. Gen., and Richard H. Seamon, Asst. to Sol. Gen.

ADOLPH COORS COMPANY, Plaintiff-Appellee,

v.

LLOYD BENTSEN,* in his official capacity as Secretary of the United States Department of Treasury; and STEVE HIGGINS, in his official capacity as Director of the Bureau of Alcohol, Tobacco and Firearms, Defendants-Appellants, and SPEAKER AND BIPARTISAN LEADERSHIP OF THE U.S. HOUSE OF REPRESENTATIVES, Intervenor-Defendant.

* Lloyd Bentsen is substituted for Nicholas Brady pursuant to Fed. R. App. P. 43(c)(1).

ADOLPH COORS CO. v. BENTSEN

No. 92-1348

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

2 F.3d 355; 1993 U.S. App. LEXIS 21202; 21 Media L. Rep. 2022

August 23, 1993, Filed

SUBSEQUENT HISTORY: Certiorari Granted June 13, 1994, Reported at: 1994 U.S. LEXIS 4632.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 87-Z-977).

COUNSEL: John S. Koppel (Stuart M. Gerson, Assistant Attorney General, and Stuart E. Schiffer, Acting Assistant Attorney General, Department of Justice, Washington, D.C.; Michael J. Norton, United States Attorney, Denver, Colorado; and Michael Jay Singer, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, D.C., with him on the briefs), Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, D.C., for the Defendants-Appellants.

K. Preston Oade (Jim M. Hansen, of Bradley, Campbell, Carney & Madsen, Professional Corporation, Golden, Colorado, with him on the brief), of Bradley, Campbell, Carney & Madsen, Professional Corporation, Golden, Colorado, for the Plaintiff-Appellee.

JUDGES: Before TACHA and BARRETT, Circuit Judges, and BROWN, District Judge.**

TACHA, Circuit Judge.

Appellants (collectively referred to as the "Government") appeal a district order declaring the portion of 27 U.S.C. 205 (e)(2) which prohibits statements of alcohol content on malt beverage labels to be an unconstitutional restraint on commercial speech in violation of the First Amendment. The Government also appeals the court's order enjoining the Government from enforcing that provision. We exercise jurisdiction under 28 U.S.C. 1291 and affirm.

I. Background

Congress enacted the Federal Alcohol Administration Act ("Act"), 27 U.S.C. 201-211, in 1935 after the repeal of Prohibition. The Act contains comprehensive regulations of the alcoholic beverage industry, including provisions that were intended to remedy industry practices which Congress had

determined were unfair, deceptive, and harmful to both competitors and consumers. Two such provisions prohibit statements of alcohol content on malt beverage[1] labels and advertisements unless such disclosures are required by state law. 27 U.S.C. 205(e)(2), (f)(2).[2]

In 1987, Adolph Coors Co. ("Coors") sought the Bureau of Alcohol, Tobacco and Firearms's approval for proposed labels and advertisements that disclosed the alcohol content of its malt beverages. The bureau denied the request pursuant to 205(e)(2) and (f)(2). Coors then brought this action to challenge the decision, arguing that the provisions impose an unconstitutional restraint on commercial speech in violation of the First Amendment.

The district court granted summary judgment for Coors and the Government appealed. On appeal, we evaluated the provisions under the four-part test for restrictions on commercial speech set forth in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

Applying the first two parts of the test, we concluded that the proposed labels and advertisements were commercial speech protected by the First Amendment and that the Government had asserted a legitimate and substantial interest in preventing strength wars among malt beverage brewers. See Adolph Coors Co. v. Brady, 944 F.2d 1543, 1547-49 (10th Cir. 1991) ("Coors I"). We reversed and remanded, however, holding that there were genuine issues of material fact as to whether the statutory prohibitions directly advance the Government's interest in preventing strength wars and whether there is a reasonable fit between the Government's asserted interest and the complete prohibitions imposed by the statute. See id. at 1554.

After conducting a trial on remand, the district court held that the relevant portion of 205(f)(2) is constitutional, but that the portion of 205(e)(2) which prohibits statements of alcohol content on malt beverage labels imposes an unconstitutional restraint on commercial speech in violation of the First Amendment because it neither directly advances nor reasonably fits the goal of preventing strength wars. The Government now appeals the district court's judgment with respect to 205(e)(2) and we limit our review to that provision.

II. Discussion

The Government has the burden of proving that the labeling prohibition of 205(e)(2) directly advances its interest in preventing strength wars.[3] We stated in Coors I that the Central Hudson test requires "an immediate connection between the prohibition and the government's asserted end. If the means-end connection is tenuous or highly speculative, the regulation cannot survive constitutional scrutiny." 944 F.2d at 1549 (internal quotations omitted). The Government challenges this standard on appeal and, relying on Posadas de Puerto Rico Association v. Tourism Co., 478 U.S. 328, 92 L. Ed. 2d 266, 106 S. Ct. 2968 (1986), argues that the Government need only demonstrate that Congress reasonably believed that the statutory prohibition would further its objective when it enacted the labeling restriction. See id. at 341-42.

Since the Government filed its appellate brief, however, the Supreme Court has decided Edenfield v. Fane, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993), in which it articulates a standard that is consistent with our pronouncements in Coors I and much stricter than the "reasonably believed" standard the Government would have us adopt. In Edenfield, the Court stated that, under this third prong of the Central Hudson test, courts must determine "whether the challenged regulation advances [the government's] interests in a direct and material way." 113 S. Ct. at 1798. It went on to say that the party restricting commercial speech carries the burden of justifying the restriction and that "this burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Id. at 1800. This burden also applies to prophylactic regulations like the challenged prohibition in 205(e)(2) where the Government prohibits conduct at the outset rather than waiting until harm has occurred. Id. at 1803 (prophylactic ban "in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem").

The Government asserts that the prohibition on speech contained in 205(e)(2) was imposed to prevent strength wars among malt beverage manufacturers. This assertion is supported by the Act's legislative history which contains testimony "that labels displaying alcohol content resulted in a strength war wherein producers competed for market share by putting increasing amounts of alcohol in their beer." Coors I, 944 F.2d at 1548. There was also hearing testimony "that not disclosing the alcohol content on malt beverages would relieve marketplace pressures to produce beer on the basis of alcohol content, resulting over the long term in beers with a lower alcohol content." Id. The Government argues that, despite changes in the malt beverage industry and market since 1935, 205(e)(2) directly advances its crusade against the continuing danger of strength wars. After reviewing the record, we conclude that, although the Government's interest in preventing strength wars is legitimate and is within its regulatory authority, the prohibition in 205(e)(2) does not advance this interest in a direct and material way.

The Government relies primarily on anecdotal evidence that malt beverage manufacturers already are competing and advertising on the basis of alcohol strength in the malt liquor sector of the market.[4] The record contains evidence that consumers who prefer malt liquor do so primarily because of its higher alcohol content and that a number of manufacturers have tried to advertise malt liquor--in violation of the regulations--by using descriptive terms such as "power," "strong character," "dynamite," and "bull" to tout its alcohol strength. On the basis of this evidence, the Government makes an inferential and conclusory argument that the "experience of the malt liquor industry establishes the continuing validity of the statutory scheme" as applied to all malt beverages as well as "the very real danger of strength wars if the labeling ban is struck down."

This argument is unavailing. Although the evidence may support the Government's assertion that there is a continuing threat of strength wars which it aims to prevent, Coors does not contest either the existence of such a threat or the Government's interest in preventing strength wars. The critical question is whether the evidence shows the required relationship between the labeling prohibition that Coors is challenging and the threat of strength wars. Coors is challenging the prohibition on factual statements regarding the percentage of alcohol by volume rather than the prohibition on the sort of descriptive terms that have been used in the malt liquor sector.[5] The Government simply has not shown a relationship between the publication of such factual information and strength wars.

The Government's argument is further undermined by the absence of any record evidence indicating that there are strength wars in states or other countries where alcohol content labeling is already required. See Edenfield, 113 S. Ct. at 1800 (noting lack of anecdotal evidence from states that do not impose similar restrictions). In fact, there is uncontroverted evidence that brewers in the United States have no intention of increasing alcohol strength, regardless of labeling regulations, because the vast majority of consumers in the United States value taste and lower calories--both of which are adversely affected by increased alcohol strength.

Finally, the Government asserts that Coors is challenging the labeling restrictions because of its desire to counter a consumer perception that its malt beverages contain less alcohol than competing brands. This assertion, however, does not show directly, or even imply, that Coors would engage in a strength war if it were able to disclose the alcohol content of its malt beverages on their labels. In fact, the opposite inference is more plausible--if Coors could overcome the misperception by simply publishing the percentage of alcohol content on the label, it would have no incentive to produce stronger beverages.

We find that the Government has offered no evidence to indicate that the appearance of factual statements of alcohol content on malt beverage labels would lead to strength wars or that their continued prohibition helps to prevent strength wars. Instead, it has offered only inferential arguments that are based on mere speculation and conjecture and fails to show that the prohibition advances the Government's interest in a direct and material way.[6] We therefore hold that the portion of 27 U.S.C. 205(e)(2) which prohibits statements of alcohol content on malt beverage labels imposes an unconstitutional restraint on commercial speech in violation of the First Amendment.

AFFIRMED.

** Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

ENDNOTES

1. "Malt beverage" is defined at 27 C.F.R. 7.10.

2. Section 205 provides in relevant part:

> It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages . . directly or indirectly or through an affiliate:

* * *

(e) Labeling

To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law . . .).

* * *

(f) Advertising

To publish or disseminate or cause to be published or disseminated by radio broadcast, or in any newspaper, periodical or other publication or by any sign or outdoor advertisement or any other printed or graphic matter, any advertisement of distilled spirits, wine, or malt beverages, if such advertisement is in, or is calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, unless such advertisement is in conformity with such regulations, to be prescribed by the Secretary of the Treasury, . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised, the alcoholic content thereof (except the statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited). . . .

27 U.S.C. 205 (emphasis added).

3. The parties do not dispute that the labeling of malt beverages' alcohol content is protected commercial speech under the first part of the Central Hudson test or that the Government has a substantial interest in preventing strength wars under the second part.

4. "Malt liquor" is the term used to designate those malt beverages with the highest alcohol content, whereas light beer and non-alcoholic beer are malt beverages containing reduced alcohol content. Malt liquors represent approximately three percent of the malt beverage market.

5. The Act's implementing regulations distinguish these two types of statements. Coors is challenging the type of restriction contained in 27 C.F.R. 7.26(a) which provides that "the alcoholic content and the percentage and quantity of the original extract shall not be stated unless required by State law." Coors is not challenging 7.29(f), which provides that "labels shall not contain the words 'strong', 'full strength', 'extra strength'...or similar words or statements, likely to be considered as statements of alcoholic content." Nor does it challenge 7.29(g), which provides that "labels shall not contain any statements, designs, or devices whether in the form of numerals, letters, characters, figures, or otherwise, which are likely to be considered as statements of alcoholic content."

