

POLITICAL REGIMES AND THE FUTURE OF THE FIRST AMENDMENT

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Fifty years ago the political scientist Robert Dahl concluded that courts are usually in sync with “the policy views dominant among the lawmaking majorities” and thus offer little help to aggrieved minorities (Dahl, 1957, p. 285). In recent years, Dahl’s classic formulation has received renewed attention. This chapter uses the example of the Rehnquist Court’s First Amendment decisions to analyze “regime politics” theory. On religion cases the Rehnquist Court was generally in sync with the socially conservative strain in the Republican Party, but in other First Amendment areas the pattern is far more complex, raising questions about the relationship between conservative judges and the political movements that brought them to office.

To the extent the Constitution really is, as Supreme Court Chief Justice Charles Evan Hughes famously said, what the judges say it is, then of course the future of the First Amendment depends on who will be interpreting it.¹ Predicting the judiciary of the future, though, depends on such small matters as the outcome of the 2008, 2010 and 2012 elections, and the health, well-being and attitude toward retirement of the current corps of Supreme Court justices – all matters on which prophets and soothsayers have as much

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expertise as legal scholars. With the federal courts now slightly tipped toward Republican appointees, and with two new Supreme Court appointees whose First Amendment views are far from crystal clear, attempting to foretell what courts will be saying in the 21st century about obscenity, or school prayer, or copyright law, is a fool's errand.

This chapter, then, aims at something markedly less ambitious: an examination of changes in how conservative judges approach the First Amendment, and a brief consideration of what this portends for the future. It may be impossible to chart the future of the Roberts Court, much less the entire federal and state judiciaries, with any accuracy, but quite possible to say some interesting things about how conservatives will talk and argue about the First Amendment in the early 21st century.

To do this, though, I examine two Supreme Courts that did their work mostly in the 20th century:

The First Amendment Religion Court. This Court moved First Amendment law in ways that cultural conservatives mostly admired. It chipped away at Warren Court Establishment and Free Exercise precedents, facilitating voucher programs that aid religious schools, and forcing government institutions to provide equal access to religious groups. The Court moved doctrine gradually, and in some areas – most famously school prayer – frustrated the Christian right, but overall, this court as one critic put it has “turned the constitutional law of religion nearly upside down” (Greenawalt, 2004).

The First Amendment Speech and Press Court. This Court often pushed First Amendment law away from the expressed desires of the Christian right. Rather than knocking down Warren and Burger Court precedents, it expanded them. It struck down laws banning flag burning and internet pornography, leaving intact or expanding protections for sexual speech. Some of its decisions, on campaign finance and commercial speech, were more palatable to conservatives, but overall the Court's decisions mostly reversed rather than advanced the expressed desires of cultural conservatives within the Republican Party.

These two courts are, of course, the Rehnquist Court. I have dramatized their differences, but one of them clearly was a more reliable supporter of the policies of the Republican Party, and especially cultural conservatives within the Republican Party, than the other.

The differences are evident not just in the decisions themselves, but also in the justices' explanation of their votes, their published opinions. In the religion cases, the opinions show a Rehnquist Court eager to revisit fundamental assumptions, upend precedents and reconsider the original meaning of the

phrases in the Constitution. Indeed the Rehnquist Court's religion opinions sometimes seem like clashes between rival historians, albeit historians with a cause. The obstacles created by a welter of Warren and Burger Court precedents are sometimes swept away, and with them rules that limited religious organizations and religious expression, to the delight of the Christian Right.

The Rehnquist Court's opinions in non-religious First Amendment cases have a markedly different tone. *This* Rehnquist Court usually avoids fundamental questions and fails to explore the "original meaning" of the First Amendment. Instead it works within the conceptual framework of earlier cases, and usually focuses on questions of application and policy. The Court's liberals and conservatives differ, but much more narrowly, on the parameters of precedents and how best to apply them to the facts at hand. Further, there are several instances in which conservatives such as Scalia "switch" and line up with the moderate-to-liberal wing of the Court. The resulting record is a puzzle. This Rehnquist Court, unlike the religion court, seems almost detached from the agenda of Republicans, floating in its own space defined by nearly a century of First Amendment precedents. Flag burners and Internet pornographers are not, one might think, core constituencies of the Republican Party. Why would Reagan and Bush appointees be lining up behind them?

Posing the question in this way is useful, but simpleminded in at least two respects. First, judges are, of course, more than mere agents of their sponsors. Even in the rare case in which they are perfectly aligned in their policy views with their appointers, judges act within an institution and profession that shapes what they think is possible and what counts as good judicial decision making. The task currently at the center of political science scholarship on courts is to understand how these institutional and professional influences on the judiciary interact with appointment patterns and external influences (Keck, 2007a). That turns out to be the same challenge presented to anyone interested in charting the future of the First Amendment. The Rehnquist Court's decisions in this realm provide a fascinating case with which to examine how the many influences on federal judges intertwine.

But my question is simpleminded in another, potentially more troublesome way: It is reductive in its portrayal of the appointing regime. Like any political movement, conservatism has internal tensions, competing strands and priorities that change over time. Cultural conservatives, especially Christian conservatives who make up a sizeable bloc within the Republican Party, have been skeptical both of the Warren and Burger Court's rulings on religion and on free expression more generally. Yet there has also always

been a libertarian strand even within the Christian Right, and in recent years that strand has flourished (Brown, 2002). The pattern of the Rehnquist Court on First Amendment issues, while undoubtedly irritating to many in the Republican Party, may reflect not merely the libertarian leanings of the justices but a broader shift within American conservatism.

THE INFLUENCE OF POLITICAL REGIMES

At some point most Americans are told, perhaps by civics teachers, that courts serve to protect minorities against tyrannical majorities. Americans are also told – occasionally by presidents and Supreme Court justices – that judicial review represents a threat to democracy because again, courts often side with minorities against majorities – the “countermajoritarian difficulty” (Bickel, 1962; Graber, 1993). In a seminal article, Robert Dahl took on both views. Because of the way justices are selected for the bench, Dahl argued, they are very unlikely to stand up against the governing majority to protect the rights of the minority. That is because, aside from exceptional periods of transition, “the Supreme Court is inevitably a part of the dominant national alliance” (Dahl, 1957, p. 293). Or as another prominent political scientist, Martin Shapiro, put it, “To the extent that courts make law, judges will be incorporated into the governing coalition ...” (Shapiro, 1981, p. 33). Those who staff the Court tend to share the worldviews of their appointers on most major political questions, and so are the least likely to take issue with the governing majority.

From this perspective, federal judges can be seen not so much as protectors of minorities, but of the regimes that appoint them. Court appointments are attempts by presidents and their allies in Congress to entrench the judiciary with allies. This can be a powerful strategy, because unlike all other appointees, federal judges serve life terms, and thus can influence public policy long after the appointing regime has fallen from power. In the late 19th century, the Republican Party was able to entrench its economic nationalist views on the federal judiciary, setting the stage for Progressive Era conflicts between legislatures and the Court on economic regulations (Gillman, 2002). The post-1937 Court is often referred to as the Roosevelt Court because it collaborated so well with New Deal Democrats, deferring on most matters to the national government, but using its power to wipe out “pockets of resistance” and expand the scope of the New Deal (Tushnet, 2006, p. 119). The Kennedy and Johnson administrations created the latter-day Warren Court, liberalizing constitutional

politics in a host of areas (Gillman, 2006). The politics of judicial appointments, including appointments to lower federal courts, became far more intense in the late 20th century as presidents increasingly sought to remake the nation by transforming the federal judiciary (Scherer, 2005). As a 199-page guide to judicial appointments created by the Office of Legal Policy in the Reagan Administration put it, “there are few factors that are more critical to determining the course of the Nation ... than the values and philosophies of the men and women who populate the third co-equal branch of the national government – the federal judiciary” (Gillman, 2006, p. 159). No wonder presidents and their allies attempt to “plant” the judiciary with helpful friends, and no wonder political scientists in what has been called “regime politics” school have been drawn to studying the planting strategy.

As regime politics scholars have demonstrated, there are many ways in which the entrenchment project can go wrong. In fact, a list of all the difficulties of the entrenchment strategy suggests just how problematic it is.

