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PRAGMATISM VS. IDEOLOGY IN FREE SPEECH CASES

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I. THE INEVITABLE IDEOLOGICAL JUDGMENT

Pragmatism sounds appealing. Life is full of hard questions, questions that defy categorical answers. Theory and abstract principle cannot resolve these questions, the argument goes; instead, judges should pay "careful attention to facts and context,"[1] focus on "practical concerns,"[2] use "pragmatic" decisionmaking rather than "grand principles,"[3] and adopt "balancing" or "flexible standards" such as intermediate scrutiny.[4] Or, as Justice O'Connor said in her concurrence in *Rosenberger v. Rector*:

> This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities. . . . When two bedrock principles so conflict, understandably neither can provide the definitive answer. Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case.[5]

But when the judges sift through the details, what should they look for? When they balance, what weight should they give to each government interest and each claim of individual right? How can one, for example, pragmatically evaluate the propriety of a restriction on pornography without a principle that tells one how constitutionally valuable pornography is?

Likewise, when judges pay attention to facts and context, what legal significance should they ascribe to these facts and contextual elements? What should they do, for instance, with the fact that a speaker espouses Communist or Socialist ideology rather than Democratic or Republican ide-

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[1] Suzanna Sherry, *Hard Cases Make Good Judges*, 99 NW. U. L. REV. 3 (2004).

[2] *Id.* at 14–16.

[3] *Id.* at 4.

[4] *Id.* at 38–39.

[5] 515 U.S. 819, 847 (1995).

ology, burns an American flag rather than expressing some other viewpoint in some other way, or expresses himself using profanities?

These questions, it seems to me, reveal the weakness of the turn from principle to pragmatism. To resolve First Amendment questions, one cannot avoid making ideological judgments.

Judges can make such judgments explicitly. They can expressly delineate the scope of two rival principles, for instance by concluding that the Establishment Clause ban on state funding of religious activities only applies to preferential funding of religious activities, and not to evenhanded funding of a wide range of secular and religious speech. Judges can also explicitly decide which principle trumps, for instance by concluding that for some particular reason the Establishment Clause prevails over the Free Speech Clause in a particular set of situations. Or judges can make the judgment implicitly or even subconsciously: They can think about all the factors, come to a conclusion, and then simply say that they have balanced all the factors and reached a certain result.

I prefer the explicit judgment, because it exposes, both to the judge and to the judge's audience, the reasoning and the premises on which it rests, and makes it possible for people to better evaluate and critique the decision. Explicit judgments also tend to provide better guidance to lower courts and to legislatures.[6] And explicit judgments that set forth relatively clear rules are especially helpful in guiding decisionmakers, and in diminishing the risk of subtle viewpoint discrimination when the rule is applied.

Explicit attention to theory may thus be eminently practical. Justice Harlan is generally seen as one of the pragmatist, less theoretical Justices,[7] but he is also the author of *Cohen v. California*, which elaborated a powerful pragmatic argument in favor of a rigid rule protecting profanity in public displays.[8] Likewise, Justice Stewart adopted a quintessentially consider-all-the-relevant-factors approach to defining obscenity—"I know it when I see it"[9]—but ten years later voted for a clear rule of protection for obscenity.[10] Presumably he remained a pragmatist, yet believed that the pragmatically sound solution was a rigid rule.

But in any event, whether one makes one's judgments of principle explicitly or implicitly, the ultimate decision can only be made by accepting

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[6] Professor Sherry suggests that "pragmatic" decisions, such as what she sees under the *Central Hudson* balancing test in commercial speech cases, "yield sufficient guidance to legislatures on all but the most difficult questions"; but I am not at all sure that this is so. *See* Sherry, *supra* note 1, at 30. Certainly some commentators see the *Central Hudson* regime as highly unpredictable, *see, e.g.*, Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 42 (2000), and I believe they are correct.

[7] *See, e.g.*, J. Richard Broughton, *Unforgettable, Too: The (Juris)prudential Legacy of the Second Justice Harlan*, 10 SETON HALL CONST. L.J. 57 (1999).

[8] 403 U.S. 15, 23–26 (1971).

[9] Jacobellis v. Ohio, 378 U.S 184, 197 (1964).