6. Because we conclude that the Government has failed to satisfy its burden under the third part of the Central Hudson test, we need not proceed to the fourth part to determine whether there is a reasonable fit between the prohibition and the Government's interest.

93-1525 LEBRON v. NATIONAL RAILROAD PASSENGER CORP.

Freedom of speech—Amtrak's ban on display of political messages in Penn Station.

Ruling below (CA 2, 12 F.3d 388, 62 LW 2423):

Amtrak's refusal to rent train station billboard for artist's display of political advertisement is not government action and, therefore, does not violate First Amendment.

Questions presented: (1) Did court of appeals err in holding, contrary to at least four other circuits, that higher degree of state involvement with private entity must be shown to establish state action for First Amendment claims than for sex and race discrimination claims? (2) Did court of appeals err in holding that Amtrak's asserted policy barring display of political advertising messages in Pennsylvania Station, New York, was not state action, when (a) United States created Amtrak, endowed it with governmental powers, owns all its voting stock, and appoints all members of its board; (b) U.S.-appointed board approved advertising policy challenged here; (c) United States keeps Amtrak afloat every year by subsidizing its losses; and (d) Pennsylvania Station was purchased for Amtrak by United States and is shared with several other governmental entities?

Petition for certiorari filed 3/28/94, by David D. Cole, and Center for Constitutional Rights, both of Washington, D.C., and R. Bruce Rich, Gloria C. Phares, Bernardette M. McCann Ezring, Jonathan Bloom, and Weil, Gotshal & Manges, all of New York, N.Y.

MICHAEL A. LEBRON, Plaintiff-Counter-Defendant-Appellee, v. NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK), Defendant-Appellant, TRANSPORTATION DISPLAYS, INCORPORATED, Defendant-Counter-Claimant.

LEBRON v. AMTRAK

Docket No. 93-7127

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

12 F.3d 388; 1993 U.S. App. LEXIS 33711

April 27, 1993, Argued

December 27, 1993, Decided

PRIOR HISTORY: Defendant-appellant National Railroad Passenger Corporation (Amtrak) appeals from a judgment entered February 11, 1993 in the United States District Court for the Southern District of New York, Pierre N. Leval, then-District Judge, that required Amtrak and defendant-counter-claimant Transportation Displays, Incorporated to display a political advertisement prepared by plaintiff-counter-defendant-appellee Michael A. Lebron on a large billboard known as the Penn Station Spectacular. The district court ruled that Amtrak was a governmental actor, and had violated the First Amendment by refusing to display Lebron's advertisement pursuant to a contract leasing the Spectacular to Lebron for the months of January and February 1993.

DISPOSITION: We reverse.

COUNSEL: KEVIN T. BAINE, Washington, D.C. (Nicole K. Seligman, Steven M. Farina, Williams & Connolly, Washington, D.C., William G. Ballaine, Mark S. Landman, Siff Rosen P.C., New York, New York, of counsel), for Defendant-Appellant.

DAVID D. COLE, Washington, D.C. (Center for Constitutional Rights, Washington D.C., R. Bruce Rich, Gloria C. Phares, Robin E. Silverman, Bernadette M. McCann Ezring, Jonathan Bloom, Weil, Gotshal & Manges, New York, New York, of counsel), for Plaintiff-Counter-Defendant-Appellee.

JUDGES: Before: LUMBARD, NEWMAN*, and MAHONEY, Circuit Judges. Chief Judge Newman dissents in a separate opinion.

OPINION BY: MAHONEY, Circuit Judge

Defendant-appellant National Railroad Passenger Corporation (Amtrak) ("Amtrak") appeals from a judgment entered February 11, 1993 in the United States District Court for the Southern District of New York, Pierre N. Leval, then-District Judge.** The judgment of the district court enjoined Amtrak and an advertising agency that performs services for Amtrak, defendant-counterclaimant Transportation Displays, Incorporated ("TDI"), to display a political advertisement prepared by plaintiff-counter-defendant-appellee Michael A. Lebron on a large billboard known as the Spectacular in New York City's Pennsylvania Station ("Penn Station"). Lebron had entered into a contract with TDI to lease the Spectacular for January and February 1993.

The district court ruled that because of the pervasive involvement of the federal government in Amtrak's structure and operations, Amtrak's conduct in controlling speech on its billboards must be deemed governmental, rather than private, in nature, and that Amtrak had violated the First Amendment by refusing to display Lebron's advertisement.

Lebron v. National R.R. Passenger Corp. (Amtrak), 811 F. Supp. 993 (S.D.N.Y. 1993).

We conclude that Amtrak is not a governmental actor subject to the strictures of the First Amendment, and accordingly reverse.

Background

In August 1991, Lebron, an artist who creates billboard displays (frequently involving commentary on public issues), first contacted TDI, which manages the leasing of many of Amtrak's billboards, about contracting for billboard space in Penn Station. The Spectacular, a curved back-lit display space approximately 103 feet wide by ten feet high, dominates the west wall of the rotunda on the upper level of Penn Station where thousands of passengers pass each day. Lebron and TDI eventually agreed that Lebron would pay $16,500 per month to rent the Spectacular for January and February 1993. On November 30, 1992, Lebron and TDI signed an agreement (the "Lease") to that effect.

In negotiating the Lease, Lebron dealt primarily with William B. Schwartz, a TDI account executive, who informed Lebron that displays for the Spectacular containing obscenity or violence were unacceptable. Schwartz asked Lebron about the content of the advertisement that Lebron intended for the Spectacular, but Lebron declined to disclose it, explaining that while his work was generally political, he wanted to keep the specific nature of his advertisement for the Spectacular confidential prior to its display. Schwartz did not then suggest that there might be a problem with political advertisements on the Spectacular.

Although Amtrak authorized TDI to manage the leasing of Amtrak's billboard space, Amtrak at all times retained the right to approve or reject all advertising copy that would appear on its billboards. (In practice, Amtrak only reviewed displays that were to appear on the Spectacular.) Thus, the Lease contained the following language:

> All advertising copy is subject to approval of TDI and [Amtrak] as to character, text, illustration, design and operation.
>
> . . . .
>
> If for any cause beyond its control TDI shall cease to have the right to continue the advertising covered by this contract, or if [Amtrak] should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.

On December 2, 1992, Lebron submitted a color photocopy of the work he intended to display on the Spectacular to TDI, which TDI promptly forwarded to Amtrak. Lebron characterizes the advertisement as "an allegory about the destructive influence of a powerful, urban, materialistic and individualistic culture on rural, community based, family-oriented and religious cultures." The district court described it as follows:

> The work is a photomontage, accompanied by considerable text. Taking off on a widely circulated Coors beer advertisement which proclaims Coors to be the "Right Beer," Lebron's piece is captioned "Is it the Right's Beer Now?" It includes photographic images of convivial drinkers of Coors beer, juxtaposed with a Nicaraguan village scene in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a tail of fire, as if it were a missile. The accompanying text, appearing on either end of the montage, criticizes the Coors family for its support of right-wing causes, particularly the contras in Nicaragua. Again taking off on Coors' advertising which uses the slogan of "Silver Bullet" for its beer cans, the text proclaims that Coors is "The Silver Bullet that aims The Far Right's political agenda at the heart of America."

811 F. Supp. at 995.

Anthony DeAngelo, Amtrak's vice president for real estate and operations development, viewed the photocopy and disapproved the display of Lebron's advertisement on the Spectacular. In a letter dated December 23, 1992, Amtrak notified TDI of its rejection, stating that "Amtrak's policy is that it will not allow political advertising on the Spectacualar advertising sign."

Lebron then commenced this action against Amtrak and TDI, claiming violations of his First and Fifth Amendment rights as well as his contractual rights under the Lease. He sought equitable relief to compel Amtrak and TDI to display his ad on the Spectacular, or alternatively, damages for breach of the Lease. After expedited discovery and a trial on documentary submissions, the district court ruled that "in rejecting [Lebron's] contract to display his art on its billboard Amtrak was engaged in governmental action and . . . the standards employed by Amtrak in rejecting his work violated its obligations under the First Amendment." 811 F. Supp. at 1005. In view of this conclusion, the district court did not reach Lebron's contractual claim. Id. at 1005 n.5. Judgment was entered enjoining Amtrak and TDI to display Lebron's advertisement on the Spectacular "for two months beginning on the date

that follows by six (6) business days the denial or expiration of any stay of [the district court's] judgment by the highest court having jurisdiction to issue such a stay."

Amtrak applied to the district court for a stay of its judgment pending appeal to this court. The district court denied the application, but "permitted delay in compliance with the judgment" for fourteen days to allow an application for a stay to this court, while recommending against the grant of any such application.

This appeal followed. In response to a motion by Amtrak, this court stayed the execution of the district court's judgment pending appeal and expedited the appeal.

Discussion

The First Amendment's directive "that 'Congress shall make no law . . . abridging the freedom of speech, or of the press' is a restraint on government action, not that of private persons." Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 114, 36 L. Ed. 2d 772, 93 S. Ct. 2080 (1973) (plurality opinion) (citing Public Utilities Comm'n v. Pollak, 343 U.S. 451, 461, 96 L. Ed. 1068, 72 S. Ct. 813 (1952)). Thus, in considering Lebron's claim that Amtrak violated his right to free speech, the threshold inquiry is whether Amtrak's refusal to run Lebron's advertisement on the Spectacular constitutes government action.

Government action is most readily found when the conduct at issue is performed by a government entity. However, that is not the case here. The Rail Passenger Service Act of 1970 (the "Act"), 45 U.S.C. § 501 (1988) et seq., created Amtrak as a private, for-profit corporation under the District of Columbia Business Corporation Act. See 45 U.S.C. § 541 (1988). This legislation rejected earlier suggestions that the nation's passenger rail service be nationalized. See Laurence E. Tobey, Costs, Benefits, and the Future of Amtrak, 15 Transp. L.J. 245, 252-53 (1987). Accordingly, the Act specifies that Amtrak is "not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government." § 541; see also National R.R. Passenger Corp. v. Atchison T. & S. F. Ry. Co., 470 U.S. 451, 454-55, 84 L. Ed. 2d 432, 105 S. Ct. 1441 (1985).

The government action inquiry is more difficult when the challenged conduct is performed not by the government itself, but by a private entity. The Supreme Court has articulated a variety of approaches for discerning the presence of government action in the activities of private entities. See Blum v. Yaretsky, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982) (private conduct deemed government action when government coerces or significantly encourages that conduct); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158-59, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978) (private entity may be deemed government actor when performing role traditionally performed exclusively by government); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974) (private action deemed governmental when "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself"); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961) (private action deemed governmental when the government "has so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a joint participant in the challenged activity").[1]

As the Supreme Court has noted, "formulating an infallible test" of government action is an "'impossible task.'" Reitman v. Mulkey, 387 U.S. 369, 378, 18 L. Ed. 2d 830, 87 S. Ct. 1627 (1967) (quoting Burton, 365 U.S. at 722). Rather, "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton, 365 U.S. at 722.

