The Meaning of Liberalism/Conservatism On The Mature Rehnquist Court: First Amendment Absolutism and A Muted Social Construction Process

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I. Introduction

In this paper I present evidence from Rehnquist Court First Amendment speech and religion cases from the 1990s to the present. I ask whether these cases of the mature Rehnquist Court of this era support the thesis that the Supreme Court continues to be constitutive in its decision-making and innovative in doctrine as it meets the demands of our more complex and diverse society.

I conclude with the argument that First Amendment speech and religion cases are different from mature Rehnquist Court in substantive due process cases on privacy, abortion choice, and homosexual rights, as well as cases under the Equal Protection Clause with regard to gender, race discrimination, and affirmative action. First Amendment speech and religion cases show a far less robust social construction process by the Supreme Court. This difference is not due to different external politics because the dominant regime in Washington is the same with regard to both doctrinal issues in a period of cultural conservatism. The difference is due to different "internal" Court norms and precedents-- First Amendment absolutist principles compared to less absolutist principles and past Court decision-making under the Due Process and Equal Protection Clauses.

Because of the historical primacy or hegemony of absolutism in First Amendment doctrine and theory, the mature Rehnquist Court engages in a muted social construction process when it decides cases. This results in less clear-cut conceptions of what constitute liberal and conservative positions in First Amendment cases than in equal protection cases and cases involving the right of privacy under the Due Process Clauses Moreover, there is far fewer opportunities for justices to debate the validity of implied fundamental rights in cases under the First Amendment than under the Equal Protection and Due Process Clauses of the 14th Amendment. The absolutism which results in a more muted social construction process in First Amendment cases also leads to Court minimalism with regard to the Internet cases. The Court fears to prescribe prematurely government regulations that would respect absolutist First Amendment principles, when such principles respecting a diverse range of speakers and listeners could be protected in the near future by technical innovations.

There is far less judicial minimalism and a more robust social construction process in substantive due process and equal protection cases. This is evident in *Romer v. Evans* (1996), and even more so in *Lawrence v. Texas* (2003) the case on homosexual rights which eviscerated *Bowers v. Hardwick* (1986). The greater differences among the justices in these cases are due to quite different theories of constitutional interpretation between non-originalists and originalists on the Court. These differences are far greater than those among liberal, moderate, and conservative non-originalists. Non-originalists and originalists are at odds over whether the Court should define implied fundamental rights under the Due Process and Equal Protection Clauses; most importantly, they are at odds over whether the social construction process is itself a valid undertaking by the Supreme Court. Under the First Amendment, there are fewer differences among originalist and non-originalist justices because, although there is a social construction process even in the First Amendment cases, the process is more restrained by the absolutism of First Amendment principles, especially in speech cases. The greater degree of difference among originalist and non-originalist justices in religion cases, and especially in

Establishment Clause religion cases, is due to the fact that historically among First Amendment cases a robust social construction process has developed, to which only non-originalist Justice's subscribe.

II. Expectations of the Rehnquist Court If Viewed As Engaging In Constitutive Decision-making

In *The Supreme Court and Constitutional Theory, 1953-1995,*[1] I argued that not until the 1991-1992 term was it possible to begin to decipher the direction that doctrine would take in the Rehnquist Court because it takes a few years for the justices' visions of polity and rights principles -- and their application to constitutional questions -- to coalesce. Prior to the landmark decisions handed down in the spring of 1992, it was not clear what direction the Rehnquist Court would take in the future in such crucial areas of constitutional law as the right of privacy and abortion choice, equal protection and race, and freedom of speech and religion. Would the Rehnquist Court have a clear vision of polity and rights principles to guide it? Would the Court reimpose an ideological lull on Court activity and make few decisions of lasting importance, as the Warren Court did in its first six years?

It was not until 1991-1992 term that we have what I will call the mature Rehnquist Court, a Court that consisted of a majority of members representing a new era in American Politics, a post-New Deal era in which a majority of justices were selected by conservative Republican Presidents who began to question many of the assumptions about whether we should have faith in government compared to economic and social markets as venues of political change. By 1991-92, eight of nine members of the Supreme Court consisted of justices appointed by conservative Republican presidents. Six members of the Court had been appointed by Presidents Reagan and Bush, who were dedicated to undermining the welfare state. These included Reagan appointees Sandra Day O'Connor (1981), William H. Rehnquist as Chief Justice (1986), Antonin Scalia (1986), and Anthony Kennedy (1988) and Bush appointees David Souter (1990) and Clarence Thomas (1991). President Nixon had appointed Harry Blackmun (1970) and first appointed William Rehnquist as an Associate Justice in 1972. President Ford had appointed John Paul Stevens (1975). In 1991-92 only Justice White (1962) had been selected by a Democratic President. With Justice Ginsburg's appointment by President Clinton in 1993 as a replacement for Justice White, the lineup, in number of appointees by Republican Presidents, did not change. Only with the appointment of Justice Breyer to replace Justice Blackmun in 1995 did the Rehnquist Court return to having seven of its nine members selected by Republican Presidents.

The landmark decisions of the 1991-92 Term of the Supreme Court included: *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992),[2] a case in which the Rehnquist Court reaffirmed the right of abortion choice for women; *Lee v. Weisman* (1992), in which the Rehnquist Court continued to employ the *Lemon* test in refusing to allow school prayer at a middle school graduation; *R.A.V v. City of St. Paul* (1992), in which the Court forbid content-based convictions for hate-related speech, but opened the door for additional penalties for hate motivated actions once a person was found guilty of illegal conduct; *United States v. Fordice* (1992), in which the Rehnquist Court applied equal protection principles in finding a continuing pattern of race discrimination in Mississippi's formerly segregated colleges and universities; and

Freeman v. Pitts (1992), in which federal courts were permitted to incrementally relinquish supervision and control of school districts that have found to have engaged in race discrimination, before full compliance has been secured from the school board to every part of the federal court order. In these cases, the mature Rehnquist Court did not turn its back on precedent or on the tests and principles that had been developed by the Supreme Court under Chief Justice Earl Warren (1953-1969) and Warren Burger (1969-1986).

Most importantly, over time, the Rehnquist Court, like the Warren and Burger Courts before it, developed its own approach to constitutional questions. Included in the Rehnquist Court approach were be new, more filigreed definitions of individual rights and more complex polity principles on which to decide cases. This was caused by the need to come to terms with questions of polity malfunction and justice in a society which has become far more diverse in its population, where terms such as majority and minority have far less clear-cut meanings.