First, there is a bit of exaggeration built into such terms as the “dominant national alliance” or the “governing coalition,” because such entities, even when electorally successful, are usually internally divided. Moreover, in recent years there has been no dominant national coalition, and appointing presidents have had to deal with senates that are closely divided, or controlled by the opposing party. After the showdown between President Reagan and a Democratic-controlled Senate over Robert Bork, presidents tended to adopt a conflict avoidance strategy, nominating judges who were not so easily associated with the wings of their parties (Clayton, 1999). Whether Roberts and Alito, President George W. Bush’s nominees, will mesh with the President’s expressed ideal, Justice Scalia, or fall somewhat closer to the more moderate voting patterns of O’Connor and Kennedy, remains to be seen. Further, when a president’s party is fractious and far from dominant in the Senate, the risk of an outright “mistake” seems to grow. David Souter, a George H.W. Bush appointee who usually votes against cultural conservatives in First Amendment cases, appears to be such a mistake (Keck, 2003, p. 186).

Second, even if presidents could pick a first-choice nominee who had the support of a unified dominant party, they would not necessarily get a nominee who votes the way they wish on every issue. It is much easier for presidents to find faithful appointees to the Forestry Service than it is for them to find loyal nominees to the Court, simply because the scope of the Court’s decision making is so much wider (Gillman, 2006, p. 141). Moreover, presidents cannot know what constitutional issues will emerge in

the years after their appointments, much less predict how their nominees will vote on such issues. The freedom of lifetime appointment means that judges can surprise their sponsors. President Nixon was partly successful in his expressed goal of nominating justices who would temper the liberalizing criminal justice decisions of the Warren Court, but one doubts that he anticipated Harry Blackmun's views on *Roe v. Wade*, which became Blackmun's most celebrated (and reviled) contribution to constitutional law. And of course Harry Truman was famously unhappy when his own appointees voted against him in the "Steel Seizure" case (*Youngstown Sheet & Tube v. Sawyer* 343 U.S. 579, 1952).

Third, the concerns of presidents and their governing coalitions do not translate directly into judicial action. Judges act within a "web of 'internal' institutional constraints, perspectives and responsibilities," and so are not of a mind to issue policy proclamations, even if they had the power to do so.² Legal actors internalize a way of thinking about and arguing cases that helps them to be effective in their jobs. Judges, for example, have to find ways to explain their choices that the audience for legal decisions finds appropriate (Carter & Burke, 2007). Given that this audience is diverse, and that its expectations leave judges plenty of choices as to how to present themselves, it is not easy to sketch out how these institutional constraints influence judges in the abstract. The constraints are certainly not reducible to a mechanical formula. They are most visible when one encounters their outer edges. Judges, for example, will often say that a result they initially thought correct "would not write" and so they have to rethink their premises. Some policies are harder than others to voice in legal terms. Social security privatization and ending affirmative action are both goals of the Republican Party, but one is more easily translated into the language of constitutional law than the other. Justices on the Warren Court found a right to state-provided criminal counsel in the Constitution, but not a basic "right to welfare" as many liberal legalists had urged. The latter task would have involved, at a minimum, a much more heroic judicial effort to find the right in the Constitution (Rosenberg, 1993).

Among the institutional constraints on judges, potentially, is precedent. Scholars in the behavioral school have debunked the notion that precedent on the Supreme Court operates as a mechanical determinant of rulings, pushing judges of all ideological stripes to the same position (Brenner & Spaeth, 2003). But as Kritzer and Richards have demonstrated, precedent can have more subtle effects, leading judges to pay attention to some factors in a case rather than others, thus "framing" the case in ways that can

influence the decision making of judges across the ideological spectrum (Richards & Kritzer, 2002; Kritzer & Richards, 2002). Beyond the narrow rules precedents sometimes create, which as generations of Realists have shown, are highly manipulable; precedent generates certain patterned ways of thinking, broad frameworks and categories, that over time become not merely accepted, but ingrained. Judges dissatisfied with those frameworks can take them on directly, but this is hard work, because they have become taken-for-granted within the legal community and even in the larger culture. Normally judges, even on the Supreme Court, tend to work within these frameworks and categories rather than upending them (Kersch, 2006).

Perhaps because the attitudinal model looms so large within their subfield, political scientists who study courts tend to think of precedent as a constraint on voting, a possible explanation for how “law” might affect people with attitudes. But as Martin Shapiro noted a generation ago, it may be more appropriate to think as precedents as aids to judges. Appellate judges are generalists who must deal with an elaborate array of increasingly complex, often technical fact situations as well as a diverse array of laws. Moreover, judges are embedded in a system that is only modestly hierarchical and far-flung, which makes it difficult for those dealing with the same problem to communicate. Precedent facilitates communication up, down and across courts, and provides judges a path through the chaotic swirl of facts in cases (Shapiro, 2002).

But of course, appointing politicians sometimes choose nominees precisely because they believe judges will overturn particularly noxious precedents. To what extent are the ambitions of appointers crushed by the judges they appoint? The regime politics literature has documented examples of what look like successful collaborations between appointers and the appointed, and some examples in which things seemed to turn out less nicely for the appointing regime. The next step is to think through the patterns of success and failure in the entrenchment strategy (Keck, 2007a). Why do some goals of the appointing regime take root on the Court while others wither? That is one of the questions this chapter explores, by comparing some “successful” and “unsuccessful” areas within the First Amendment jurisprudence of the Rehnquist Court. But I also want to use the example of the First Amendment to show how difficult it can be to measure “success.” Conservative views of the First Amendment are diverse and may even be changing, which makes charting the future of First Amendment discourse a particularly difficult task.

THE REHNQUIST COURT AND THE RELIGION CLAUSES

The Rehnquist Court religion cases have, from the perspective of the religious conservatives, been a mixed bag. For Eric Claeys they were a “wasted opportunity” because while the Court made substantial changes in the interpretation of the Free Exercise Clause, it was not nearly as successful with the Establishment Clause, particularly in the school prayer cases (Claeys, 2006, p. 363). But another observer, Jay Wexler, sees a more radical shift, concluding that the Court has “virtually rewritten the entire law regarding the First Amendment’s Religion Clauses” (Wexler, 2006, p. 263).

Wexler’s comment captures something that is easily missed by those who study the religion clause cases in isolation: Just about everything in this area is up for grabs, with little agreement among the justices even on fundamental principles. The Rehnquist Court shook up an already unstable body of doctrine. Abner Greene has created a useful typology of the Rehnquist Court’s religion jurisprudence (Greene, 2006). One group concerns policies that create special benefits (the concern of the Establishment Clause), the other concerns policies that create special burdens (the Exercise Clause). The major change the Rehnquist Court made in both areas was to replace complex rules – The *Lemon* and *Sherbert* Tests – with a seemingly simpler rule of formal neutrality: If the benefit and burden is part of a more general category of benefits or burdens that apply to non-religious entities, it is constitutional. Of course, as Greene himself admits, this is an oversimplified account of a large body of cases, but it is a good starting point. In *most* instances, the move to a formal neutrality standard has shifted First Amendment doctrine in ways that accord with the policy views of Republicans, especially Christian conservatives.

Government Aid to Religious Institutions

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court ruled that reimbursing private schools for teachers’ salaries and instructional materials resulted in excessive entanglement of church and state. *Lemon*, of course, is best known for the *Lemon* test for Establishment Clause violations:

First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion ... finally, the statute must not foster an excessive entanglement with religion. (403 U.S. 612–613)

This seemed a tough standard for government programs that provide aid to parochial schools. The Burger Court used the *Lemon* test in *Meek v. Pittinger* 421 U.S. 349 (1975) to strike down a program that lent instructional materials to parochial schools and in *Wollman v. Walter* 433 U.S. 229 (1977) to rule against public transportation for parochial school trips. But in *Mueller v. Allen* 463 U.S. 388 (1983), the Burger Court offered a bit of hope for those supporting aid to parochial schools, concluding that a tax deduction for some educational expenses was constitutional, even though this deduction overwhelmingly was used for expenses at sectarian schools. And in *Witters v. Washington Dept. of Services for the Blind* 474 U.S. 48 (1986), the Court upheld a state program providing vocational assistance to a student studying for the ministry, reasoning that any public money that went to a religious institution “does so only as a result of the genuinely independent and private choices of aid recipients” (474 U.S. at 487).

