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SILENCE ON THE STREET CORNER

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In a recent series of articles I have argued that the plight of the street corner speaker, as the test of our freedom, is obsolete.¹ A legal regime that does no more than protect the street corner speaker will not ensure a vibrant democracy, because in this age the character of public debate is determined not by what the street corner speaker has to say, nor by his or her capacity to engage the casual passerby, but rather by the media, especially television. Indeed, street corner activities, whether they be speeches, demonstrations or parades, are staged largely for the television camera and obtain their power from appearing on the evening news.

Over the last two decades it has become increasingly difficult for radical critics of the status quo to obtain access to the mass media. In the late 1960s, the Supreme Court upheld a Federal Communications Commission (FCC) regulation—the fairness doctrine—which was aimed at broadening the spectrum of viewpoints heard on radio and television.² In the early 1970s, however, the Court reversed course. It held, first, that it would be unconstitutional for government to create an analogous access to the print media³ and, second, that even with respect to broadcasting, there was no obligation, statutory or constitutional, for the FCC to create access for the direct expression of an editorial opinion.⁴ Regulations such as the fairness doctrine were deemed purely optional. In the

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1. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

2. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

3. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); see also *Pacific Gas Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986) (a regulation requiring public interest newsletter included in billing envelope unconstitutional).

4. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1972).

1980s, this process continued along the same trajectory, and in 1987 the Reagan FCC renounced the fairness doctrine altogether.⁵ Soon thereafter, the Court of Appeals for the District of Columbia upheld the FCC's decision as a permissible exercise of administrative discretion.⁶

The FCC remains under a statutory obligation, upheld by the Court, to police the networks to make certain that they provide adequate opportunity for presidential candidates to carry their message to the public.⁷ But this arrangement provides little relief for more radical critics of the established order, since they tend to work outside the formal party structure. Similarly, the FCC policy giving preference to women and minorities in awarding or allocating licenses, also upheld by the Court,⁸ is not likely to improve the situation markedly.

For one thing, those awarded licenses operate under market constraints and thus it is not entirely clear what difference the attempt to diversify ownership in terms of gender or race will make in the character of broadcasting. Moreover, the FCC does not seem especially committed to this ownership-diversification policy and is likely to implement it in a lax and haphazard way. In fact, the FCC would have formally and openly abandoned the policy if it were not for the intervention of Congress. Finally, account must be taken of the fact that the decision of the Supreme Court upholding the ownership-diversification policy was based on the narrowest of margins, five-to-four, and two of the majority, Marshall and Brennan, have since retired. The Court of Appeals for the District of Columbia recently handed down an opinion—authored by Clarence Thomas, Marshall's replacement—which cut back on that decision, holding unconstitutional the aspect of the FCC policy which gives a preference to women.⁹

The collapse of the legal regime that sought to broaden the expression of differing views in the media does not close the door to radical critics altogether. Some, especially the religious-based organizations, are wealthy enough to buy air time, or even their own stations or newspapers. Other dissident voices can be heard through "op-ed" essays, letters to the editors, magazines of opinion, and broadcasts on public access cable channels (for those who like to stay up in the wee hours of the night). The events and activities of dissident groups are also covered by the networks and major newspapers.

One does not want to ignore these speech opportunities altogether,

5. *Syracuse Peace Council v. Television Station WTVH*, F.C.C.R. 5272 (1987), F.C.C.R. 2035 (1988).

6. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

7. *CBS v. FCC*, 453 U.S. 367 (1981).

8. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

9. *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992).

but, in truth, they are rather limited. Most radicals do not have the funds to buy air time, the networks are reluctant to sell air time to them anyway, spokespersons for the underprivileged do not have the capital to buy a newspaper or television station, and coverage of protest activities is circumscribed by the economic imperatives that drive the privately-owned media and today enfeeble public broadcasting.

In this context, the street corner takes on new importance for democratic theory. It stands as one of the few remaining speech opportunities for radical activists to make an appeal to the public: the last, desperate forum. One would have thus hoped for the Court to accommodate the changes it has wrought in the law governing the media by increasing the protection of the street corner. In fact, just the opposite has happened. Rather than compensating for its decisions on the media by expanding the protection of alternative means of speech, the Court has pursued a policy which aggravates or compounds the effect of its media decisions. In doing so, it has implied that the media decisions were not driven by a sensitivity to the special needs of a free press, which are of course considerable, but rather by the lack of taste for, or perhaps even an aversion to, robust public debate.

I

Starting in 1939, in the famous case of *Schneider v. State*,¹⁰ the street corner has been guarded by what I will call "the weighted balancing test." That test avoids definitional squabbles as to whether certain conduct—pamphleteering or picketing, for example—is "speech" rather than "action" by conceding to the state the power to pursue its interests in a way that has the added effect of restricting speech. The First Amendment operates not as an impenetrable shield around the speaker, creating an immunity against regulations that have the effect of limiting speech, but rather as a mechanism that structures the justificatory process. The street corner speaker can be silenced if, but only if, the state can demonstrate that it has an interest other than to suppress the expression of speech and that the significance of this interest outweighs the harm it causes to free speech.