[10] Miller v. California, 413 U.S. 15, 47–48 (1973).

one contested principle or another, not just by relying on "concrete, atheoretical concerns." The principle need not be a "grand principle[]," a "sweeping statement[] of principle," "painting with a broad brush," or "mechanical recourse to ideology, theory, or first principles" ("mechanical" being generally what the other person does, while what we do is "sensitive" or at worst "bright-line"). It might be a principle that applies only to a certain kind of speech restriction, or that admits of exceptions. Even the relatively bright-line rules of First Amendment laws—such as the protection for advocacy of illegal conduct except when it is incitement, or the rules in libel cases—are hardly "mechanical" or utterly lacking in nuance. But we always need to focus on what rule judges should apply, which is an issue that will generally require theoretical analysis rather than simply asking judges to be "pragmatic" or to "sift[] through the details."

II. BUT IS PRAGMATISM HAPPENING?

If the Court's recent First Amendment jurisprudence is indeed "quintessentially pragmatist," in the words of Professor Suzanna Sherry's provocative article, that would undermine my argument. First, it would suggest that it is indeed possible to have true pragmatism, in the sense of "pragmatic considerations rather than grand principles often determin[ing] the outcome, producing some unpredictability but an overall just regime"[11]—an approach that is "concrete," "atheoretical," involving "practicalities not principles," "oppos[ed] to formalism" and to "rigid rules" and "grand theories."[12]

Second, it would suggest that such pragmatism is good, since it yields "an overall just regime." And third, it would suggest that the Justices at least think pragmatism is good, which might make one wonder how much attention to pay to a professor who thinks otherwise.

It seems to me, though, that the Court's recent First Amendment caselaw is hard to describe as notably based on pragmatism rather than principles. The Justices tend to decide cases by applying, creating, or refining basic First Amendment principles—just as the brief discussion in Part I suggested that they must.

"Pragmatism," unfortunately, is not a clearly defined term. Any judgment about whether a set of decisions is "quintessentially pragmatic" rather than focused on "grand principle" (or not-so-grand principle) is therefore necessarily impressionistic. Nonetheless, I think the evidence below supports my impression that principles must lie at the root of the Court's decisions.

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[11] Sherry, *supra* note 1, at 4.

[12] The last three quotes come from Professor Sherry's oral remarks at the Northwestern Faculty Conference on the Rehnquist Court (April 23–24, 2004).

A. The Debates About Principles

To begin with, the Court's 1994–2004 free speech cases are full of explicit debates about First Amendment principles. Since 1994, the Court has decided three cases about whether discrimination against religious speech is permissible under the Free Speech Clause (or even mandated by the Establishment Clause). The decisions required basic theoretical judgments about the degree of protection to be offered to religious speech. And they yielded a fairly clear rule, which is that religious speech is generally just as protected as other kinds of speech, even when it uses government property.[13]

Likewise, the Court has decided five campaign finance cases, filled with debates about basic First Amendment principles.[14] It has decided seven cases involving the proper scope of the government's power to discriminate based on the content of speech in funding and contracting, and in the process, considered some fundamental questions of First Amendment theory.[15] It has decided *Boy Scouts v. Dale*,[16] which involved the question whether groups sometimes have a First Amendment right to exclude people based on sexual orientation (certainly a decision that involved a "cultural schism," whether or not it "reinforced" the schism[17]). I could give more examples, but I hope these illustrate the point sufficiently.

In the process, the Court has often been establishing, reaffirming, or debating principles. It hasn't just been "working out the mundane, detailed, on-the-ground implications of" "long since established first (and second and third) principles"—something that Professor Sherry points to as helping make the Court "quintessentially pragmatist." As I mentioned, "pragmatism" is a vague enough concept that it is hard to tell for certain whether any particular case is about "pragmatism" as opposed to "principle." Still, it seems to me that under any but the broadest (and least useful) definitions of pragmatism, the majority of these cases are indeed decisions about matters of "principle."[18]

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[13] Good News Club v. Milford Sch. Dist., 533 U.S. 98 (2001); Rosenberger v. Rector, 515 U.S. 819 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995). The rule is not categorical, but it is a strong presumption, *see Capitol Square*, 515 U.S. at 775–76 (O'Connor, J., concurring in part and concurring in the judgment) (suggesting that religious speech may sometimes properly be subjected to certain fairly minor burdens to prevent a mistaken appearance of endorsement), and all three of the cases have indeed applied it to uphold protection for religious speech.

[14] McConnell v. FEC, 540 U.S. 93 (2003); FEC v. Beaumont, 539 U.S. 146 (2003); Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

[15] *Good News Club*, 533 U.S. 98; Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Bd. of County Comm'rs v. Umbehr, 518 U.S. 668 (1996); O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996); Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); Rosenberger v. Rector, 515 U.S. 819 (1995).

[16] 530 U.S. 640 (2000).

