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Hard Cases Make Good Judges

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I. INTRODUCTION

William H. Rehnquist became Chief Justice in 1986. Those of us old enough to recall the constitutional landscape before that time look back on a Court dominated by questions of equal protection, substantive due process, and free speech (as well as criminal procedure, recently spun off into a separate discipline). Cases involving federalism were virtually non-existent, and questions of separation of powers arose infrequently. Religion cases were few and far between; the Takings Clause was invisible. What a difference two decades make.

Some of the changes can be traced to Justice Rehnquist's earliest years on the bench, when he was often a lone dissenter. In those days, he sought three primary objectives: to tear down the wall between church and state, to un-handcuff the police, and to reinvigorate John Calhoun's views on state sovereignty. All three have largely been accomplished. But what has happened in the areas on which the pre-Rehnquist Court focused? Equal protection has gone in circles, with the Court last term reaffirming the thirty-year-old *Bakke*. Substantive due process has gone nowhere: The Court adheres to old precedent but seems reluctant to protect any new rights. And free speech? Once it became clear—no later than the mid-1970s—that outright government censorship of ideas was impermissible, free speech doctrine proliferated into increasingly arcane sub-areas as legislatures confronted multi-faceted and often insoluble problems, presenting the Court with complex and difficult decisions on the margins of free speech law.

Since the Rehnquist Court came into its own in 1994—what has been called the second Rehnquist Court[1]—the Court has not had a single pure political censorship case along the lines of *Brandenburg*, *Tinker*, or the communist cases of the 1950s. Nor has it touched its established obscenity doctrines or faced many questions about the First Amendment rights of schoolchildren, prisoners, protesters, or soldiers—the stuff of earlier Courts. Instead, this Court has ruled on a dizzying array of allegedly speech-infringing government activities, including regulation of cable TV and the

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[1] *See* Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003). In this article, I will focus on cases decided during this period.

Internet; attempts to make elections fairer and less dependent on money; advertising restrictions that do everything from limiting advertising to compelling contributions to advertising; punishing the disclosure of information obtained from wiretapping; and time-place-and-manner restrictions on speech from political solicitation to anti-abortion protests.

Given this breadth, it would be foolish to attempt a synthesis. Each of the topics has its own extensive scholarly literature, to which I have little of substance to add. Instead, I suggest that the Court's method of approaching these questions is exactly what one would expect under the circumstances: Having long since established first (and second and third) principles, a Court working out the mundane, detailed implications of those principles is likely to be a quintessentially pragmatist Court. The decision in each case is therefore likely to depend on context, and generalizations will be hard to find. But those same decisions are also more likely to be viable compromises that do not tend to reinforce cultural schisms.

In this Article, I will focus on three areas that illustrate this pragmatist approach: commercial speech and advertising, election regulations (other than campaign finance), and restrictions on pornography (that is, material that is sexually graphic but not legally obscene). I will argue that in each area, pragmatic considerations rather than grand principles often determine the outcome, producing some unpredictability but a just regime overall.

II. COMMERCIAL SPEECH AND ADVERTISING

A. Background

Since 1976, when the Supreme Court first held that commercial speech is constitutionally protected but subject to greater regulation than non-commercial speech,[2] it has struggled to define the boundaries of permissible regulation. Even though the Court adopted a four-part "test" four years later in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[3] the subsequent cases do not lend themselves to easy synthesis or obvious coherence. While the Court has invalidated the majority of commercial speech restrictions that have come before it, it has upheld a not-insignificant percentage. A number of the cases contain powerful dissents, and even when the Justices unanimously agree on the outcome they often cannot agree on the reasoning, leading to concurrences in the judgment only, multiple opinions with Justices signing on to different parts of different opinions, and cases with no majority opinion at all. I argue here that this state of affairs is both expected and untroubling, because commercial speech cases raise questions of practice rather than principle and are thus best resolved through balancing and contextual examination, rather than by

[2] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[3] 447 U.S. 557 (1980).

the application of the rigid tests one expects when answering questions that involve core First Amendment principles.