The Court's opinion in *Schneider* was written by Justice Roberts, and in a straightforward manner, refreshingly free of the jargon later to characterize modern free speech decisions, he defined the task before him in these terms:

In every case . . . where legislative abridgement of [First Amendment] rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs re-

10. 308 U.S. 147 (1939).

specting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.¹¹

Schneider actually consisted of four different cases. One, of no special concern to us, involved an ordinance requiring a license for door-to-door canvassing. A Jehovah's Witness challenged that ordinance, and the Court struck it down under the authority of *Lovell v. Griffin*¹² as vesting the municipal authorities with too much discretion. The other three cases, unified by the fact that they involved local ordinances that prohibited distributing handbills or leaflets on the streets, are of great importance in illuminating what I have called the weighted balancing test.

In one case, arising from Los Angeles, a person was convicted for distributing a handbill that advertised a meeting sponsored by the "Friends Lincoln Brigade" at which developments in the Spanish Civil War were to be discussed. The second case, coming from Milwaukee, involved a labor dispute with a meat market. One of the persons picketing the market was convicted for distributing handbills that set forth the position of the workers and asked persons to refrain from patronizing the market. The handbills in the third case announced a meeting to protest the way a state unemployment insurance program was being administered. This case involved an antihandbilling ordinance of Worcester, Massachusetts; in both this case and the one from Milwaukee there was ample evidence of the obvious—that many of the passersby who had received the handbills had discarded them, thereby littering the streets.

Save for a laconic dissent by McReynolds, the Court was unanimous in setting aside the convictions for handbilling. The whole of Roberts's analysis consists of the following paragraph:

The motive of the legislation under attack in [these handbilling cases] is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of

11. *Id.* at 161.

12. 303 U.S. 444 (1938).

such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.¹³

In this passage, we can see the weighted balancing process at work. Justice Roberts acknowledged the legitimacy of the state's interest in avoiding litter. Litter is aesthetically unpleasant, may be a health hazard, and requires additional expense on the part of government to clean up. However, these interests pale compared to the interest in free speech, which Roberts characterized earlier in the opinion as lying "at the foundation of free government by free men."¹⁴ For Roberts, the scales are tipped in favor of free speech and, as a result, the interests of the state must be especially worthy and important to save a statute restricting speech.

Even after deciding that the interest in avoiding litter is not sufficient to justify the interference with speech, Roberts pointed out, perhaps as a gesture of respect to the state, that the state has other alternatives for satisfying its interests. For example, the state could prosecute the passersby who actually threw the handbills in the street or on the sidewalk. Obviously, this strategy would be less effective and less efficient than going after the distributor of the handbills, but those sacrifices are considered the price for safeguarding the foundational freedom. As Harry Kalven phrased it years later, Roberts understood that free speech is not a luxury civil liberty.¹⁵

II

The full flowering of *Schneider* awaited the 1960s, when the Warren Court used the weighted balancing test to protect the always passionate and sometimes disruptive speech activities of the civil rights movement.¹⁶ Moved by the Court's heroic determination to keep the streets and sidewalks of the nation open to political activists, Harry Kalven added the concept of the "public forum" to the First Amendment lexicon and explained how access to that forum was central to a vibrant democracy.¹⁷

13. 308 U.S. at 162.

14. *Id.* at 161.

15. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 156, 197 (1988).

16. See Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1966 SUP. CT. REV. 1; HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965; republished with the "Public Forum" article in 1966); see also Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 U.C.L.A. L. REV. 1713 (1987).

17. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 553-58 (1965) (reversing conviction of

In the 1970s and 1980s, however, the tide shifted, and under the leadership of Chief Justice Burger and Justice, later Chief Justice, Rehnquist, the Court's protection of the street corner—née "public forum"—became increasingly less generous. *Schneider* remained on the books; it was frequently cited and discussed by the Court, but it was drained of all vitality.

One striking illustration of this development, and of the method by which Roberts's weighted balancing process has been transformed and distorted, is the Supreme Court's 1984 decision in *Los Angeles v. Taxpayers For Vincent*,¹⁸ upholding a ban on posting political signs on utility poles. The signs in question supported Roland Vincent, a candidate running for the city council, and contained the simple message: "Roland Vincent—City Council." Acting under the authority of an ordinance that banned posting any signs on utility poles (or similar affixtures), city maintenance crews removed the signs. In response, Roland's supporters brought an injunctive suit in federal court attacking the ordinance as applied. By a divided vote, the Court, in an opinion by Justice Stevens, upheld the ordinance on the ground that it furthered various aesthetic interests, including the desire to avoid "visual clutter." Brennan, Marshall and Blackmun dissented.

The result in *Vincent* stands in bold contrast to that in *Schneider*, as does the method of analysis, though that is less obvious. In place of the weighted balancing test of *Schneider*, Justice Stevens, building on a number of intervening precedents,¹⁹ used a multi-tiered categorization approach. Under *Schneider*'s weighted balancing test, the governing metaphor is a scale especially rigged by the First Amendment: a thumb is placed on the side of speech, thereby requiring the state to produce, on the other side, an especially weighty or urgent interest in order for the regulation to survive. Under the categorization approach used in *Vincent*, the judge still considers two factors—the harm to speech and the state's interest. However, rather than balancing these factors, one against the other, the judge analyzes them in terms of two columns of pigeonholes or boxes. One column is for the harm, the other for the state's interest.

speaker for obstruction of sidewalk); *Edwards v. South Carolina*, 372 U.S. 229, 235-37 (1963) (use of breach of peace ordinance to ban demonstrations violates First Amendment rights of civil rights protestors); *see also NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (holding Virginia statute banning solicitation of legal business infringes First Amendment rights of NAACP).