[17] *See* Sherry, *supra* note 1, at 4.

[18] *Id.* at 2, 3. If one defines "pragmatic" as "partly paying attention to consequences rather than just trying to deduce from abstract moral axioms," then the decisions are indeed pragmatic—but that would

And the same is true even of many of the cases that Professor Sherry focuses on: commercial speech cases, non-campaign-reform election cases, and pornography cases. The opinions in *44 Liquormart v. Rhode Island*, for instance, divided on a fundamental theoretical question: When may the government ban truthful commercial advertisements for fear that the advertisements will lead listeners to act in ways that the government thinks are harmful?[19] The opinions in *Florida Bar v. Went For It* also divided in part on matters of basic principle: Whether commercial speech may be restricted on the grounds that it will be seen as intrusive and therefore offensive,[20] and whether the government may "seek[] to protect[] lawyers' reputations by preventing them from engaging in speech some deem offensive."[21] The government's power to enact paternalistic regulations and to shield people from offense has long been a basic theoretical issue in First Amendment law. These cases confront this issue in the context of commercial advertising.

Likewise, *McIntyre v. Ohio Elections Commission* involved a debate about whether anonymous speech should be protected—an important question of First Amendment theory.[22] To be sure, the debate was in consider-

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also be true of the Court's First Amendment jurisprudence throughout the past century. The Justices have long seen the First Amendment largely (though not entirely) in instrumental terms, and as a result have always stressed the consequences both of tolerating speech and of suppressing it. *See, e.g.*, Whitney v. California, 274 U.S. 357, 374–75 (1927) (Brandeis, J., concurring); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268–83 (1964).

[19] Professor Sherry suggests that this theoretical question has now been more or less permanently set aside:

> By 1999, the Court had apparently given up on finding a theoretical rationale for its commercial speech doctrine. In *Greater New Orleans Broadcasting Association, Inc. v. United States*, the Court unanimously struck down a federal statute prohibiting private-casino gambling advertising even in states that permitted private-casino gambling. Justice Stevens made up for his lack of support in *44 Liquormart* by writing for himself and seven other Justices. He acknowledged that there was both judicial and scholarly criticism of *Central Hudson*, but found that "there is no need to break new ground," because *Central Hudson* clearly invalidated the statute. Theory be damned. Only Justice Thomas adhered to his earlier insistence that *Central Hudson* should not be used even when it produced the correct result.

Sherry, *supra* note 1, at 9.

I do not see why *Greater New Orleans Broadcasting* should be read this way. The Justices saw *Greater New Orleans Broadcasting* as an easy case under *Central Hudson* and apparently decided not to spend more time or energy on the matter than necessary. Some Justices (such as Justice Thomas) may be inclined to write brief concurrences explaining their differences in many cases where they would adopt a broader rule than the majority. But other Justices may find this unnecessary, especially given that they had already expressed their views recently; the decision whether to invest effort in writing separately may be a question of personal style or even mood. So most Justices' decision not to repeat an unresolved debate that was unnecessary to decide an easy case hardly means that "theory be damned" more broadly, or that the Court has "given up" on the theoretical question. In a later case, the *44 Liquormart* fight might easily be taken up again.

[20] 515 U.S. 618 (1995).

[21] *Id.* at 639.

[22] Professor Sherry reasons that *McIntyre* confirms her intuition that "context and fine distinctions matter more than high principles" because "Justice Scalia's dissent notes that the case does not involve a

able measure consequentialist, but much First Amendment theory is consequentialist.[23] Similarly, in *Republican Party v. White*—which revolved around whether the First Amendment democratic self-government principles applied to judicial elections as well as other elections—both the premises and the outcomes of the majority and the dissents rested on fundamental differences of principle.[24] Nor do *McIntyre* and *White* involve what Professor Sherry calls "relatively unguided balancing," which is what she characterizes them (and two other election cases) as doing. Both cases apply strict scrutiny,[25] which at least provides something of a guide for analysis—in fact, a guide that almost always leads to invalidation of the statute.

Similarly, as Professor Sherry herself acknowledges, the pornography cases also rested in large measure on differences in principle. Consider, for instance, *Ashcroft v. Free Speech Coalition*.[26] The government's strongest argument was that virtual child pornography, while not literally within the boundaries of the *New York v. Ferber* child pornography exception, had to be restricted because otherwise the government could not effectively punish actual child pornography: Defendants could often credibly say "I thought

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'bedrock principle,' but is rather 'at the periphery of the First Amendment.'" Sherry, *supra* note 1, at 17. Yet this was the view of only two Justices; the six-Justice majority opinion reasoned that anonymous speech has "played an important role in the progress of mankind"; that "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry" (which suggests that the interest in protecting anonymous works is pretty weighty); that "[n]o form of speech is entitled to greater constitutional protection than Mrs. McIntyre's"; and that "[u]nder our Constitution, anonymous pamphleteering is . . . an honorable tradition of advocacy and of dissent" because "[a]nonymity is a shield from the tyranny of the majority." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42, 347, 357 (1995).