The crux of the argument in these cases was that aid was constitutional if offered in a formally neutral way, leaving recipients to choose whether to use it for religious or secular schooling. Conservatives on the Court argued that this neutrality standard reflected the original meaning of the First Amendment much more faithfully than the *Lemon* test. Over a series of Establishment cases in the Rehnquist Court, the neutrality standard became more prominent in the Court’s opinions while the *Lemon* test receded. In *Zobrest v. Catalina Foothills School District* 509 U.S. 1 (1993), the Court by a 5-4 vote approved government-funded sign-language interpreters in parochial schools, reasoning that the tutors were equally available to children in sectarian and non-sectarian programs. In *Agostini v. Felton* 521 U.S. 203 (1997), the Court upheld the use of federally funded Title One tutors in parochial schools as within the First Amendment, explicitly overruling its contrary holding in *Aguilar v. Felton* 473 U.S. 402 (1984). In her opinion for the Court, O’Connor used the *Lemon* test, but argued that that *Zobrest* and other subsequent cases modified the way the Court interprets both the effects and entanglement prongs. The mere presence of a public employee in a parochial school can no longer be assumed to advance religion, she argued; only evidence that the employee was involved in advancing religion, or that the program “defines its recipients by reference to religion” would make the program unconstitutional (521 U.S. at 234).

Another step toward the neutrality standard came in *Mitchell v. Helms* 530 U.S. 793 (2000), in which the Court by a 5-4 vote approved a federal program providing equipment and educational materials to both public and parochial schools. The majority was split into two camps. Thomas, writing for a plurality, used what he called the *Agostini* test rather than the

Lemon test: Government aid to religious institutions will be approved where it “does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement” (530 U.S. at 808, quoting *Agostini* 521 U.S. at 234). Further, in weighing each of the first two prongs, Thomas wrote, the Court should consider whether aid is given in neutrally, “only as a result of the genuinely independent and private choices of individuals” (530 U.S. at 810, quoting *Agostini* at 226). O’Connor, in her concurrence, took issue with Thomas’s “near absolute position with respect to neutrality” (838), and insisted on applying the modified version of the *Lemon* test she had announced in *Agostini*, but voted with the majority.

In *Zelman v. Simmons-Harris* 536 U.S. 639 (2002), Chief Justice Rehnquist drew on *Mueller*, *Witters*, *Zobrest*, *Agostini* and *Mitchell* to conclude that a voucher program in which 96% of government aid flowed to religious schools was not a violation of the Establishment Clause. Summarizing this line of cases Rehnquist wrote:

While our jurisprudence with respect to the constitutionality of direct aid programs has “changed significantly” over the past two decades ... our jurisprudence with respect to true private choice programs has remained consistent and unbroken. (649)

Zelman represented the triumph of the formal neutrality standard. Where in earlier cases the Court had worried about “divertibility,” the possibility that the aid in question could be used to support religious instruction, under the neutrality standard this became irrelevant, as long as the aid was shown to flow through individuals who can (at least theoretically) choose between secular and religious institutions.³ Similarly the actual effect of the program, in this case a large governmental subsidy to religious organizations, is discounted in *Zelman* because of its path through the choices of individuals. By largely substituting a neutrality rule for the *Lemon* test, the Rehnquist Court transformed the Establishment Clause, opening up government funding of religious institutions.

Access to Government Forums

A second line of cases that pleased religious conservatives was the public access cases, in which religious groups used First Amendment lawsuits to fight what they perceived as an unfair bias toward secular organizations in public life. Here again the Rehnquist Court drew on a Burger Court precedent, *Widmar v. Vincent* 454 U.S. 263 (1981), which found that a public university that made its facilities available to registered student groups could

not bar groups using the facilities for religious discussion and worship. As in the government aid cases, the Court progressively expanded the contexts in which religious organizations could be accommodated. Further, it supplanted the *Lemon* test with the more permissive formal neutrality standard in evaluating whether granting the claimed access rights to religious groups would violate the Establishment Clause.

The first step was *Board of Education v. Mergens* 496 U.S. 226 (1990), in which the Court upheld the constitutionality of the Equal Access Act, which prohibits public schools that open up their facilities to student groups from discriminating on the basis of the “religious, political philosophical or other content of the speech.” Applying the *Lemon* test, the Court found that the Access Act did not have the effect or purpose of advancing religion and did not create an excessive entanglement; it merely ensured government neutrality once a public forum is created. In *Lamb’s Chapel v. Center Moriches Union Free School District* 508 U.S. 384 (1993), the Court unanimously ruled that a school district that opened its facilities to outside groups for “social, civic or recreational uses” violated the First Amendment’s freedom of speech when it barred a religious group from showing on school grounds a film series with a Christian perspective on child-rearing. White, writing for the Court, concluded that under the *Lemon* test, allowing such a religious perspective on school grounds was not a violation of the Establishment Clause. This stimulated a typically caustic concurrence from Scalia, who compared the *Lemon* test to “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried” (508 U.S. at 398).

With *Rosenberger v. Rector* 515 U.S. 819 (1995), the Court expanded the principle of the equal access cases to include access to government funding. The Court, this time divided 5-4, ruled that the student government of the University of Virginia violated the First Amendment when it denied funding for a religious publication by a student group. Kennedy, writing for the majority, concludes that a University rule against funding “religious activities” constitutes unconstitutional viewpoint discrimination. In weighing the University’s Establishment Clause argument, Kennedy eschewed *Lemon* and instead employed the neutrality rule, finding government funding of religious publications unproblematic as long as the state does not discriminate between religious and non-religious groups. O’Connor’s concurrence typically downplayed the precedential value of the case, claiming that “the nature of the dispute does not admit of categorical answers, nor should any be inferred from the Court’s decision today” (515 U.S. at 849).

In *Good News Club v. Milford Central School* 533 U.S. 98 (2001) the Court expanded the access cases in another direction, holding that a school that opened its doors to after-hours student clubs could not prohibit the use of school facilities for meetings that included prayer and discussion of scripture. These meetings, the school contended, amounted to religious worship. The school argued that it had the right to determine the range of activities conducted on school grounds – sports but not political meetings, for example – and that allowing religious worship violated the Establishment Clause. But the Court, on a 6-3 majority, characterized the school’s actions as unconstitutional “viewpoint discrimination.” Writing for the majority, Justice Thomas noted that the school had allowed groups, like the Boy Scouts, whose activities include speech about moral and character development. The Good News Club, he argued, simply provided a more religious perspective on character development, and excluding the Club while including other groups was a violation of the First Amendment. Finally, Thomas argued that including the Club would not coerce children into religion, nor would it fail the neutrality test, thus access – even for activity that includes “worship” – did not violate the Establishment Clause. With *Good News* and *Rosenberger*, the Court used the First Amendment to pry open the doors of government forums, and paved the way for much greater cooperation between government and religious institutions than the Warren Court precedents had countenanced.

School Prayer

The flip side to aid and access decisions were the Rehnquist Court’s two major school prayer rulings. Cultural conservatives in the Republican Party were infuriated by the Court’s holdings in *Lee v. Weisman* 505 U.S. 577 (1992) and *Sante Fe Independent School District v. Doe* 530 U.S. 290 (2000), which not only upheld Warren Court precedents but expanded them.

Weisman concerned a prayer given at a middle-school graduation by a Rabbi. The school district pointed to the non-sectarian language of the prayer and the nature of the setting, a graduation ceremony that did not, unlike previous school prayer cases, take place within a classroom, and at which attendance was voluntary. The Court, on a 5-4 vote, ruled that the school had nonetheless violated the Establishment Clause. Kennedy’s opinion steered clear of *Lemon*. Instead he based his ruling on the principle that the “government may not coerce anyone to support or participate in religion or its exercise ...” (505 U.S. at 587). A concurrence by Justice Blackmun, joined by O’Connor and Stevens, made clear that Kennedy’s “coercion test” was

tolerated but not enthusiastically endorsed by his fellow justices in the majority. The concurrence used the *Lemon* test to analyze the case, and suggested that coercion is a sufficient, though not necessary, indication of an Establishment Clause violation (505 U.S. at 604). Scalia, in his dissent, was predictably scornful of the psychological aspects of Kennedy's coercion test, noting that while he had been critical of the nuances in the Court's religious display jurisprudence, "interior decorating is rock-hard science compared to psychology as practiced by amateurs" (636).