18. 466 U.S. 789 (1984).

19. *See Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 649-51 (1981) (employing categorical analysis to review state solicitation regulation at state fair); *United States v. O'Brien*, 391 U.S. 367, 376-80 (1968) (using categorical analysis to review a regulation against destroying draft cards).

The first column classifies regulations according to the way they impinge on speech. A law that discriminates among speakers on the basis of content is to be classified as a "content regulation," whereas a law that regulates the time, place or manner of speech belongs in a box labelled "access regulation." The second column consists of three boxes for classifying the interest of the state furthered by the law; one box is "compelling," a second "substantial," and the third "ordinary." Each indicates a different degree of importance for the state's interest.

The categorization approach also involves a set of rules, sometimes referred to as "tiers of scrutiny," that requires certain matches or linkages between the two columns, that is, between the type of speech-harm and the state interest. To be acceptable, a content regulation requires a state interest that falls in the "compelling" box; in other words, it is subject to the strictest or most exacting scrutiny. An access regulation is subject to a lesser or intermediate degree of scrutiny, because the state's interest only need be "substantial" or "significant."

In and of itself, the shift in metaphors, from a weighted balancing to a categorization approach, may be of no moment. It may simply be reflective of the ever-increasing bureaucratization of constitutional law, a way of administering a complex body of doctrine, posing no special danger to First Amendment values.²⁰ As in the weighted balancing test, the categorization approach could respect the preferred status of free speech by always requiring that the state interest be "compelling." In that instance, there would be little difference between the two methods. Justice Roberts did not use the term "compelling," but he might as well have, because he required that the state interest be especially urgent in order to justify an abridgement of speech. A critical difference arises, however, because the movement to a categorization approach was accompanied by a lessening of the state's burden. "Compelling" is not the standard against which an access regulation like the Los Angeles ordinance is to be measured. Rather, such ordinances are to be judged under an intermediate standard, "substantial," which is obviously more than "ordinary," but also less than "compelling."

In upholding the ordinance, the district court in *Vincent* said the interest of Los Angeles in avoiding visual clutter was "legitimate and compelling."²¹ This conclusion seems absurd on its face—if the desire to avoid visual clutter is a compelling interest, it is hard to understand what the

20. See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1500-01 (1975). Professor Ely argued that the Warren Court favored using categorization analysis in First Amendment cases as a way to limit judicial discretion. See also *Employment Div. v. Smith*, 110 S. Ct. 1595 (1990) (Scalia applied categorization analysis to free exercise claims).

21. 466 U.S. at 795.

word "compelling" means. Justice Stevens ruled, however, that the city's interest need only be "significant" or "substantial."²² The earlier cases teach, according to Stevens, that "the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest."²³ He described the interest municipalities have in regulations of this type as "weighty,"²⁴ and concluded that "[t]he problem addressed by this ordinance—the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property—constitutes a significant substantive evil within the City's power to prohibit."²⁵

Stevens's move to the intermediate standard of review was predicated on the view that the Los Angeles regulation was content neutral. The regulation did not by its terms single out Roland Vincent or political candidates in general, but rather applied to all persons wanting to use the utility poles. In taking this position, Stevens was faithful to a line of cases from the 1970s and 1980s that singled out content regulation as especially threatening to First Amendment values. Precedent aside, however, a question can be raised about the soundness of his position. Barring one speaker or one category of speakers from the street corner is offensive, but so is a ban that shuts down the street corner altogether. It in effect disfavors those speakers who most need the street corner to reach the public and, in any event, reduces the overall quantity of public discussion, thereby impairing the public's capacity for self-determination. It was these concerns that moved the Court in *Schneider*, which, after all, involved bans on handbilling that were much like the Los Angeles ban on posting signs—general ones.

Justice Stevens's willingness to lower the standard of review is a disturbing departure from *Schneider* and the public forum cases of the civil rights era, but perhaps less so than how he applied the substantial interest test. At the very end of his opinion, he quoted the talismanic formula of *New York Times Co. v. Sullivan*, which spoke of the country's commitment to public debate that is "robust, uninhibited and wide-open."²⁶ Nowhere in his analysis, however, does the reader feel the pull of this commitment. Justice Stevens said that the interest in avoiding visual clutter is "substantial" or "significant" or "weighty," but he used these terms in a mechanical way, as though he were simply going through the motions. Indeed, if the interest in avoiding visual clutter is sufficient to justify a ban on speech, there is little that would not be. Certainly, any of

22. *Id.* at 804-05.

23. *Id.* at 804.

24. *Id.* at 806.

25. *Id.* at 807.