[23] Some philosophers and academics may feel that principles can be derived from theoretical axioms, but I know of few judges who have taken the same view. Most of them, even ones who have been seen as highly ideological—for instance, Justices Black, Douglas, Brennan, Scalia, and Thomas—have often defended their principles as being driven by pragmatic concerns about the dangers of certain sorts of government power, the value of free speech, the harms that some speech can pose, and so on. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268–83 (1964) (Brennan, J.); Barenblatt v. United States, 360 U.S. 109, 145–53 (1959) (Black, J., dissenting).

Broad protection of free speech itself, for instance, has long been defended as good pragmatic policy, flowing from a deep understanding of facts, context, and practical reality. Just as a pragmatist may adopt a bright-line rule for pragmatic reasons, so a defender of bright-line rules may be a pragmatist at heart.

[24] Professor Sherry reasons that "[a] judge's theoretical views on the value of free speech might determine his position on flag-burning—much as theoretical disagreements seem to drive the results in the federalism and religion cases—but they will not be of much use on the sorts of questions raised by these election cases," Sherry, *supra* note 1, at 18; but I don't see why this is so. The right to anonymous speech, the right to speech by judges in campaigns, and a party's right to limit who gets to choose its candidate all involve theoretical questions about the value of free speech, the role of speech in various aspects of self-government (such as judicial elections), and the value of the autonomy of expressive associations.

[25] *McIntyre*, 514 U.S. at 347–48; Republican Party v. White, 536 U.S. 765, 774–75 (2002).

[26] 535 U.S. 234 (2002).

these weren't real children, but amazing imitations!" To stop the speech that is within an exception (here the child pornography exception), the government said, we must also punish some speech that is outside the exception.[27]

The majority responded with a statement of First Amendment principle: "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter."[28] We must protect the speech outside the exception, the Court thus held, even if that means not punishing some of the speech within the exception. The dissent instead adopted the government's proposed principle: "Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography, and we should defer to its findings that rapidly advancing technology soon will make it all but impossible to do so."[29]

Only Justice Thomas's solo concurrence focused much on factual details: He took the view that virtual child pornography might be banned if the government could show that allowing it really would interfere with the fight against actual child pornography, but he thought that the government had not made such a factual showing.[30] The other eight Justices saw the case as a matter of First Amendment principle—and even Justice Thomas may have seen it the same way, though his principle might turn on a factual inquiry that the other Justices saw as less necessary.

The same is true even of those cases that seem to rest on supposedly empirical decisions, such as whether a law is "narrowly tailored" to an interest or "directly advances" the interest, rather than on the normative judgments such as whether the law serves an important or compelling enough government interest.[31] Many of the key questions even in narrow tailoring—for instance, whether important government interests may be served using paternalistic means[32]—are clearly normative. Other judgments, such as how effective any less restrictive alternative has to be in order to lead the law to be invalidated,[33] how much over- or

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[27] *See* Petitioner's Brief at 23–24, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (No. 00-795); *Free Speech Coalition*, 535 U.S. at 254.

[28] *Free Speech Coalition*, 535 U.S. at 255.

[29] *Id.* at 267 (Rehnquist, C.J., dissenting).

[30] *Id.* at 259 (Thomas, J., concurring in the judgment).

[31] Rubin v. Coors Brewing Co., 514 U.S. 476 (1995); United States v. Edge Broad. Co., 509 U.S. 418 (1993).

[32] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

[33] Consider, for instance, the conclusion on which seven of the *44 Liquormart* Justices agreed—that the price advertising ban failed the "reasonable fit" requirement, because there were many "less burdensome alternatives [that] reach the stated goal." *Id.* at 507–08 (plurality); *id.* at 529 (O'Connor, J., concurring in the judgment); *cf. id.* at 518 (Scalia, J., concurring in the judgment) (agreeing that the advertising ban was unconstitutional, but not going into details about why this is so). This judgment rested on an important and far-from-obvious principle: that a commercial speech restriction is unconsti-

underinclusiveness is too much,[34] and so on, also often end up being normative. And even the purely empirical predictions may be based on an ideological perspective, for instance when one is judging how harmful pornography tends to be, how corrupting quid pro quo contributions tend to be, and so on.

