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The First Amendment in a Justice Rehnquist World

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ESSAY

THE FIRST AMENDMENT IN A JUSTICE REHNQUIST WORLD

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It is quite possible, at least in the philosophic sense, to believe thoroughly in the right of free speech, but to have a good deal of doubt about its usefulness.

William H. Rehnquist[1]

In February, 1997, a mysterious and fatal virus strikes four Supreme Court Justices. President Gingrich quickly nominates replacements to fill the unexpected vacancies. During their confirmation hearings, all four testify that they share Justice Rehnquist's views on the First Amendment. After the Senate confirms them, the four new Justices, along with Justice Rehnquist, begin aggressively rewriting first amendment law. The following is what the First Amendment might look like in this new Justice Rehnquist world.[2]

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1. *Civility and Freedom of Speech*, 49 Ind. L.J. 1, 2 (1973).

2. Some of the cases discussed in this Essay are imaginary and some are real. All of the imaginary decisions are, however, based on actual opinions Chief Justice Rehnquist has written or votes he has cast. Despite the tone of this Essay, I am not suggesting that all of these decisions are unreasonable interpretations of the First Amendment, although many are. Moreover, to be fair, Justice Rehnquist has, on occasion, ruled in favor of those asserting First Amendment rights. *See, e.g.*, Keller v. State Bar of Cal., 496 U.S. 1, 15-16 (1990) (writing for a unanimous Court, Justice Rehnquist held that state bars cannot use mandatory dues for political causes unrelated to regulating the legal profession); Hustler Magazine v. Falwell, 485 U.S. 46, 49-50 (1988) (writing for a unanimous Court, Justice Rehnquist held that a public figure could not recover for intentional infliction of emotional distress arising out of magazine parody without establishing malice as required by New York Times v. Sullivan, 376 U.S. 254 (1964)); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982) (Rehnquist, J. concurring) (holding boycotts are constitutionally protected under the first amendment). Nevertheless, as this Essay demonstrates, Justice Rehnquist has a uniquely (for a Supreme Court Justice) limited view of first amendment protections. *See, e.g., infra* notes 8, 11, 16, 22 (citing examples of Justice Rehnquist taking positions on first amendment issues not shared by anyone else on the Court).

THREE YEARS LATER

It is a cold December day in London, England. Sir Andrew Blake is a noted British law professor and civil rights advocate who prefers the free speech protections of the United States Constitution to England's common law legal system. Three years ago, Sir Andrew suffered a serious stroke after he began a book comparing the English and American notions of freedom of speech, freedom of the press, and freedom of religion. He is finally ready to complete the project, but upon returning to work, discovers an astonishing First Amendment development in the United States. It appears that two similarly situated political protesters were recently given quite different treatment by the United States Supreme Court. One political protester, upset about the Gingrich Administration's foreign policy, was arrested for burning the American flag during a peaceful demonstration. He was prosecuted pursuant to a state law prohibiting flag burning if the burner's intent is to cause offense to others.[3] The Supreme Court upheld his conviction on the basis that "one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people — whether it be murder, embezzlement, pollution, or flag burning."[4]

On the same day that the flag burner was arrested, another political protester, upset about his state's affirmative action policies, was arrested for burning a cross directly in front of several people of color. He was prosecuted under a state law that prohibits the use of symbols that "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."[5] The state supreme court interpreted this hate speech law to apply to only those symbols that amounted to "fighting words," which "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[6] The United

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3. This statute is similar to the Texas law struck down in Texas v. Johnson, 491 U.S. 397 (1989), which prohibited the "desecration" of the American flag in a way that "the actor knows will seriously offend one or more persons likely to observe or discover his action." *Id.* at 401 n.1.

4. *See* Texas v. Palmer, 646 U.S. 112 (1997) (quoting Justice Rehnquist's dissent in *Texas v. Johnson*, 491 U.S. at 435).

5. This statute is identical to the law struck down by the Supreme Court in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (Justice Rehnquist joined Justice Scalia's opinion). The defendant in *R.A.V.* burned a cross on a black family's lawn. *Id.* at 2541.