26. *Vincent*, 466 U.S. at 817, quoting 376 U.S. 254, 270 (1964).

the reasons typically given to silence the street corner speaker—to avoid traffic hazards, lessen pedestrian congestion, ensure free unimpeded access to stores, prevent breaches of the peace—would suffice. Even the desire to avoid litter, based, as it is, on both health and aesthetic considerations, would be sufficient to justify a ban on handbilling. Nothing, absolutely nothing, would be left to *Schneider* and its progeny.

Faced with this disturbing result, Stevens pursued two lines of argument which may be read as efforts to temper his position. The first suggests that the state had no alternative—the state could not further its interests in a way that would be significantly less threatening to First Amendment values. In the context of the weighing process of *Schneider*, this concern with alternative regulatory strategies enters into the judgment about whether the state's interest justifies the law in question. The presence of a less restrictive alternative (specifically, the statute making it a crime to litter) negated or undercut the claim that the ban on handbills was compelled by an interest in avoiding litter. In the categorical approach of the modern cases, the inquiry into "less restrictive alternatives" appears as an additional requirement. The state interest must be substantial (or in some instances, compelling) and the regulation must also be the least restrictive way of satisfying this interest.²⁷ This means that in order to uphold the Los Angeles ordinance, Stevens had to conclude not only that the avoidance of visual clutter was a substantial interest, but also that the ordinance Los Angeles adopted was the least restrictive way of furthering that objective.

Clearly, there were less restrictive alternatives in this case. As Justice Brennan pointed out in dissent, instead of banning all posted signs throughout Los Angeles, as the ordinance did, the city could have banned the posting of signs in some areas or it could have enacted measures to reduce the density of signs. Compared to a total ban, such measures may not have satisfied the city's aesthetic interest as fully or efficiently. *Schneider* indicated, however, that the least-restrictive-alternative test requires that some sacrifices be made for the sake of free speech.

Stevens avoided this conclusion, in part, by watering down the least-restrictive-alternative requirement of the modern cases. A regulation that impinges on speech will fall only if it is "substantially broader than necessary" to protect the state interest.²⁸ A regulation may not be the least restrictive alternative, but nonetheless will be allowed to stand if it is not "substantially" more restrictive than other strategies available to the state. The burden on the state to seek out the *least* restrictive alterna-

27. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

28. *Vincent*, 466 U.S. at 808.

tive is reduced. Density regulations of the type Brennan proposed may be less restrictive than a total ban, but, according to Stevens, the state will not be pressured to opt for them because they are not "substantially" less restrictive. Not every saving of speech is required, only substantial ones.

A similar disregard for the special importance of First Amendment values was manifested when, in the context of the least-restrictive-alternative inquiry, Justice Stevens went on to distinguish *Schneider* itself, on the ground that the antilittering statute imagined by Roberts would not have entailed an interference with speech, while the alternatives imagined by Brennan would have. He wrote:

[A]n antilittering statute could have addressed the substantive evil without prohibiting expressive activity. . . . Here, the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself.²⁹

In this passage, Stevens is accurately describing a difference between the two cases, but his effort to turn that difference into a limiting factor of *Schneider* is unpersuasive. Roberts's mention in *Schneider* of the antilittering statute was intended as an example, to indicate that there are less restrictive alternatives to the ban on handbilling involved in that case.³⁰ What should control is not the example, but the rule, which requires the Court to ask whether there were less restrictive alternatives than the one chosen by Los Angeles, as there indeed were. Even if Brennan's alternatives would have entailed some interference with speech, that interference would have been less than that produced by the total ban in force in Los Angeles.

A second strategy for softening or excusing the result in *Vincent* may be found in Stevens's claim that the speaker had adequate alternative channels of communication. Specifically, Stevens wrote, "nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellee's ability to communicate effectively is threatened by ever-increasing restrictions on expression."³¹ Trying to put an affirmative gloss on this statement, one might read Stevens as suggesting that when there are no alternative channels, the state interest must be compelling (even though the regulation in question is a general one), or that the state interest must be truly substantial, or that the Court would apply the least-restrictive-alternative test more rigorously. Under this interpretation, when there are no alternative channels, the loss to free speech is more

29. *Id.* at 810.

30. Note the word "amongst" in the passage quoted from *Schneider*, 308 U.S. at 162.

31. *Vincent*, 466 U.S. at 812.

egregious and there will be reason for the Court to be more scrupulous in its review of the state's action.

I find, however, little consolation in this part of Stevens's analysis in *Vincent*. Rather than asking whether posting signs on utility poles is a sensible and effective method of communicating with the public—which is all one could possibly say about handbilling—Stevens seems to place the burden on the speaker to demonstrate that the means of communication is “uniquely valuable.” Handbilling, or any other mode of communication, when taken by itself, cannot possibly meet this test. There are always alternatives, some better than others, but no single mode of communication is “uniquely valuable.” Roberts in *Schneider* respected the choice of the speaker concerning the means by which he or she would try to reach the public and then placed the burden on the state to justify interferences with that choice. As he put it, “One is not to have the exercise of his liberty of expression abridged on the plea that it may be exercised in some other place.”³² Justice Stevens, reflecting a fundamentally different orientation, seems prepared to put the burden of justification on the state only after the speaker has justified his or her choice of the means of communication, and has done so in some compelling way.