Evidence from the landmark cases of the 1991-92 term of the Rehnquist Court support the view that it was "constitutive" not simply "instrumental" in its decision-making, as had been the Supreme Court under Chief Justice Warren and Burger. The basic tenets of the constitutive approach are the following: 1. The Supreme Court does not make its choices instrumentally--that is, it does not choose an outcome and then simply use polity and rights principles to support that outcome; 2. The Supreme Court does not decide cases in ways that are similar to those used by legislative or bureaucratic policy-makers; instead, there is a "constitutive" decision-making process in which members of the Supreme Court engage in a textured and sincere debate about which polity and rights principles are applicable to a case and how to apply them; 3. The Supreme Court is aware of new ideas, scholarship, and methods of problem definition created by the interpretive community; over time it incorporates these into its decisions. This is evident in *Casey* when personhood and equal protection, not privacy rights, became that case's theoretical centerpiece; 4. Polity principles, such as when to follow precedent, when to trust elected bodies or courts, and when to trust different levels and branches of government to make constitutionally important decisions are as important to Rehnquist Court decision-making in these 1991-92 landmark cases as they were in the Warren and Burger Court eras; 5. The Rehnquist Court, now dominated by Reagan-Bush appointees, like the Court in previous eras, finds justices protecting their autonomy and that of the Supreme Court as an institution from the influence of the President and majority coalition that was responsible for their appointment to the Court. [3]

What can be expected from the Rehnquist Court in the future. We can expect the following: 1. Constitutional questions, especially those which relate to the rights of subordinated groups, which are based on race, gender, immigrant status, national origin, or religion, will be far more complex and difficult to decide than in the Warren and Burger Court eras. Unlike the question of racial equality on the Warren Court and gender equality on the Burger Court, there are fewer situations today in which citizens are formally denied equal protection of laws and access to the political system; 2. The complexity of constitutional issues will result in the Rehnquist Court responding to calls for individual rights with more answers of "no" than in prior Court eras, while taking longer periods of time to provide a yes to calls for new rights; rights principles will be far more measured and less ringing in tone than those defined in prior Court eras; 3. The Rehnquist Court, like the Court eras before it, will respond positively to new calls for rights; however, it will have to develop far more complex visions of polity malfunctions and

denial of individual rights to justify the need for new individual rights and legitimate them, as confirmed in homosexual rights cases, such as *Romer v. Evans* (1996), and recently in *Lawrence v. Texas* (2003).

The Rehnquist Court will respond positively to new calls for rights for the following reasons: 1. There is a fundamental respect, and need for, the Supreme Court to continue to be counter-majoritarian when rights and polity principles are violated; 2. The interpretive community will pressure the Supreme Court to develop new rights and new polity principles that will be based on more complex concepts of justice and more complex visions of political system malfunction, respectively; 3. Most lawyers (and judges) are socialized into viewing the Constitution and long-held legal precedents as representing fundamental rights and polity principles for our nation, whose protection requires the Court at key moments to be counter-majoritarian; and 4. The Court must support fundamental constitutional principles and the precedents developed under them, such as First Amendment rights to speech and religious freedom, equal protection of the law, due process, separation of powers, and federalism, while not simply being beholden to precedent, in order to meet the severe test of providing constitutional law for a far more diverse nation.[4]

If justices on the Rehnquist Court are simply instrumental in their decision-making, that is, if they simply follow election returns or their own policy wants or those of the president/ majority coalition that appointed them, and use principles simply to support predetermined policy wants, what might we expect from the Rehnquist Court, which consists of so many members who were selected by conservative Republican presidents? We would expect the Rehnquist Court, if it was simply instrumental in its decision-making, to reject long-held polity and rights principles and precedents from the Warren and Burger Court eras. If the instrumental elections returns or policy-making vision of Supreme Court decision-making is valid, we would expect few additions to the rights of individuals generally and, most importantly, few additions to the rights of what I will call subordinated groups-- women, homosexuals, immigrants, minority races, aliens, and poorer Americans, and perhaps significant reduction in the rights of members of such groups. We should also expect the Supreme Court to overturn Supreme Court decisions that the presidents and majority coalitions which appointed the members of the Rehnquist Court have opposed in such a public and determined way. We would find the Rehnquist Court refusing to support government decision-makers, especially at the national level, and instead exercising a faith in economic markets and private action rather than public regulation.

In doctrinal terms, we would expect the Rehnquist Court to reject of the concept of implied fundamental rights, especially the right of abortion choice. We would expect that basic principles which support the separation of church and state would be all but done away with, along with the free exercise of religion especially for members of minority religions. In the area of freedom of expression, we would expect to find much greater support for the state's ability to sustain order against minority viewpoints and those who don't support traditional values of love of country and flag. We would expect a Supreme Court dominated by Reagan-Bush appointees to not take seriously the constitutional interests of subordinated groups and minorities, whether the doctrinal area be equal protection, First Amendment speech and religious freedom, or implied fundamental rights. Thus, we would expect the Rehnquist Court to make decisions

favoring majority religions, not minority religions or the non-religious, given the support of the religious right by conservative Republican presidents.

If, however, the mature Rehnquist Court follows the constitutive approach, not election returns, and is not simply instrumental in its approach, we would expect it to define new individual rights, be counter-majoritarian when fundamental polity and rights principles are about to be undermined, and make innovative approaches when they define the powers of government, individuals, and markets to allocate values, goods, and power. We would expect the number of concurring and dissenting opinions to increase because of the complexity of issues brought from a more diverse nation, resulting in less ringing statements of rights. We would expect the Court to seek more neutral principles--ie. principles that are not group specific; we also expect that the Court will find it very difficult to develop such principles. Finally, we would expect justices of the Supreme Court not to hold at the center of their thinking the policies which are advocated by those who placed them on the Court and the policies which they favor personally.

Respect for long-standing principles and precedents as central to the rule of law and to Court legitimacy, following basic polity and rights principles, being consistent in the application of these principles, and a deep concern to provide constitutional law for an increasingly diverse and complex society are far more important objectives of justices, objectives which require them not to make decisions on instrumental policy grounds or because of a need to follow election returns.

III. Major Rehnquist Court Religion Decisions Since 1990

A. The State Shall Not Establish Religion

If the Rehnquist Court were instrumental in its decision-making on Establishment Clause cases and simply followed election returns, one would expect this Court era which is dominated by Reagan-Bush appointees to take a very strong stand to reduce the separation of church and state because of the expanded role of the Christian right in the majority coalition of the Reagan-Bush Republican party.[5]

If the mature Rehnquist Court is following a constitutive decision-making process in Establishment Clause cases we would expect it to follow precedent such as the *Lemon* test when it decides cases on the establishment of religion by government. We would also expect the Court to support the free exercise of religion and the separation of church and state for minority religions which are not part of the Republican Party's majority coalition. We would also expect the Rehnquist Court to develop principles to meet the needs of a nation that is more diverse in its religions and has many non-religious citizens. Finally, we would expect the Court to seek greater neutrality in its principles so its principles can provide direction to and respect for diverse religions and the non-religious in our nation. We would also expect that the quest for neutrality would be difficult, if not impossible to meet.

As I shall explore in this paper, an analysis of free exercise and establishment clause cases in the 1990's finds the mature Rehnquist Court using *Lemon* test principles to continue a

regime of the separation of church and state. At times it relied on these principles more than in the Burger Court era of the early 1980s or in the Rehnquist Court of the late 1980s, when the Court seemed to be seeking an end to strong notions of the need for the separation of church and state, instead of focusing on the fear of political divisiveness and political entanglement with religious institutions, which are core polity principles in the *Lemon* test. In the area of freedom of religion, the mature Rehnquist Court is clearly following a constitutive approach to its decision-making and remains adamant that the Supreme Court sustain the separation of church and state in the future.

I have ordered the cases for this discussion by starting with situations of religion in open public squares, to forums in which the Court could expect the listener to be mature in her religious values, such as on college campuses, to situations of semi-open forums for speech in public schools which are not under the direction of teachers, to situations in the classroom and in school assemblies.

1. Religious Speech in Public Squares

In *County of Allegheny v. American Civil Liberties Union, Pittsburgh Chapter* (1989), the Rehnquist Court turned its back on some premises which were so accommodating to religious speech in public squares in *Lynch v. Donnelly* (1984), a Burger Court case. In *Allegheny*, the Rehnquist Court finds that the *Lemon* test cannot support a crèche display in a setting that fails sufficiently to detract from its religious message. The Rehnquist Court sets the standard of review at strict scrutiny of religious displays on public land which might be demonstrating a government's allegiance to a particular sect or creed. (p. 602-605) The Court allows the Jewish symbol of a Menorah to be displayed given that its setting next to a Christmas tree undercuts the view that government seeks to endorse a particular religion.