6. *See* Seaver v. Allstate, 432 All Rept. 2d. 234, 236 (1997) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

States Supreme Court reversed the defendant's conviction on the basis that the hate speech law, even as narrowly construed by the state supreme court, violated the First Amendment.[7] Sir Andrew quickly surmises that these two cases mean that states can legally outlaw the burning of an American flag in political protest, but they cannot prohibit the burning of a cross to demonstrate racial hatred.[8] In light of this development, Sir Andrew decides that in order to complete his book he ought to visit the United States to observe first hand what has occurred since he suffered his stroke three years ago.

Day I

Upon disembarking his jumbo jet at Allstate International Airport and walking through the crowded terminal to baggage claim, Sir Andrew notices that there are no political, religious or social groups distributing information in the Airport. Sir Andrew had heard that such groups frequently target American transportation centers, and he is somewhat surprised by this lack of activity in a busy airport. While waiting for his luggage, he opens his summary of Supreme Court cases and sees that the Supreme Court has held that airports are not public fora because they have not for "time out of mind been held in the public trust and used for the purposes of expressive activity."[9] Therefore, the Supreme Court subsequently held that even *complete* bans on the sale and distribution of litera-

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7. *See* Fingers v. Allstate, 631 U.S. 123 (1997). Justice Rehnquist, writing for the majority, relied on the Court's prior *R.A.V.* decision. *See R.A.V.*, 112 S. Ct. at 2541. In that decision, the Court held that if a state is going to prohibit fighting words, it must prohibit all fighting words and not a subset of fighting words involving race, color, creed, religion or gender. *Id.* at 2449-50. For a discussion comparing this holding to the holding in Texas v. Johnson, see *infra* note 8.

8. Justice Rehnquist is the *only* member of the Court who both voted to uphold the flag burning law and strike down the hate speech law on the specific basis that a state cannot prohibit race-based fighting words. *Johnson*, 491 U.S. at 421 (Rehnquist, C.J., dissenting); *R.A.V.*, 112 S. Ct. at 2541. The other three Justices who would have upheld the flag burning law, Justices White, Stevens, and O'Connor, would have also upheld the Minnesota hate speech law at issue in *R.A.V.* had it truly been limited to race-based fighting words likely to cause an immediate breach of the peace. *See R.A.V.*, 112 S. Ct. at 2550-60. They found, however, that the Minnesota Supreme Court had not really limited the statute to apply only to fighting words. *Id.* These three Justices, therefore, believe that states can prohibit *both* racially-based fighting words and the burning of the American flag with the intent to offend others. Therefore, although Justices White, O'Connor, and Stevens may have somewhat narrow views about the first amendment, they are nonetheless consistent. Justice Rehnquist, however, is the *only* member of the Court who believes that states can prohibit flag burning as a means of political protest, but cannot prohibit race-based fighting words. *Johnson*, 491 U.S. at 421 (Rehnquist, C.J., dissenting); *R.A.V.*, 112 S. Ct. at 2549-50.

9. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2706 (1992) (Justice Rehnquist wrote for the majority).

ture in airports do not violate the First Amendment.[10] Sir Andrew concludes that Allstate has probably enacted such a total ban.

After Sir Andrew collects his suitcase, he takes a taxi to his hotel, checks in, and decides to take a walk. His hotel is near Allstate Central Park and because it is such a beautiful warm day, he decides to buy a newspaper and read it in the park. He finds several newsracks and notices that the price of one newspaper, *The Allstate Times*, is fifty cents while the price of the other newspaper, *The Local Gazette*, is only thirty-five cents. Surprised by this discrepancy, he asks a passerby what accounts for the difference in price. Luckily the passerby, a member of the Allstate legislature, is equipped with the answer.

"Last year we passed a law that places a use tax on newsprint and ink but we exclude the first one hundred thousand dollars of ink and paper from any taxation. That means that only large newspapers have to pay the use tax."[11]

"Doesn't your First Amendment prohibit a tax on large newspapers but not small newspapers?" Sir Andrew asks.

"No sir, that used to be the law but the Supreme Court recently changed its view and held that a tax on only certain members of the press does not violate the First Amendment unless it is a 'deliberate and calculated device designed with an illicit purpose.'[12] Of course, we argued that we wanted to raise revenue without hurting the little guy. We didn't tax that rag the *Allstate Times* for any illicit purpose, at least not that the *Times* could prove in court."

Sir Andrew thanks the legislator for his time and information. The legislator responds by handing Sir Andrew his business card and encouraging him to call if he has any more questions during his stay in Allstate.