III

While the Court in *Vincent* subtly manipulated the weighted balancing test and its modern counterpart to produce a result fundamentally at odds with *Schneider*, it nominally adhered to a watered-down version of the test. The Court promised an intermediate measure of scrutiny, though, as we saw, that promise was thoroughly breached in the application. However, in *United States v. Kokinda*,³³ a 1990 decision, the revisionary process took a further turn, virtually repudiating *Schneider* and all that it represents. In an opinion by Justice O'Connor, a plurality of the justices openly abandoned any special review, by either weighted balancing or intermediate scrutiny, of a large class of regulations that restrict access to public property, including sidewalks. Justice Kennedy refused to join O'Connor's opinion. He insisted that some intermediate measure of scrutiny be applied, although, in the spirit of *Vincent*, upon which he relied, he found it satisfied. Brennan, Marshall and Blackmun dissented once again. This time they were joined by Stevens.

At issue in *Kokinda* was a regulation of the Postal Service prohibiting the solicitation of funds on its property. The regulation was applied to a group of volunteers for a political organization who had set up a table on the sidewalk near the entrance of a post office to solicit contributions,

32. *Schneider*, 308 U.S. at 163.

33. 110 S. Ct. 3115 (1990).

take orders for books and subscriptions to the organization's newspaper, and distribute literature addressing a variety of political issues.

The post office in question was a free standing building on a major highway in suburban Maryland. People drove to the post office, parked in the parking lot, and then walked from their cars to the post office on the sidewalk used by the political activists for their solicitations. The solicitors were subjected to criminal prosecution and appeared very much like the picketers in front of the Milwaukee meat market in *Schneider*. There was, however, one crucial difference: the sidewalk was owned and constructed by the Postal Service rather than the city.

The government defended its action on the ground that solicitations impede the normal flow of traffic in and out of the post office, thereby interfering with the much heralded program of the Postal Service to become more efficient. There were three responses to this argument. The dissenters, who spoke through Brennan, in one of his very last opinions, acknowledged the legitimacy of the government's interest in efficiency, but thought it was insufficient to justify the interference with speech. The dissenters were faithful to *Schneider*. A second response was set forth in Justice Kennedy's concurring opinion. He was prepared to uphold the prosecution on the theory that the interest of facilitating traffic flow qualifies as a "substantial," "significant," or "weighty" interest under *Vincent* (after all, almost anything can).³⁴

The third and most startling response was voiced by Justice O'Connor in the plurality opinion; that response represents the most resounding defeat for free speech. She too upheld the government's action, but, unlike Kennedy, she did not use the weighted balancing test or put the government under any form of special scrutiny, strict or intermediate. The government was required to have only a *legitimate* interest and, in this case, its interest in facilitating traffic flow amply satisfied that standard. O'Connor insisted that the state interest need not be "compelling," "significant," "substantial," or "weighty." It need only be permissible or legitimate. Early in her opinion she declared that the government action was to be "examined for reasonableness,"³⁵ and by that she meant only that the government's interest in clearing the sidewalk must be a legitimate or permissible one.

An extended discussion in her opinion about the specific speech activ-

34. *Id.* at 3126.

35. *Id.* at 3119-20. Later, Justice O'Connor took up the defendants' argument, based on standard doctrine, that banning solicitation was not the least restrictive means of furthering the Postal Service's interest in becoming more efficient. She immediately cut off such inquiries, however, by disavowing any form of the strict scrutiny or weighted balancing test: "Even if more narrowly tailored regulations could be promulgated, however, the Postal Service is required only to adopt *reasonable* regulations . . ." *Id.* at 3124.

ity involved—solicitation—suggests that Justice O'Connor may have distinguished *Schneider* and the case before her on the ground that solicitation is more disruptive of pedestrian traffic flow on the sidewalk than are other speech activities, such as handbilling.³⁶ I for one doubt the factual predicate of this distinction. It is true, of course, as Justice O'Connor noted, that the pedestrian must stop and think whether to give, but the same could be said of handbilling or even of delivering a speech—the pedestrian may have to stop and think whether to read or listen. But even conceding that solicitation is more disruptive than handbilling, that does not call for adjusting or lowering the standard of review, but only, as Justice Kennedy thought, for concluding that the higher or intermediate standard of review—requiring the state to have a substantial interest—is satisfied. The burden of Justice O'Connor's opinion consists of the disavowal of the weighted balancing test or any form of special scrutiny, and that ruling turned not on the specific form of the speech activity (solicitation), but rather on the structure of ownership of the underlying property—the sidewalk.

Justice Roberts's perspective on property was functional. He was not concerned with the question of title; in fact, the question of who owned the sidewalk played absolutely no role in his analysis in *Schneider*. Rather, he understood the need of the political activists to reach the public in order to advertise their meeting or present their views, and saw the distributions of handbills on the sidewalk as a perfectly sensible way of achieving that objective. The public used the sidewalk and the speech activity did not substantially or excessively interfere with the ordinary uses of the physical space in question. Speech was compatible with use.