B. The Unusual Lineups

What about the Court's unusual lineups in First Amendment cases? Free speech cases often do not follow the 5-4 conservative-liberal divides that we see in federalism cases, Establishment Clause cases, and other areas of modern constitutional law. Might this be evidence, as Professor Sherry suggests, that the Justices are being more pragmatic than theoretical?[35]

It seems to me that these unusual lineups may mostly be evidence not of pragmatism but simply of unusual ideologies. The Justices' First Amendment ideologies just do not obviously match their ideologies on other matters. Likewise, their ideologies on particular subsets of free speech law (for instance, government benefits, pornography, and campaign finance) may be somewhat different than their ideologies on other subsets.

That "[s]ome of the coalitions of Justices are nothing short of bizarre if one begins with the conventional wisdom on judicial politics and allegiances"[36] may mean it is time to revise the conventional wisdom. There should be little surprising, for instance, in Chief Justice Rehnquist's split

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tutional when there are alternatives that are less speech-restrictive (such as mandated price minimums, higher sales taxes, and limits on per capita purchases), but more burdensome in other ways.

Yet each of these alternatives had important harmful side effects: Limiting per capita purchases using a prescription drug model would be a substantial restraint on people's liberty and on their privacy, since then there would have to be records of how much people were buying. Raising prices, through minimums or taxes, would impose costs even on those people who have found the lowest prices on their own. How much these harmful side effects should count in deciding whether the speech restriction was a "reasonable fit" is a difficult theoretical question. Applying intermediate or strict scrutiny often involves such questions.

[34] *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 131 (1989) (Scalia, J., concurring in the judgment).

Likewise, consider another unanimous commercial speech decision, *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999), which struck down a ban on broadcasts of casino gambling ads. In the course of deciding whether the law "directly and materially advance[d] the asserted governmental interest," the Court pointed to various exceptions that undermined the law's effectiveness, such as the exception for casinos run by Indian tribes. *Id.* at 187–88. And yet whether such underinclusiveness should condemn a law is an important theoretical question: One could, for instance, argue that Congress should be entitled to serve several interests at once—trying to reduce gambling while at the same time protecting the sovereignty and economic well-being of Indian tribes that would remain poor without casino revenue.

The Court may well have been right to reject the argument. But the rejection of this argument had to rest on a judgment about this theoretical question—a judgment on a matter of principle. And the Court's answer to the question thus also created a principle for future cases.

[35] *See* Sherry, *supra* note 1, at 8, 18.

[36] *Id.* at 22.

from the conservatives in *Thompson v. Western States Medical Center*,[37] a commercial advertising case; in Justice Thomas's split from the conservatives in *United States v. Playboy Entertainment Group*,[38] *Ashcroft v. Free Speech Coalition*,[39] and *Ashcroft v. ACLU (II)*;[40] Justice Breyer's split from the liberals in *Playboy*, *Florida Bar v. Went For It, Inc.*,[41] and *Ashcroft v. ACLU (II)*; or Justice Kennedy's flanking Justice O'Connor on the "left" in *Went For It*.[42]

Justice Kennedy has a broadly speech-libertarian ideology;[43] it is not quite accurate to say, for instance, that he is "perfectly content to apply highly manipulable intermediate scrutiny to the regulation of commercial speech,"[44] especially given that he joined Justice Stevens's more rigorously speech-protective opinion in *44 Liquormart*. Justice Thomas on balance has a fairly speech-libertarian ideology as well.[45]

Chief Justice Rehnquist, on the other hand, has a broadly pro-government ideology in free speech cases, especially as to commercial advertising.[46] Justice Breyer may be a pragmatist, but his free speech ideology is also broadly pro-government. As my study of the Justices' votes in free speech cases shows, in the aggregate Justice Breyer and Chief Justice

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[37] 535 U.S. 357 (2002). *See* Sherry, *supra* note 1, at 9 ("But [the dissenters in *Thompson* were] not the four whom the reader might have guessed after learning that O'Connor and Thomas were in the majority: Justice Breyer's dissenting opinion was joined by *Chief Justice Rehnquist*, Justice Stevens, and Justice Ginsburg (Justice Souter, usually in agreement with the three other liberals, joined the majority in invalidating the statute). Again, this odd line-up suggests that theory and first principles do not drive the results.").

[38] 529 U.S. 803 (2000).

[39] 535 U.S. 234 (2002).

[40] 124 S. Ct. 2783 (2004).