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10. *See* ACLU v. Kennedy Airport, 629 U.S. 421 (1998) (relying on Justice Rehnquist's dissenting opinion in Lee v. International Soc'y for Krishna, Inc., 112 S. Ct. 2709, 2710 (1992)). In *Lee*, the Supreme Court invalidated a total ban on leafletting at Kennedy, La Guardia, and Newark Airports. *Lee*, 112 S. Ct. at 2709.

11. An identical law was struck down by the Supreme Court in Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 575, 593 (1983). Justice Rehnquist was the *sole* dissenter to the holding that the exemption violated the first amendment because it treated large newspapers differently than small newspapers. *Id.* at 596 (Rehnquist, J., dissenting). Even Justice White, who consistently voted against special protections for the press under the first amendment, *see, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 369 (1974) (White, J., dissenting); Branzburg v. Hayes, 408 U.S. 665, 667 (1972), believed the tax scheme to be unconstitutional. *Minneapolis Star*, 460 U.S. at 593 (White, J., concurring in part & dissenting in part).

12. *See* New York Times v. Alabama, 639 U.S. 217 (1999) (citing Justice Rehnquist's dissent in *Minneapolis Star*, 460 U.S. at 603).

Sir Andrew purchases the *Local Gazette* and sits down on a park bench. While he is reading the paper, he notices an interesting story on page thirty-two. It appears that the new military leaders of the country of Tyranny have nationalized the country's newspapers and clamped down on all political dissent. In addition, according to the story, Tyranny just happens to have an embassy in Allstate. Because Sir Andrew believes in freedom of speech at all times and in all cultures, he decides to stage a one-person protest in front of Tyranny's embassy. He visits a stationary store and draws a large sign stating "Down with Tyranny! Allow Private Newspapers and the Freedom to Dissent." Pleased with his pun, he ascertains the location of the embassy and heads there feeling quite good about himself. "Nothing like a good political protest to make one's day," he always says.

When he arrives at the embassy, he stands on the sidewalk about 300 feet from the front door and holds up his sign. Five minutes later, however, a policeman approaches Sir Andrew and informs him that he is breaking a law prohibiting the display of any sign within 500 feet of an embassy that tends to bring the government occupying that embassy into "public odium or disrepute."[13] Sir Andrew says to the officer, "You mean I'm not allowed to protest in front of the embassy?" The policeman responds that such protests are illegal under the Allstate Embassy Protection Act and that he happens to know the Supreme Court recently upheld the law.[14] He also tells Sir Andrew that, because he is obviously a foreigner, he will cut him some slack and not arrest him if he agrees to leave the embassy immediately. Sir Andrew is tempted to fight on but decides that he will not be able to continue his First Amendment tour of the United States if he is sitting in jail or deported back to England. Accordingly, he agrees to leave the embassy and returns to his hotel to reconsider the events of his first day in the United States.

Day II

Having slept rather soundly through the night, Sir Andrew orders a room service breakfast and turns on the television to watch the

13. This law is identical to the law struck down by the Supreme Court in Boos v. Barry, 485 U.S. 312, 315, 329 (1988).

14. *See* Gulf War Veteran Soc'y v. Allstate, 644 U.S. 167 (1999) (relying on Justice Rehnquist's dissent in *Boos*, 485 U.S. at 338). Justice Rehnquist relied on Judge Bork's decision in the court of appeals. *Boos*, 485 U.S. at 338.

local news. After several uninteresting stories, he hears an item that takes his attention away from his breakfast. The newscaster reports that at 10:00 a.m. this morning the trial of a young man who was arrested for breach of the peace is scheduled to begin in the Allstate courthouse. What makes the trial noteworthy, according to the newscaster, is that the defendant was arrested for creating a disturbance while advocating that Jewish-Americans be deported to Israel. The main issue in the case is whether the protester was entitled to keep speaking after a police officer ordered him to stop for fear that the crowd would attack the speaker and cause a riot.[15] After hearing about the trial, Sir Andrew decides that he will begin his day by visiting the courthouse to observe how this fascinating First Amendment case will unfold.