In this case, the district court concluded that "based on examination of the federal government's deep and controlling entwinement in Amtrak's structure and operation, . . . when Amtrak undertakes to control the content of speech on its billboards, its conduct must be deemed governmental rather than private." 811 F. Supp. at 997. Supporting this assessment, the district court described Amtrak as "a corporation whose directors are appointed by the President, whose operations are financed by the federal government, and whose properties, in major part, are mortgaged to the federal government." Id. at 998.

We need not reiterate the details underlying this description, see id. at 997-98 and nn. 3-8, because we do not take issue with this aspect of the district court's opinion, but rather with the legal conclusion that is derived from it. As the district court pointed out, there are "a number of cases in which discharged employees charged either Amtrak or the similarly structured Consolidated Rail Corporation ('Conrail') with unconstitutional governmental action . . . [in which] the courts held that Amtrak's (or Conrail's) actions in dealing with its employees were not deemed to be governmental action." Id. at 999 (collecting cases).

One of these cases was Myron v. Consolidated Rail Corp., 752 F.2d 50 (2d Cir. 1985). In that case, we held that:

> Despite federal funding, regulation, stock ownership and representation on the board of directors, there is nothing resembling federal supervision of day-to-day activities. In sum, we conclude that despite an obviously close relationship, the federal government has not "so far insinuated itself into a position of interdependence" with Conrail that the latter's personnel decisions can be considered federal action. Id. at 55-56 (footnote omitted) (quoting Burton, 365 U.S. at 725).

The district court distinguished Myron and the similar precedents cited by the district court as follows:

> The fact that Amtrak is considered a private employer in administering its employment of personnel does not mean it will be deemed private when it regulates speech. Whether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue. As Judge Friendly explained in Wahba v. New York University, 492 F.2d 96, 100 [(2d Cir.), cert. denied, 419 U.S. 874 (1972)], "we do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims concerning different forms of governmental involvement and other constitutional guarantees." See also Weise v. Syracuse University, 522 F.2d 397, 404 (2d Cir. 1975).

811 F. Supp. at 999 (footnote omitted).

We are not persuaded by this analysis. Myron addressed the "government action" issue in the specific context of a "claim that Conrail violated [Myron's] First and Fifth Amendment rights by discharging him for representing various people with interests adverse to Conrail." 752 F.2d at 54. We therefore decline to regard Myron as a precedent confined to employee matters that does not provide strong guidance, if not controlling authority, for our decision in this First Amendment case.

Wahba also involved an assertion of First Amendment claims, but we were nonetheless "unable to discern the government action necessary to sustain . . . them." 492 F.2d at 98. Weise ruled that a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue, as is so often the case in employment litigation, than when there is a claim of a First Amendment violation. 522 F.2d at 405. Specifically, although we reversed and remanded the dismissal of plaintiffs' § 1983 claims that they were denied employment or had their employment terminated because of sex discrimination, 522 F.2d at 400, 413, we explicitly stated that: "If our concern in this case were with discipline and the First Amendment, the alleged indicia of state action - funding and regulation - would most likely be insufficient." 522 F.2d at 405.

The district court expressed concern that in the absence of First Amendment restraints flowing from a finding of government action, Amtrak could post its own political advertisements on the Spectacular, postulating the example that Amtrak "would be free under the First Amendment to donate its billboards to the support of the incumbent President's election." 811 F. Supp. at 1000. Whatever its constitutional implications, which we do not address, such conduct would constitute a criminal violation of federal law. See 2 U.S.C. §§ 441b, 437g(d) (1988); see also Stern v. Federal Election Comm'n, 287 U.S. App. D.C. 256, 921 F.2d 296, 297 (D.C. Cir. 1990) (noting § 441b prohibition of corporate political contributions).

Our opinion in Myron accords with numerous cases that have concluded that Amtrak and Conrail are not subject to constitutional restraints upon government action. See, e.g., Andrews v. Consolidated Rail Corp., 831 F.2d 678, 682-83 (7th Cir. 1987) (following Myron); G. & T. Terminal Packaging Co. v. Consolidated Rail Corp., 830 F.2d 1230, 1236 (3d Cir. 1987) ("Every court that has considered the matter has concluded that Conrail is not a governmental actor for purposes of constitutional analysis."), cert. denied, 485 U.S. 988, 99 L.Ed. 2d 501, 108 S. Ct. 1291 (1988); Morin v. Consolidated Rail Corp., 810 F.2d 720, 722-23 (7th Cir. 1987) (per curiam)(following Myron); Anderson v. National R.R. Passenger Corp. (Amtrak), 754 F.2d 202, 204-05 (7th Cir. 1984) (per curiam); Verdon v. Consolidated Rail Corp., 828 F. Supp. 1129, 1137 (S.D.N.Y. 1993); Wilson v. Amtrak Nat'l R.R. Corp., 824 F. Supp. 55, 57-58 (D. Md. 1992); Railway Labor Executives' Ass'n v. National R.R. Passenger Corp., 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988); Marcucci v. National R.R. Passenger Corp., 589 F. Supp. 725, 727-29 (N.D. Ill. 1984); Kimbrough v. National R.R. Passenger Corp., 549 F. Supp. 169, 172-73 (M.D. Ala. 1982).

In view of this unvarying line of authority, and the fact that our pertinent precedent addressed an issue of First Amendment retaliation, see Myron, 752 F.2d at 54, we conclude that Amtrak's refusal to

run Lebron's advertisement on the Spectacular was not government action, and accordingly is not to be tested against the requirements of the First Amendment. Thus, we do not reach the merits of Lebron's First Amendment claim.

In view of the dismissal of Lebron's only federal claim, it will not be appropriate for the district court to address his contract claim on remand.[2] See United Mine Workers v. Gibbs, 383 U.S. 715, 726-27, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966); Eatz v. DME Unit of Local Union No. 3, 973 F.2d 64, 67 (2d Cir. 1992). Lebron is free to pursue that claim in state court. Under N.Y. Civ. Prac. L. & R. 213 (McKinney 1990), Lebron's contract claim is subject to a six year statute of limitations. See also id. 205(a) (McKinney Supp. 1993), id. cmt. 205:2 (McKinney 1990) (in any event, Lebron may sue in state court within six months of dismissal in federal court).

Conclusion

The judgment of the district court is reversed and the case is remanded with the instruction to dismiss the complaint. As stated at oral arugment, Lebron's motion to strike pages from the joint appendix and for double costs and attorney fees is denied; his motion to file a supplemental volume of exhibits is granted.

* Judge Newman became chief judge of the Second Circuit Court of Appeals on July 1, 1993.

** Judge Leval became a member of the Second Circuit Court of Appeals on November 8, 1993.

ENDNOTES TO OPINION

1. Some commentators have suggested that more recent Supreme Court cases, and especially the Court's ruling that the United States Olympic Committee is not a governmental actor subject to constitutional restraints in San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 542-47, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987), have curtailed Burton's precedential authority. See Laurence H. Tribe, American Constitutional Law § 18-3, at 1701 n.13 (2d ed. 1988); Marcia Berman, An Equal Protection Analysis of Public and Private All-Male Military Schools, 1991 U. Chi. Legal F. 211, 225-26; see also Jackson, 419 U.S. at 358 ("actual holding" of Burton limited to lessees of public property); Adams v. Vandemark, 855 F.2d 312, 317 n.7 (6th Cir. 1988) ("The more recent Supreme Court cases in this area appear to have limited the broad realm of state action Burton suggested."), cert. denied, 488 U.S. 1042, 102 L. Ed. 2d 992, 109 S. Ct. 868 (1989); Imperiale v. Hahnemann Univ., 776 F. Supp. 189, 195-96 (E.D. Pa. 1991) (same), aff'd, 966 F.2d 125 (3d Cir. 1992) (per curiam).

2. Correspondingly, TDI's counterclaim for a declaratory judgment that it is entitled to terminate the Lease will not be decided in this action.

JON O. NEWMAN, Chief Judge, dissenting:

The issue presented by this appeal is whether Amtrak, formally known as the National Railroad Passenger Corporation, is subject to the First Amendment when it acts to deny advertising space on the basis of political content. Because I believe the First Amendment limits Amtrak in making such decisions, I respectfully dissent.

The Court does not dispute the detailed findings of the District Court as to the extent of the Government's role in the structure and financing of Amtrak, including the undeniable fact that six members of the nine-member Amtrak board are appointed by the President of the United States, two others by the Government as owner of Amtrak's preferred stock, and the ninth member by the other board members. Instead, the Court relies on prior cases that have ruled Amtrak and Conrail not to be governmental actors when they discharge or fail to rehire workers, see, e.g., Andrews v. Consolidated Rail Corp., 831 F.2d 678, 682-83 (7th Cir. 1987); Anderson v. National R.R. Passenger Corp. (Amtrak), 754 F.2d 202, 204-05 (7th Cir. 1984), even where First Amendment rights are peripherally involved, see, e.g., Myron v. Consolidated Rail Corp., 752 F.2d 50, 54-56 (2d Cir. 1985).

However, it has long been the law in this Circuit, and the Supreme Court has given no contrary indication, that the state action determination is dependent in part on the nature of the constitutional right alleged to have been impaired. See Weise v. Syracuse University, 522 F.2d 397, 404 (2d Cir. 1975); Wahba v. New York University, 492 F.2d 96, 100 (2d Cir.), cert. denied, 419 U.S. 874, 42 L. Ed. 2d 113, 95 S. Ct. 135 (1974). In the District Court, Amtrak conceded that, if it restricted service to passengers on the basis of race, religion, or national origin, it would be deemed a governmental actor in that respect. See Lebron v. National R.R. Passenger Corp. (Amtrak), 811 F. Supp. 993, 999 (S.D.N.Y. 1993).

In view of the extensive involvement of the Government in the structure and financing of Amtrak, I agree with then-District Judge Leval that Amtrak is a governmental actor, subject to First Amendment limitations, when it undertakes to regulate the political content of advertisements on its billboards. Our ruling in Myron is not a precedent for forgoing all First Amendment scrutiny with respect to Amtrak. We there ruled that Conrail was

not subject to First Amendment limitations for discharging an employee for disloyalty. Though the employee, an attorney, had sought to reenforce his employment claim with an allegation that his First Amendment right to represent fellow employees in litigation was being impaired by his discharge, we made it clear that what we were placing beyond constitutional scrutiny were Conrail's "personnel decisions." Myron, 752 F.2d at 55-56. At most an indirect First Amendment issue was implicated. By contrast, in the pending case Amtrak purports to have complete insulation from a core First Amendment claim -- that it determines the use of its resources, in this case, the availability of its advertising spaces, on the basis of political views.