It is significant that the majority of the Court that prohibits the crèche standing alone and allows the Menorah in a setting with a Christmas tree, and the four justices (Kennedy, Rehnquist, White, and Scalia) who would permit both holiday displays, rely more firmly on the *Lemon* test than in the *Lynch* case.

In *Capital Square Review and Advisory Board v. Pinette* (1995), the Rehnquist Court finds that the state of Ohio violated the Establishment Clause by not permitting a cross to be placed by the Klu Klux Klan in a public square that was open to holiday displays. The Court found that private religious speech is just as protected as speech by religious organizations. Once the square is opened as a public forum, only the most compelling state interest can close it. Establishment Clause values do not constitute a sufficient enough government interest to close the square to the Klan's cross. In *Widmar*, a 1981 Burger Court case, and *Lamb's Chapel*, a case decided by the Rehnquist Court in the same term as *Pinette*, the Rehnquist Court found ample precedents to allow private religious speech when public space is opened to all speech. The Court noted that since the cross represents private religious speech, one can't confuse the Klan's cross as being government speech or religious endorsement simply because it is placed in a public forum.

Justice O'Connor, joined by Souter and Breyer, stated that one could not interpret the

state's tolerance of the Klan's religious display as an endorsement of religion. Justices Stevens and Ginsburg dissented. Stevens seeks to "rebuild the wall of separation between church and State" (p. 1 of slip opinion) in arguing that the "Establishment Clause should be construed to create a strong presumption against the installation of unattended religious symbols on public property." (p. 1) Justice Ginsburg dissents because there is no disclaimer or other way to disassociate the cross from government speech and endorsement of religion.

2. Religious Speech on College Campuses

Building on *Widmar* and *Lamb's Chapel, in Rosenberger v. Rector and Visitors of University of Virginia* (1995), the Rehnquist Court, in an opinion written by Justice Kennedy, finds unconstitutional the refusal of the University of Virginia to fund a student paper with a Christian perspective from the student activities fee. This is viewed as unconstitutional viewpoint discrimination, discrimination based on the speaker's motivating ideology, opinion, or perspective, because such funds are used by groups and student publications representing many different points of view. There is no Establishment Clause violation in this context because the state must be neutral in its choices among religious and non-religious thought. The state's objective is to have the student fee open the forum to diverse viewpoints. Also, the state takes pains to separate itself from the viewpoint and selection of views that get subsidized by the student fee.

In this decision, Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. They view this as direct aid to religions which is barred by the Establishment Clause, (p. 2). Souter argues, all articles "become platforms from which to call readers to fulfill the tenets of Christianity in their lives," (p. 4). This is the direct subsidization of preaching which is forbidden under the Establishment Clause, (p. 5). Souter uses the writings of Madison to make this point. He is criticized by Justice Thomas who says that Souter got the Founder's view of religion wrong. Even though the Court supports subsidization for a religious newspaper in a college setting in *Rosenberger*, the mature Rehnquist Court has kept up the polity principles of the *Lemon* test.

3. Religious Speech in Public Schools: "Limited Public Forums”

In *Board of Education of the Westside Community Schools (Dist. 66) et. al. v. Mergens* (1990), the Rehnquist Court supports the constitutionality of the Equal Access Act, passed by Congress in 1984. This law required that a public secondary school which creates a "limited public forum" that is open to student clubs cannot discriminate against student clubs whose meetings are based on "religious, political, philosophical," speech or speech based on other content,(p. 235). Only Justice Stevens dissented. The Court found that Congress' extension of the *Widmar* decision to public schools, from colleges, was constitutional. In supporting the power of the school to set its curriculum, the Court emphasized that the term "noncurriculum related student group" in the law is to be interpreted "broadly to mean any student group that does not *directly* relate to the body of courses offered by the school, "such as a chess club compared to a French Club,"(p. 239). Once a limited public forum is opened for such clubs, schools cannot deny access to religious groups. Again the *Lemon* test is used in this case. Moreover, there is no endorsement of religion by the state if it allows religious and non-religious groups access to this

forum and there is no formal teacher participation in these clubs.

In *Lamb's Chapel v. Union Free School District* (1993), the Rehnquist Court, declared unconstitutional a New York state law which authorizes local school boards to adopt reasonable regulations that permit after-school use of school property for many purposes, but refused to allow meetings for religious purposes. To not allow religious meetings is unconstitutional content-based viewpoint discrimination. Again, the mature Rehnquist Court relies on the *Lemon* test to find that a showing of a religious film after school hours in a meeting open to the public without school personnel involvement should not be viewed as an endorsement of religion. All justices supported this finding.

In these cases, the mature Rehnquist is allowing the use of limited public forums for religious speech when they are open for political speech as long as government/school officials are not actively participating in such forums and the forums are open enough that religious speech is only one of many different ideas that are allowed in the public forum. Also, in no way are such limited public forums in schools to undermine the authority of school officials to decide on the nature of the curriculum or to take resources way from the teaching program.

In *Good News Club v. Milford Central School* (2001) the Court followed *Lamb's Chapel* in allowing a club to conduct prayers after school hours in a room of a school that is attended by K-12 students. The Court said students are not coerced in attending the club; nor would students view having the club after school as state endorsement of religion. A group's religious activity cannot be proscribed on the basis of what the youngest members of the audience might misperceive.

4. Prayers in Public School Classrooms and Assemblies

In *Lee v. Weisman* (1992), the Rehnquist Court outlaws prayers at a middle school graduation. Most importantly, the mature Rehnquist Court renews its faith in the principles of the *Lemon* test, which require that for a law or government policy to be upheld under the Establishment Clause it must 1) have a secular purpose, 2) have a principle or primary effect that neither advances nor inhibits religion, and 3) not foster excessive entanglement with religion.[6] *Weisman* demonstrates that a majority of the Rehnquist Court continues to support polity-based principles in the *Lemon* test of no entanglement between church and state and no state endorsement of religion, plus a concern about the political divisiveness that would result should the state endorse religion. [7] Most importantly, in *Weisman* and many of the cases discussed in this paper, the mature Rehnquist Court rejects the call by some scholars who wish to undermine the polity principles that call for institutional separation of church and state by conflating the free exercise rights and institutional polity principles within the Establishment Clause under the rights principle that citizens simply must be free from government coercion when they engage in religious activities. In supporting the no-entanglement, no political divisiveness, and no religious endorsement by the state principles of the *Lemon* test, the separation of church and state remains on a strong footing, while minority religions have access to limited public forums when other religions and political speakers have access. In *Weisman,* as in *Planned Parenthood,* the mature Rehnquist Court chooses to follow and build upon precedents supportive of long-held rights, rather than to follow election returns and support the policies of the presidents and majority

coalitions that placed the Rehnquist Court justices on the Supreme Court. This is evident in *Santa Fe Independent School District v. Doe* (2000), a case in which the Supreme Court reiterated *Weisman* principles in finding that student-led, student initiated prayer at football games violate the Establishment Clause.

5. Carving Out Separate School Districts Based on Religion

In *Board of Education of Kiryas Joel Village School District v. Grumet* (1994), the Rehnquist Court refused to allow New York state to carve out a separate school district for children living in the Village of Kiryas Joel, a religious enclave of the Satmar Hasidim sect of Judaism. This school district was to provide services for handicapped children, busing, remedial education, and health and welfare services for students who attended private schools. Prior to this action, Kiryas Joel schools had fallen within the Monroe-Woodbury Central School District. Justice Souter wrote the majority opinion, joined by Justices Blackmun, Stevens, O'Connor, and Ginsburg in most of its parts. Scalia wrote a dissenting opinion, joined by Justices Rehnquist and Thomas.