Sante Fe involved a nondenominational prayer led by a student before a high school football game in Texas. In what was perhaps a misguided attempt to ward off judicial scrutiny, the school had conducted a secret ballot election of the senior class to determine what form of prayer, if any, would be given and who would lead it. The school argued that its elections system was a public forum, and that as in *Rosenberger*, the University of Virginia student publications case, it was simply granting equal access to the religious and irreligious. Stevens wrote for a 6-3 majority that included O'Connor, who had flipped sides after voting with the minority in *Weisman*. He dismissed the analogy to *Rosenberger*, noting that in *Sante Fe*'s voting system, the minority would get no access at all to the purported forum. Stevens then employed an O'Connor innovation, the "endorsement test," judging the school's actions by "whether an objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement of prayer in public schools" (530 U.S. at 12 quoting *Wallace v. Jaffee* 472 U.S. at 73). Stevens concluded that the school policy failed both the endorsement test and Kennedy's coercion test.

The school prayer decisions expanded Warren and Burger precedents beyond the classroom and outside curricular instruction. That said, the majority opinions in the case suggest discomfort with the *Lemon* test. Whether as alternatives, or as glosses on *Lemon*, Kennedy's "coercion test," and O'Connor's "endorsement test," have not, however, won over their colleagues, further muddling law in this area. The result in these cases sharply contrasts with the aid and access decisions, suggesting that the Rehnquist Court, even in its religious clause decisions, did not march in lockstep with the religious right.

Free Exercise

Another area, the Free Exercise cases regarding "generally applicable" laws, can also be scored as a defeat for cultural conservatives, though the scoring here is not nearly as clear-cut as in the prayer cases. In *Sherbert v. Verner* 374

U.S. 398 (1963), the Warren Court had established the rule that a generally applicable law affecting religious practice, in this case an unemployment law that cut off benefits to a Seventh-Day Adventist who refused as part of his religion to work on Saturday, had to be justified by a “compelling state interest,” a high standard. *Sherbert*, was, however, from the beginning a shaky precedent, and the Court often found ways to uphold general laws that affected religious practice (*Goldman v. Weinberger* 475 U.S. 503, 1986; *Bowen v. Roy* 476 U.S. 693, 1986; *Lyng v. Northwest Indian Cemetery Protective Association* 485 U.S. 439, 1988). Nonetheless, the Rehnquist Court attracted great attention when, in *Employment Division v. Smith* 494 U.S. 872 (1990), Scalia’s majority opinion declared that generally applicable laws that affect religious exercise would be presumed constitutional.

Smith succeeded in uniting a diverse array of religious groups, along with congressional Democrats and Republicans: they could all agree the Court had badly erred. Soon after *Smith*, Congress by a lopsided vote enacted the “Religious Freedom Restoration Act,” which created a statutory right that mirrored the *Sherbert* doctrine: neutral laws that affect religious exercise had to be justified by a compelling interest. But the Rehnquist Court returned the volley: In *Boerne v. Flores* 521 U.S. 507 (1997), it struck down RFRA, at least as it applied to states. Finally, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* 508 U.S. 520 (1993), the Court clarified that it would be very tough on cases in which public officials aimed specifically to curb the religious exercise of some group, as the city of Hialeah had done in enacting animal sacrifice laws targeting practitioners of Santeria.

Smith, *Boerne* and *Lukumi Babulu Aye* are hard to analyze from a regime politics perspective. Many religious conservatives joined the broad coalition that attempted to use the Religious Freedom Restoration Act to “overturn” *Smith*. That said, it seems unlikely that the rule in *Smith* had much effect on the religious practices of Christians, who can campaign effectively in legislatures for exemptions from general laws that affect their religious practices. *Smith* and *Lukumi* are much more relevant to members of minority religions, because their religious practices are much more likely to come into conflict with general laws.

THE REHNQUIST COURT AND THE NON-RELIGION FIRST AMENDMENT CASES

An exhaustive review of the Rehnquist Court speech and press decisions – one study counts 143 non-religion First Amendment cases ([Epstein & Segal](#),

2006) – would be exhausting indeed. Given the task of this chapter, though, it is best to compare areas in which the Court was either most out of line with its Republican appointers and those in which it was most active in support of traditional Republican constituencies.⁴ Thus I focus on the Court’s flag-burning, sexual speech and commercial speech cases. Here, unlike in most of the religion cases, conservatives on the Court mostly extended the frameworks of previous more liberal courts, in ways that sometimes displeased cultural conservatives.

Flag-Burning

In *Texas v. Johnson* (491 U.S. 397, 1989), the Court reversed a conviction under a state law prohibiting desecration of “sacred objects.” Writing for the majority, Justice Brennan found flag-burning to be a type of symbolic speech protected by the First Amendment and applied the *O’Brien* test for mixed conduct/speech cases (*United States v. O’Brien*, 301 U.S. 367, 1968). Finding no governmental interest unrelated to the speech in the case, Brennan applied “exacting scrutiny” and found no interest sufficiently compelling to justify punishing Johnson’s speech.

Brennan’s opinion was joined by the traditional liberals Marshall and Blackmun, but also by Reagan appointees Scalia and Kennedy. Kennedy wrote an extraordinary concurrence expressing his pain in siding with a flag-burner:

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. (*Texas v. Johnson*, 491 U.S. at 420–421)

Four dissenters were not compelled. Writing for justices White and O’Connor, Chief Justice Rehnquist framed the case not as an example of symbolic speech, but rather as “low-value” speech, as described in the classic 1942 case *Chaplinsky v. New Hampshire* (315 U.S. 568, 1942). Quoting *Chaplinsky*, Rehnquist argued that flag-burning is “‘no essential part of the exposition of ideas and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed’ by the public interest in avoiding a probable beach of the peace” (491 U.S. at 431). Justice Stevens wrote a brief concurrence arguing that the flag was a special symbol and thus immune from normal First Amendment analysis.

Congress, reacting to the public uproar over *Texas v. Johnson*, enacted the “Flag Protection Act of 1989.” Thus flag-burning returned to the Court in

United States v. Eichman, 496 U.S. 310 (1990). Although the Protection Act had been crafted to pass the *O'Brien* test as a restriction on conduct rather than speech, the same majority as in *Texas v. Johnson* rejected the law, on similar grounds.

In these cases two Reagan appointees – Kennedy and Scalia – helped to form the majority, and one of the Court’s moderates, Stevens, voted with the minority. In siding with the majority, Kennedy and Scalia accepted and extended several frameworks for thinking about free speech developed in the Warren and Burger Courts. It is useful to list all the ways in which Kennedy and Scalia (and to some extent even the dissenters) accepted these frameworks, some of which were controversial with cultural conservatives when first proposed, but have subsequently become part of the architecture of free speech law.

First Kennedy and Scalia went along with using the *O'Brien* test in this case, which frames this case as an example of symbolic speech, or speech mixed with action. This concedes a central claim, that an action – burning the flag – is a kind of expression, a “medium for the communication of ideas” as another flag case, *Spence v. Washington* (18 U.S. 405, 1974), put it, and thus though literally not speech, falls under the First Amendment. This concession is so unremarkable today that it barely receives mention, but at one time it would have been fiercely argued. Instead the sides in the flag-burning cases concentrated on the follow-up issue, as articulated in *O'Brien* – whether the state had an interest unrelated to the suppression of ideas. The dissenters struggled to articulate an interest that could be considered unrelated to expression, one that was “content-neutral.”