This functional approach controlled for much of the post-war period, and largely accounted for the generous protection the Warren Court gave to public demonstrations and protests during the civil rights era. The justices were always sensitive to the degree of disruption that was being caused—the interest in order was weighed against the value of free and open debate—and sometimes the Justices were divided over how the balance was to be struck. There was, however, virtually no concern with title. Indeed, in 1968, the Court protected speech activity occurring on a privately-owned shopping center on the same terms as it had protected speech activity on state-owned property, such as streets and sidewalks.³⁷

36. This suggestion is reinforced by the position O'Connor subsequently took in *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701 (1992) and *Lee v. International Soc'y for Krishna Consciousness*, 112 S. Ct. 2709 (1992), where she supported a ban on solicitation in the New York area airports, but voted against a ban on airport leafletting. See 112 S. Ct. 2711, 2715 (O'Connor, J., concurring); *infra* notes 45 and 48. Justice Kennedy also divided his vote in this way, but, as in *Kokinda*, applied the intermediate standard of review. 112 S. Ct. 2711, 2724 (Kennedy, J., concurring).

37. *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968).

In the early 1970s, however, a newly constituted Court broke with this tradition, and began to make ownership the central question. Under the guise of implementing the state action requirement, the Court closed off private property, including shopping centers and malls, from speech activities.³⁸ Only government-owned property could be considered a public forum. In a sense, the state had to appear twice: as the agency demanding the silence and as the one enforcing that demand. The Court would begin the weighing process of *Schneider* or the multi-tiered scrutiny of the later cases only if it were shown that the speech-activity occurred on the property of the state.

At first blush, it would seem that speakers in *Kokinda* could easily accommodate this new doctrine because the sidewalk was constructed and owned by the Postal Service and the Postal Service may properly be considered a governmental institution. The Postal Service has near-monopoly powers, receives public revenues, and is endowed with many powers of the state. Technically, it operates as a public corporation, rather than as a governmental agency, but the members of its board are appointed by the President. Justice O'Connor did not deny the governmental status of the Postal Service, but chose a different strategy altogether: disaggregating the state. Almost as though she had fallen captive to the rhetoric of the privatization movement of the Reagan years, O'Connor insisted that in ejecting the political activists the government was acting only its "proprietary capacity," in much the same way as a private business or private landowner might. According to O'Connor, the Postal Service was trying to keep its sidewalk clear in order to facilitate access into a building where it offered various services and products for sale.

Crucial to O'Connor's analysis was a distinction among the various ways the state may act. To support such an approach she cited and quoted a decision of the early 1970s, *Lehman v. Shaker Heights*,³⁹ where the Court, in an opinion by Justice Blackmun, upheld a municipality's refusal to sell space on its buses for political advertisements. The Court in *Lehman* found that the government was acting in its "commercial capacity" and so was to be judged by a lesser First Amendment standard. To be sure, there is language in *Lehman* supporting the theory disaggregating the state, but the real source of that theory is Justice Rehnquist, who for the last twenty years has argued "that the role of government as sovereign is subject to more stringent limitations than is the role of gov-

38. *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd v. Tanner*, 407 U.S. 551 (1972). See generally *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (awarding racially discriminatory private club liquor license does not satisfy the Fourteenth Amendment's state action requirement).

39. 418 U.S. 298 (1974).

ernment as employer, property owner, or educator."⁴⁰

Originally, Justice Rehnquist propounded this theory in lonely dissent. In *Kokinda* his theory obtained the support of the middle of the Court—not just Scalia and himself, but also White and O'Connor. Then, just two years after *Kokinda*, immediately following the retirement of Brennan and Marshall, the theory disaggregating the state became majority doctrine.⁴¹ Brennan's replacement, David Souter, rejected the theory altogether, insisting that the Court should treat "as a public forum any piece of public property that is 'suitable for discourse' in its physical character, where expressive activity is 'compatible' with the use to which it has actually been put."⁴² However, Marshall's replacement, Clarence Thomas, joined the four justices who formed the *Kokinda* plurality, and a majority of five used the theory to uphold a ban on solicitation in the terminals of the three major airports in the New York metropolitan area.

The airports in question were owned and operated by a governmental agency (the Port Authority). "The terminals are," as Rehnquist, the author of the majority opinion, wrote, "generally accessible to the general public and contain various commercial establishments such as restaurants, snack stands, bars, newsstands, and stores of various types."⁴³ In a separate concurrence Justice O'Connor added, "In my view, the Port Authority is operating a shopping mall as well as an airport."⁴⁴ Nonetheless, a majority of five—Rehnquist, White, O'Connor, Scalia and Thomas—refused to subject the regulation of the Port Authority banning solicitation to strict scrutiny. By way of explanation, Chief Justice Rehnquist wrote, "Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subjected."⁴⁵

40. Board of Educ. v. Pico, 457 U.S. 853, 920 (1982) (Rehnquist, J., dissenting); see FCC v. League of Women Voters, 468 U.S. 364, 405 (1984) (Rehnquist, J., dissenting); First National Bank v. Bellotti, 435 U.S. 765, 823-25 (1978) (Rehnquist, J., dissenting). See also Regan v. Taxation with Representation 461 U.S. 540, 544 (1983); Rust v. Sullivan, 111 S.Ct. 1759 (1991).