Souter wrote, "Because this unusual act [of creating a separate school district] is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires government impartiality toward religion, we hold that it violates the prohibition against establishment." (p. 2). It was the carving out of a school district so it fit only this sect's land, and the failure to follow usual state procedures and criteria for defining school districts that made this act a violation of the Establishment Clause.

In *Weisman*, a majority of the Court, including Justice Souter, (p. 9) continued to rely on the *Lemon* test. Moreover, it is quite clear that most members of the Rehnquist Court, even Justice O'Connor who opposes formal use of the *Lemon* test, support the test's polity principles of no entanglement between church and state, no laws with a primary sectarian purpose, and no laws or practices that will invite political divisiveness. These principles retain strong support by most members of the mature Rehnquist Court even though they have been attacked by key supporters of Republican administrations since the 1980s. Justices Souter, Breyer, Ginsburg, and Stevens seek an even tighter line of separation between church and state. Justice Kennedy, perhaps not surprisingly after his, Justice Souter's and Justice O'Connor's joint opinion in *Planned Parenthood*, refused to turn his back on support for the separation of church and state.

Only Justices Thomas and Scalia, and to a degree Justice Rehnquist, refuse to support the tough polity principles of the *Lemon* which protect the separation of church and state. Such an approach to these cases might offer evidence that some members of the Rehnquist Court seek to follow the policy wants of the President (and majority coalition) who placed them on the Court. However, this argument is valid only if these justices were simply instrumental in their decision-making and could be counted on to follow the elections returns in most cases. There is no evidence that this is so, as we shall explore below, for example, in our look at Justice Scalia's position of flag burning.

It is also important to note that in Establishment Clause cases the Rehnquist Court seems quite concerned about laying a framework in which institutions that open up public forums to

political speech also do not get into the business of making content choices among religious speech and whether speech is religious or political in nature.

B. Free Exercise of Religion --The Intersection of First Amendment and Equal Protection Principles

While there is a free exercise component in Establishment Clause cases, in most cases under the Free Exercise Clause issues revolve around questions about whether citizens should be permitted the free exercise of religion at times when laws would prohibit such acts were they not based on a religious motivation. When we compare *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993), we see the mature Rehnquist Court trying to come up with principles which will accommodate religious acts while not undermining laws which are in place to protect interests which the government thinks are important. In these cases the practices of minority religions are usually at issue.

In *Smith,* the Rehnquist Court decided that the Free Exercise Clause permits the state to prohibit sacramental use of peyote, a controlled substance, and therefore could deny unemployment benefits for an individual dismissed from a job for using peyote. The Court finds that the law which bans the use of peyote is neutral in its content; it was passed for reasons unrelated to religious expression. In this decision a majority of the Court supports the polity principle of state determination of criminal laws. They allow a state to permit the use of peyote for sacramental use if it so chooses, but the Court refuses to make the use of peyote for religious purposes a right under the Free Exercise Clause. That is, the Court decides that it is constitutionally permissible to exempt sacramental peyote use from being a violation of drug laws, but a state is not constitutionally required to do so.

Justice Scalia wrote for the Court. For five members of the Court a religious motivation in the use of peyote did not place citizens beyond the reach of the law. Scalia emphasized that when a government law is passed with neutral (non religious) intent, when there is a compelling government interest for the law, and when the law is of general applicability -- that is, it does not target religious practices -- it may be applied against citizens whose motivation for breaking the law is religious. Moreover, Scalia notes that unlike the *Yoder* case, there is no constitutional right that needs protection, such as a parent's right to bring up a child as he wishes. Five members of the Court were concerned that we court anarchy if we did not respect the compelling interest test and seek to limit the use of drugs,(p. 15).

In *Smith,* five members of the Rehnquist Court chose to leave important questions concerning the free exercise of religion up to the vote of state legislatures whenever the state has decided there is a compelling government interest to stop a practice generally. The Court chooses to leave questions of the free exercise of religion to each state rather than to establish a principle that all in the nation must follow. This polity principle places minority peoples and religions at a severe disadvantage. It means that the same religious practice may be allowed in one state but not another. Justice Scalia does not want judges to weigh the social or policy objectives of laws which are passed by states for neutral reasons to meet compelling government interests or to weigh the importance of such interests against the requirements of the First Amendment Free

Exercise Clause,(p. 17). Scalia is willing to allow states to do this. This undermines the notion that free exercise principles constitute fundamental rights that are defined and enforced by the Supreme Court.[8]

Justice O'Connor, joined by Brennan, Marshall and Blackmun, reject the majority view that the Free Exercise Clause contains a single categorical rule that "if prohibiting the exercise of religion...is...merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended," (p. 3, referring to p. 5-6 of majority opinion). O'Connor argues that we always have to balance religious concerns with generally applicable regulations, as the Court did in *Yoder*.

By undermining the compelling interest test which requires the government to demonstrate a compelling interest before limiting religious practices even if they violate general criminal prohibitions, the majority justices sacrifice the Court's important role of monitoring states so that free exercise rights are respected and uniform in all states. To allow a majority of the people to disfavor minority religions should not be viewed simply as an "unavoidable consequence" of trusting democracy, because the First Amendment Free Exercise Clause was enacted, in part, to protect minority religions.

Four justices (O'Connor, Brennan, Marshall, and Blackmun) oppose Scalia's test as to the constitutionality of laws as applied to religious practices. They would apply the following test: whether exempting respondents from the state's general criminal prohibition unduly interferes with the fulfillment of a governmental interest -- in this case in the prohibition of the possession and use of a controlled substance. In applying this test, O'Connor supports the outcome in the case, but not Scalia's test. She writes, "Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is essential to accomplish the overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance." (p. 15-16)

Note that the four justices who do not want a *U.S. v O'Brien*-like general rule that any laws which are based on neutral government interests can stop religious speech, don't want to leave the First Amendment religion clauses open to a vote of the legislature; they want the Court, not legislatures, to balance compelling government interests and free exercise concerns.

This case demonstrates the importance of polity principles as bases for protecting individual rights, the differences among the justices as to basic free exercise principles, and the importance of the balance between polity and rights principles in Court decision-making. The significance of polity principles for ensuring the protection of rights is demonstrated by the comparison of Scalia's majority opinion, joined by Rehnquist, White, Stevens, and Kennedy, with Justice O'Connor concurrence, joined by Brennan, Marshall, and Blackmun. Justice Blackmun, in his dissent, joined by Brennan and Marshall, wanted the Court to look at this law under the standard that a statute which burdens the free exercise of religion can only stand if the law is general and the state's refusal to allow a religious exemption is justified by a compelling interest that cannot be served by less restrictive means.

Blackmun joins O'Connor in the view that the majority undercuts settled law and

mischaracterizes *Cantwell*, *Yoder*, and other precedents. For Blackmun, to not require strict scrutiny when a law burdens religion and to allow the repression of minority religions as an "unavoidable consequence of democratic government" is to distort both precedent and constitutional values, (p. 2). The dissenting justices agree with O'Connor's analysis of First Amendment doctrine, but not her answer to the question of whether peyote use could be permitted in religious services. Blackmun argues that the state must show that to allow peyote use for religious purposes will undercut state efforts to meet its compelling interest, the widespread use of a controlled substance. The state has not done so.

