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by
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When we look at First Amendment decisions over the last several years, First Amendment advocates are struck by a paradox. On the one hand, in some cases the Supreme Court, including its most conservative members, appears to be a vigorous defender of the First Amendment and strikes down even Congressional statutes that interfere with First Amendment freedoms. For example, in both *Simon & Schuster, Inc. v. New York State Crime Victims Board* (the Son-of-Sam case),[1] and *R.A.V. v. City of St. Paul*,[2] the Supreme Court was unanimous, producing eighteen votes in favor of the First Amendment. Similarly, in *United States v. Eichman*,[3] the flag-burning decision, Justice Scalia joined the majority in ruling that the law prohibiting flag-burning was unconstitutional.

The Court majority in other cases, however, led by conservative Reagan-Bush appointees such as Justice Scalia, has deferred to government regulation and rendered decisions seriously harmful to the First Amendment. For example, consider *Rust v. Sullivan*,[4] the abortion gag-rule case; *Employment Division v. Smith*,[5] which severely damaged the right to free exercise of religion; and the public forum cases, including *United States v. Kokinda*[6] and *International Society for Krishna Consciousness, Inc. v. Lee*.[7]

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1. 112 S. Ct. 501 (1991).
2. 112 S. Ct. 2538 (1992).
3. 496 U.S. 310 (1990).
4. 111 S. Ct. 1759 (1991).
5. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).
6. 497 U.S. 720 (1990).
7. 112 S. Ct. 2701 (1992).

How can we understand this? We can find at least a partial explanation in two opposing impulses, even among the most conservative Justices, as exemplified by Justice Scalia. First, there is a libertarian impulse among people like Justice Scalia to be against what they may regard as "heavy-handed government regulation" of attitudes and beliefs, and against the so-called "political correctness" movement. According to this view, when one is within the genuine First Amendment sphere one must be vigorous in defending free expression rights and the rights of the individual. On the other hand, there is the kind of "statist" view, exemplified particularly by Chief Justice Rehnquist, that defers to the government against individual rights.

Now, if you are Justice Antonin Scalia, or any of the other Justices on the Court, how do you reconcile these contrary impulses? One way is by effectively imposing a kind of prior restraint on First Amendment analysis. In other words, if before reaching the question of whether a restriction is valid under one of the demanding First Amendment tests, such as strict scrutiny, the Court decides *a priori* that the First Amendment does not apply, or that the version of the First Amendment that does apply is very weak, then the conflict is resolved because the Court does not have to get into the First Amendment and strict scrutiny at all. In other words, it is an attempt to restrain First Amendment analysis, in many cases, before the Court even gets there—to define things out of the realm of the First Amendment, or at least the most demanding aspects of the First Amendment. To put it another way, we often say that application of the First Amendment "triggers" strict scrutiny. This method of analysis effectively puts a trigger lock on the First Amendment.

We can see at least three particular examples of this type of analysis in Supreme Court decisions over the last several years: First, the use of the "neutral laws of general applicability" rationale; second, permitting government self-definition of the "public forum"; and third, virtually redefining out of existence First Amendment burdens on government benefits.

The starting point in terms of neutral laws of general applicability has to be *Employment Division v. Smith*. Before *Smith*, since at least *Sherbert v. Verner*,[8] the courts had ruled consistently that where a law burdens the free exercise of religion—that is, the exercise of religion by individuals in terms of their own religious practices—even if that law is neutral or not intended to restrict religion, that law is unconstitutional unless it survives strict scrutiny—unless it is necessary to promote a com-

8. 374 U.S. 398 (1963).

pelling governmental interest. The classic example is *Wisconsin v. Yoder*,[9] where compulsory school attendance laws, as applied to the Amish, were ruled unconstitutional.

Smith, however, drastically and dramatically changed that. Even those who agree with *Smith* would have to agree that Justice Scalia's opinion in that case effected a major change in First Amendment analysis. In that case, which concerned an Oregon law criminalizing peyote as it applied to American Indians who used peyote for sacramental purposes, Justice Scalia essentially applied a prior restraint on the First Amendment by saying that no significant First Amendment scrutiny needed to be applied at all to the law, because it was a neutral law of general applicability that was not intended to infringe First Amendment free exercise rights.