[41] 515 U.S. 618 (1995).

[42] I likewise do not share the surprise captured in the assertion that:

> This configuration of Justices [in *44 Liquormart*] is astonishing in many ways. Justices Thomas and Stevens appear to have switched places, with Thomas backing away from the simple *Central Hudson* test he applied in *Coors*, and Stevens willing to use *both* the approach he used in his concurrence in *Coors and* the *Central Hudson* test—indeed, it is difficult to understand why Justice Thomas did not join that part of Justice Stevens' opinion rejecting the *Central Hudson* test.

Sherry, *supra* note 1, at 8 (italics in original).

First, Justices Thomas and Stevens may have switched places, but the places they switched are right next to each other: They both have strongly protective views of commercial speech. Second, when a Justice is writing for the majority, as Thomas did in *Coors*—or a plurality, perhaps with an eye towards trying to get a majority, as Stevens did in *44 Liquormart*—he will often be more moderate than when he writes alone, because he needs to satisfy the other Justices who are joining his opinion. And Justice Thomas likely didn't join Justice Stevens's rejection of *Central Hudson* because it was not speech-protective enough for his liking. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 523–26 (1996) (Thomas, J., concurring in part and concurring in the judgment).

[43] *See* Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*, 48 UCLA L. REV. 1191 (2001), *available in updated form at* http://www1.law.ucla.edu/~volokh/howvoted.htm.

[44] Sherry, *supra* note 1, at 27.

[45] *See* Volokh, *supra* note 43.

[46] *Id.*

Rehnquist are the Justices who are the *least* likely to vote to uphold a free speech claim.[47]

Justice O'Connor may also be a pragmatist, but her votes in professional advertising cases have been very consistent, as close to a "rigid rule" against constitutional protection as you can get.[48] The reasons for her judgment about the need to regulate professional advertising might be pragmatic: She might believe, for instance, that such advertising is especially likely to cause confusion, conflicts of interest, or undue influence by the professional on the client.[49] But that does not keep her reasons from being ideological, or matters of "principle." People often adopt ideological principles based on their pragmatic understandings of how the world works.

The same is largely true of the pornography cases. Professor Sherry writes that "our first clue that pornography jurisprudence is not about core principles is the peculiar and shifting alliances of the Justices and the frequent failure to agree on a rationale." But Justices Stevens, Ginsburg, Souter, and Kennedy almost always support protecting pornography.[50] Chief Justice Rehnquist and Justice Scalia and, to a slightly lesser extent Justice O'Connor, are quite consistently against broadly protecting pornography.

Professor Sherry acknowledges that Chief Justice Rehnquist and Justice Scalia have adhered to consistent positions, but characterizes this consistency pejoratively, as flowing from a "visceral reaction to indecent speech," involving a "refus[al] to engage in any but the most superficial

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[47] *Id.*

[48] *See, e.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (Justice O'Connor joining a majority opinion); Ibanez v. Fla. Dep't of Bus. & Prof'l. Regulation, 512 U.S. 136 (1994) (O'Connor, J., concurring in part and dissenting part); Edenfield v. Fane, 507 U.S. 761, 778 (1993) (O'Connor, J., dissenting); Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 119 (1990) (O'Connor, J., dissenting); Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 480 (1988) (O'Connor, J., dissenting); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 673 (1985) (O'Connor, J., concurring in part and dissenting in part). The only cases in which Justice O'Connor voted to hold unconstitutional a restriction on professional advertising were the three cases in which the Court was unanimous in striking down the restriction: *In re R.M.J.*, 455 U.S. 191 (1982), the part of *Ibanez* in which she concurred, and a small part of *Zauderer*.

[49] *See, e.g.*, *Zauderer*, 471 U.S. at 674–75.

[50] With some exceptions, such as Justices Stevens and Souter in *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), and Justice Kennedy in the erogenous zoning and nude dancing cases. Justice Kennedy's opinions in *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (*Ashcroft v. ACLU (I)*), and *United States v. American Library Association*, 539 U.S. 194 (2003), reached pro-government results, but suggested a pretty speech-protective approach for future cases. *See Ashcroft v. ACLU (I)*, 535 U.S. at 591–602 (Kennedy, J., concurring in the judgment) (stating that "[t]here is a very real likelihood that the Child Online Protection Act is overbroad and cannot survive such a challenge," but concluding that the Court should remand so that lower courts can more precisely determine the Act's scope); *Am. Library Ass'n*, 539 U.S. at 214–15 (Kennedy, J., concurring in the judgment) (upholding the statute against a facial challenge by reading it quite narrowly). Justice Kennedy later wrote the speech-protective majority opinion in *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004) (*Ashcroft v. ACLU (II)*).