In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993), analyzed in light of *Smith*, a majority of the Rehnquist Court rejects Scalia's test for free exercise cases. In moving away from the *Smith* case rule (that a law that is simply neutral in intent and general in application is enough to allow government to limit the free exercise of a religious practice) the Court, in *Hialeah*, emphasized that neutrality and general applicability of a law that limits religious practice are interrelated. The failure to satisfy one requirement is a likely indication that the other has not been satisfied, (p. 8-9). In *Hialeah*, the Court found that the city's anti-animal sacrifice law had been "gerrymandered," in the Court's words, to proscribe the religious killings of animals by Santeria church members, but to exclude the killing of all other animals,(p. 11-18). Moreover, the regulations suppressed far more religious conduct than was needed to meet the valid public health concerns of the law. The Court finds that the laws as applied to the sacrifice of animals for religious purposes are over and underinclusive with regard to animal killings for food, eradication of insects and pests, and the euthanasia of excess animals. This could not be said for the banning of a controlled substance in *Smith*, which is not allowed for any purposes. Perhaps, if peyote is allowed for medicinal purposes, questions of over and under-inclusiveness of the law in that case might be raised. To do so, one must balance a concern for the free exercise of religion and the state's interest against drug use. Scalia refused to make such a balance.

In a majority opinion by Justice Kennedy, who was in the majority in the *Smith case*, we see the Court changing the *Smith* test by meeting some of the concerns of the justices in the concurrence and dissent in *Smith* to be more supportive of religion. Justice Kennedy draws upon equal protection analysis in *Arlington Heights v. Metropolitan Housing Development Corp.* (1977) to demonstrate that since the history of city actions with regard to laws as to the killing of animals changed when this sect came to the city, this is evidence of discrimination of a minority group. Scalia and Rehnquist refuse to go along with the equal protectionesque part of the Kennedy decision which seeks to protect minority religions; Scalia's majority opinion in *Smith* left such protection up to state legislatures, not federal courts.

Justice Souter concurs with the principle of this case in "that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice," (p. 1). However, he refuses to join part II of the majority opinion because in dicta the *Smith* rule is mentioned, and he opposes the *Smith* rule. Unlike the *Smith* case, here the Court finds the laws simply restricting religion, while the anti-peyote laws in *Smith* were on the books as general anti-drug use laws. Souter would still not support the use of a law that is neutral with regard to religion on its face or in its purpose, but may lack neutrality in its effect by forbidding something that religion requires, (p. 3). Souter wants to ensure not only formal neutrality of laws with regard to religion, but also what he calls "substantive neutrality," (p. 4). Souter writes a critique of the *Smith* rule which

acknowledges that there has been a modification of the *Smith* rule in this case. He argues that the *Smith* rule is of limited use as precedent because it is too statute specific in terms of the interest stated by the state for the law and is not solicitous of the needs of our nation to balance state interests with support for the free exercise of religion. Blackmun, joined by O'Connor, agrees with Souter that "the First Amendment's protection of religion extends beyond those rare occasions in which the government explicitly targets religion," (p. 1).

When looking at both *Smith* and *Lukumi Babalu Aye,* we see the difference between the originalists and non-originalists in their different views on whether justices have the authority to engage in robust social constructions when deciding cases. This is relevant especially in their concerns about minority religions and what I have called above the "equal protectionesque" nature of Kennedy's majority opinion in *Lukumi Babalu Aye.*

The Rehnquist Court could have decided to be more solicitous of religious speech than it has been. It could have followed election returns and turned its back on the key polity principles in the Establishment Clause. It was under pressure from important scholars in the interpretive community to see all cases as free exercise rights and to drop the polity principle-based parts of the *Lemon* test which continued a wall of separation to the level of the Rehnquist Court. But, even a Court with a clear majority of appointees by conservative Republican presidents chose not to do so. Rather, it chose to follow precedent and build doctrine upon principles developed during the Warren and Burger Court years. It chose to support the right of minority religions to the free exercise of religion and to trust federal courts, not legislatures, to ensure that free exercise rights are the same for all citizens.

IV. Major Rehnquist Court Freedom of Political Speech and Action Decisions Since 1990

Perhaps in no other area of constitutional law do we see the Rehnquist Court meeting the needs of a more complex and diverse nation than through doctrinal innovations in the area of freedom of expression. For this paper I will concentrate on flag burning, hate speech, and political speech and expressive action near abortion clinics. In each of these areas the mature Rehnquist Court has made important and principled, First Amendment innovations, which could not have been predicted by assuming that the Supreme Court is instrumental in its decision-making and follows election returns.

More specifically, the Rehnquist Court has led the way in making content neutrality a key principle in protecting the right of citizens to the freedom of expression. Moreover, the Rehnquist Court has gone far to protect expressive actions in addition to speech. We see this most dramatically in the flag-burning case, *Texas v. Johnson* (1989), the hate speech cases, *R.A.V. v. City of St. Paul* (1992) and *Wisconsin v. Mitchell* (1993), and the abortion clinic cases, *Bray v. Alexander Women's Health Clinic* (1993) and *Madsen v. Women's Health Center* (1994).

Moreover, in commercial speech cases, which I will not go into in detail, the Rehnquist Court has allowed government to limit commercial speech to a greater degree than was allowed by the Burger Court.[9] The Rehnquist Court did not simply allow commercial speech, but rather it viewed speech in the name of commerce and making money as less protected from government

control than general political speech. This finding would not be expected if the Rehnquist Court followed election returns given the robust support for economic growth at any cost in the Reagan-Bush years.

A. Flag Burning as Expressive Action

In *Texas v. Johnson* (1989), Justice Brennan, joined by Justices Scalia, Kennedy, Marshall, and Blackmun, found flag burning to be expressive conduct which invokes First Amendment principles. Because the state's regulation of such conduct was found to be related to the suppression of free expression, the Court's review of government suppression of flag burning called for a more stringent standard on the permissibility of government suppression than the test in *U.S. v. O'Brien* (1968).

The Rehnquist Court could not find non-trivial, non-speech related government interests in the state's ban on flag burning -- given the safe place of the demonstration in front of the Dallas City Hall. Most importantly, because any principle to ban flag burning under safe conditions must be based on the acceptance of the state's view of the content of what a flag stands for, the Rehnquist Court finds any law banning flag burning unconstitutional. Texas has not, nor can it, define an important government interest that is not related to the suppression of free speech in banning flag burning and flag desecration for political reasons. In this decision, the Rehnquist Court questions the automatic applicability of the *O'Brien* test. This test was used in *U.S. v. O'Brien* (1968), a case which outlawed draft card burning. It was also used in *Clark v. Community for Creative Non-Violence* (1984), a case in which the Burger Court allowed a ban on sleeping in the park for homeless demonstrators. Brennan referred to the O'Brien test as a "relatively lenient standard." He called for a more forceful standard to protect political speech than the *O'Brien* test.

The Court also rejected the argument that flag burning is automatically to be viewed as fighting words. A state's assertion that it seeks to preserve the symbol of nationhood and national unity is to place the government's view of the flag above a view of the flag that the government finds to be offensive. Because such a choice by the state is not content neutral, laws banning flag burning violate First Amendment principles. Moreover, the state cannot assume that burning a flag in public is itself a breach of peace. To do so would mean that the state could convict an individual for simply expressing her view of a flag, rather than for specific actions which constitute a breach of peace.