Sir Andrew arrives at the courthouse at 9:15 a.m. to make sure that he can obtain a seat in the courtroom. Upon arriving there, however, he is told that at 8:00 that morning the judge granted the joint request of the defendant and the prosecutor to close the trial to the public. Sir Andrew asks the clerk how this can be and she responds that he might want to talk to the legal reporter for the *Allstate Times* who was in the courtroom when the judge issued her closure order. Sir Andrew calls the newspaper and asks to talk to the legal reporter. When she comes on the line, Sir Andrew explains who he is and asks about the reasons for and legality of the judge's closure order. The reporter explains that the government wanted the courtroom closed for fear that a courtroom disturbance would cause a mistrial, and the defendant wanted the courtroom closed because his attorney believed that the jury would be more sympathetic without a large crowd in the courtroom. Sir Andrew replies that the press and public must have some right to attend a trial of such important public interest. The reporter sighs, and informs Sir Andrew that at one time he would have been correct but now if the prosecutor and the defendant agree to close a trial, the judge can order the trial closed for that reason alone. Moreover, such an order is not

15. A similar issue was raised by Feiner v. New York, 340 U.S. 315, 316-17 (1951), and has generated much academic commentary. *See, e.g.*, Note, 80 HARV. L. REV. 1773, 1775 (1967) (arguing that a hostile audience should not be permitted to suppress a peaceful demonstration by using acts of violence which necessitate police intervention); Richard Stewart, *Public Speech and Public Order in Britain and the United States*, 13 VAND. L. REV. 625, 632-33 (1960) (discussing *Feiner* in detail); Walter Gellhorn, AMERICAN RIGHTS: THE CONSTITUTION IN ACTION 55-62 (1960) (discussing the problem that arises, such as in *Feiner*, when a speaker's words have actually aroused the hostility of his audience, creating the possible danger of public disorder).

subject to judicial review, regardless of the press's or the public's desire to attend the trial.[16] Sir Andrew politely thanks the reporter for her help, hangs up the phone, and heads to the courtroom cafeteria for a cup of coffee and a moment of reflection to ponder this surprising disruption of his planned morning activity.

Frustrated by his exclusion from the trial, Sir Andrew decides to call his niece who lives in the neighboring town of Robertsonville, about 40 miles away. She is a teacher in a private Catholic high school there and suggests that Sir Andrew rent a car and meet her at the school around 1:00 p.m. After she gives him directions, Sir Andrew finishes his coffee and returns to his hotel to inquire about renting a car.

Sir Andrew arrives at the school promptly at 1:00 p.m., and is greeted by his niece with a warm hug. She asks him if he wants a tour of the school, and he responds affirmatively. They enter the school, and Sir Andrew's niece shows him into a room containing numerous state of the art computer systems designed to assist students preparing for college. As they are about to leave the room, Sir Andrew notices the following plaque to the right of the door:

> THIS COMPUTER ROOM WAS MADE POSSIBLE BY A GRANT FROM THE ROBERTSONVILLE GENERAL ASSEMBLY.

Surprised, Sir Andrew says to his niece, "I thought that the United States Constitution's First Amendment prohibits direct gov-

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16. *See* Wall St. J. v. Allstate Sup. Ct., 655 U.S. 567 (1998) (relying on Justice Rehnquist's *sole* dissent in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604 (1980) (Rehnquist, J., dissenting)). In that dissent, Justice Rehnquist asked whether there is "any provision in the Constitution" that requires a trial court to open its proceedings to the press and public. *Richmond*, 448 U.S. at 606 (Rehnquist, J., dissenting). His answer was that he was "unable to find any such prohibition," when both the defendant and the state consent to a closure order. *Id.* This type of rhetoric, reading the First Amendment out of the Constitution, is characteristic of Justice Rehnquist's First Amendment decisions. *See, e.g.*, Posadas De Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 346 (1986) (upholding a Puerto Rican regulation prohibiting certain kinds of casino advertising directed at residents of Puerto Rico but not tourists). In *Posadas*, Justice Rehnquist wrote, "[i]t would . . . be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising. . ." *Id.* Justice Brennan responded in dissent that a doctrine prohibiting the states from restricting speech was not "strange" at all but "called the First Amendment." *Id.* at 354-55 n.4 (Brennan, J., dissenting); *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting) (writing in a *sole* dissent that would uphold a state law prohibiting pharmacists from advertising prices of prescription drugs, a law the Court invalidated under the first amendment, Justice Rehnquist said, "there is certainly nothing in the United States Constitution which requires the Virginia legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.").

ernment support for religious schools."