In permitting this frontal First Amendment challenge to be governed by the oblique First Amendment ruling in Myron, the Court dismisses rather brusquely the District Court's forcefully articulated concerns as to the consequences of First Amendment exemption for Amtrak in its advertising decisions. Judge Leval pointed out that, without First Amendment limitation, Amtrak would be free to sponsor advertisements on its billboards taking sides with respect to political contests, or promoting or denigrating particular religions, or advocating its view on contentious public issues like abortion. See Lebron, 811 F. Supp. at 1000. The Court makes no response with respect to the prospect of Amtrak's using its advertising resources on matters of religion or public issues, and rejects the concern about politics by pointing out that "donation" of advertising space would run afoul of existing statutes. No mention is made of the District Court's valid concern about Amtrak's opportunity to sell advertising space only to candidates it favors.

In any event, the existence of a limited statutory bar to one aspect of the serious concerns raised by the District Court is no answer to Lebron's constitutional claim. The fact that a corporation like Amtrak, organized by authority of an act of Congress, would be criminally liable if its donation of advertising space were deemed to be a political contribution, see 2 U.S.C. §§ 441b, 437g(d) (1988), provides no remedy for a civil plaintiff like Lebron who claims a First Amendment violation because his offer to purchase advertising space has been rejected, allegedly without required limitations on Amtrak's discretion, because of the ad's political content.

Though I disagree with the majority's ruling requiring the outright dismissal of Lebron's suit, I would not uphold the District Court's injunction requiring Amtrak to display Lebron's ad. Amtrak's advertising policy may well run afoul of First Amendment limitations, as the District Court ruled, notably because the current "vague policy provides Amtrak officials with precisely the kind of unfettered discretion to control speech that the Supreme Court has held to contravene the First Amendment," Lebron, 811 F. Supp. at 1003. But the policy, despite its vagueness, is claimed to prohibit political messages. This is not a case where an official, subject to First Amendment restraint, has used unfettered discretion to deny permission to use a traditional public forum like city streets for a parade. See Shuttlesworth v. Birmingham, 394 U.S. 147, 22 L. Ed. 2d 162, 89 S. Ct. 935 (1969). Amtrak's billboard space in Pennsylvania Station, even if used in the past for ads of a public service nature, has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for promoting "The Far Right's political agenda." Lebron, 811 F. Supp. at 995. On the present record, it is not an appropriate use of a federal court's equity power to force Amtrak to venture so extensively into the political arena. If the denial of advertising space under Amtrak's existing policies encounters First Amendment objections, damage remedies and declaratory relief will have to suffice.

For these reasons, I dissent from the judgment ordering the complaint dismissed.

93-723 U.S. v. X-CITEMENT VIDEO INC

Obscenity—Child pornography—Elements of offense—Knowledge of actor's age.

Ruling below (CA 9, 982 F.2d 1285, 61 LW 2396, 52 CrL 1287):

Federal statute that prohibits distribution or receipt of child pornography, 18 USC 2252, lacks element of knowledge that actor is under age of 18 and thus violates First Amendment.

Question presented: Did court below correctly hold that Section 2252 is unconstitutional on its face on ground that it does not require government to prove that defendant knew that materials at issue show minors engaging in sexually explicit acts?

Petition for certiorari filed 11/5/93, by Drew S. Days III, Sol. Gen., John C. Keeney, Acting Asst. Atty. Gen., William C. Bryson, Dpty. Sol. Gen., Christopher J. Wright, Asst. to Sol. Gen., and Joel M. Gershowitz, Justice Dept. Atty.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. X-CITEMENT VIDEO, INC., Defendant-Appellant. Plaintiff-Appellee, v. Rubin Gottesman, Defendant-Appellant.

No. 89-50556, No. 89-50562

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

982 F.2d 1285; 1992 U.S. App. LEXIS 32542; 92 Cal. Daily Op. Service 10050; 92 Daily Journal DAR 16843

March 5, 1992, Argued and Submitted, Pasadena, California

December 16, 1992, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California. D.C. No. CR-88-0295-KN-3 UNITED STATES OF AMERICA,. D.C. No. CR-88-0295-KN-1. David V. Kenyon, District Judge, Presiding.

COUNSEL: Stanley Fleishman, Fleishman, Fisher & Moest, Los Angeles, California, for the defendants-appellants.

Nancy B. Spiegel, Assistant United States Attorney, Los Angeles, California; Janis Kockritz, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

JUDGES: Before: William C. Canby, Jr., Alex Kozinski and Ferdinand F. Fernandez, Circuit Judges.

OPINION BY: CANBY, Circuit Judge

Defendant Rubin Gottesman appeals his conviction, after a bench trial, for violating the Protection of Children Against Sexual Exploitation Act of 1977 ("Act"), 18 U.S.C. § 2251 et seq. (1988). Gottesman was convicted of violating sections 2252(a)(1) and (a)(2) of the Act, which prohibit the distribution, receipt, or shipping of child pornography. Gottesman challenges the Act as unconstitutional, both on its face and as applied. We conclude that the Act is unconstitutional on its face and, therefore, reverse.

FACTUAL BACKGROUND

In 1986 and 1987, an undercover police officer contacted Gottesman, the operator of X-Citement Video, Inc., and expressed interest in buying pornographic videotapes featuring one Traci Lords. The officer stated that he wanted tapes that Lords had made when she was under the age of 18. Gottesman eventually sold two sets of such tapes: the first was a box of 49 tapes that he sold directly to the police officer; the second was a box of 8 tapes that Gottesman sold to the police officer and sent (per the police officer's instructions) to Hawaii.

A federal grand jury indicted Gottesman for distributing, shipping, and conspiring to distribute and ship child pornography in violation of 18 U.S.C. § 2252. After a bench trial, Gottesman was convicted on these counts; the district court sentenced him to 12 months incarceration and ordered him to pay a $100,000 fine.

After he had filed a notice of appeal to this court, Gottesman requested a remand to the district court for reconsideration in light of United States v. Thomas, 893 F.2d 1066 (9th Cir.), cert. denied, 112 L. Ed. 2d 53, 111 S. Ct. 80 (1990), which we granted. Gottesman then asserted before the district court, first, that Thomas had ruled that section 2252 lacked a requirement that a defendant know that he is distributing or shipping child pornography, and, second, that, as construed, section 2252 on its face violates the First and Fifth Amendments to the U.S. Constitution. The district court rejected these arguments and upheld the constitutionality of section 2252.

On appeal, Gottesman contends that: Section 2256 of the Act[1] is unconstitutional on its face because it is vague and overbroad; section 2252 of the Act[2] is unconstitutional on its face because it does not require scienter;[3] and the Act, as applied, violates the First and Fifth Amendments because the tapes at issue are not child pornography. We reject the challenges to section 2256 but agree that section 2252 is fatally defective. Because we conclude that section 2252 is unconstitutional on its face, we do not reach Gottesman's argument about the Act as applied.

DISCUSSION

I. Does Section 2256 Render the Act Unconstitutionally Vague and Overbroad?

A. Is the Act Unconstitutionally Overbroad Because it Raises the Statutory Age of Majority from 16 to 18?

Gottesman asserts that section 2256[4] of the Act its definitional section is facially unconstitutional because it renders the Act applicable to depictions of those under the age of 18, whereas the statute upheld in New York v. Ferber, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982), set the age of majority at 16. See Ferber, 458 U.S. at 774 (rejecting constitutional challenges to statute prohibiting promotion or distribution of sexual performances by children under the age of 16). Gottesman argues that adding two years to the age of majority renders the Act unconstitutionally overbroad. He contends that it is far more difficult to determine when a person is under 18 than it is to determine when he or she is under 16. The result, according to Gottesman, is that distribution of sexually explicit material becomes such a hazardous profession that its practitioners will refuse to handle materials involving persons anywhere near the age of 18, thus restricting protected expression involving, for example, 23- or 25-year-olds.

The Supreme Court stated in Ferber that it would invalidate a statute for overbreadth "'only as a last resort.' . . . The overbreadth involved [must] be 'substantial' before the statute involved will be invalidated on its face." Ferber, 458 U.S. at 769 (citation omitted). Although Gottesman's argument is not without some force, we see no basis for concluding that any overbreadth here is sufficiently greater than that attending a 16-year age line to compel a different result. Indeed, we would not lightly hold that the Constitution disables our society from protecting those members it has traditionally considered to be entitled to special protections - minors. Gottesman merely quotes a district court case discussing the Act's raising of the age of majority from 16 to 18, United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987), vacated, mandate granted, United States v. United States District Court for the Central District of California, 858 F.2d 534 (9th Cir. 1988), and a series of Supreme Court cases that permit "adult" treatment of 16- and 17-year-olds. See, e.g., Stanford v. Kentucky, 492 U.S. 361, 106 L. Ed. 2d 306, 109 S. Ct. 2969 (1989) (permitting capital punishment for 16- and 17-year-olds). With respect to the former, Kantor did state that the Act seemed overbroad, but it also refused to strike down the statute on its face, in light of Ferber. With respect to the Supreme Court cases, they merely permit, rather than require, adult treatment of 16- and 17-year-olds. Moreover, they indicate nothing about the substantiality (or lack thereof) of the overbreadth of section 2256. Thus, Gottesman's arguments are far from sufficient to overcome the presumption against invalidating a statute on its face for overbreadth.

B. Does Section 2256 Render the Act Unconstitutionally Overbroad or Vague Because it Substitutes "Lascivious" for "Lewd"?

Gottesman contends that section 2256 is overbroad and vague because Congress replaced "lewd" with "lascivious" in defining illegal exhibition of the genitals of children. See 18 U.S.C. § 2256(2)(E). In so arguing, he ignores United States v. Wiegand, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856, 98 L. Ed. 2d 118, 108 S. Ct. 164 (1987), in which we rejected a similar argument, stating that "'lascivious' is no different in its meaning than 'lewd,' a commonsensical term whose constitutionality was specifically upheld in Miller v. California and in Ferber." Wiegand, 812 F.2d at 1243 (citations omitted). We adhere to the view expressed in Wiegand.

C. Does Section 2256 Render the Act Unconstitutionally Overbroad or Vague Because it Prohibits Actual or Simulated Bestiality and Sadistic or Masochistic Abuse?

Gottesman asserts that section 2256 is overbroad and vague because it includes among the covered acts, without further definition, actual or simulated bestiality and sadistic or masochistic abuse. 18 U.S.C. § 2256(2). This argument was essentially answered in Ferber, which upheld the constitutionality of a similar statute. The relevant section of the statute at issue in Ferber defined the prohibited sexual conduct as "'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.'" 458 U.S. at 751.