It is important to note that in a concurrence, Justice Kennedy emphasizes a polity principle that is important to him on the role of the Court, a position which informs later decisions including the joint opinion the he wrote with Justices O'Connor and Souter in *Planned Parenthood.* Kennedy writes,

> The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility. For we are presented here with a clear and simple statute to be judged against a pure command of the Constitution. The outcome cannot be laid at no doors but ours, (p. 420-421).[10]

Kennedy is stating a view on the important responsibilities of the Court to protect rights. He continues, “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,” (p. 420-421).

Here is another example, as in the abortion cases, when a justice says that justices do not make constitutional choices simply to secure, in instrumental terms, policy outcomes that they would desire as citizens or would be supported by most politicians or by the presidents and majority coalitions who selected them.

Moreover, *Texas v. Johnson* principles continue to be supported by the mature Rehnquist Court, as states and Congress seek constitutional protection against flag desecration, as in *United States v. Eichman* (1990). This case was the Court’s response when Congress passed the Flag Protection Act of 1989, which made it a federal crime to “knowingly mutilate, deface, physically defile, burn, maintain on the floor or ground, or trample upon any flag of the United States.”

It is important to note that the Rehnquist Court supported strong rights to expressive action, prior to Ginsburg and Breyer joining the Court. Also, as in Kennedy's position in this case and his change in the type of free exercise principles he supported in *Hialeah* compared to the *Smith* case, Justice Kennedy seems to realize that future constitutional principles lie in his hands and so he seeks to develop principles that will stand the test of time for a changing nation. Justice Kennedy in the 1990s seems to be doing what Justice Blackmun did in the 1970s. He seems to be viewing the role of the Supreme Court justice in different terms than that of a lower court judge. This is another reason why instrumental decision-making and following election returns do not explain the jurisprudence of Supreme Court justices.

B. Hateful Action and Speech

We see a similar situation with regard to the mature Rehnquist Court's view of government regulation of hate speech. The Court refuses to allow a citizen's guilt or innocence with regard to expressive action to rest on the content of the speech itself. In *R.A.V. v. City of St. Paul* (1992), the Rehnquist Court found St.Paul's Bias-Motivated Crime Ordinance to be unconstitutional. The ordinance stated,

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor, (p. 280).

The majority opinion was written by Justice Scalia, and joined in by Justices Rehnquist, Kennedy, Souter, and Thomas. All Justices concurred in the view that this law violated the First Amendment. Scalia emphasized that while obscenity, defamation, and fighting words may be regulated because of their constitutionally prescribable content, the government may not regulate such words based on a hostility or favoritism towards a nonprescribable message they contain. With regard to this ordinance, the regulation of “fighting words” may not be based on its non-

prescribable content, (p. 282-390). Because this law permits displays containing “fighting words” to be used by those in favor of racial and gender tolerance and equality, but not those against such tolerance, the ordinance does not simply permit content discrimination. It is based on viewpoint discrimination, and thus a violation of basic First Amendment principles. The state cannot selectively silence speech on the basis of content, (p. 391-393).

The Court is saying that it can proscribe fighting words based on their use in a context which makes them fighting words, but the state cannot prescribe what are fighting words based on the viewpoint or motivation of the speaker.

As in the *Texas v. Johnson* flag burning decision, also supported by Justice Scalia, it is the non-speech elements of fighting words, not the specific fighting words themselves which make them illegal fighting words. The state may not create content-based subgroups of words which constitute fighting words or allow fighting words for use by pro-tolerance groups but not for those the state has said are against tolerance. This law would allow insults and abusive invectives, no matter how vicious and severe, to express hostility on the basis of political affiliation, union membership, or homosexuality, but not allow such invectives on the basis of race, color, creed, religion or gender. The law focuses too much on content, rather than non-speech elements of fighting words, which are the basis of threats against individuals and lead to a breach of peace in the community. Scalia writes, "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects,” (p. 391). Racial epithets would not be allowed to speakers of all views. However, for example, words that cast aspersions on a person's mother could be used by all groups who favor racial, color, and gender tolerance and equality; they could not be used by those speaker's opponents -- those who do not support tolerance.

While the justices on the Court had different views about whether categories of words of different content should be banned under the Constitution, all nine justices found the St. Paul law unconstitutional. What Justice Stevens and other justices questioned was the premise of the majority opinion that all “content-based regulations are presumptively invalid,” (p. 425).

In *Wisconsin v. Mitchell* (1993), a unanimous Court, in a decision written by Chief Justice Rehnquist, permitted the government to increase the penalty for conduct which violates criminal law when such conduct is motivated by hate. Additional penalties for bias-motivated actions were permitted because the determination of guilt or innocence is first determined on the basis of the action, not on the basis of the content of the speech. Because bias-motivated crime may inflict great individual and societal harm, such as retaliatory crimes or incite community unrest, a society may seek to deter such criminal acts more stringently when the acts are done with bias as a motive. This is not different from Title VII of the 1994 Civil Rights Act which makes it unlawful for an employer to discriminate in employment on the basis of race, color, religion, sex, or national origin. An employer cannot use the argument that such a law denies him his First Amendment rights to speech or expressive conduct.

In *Virginia v. Black* (2003), *R.A.V.* principles continue to be supported. The Court finds Virginia’s statute banning cross burning with “intent to intimidate a person or group of persons” does not to violate the Constitution. However, the provision of the statute treating any cross

burning as prima facie evidence of intent to intimidate is not constitutional.

With regard to hate crimes cases, we again find the Rehnquist Court trying to establish First Amendment principles that allow offensive political speech, while not allowing conduct which will lead to a breach of peace or muzzle the weak in society. The Court is also concerned that with a more diverse society, there is a greater chance that expression and expressive conduct will occur. Government must ensure that First Amendment speech is protected for all, not only those who have viewpoints which are shared by political leaders and a majority of the population. Apparently, absolutist First Amendment speech principles keep the social construction process in check.

C. Picketing at Abortion Clinics

In *Bray v. Alexandria Women's Health Clinic* (1993), the Rehnquist Court refused to allow 42 U. S. C. Section 1985(3), a law which prohibits conspiracies which deprive any person or class of persons the equal protection of the laws, to be used to enforce trespass laws against individuals and groups who seek to close down abortion clinics. The Court found that opposition to abortion does not qualify alongside race discrimination as an "otherwise class-based, invidiously discriminatory animus [underlying] the conspirators' action," that is required to prove a private conspiracy in violation of Section 1985.

The Court decided that since there are reasons to oppose abortion other than one's sex or a derogatory view of women, this situation is unlike those in which conspiracies are based on race or gender. Opposition to abortion is not simply a sex-based intent nor does the fact that only women seek abortions make actions in opposition to abortion a sex-based effect. Nor is there discrimination against out-of-state women seeking abortions--since the actions of demonstrators affect all.

In a concurrence, Justice Kennedy uses a polity principle, the fear of the nationalization of crime, in arguing that a false step here opens the way to using conspiracy statutes against a whole range of state crimes; use here would make such crimes a concurrent violation of a single congressional statute passed more than 100 years ago, (p.1). Kennedy also views the different rationales used by the dissenters in support of the use of 1985 as an indication that the Court is not yet coalesced in its thinking --and thus he is not ready to support its use now.

Justice Souter argued that one might claim successfully that the actions of Operation Rescue in shutting down abortion clinics and causing physical harm were done with the intention of preventing state officials from providing all citizens the equal protection of the laws, especially if such actions overwhelm state law enforcement. Souter would remand the case back to lower courts to see whether the police in fact were overwhelmed.