Rehnquist’s dissent in *Texas v. Johnson* points to another, largely taken-for-granted backdrop to the flag-burning cases: The erosion of the *Chaplinsky* “two-tier” approach to speech, in which some forms of speech – libel, obscenity, “fighting words” – are said to fall entirely outside the First Amendment. While *Chaplinsky* has never been explicitly overruled, the core idea in the passage Rehnquist quoted – that some forms of speech deserve no constitutional protection – has largely been abandoned. As Robert Post has argued, one of Justice William Brennan’s major contributions to constitutional law was to focus on its effects rather than its abstract categories. In First Amendment law, this led to a newfound concern that laws punishing “bad speech” like libel could in operation deter all kinds of good speech (Post, 1993). Libel, for example, is still a disfavored category, but doctrines such as vagueness, overbreadth and the “actual malice” test for defamatory material about public figures are used to insure that libel laws do not create a “chilling effect” on journalists. Similarly, obscenity can

still be regulated, but only within a framework, the *Miller* test, designed to ensure that non-obscene sexual speech is not chilled.

Despite Rehnquist's quotation from *Chaplinsky*, none of the justices on the Rehnquist Court has called for rolling back the many Warren and Burger Court precedents that have undermined the "in-out" approach to the First Amendment. That is not because conservatives have failed to attack these decisions. It is certainly plausible to argue, as Robert Bork has, that the First Amendment was understood by the Framers to protect only "political" speech – speech relevant to decision-making in a democracy. Under Bork's conception of "political" speech, libel, obscenity, flag-burning and even commercial speech would not fall within the ambit of the First Amendment (Bork, 1971). Bork's call for a narrowed, original understanding of the First Amendment has, however, gone unheeded, even among the purportedly originalist conservatives on the Court. Indeed there is remarkably little analysis of the original meaning of the First Amendment in the Rehnquist Court's Speech and Press Clause jurisprudence.

Thus in siding with the majority, Kennedy and Scalia were not simply agreeing with a result, but acquiescing to a set of frameworks developed by liberals in the Warren and Burger courts over the past 30 years. Of course, even while bowing to all the precedents in the case, Kennedy and Scalia still could have accepted Stevens' invitation to make a special exception for the flag, a "ticket for this show only" precedent. In that sense, accepting the frameworks I have described did not mechanically obligate Kennedy and Scalia to overturn flag-burning laws, as the votes of the dissenters demonstrate. It did, however, frame their choices. If the two were to vote to approve flag-burning laws, they would have to acknowledge, as Stevens did, that they were making a special exception by making some very fine (and to many in the legal community unconvincing) distinctions. By choosing the easier path, Kennedy and Scalia extended the First Amendment precedents in this area, and in turn made it just a little bit harder for future judges to reframe the issue of flag-burning.

Sexual Speech on the Internet

The Rehnquist Court was confronted by a new medium, the Internet, and had to wrestle with how the First Amendment applied to it. Understandably the justices were drawn to analogies to older media as a way of making sense of the Internet. But which ones? Telephones, like the Internet, are used by individuals in ways that make it hard for the companies carrying the signal

to monitor. Television, like the Internet, comes into the home in a way that makes it arguably hard to shield children from unwanted messages. But then again, the Internet also could be analogized to the print media, the most protected from regulation under the First Amendment. The Court chose the print analogy, and in a series of cases provided the same broad protections for expression on the Internet that had previously been given to print media.

The Internet had implications for many aspects of First Amendment law, but the area the Rehnquist Court confronted most often was sexual speech. Put bluntly, the Internet offers everyone, minors included, unprecedented access to sexual imagery and sexual speech. The Rehnquist Court's first major encounter with Internet sexuality came in *Reno v. ACLU*, 521 U.S. 844 (1997). By a vote of 7-2, the Court struck down the Communications Decency Act, which prohibited transmission of obscene or "indecent" materials to minors, either through intentional communication with children or by displaying them "in a manner available" to those under 18.

Prohibiting obscene materials on the Internet posed no particular issue; under the reigning obscenity precedent, *Miller v. California* 413 U.S. 15 (1973), the Court had approved of obscenity regulations for the print media. But "indecent" material was another matter. In *FCC v. Pacifica* 438 U.S. 726 (1978), the Court had upheld regulations for the broadcast media that regulated the times when indecent speech could be aired. In *Renton v. Playtimes Theatres* 475 U.S. 41 (1986), the Court had approved zoning rules that limited the locations of businesses selling sexually explicit materials. The Decency Act's defenders urged the Court to consider the Act a kind of zoning rule on the Internet, restricting children's access to sexual material but leaving it generally available to adults.

Writing for the majority, Justice Stevens concluded that the Decency Act could not be compared to zoning or broadcast indecency laws. He rejected the analogy to regulations on broadcasting, concluding that the Internet was not as intrusive as television – viewers, he claimed, were not likely to arrive at a sexually explicit website by accident. Further, the Internet did not have the long history of regulation that had affected broadcasting, a pattern of government involvement justified by the relative "scarcity" of spectrum on which to broadcast. Stevens also rejected the zoning analogy, in part because he concluded that there was no effective way for content providers on the Internet to zone. Keeping only children away from sexually explicit material, he concluded, was technologically impossible. Only Chief Justice Rehnquist and Justice O'Connor dissented, and on narrow grounds: They would have ruled the law as constitutional as applied to intentional communication between an adult and a child.

After the Decency Act was struck down, Congress passed a new, more carefully crafted statute, the Child Online Protection Act (COPA). To define what it criminalized, the Act drew on the test created in *Miller v. California* for obscenity, slightly altering its language to refer specifically to minors. One of the prongs in the statute, paralleling *Miller*, asked if “the average person, applying contemporary community standards, would find, taking the material as a whole *and with respect to minors*, is designed to appeal to *or is designed to pander to* the prurient interest ...” [Italicized phrases are amendments to the *Miller* prong.] In *Ashcroft v. ACLU* 535 U.S. 564 (2001), the Court encountered a fascinating question raised by the collision of the Internet with the *Miller* test: If obscenity is judged by “community standards,” what is the community that decides whether Internet pornography is obscene? Under the COPA, the job of deciding whether Internet pornography is obscene would fall to local juries, who tend to interpret the law in light of local standards, raising the possibility that juries in the most puritan communities would have the greatest influence over Internet content. On this narrow question – whether local juries should decide what count as “community standards” for Internet pornography – the Court on an 8-1 vote upheld the COPA. The majority was badly divided, but Justice Thomas’s lead opinion was unsympathetic to the arguably distinct problems posed to purveyors of sexual material on the Internet, who do not have the option of sending mild versions of their stuff to Mississippi and raunchy versions to Manhattan. If that was their problem, he suggested, they should try another medium. In any case, the Court was not going to create a new regulatory scheme for the Internet; the *Miller* test would do.

The Rehnquist Court encountered yet another Internet regulation, the Child Pornography Protection Act, in *Ashcroft v. Free Speech Coalition* 535 U.S. 234 (2002). This law criminalized the possession and distribution of Internet pornography involving children, but went beyond this to include material that merely appeared to be children – computer-generated images, or adult actors who looked childlike. The government argued that this “virtual child pornography” stoked viewer’s interest in the real kind, and made it harder to detect when actual children were involved. Writing for a 6-3 majority, Kennedy noted that under *New York v. Ferber* 458 U.S. 7474 (1982), child pornography did not have to meet the *Miller* test for obscenity to be criminalized. But Kennedy distinguished *Ferber* as involving actual children, and ruled that the CPPA was overbroad and unconstitutional. Rehnquist, O’Connor and Scalia dissented, arguing that parts of the law could be constitutionally applied, and concluded that the majority’s overbreadth analysis itself swept too broadly.

Finally, in *U.S. v. American Library Association* 539 U.S. 194 (2003), the Court upheld a provision in a grant program for libraries requiring them to install filtering software on Internet terminals. Rehnquist, in his majority opinion, noted that no one considers it a First Amendment violation when libraries choose which books to circulate, even if patrons might choose other books. Installing filtering software on computers, he noted, is even less restrictive to patrons because the software can always be turned off if the patron requests.

The library case aside, in the Internet cases, the Rehnquist Court mostly took Warren and Burger Court precedents such as *Miller* and applied them to a new medium. In so doing, the Court reinforced speech-protective precedents, and made it difficult for Congress to slow down the proliferation of sexual imagery on the Internet. The Rehnquist Court, including some of its most conservative members, found itself siding with pornographers, even child pornographers, against large majorities in Congress.

