

2017

Cutting Through: Thirteen Ways of Looking at Justice Stevens

Abner Greene

Fordham University School of Law, agreene@law.fordham.edu

Follow this and additional works at: https://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Supreme Court of the United States Commons](#)

Recommended Citation

Abner Greene, *Cutting Through: Thirteen Ways of Looking at Justice Stevens*, 94 Wash. U. L. Rev. 1429 (2017)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/934

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

CUTTING THROUGH: THIRTEEN WAYS OF LOOKING AT JUSTICE STEVENS

ABNER S. GREENE*

1976. *YOUNG V. AMERICAN MINI-THEATRES, INC.*¹

Detroit imposes special zoning restrictions on adult movie theaters. “If the theater is used to present ‘material distinguished or characterized by an emphasis on matter depicting, describing or relating to “Specified Sexual Activities” or “Specified Anatomical Areas,”’ it is an adult establishment.”² This is broader than regulable obscenity, and clearly content-based. Can it be saved?

“The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech,” writes Justice Stevens for a plurality.³ He continues:

Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see “Specified Sexual Activities” exhibited in the theaters of our choice.⁴

True, no?

1978. *FCC V. PACIFICA FOUNDATION*⁵

George Carlin’s Filthy Words (or seven dirty words) routine was broadcast on the radio, and the FCC issued a declaratory order to be associated with the radio station’s file. The language was patently offensive and indecent and as such worthy of a demerit under federal law.

For a plurality, Justice Stevens again pulls no punches: “The order must . . . fall if, as *Pacifica* argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past

* Leonard F. Manning Professor, Fordham University School of Law. I clerked for Justice Stevens during the 1987 and 1988 Terms. Thanks to Greg Magarian for asking me to contribute to this issue honoring a great Justice, American, and mentor.

1. 427 U.S. 50 (1976).

2. *Id.* at 53.

3. *Id.* at 66.

4. *Id.* at 70.

5. 438 U.S. 726 (1978).

cases demonstrate, however, that no such absolute rule is mandated by the Constitution.”⁶ That much seemed clear; all of the low-value categories of speech allow regulation based on content (subject to what we might call categorical or definitional balancing tests). Since Carlin’s words did not fit within any recognized low-value category, the task for the Court was harder. Two factors led to the plurality’s conclusion that the administrative order was constitutional: “the broadcast media have established a uniquely pervasive presence in the lives of all Americans”;⁷ and “broadcasting is uniquely accessible to children, even those too young to read. Although Cohen’s written message [“Fuck the Draft”]⁸ might have been incomprehensible to a first grader, Pacifica’s broadcast could have enlarged a child’s vocabulary in an instant.”⁹

Despite contemporaneous and subsequent critique that this view played too fast and loose with established First Amendment doctrine, the *Pacifica* holding remains good law, and stands as an excellent example of Justice Stevens’ willingness to examine speech content, measure its value against its harm, and engage in a common law judge’s best trait, context-specific reasoning.

1982. *UNITED STATES V. LEE*¹⁰

For religious reasons, the Amish provide for their own elderly, and believe they should be exempt from the social security tax and benefits system. The Court majority declares, “The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”¹¹ The government interest in the social security system is high, and “it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.”¹²

Concurring in the judgment, Justice Stevens agrees that the Free Exercise Clause requires no exemption, but for a quite different reason. First of all: “The Court overstates the magnitude of this risk because the Amish claim applies only to a small religious community with an

6. *Id.* at 744.

7. *Id.* at 748.

8. *See* *Cohen v. California*, 403 U.S. 15 (1971).

9. 438 U.S. at 749.

10. 455 U.S. 252 (1982).

11. *Id.* at 257.

12. *Id.* at 259-60.

established welfare system of its own.”¹³ Strict scrutiny isn’t the right standard here, maintains Justice Stevens. He writes:

[A] standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) better explains most of this Court’s holdings than does the standard articulated by the Court today.¹⁴

He adds:

[T]he principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.¹⁵

Eight years later, in *Employment Division v. Smith*,¹⁶ Justice Stevens’ position becomes the official view of the Court regarding Free Exercise Clause exemptions.