The dissenters view this law as protecting citizens from the theft of their constitutional rights by organized and violent mobs, (Stevens dissent, p. 3). Operation Rescue activities for Stevens hinder and prevent adequate protection by constituted authorities as a result of a nationwide conspiracy. Stevens does not accept federalism concerns and fears of undercutting First Amendment rights of assembly. For Stevens the text of the statute and the history of its

passage provide no basis for excluding coverage to any recognizable class of persons who are entitled to and are being denied equal protection of the law. Stevens argues that the law was not passed only to protect newly emancipated slaves. (p. 13) It is invidious discrimination against women even if animated by motives other than simply gender discrimination. O'Connor and Blackmun dissent because they also see the law as preventing organized groups from overwhelming local police and thus denying citizens their constitutional rights, in this case that of securing an abortion.

The case of *Madsen v. Women's Health Center* (1994) is a superb example of the Court trying to wrestle with some of the problems that it could not resolve in *Bray*. In an opinion written by Chief Justice Rehnquist, joined by Blackmun, O'Connor, Souter, and Ginsburg (and joined by Stevens in parts), the Rehnquist Court allows a Florida Court to issue an injunction that prohibits anti-abortion protesters from demonstrating in specific places and ways outside an abortion clinic. The Court allows a more stringent injunction here because there is a history of actual and threatened violation of law by Operation Rescue. A more tailored injunction other than general time, place, and manner rules is allowed by the Court when it must protect a women's rights to medical services, ensure public safety and the free flow of traffic, protect property rights, and preserve residential privacy. The Rehnquist Court reasons that because prior injunctions failed to secure these objectives, a 36-foot buffer around clinic entrances and driveways burdens speech no more than is necessary to meet these compelling government objectives. Limits on noise near the clinic are also permissible.

However, the Rehnquist Court prohibited a 36 foot buffer zone as applied to private property north and west of the abortion clinic, since such a zone would burden speech; patients and staff have no need to go in these areas to gain a clear entrance and exit from the clinic. Nor can the state court place a blanket ban on "images observable" from the clinic. To limit signs that threaten (or are fighting words) could do the same job; also individuals in the clinic could pull the curtains. Absent findings that there are signs that constitute fighting words or threats of violence, or words that are indistinguishable from a threat of physical harm, a 300 foot no approach zone completely around the clinic--and its accompanying consent requirement to be in that zone--burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic, (p. 18 and 19).

The significance of this decision is that the mature Rehnquist Court allows the Florida judge to change the injunction as to where First Amendment activities may occur around an abortion clinic, based on the past actions of the protesters and the prior content of their signs. I note that in previous First Amendment cases the Rehnquist Court made content neutrality a key component[11] when seeking limits on government's regulation of political and religious speech. Here the Court shies away from content neutrality. If you consider this case, along with *Bray* the Court seems to be groping to find ways to protect abortion clinics that fit polity and rights principles that they hold to be important, such as respect for federalism, respect for neutral principles, and respect for courts' roles in protecting individual rights.

In this case the Rehnquist Court views an injunction different from a generally applicable statute, whose constitutionality is to be assessed under traditional time, place, and manner regulations which are narrowly tailored to serve a significant government interest. An injunction

requires a close fit, not just with general First Amendment principles, but with the government's interest in order at the site of the area which the injunction covers. Rehnquist writes, "Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than is necessary to serve a significant government interest," (p. 10).

This standard is of a lower scrutiny than the strict scrutiny that Scalia wants; nor is it the far more lenient standard Stevens wants because the injunction is to stop illegal activity. Scalia, joined by Kennedy and Thomas, concurs and dissents in part. They do not like the 36 foot zone because it applies only to a particular group (Operation Rescue). Only this group is not permitted to exercise its rights of speech, assembly, and association and is limited by a noise prohibition. They believe the majority opinion undermines First Amendment precedents and traditions because it is content-based and is prior restraint on a group with a particular point of view. He does not like the fact that pro-abortion groups are not under such an injunction. He sees this injunction as viewpoint-based.

In *Hill v. Colorado* (2000), the non-originalist majority continues the *Madsen* approach which limits access to protesters near anti-abortion clinics, to the chagrin of originalist Justice Scalia. He views the limitation is content-based because similar limits are not placed of individuals who want to speak to persons about issues other than abortion choice.

Again, it is the difference between originalists and non-originalists, not between liberals and conservatives, over support for a more robust social construction process which is key to explaining differences among the Justices on the mature Rehnquist Court.

V. Conclusion

What we see in the abortion demonstration cases, as well as in the religion and freedom of expression cases, is the mature Rehnquist Court in a position of flux on the major constitutional questions of the day as new members seek consistency in the way to view cases. In the abortion demonstration cases, it is quite clear that we have not heard the last words on these issues from Justices Kennedy and Souter. Many of the Reagan-Bush appointees are not simply saying that since the Republican administrations have placed them on the Court, they will favor localism and state power rather than federal statutes and federal court support of state court injunctions to protect the rights of citizens who seek to protect their constitutional rights. Nor are the Reagan-Bush appointees, or the appointees of the Clinton administration, Justices Ginsburg and Breyer, taking stands that will make it impossible for them to deal with complex rights issues in the future in a way that is consistent with their polity and rights principles.

Because questions of individual rights are not as clear-cut as they were in the days of formal race and gender discrimination in the Warren and Burger Court eras, it will take the Rehnquist Court more time to define new rights. The Rehnquist Court will have to decide more cases than did previous Courts in sorting out the polity and rights principles that are applicable to specific cases.

For example, in *Bray*, it is not clear whether the situation near abortion clinics raises questions of gender discrimination or some other rights violation, such as the liberty rights of those who seek an abortion, or whether it is simply a First Amendment context. It is also not clear how the protection of classes of citizens denied equal protection of the laws are to be balanced against polity principles, such as deference to state law enforcement and a fear of a national police force as a future force for tyranny in our nation.[12]

In any event, from the contemporary Rehnquist Court which is dominated by justices who were selected by conservative Republican Presidents, we can expect new rights, new constitutional principles, and the continuation of the constitutive decision-making process which balances polity and rights principles. We also can expect that should a majority of the Supreme Court be chosen by liberal Presidents in the Twenty-First century, that that Court's definition of individual rights will not be as ringing as those defined in the Warren years or even the Burger Court age of intermediate scrutiny balancing.

Also, as the nation becomes more diverse, concepts we use today will no longer speak to our constitutional problems in the future. For example, in the diverse, multi-cultural nation of the future, constitutional principles built on relatively simple ideas like the relationship between the majority and minority, will have less meaning and usefulness in settling constitutional questions, because in many political constituencies, and in the nation, a simple majority will not exist.

Problems of constitutional theory and practice today include intractable equal protection questions, such as affirmative action and what constitutes race discrimination in the make-up of congressional districts. On First Amendment speech theory and practice we ask what principles will protect citizens from hate crimes while also fostering robust speech and expressive actions.

These constitutional questions test the limits of constitutional theories, many of which were developed in the age when our nation sought to end the domination of blacks by whites and the discrimination of women by men. Because we may lack today the constitutional theories to handle these issues and the even more complex constitutional questions that will arise in the future in our multi-cultural, multi-racial, multi-ethnic, and multi-religious nation, we should not expect the Rehnquist Court to come up with quick answers and simple controlling principles. At the same time the Supreme Court must come up with some answers to constitutional questions because the political system cannot be trusted to do so.

If polity-based constitutional theory is chosen to meet the constitutional questions of the future, which I think must be the choice, how is it to define structural inequalities in the political system when diversity is the rule and simple concepts supporting pluralist government, as seen in John Hart Ely's work already are anachronistic.[13] Does the presence of a more diverse citizenry mean we should trust government to decide speech regulations because no one group is dominant? Does a diverse citizenry mean Federalist 10 problems of a tyranny of the majority in small constituencies, and large ones, is no longer a problem? Or does the race, class, gender, sexual orientation, and ethnic separation in our nation require more searching constitutional principles to protect our citizens? Does the cumulative nature of race, gender, and class inequalities mean we have to rethink the liberal theoretical base of constitutional theory and law?