"Oh no," she responds. "We receive almost all of our secular books, equipment and materials from the state. In addition, public school teachers help us out with our secular subjects like math and science. The state is a big help and without the state aid for our secular education we would have a much harder time conducting many of our religious programs."[17]

After his niece shows him around the school, Sir Andrew asks her if there are any public schools nearby. He thinks it might be interesting to compare the two schools. She responds that the Robertsonville High School is only two miles away and since she has arranged to take the afternoon off, she can accompany him on his visit.

They arrive at the school around 2:30 p.m. and head to the principal's office to ask permission to look around, which the principal grants. The school is old, dirty, and in much worse condition than his niece's private school. Sir Andrew suggests that they visit a class and they enter a classroom at 2:45 to hear the teacher summarizing the lesson for that class. At 2:55, the teacher says, "As we leave school today, let us spend a minute in silent prayer and thank the good Lord for all that he has bestowed upon us." All the students in the class bow their heads except for two boys in the back of the room. Sir Andrew remarks to his niece that he thought that teacher-led prayer was prohibited in American public schools. She whispers that it used to be but in a recent landmark decision the Supreme Court held that such prayer was permissible as long as the students have the choice of not praying with the rest of the class.[18]

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17. This kind of aid to parochial schools was upheld by the Supreme Court in Ollie North Elementary Sch. v. Missouri, 657 U.S. 432 (1997), in which a majority of the Court embraced Justice Rehnquist's discussion of the history and purposes of the establishment clause in Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting). In that dissent, Justice Rehnquist argued that the establishment clause should be interpreted to "prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. [It does not require] the government to be strictly neutral between religion and irreligion." *Wallace*, 472 U.S. at 113. Pursuant to this rationale, secular aid provided to parochial schools, no matter how great the aid and no matter how much such aid actually furthers the religious mission of the schools, easily passes constitutional muster. In fact, Justice Rehnquist has consistently voted to approve extensive aid to parochial schools. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 420-21 (1985) (Rehnquist, J., dissenting) (noting that public school teachers may provide teaching services in parochial school classrooms) (relying on his dissent in *Wallace*, 472 U.S. at 91); Meek v. Pittenger, 421 U.S. 349, 387 (1975) (Rehnquist, J., concurring in part & dissenting in part) (arguing that equipment and materials can be constitutionally provided to parochial schools).

18. *See* Falwell v. Georgia, 634 U.S. 345 (1997) (relying on Justice Rehnquist's dissent in

As Sir Andrew and his niece leave the school, she invites him to spend the afternoon with her. Sir Andrew declines, however, because he has developed a painful migraine headache. He tells his niece that he needs to return to his hotel to take some medicine that will hopefully alleviate his discomfort.

As Sir Andrew is driving on the freeway back to his hotel, he notices that the Allstate license plates carry the slogan, "Choose Life, not Death, Support the Unborn," in small letters on the bottom of each plate. This surprises him so he picks up the car phone that came with his rental car and calls the state legislator whom he met yesterday morning in the park.

"Walter, this is Sir Andrew. Say, I have a question for you. I am driving on the motorway, and I have noticed that all of the Allstate cars have license plates supporting one side of your country's abortion debate. Is the slogan mandatory or can someone order a license plate without the slogan or cover it up?"

"Good to hear from you, Andrew," Walter says, "You know that slogan created quite a stir because some of our citizens did not want it on their plates. The law says it is mandatory so the hotheads sued us. The case went all the way to the Supreme Court but we won.[19] Personally, I never saw what the fuss was about."

"Thank you Walter," Sir Andrew says, "hopefully, I won't have to bother you again." Sir Andrew hangs up the phone and, his headache getting worse, begins concentrating more fully on his driving and the road back to his hotel. He arrives around 5:00 p.m., orders a room service dinner, and decides to begin a journal summarizing his First Amendment adventures in America. Over dinner, Sir Andrew realizes that his book comparing the two countries needs to be revised significantly.

Wallace, 472 U.S. at 91). In *Wallace*, Justice Rehnquist said that nothing in the establishment clause prohibits the state from endorsing prayer in the public schools. *Wallace*, 472 U.S. at 113-114 (Rehnquist, J., dissenting); *see also* Lee v. Weisman, 112 S. Ct. 2649, 2678 (1992) (joining Justice Scalia's dissent arguing that prayer at public school graduation ceremony does not violate the first amendment).