1989. *TEXAS V. JOHNSON*¹⁷

The Court holds 5-4 that the state may not criminally prosecute Gregory Johnson for burning the American flag in public as an act of political protest. At least it may not do so under Texas’ “Desecration of a Venerated Object” statute, which focuses the jury’s attention on whether Johnson knew that his action would seriously offend one or more persons.

Justice Stevens—Lieutenant Commander, United States Navy; Bronze Star, codebreaking team—dissenting, would take this case out of standard Free Speech Clause doctrinal analysis:

The question is unique. In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately

13. *Id.* at 262.

14. *Id.* at 263 n.3.

15. *Id.* at 263 n.2.

16. 494 U.S. 872 (1990).

17. 491 U.S. 397 (1989).

promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.¹⁸

He doesn't have the votes here, nor in the next flag-burning case,¹⁹ but his willingness to take on established First Amendment doctrine is profound.

1992. *R.A.V. v. CITY OF ST. PAUL*²⁰

St. Paul, Minnesota, prohibits fighting words on the basis of race, color, creed, religion, or gender.²¹ A clearly racially-motivated cross-burning occurred, considered to come within the statute. The Court holds that the statute unconstitutionally discriminates on the basis of the subject matter of the fighting words in question. At a key moment in his majority opinion, Justice Scalia writes that the ordinance “does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable.”²²

Concurring in the judgment (he agreed with Justice White that the ordinance was overbroad, but disagreed with the majority that the limitation to race-based and other fighting words was unconstitutional), Justice Stevens, taking up an example offered by Justice Scalia in his “very reasons” discussion, explains:

Just as Congress may determine that threats against the President entail more severe consequences than other threats, so St. Paul's City Council may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats. This latter judgment—that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words—seems to me eminently reasonable and realistic.²³

18. *Id.* at 436.

19. *See* *United States v. Eichman*, 496 U.S. 310 (1990).

20. 505 U.S. 377 (1992).

21. As the courts interpreted the complex statute. *Id.* at 380 (internal citations omitted).

22. *Id.* at 393.

23. *Id.* at 424.

Similarly, says Justice Stevens, responding to another Scalia example, “Certainly a legislature that may determine that the risk of fraud is greater in the legal trade than in the medical trade may determine that the risk of injury or breach of peace created by race-based threats is greater than that created by other threats.”²⁴

Here Justice Stevens offers a kind of deference to the city in determining whether certain types of fighting words needed regulating more than other types. He refuses to adopt the suspicion of the majority opinion that the city council was up to no good in drawing the lines it did.

1996. 44 *LIQUORMART, INC. v. RHODE ISLAND*²⁵

The Court invalidates Rhode Island’s ban on truthful price advertising for alcoholic beverages. This turns out to be a pretty easy case; in several different opinions, the Justices agree that the state has various ways to suppress alcohol consumption short of limiting truthful speech.

For a plurality only, Justice Stevens explains that the “greater includes the lesser” manner of reasoning doesn’t work here. The state argued that its greater power to ban the sale of alcoholic beverages (under the Twenty-First Amendment) means that it also has the lesser power to permit such sale, but ban price advertising. Justice Stevens would have none of this:

Although we do not dispute the proposition that greater powers include lesser ones, we fail to see how that syllogism requires the conclusion that the State’s power to regulate commercial *activity* is “greater” than its power to ban truthful, nonmisleading commercial *speech*. . . . [W]e think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct. As a venerable proverb teaches, it may prove more injurious to prevent people from teaching others how to fish than to prevent fish from being sold. Similarly, a local ordinance banning bicycle lessons may curtail freedom far more than one that prohibits bicycle riding within city limits. In short, we reject the assumption that words are necessarily less vital to freedom than actions, or that logic somehow proves that the power to prohibit an activity is necessarily “greater” than the power to suppress speech about it.²⁶

24. *Id.* at 424–25.

25. 517 U.S. 484 (1996).

26. *Id.* at 511.