Can we afford to revert back to long-standing liberal principles, such as the strict separation of public and private space, and expect to be able to settle the constitutional problems that face our nation today and will face it in the future?

No matter which presidents and majority coalitions select the Supreme Court justices in the future and no matter what direction that constitutional theory and practice take in the future, we can expect that the Supreme Court will continue to be constitutive in its decision-making. A major concern is whether political scientists have the methods, will, and imagination to meet the urgent need for more complex definitions of political system malfunctions, which will be central as bases for the definition, justification, and legitimacy of expanded individual rights for the citizens of our diverse nation.[14]

Of equal concern is whether legal scholars and political theorists have the ideas and imagination to develop constitutional theories that will help the Supreme Court and the interpretive community define individual rights and the powers of government in the future.[15] At the core of this effort will be our ability to explain differences in the social construction process among doctrinal areas, and interpret these differences. For example, explaining why the social construction process is more robust in the mature Rehnquist Court in the doctrinal areas of substantive due process and equal protection as compared to First Amendment cases will tell us the effects of internal Court decision-making factors, such as visions of polity and rights principles, differences over the legitimacy of contrasting interpretive frameworks between originalists and non-originalists, as well as the process through which the Supreme Court brings the outside social, economic, and political world into its decision-making. If the outside world, in terms of the governing coalition and historical factors, is static, but there are quite varying degrees of differences among the justices and doctrinal areas as to what constitute liberal or conservative positions, internal legalistic explanations must be sought. But these can only be understood in light of how justices differ in how they choose to bring the social, political, and economic world outside the Court into their jurisprudence. This process is not completely internal to the Court in that central to Court decision making is the social construction of a changing world outside the Court. [16]

Caselist

Sherbert v. Verner, 374 U.S. 398 (1963)
U.S. v. O'Brien, 391 U.S. 367 (1968)
Lynch v. Donnelly, 465 U.S. 668 (1984)
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)
Bowers v. Hardwick, 478 U.S. 186 (1986)
Texas V. Johnson, 491 U.S. 397 (1989)
County of Allegheny v. ACLU, Greater Pittsburgh, 492 U.S. 573 (1989)
Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990)
Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)
Bd. of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990)
United States v. Eichman, 496 U.S. 310 (1990)
Freeman v. Pitts, 503 U.S. 467 (1992)
R.A.V. v. City of St. Paul, Minnesota, 505 U.S 377 (1992)

Lee v. Weisman, 505 U.S. 577 (1992)
Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)
Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993)
Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S.384 (1993)
Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)
Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994)
Madsen v. Women's Health Center, 512 U.S. 753 (1994)
U.S. v. Lopez, 514 U.S. 549 (1995)
Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995)
Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995)
Romer v. Evans, 517 U.S. 620 (1996)
Santa Fe Independent School District v. Doe, 530 U.S. 133 (2000)
Hill v. Colorado, 530 U.S. 703 (2000)
Good News Club v. Milford Central School, 533 U.S. 98 (2001)
Virginia v. Black (2003) No. 01-1107
Lawrence v. Texas (2003) No. 02-102.

Notes

[1] Lawrence, KS: University Press of Kansas, 1994

[2] Within the text, I have placed the page number, either from the United States Reports on the Supreme Court, or more likely, from the slip opinions of the case.

[3] See Kahn, *The Supreme Court*, Chapters 1-3, for a fuller statement of the constitutive approach, and see Chapters 2, 3, 4, and 5, as to why instrumental approaches to Supreme Court decision-making fail to explain Supreme Court decision-making.

[4] See Kahn, *The Supreme Court*, Chapter 8, Conclusion: The Rehnquist Court and the Future, for the application of the constitutive approach to landmark cases decided in the 1991-2 term.

[5] See Kahn, *The Supreme Court*, Chapter 4, Constituting the Separation of Church and State, for a constitutive decision-making analysis of Burger Court Establishment Clause cases.

[6] See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) at 612-613.

[7] See Kahn, "God Save Us From the Coercion Test: Constitutive Decision-making, Polity Principles, and Religious Freedom, *Case-Western Reserve Law Review* 43 (Spring, 1993): 983-1020, for a full discussion of Justice Kennedy and the mature Rehnquist Court's continued reliance on the *Lemon* test.

[8] The fact that the five justices in the majority would allow government to adopt a nondiscriminatory religious-practice exemption for the use of peyote, places this case in a similar situation to *Roe v. Wade* (1973), a situation that undermines the legitimacy of the holding in each of these cases. A major problem in *Roe v. Wade* (1973) is that the decision switches from being based on liberty interests and rights principles in the first and second trimester of pregnancy, and leaves the question of whether there is a right to abortion choice up to state legislatures, not to a constitutional principle decided by the Court, in the third trimester of pregnancy. I note that a

state could allow abortions under *Roe* up to the time of birth, except if one were necessary to protect maternal health. In *Smith* we have a similar situation. A state may allow the use of peyote if it wishes, thus allowing a state legislature, not a constitutional principle to determine what the nature of the free exercise right. In both cases the legitimacy and the solidity of the rights at issue, and of the rule of law itself, are undermined.

[9] See *Austin v. Michigan State Chamber of Commerce* (1990), a case in which the Rehnquist Court restricts the use of campaign funds by the Chamber of Commerce, citing the fact that this organization engages in speech for profit, as a basis for allowing more restrictions on its use of funds in elections.

[10] See Ronald Kahn, "The Social and Political Construction of Abortion Rights in Supreme Court Decision-making," Paper presented at the Annual Meeting, Western Political Science Association, Las Vegas, NV, March 15-17, 2001, for a fuller explanation of the social construction process in the area of abortion rights.

[11] See *R.A.V. v. St. Paul* (1992) and *Texas v.* Johnson (1989).

[12] See *U.S. v. Lopez* (1995) for an interesting case that finds the Rehnquist Court asking important questions about the limits of the national real police power under the commerce clause, as they relate to national laws limiting guns in schools.

[13] See John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980*)* a book which uses the notion of majority and minority interests and responsibilities under the Equal Protection Clause, to attempt to provide a general theory of constitutional interpretation in a pluralist political system. See Kahn, *The Supreme Court*, Chapter 6, The Burger Court and Constitutional Theory, especially pp. 181-191, for arguments on the limitations of the Ely approach, and that of other critical pluralists.

[14] See Ronald Kahn, "Review Essay: Rethinking Constitutional Theory Method, Practice, and Doctrinal Change," *The Journal of Politics*, 55 (February, 1995): 229-42, and "Social Facts and the Reconceptualization of Constitutional Theory," *Law and Courts*, 5, No. 2 (Summer, 1995): 10-14.

[15] See Ronald Kahn, "Hermeneutics and Constitutional Faith," *Polity*, 22, (Fall, 1989): 165-179, and "Pluralism, Civic Republicanism, and Critical Theory," *Tulane Law Review*, 63, (1989): 1475-1500.

[16] See Ronald Kahn, "Social Constructions, Path Dependence, and Supreme Court Reversals: *Lochner* and *Plessy*, But Not *Roe*," paper presented at Annual Meeting, Western Political Science Association, Denver, Colorado, March 27-29, 2003, for an explanation of this social construction process in landmark cases. (File: KahnSchmooz04fin)