19. *See* National Org. for Women v. Allstate, 658 U.S. 324 (1999) (relying on Justice Rehnquist's dissent in Wooley v. Maynard, 430 U.S. 705, 719-22 (1977) (Rehnquist, J., dissenting)). In *Wooley*, the Court held that New Hampshire violated the first amendment rights of Jehovah's Witnesses by requiring them (and all other residents of New Hampshire) to have license plates inscribed with the motto "live free or die." *Wooley*, 430 U.S. at 717. Justice Rehnquist would have upheld the New Hampshire law on the grounds that there is no affirmation of belief involved when a State requires its citizens to carry political messages on their license plates. *Id.* at 722 (Rehnquist, J., dissenting).

After dinner, Sir Andrew feels much better and decides to attend a theatrical production for his evening entertainment. He calls the concierge and is delighted to learn that a revival of the musical "Hair," is playing at the Allstate municipal theater. The sixties being Sir Andrew's favorite decade, he arranges for a ticket and arrives at the theater at 8:00 p.m. The cast is strong, the production lively, and, of course, toward the end of the show, the nudity is frontal and complete. Sir Andrew leaves the theater his spirits soaring.

As Sir Andrew walks back to his hotel, he decides to take a detour and finds himself in a dark and seedy part of town full of abandoned and boarded-up buildings. He quickens his pace, takes a few turns, and ends up back on the well-lit avenue leading to his hotel. When he arrives at the lobby, Sir Andrew asks the concierge about all of the abandoned buildings. The concierge responds that they used to be strip clubs before Allstate outlawed nude dancing in bars. Sir Andrew thanks the concierge again for the tickets and retires to his room.

While performing his evening rituals, Sir Andrew reflects on the night's events. The play "Hair," with its nude scene, is obviously allowed by state authorities, but nude night club dancing is not permitted. This seems intuitively inconsistent to Sir Andrew, but it also rings a bell. He once again consults his summary of Supreme Court cases, and there he finds what he has been looking for, *Barnes v. Glen Theater, Inc.*[20] In that case, Justice Rehnquist held that a state could ban nude dancing in bars even though the state's lawyers conceded that the state would permit nude dancing as part of plays and ballets.[21] Sir Andrew records the evening's events in his journal and decides to turn in for the night.

Day III

When he awakes, Sir Andrew decides to take a short walk before breakfast. Walking along Allstate's streets, he thinks about what he has seen during his first two days in the United States. Clearly, there is something very strange going on in a country allegedly committed to freedom of expression, freedom of the press, and freedom

20. 111 S. Ct. 2456 (1991).

21. *Id.* at 2473 (White, J., dissenting). For one commentator's analysis of *Barnes*, see Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 644 (1992) (describing Justice Rehnquist's decision in *Barnes* as "ambiguous" and "unelaborated").

of religion. As he turns a corner, however, he notices an envelope on the sidewalk. Inside the envelope are ten one hundred dollar bills. Elated by his find, he heads back to the hotel to have breakfast and to figure out what to do with the money.

Over his chipped beef on toast, Sir Andrew decides to donate the money to an American charitable organization. After finishing his breakfast, he returns to his room and looks up "Charitable Organizations" in the yellow pages. To his great surprise, there are none listed. Perplexed, he calls the local public library to ascertain how to find information on charitable groups. A chipper young man answers the phone and Sir Andrew says:

"Hello, I am visiting Allstate from a foreign country and I am interested in donating some money. Can you provide me some information relating to local charities?" The young man pauses and then responds in a low voice:

"Well, I would like to give you that information, but the sad fact is that there are no charities operating in Allstate anymore; although that is a situation the legislature is trying to change."

"That cannot be," Sir Andrew immediately replies. He then remembers the events of the last two days and says, "Permit me to rephrase that. Why are there no local charities?"