Commercial Speech

From a regime politics perspective, commercial speech offers an odd case. Freeing up the speech of businesses that advertise seems like a Republican project, but it was the liberals on the Burger Court who were the biggest champions of commercial speech, and William Rehnquist the biggest foe. Moreover, the businesses that came before the Rehnquist Court to plead their case against government regulation sold alcohol, cigarettes, games of chance and personal injury litigation – not products close to the heart of cultural conservatives.

In an early case on commercial speech, the Court had declared that the First Amendment created no obstacle at all to regulation of advertising (*Valentine v. Chrestenson* 316 U.S. 52, 1942). But in the Burger Court commercial speech, like libel and other “low-value” expression, found some shelter under the First Amendment. The Burger Court summarized its standards for gauging the constitutionality of commercial speech regulation in *Central Hudson Gas v. Public Service Commission* 447 U.S. 557 (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. (566)

The *Hudson* test was criticized by several members of the Rehnquist Court, but unlike the *Lemon* and *Sherbert* tests lived to see the beginnings of the Roberts Court undiminished.

Hudson survived partly because the Court found it easy to strike down objectionable laws under its aegis. In *Rubin v. Coors Brewing* 514 U.S. 476 (1996), the Court used the *Hudson* test to unanimously strike down a federal law banning labels on beer from describing their alcohol content. Two years later, in another liquor case, *44 Liquormart v. Rhode Island* 517 U.S. 484 (1996), all nine justices voted to strike down a state law banning the advertising of liquor prices, though they divided on the rationale. Stevens, together with Kennedy and Ginsburg, concluded that regulations against truthful commercial messages “for reasons unrelated to the preservation of a fair bargaining process” should receive strict scrutiny rather than the more deferential *Hudson* test. Most of the other justices found the law unconstitutional under *Hudson*. Thomas argued that where “the government’s asserted interest is to keep legal users of a product or service ignorant” *Hudson* should not be used; the law should be considered per se unconstitutional (518). But while Thomas’s concurrence was quite critical of *Hudson*, he did not argue for wholly overruling it; he simply wanted to carve out a large exception to it. In *Greater New Orleans Broadcasting Association v. U.S.* 527 U.S. 173 (1999), the Court was unanimous in striking down a federal law prohibiting advertising for private casino gambling. Stevens, in his opinion, concluded that there was no need to revisit the validity of the *Hudson* test because the statute clearly fails it. Thomas concurred to reiterate his contention that governmental attempts to manipulate consumer choice in the marketplace by keeping consumers ignorant are “per se illegitimate” (197). Finally, in *Lorillard Tobacco Co. v. Reilly* 533 U.S. 525 (2001), the Court struck down two state restrictions on tobacco advertising, though it did leave intact regulations requiring that tobacco products be displayed behind counters. Once again, the Court was badly divided on the rationale, with Kennedy, Scalia and Thomas all expressing concerns about *Hudson*. Souter, Stevens, Ginsburg and Breyer, meanwhile, dissented from parts of the result. *Lorillard* then, is a “flipped” decision where the Court’s conservatives were most sympathetic to a free expression argument.

Just as confusing was the lineup in a rare case in which the Rehnquist Court rejected a First Amendment commercial speech challenge (*Florida Bar v. Went for It* 515 U.S. 618, 1995). The case tested the constitutionality of a rule prohibiting lawyers from mailing solicitations to victims within 30 days of an accident. This decision found Breyer in a five-person majority

alongside O'Connor, Rehnquist, Scalia and Thomas, while Kennedy wrote for the dissenters. Both sides used *Hudson* to frame the issues.

It is hard to summarize the scrambled voting patterns in the commercial speech cases; indeed in cases like *Lorillard* it is hard enough to even describe the votes. The clearest pattern that emerges is of a Court that retains the *Hudson* test, grumbles about it occasionally, and seems to use it more and more aggressively to scrutinize speech restrictions, *Went for It* to the contrary.

EXPLAINING THE DIVERGENCE(S)

Conservative Republicans who had a hand in appointing the majority of the Rehnquist Court might, on balance, have been satisfied with its rulings on religion – except for its ruling on school prayer. On the other side, the Court's decisions on sexual speech and flag-burning could not have satisfied them – though its commercial speech rulings might have had some use for business constituencies. (More if the Court had brought commercial speech to parity with other kinds of protected expression, a move that would have required overruling *Hudson*.) What explains this very mixed pattern of support and opposition to the preferences of the appointing regime?

Sorting through the common explanations is difficult, because many of them do not generate a hard and fast mechanical prediction about how the Court will act in a particular case. Whether this is an indication of the richness and subtlety of the explanations, or a flaw rendering them nearly useless, depends in large part on one's view of the enterprise of social science, a matter clearly outside the scope of this chapter. That said, despite the “nuance,” or, as some may view it, the “squishiness,” of these explanations, the example of the Rehnquist Court First Amendment cases does help us think through some of them.

The Deviant Cases Help the Regime

One common claim in the regime politics literature is that judicial decisions that seem to go against the appointing regime are actually helpful to it. The Rehnquist Court's decision in *Planned Parenthood v. Casey*, for example, is said to have kept a troublesome issue for Republicans off the legislative agenda (Clayton, 1999; Rosen, 2006). On this account, the First

Amendment cases that superficially look like departures from Republican goals are in fact in the long-run interest of the Party. The flag-burning, school prayer, Internet pornography and obscenity cases can be explained because they give legislators, including Republicans, the ability to vote for the statute, then castigate the judges who make the ruling (and then, once the statute is struck down, get credit for voting for yet another statute on the same topic, as Congress has in both the flag-burning and Internet pornography cases). This is especially true if Republican legislators consider the statutes unconstitutional, but need to vote for them to curry favor with voters.

One does not have to be a hard-core positivist to notice that once even apparent reversals count as victories, presidents can never be shown to “lose” – any outcome can be explained as supporting the appointing coalition (Keck, 2007b). Moreover, the counterfactuals are harder to measure than is commonly supposed. Would it really hurt the Republican Party to make flag-burning, Internet pornography and school prayer into prominent legislative controversies? It is probably best to think of the “apparent reversal” analysis as an interesting description of how judicial outcomes can be used by governing regimes, rather than an *explanation* of those outcomes. It seems just a bit too subtle to believe that presidents, seeing an opportunity to gain from a backlash, appoint justices who they know will rule against them in high-profile cases.

The Deviant Cases Line up with Public Opinion

There is a large literature on the significant influence of public opinion on rulings of the Supreme Court (Mischler & Sheehan, 1996). Indeed, Rosen claims in a recent book that the judiciary has become “The Most Democratic Branch” because its decisions align much more closely with public opinion than those of the other branches (Rosen, 2006).

Public opinion, however, is not terribly helpful for explaining the Rehnquist Court’s decision making in First Amendment cases. That is because most of the things the Court has done, including many of those most disappointing to the appointing regime, are also very unpopular with the public. Forty years of negative court decisions have not reduced the allure of school prayer for the public. Laws against flag-burning and sexual portrayals on the Internet are very popular; it seems unlikely that any politician, seeking public approval, would campaign against them.

Kennedy and O'Connor

Thomas Keck points out that Kennedy and O'Connor are the reason the Supreme Court has become "the most activist court of all," because they strike down both liberal and conservative policies, and thus provide the deciding votes in either circumstance (Keck, 2004). To what extent do the votes and opinions of Kennedy and O'Connor also explain the diverging pattern of First Amendment Rehnquist Court decisions?

In the religion cases Kennedy and O'Connor are crucial. They have often provided the fourth and fifth votes in the access and aid cases, and they were the swing voters in the school prayer cases. Because of their position they determined the Court's religious clause jurisprudence, supporting a move away from the strict interpretation of the *Lemon* test – grudgingly in O'Connor's case. They have, however, been much less successful as policy entrepreneurs. Kennedy's coercion test and O'Connor's endorsement test have not gained the support of a majority of their colleagues.⁵

In the non-religion cases the pattern is much less clear. Often the votes of Kennedy and O'Connor cancel each other out. O'Connor tends to vote with the government; Kennedy is usually found with the Court's liberals. Moreover, in these cases Thomas (sexual speech) and Scalia (flag-burning) make a difference by contributing votes to the libertarian side. Further, in the commercial speech cases all of the conservative justice have at one time or another voted with the plaintiffs.