analysis in evaluating government restrictions," and reflecting the Justices' "commitment to a pragmatist approach waver[ing] in the face of a prior emotionally or politically driven commitment."[51] And yet the Justices' votes could equally well flow from a reasoned, careful, and principled judgment—which they have enunciated in their opinions—that pornography is not very valuable and that the interests asserted by the government are quite strong.[52] What Professor Sherry may see as emotional, visceral, and superficial failure to use pragmatism properly (perhaps a failure born of "puritan distaste"[53]) may actually be a thoughtful adoption of a different principle.[54]

Justices Breyer and Thomas are in the middle on pornography cases, though even Justice Thomas often relies here on core principles (e.g., strict scrutiny of content-based restrictions on speech that fits outside the existing First Amendment exceptions, as in *Playboy*,[55] *Free Speech Coalition*,[56] and *Ashcroft v. ACLU (II)*,[57] or the freedom from speech compulsions in *Denver Area*[58]). Justice Thomas's principles may just be somewhat more complex than the traditional liberal or conservative views on pornography, which may lead to results that favor the government in some situations and the speaker in others.

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[51] *See* Sherry, *supra* note 1, at 18.

[52] *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 267 (2002) (Rehnquist, C.J., dissenting); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 831 (2000) (Scalia, J., dissenting); FW/PBS, Inc. v. Dallas, 493 U. S. 215, 256–61 (1990) (Scalia, J., concurring in part and dissenting in part).

[53] *See* Sherry, *supra* note 1, at 22 (suggesting that some citizens' support for obscenity laws is born of "overwhelming" "puritan distaste"); *id.* at 29 & n.113 (stating that Chief Justice Rehnquist's and Justice Scalia's votes in obscenity cases "seem . . . driven by extra-legal factors").

[54] Likewise, I am puzzled by Professor Sherry's argument that "the shifting coalitions of different Justices and the multiplicity of rationales and opinions—in stark contrast to the predictable five to four outcomes in the federalism cases, for example—suggest that individual Justices are honestly struggling with difficult issues rather than reaching predetermined conclusions." *Id.* at 6. Why do predictable outcomes show lack of honest struggle? What is dishonest about developing (perhaps after a considerable amount of intellectual struggle at the outset) a broad rule that quickly resolves otherwise difficult issues?

I doubt that we would condemn Justices Brennan and Marshall, for instance, for failure to "honestly struggl[e] with difficult issues" in their rejection of the death penalty, or Justices Black and Douglas for failure to "honestly struggl[e] with difficult issues" in their rejection of restrictions on Communist advocacy or on obscenity, even though their views were eminently "predictable." We would presumably say that they have considered the difficult issues and have reached a result that they understandably see no reason to deviate from. The same appears true of the "predictable" votes in federalism cases, or in modern pornography cases.

[55] 529 U.S. 803 (2000).

[56] 535 U.S. 234, 259 (2002) (Thomas, J., concurring in the judgment).

[57] 124 S. Ct. 2783 (2004).

[58] 518 U.S. 727 (1996).

C. *The Fact-Intensive Analyses*

Professor Sherry also points out that the Justices often go deeply into the facts of First Amendment cases, and suggests that this too implies a "pragmatic" approach rather than one based on grand principle.[59] But attention to the facts does not necessarily show an abandonment of ideological principles.

First, some reliance on factual claims may just be the application of principles. A principle may mandate that courts look closely at the facts: Justice Brennan's approach to content-neutral speech restrictions, for instance, was based on a principle of broad protection for speech, and the way this broad protection was operationalized was by requiring the government to show facts that prove a speech restriction was indeed necessary.[60]

Likewise, the *Central Hudson* test demands that the government provide facts or at least plausible factual inferences as evidence that the speech restriction will really materially serve important government interests.[61] This requirement of factual support, and of a judicial hard look at the government's factual assertions, is itself an important principle. The cases applying such fact-sensitive tests are thus applications of this principle, rather than rejections of principle.