"Well, what happened was that the Allstate legislature decided to enact all kinds of restrictions on how charitable organizations can operate and solicit funds. For example, it passed a law prohibiting the solicitation of contributions by any charitable organization that spends more than twenty-five percent of its receipts on administrative expenses.[22] It also limited how such organizations can use professional fund raisers to help them ask for donations. For example, such fund raisers have to be licensed by the state, there is a maximum fee that fund raisers can charge charitable groups, and fund raisers have to disclose to potential donors significant and obtrusive information relating to their activities during the previous twelve months.[23] Several charities sued to challenge the laws but my under-

22. A similar law was struck down by the Supreme Court in Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980). The Court concluded that the state's interest in preventing fraud and public annoyance by charitable organizations could be furthered by measures less extreme than the administrative expenses cap. *Id.* at 637. The Court also stated that "our cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money." *Id.* at 633 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)). Justice Rehnquist was the *sole* dissenter. *Id.* at 639 (Rehnquist, J., dissenting).

23. All three restrictions were once struck down by the Supreme Court in Riley v. National

standing is that the Supreme Court upheld each of the regulations.[24] Anyway, because of those laws, local charities decided that they could not operate effectively in our state. I understand that the legislature may try to rectify the problem but you must be aware of the difficulties involved in trying to get them to admit they were wrong."

"Thank you for your help, young man. I hope your legislature acts quickly." Sir Andrew hangs up the phone and decides that he will hold on to the money and donate it to his favorite British charity.

Sir Andrew's agenda for the morning includes an appointment with a local public broadcasting television station. The station runs a program called "Crossroads," that is devoted to discussions about current trends in foreign countries. The host of the show wants to interview Sir Andrew on the differences between freedom of speech in America and freedom of speech in England. Sir Andrew arrives at the station at 10:00 a.m. He is shown to a dressing room where he is provided a cup of coffee and a list of rules regarding the format of the show. One of the rules states the following:

> This television station receives federal funds pursuant to the Public Television Funding Act of 1996. Pursuant to that Act, federal funds cannot be used to advocate the use of abortion as a method of family planning or the use of illegal drugs for recreational purposes. Accordingly, please prepare your remarks consistently with this federal law.

Sir Andrew stares with disbelief at this provision. Although he had no intention of talking about either topic, he is surprised by this restriction on what he can say. While he is pondering this problem, a well-dressed man walks into his dressing room and says:

"Hello, you must be Sir Andrew. My name is Thomas Winston and I am the host of 'Crossroads.' I see you have read our rules and regulations. We go on in thirty minutes. Do you have any questions?"

"I certainly do," responds Sir Andrew. "What is all this about not advocating abortions or the use of drugs?"

Winston looks at Sir Andrew somewhat pensively and says, "Oh yes, that. This law was passed several years ago because those idiots

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Fed'n of the Blind of N. C., Inc., 487 U.S. 781, 803 (1988). Justice Rehnquist dissented as to all three regulations. *Id.* at 804, 814 (Rehnquist, C.J., dissenting).

24. *See* UNICEF v. Allstate, 656 U.S. 234 (1997) (relying on Justice Rehnquist's dissents in *Schaumburg* and *Riley*).

in Washington didn't want taxpayer dollars going to fund topics they thought the public didn't like. They made a big stink over how the First Amendment might protect such programs, but not when the programs are aired over stations that receive federal funds. I think it is a ridiculous rule, but we cannot survive without the federal money so we have to follow it. So, please take this law into account during the show or our funding could be withdrawn."

Sir Andrew pauses, sizes up Thomas Winston, and then says, "Surely this law violates your First Amendment. The United States government cannot condition its financial grants on the recipients' promise not to discuss certain topics or express certain viewpoints."

"Well, I'm no lawyer but I do know that the Supreme Court has upheld this law.[25] This is how our lawyers explained this case to me. The government has no obligation to fund public television. Accordingly, when it does decide to do so, it may put restrictions on the use of that money. Here, the government decided that taxpayers did not want their tax dollars spent advocating abortions or illegal drugs. According to our lawyers, the Supreme Court held that the restriction against such shows simply furthered the purposes of the grant program and therefore did not violate any constitutional provision, including the First Amendment."[26]

Sir Andrew reflects on this answer. In light of the American government's involvement in so many of the daily affairs of the American people, an interpretation of the First Amendment that allows the government to tie its largesse to forfeiture of First Amendment freedoms is an extremely dangerous one. Therefore, being a man of principle, Sir Andrew decides that he cannot in good conscience agree to be on the show and, after apologizing to the host, he walks out of the television station disappointed that he couldn't appear on the show.