41. International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701 (1992).

42. International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2711, 2724.

43. International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2704.

44. International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2711, 2713.

45. A majority of five justices applied the same lax standard of review to the leafletting regulation of the Port Authority, but only four—Rehnquist, White, Scalia and Thomas—found it satisfied. O'Connor broke from this group. While she found the lax standard satisfied in the case of the solicitation ban, she concluded that a companion ban on leafletting in the terminals "cannot be upheld as reasonable on this record." 112 S. Ct. at 2713. Justice O'Connor acknowledged the litter rationale of *Schneider* but characterized that only as a possible explanation for the regulation. *Id.* at 2714. She repeatedly emphasized, "Here, the Port Authority provided no independent reason for prohibiting leafletting and the record contains no information from which we can draw an inference that would support its ban." *Id.* Rehn-

In support of this proposition Rehnquist cited the plurality opinion in *Kokinda* (the circle is now complete). But he did not offer—in this case or any other—a principled defense of his theory disaggregating the state. Nor is one readily apparent. Of course, the state acts in manifold ways, but that does not mean it is any less the state when it acts in one way or another. Even when the state acts in the guise of an employer, property owner, or educator, it remains the instrumentality of the public and, for that very reason, is given special prerogatives and saddled with special duties, including those that emanate from the Constitution.

Rehnquist and O'Connor have made only the faintest concession to this point. In *Kokinda* itself, O'Connor declared that "[t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints."⁴⁶ The state must have some reason for its action and it cannot be an illegitimate or forbidden one. In Justice O'Connor's words, the law must not be "an effort to suppress expression merely because public officials oppose the speaker's view."⁴⁷

This concession echoes the special rules of the categorical approach that are applicable when the state engages in content regulation, but the plurality position in *Kokinda* remains troubling. Granted, the Postal Service is under a restraint not applicable to a purely private business, but the restraint is considerably reduced from that applied, for example, to Milwaukee in *Schneider* or even to Los Angeles in *Vincent*. The state need not find a compelling or substantial reason for its action, but only a good one. This difference in standard breaks with the line of decisions emanating from *Schneider*, and, because the state will rarely, if ever, need to defend its action in terms of the forbidden reason, in practice this standard is likely to leave First Amendment values most vulnerable. As long as the law under which the state clears the street corner is of general applicability, the state will be able to provide, as it did in *Schneider*, a non-speech related justification.⁴⁸ Silence can be easily enforced if the

quist and the other three found this position implausible; Rehnquist spoke of the problems of congestion and delay, and virtually invited the Port Authority to return to the Court on the basis of a more complete record. *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2709, 2710.

46. *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990).

47. *Id.* at 3121, (quoting *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983)).

48. The Port Authority case seems to be an exception to this generalization, for in that case Justice O'Connor, using the lax standard review of *Kokinda*, found the leafletting regulation unconstitutional. *See supra* note 45. Yet no other justice supported her position, nor is it clear whether it was based on a strategic failure of the Port Authority—a failure to give a good reason or build the record necessary for the Court to infer one—or whether Justice O'Connor is creating a new tier of scrutiny—lax-plus, lying somewhere between the lax and intermediate standards of review. Perhaps she is having some second thoughts about *Kokinda*, and is sug-

state is prepared to act (more or less) generally.

Viewed in these terms, *Kokinda* represents an especially destructive revision of *Schneider*, even more than *Vincent*. The case stands for the proposition that when the government demands silence on its property—the state acting in its proprietary capacity—that action will not be subject to the weighted balancing test or any other form of special scrutiny. The state need not establish a compelling reason, or even a substantial one; it need only produce a permissible reason. There are, however, two exceptions to the *Kokinda* rule. O'Connor promised to apply special scrutiny to the action of the government even when it is acting in its "proprietary capacity" if: (a) the government property has been "traditionally" open to the public for expressive activity or (b) the government property is "expressly dedicated" to speech activity.⁴⁹

Neither of these two exceptions was available in *Kokinda* itself. The government allowed solicitation on the sidewalk in the past, but reversed its policy a decade before the confrontation that was the subject of the case arose. Accordingly, O'Connor concluded that the sidewalk was not expressly dedicated to speech activity and thus the second exception did not apply. Moreover, although in the past this sidewalk had been open to the public for expressive activities, it had not always been. On the basis of this fact, O'Connor held that the requirements of the first exception—the one couched in terms of traditional practices—had been satisfied. Clearly, O'Connor was using an odd definition of the notion of "traditionally;" she interpreted it to mean "always."

The two limitations built onto the *Kokinda* rule seem to be a concession to precedent, or to the honored place the street corner (now understood literally) has held in First Amendment jurisprudence since the days of *Schneider* and another of Justice Roberts's opinions, *Hague v. CIO*.⁵⁰ It is difficult, however, to view the exceptions as rooted in a proper understanding of the Constitution. Why should the stringency of the First Amendment be made to vary according to the traditions of the community or the decision of the state expressly to dedicate its property for speech purposes? These exceptions tend to make the Constitution a mechanism either to codify tradition or to estop the state, but I tend to conceive of the Constitution in just the opposite way: as a limitation on the prerogatives of the state and as a basis for critically examining community traditions.