1997. *RENO V. ACLU*²⁷

Here's Justice Stevens, for the Court, leading off the opinion:

At issue is the constitutionality of two statutory provisions enacted to protect minors from "indecent" and "patently offensive" communications on the Internet. Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three-judge District Court that the statute abridges "the freedom of speech" protected by the First Amendment.²⁸

This is a complex case, the first in which the Court addresses sexual speech on the internet and potential harm to children. And even though the Court's awareness of the internet is still in its infancy, Justice Stevens sees the future:

[T]he Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.²⁹

And in the conclusion, Justice Stevens writes:

The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.³⁰

27. 521 U.S. 844 (1997).

28. *Id.* at 849.

29. *Id.* at 870.

30. *Id.* at 885.

2000. *CITY OF ERIE V. PAP'S A.M.*³¹

The city bans intentionally or knowingly appearing in public in a state of nudity. Both the preamble to the ordinance and other legislative history clearly reveal the purpose of the law is to eliminate nude dancing at strip clubs. Justice O'Connor's plurality deems this an *O'Brien*³² case, applying that case's test for incidental restrictions on expression, but instead of examining the law's general purpose (which is the norm for *O'Brien* analysis), she examines the purpose as-applied to nude dancing at strip clubs,³³ and upholds the law on the secondary effects rationale developed by Justice Stevens in *Young*.³⁴

In dissent, Justice Stevens challenges the core doctrinal moves in Justice O'Connor's opinion:

Far more important than the question whether nude dancing is entitled to the protection of the First Amendment are the dramatic changes in legal doctrine that the Court endorses today. Until now, the "secondary effects" of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interests may provide the basis for censorship.³⁵

The plurality cannot have its cake and eat it too—either Erie's ordinance was not aimed at speech and the plurality may attempt to justify the regulation under the incidental burdens test, or Erie has aimed its law at the secondary effects of speech, and the plurality can try to justify the law under that doctrine. But it cannot conflate the two with the expectation that Erie's interests aimed at secondary effects will be rendered unrelated to speech by virtue of this doctrinal polyglot.³⁶

31. 529 U.S. 277 (2000).

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

33. *Id.* at 289–90.

34. *Id.* at 294.

35. 529 U.S. at 317–18.

36. *Id.* at 326.

2000. *SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE*³⁷

The local public school board authorizes high school students to vote to designate students to deliver invocations at varsity football games. Under Court precedent, two issues are relevant: Is the state behind the push for prayer, or is this student initiated? If there is sufficient state action, are students psychologically coerced to participate in the relevant prayer activity?

After engaging in careful analysis of the history behind this particular practice, Justice Stevens (for a 6-3 majority) concludes, on question one: “The delivery of such a message—over the school’s public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as ‘private’ speech.”³⁸

And on the second question, here’s Justice Stevens:

The District . . . minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. . . . “[L]aw reaches past formalism.” To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is “formalistic in the extreme.”³⁹

It would have been easy enough for the Court to distinguish its precedent on prayer in elementary school classrooms, and for high school graduation, but that would have failed to recognize the legal relevance of the social facts regarding high school football games in many parts of the United States.

2000. *BOY SCOUTS V. DALE*⁴⁰

New Jersey law forbids places of public accommodation from discriminating on the basis of sexual orientation (*inter alia*). The state court deems the Boy Scouts covered by the law, and holds that the Scouts violated the law by dismissing an openly gay assistant scoutmaster because of his sexual orientation. The Supreme Court, 5-4, holds that this application of

37. 530 U.S. 290 (2000).

38. *Id.* at 310.

39. *Id.* at 311 (internal citations omitted).

40. 530 U.S. 640 (2000).

state law violates the Boy Scouts' First Amendment (unenumerated) right of expressive association. Key to the Court's holding is this: "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."⁴¹

This is a complex case; perhaps any kind of compelled membership in a noncommercial organization should constitute a presumptive violation of the freedom of association; whether we should call that intimate or expressive association, in settings such as the Boy Scouts, is a tricky question. The Court treats this as an expressive (not intimate) association case; and focuses not on the ways in which compelled membership might be thought to intrinsically risk affecting the organization's idea and identity formation, but rather on whether Dale's "presence" per state law would "send a message." On that, Justice Stevens has this to say, in dissent: "His participation sends no cognizable message to the Scouts or to the world. . . . Dale did not carry a banner or a sign; he did not distribute any fact sheet; and he expressed no intent to send any message."⁴² Justice Stevens adds:

It is . . . farfetched to assert that Dale's open declaration of his homosexuality, reported in a local newspaper, will effectively force BSA to send a message to anyone simply because it allows Dale to be an Assistant Scoutmaster. For an Olympic gold medal winner or a Wimbledon tennis champion, being 'openly gay' perhaps communicates a message—for example, that openness about one's sexual orientation is more virtuous than concealment; that a homosexual person can be a capable and virtuous person who should be judged like anyone else; and that homosexuality is not immoral—but it certainly does not follow that they necessarily send a message on behalf of the organizations that sponsor the activities in which they excel.⁴³

41. *Id.* at 653.

42. *Id.* at 694–95.

43. *Id.* at 697.

2005. *VAN ORDEN V. PERRY*⁴⁴

On the same day, the Court strikes down a Ten Commandments display on a Kentucky courthouse wall and upholds a Ten Commandments monument on Texas state capitol grounds. Justice Breyer is the swing vote. The state capitol grounds host 17 monuments and 21 historical markers, none challenged as violative of the Establishment Clause except the one in question here. The Ten Commandments monument displays the language of the commandments, some of which are explicitly religious or theistic.

For Justice Stevens, dissenting, this is an easy case. "In my judgment, at the very least, the Establishment Clause has created a strong presumption against the display of religious symbols on public property."⁴⁵ A public-private line is critical here (as it was in the Santa Fe case, where solely student-sponsored prayer would have been fine):

For those of us who learned to recite the King James version of the text long before we understood the meaning of some of its words, God's Commandments may seem like wise counsel. The question before this Court, however, is whether it is counsel that the State of Texas may proclaim without violating the Establishment Clause of the Constitution.⁴⁶

At least on these facts, the answer seems obvious:

Viewed on its face, Texas' display has no purported connection to God's role in the formation of Texas or the founding of our Nation; nor does it provide the reasonable observer with any basis to guess that it was erected to honor any individual or organization. The message transmitted by Texas' chosen display is quite plain: This State endorses the divine code of the "Judeo-Christian" God.⁴⁷

A different kind of setting, or a clearly private display, would have yielded a different result, even for Justice Stevens, an ardent anti-establishment Justice. But here he sees a Ten Commandments monument, with its clearly religious/theistic language, in a prominent state capitol grounds setting, not cured by the fact that other secular monuments and markers are also scattered throughout the grounds.

44. 545 U.S. 677 (2005).

45. *Id.* at 708.

46. *Id.*

47. *Id.* at 707.

2010. *CITIZENS UNITED V. FEC*⁴⁸

The Court, 5-4, strikes down federal restrictions on corporate independent expenditures in candidate elections.

Justice Stevens, dissenting, writes:

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.⁴⁹

At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.⁵⁰

In later writing,⁵¹ Justice Stevens argues for amending the Constitution to overturn *Citizens United*.

2010. *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*⁵²

Hastings Law School, a state school, officially recognizes and funds student groups only if they allow all students to be members and run for

48. 558 U.S. 310 (2010).

49. *Id.* at 394.

50. *Id.* at 479.

51. JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* (2014).

52. 561 U.S. 661 (2010).

leadership positions. The Christian Legal Society (CLS) can't abide by this for openly gay and lesbian students. So Hastings won't recognize or fund CLS. The Court holds the School's registered students organization (RSO) program a limited public forum, and its "all comers" policy viewpoint neutral and reasonable.

For Justice Stevens, concurring, the case is better seen through the government as educator/government speech lens than through the limited public forum lens. He writes:

Having exercised its discretion to establish an RSO program, a university must treat all participants evenhandedly. But the university need not remain neutral—indeed it could not remain neutral—in determining which goals the program will serve and which rules are best suited to facilitate those goals. These are not legal questions but policy questions; they are not for the Court but for the university to make.⁵³

He adds, "A free society must tolerate . . . groups [that discriminate on various grounds]. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities."⁵⁴

Surely this is the more accurate lens, is it not?

53. *Id.* at 702.

54. *Id.* at 703.