Second, sometimes facts do make the case easier. If some statute seems unreasonable given some particular facts, the majority on the Court might think that its decision would be more persuasive—both to some fence-sitting Justices, and to the public—if the opinion stressed those facts and set aside the contentious ideological issues. This might explain the nine-to-zero *Coors* and *Greater New Orleans Broadcasting* decisions,[62] in which the Court's stress on the seeming inconsistency of the statutory scheme may have maximized the opinion's persuasiveness. But the ideological issues that the Court avoided in *Coors* and *Greater New Orleans Broadcasting*—such as whether paternalistic commercial speech regulations are permissible—may well resurface in future cases, just as they surfaced in *44 Liquormart*.[63] If not reaching the deep ideological disputes in every case is "pragmatism," it is only pragmatism in the tactical sense of avoiding big fights over small, easy cases. It does not reveal a broader rejection of theory as a tool for deciding the genuinely hard free speech cases.

Third, in some cases fine practical distinctions may indeed have affected the results. But this might just reflect a few pragmatist swing votes, or votes from Justices who are undecided on the theory, rather than a situation where "all of the Justices are strongly committed to a pragmatist ap-

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[59] Sherry, *supra* note 1, at 12.

[60] *See, e.g.*, Heffron v. ISKCON, 452 U.S. 640, 656–63 (1981) (Brennan, J., dissenting).

[61] 447 U.S. 557 (1980).

[62] *See* Sherry, *supra* note 1, at 13–14.

[63] *See id.* at 7–8.

proach."[64] For instance, the cases involving compelled funding for commercial advertising, *Glickman v. Wileman Brothers & Elliot, Inc.*[65] and *United States v. United Foods*,[66] were on their face distinguished on narrow, fact-intensive grounds.[67] But if these distinctions were persuasive at all, they were persuasive only to the two swing voters (Justices Stevens and Kennedy). And it is also possible that one or both of those Justices simply changed his mind from the first case to the second.

Likewise with *Florida Bar v. Went For It*, where the five-Justice majority seemed to focus a lot on facts in upholding a restriction on lawyer advertising. Three of the Justices in the dissent, Justices Kennedy, Stevens, and Ginsburg, are generally commercial speech maximalists.[68] Three of the Justices in the majority, Rehnquist, O'Connor, and Breyer, are generally commercial speech minimalists;[69] Justice O'Connor, in particular, has almost uniformly endorsed restrictions on lawyer advertising,[70] as has Chief Justice Rehnquist.[71] Justice Thomas was at the time apparently moving from a minimalist to a maximalist position.[72] Only Justices Scalia and Souter seem likely to have been especially influenced by the particular factual details.

D. The Use of Standards Rather than Rules

The use of standards rather than rules might be characterized by some as reflecting a preference for pragmatism rather than principle. Professor Sherry, for instance, describes "two variations on pragmatism": "relatively unguided balancing," and "flexible standards" such as those involved in the Court's commercial speech intermediate scrutiny test.[73]

Yet consider the constitutional rights doctrine in which the Court has most self-consciously adopted a general balancing test: the Fourth Amendment "special needs" cases, which generally ask whether a particular class of search is "reasonable" given all the circumstances. The debates in these

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64 *Id.* at 5.

65 521 U.S. 457 (1997).

66 533 U.S. 405 (2001).

67 533 U.S. 405, 411–13 (2001).

68 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

69 *Id.*

70 *See supra* note 48.

71 *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

72 *Compare* United States v. Edge Broad. Co., 509 U.S. 418 (1993), *and* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), *with 44 Liquormart*, 517 U.S. 484, *and* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999). *See also 44 Liquormart*, 517 U.S. at 525 n.7 (Thomas, J., concurring in part and dissenting in part) ("The outcome in *Edge* may well be in conflict with the principles . . . ratified by me today."); *id.* at 522, 524 n.6 (citing favorably the *Discovery Network* majority).

73 Sherry, *supra* note 1, at 30–31; *see also id.* at 29–30.

cases are very much about principles, even though they seem to involve "balancing." As I suggested above, how one balances individual rights against government interests, or how one decides what is a reasonable sacrifice of rights given the interest involved, heavily depends on the value one places on the right and the interest. And that is quintessentially a question of principle.

III. CONCLUSION

Curiously, in spite of all my disagreements with Professor Sherry, I agree with her on one bottom-line result: Generally, the Rehnquist Court has produced "an overall just regime" (albeit with "some unpredictability") in the area of free speech.

But I think it has produced such a regime largely by explicitly discussing and resolving important questions of principle: Should religious speech generally be treated the same as other speech? Should anonymous speech generally be fully protected? Should judicial campaigns be treated largely the same as political campaigns for free speech purposes? Should expressive associations have a fairly broad right to decide when to exclude members who will be called on to speak on the association's behalf? It seems to me that the Justices and commentators are right to address these (and many other) theoretical questions, rather than fleeing to a seemingly unideological pragmatism that only hides the theoretical debates.