Aside from its theoretical adequacy, a question can also be raised about the pragmatic significance of these two exceptions to the *Kokinda*

gesting that though the reason for banning leafletting need not be compelling nor substantial it has to be a little better than permissible.

49. *Kokinda*, 110 S. Ct. at 3119.

50. 307 U.S. 496 (1939).

rule. The exceptions may keep the old and familiar street corner open, but they would leave unprotected all the new configurations of public space, for example, the new government plaza or, as more recently revealed, airport terminals, and thus make it more difficult for political activists to reach the public. These days there are fewer and fewer passersbys on the old familiar street corner; the streets of the city are empty. Granted, a significant portion of the public can be found in the new downtown mall, or in the suburban shopping centers, especially on a Saturday morning, but since these public arenas are privately owned, more so than the sidewalk of the Postal Service or the terminals of the Port Authority, the principle that lies at the heart of *Kokinda* puts these places beyond, far beyond, the reach of the First Amendment. What, then, is left of free speech?

IV

In cases like *Vincent* and *Kokinda* the Supreme Court has drawn back from *Schneider* and the decisions of the civil rights era that kept the street corner free and open. It has not, however, equivocated on its promise to guard against content regulation. The majority in *Vincent* required the state only to establish a "substantial" interest, and gave a weak reading to the requirement. Nonetheless, it indicated that it would require the interest to be "compelling" if the regulation discriminated on the basis of content among persons wanting to use the utility poles. A similar concern for content regulation was espoused in the plurality opinion in *Kokinda*. When acting in its "proprietary capacity," the government can defend its action by offering any reason for its action other than the desire to suppress the expression of an idea because "public officials oppose the speaker's view."

In addition, some recognition must be given to the fact that even during the Rehnquist era the rule against content regulation has produced some notable free speech victories. The flag-burning cases are perhaps the paramount examples.⁵¹ Moreover, the jurisdiction of the censor has remained limited when it comes to the traditional categories of content regulation, such as obscenity, libel, and subversive advocacy.⁵² A question can be raised, of course, about whether at this very moment this protection against content regulation is as generous as it once was, considering the retirements of Justices Brennan and Marshall, crucial as they were to the free speech victories of the 1970s and 1980s. Still, no

51. *United States v. Eichman*, 110 S. Ct. 2404 (1990); *Texas v. Johnson*, 491 U.S. 39 (1989).

52. See HARRY KALVEN, JR., A WORTHY TRADITION 3-298 (synthesis and celebration of the Warren Court legacy regarding content regulation).

matter how firm the protection against content regulation may be, and no matter how necessary, it is not sufficient. Protection against access regulations is as integral to a system of free expression as is protection against content regulations.

On several occasions the Supreme Court has declared that under the First Amendment there is no such thing as a false idea.⁵³ It is the sentiment encapsulated by this declaration that underlies the rule against content regulation and accounts for much of its appeal. No ideas should be excluded from public debate. Access regulations do not brand ideas as false, and thus they avoid this stricture, but nonetheless have a decisive effect upon the nature of public debate. Such regulations control the opportunities for speech and, by virtue of the fact that not all groups in society have the same speech opportunities, a curtailment of one opportunity—a street corner—may advantage one group over another.

Besides differentially advantaging speakers, access regulations also affect the character of public debate by controlling what the public hears or sees. The most determined citizen can, of course, actively pursue or learn of an idea wherever and however it is expressed—it only need be aired somewhere in society. It would be foolish, however, to take this model—of the citizen running after ideas—as the behavioral norm of our society or of any modern working democracy. A proper regard for democratic values requires easy access to all ideas, for without such exposure the public is not likely to know its options or the costs of the present arrangements under which it lives.

If a choice need be made between these two forms of protection—protection against access regulations and protection against content regulations—I am not clear how that choice is to be made. Conventional wisdom says we should prefer the rule against content regulation. I wonder, however, whether democratic values are indeed furthered by having bold and dramatic rules protecting flag burning or parodies such as those involved in the *Hustler* case, in which a minister confesses to a drunken sexual rendezvous with his mother in an outhouse,⁵⁴ while allowing the state to restrict the public's exposure to political discourse of the type involved in *Vincent* and *Kokinda*. Could it be that we have moved one step forward, but two steps back?

While judging the relative significance of these two forms of protection may pose a genuine dilemma for democratic theory, fortunately this need not be the Court's burden. There is no inconsistency—logical or otherwise—in generously providing both protections. Indeed, as reference to the civil rights era makes clear, history teaches that both kinds of protec-

53. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

54. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

tions are possible and stem from the same underlying commitment to the enrichment of public debate.

In cases like *Vincent* and *Kokinda* we see the erosion—no, the betrayal—of that very commitment. The present Court speaks of a national commitment to robust public debate, and repeatedly mouths the formula of *New York Times Co. v. Sullivan*, but, as in the media cases, is unprepared to give operative significance to these words. The Court tolerates the silencing hand of the policeman even though he cannot plead a special urgency in defense of his decision to clear the street corner. The present Court does not demand a compelling interest, sometimes it does not even require a substantial one, to justify this suppression of speech. The Court has lessened the standard of review, and in so doing has seriously compromised the values that lie, as Roberts recognized, “at the foundation of free government by free men.”