Gottesman focuses on three differences between section 2256 and the statute in Ferber: First, he argues that section 2256's prohibition of "simulated" acts renders it overbroad and vague. The statute in Ferber also prohibited "simulated" acts, however, and the structure of the sentence suggests that "simulated" modified all the acts on the list. Thus, there is no meaningful distinction between section 2256 and the Ferber statute in this regard. Second, Gottesman focuses on section 2556(2)(D)'s alleged inclusion of "sadistic or masochistic; abuse." The semicolon before "abuse" is a typographical

error in the unofficial code, however; the official version of section 2256(2)(D) states "sadistic or masochistic abuse." Compare 18 U.S.C. § 2256(2)(D) (1988) with 18 U.S.C.A. § 2256(2)(D) (West Supp. 1992). The only difference between section 2256 and the Ferber statute, therefore, is the former's replacement of "sado-masochistic abuse" with "sadistic or masochistic abuse." The two terms are indistinguishable. The final difference that Gottesman cites is that the Ferber statute prohibited "sexual bestiality," whereas section 2256 refers only to "bestiality." Gottesman suggests that, under section 2256, "bestiality" could be read to encompass its entire dictionary definition, so that it would also prohibit, e.g., "the display, gratification, or an instance of bestial traits or impulses." Webster's International Dictionary (3rd ed. 1966). In context, however, such a reading would not be justified; "bestiality" is listed as a subcategory of "sexually explicit conduct." The term can hardly be interpreted to mean "acting beastly"; properly construed, the term is no different from Ferber's "sexual bestiality."

Thus, we reject all of Gottesman's vagueness and overbreadth challenges to the Act.

II. Does Section 2252 Render the Act Unconstitutional Because it Does Not Require Proof of Scienter that the Materials Distributed Are Child Pornography?

Gottesman's other facial challenge to the Act is that section 2252 - the section prohibiting, inter alia, the distribution or receipt of child pornography - violates the guarantee of free speech under the First Amendment and the guarantee of due process under the Fifth Amendment because it does not require that the prosecution demonstrate the defendant's knowledge of the age of the performers. Gottesman argues that: (1) section 2252 does not include a scienter requirement regarding the minority of the performers; and (2) the lack of a scienter requirement violates the First and Fifth Amendments to the Constitution.

A. What Showing of Scienter Does Section 2252 Require?

The main point of contention between the parties is over the scienter requirement of section 2252. Gottesman contends that section 2252 does not require knowledge of the minority of the performers, whereas the government argues that section 2252 requires knowledge of "the nature and character of the material." The government's position is a bit cagey; it suggests at times that the statute requires that the distributor know that the material is child pornography, but argues that it does not require that the distributor know the age of the performers. Of course, it would make no difference under any construction of the statute if the defendant did not know precisely whether the underage performer was age 6, 7 or 8. What the government seems to be saying in its brief, however, is that the statute does not even require that the defendant know that one or more performers was under the age of 18, so long as he knew the general nature of the materials he was distributing.

We ruled on the question of the scienter required by the Act in Thomas, in which the defendant was accused of violating section 2252. Thomas, like Gottesman in the instant case, argued that section 2252 requires knowledge of the minority of the performer, and that, therefore, the indictment was insufficient because it failed to allege that Thomas knew that the pornography he transported depicted a minor. After setting forth section 2252, we stated that

> In subsection 1, "knowingly" modifies only "transports or ships." In subsection 2, "knowingly" modifies only "receives." The section [2252], therefore, does not require that Thomas knew that the pornography he transported, mailed, and received involved a minor. The section requires only that Thomas knowingly transported and received the material.

893 F.2d at 1070 (emphasis added).

Thus, Thomas held that section 2252 does not require knowledge that the material involves a minor. In fact, Thomas indicates that section 2252 does not require any knowledge of the contents of the material; the only scienter requirement of section 2252 is the defendant's knowledge that he mailed the material.

The government does not attempt to distinguish Thomas, but rather relies on United States v. Moncini, 882 F.2d 401 (9th Cir. 1989). In Moncini, the defendant argued that section 2252 requires the government to prove that a defendant knew that mailing child pornography was illegal. We rejected this argument, stating that "section 2252(a) requires that the government prove that the defendant had knowledge of the nature of the contents of the visual depictions and that the depictions were to be transported or shipped," but that no more was required. Id. at 404. Thus, we held that section 2252 did not require knowledge of the illegality of mailing child pornography. See also United States v. Brown, 862 F.2d 1033, 1036 (3rd Cir. 1988) (under section 2252 "recipient need only know that the material he receives is child pornography").

The problem with the government's reliance on Moncini is that its statement that knowledge of the contents is required is dictum. In Moncini, the question before us was whether section 2252 requires knowledge of the illegality of the mailings; the statement regarding knowledge of the contents was unnecessary to our ruling. In Thomas, on the other hand, the defendant squarely raised the question of whether section 2252 requires knowledge that the performers are under the age of 18. Our statement that section 2252 requires no such knowledge constituted part of our ruling. Thus, Thomas is the only precedent from this circuit on the question of whether section 2252 requires scienter of the minority of the performers. We are bound by its conclusion that section 2252 contains no such requirement.

B. What Level of Scienter Does the Constitution Require?

Gottesman contends - and the government does not dispute - that a statute prohibiting the distribution of printed or taped materials that does not require some knowledge of the contents of the material violates the First and Fifth Amendments of the U.S. Constitution. The Supreme Court so ruled in Smith v. California, 361 U.S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215 (1959). In Smith, the Court held that the First Amendment prohibits prosecution of a book distributor for possession of an obscene book unless the distributor has "knowledge of the contents of the book." 361 U.S. at 153. See Ferber, 458 U.S. at 765 ("As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."); see also Osborne v. Ohio, 495 U.S. 103, 115, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990) (noting "the requirement laid down in Ferber that prohibitions on child pornography include some element of scienter").

The Smith opinion did not delineate the level of scienter that the Constitution requires. In Hamling v. United States, 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974) and Ripplinger v. Collins, 868 F.2d 1043 (9th Cir. 1989), however, the constitutional requirements were clarified somewhat. In Hamling, a defendant convicted of distributing obscene material argued that the government was required to prove that he knew that the material was obscene. The Supreme Court, in rejecting this argument, stated that: "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." Hamling, 418 U.S. at 123. We applied Hamling in Ripplinger, finding a statutory definition unconstitutional on its face because it did not require actual knowledge of the contents of the pornographic material. In so ruling, we indicated that a statute must require knowledge of the character of the materials in order to pass constitutional muster. Ripplinger, 868 F.2d at 1056.

In purporting to apply these principles here, the government once again skates a very fine line in its brief. It concedes that, to be constitutional, the statute must require knowledge of the nature and character of the material, and it sometimes formulates this requirement as knowledge that the material is "child pornography." On the other hand, it appears to resist a requirement of proof that the defendant know that one or more performers were underage. It emphasizes that the Constitution does not require knowledge by the defendant of the actual age of the underage performer. Of course that must be true. The question, however, is whether it requires knowledge that one or more per formers was under age 18. In at least part of its argument, the government seems to suggest that there is no such requirement:

> Thus, the scienter required by the child pornography statutes is analogous to that required for obscenity convictions - general knowledge of the nature of the contents of the materials, not knowledge of the specific age of the minor. See also United States v. Thomas, 893 F.2d 1066, 1070 (9th Cir. 1990)(section 2252(a) does not require proof that defendant knew that pornography involved a minor). . . .

Government's brief, p. 17.

At oral argument, the government moved away somewhat from this perch and conceded that the statute would have severe constitutional problems if it did not include a requirement of knowledge that at least one performer engaged in the specified sexually explicit acts was under 18 years of age.

Whatever the government's position, we conclude that the constitutional minimum requirement of scienter for the Act's proscription of transporting or receiving child pornography is knowledge that at least one of the performers is under age 18. It is true that, in Hamling, it was not necessary that the violator know that the material he was distributing was obscene. But the Supreme Court's point was that it was not essential that the violator know the legal status of the materials; he could not "avoid prosecution by simply claiming that he had not brushed up on the law." Hamling, 418 U.S. at 123. The question before us does not concern the defendant's requisite knowledge of the law; it concerns his knowledge of a particular fact - the underage of the performer.

Our decision in United States v. United States District Court for the Central District of California, 858 F.2d 534 (9th Cir. 1988), is highly instructive. There we dealt with charges under section 2251(a) of the Act against producers of films also featuring the redoubtable Traci Lords; the issue was whether the producers were entitled to an affirmative defense that they were deceived by Lords into believing that she was an adult. We held that the First Amendment required that provision for such a defense be engrafted onto the Act. Id. at 538-44. We declined to hold, however, that the Constitution required knowledge of the minority of the performer to be an element of the offense. Our reasons for so declining are most relevant here:

> Defendants would have us go farther and hold that the first amendment requires the government to prove scienter as part of its case. They rely on the Supreme Court cases holding that the government must carry such a burden in cases involving booksellers and other downstream distributors. See, e.g., Hamling, 418 U.S. at 123, 94 S. Ct. at 2910. We do not view these cases as controlling here. Those who arrange for minors to appear in sexually explicit materials are in a far different position from those who merely handle the visual images after they are fixed on paper, celluloid or magnetic tape. While it would undoubtedly chill the distribution of books and films if sellers were burdened with learning not only the content of all of the materials they carry but also the ages of the actors with whom they have had no direct contact, see Smith, 361 U.S. at 153-54, 80 S. Ct. at 218-19, producers are in a position to know or learn the ages of their employees. We note that several states have taken this approach. . . .

Id. at 543-44 n.6.

These considerations concerning distributors or receivers are directly applicable here, and we find them compelling. Section 2252 potentially applies to all kinds of recipients or distributors of videotapes and magazines. To render them all prima facie criminals if one of the performers in a portrayal of sexually explicit conduct is underage, without the distributor's or recipient's knowledge, would be to create precisely the kind of chilling effect condemned by Smith. That we cannot do consistently with the First Amendment as the Supreme Court has interpreted it.

We conclude, therefore, that the First Amendment mandates that a statute prohibiting the distribution, shipping or receipt of child pornography require knowledge of the minority of the performers as an element of the crime it defines. Section 2252, as authoritatively construed by Thomas, does not so require.

The question then arises whether, in the face of Thomas, we could construe section 2252 so as to save its constitutionality. In District Court, we engrafted an affirmative defense onto section 2251(a) in order to save it. Despite that example, we do not feel free to follow an analogous course here. First, it comes closer to judicial rewriting of a statute to engraft onto it an element of the crime than it does to recognize an affirmative defense, of a type that often exists without being specified in the statute defining the crime. See District Court, 858 F.2d at 542. Second, Thomas decided the precise question whether knowledge of the performer's underage was an element of 2252, and it cited District Court for the analogous proposition that scienter was not an element of section 2251. Thomas, then, was decided in full knowledge of District Court and its rationale. Thomas nevertheless ruled squarely that scienter of the minority of the performer was not an element of the crime defined by section 2252. Not sitting as an en banc court, we regard ourselves as bound by Thomas's interpretation.

CONCLUSION

In summary, then, we conclude that the First Amendment to the United States Constitution mandates that a statute prohibiting the distribution, shipping or receipt of child pornography require as an element knowledge of the minority of at least one of the performers who engage in or portray the specified conduct. Section 2252, as authoritatively construed by Thomas, does not so require. As a result, section 2252 is unconstitutional on its face. Gottesman's conviction therefore cannot stand.