Sir Andrew decides to walk from the studio back to his hotel. On the way he notices a young man handing out leaflets in the street. Sir Andrew takes one of the leaflets which says:

A VOTE FOR VICK IS A VOTE AGAINST QUOTAS! ELECT VICK

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25. *See* Firing Line v. United States, 654 U.S. 432 (1997).

26. Justice Rehnquist has used this logic to uphold (or argue to uphold) both content-based and viewpoint based restrictions on speech in the context of governmental subsidies. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 203 (1991) (upholding HHS regulation prohibiting family planning organizations that receive federal funds from advocating abortions); FCC v. League of Women Voters, 468 U.S. 364, 402 (1984) (Rehnquist, J., dissenting) (dissenting from Court decision invalidating law prohibiting public television stations from editorializing).

> THOMAS FOR GOVERNOR AND HE WILL HELP YOU GET YOUR JOB BACK. ISN'T IT ABOUT TIME TO PUT HARD WORKING REAL AMERICANS BACK TO WORK? ON ELECTION DAY VOTE FOR VICK! [paid for by Friends for Vick].

Sir Andrew reads the leaflet with some fascination because he has a lunch date with an old friend who works for a group dedicated to furthering minority rights in Allstate. He looks forward to discussing this leaflet with his friend.

After Sir Andrew returns to his hotel room, he finds a message from his wife that he needs to return to London immediately. Accordingly, he makes a reservation on the next available flight, which leaves at 5:00 p.m., and packs his suitcase. He then heads downstairs to meet his friend for lunch at the hotel restaurant. After they order, Sir Andrew takes the leaflet from his pocket and shows it to his old friend. "Well Catherine, I trust your organization is fighting this Vick guy tooth and nail."

"Actually, Andrew, we are not allowed to fight or support specific candidates anymore. Allstate has a law that prohibits all corporations, and we are incorporated you know, from making any expenditure in connection with a state or local election. We are allowed to set up a segregated fund for that purpose, but that is costly and difficult."[27]

Sir Andrew drops his fork and says, "but you are a public interest organization. Surely, groups like yours are allowed to support candidates whose beliefs are consistent with the beliefs of your members."

"Unfortunately not," Catherine replies. "About three months ago the Supreme Court upheld the Allstate law on the grounds that the special characteristics of the corporate structure allow the state to regulate corporate speech even when it is political and even if the corporation is politically oriented and not-for-profit.[28] It is a terrible decision but I am afraid we are stuck with it."

Sir Andrew tells Catherine he is sorry but not surprised after what he has seen over the past three days. Sir Andrew then decides to change the subject and he and Catherine enjoy a merry lunch recounting fond memories of their days at Cambridge.

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27. This Allstate law is substantially similar to the federal law that the Supreme Court invalidated in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 263 (1986). Justice Rehnquist dissented. *Id.* at 266 (Rehnquist, C.J., dissenting).

28. *See* Citizens for a Safer Allstate v. Allstate, 688 U.S. 234 (1999) (relying on Justice Rehnquist's dissent in *FEC*, 479 U.S. at 266 (Rehnquist, C.J., dissenting)).

By the time lunch ends, it is almost 3:00 p.m. and Sir Andrew has to take a taxi to the airport. As his plane takes off, Sir Andrew reviews the events of the last three days. His trip began, of course, because the Supreme Court decided that a person who burned the American flag in political protest could be prosecuted under a flag burning law, but a person who burned a cross directly in front of several people of color could not be prosecuted under a law prohibiting race-based fighting words. He then learned that state-owned airports can constitutionally ban all leafletting; that the states can tax large newspapers differently than small newspapers; that states can ban political protests outside foreign embassies; that the public and the press have no right to attend trials of great public interest; that the states can finance religious schools and sponsor prayer in the public schools; that the states can mandate that their drivers carry political messages on their license plates; that the states can prohibit nude dancing in bars while allowing it in the local community theater; that the states can regulate charities out of existence; that the states can condition their financial grants to the arts on the grantee agreeing not to express certain viewpoints; and that states can severely impede the political speech of political organizations. After reviewing his journal, Sir Andrew closes his eyes and drifts off into a deep sleep where he has a nightmare about the Chief Justice of the United States Supreme Court presiding on the bench wearing nothing but a larger than life American flag.