Putting all this together, at least in the areas reviewed in this chapter, Kennedy's vote helps to explain the divergence, but so do some of the votes of Thomas and Scalia. Strangely enough, O'Connor, so often at the center of anything involving the Rehnquist Court, does nothing to solve this mystery because she lined up with the government in both the Internet sex and flag-burning cases.

The Outcomes Demonstrate the Weight of Precedent

If precedent matters the way Kritzer and Richards suggest, it does so by focusing judges on certain aspects of cases, framing what matters and what does not among the many case facts. If precedent matters the way Kersch suggests, it matters because it creates frameworks that resonate even beyond the judiciary, in popular culture.

Just as Kritzer and Richards found in their more systematic study, there is evidence throughout the cases reviewed here that judges reason "in the

shadow of precedent,” even where they ultimately break away from it. In the access and aid cases, for example, the Court moved gradually away from the *Lemon* test, diminishing by small increments the obstacles to government involvement with religion. In the absence of *Lemon* and other precedents it is hard to believe this group of justices would have taken the same slow path. *Smith* may seem a sharper break, though Scalia’s claim that the Court had already backed away from the implications of *Sherbert* in previous cases rings true. And of course, in the expression cases that do not deal with religion the justices largely stick with the precedents, even when they admit some disgruntlement with them. That may be, as Kersch suggests, because the intellectual scaffolding of expression law, and concepts such as symbolic speech, are now built into the popular culture, so that any attempt to transform this realm would pit the justices not just against their colleagues, but the broader society (Kersch, 2006). It was Justice Rehnquist, after all, who explained why he voted to uphold the core of the *Miranda* decision by citing its entrenchment within “our national culture” (*Dickerson v. United States* 530 U.S. 428 at 443, 2000).

But all that said, the “weight of precedent” ultimately did not stop the Rehnquist Court from making fundamental changes in First Amendment law. Why were *Lemon* and *Sherbert* largely discarded while *O’Brien*, *Miller Hudson* and all the supporting free expression precedents were followed, even reinforced?

An institutional explanation starts with the mundane observation that justices are judges, and thus care about how well crafted the law is. Conservative judges, at least, found *Lemon* and *Sherbert* to be poorly crafted. The justices rejected them because they provided fuzzy ways to think through what should matter in Religion Clause jurisprudence – and uncertain guides to lower court judges. That is certainly Scalia’s opinion. The flip side of this analysis is the claim that conservative judges have accepted “liberal” expression precedents because they work well enough in practice. This is the account of Suzanna Sherry, who argues that expression law has become more pragmatic and less ideological, a shift she approves (Sherry, 2004).

But in law, utility, like beauty, lies in the eyes of the beholder. A justice who concludes that the expression precedents “work well” or at least, well enough, must evaluate them partly on how well they reflect the justice’s understanding of the First Amendment. It is hard to believe, in turn, that this understanding has nothing to do with the justice’s political beliefs. The liberals on the Rehnquist Court evinced no great dissatisfaction with *Lemon*, after all. Meanwhile the Court’s conservatives did not seem particularly

enamored with the *Hudson* test, but failed to argue for overruling it, probably because they could work within it to get the result they deemed correct. While judicial craft almost certainly affects the way the Court evaluates precedents, its influence is hard to measure – especially where judges seem to evaluate craft of a precedent in line with their political beliefs.

The Outcomes Reflect the Libertarian Strand within Conservatism

One way to think about the divergent outcomes in these religion and expression cases is to see them as arising out of different brands of conservatism. In the expression cases, the libertarianism of Kennedy, and to a lesser extent Scalia and Thomas, is matched against the more statist conservatism of William Rehnquist and O'Connor. In the religion cases, by contrast, the differences in these brands of conservatism are muted, and all five vote together.

Lining the justices up this way, however, is a bit puzzling. For example, in Mark Tushnet's generally persuasive account, the battle on the Court is between Country-Club Republicanism, personified by O'Connor and Kennedy, and Modern Republicanism, the club of Rehnquist, Scalia and Thomas (Tushnet, 2005). The expression votes, though, sometimes match Kennedy, Scalia and Thomas against O'Connor and Rehnquist. First Amendment expert Eugene Volokh explains that "The justices' First Amendment ideologies just do not obviously match their ideologies on other matters" (Volokh, 2004, p. 40), but this seems a bit too convenient – and unlikely given the reams of behavioral studies that suggest justices' votes tend to factor together pretty well on at most two dimensions, suggesting that there is no special "expression" ideology.⁶

That said, a libertarian strain within conservatism does help account for the overall pattern of the cases, nearly all of which can be seen as expanding individual rights. The aid cases expand the ability of individuals to choose to participate in religious organizations, especially schools. The access cases grant religious organizations the ability to use government forums. The expression cases expand individuals' rights to burn the flag, contribute sexually explicit materials to the Internet, and advertise products. Only *Smith*, the Free Exercise case, looks like an example of diminished individual rights – and only if one believes that the Court before *Smith* was in fact dedicated to strictly scrutinizing laws that affected religious practice.

As Mark Graber has argued, conservative judges are likely to be libertarian, or at least more libertarian than voters (Graber, 2006a, 2006b; Keck, 2004). This is because judges, like other officeholders, are much more likely than voters to come from the educational and financial elite, which tends to be more libertarian than the masses. But judges are also affected by the institution in which they serve (Keck, 2007a). They interpret a Constitution that has many more negative than positive rights, and they lead a judiciary which has proven more effective in stopping governments from doing things than it is in getting governments to do more things. It is not so surprising, given all this, that the Rehnquist Court's First Amendment jurisprudence tended toward more libertarianism than some cultural conservatives in the Republican Party might have wished.

The Outcomes Reflect the Efforts of Conservative Legal Groups

Because I have been surveying the Court's First Amendment decisions from the "top down," I have neglected a crucial actor: the conservative legal groups that have been bringing religious liberty claims to the federal judiciary. Indeed, from the perspective of sociolegal studies, this is the place to start in analyzing legal change – rights "on the books," this body of scholarship suggests, cannot be effectively mobilized without a legal support structure (Epp, 1998). And indeed, religious liberty groups have been among the most effective litigators in the federal courts in recent years. As Steven Brown shows in his cogent study, conservative Christian legal groups have learned to employ the techniques of their predecessors on the left, most famously the NAACP. Brown describes a wide-ranging legal infrastructure, with thousands of attorney volunteers, several groups with professional staff and millions of dollars in funding, topped by star Supreme Court litigators such as Jay Sekulow, labeled the "Thurgood Marshall" of the movement by one Christian right leader (Brown, 2002, p. 37). Of 44 religion cases argued at the Supreme Court between 1980 and 2000, Christian right groups appeared as amici in 29, and as sponsors or funders in 9, among them *Rosenberger* and *Lambs Chapel*, two of the most significant First Amendment victories for conservatives (Brown, Figure 1, p. 84).

Can the efforts of these Christian groups explain the divergence between the religion and non-religion cases? Conservative legal groups have clearly focused more on religious liberty than other First Amendment issues. One of the major organizations, the Alliance Defense Fund, describes itself as "a national Alliance funding the legal defense and advocacy of religious

freedom, the sanctity of human life, and family values” (Brown, 2002, p. 41). Brown points out that, as the order of this list suggests, cases involving religious liberty get the largest proportion of the ADF’s funding (42). Another group, the Rutherford Institute, has an even greater focus on religious liberty. The Institute’s founder, John Whitehead, advocates that Christian organizations take a libertarian approach to law: “If you don’t want others ramming their views down your throat, you can’t ram your views down their’s” (Brown, p. 35). It is unsurprising that conservative lawyers, like conservative judges, tend to be more libertarian than the conservative movement as a whole. Like the judges, lawyers are elites who have been socialized into a culture of negative rights – a tendency Tocqueville noted and applauded many years ago (Tocqueville, 2000, p. 258).