REVERSED.

ENDNOTES TO OPINION

1. Section 2256 provides that:

> For the purposes of this chapter, the term
> (1) "minor" means any person under the age of eighteen years;
> (2) "sexually explicit conduct" means actual or simulated
> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (B) bestiality;
> (C) masturbation;
> (D) sadistic or masochistic abuse; or

(E) lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape;

(6) "computer" has the meaning given that term in section 1030 of this title; and

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.

2. The relevant portions of Section 2252 provide that:

(a) Any person who -

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails any visual depiction, if -

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if -

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

* * *

shall be punished as provided in subsection (b) of this section.

(b)(1) Whoever violates paragraph (1), (2), or (3) of subsection (a) shall be fined under this title or imprisoned not more than ten years, or both, but, if such person has a prior conviction under this section, such person shall be fined under this title and imprisoned for not less than five years nor more than fifteen years.

3. Gottesman also argues that the indictment was insufficient because it did not allege scienter. In light of our ruling on the constitutionality of the Act, we do not address this issue.

4. Gottesman refers to this section as § 2255. The difference is inconsequential: Section 2255 was recently renumbered as § 2256, and they are otherwise identical.

DISSENT: KOZINSKI, Circuit Judge, dissenting in part.*

What makes this case hard is that most of the materials defendant distributes are protected by the First Amendment. The thought that someone in his position might be convicted, despite an innocent mind, because of a short scene in one videotape among the thousands he carries in stock, should give pause to anyone concerned about free speech. I therefore agree with my colleagues that a child pornography statute must contain a mens rea requirement. But I do not agree that Gottesman must have known the videos he sold depicted child pornography; recklessness on his part would have sufficed. Moreover, under our traditional rules of construction, we can read a recklessness mental state into the statute, to bring it in line with the Constitution. Indeed, we have a duty to do so.

I

Part II(B) of the majority opinion answers the question: "What level of scienter does the Constitution require?" It concludes that a defendant in a child pornography case must be proven to have "knowledge of the minority of at least one of the performers." Maj. op. at 14536. In reaching this conclusion, the majority relies on New York v. Ferber, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982), which holds that, under a child pornography statute, "as with obscenity laws, criminal responsibility may not be imposed without some element of scienter." Id. at 765 (emphasis added). But Ferber did not say what level of scienter is sufficient in a child pornography case - whether it be purposefulness, knowledge, recklessness, negligence, or something else altogether.

The Supreme Court answered this question eight years later in Osborne v. Ohio, 495 U.S. 103, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990). Osborne upheld a statute that outlawed the possession of child pornography where the defendant either knew the performers were underage or was at least reckless as to this fact. The Court considered Osborne's argument that the statute was "unconstitutionally overbroad because it applied in instances where viewers or possessors lack scienter," and rejected it because "although [the challenged statute] does not specify a mental state, Ohio law provides that recklessness is the appropriate mens rea where a statute neither specifies culpability nor plainly indicates a purpose to impose strict liability." Id. at

113 n.9 (internal quotation marks omitted). Recklessness, the Court held, "plainly satisfied the requirement laid down in Ferber that prohibitions on child pornography include some element of scienter." Id. at 115 (emphasis added). The mens rea issue was squarely raised and squarely resolved. I don't understand how the majority can fail to follow - or even address - this passage from Osborne.[1]

The majority is led astray by Smith v. California, 361 U.S. 147, 4 L. Ed. 2d 205, 80 S. Ct. 215 (1959), Hamling v. United States, 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974), and Ripplinger v. Collins, 868 F.2d 1043 (9th Cir. 1989) - all adult obscenity cases. Ferber did indeed refer to the scienter requirement of obscenity cases such as these when announcing a scienter requirement in child pornography cases, but only by way of analogy. 458 U.S. at 765. In fact, Ferber blazed a trail for child pornography quite separate from that for obscenity. This distinction is rooted in the government's greater power to prohibit child pornography. The Ferber Court painfully catalogued the harms sexual exploitation inflicts on children, demonstrating the surpassing importance of the government's interests in this area. Id. at 756-62;[2] accord Osborne, 495 U.S. at 109-10. Because these interests provide a far more compelling basis for prohibiting child pornography than adult pornography,[3] the Court in Ferber cast child pornography outside the umbrella of the First Amendment, without regard to whether the materials in question were obscene. 458 U.S. at 764.

All this means that obscenity precedents just don't work in the child pornography context. For instance, private possession of child pornography can be criminalized, Osborne, 495 U.S. at 108, while private possession of obscene material cannot, Stanley v. Georgia, 394 U.S. 557, 568, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969).[4] Similarly, child pornography can be barred even if it doesn't appeal to prurient interests, even if it isn't patently offensive and even without considering the work as a whole. Ferber, 458 U.S. at 764. But see Miller v. California, 413 U.S. 15, 24, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). Justices Brennan and Marshall, consistent dissenters in the court's major obscenity cases, concurred in Ferber. Compare Miller, 413 U.S. at 47 (Brennan, J., dissenting); Paris Adult Theatre v. Slaton, 413 U.S. 49, 73, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973) (Brennan, J., dissenting), with Ferber, 458 U.S. at 775 (Brennan, J., concurring).

Just as telling is the Court's more relaxed approach to scienter in child pornography cases. Osborne's one short paragraph in the text, 495 U.S. at 115, and two equally laconic sentences in an omnibus footnote disposing of two unrelated claims, id. at 112 n.9, stand in stark contrast to other First Amendment cases where the Court agonized at length over the scienter issue. See, e.g., Smith, 361 U.S. at 150-55 (scienter required for obscenity prosecution); Hamling, 418 U.S. at 118-24 (knowledge of nature and character of materials rather than knowledge of their legal status as obscenity is proper mental state for obscenity prosecution); see also New York Times Co. v. Sullivan, 376 U.S. 254, 279-83, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) (announcing actual malice requirement in defamation action by public figure); Masson v. New Yorker Magazine, Inc., 115 L. Ed. 2d 447, 111 S. Ct. 2419, 2431-33 (1991) (fleshing out actual malice standard as applied to defamatory statements in the form of inaccurate direct quotations).

These distinctions bear out the original observation in Ferber that "the States are entitled to greater leeway in the regulation of pornographic depictions of children" than in regulation of obscenity. They cast serious doubt on any analysis that relies on obscenity cases in the child pornography context. Id. at 756.[5] Osborne is the relevant authority and Osborne holds that recklessness is a sufficient mental state to support a conviction in a child pornography case.

II

A. All of this would be beside the point if, as the majority suggests, United States v. Thomas, 893 F.2d 1066 (9th Cir.), cert. denied, 112 L. Ed. 2d 53, 111 S. Ct. 80 (1990), conclusively held that 18 U.S.C. § 2252(a) is a strict liability statute. But Thomas addressed only a very narrow question: Does section 2252(a), as a matter of simple statutory construction, require the government to prove the defendant knew the materials contained child pornography? All Thomas tells us is that the word "knowingly" in the statute does not apply to the age of the depicted children. 893 F.2d at 1070. This is not much more than we would learn by reading the statute ourselves. The ruling neither considered nor excluded the possibility that a lower level of scienter, like recklessness, might apply as a matter of constitutional interpretation.[6]

The defendant in Thomas made no constitutional argument; the Thomas court said nothing about the First Amendment. Indeed, had Thomas addressed the constitutional issue, it would have been bound by both the Supreme Court's and our own holdings that child pornography can't be a strict liability offense. Ferber, 458 U.S. at 765; United States v. United States District Court, 858 F.2d 534, 540 (9th Cir. 1988) ("Kantor")

(interpreting a different section of the same statute involved here and in Thomas). Had Thomas considered the First Amendment, it would have had to either follow Kantor and read a scienter requirement into the statute, or strike the statute down altogether.

Of course, there is absolutely nothing wrong with the Thomas decision. We generally deal only with arguments raised by the parties. Collins v. City of San Diego, 841 F.2d 337, 339 (9th Cir. 1988). If the defendant did not raise a First Amendment defense, the panel had no obligation to raise it for him. But surely Thomas's failure to decide the constitutional question - how to interpret section 2252(a) in light of the First Amendment - cannot foreclose us from deciding that question now that it's been squarely put to us. See, e.g., United States v. Vroman, 975 F.2d 669, 671-72 (9th Cir. 1992).

The majority's supine willingness to be bound by a panel that decided a question different from that posed to us leads to truly paradoxical results. Because of an accident of timing - because the first defendant to challenge section 2252(a) neglected to raise a First Amendment claim - section 2252(a) turns out to be unconstitutional. See maj. op. at 14535- 36. A neighboring section, 2251(a), is saved because the first case to consider it did present a First Amendment challenge, giving us the opportunity to narrow it. See Kantor, 858 F.2d at 542-44.

Our jurisprudence cannot evolve in such a haphazard fashion. Under the majority's reasoning no court would be able save section 2252(a). Not Thomas because they had no reason to confront the issue; and not we today because we are bound by Thomas. Our prudential rule of avoiding unnecessary consideration of issues not put before us by the parties turns into a trap. Giving preclusive force to the never-contemplated emanations from Thomas undermines our duty to save the statute if we can.[7]

B. Because Thomas cannot be read to foreclose an issue that it had no reason to reach, it is our job to confront it today: Can we save 2252(a) by reading into it a requirement that defendant here acted recklessly as to the age the minor?[8] Not only can we, we must. See, e.g., Dennis v. United States, 341 U.S. 494, 499-501, 95 L. Ed. 1137, 71 S. Ct. 857 (1950) (plurality opinion).

Statutes often fail to specify mental states for each element of the criminal offense, and courts routinely read scienter into a statute even absent constitutional considerations. See Liparota v. United States, 471 U.S. 419, 426, 85 L. Ed. 2d 434, 105 S. Ct. 2084 (1985); United States v. O'Mara, 963 F.2d 1288, 1292-96 (9th Cir. 1992) (Kozinski, J., concurring). In Kantor, we grafted an affirmative defense of reasonable mistake of age onto the statute, something far more exotic than just reading in a mental state element. Having determined under Ferber and Osborne that the federal child pornography statute is constitutional if only it includes a mens rea requirement, I would pose the same question here as we did in Kantor: Would Congress, if given the choice, have passed section 2252(a) with a recklessness requirement as to the age of the minor, or not passed it at all? Kantor, 858 F.2d at 542; see also Regan v. Time, Inc., 468 U.S. 641, 653, 82 L. Ed. 2d 487, 104 S. Ct. 3262 (1984) (plurality); id. at 691-92 (Powell, J., concurring). To pose the question is to answer it. Congress grave problem, one deserving sweeping prohibitions and strict sanctions. It is inconceivable that, given the choice between no statute at all and a statute that contains a requirement of recklessness, those involved in passing the child pornography statute would have chosen the former rather than the latter. In drafting the statute, Congress did delete a knowledge requirement, but I do not read this as precluding any and all scienter requirements. Indeed, "we are quite sure that the policies Congress sought to advance by enacting [section 2252(a)] can be effectuated even" after we read a mental state element of recklessness into the statute. Regan, 468 U.S. at 653.