The most eloquent attack on Justice Scalia came from Justice O'Connor, who effectively demonstrated how dramatically Justice Scalia's opinion had changed the law. As Justice O'Connor explained in her concurring opinion in *Smith*, "laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[10] According to Justice O'Connor, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."[11] Quoting from Justice Jackson's opinion in *West Virginia State Board of Education v. Barnette*,[12] Justice O'Connor noted that " '[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy,' " including the right to free exercise of religion. These rights " 'may not be submitted to vote; they depend on the outcome of no elections.' "[13] But, according to Justice Scalia, and unfortunately the majority, it simply is not so.

Another way of demonstrating how widespread the criticism against the *Smith* opinion has been is to note who has been attacking it. Critics include everyone from People for the American Way and the American Civil Liberties Union on one side, to the National Association of Evangelicals and the Traditional Values Coalition on the other. These and many other groups have joined in supporting the proposed Religious Freedom Restoration Act, which would create a federal right to free ex-

9. 406 U.S. 205 (1972).
10. 494 U.S. at 901 (O'Connor, J., concurring).
11. *Id.* at 902.
12. 319 U.S. 624 (1943).
13. *Smith*, 494 U.S. at 903 (quoting *Barnette*, 319 U.S. at 638).

ercise of religion equivalent to the constitutional right before *Smith*. Nevertheless, constitutional liberty has been severely damaged by the decision in *Smith*.

The use of "neutral laws of general applicability" analysis, however, has not stopped with the Free Exercise Clause. The Court also used this analysis recently in the free press area in *Cohen v. Cowles Media Co.*[14] There, in an opinion by Justice White, the Court said that a confidential source could sue a newspaper and reporters under a promissory estoppel theory for using that confidential source's name contrary to a promise made by reporters. The Court in *Cowles* did not, for example, seek even to balance First Amendment rights against promissory estoppel. Instead, the Court explained that what was at issue was simply a neutral law—promissory estoppel—and that therefore the First Amendment just did not apply.

Justice Souter was eloquent in his dissent in *Cowles*, talking about the importance of applying First Amendment principles in much the same way Justice O'Connor did in her concurrence in *Smith*. And as he and others have noted, one of the problems with *Cowles*, at least in theory, is that it threatens decisions like *Hustler Magazine v. Falwell*[15] or even *New York Times Co. v. Sullivan*.[16] After all, libel laws and laws against intentional infliction of emotional distress are neutral laws that are not aimed particularly at the press. One could argue that there should not be a special First Amendment protection for the press in those areas, based on neutral law of general applicability analysis. Fortunately, the majority does not appear prepared to go that far.

The direction this analysis really could take is illustrated most dramatically by *Barnes v. Glen Theatre, Inc.*,[17] the case in which the Supreme Court ruled five to four that an Indiana law banning public nudity can be properly applied to ban nude dancing. All of the justices except Justice Scalia analyzed that statute under the *O'Brien* test, which essentially suggests that a neutral law of general applicability—one that is not specifically aimed at, but actually has an effect on, expression—has to pass an intermediate but nonetheless rigorous First Amendment test, rather than undergo strict scrutiny.[18]

Justice Scalia had a markedly different view: "Since the Indiana regulation is a general law not specifically targeted at expressive conduct,

14. 111 S. Ct. 2513 (1991).
15. 485 U.S. 46 (1988).
16. 376 U.S. 255 (1964).
17. 111 S. Ct. 2456 (1991).
18. *See* United States v. O'Brien, 391 U.S. 367 (1968).

its application to such conduct does not in my view implicate the First Amendment."[19] According to Justice Scalia, only if conduct is prohibited *because* of its communicative attributes does the First Amendment come into play. If this is not the case, then even with respect to a law that burdens free expression, judges should apply the judicial prior restraint and not even get to First Amendment analysis. In other words, Justice Scalia wants to do what the conservative majority has done in civil rights areas—to import an intent test, in a sense, to the First Amendment. Unless a legislature or city council intends to affect free speech rights, according to Justice Scalia's theory, the First Amendment does not apply at all. This is an extremely dangerous view that ignores the special status of religion, speech, and the press under the First Amendment, as Justice Jackson said so many years ago.[20]

There is a second area in which we are seeing attempts, not always successful, to apply judicial prior restraint to First Amendment analysis: permitting government self-definition of the "public forum." Without offering a comprehensive view of what public forum law was even before the Supreme Court modified it further in the last couple of years, the Court suggested that there were so-called "traditional" public fora like sidewalks and parks, and so-called "designated" public fora, in which restrictions on speech could only survive if they could meet strict scrutiny. With respect to everything else that was public property, a restriction on speech would be legitimate unless it was an unreasonable restriction or unless it was one that was viewpoint-based.