Yet while the lawyers and organizations in Brown’s study clearly have a libertarian cast, Brown’s study also notes they have been responsive to cues provided by the federal judiciary. He points out, for example, that Christian groups came to their public forum free speech arguments only after years of “beating our heads against the wall,” as one litigator put it, by making pure Establishment Clause and Free Exercise claims that were rejected (58). As is common in such circumstances, it is hard to know exactly how much judges are following the litigators’ lead in First Amendment cases and to what extent the influence flows in the other direction. Nonetheless, the rise of a liberty-oriented conservative legal movement is an important part of the story of the Rehnquist Court’s First Amendment jurisprudence.

THE CONSERVATIVE FIRST AMENDMENT

This chapter has offered a few carefully selected scenes from the Rehnquist Court’s handling of First Amendment cases. To reflect the full sweep of First Amendment law, one would have to include many more such scenes: the Court’s cases on campaign finance, or hate speech, or religious displays, or time, place and manner regulation. Nonetheless, even this narrowed review demonstrates that the conservatives who came to power on the Rehnquist Court have reshaped the First Amendment in some areas and merely extended older, liberal precedents in others. The Rehnquist Court’s record in First Amendment cases suggests some intriguing patterns that are likely to extend well into the 21st century.

First, there is a radical divergence between the religion cases and the non-religious cases. In the religion cases, the Court’s conservatives have been

pushing hard against the categories created by precedent. They often use extensive quotations and examples from the founding period to challenge fundamental premises about meaning of the Constitution. Reading these cases, one sometimes feels stuck in a rather old-fashioned history seminar, where the deeds and words of great men from the past are argued over (Strang, 2006).

The opinions in the non-religion cases, by contrast, seem much more technical and policy-oriented, even technocratic. There is relatively little discussion of fundamental premises, and almost no invocation of history. On a Court that has a couple of self-proclaimed “originalists” that in itself is notable. In the First Amendment cases that do not directly involve religion, originalism takes a backseat to stare decisis. The Court’s conservatives are willing to apply the frameworks they have inherited, often with “liberal” results. Much of the discussion in the opinions, then, is about how agreed-upon principles are applied. Typically, liberals and conservatives disagree, but their disagreements are muted.

Both patterns – fundamental disputes in the religion cases, narrower technical disputes in the non-religious expression cases – are likely to continue on the Roberts Court. It is hard to see how differences over the meaning of the religion clauses can be worked out anytime soon. The Rehnquist Court has uprooted the *Lemon* and *Sherbert* tests, and in so doing has pushed Establishment and Free Exercise law in new directions whose parameters are not yet clear. Although the “neutrality” test seems to have become accepted in the aid and access cases, Kennedy’s “coercion” test and O’Connor’s “endorsement” test have not been accepted in the school prayer and religious display cases, leaving a vacuum. The law journals are filled with proposals to go even further in rethinking traditional approaches to the religion clauses, and there are indications that some justices, especially Thomas, are receptive to these more far-reaching suggestions.

O’Connor’s departure removes a significant obstacle to further innovation in the religion cases. On the Rehnquist Court O’Connor acted as an anchor for the conservative majority, usually providing a fifth vote, but always slowing the direction her colleagues were moving. It was O’Connor who kept the ghost of *Lemon* from fading from view, to the considerable annoyance of Scalia. Roberts or Alito could take on the O’Connor role of frustrating more rapid change. But even if they do, they will still have to wrestle with unsettled doctrine in the school prayer and religious display cases.

It is hard to imagine expression law transformed by the Roberts Court the way the religion clauses were reshaped by the Rehnquist Court. Conservative

groups learned to use public forum arguments effectively, but outside of this realm they have not had any effect on free expression law. The typical free expression case is presented with many layers of judicial scaffolding. In the flag-burning case, for example, there was *Spence, O'Brien* and many symbolic speech, fighting words and public expression precedents. The justices often tinker with the top layer, but rarely dig down to the bottom. It is a thankless task, and one almost guaranteed to have little payoff.

Where conservatives do shift First Amendment law, they are likely to frame their changes as expanding rights rather than retracting them. As several scholars have suggested, there is a libertarian tilt to legal conservatism that partly reflects tensions within the Republican Party, but also the professional and institutional positioning of both conservative public interest law groups and conservative judges. Moreover, as many have observed, the nature of First Amendment disputing has shifted over time. Where before, the typical First Amendment plaintiff was an outsider, or a group marginalized by the community, more and more today the expression cases pit organizations, often corporations, against government regulations. It is unsurprising that in such areas as campaign finance and commercial speech conservatives have become associated with the pro-plaintiff side. *Lorillard's* “flipped” result, in which conservatives cast their votes in favor of a First Amendment plaintiff, and liberals dissent, is likely to become more common. To the extent that First Amendment cases still involve the classic pattern – a freedom-loving individual pitted against a repressive institution – conservatives have in some cases recast themselves as the insurgents. In the religious access cases, for example, religious groups portrayed themselves as an oppressed minority, discriminated against by government institutions controlled by secularists. Similarly in abortion protest cases, it is pro-life conservatives who claim their rights to free expression are being trampled. Arguments over campus “hate speech” regulation also have this quality, as conservatives argue that they are the victims of overzealous university regulators.

Do all these developments presage a more fundamental shift in the political culture, in which cultural conservatives give up their longstanding ambition to use the state’s authority to curb expression deemed harmful? There is no sign of this in Congress, where laws regulating controversial forms of expression regularly gather overwhelming support among Republicans. Of course such laws also get many Democratic votes, as they reflect public demands for action on such troublesome forms of expression such as sexual speech, flag-burning and broadcast indecency (*Keck, 2007a*). The record in Congress, though, suggests a continuing disjunction between

judicial and legislative conservatives. Indeed, there is no reason to believe that simply because conservatives have taken up the cudgels of freedom of expression in some realms that cultural conservatives as a group will give up on the tools of state intervention in others. That said, the Rehnquist Court's rulings may have a modest influence on the agenda of conservatives, bolstering the libertarian strain within the movement, and discouraging those who seek to curb speech they consider corrosive to moral values. With its path-breaking rulings in the religion cases, and path-following rulings in other realms of First Amendment law, the Rehnquist Court has set a pattern that is likely to endure well into the 21st century.

NOTES

1. Powell (2006, p. 381), quoting Charles Evans Hughes, *Addresses of Charles Evans Hughes* 185 (1916). In fact as Powell notes, Hughes did not literally believe that the Supreme Court controlled the meaning of the Constitution, and lived to regret the way the quotation was used. On the many ways in which the Constitution is fought over outside the judiciary, see Whittington (2001).

2. See Gillman (2006, p. 141). Malcolm Feeley and Edward Rubin offer a particularly nuanced account of how internal constraints on judicial policymaking operate (Feeley & Rubin, 1998).

3. In *Locke v. Davey* 540 U.S.712 (2004), the Rehnquist Court upheld the constitutionality of a Washington state scholarship program that excluded students studying for the ministry. Chief Justice Rehnquist, writing for a 7-2 majority, concluded that while the Establishment Clause did not foreclose state subsidies to such students, the Free Exercise Clause did not require the subsidies either. *Locke v. Davey*, then, suggests the limits of the government aid cases – with the important exception of the “public forum” cases, the Court has not interpreted the religion clauses to require equal support to religious and non-religious activities.

4. My selection criteria lead me to focus in this chapter on surprising cases, those in which simple generalizations about conservatives do not hold true. Thus the cases I analyze may be unrepresentative of the larger group of Rehnquist Court First Amendment decisions. Epstein and Segal, using a well-known database, code 40 of 143 Rehnquist non-religious First Amendment cases as “value conflict” cases, in which the First Amendment is weighed against another “constitutional or political” value. In pure cases, those coded as without “value conflict,” the traditional liberal-conservative split appears, but in the “value conflict” cases the relationship between ideology and vote fades, or depending on the measure of ideology, actually reverses (Epstein & Segal, 2006, p. 104). Of course this result depends on the authors code the decisions; one could argue that all First Amendment cases involve constitutional or political value conflicts.

5. Wexler (2006) claims that the endorsement test has become quite influential in the lower federal courts.

6. See note 3 above on this point.

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