We must be chary of striking down an Act of Congress, particularly one that promotes interests as vital as protecting children from sexual exploitation. We have already saved section 2252(a)'s companion statute from unconstitutionality by correcting a very similar defect. Kantor, 858 F.2d at 542-44. I see no impediment to saving the statute once again; in fact, the second time around should be easier than the first.

Conclusion

After Osborne, it's settled that recklessness is a sufficient level of scienter under the First Amendment in a child pornography case; accordingly, I dissent from Part II(B) of the majority opinion which announces a knowledge requirement. Building on this distinct starting point with respect to mental state, I also disagree with Part II(A), which holds that our prior decisions preclude reading a recklessness requirement into section 2252. I join the other parts of the opinion.

* Strictly speaking, this is a concurrence, because I too would reverse Gottesman's conviction on the ground that he was tried under a theory which

imposed strict liability as to the age of the minor. I style it a dissent, however, because I would avoid striking down an Act of Congress, and would remand for a retrial under a statute properly narrowed to comply with constitutional norms.

ENDNOTES FOR DISSENT

1. Osborne might be distinguished because it is a possession case, not a distribution case. However, this distinction cuts entirely the wrong way for the defendant here. Under Stanley v. Georgia, 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969), the state has more latitude to proscribe the distribution of materials not protected by the First Amendment than it does when prohibiting their private possession. Id. at 568 ("States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.") If recklessness was scienter enough to convict Osborne for his private possession of child pornography, it is certainly enough to convict Gottesman for distributing it.

2. The Court recognized that "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," 458 U.S. at 759; that "the advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation," id. at 761; and that "the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis," id. at 762. Noting the strength of the government interest in "safeguarding the physical and psychological well-being of . . . minors," id. at 756-57, the Court said it would "not second-guess [New York's] legislative judgment . . . that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," id. at 757-58.

The scars of child pornography can last a lifetime. As adults, those exploited as minors may be under pressure to rationalize their conduct, even though they bear no moral responsibility for it. Consider the words of the 24-year old Traci Lords: "I don't think I did anything that special or weird or different. The only difference was that I did it on video. Every teenage cheerleader runs around, screws half the football team, and takes drugs. The major difference is that the evidence of my doing it existed on the shelves of video stores." Michael Kaplan, The House of Lords, Movieline, Jan./Feb. 1993, at 71, 72.

3. Pornography featuring adults can be regulated to protect unwilling recipients and juveniles from offensive exposure, Miller v. California, 413 U.S. 15, 18-19, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973), and to vindicate society's interest in order and morality, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973). Because these interests are weaker than that in protecting children from appearing in sexually explicit materials, the state may prohibit non-obscene child pornography but only obscene adult pornography. Miller, 413 U.S. at 23.

Of course, many have argued - and many more have disagreed with them - that, just as the child pornography trade harms children, adult pornography harms both the people who appear in the materials, and the people who are hurt by the attitudes these materials foster. But society's interest in avoiding these harms has been held to not justify restricting speech. See American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd without opinion, 475 U.S. 1001, 89 L. Ed. 2d 291, 106 S. Ct. 1172 (1986). But see Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv. C.R.-C.L. L. Rev. 1 (1985); Cass R. Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589. See generally Gerald Gunther, Constitutional Law 1125-26 & n.1 (12th (wheeled) ed. 1991) (as usual, most of the action is in the footnote).

4. "We find this case distinct from Stanley because the interest underlying child pornography prohibitions far exceed the interest justifying the Georgia law at issue in Stanley." Osborne, 495 U.S. at 108.

5. For a discussion of the doctrinal isolation of child pornography cases and the need for separate standards to decide them, see Frederick Schauer, Codifying the First Amendment: New York v. Ferber, 1982 Sup. Ct. Rev. 285, 287-88 & 308-09:

> [Ferber created] yet another comparatively distinct area of First Amendment doctrine. The rules relating to child pornography now take their place alongside the equally distinct rules relating to obscenity, defamation, advocacy of illegal conduct, invasion of privacy, fighting words, symbolic speech, and offensive speech. Moreover, each of these areas contains its own corpus of subrules, principles, categories, qualifications, and exceptions. . . When we take all this together it becomes clear that the First Amendment is becoming increasingly intricate. . . .

Id. at 308-09.

Schauer generally applauded the Court's segregation of child pornography and obscenity into more distinct categories for purposes of First Amendment scrutiny. However, he presciently flagged as a potential pitfall precisely the kind of mistake the majority makes here: "Extreme subdivision of the First Amendment magnifies the risk that an increasingly complex body of doctrine, even if theoretically sound, will be beyond the interpretative capacities of those who must follow the Supreme Court's lead primarily lower court judges, legislatures, and prosecutors." Id. at 288.

6. My colleagues may be distracted by Thomas because of an unfortunate accident of nomenclature. Both statutory construction and constitutional narrowing are sometimes referred to as interpretation. They are, in fact, very different animals. Statutory interpretation is an attempt to divine the meaning of the statute as passed by Congress and signed by the President. Constitutional narrowing seeks to add a constraint to the statute that its drafters plainly had not meant to put there; it is akin to partial invalidation of the statute. See, e.g., Regan v. Time, Inc., 468 U.S. 641, 652-654, 82 L. Ed. 2d 487, 104 S. Ct. 3262 (1984). In performing the former task we may not add anything to the statute that is not already there (or ignore anything that is); in performing the latter function, we must do precisely that. In pure interpretation, we must carry out the legislative will. In performing our constitutional narrowing function, we may come up with any interpretation we have reason to believe Congress would not have rejected. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) (courts should construe statutes to avoid

unconstitutionality "unless such construction is plainly contrary to the intent of Congress").

7. First Amendment challenges to statutes often arise long after the statute is first applied. Title VII, for instance, has for over a decade restricted harassing speech in the workplace, but the first reported federal case involving a First Amendment defense was decided only in 1991. See, e.g., Henson v. City of Dundee, 682 F.2d 897, 900-01 (11th Cir. 1982); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534-37 (M.D. Fla. 1991); see generally Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law 592-600 (1992). Because First Amendment defenses were rarely raised, harassment law evolved with little concern for free speech, and some workplace harassment cases seem suspect on First Amendment grounds. See, e.g., Snell v. Suffolk County, 611 F. Supp. 521, 531-32 (E.D.N.Y. 1985) (injunction banning "any racial, ethnic, or religious slurs . . . in the form of 'jokes,' 'jests,' or otherwise," whether or not severe or pervasive enough to create a hostile work environment), aff'd, 782 F.2d 1094 (2d Cir. 1986); Tunis v. Corning Glass Works, 747 F. Supp. 951, 955, 959 (S.D.N.Y. 1990) (use of gender-based terms like "foreman" or "draftsman" could be harassment), aff'd without opinion, 930 F.2d 910 (2d Cir. 1991). For an excellent discussion of the issue, see Eugene Volokh, Note, Freedom of Speech and Workplace Harassment, 39 UCLA L. Rev. 1791, 1800-07 (1992) (describing other cases). See also Lindemann & Kadue, supra; Kingsley R. Browne, Title VII as Censorship: Hostile Environment Harassment and the First Amendment, 52 Ohio St. L.J. 481 (1991); Marcy Strauss, Sexist Speech in the Workplace, 25 Harv. C.R.-C.L. L. Rev. 1 (1990).

We may one day conclude that some workplace speech - for instance, a bigoted political poster - is protected even if it creates a hostile work environment. But if this happens, surely the right answer is to save as much of workplace harassment law as we can, not to throw it all out just because a few courts, not faced with First Amendment defenses, may have read it too broadly.

8. Which mental state to choose is not entirely clear. In Kantor, we stated that "Congress may take steps to punish severely those who knowingly subject minors to sexual exploitation, and even those who commit such abuse recklessly or negligently. . . ." 858 F.2d at 540. We know, after Osborne, that recklessness is sufficient, but it is not at all clear that a lesser state of mind, such as negligence, would not suffice to save the statute. Cf. Robert R. Strang, Note, "She Was Just Seventeen . . . and the Way She Looked Was Way Beyond [Her Years]": Child Pornography and Overbreadth, 90 Colum. L. Rev. 1779, 1801-02 (1990) (providing mistake of age defense to section 2252 prosecution satisfies First Amendment scienter requirement).

93-1796 HOLMBERG v. RAMSEY, MINN.

Zoning—Adult entertainment—Content-based censorship.

Ruling below (CA 8, 12 F.3d 140):

City ordinance that makes available two zones in which sexually oriented businesses may locate, provided that they are situated at least 1000 feet from residentially zoned property, day-care centers, educational facilities, public libraries and parks, other sexually oriented businesses, liquor establishments, and churches, is content-neutral and narrowly tailored to achieve substantial governmental interest in avoiding negative secondary effects of such businesses established by studies of effects of such businesses in other cities, including increased crime, diminished property values, and general neighborhood blight; accordingly, ordinance is reasonable time, place, and manner restriction on speech, and does not violate First Amendment.

Questions presented: (1) Does adult entertainment zoning ordinance constitute impermissible content-based censorship, when it amortizes out of existence lawful non-conforming adult entertainment uses, solely on basis of content of materials sold and exhibited, regardless of secondary effects, but permits non-adult uses defined, solely on basis of content, to remain in existence in absence of affirmative showing of adverse secondary effects? (2) Does adult entertainment zoning ordinance satisfy constitutional requirements for alternative avenues of communication, when virtually all of land area for permitted adult uses is available only at discretion of city council? (3) Does adult entertainment zoning ordinance satisfy constitutional requirements for alternative avenues of communication, when only area available for adult entertainment is vacant, undeveloped property, at which no commercial use would be viable?

Petition for certiorari filed 5/11/94, by Randall D. B. Tigue, of Minneapolis, Minn.

Larry Holmberg; Amusement Center, Inc., a Minnesota corporation, Appellants, v. City of Ramsey, a municipal corporation, Appellee.

Holmberg v. City of Ramsey

No. 92-3897MN

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

12 F.3d 140; 1993 U.S. App. LEXIS 33974

March 18, 1993, Submitted
December 30, 1993, Filed

SUBSEQUENT HISTORY: Rehearing and Rehearing En Banc Denied February 19, 1994, Reported at: 1994 U.S. App. LEXIS 2207.

PRIOR HISTORY: Appeal from the United States District Court for the District of Minnesota. District No. CIV 4-90-320. Honorable Diana E. Murphy, District Judge.

DISPOSITION: Affirmed

COUNSEL: Counsel who presented argument on behalf of the appellant was Randall D.B. Tigue Minneapolis, Minnesota.