In the last few years, however, the Supreme Court has increasingly placed everything in the third category, effectively letting the government self-define even what were thought to be traditional public fora. The best example of this is *United States v. Kokinda*,[21] in which Justice O'Connor wrote the plurality opinion. *Kokinda* concerned a post office regulation prohibiting solicitation on a public sidewalk between the post office and the parking lot. The plurality said that even though it is a sidewalk, which is after all one of the very fora to which the Court in *Hague v.*

19. 111 S. Ct. at 2465 (Scalia, J., concurring).

20. In fact, Justice Scalia attempted to apply this type of analysis to free speech issues again last term in his opinion for the majority in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). Relying in part on his concurring opinion in *Barnes*, Justice Scalia wrote in dicta that when "the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2545-46.

21. 497 U.S. 720 (1990).

CIO[22] was referring in defining public fora, they would not consider it either a "traditional" or a "designated" public forum.

The sidewalk was not a traditional public forum, according to the plurality, because it was built for nonspeech purposes and because it is in a specific location between the post office and the parking lot. As the dissent pointed out, however, most parks are built for recreational rather than First Amendment purposes, but nonetheless are considered traditional public fora. Similarly, the sidewalk in front of the Supreme Court is not built for expressive purposes and was built in a specific location to get people to and from the Supreme Court building, but the Court itself in *United States v. Grace*[23] said that the sidewalk was protected as a "traditional" public forum under the First Amendment. The plurality opinion in *Kokinda* contradicts this analysis.

Perhaps even more troubling was the plurality's rationale on the "designated" forum issue. The sidewalk was not a "designated" public forum, according to the plurality, because even though the post office allowed other First Amendment activities such as leafletting and picketing, it did not allow soliciting. Therefore, as far as soliciting was concerned, the sidewalk was not a "designated" public forum. According to that rationale, anything the government so desires can be defined out of and removed from being a public forum, relegating speech restrictions to the lowest level of public scrutiny.

A similar view was upheld by the majority in the *International Society for Krishna Consciousness, Inc. v. Lee* (*ISKCON*),[24] having to do with municipal airports. What is interesting and somewhat hopeful for the First Amendment in *ISKCON* is that even though Justice O'Connor, for example, added airports to the category of the nonpublic forum, she was willing to add some teeth to the First Amendment test in this area. According to Justice O'Connor, even though a public airport is not a public forum, the rule against leafletting and other kinds of speech could not be considered reasonable and therefore was unconstitutional.

But again, we need only look to Justice Scalia to see the troubling direction in which this analysis could be heading. This is illustrated by another case from this past term, *Burson v. Freeman*.[25] *Burson* concerned the constitutionality of laws that ban political campaign activity within a certain radius of a polling place on election day. Eight members of the Court agreed that this restriction had to be evaluated by using

22. 307 U.S. 496 (1939).
23. 461 U.S. 171 (1983).
24. 112 S. Ct. 2701 (1992).
25. 112 S. Ct. 1846 (1992).

strict scrutiny, because it was clearly a content-based restriction on a traditional public forum—sidewalks outside of a polling place. According to Justice Scalia, however, even if the sidewalk was not built for the specific purpose of taking people to and from the polling place, because there had been so many states that for so long had restricted speech in those areas, they had effectively taken that part of the sidewalk out of the public forum, at least on election day. In other words, Justice Scalia would effectively permit total self-definition of a public forum. All the state must do is have enough attempted regulation for a long enough time, and according to Justice Scalia there is literally nothing left of even the most traditional public forum for First Amendment purposes. The result is to put a prior restraint on First Amendment analysis—not to exclude it totally in this instance, but to relegate it to the lowest level of First Amendment scrutiny.

A final example of this type of First Amendment analysis has to do with redefining out of existence government First Amendment burdens on benefits, as illustrated by the Court's decision in *Rust v. Sullivan*.[26] While there is some controversy about just what the law was before *Rust*, in general the courts had ruled that while there was no right to a government job or other government benefit, it was improper to condition a government job or benefit on giving up First Amendment rights while on the job. For example, in *Abood v. Detroit Board of Education*,[27] while employees were certainly free to advocate pro-union or anti-union sentiments outside the job, that was not enough for the Supreme Court. It violated the First Amendment, according to the Supreme Court, to require public employees to join a union and essentially symbolically support the union on the job as a condition of having that job in the first place.