Counsel who presented argument on behalf of the appellee was James J. Thompson, Minneapolis, Minnesota.

JUDGES: Before FAGG, MAGILL, and HANSEN, Circuit Judges.

FAGG, Circuit Judge.

Larry Holmberg owns and operates an adults-only business that deals in sexually explicit materials protected under the First Amendment. Holmberg brought this action against the City of Ramsey challenging the constitutionality of the City's zoning ordinance, which requires Holmberg to relocate his business because the business is located within 1000 feet of a day-care center, a church, a bowling alley that serves liquor, and residential property. Following a trial, the district court upheld the ordinance. Schneider v. City of Ramsey, 800 F. Supp. 815 (D. Minn. 1992). Holmberg appeals and we affirm.

On April 19, 1990, Holmberg opened his business on property he owned near Highway 10, the main commercial road through the City. Although Holmberg's business does not have direct access to Highway 10, the business is visible from the highway. Holmberg sells adults-only books and magazines and sexual novelties. Holmberg also provides coin-operated machines for viewing adults-only movies on the premises. Because Holmberg's business was the first of its kind in the City and the City had no ordinance dealing with sexually oriented businesses, the Ramsey City Council met to consider the advisability of amending its zoning ordinance. Having decided to study how these businesses affect their neighborhoods, the City Council passed an interim ordinance banning the operation of sexually oriented businesses until the study was completed. After Holmberg obtained a district court restraining order prohibiting the City from closing his business, the City Council lifted the interim ordinance's ban so Holmberg could operate his business. Although the City Council's initial action was constitutionally flawed, the district court made clear that the City Council passed the interim ordinance to foster an orderly study and to develop an appropriate zoning measure, rather than to suppress Holmberg's adults-only materials.

The City promptly hired a professional city planner to investigate the secondary effects of sexually oriented businesses and prepare a report for the City Council's consideration. The planner gathered and analyzed relevant neighborhood impact studies conducted by other cities located inside and outside of Minnesota. The planner also examined a variety of relevant reports, including a Minnesota Attorney General's report about regulating these businesses. Based on the planner's report, recommendations by the city planning commission, and local public hearings, the City Council concluded that sexually oriented businesses like Holmberg's would produce negative secondary

effects including increased crime, diminished property values, and general neighborhood blight in Ramsey. The City Council then amended the City's zoning ordinance to include provisions aimed at minimizing the unwanted secondary effects of sexually oriented businesses.

As amended, the zoning ordinance designates two commercial zones in which sexually oriented businesses may operate. Within these zones, sexually oriented businesses must be located at least 1000 feet from residentially zoned property, day-care centers, educational facilities, public libraries, public parks, other sexually oriented businesses, on-sale liquor establishments, and churches. Although Holmberg's business is located within one of the newly-created zones, Holmberg's business is nonconforming because it is located within 1000 feet of a day-care center, a church, a bowling alley that serves liquor, and residential property. Thus, under the zoning ordinance, Holmberg must relocate his business within a given grace period. Holmberg neither challenges the reasonableness of the grace period nor claims he is unable to recoup his investment within this period.

Relying on City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986), the district court concluded Ramsey's zoning ordinance does not violate the First Amendment. The district court found the City reasonably relied on other cities' relevant studies in concluding sexually oriented businesses will produce undesirable secondary effects in Ramsey, the City passed the zoning ordinance to diminish the unwanted secondary effects, and the ordinance gives sexually oriented businesses like Holmberg's a reasonable opportunity to operate in the City. Having reviewed the record, we conclude these findings are not clearly erroneous.

We agree with the district court that Holmberg's case is largely controlled by Renton. Because the City's zoning ordinance limits the location of sexually oriented businesses rather than banning them altogether, the ordinance is analyzed as a form of time, place, and manner regulation of protected speech. Id. at 46. Regulations of this kind withstand First Amendment attack provided the regulations are content-neutral, are designed to serve a substantial governmental interest, and do not unreasonably limit alternative avenues of communication. Id. at 47. Initially, Holmberg contends Ramsey's zoning ordinance is not content-neutral. To decide this issue, we must consider the City's purpose in passing the ordinance. Ward v. Rock Against Racism, 491 U.S. 781, 791, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989). If the City's ordinance serves a purpose unrelated to the expressive content of the sexually oriented businesses the City wants to regulate, the ordinance is deemed neutral, even though the ordinance may affect those businesses incidentally. Id. Here, the ordinance's stated purpose is to lessen the undesirable secondary effects sexually oriented businesses have on surrounding neighborhoods, make these businesses less accessible to minors, prevent losses in property values, and reduce criminal activity. Like the district court, we find nothing in the ordinance that suggests the City Council passed the ordinance to suppress the message of Holmberg's sexual materials, rather than to limit the choice of locations for businesses like his. Thus, the ordinance, justified without reference to the content of the regulated speech, is content-neutral. Id.

Notwithstanding the ordinance's clearly stated purpose, Holmberg contends the circumstances that led to the enactment of the zoning ordinance show the City's concern with secondary effects is a pretext masking the City's real purpose to censor his sexually oriented business's protected speech. Holmberg's contention flies in the face of the district court's findings. See 800 F. Supp. at 821-23. Fortified by compelling support in the record, the district court's finding that the City Council passed the zoning ordinance to diminish sexually oriented businesses' secondary effects "is more than adequate to establish that the City's pursuit of its zoning interests here was unrelated to the suppression of free expression." Renton, 475 U.S. at 48.

Next, Holmberg contends the City failed to establish that its ordinance serves a substantial governmental interest. Holmberg argues the City cannot support its claim that sexually oriented businesses cause undesirable secondary effects because the City produced no evidence that his business increased crime, lowered property values, or jeopardized minors' well-being. We agree with Holmberg that it is not enough for the City merely to give lip service to a legitimate governmental interest. The City also has the burden to substantiate its declaration that zoning regulations are needed to curb unwanted secondary effects of sexually oriented businesses that operate in Ramsey. See Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 469 (8th Cir. 1991). Although a city can establish its substantial interest by showing that sexually oriented businesses are actually causing secondary effects, see SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1274 (5th Cir. 1988), cert. denied, 489 U.S. 1052 (1989), a city can also satisfy its burden by compiling a record of other cities' experiences with sexually oriented businesses that the city reasonably believes to be relevant to the city's problem, see id. (citing Renton, 475 U.S. at 50-52); International Food & Beverage Sys. v. City of Fort Lauderdale, 794 F.2d

1520, 1526-27 (11th Cir. 1986). Here, the City passed its zoning ordinance relying on other cities' studies showing that sexually oriented businesses have an adverse impact on surrounding neighborhoods. Because the City reasonably believed the studies were relevant to the problems in Ramsey, the City satisfied its burden. See Renton, 475 U.S. at 51-52.

In a related argument, Holmberg contends the face of the ordinance "plainly reflects an intent to censor on the basis of content, rather than [a] concern over secondary effects" because the ordinance treats his nonconforming sexually oriented business differently from other nonconforming uses in the city. Holmberg points out correctly that the ordinance permits nonconforming uses that do not deal in sexually explicit materials to remain in their current locations until the City produces "documented studies and evidence" showing adverse secondary effects. Conversely, Holmberg contends the ordinance mandates that his nonconforming business must relocate without requiring the City to make a similar showing. Holmberg's argument that the ordinance relieves the City of the burden to establish its substantial interest in the ordinance's provisions targeting the secondary effects of sexually oriented businesses is legally frivolous. In our view, Holmberg simply ignores the district court's findings that the City enacted the ordinance on the strength of thorough research, public hearings, documented studies, and considered deliberations, and stubbornly argues the City must document its substantial interest with localized studies and evidence showing that secondary effects actually exist. Under the First Amendment, the City was not required "to conduct new studies or produce evidence independent of that already generated by other cities" before enacting an ordinance that lessens sexually oriented businesses' secondary effects. Renton, 475 U.S. at 51. When the ordinance was passed, the City Council had reliable evidence before it that businesses like Holmberg's produce undesirable side effects. Thus, the ordinance's provisions requiring Holmberg to relocate his business represented a legitimate governmental response to a substantial interest, not content-based regulation.

Holmberg also contends the ordinance denies him a reasonable opportunity to operate a sexually oriented business in Ramsey. Under the ordinance, sexually oriented businesses have access to 35% of the City's land zoned for commercial uses, which includes both developed and undeveloped land. Much of the available land is located along major streets that intersect Highway 10 and, like Holmberg's current location, the land is within sight of the highway. Nevertheless, Holmberg contends the cost of relocating on this land effectively puts him out of business. The First Amendment is not violated, however, merely because Holmberg must "fend for [himself] in the real estate market, on an equal footing with other prospective purchasers and lessees." Id. at 54. We agree with the district court that the land available to Holmberg under the ordinance puts him on equal footing with other businesses considering locating in Ramsey. See 800 F. Supp. at 822-23. Because the ordinance provides Holmberg with potential relocation sites in accessible, commercially zoned areas, we conclude the ordinance does not unreasonably limit alternative avenues of communication. See Alexander v. City of Minneapolis, 928 F.2d 278, 283-84 (8th Cir. 1991).

Additionally, Holmberg contends the ordinance gives the City unbridled discretion to deny his requests to subdivide a larger tract of land and construct a building for his business on one of the smaller lots. Because Holmberg would use the subdivided land for a sexually oriented business, Holmberg believes the planning commission and City Council would deny his subdivision requests based on language in the ordinance permitting them to consider "the best use of the land." The City strenuously disagrees. As the City reads the ordinance, sexually oriented businesses can locate anywhere within the authorized commercial zones, provided the location is at least 1000 feet from the protected uses. The City thus concedes that it could not use the challenged language to deny Holmberg's request to subdivide a larger tract of land because Holmberg would relocate his sexually oriented business on the subdivided land. We conclude the City's interpretation alleviates Holmberg's concern. See Ward, 491 U.S. at 795-96.

Finally, Holmberg contends the ordinance violates his equal protection rights because it treats sexually oriented businesses differently than other nonconforming uses that do not deal in sexually oriented materials. Holmberg bases his contention on the same reasons he advances in support of his First Amendment challenge. We believe our earlier discussion rejecting Holmberg's First Amendment challenge also forecloses Holmberg's equal protection contention. See Renton, 475 U.S. at 55 n.4.

In our view, Ramsey's zoning ordinance is content-neutral, the City has shown the existence of a substantial governmental interest to support its ordinance, and the ordinance is narrowly-tailored to achieve the City's substantial interest. The zoning ordinance utilizes separation restrictions to accomplish the City's stated goal of protecting the quality of life in the community, while at the same time makes some areas of the City available for sexually oriented businesses and their patrons. In

sum, Ramsey's zoning ordinance comes to grips with undesirable secondary effects of sexually oriented businesses in a way that satisfies the requirements of the First and Fourteenth Amendments. Having carefully considered all of Holmberg's contentions, we affirm the district court.