In *Rust*, however, the Court dramatically departed from that analysis. *Rust* concerned Title X family planning clinics. As a condition on receiving government money to help run those clinics, under a Reagan era regulation, the clinics were not allowed to counsel with respect to abortion, not allowed to refer people to abortion clinics, and indeed were required to say that they did not consider abortion appropriate and to do other kinds of very clearly anti-abortion directed counseling. The rule involved in *Rust* should have raised unconstitutional conditions and related concerns; indeed, as a viewpoint based-rule, it clearly should have been subjected to strict scrutiny under the First Amendment.

26. 111 S. Ct. 2538 (1991).
27. 431 U.S. 209 (1977).

Instead, in an opinion by Chief Justice Rehnquist, the majority imposed a prior restraint on First Amendment analysis. The First Amendment did not apply at all to the *Rust* restriction, according to the majority, because it was not an unconstitutional condition that was being applied—doctors could speak outside of the clinics, and all that was happening was that there was a narrow definition of the Title X program. The program at issue was defined, according to Chief Justice Rehnquist, as pre-conception family planning and other kinds of activities that do not relate to abortion, and therefore all the government was doing was refusing to subsidize pro-abortion activities while subsidizing other types.

The dissent in *Rust* made clear the real problems with that analysis. Indeed, in the Title X program itself it was perfectly legitimate to refer pregnant women to medical services that would lead away from abortion. Doctors could refer women to pre-natal services, or to gynecological services, but could not refer them to abortion-related services, indicating the improper viewpoint-based nature of the *Rust* rule. Even the majority saw that its analysis might be going a little bit too far in all cases; the majority noted, for example, that in the context of universities, its new version of the unconstitutional conditions doctrine would be somewhat problematic. But again, the majority attempted to place a prior restraint on First Amendment analysis.

After *Rust*, under the Bush Justice Department, there were serious and troubling attempts to extend the *Rust* doctrine further. In *Board of Trustees of the Leland Stanford Junior University v. Sullivan*,[28] and in *Finley v. NEA*,[29] the government sought to extend that analysis to apply to funding of scientific research and to funding of the arts. Fortunately, the lower courts in both of those cases rejected the extension of the *Rust* analysis. It is difficult to predict the future of *Rust*, and many believe that it may be confined to the specific context of abortion counseling. In any case, *Rust* provides yet another example of judicial prior restraint on the First Amendment.

The future of this type of analysis is somewhat unclear. In part, it will depend upon the composition of the Supreme Court. In part, it will also depend on the other Justices' reactions to the dialogue and the counterpoint that is developing between Justice Scalia, who is clearly a champion of prior restraints on First Amendment analysis, and Justices Souter and O'Connor, who on several occasions have disagreed with such analysis.

28. 773 F. Supp. 472 (D.D.C. 1991).

29. 795 F. Supp. 1457 (C.D. Cal. 1992), appeal pending.

In any event, this subject is an important one to keep in focus because of the dangers presented by "prior restraint" analysis. First, such analysis has several times amounted to a kind of sneak attack on the First Amendment. Placing entire controversies outside the realm of the First Amendment makes it easier in some ways for judges to handle what can be difficult First Amendment issues. In a case like *Employment Division v. Smith*, moreover, the issue was never even raised by any of the parties in the case, it was totally unnecessary to the outcome (as Justice O'Connor observed), it occurred in a case that seemed unsympathetic to some First Amendment advocates on its facts (since it dealt with drugs) and, until the Court rendered its opinion, it had not looked like a case that threatened to redefine the First Amendment. That suggests a real need for advocates to keep a careful eye on cases that come to the Supreme Court because they may lead in dangerous directions that are not initially apparent.

Furthermore, attempted judicial prior restraint on First Amendment analysis is particularly dangerous because of the fact that it can narrow so dramatically the scope of the First Amendment. This is true even with respect to content- and viewpoint-based restrictions, such as in *Rust* and *Barnes*. It may leave us with what is a vigorous First Amendment, in a sense, but a vigorous First Amendment within a sphere that can become so narrow as to eviscerate the kinds of protection that the First Amendment was designed to provide.