The beginning of modern commercial speech doctrine is found in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, in which the Court invalidated a Virginia statute that prohibited pharmacists from advertising the prices of prescription drugs. Justice Blackmun's majority opinion (from which only Justice Rehnquist dissented) explicitly rejected the state's argument that keeping price information away from consumers was justified in order to keep them from making poor decisions:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.[4]

The Court concluded: "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. . . . [W]e conclude that the answer to this [question] is in the negative."[5] The Court thus expanded constitutional protection to commercial speech, but limited its holding to truthful information that the state sought to suppress out of paternalistic concern about the uses to which the information might be put.

Difficulties arose almost immediately in applying this new partial protection. A year after *Virginia Board*, the Court easily invalidated restrictions on generic lawyer advertising that were prompted by the same paternalistic concerns.[6] But the next year, in *Ohralik v. Ohio State Bar Ass'n*,[7] the Court upheld sanctions imposed on a lawyer for soliciting business directly from two young women injured in a car accident, one of whom still lay in traction in a hospital. The Court found that the state's ban on this type of uninvited, in-person solicitation served numerous important state purposes, prophylactically guarding against harms that included overreaching by lawyers, infliction of emotional distress and invasion of the privacy of the solicited individual, undue lawyer influence on lay persons, and harm to the reputation of the legal profession as a whole. While paternalistic concern for the possible misuse of information by the recipient was not a sufficient justification for the suppression of commercial speech, the Court credited these other justifications although they probably would not have been sufficient to permit suppressing political or artistic speech.

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[4] *Va. State Bd.*, 425 U.S. at 770.

[5] *Id.* at 773.

[6] Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

[7] 436 U.S. 447 (1978).

The early commercial speech cases thus recognize that restricting commercial speech raises questions that differ in some respects from restrictions on more core speech, demanding a more fluid approach. Indeed, the Court specifically noted in *Virginia Board*, and repeated in *Ohralik*, that "[t]here are commonsense differences between [commercial] speech . . . and other varieties."[8] Context and "commonsense" matter here, as they rarely do when a popular or legislative majority is simply trying to censor speech it does not agree with or finds offensive. The Court confirmed the need for flexibility in evaluating restrictions on commercial speech when it adopted, in *Central Hudson*, what is essentially a test of intermediate scrutiny: As long as the speech concerns a lawful activity and is not misleading, it cannot be restricted unless it "directly advances" a "substantial" government interest and is "not more extensive than is necessary to serve that interest."[9] Each of the quoted requirements, of course, is subject to a vast range of interpretation and application in particular cases.

We should not be surprised, then, that the Rehnquist Court cases continue a pattern of careful attention to facts and context rather than reasoning from (contested) first principles. Since 1994, the Court has decided six cases involving restrictions on commercial speech, invalidating all but one. In addition to the flexibility of the *Central Hudson* test, two aspects of the cases suggest that all of the Justices are strongly committed to a pragmatist approach. First, the shifting coalitions of different Justices and the multiplicity of rationales and opinions—in stark contrast to the predictable five-to-four outcomes in the federalism cases, for example—suggest that individual Justices are honestly struggling with difficult issues rather than reaching predetermined conclusions. Second, an analysis of the opinions in each case illustrates the breadth of the contextual and pragmatic concerns considered by the Court.

B. Shifting Coalitions and Multiple Rationales

Three of the cases were unanimous in result, but none produced an opinion joined by all the Justices. One of the three, despite its unanimity, contained *no* majority opinion at all on the First Amendment question. In both *Rubin v. Coors Brewing Co.*[10] and *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*,[11] a unanimous Court invalidated a restriction on commercial speech. In each of these cases, however, one Justice disagreed with the majority's rationale and concurred in the judgment only—and, surprisingly, Justice Stevens, perhaps the Court's most liberal member, concurred in *Coors*, while Justice Thomas, one of the Court's most conservative members, concurred in *Greater New Orleans Broadcasting*.

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[8] *Va. State Bd.*, 425 U.S. at 771 n.24; *Ohralik*, 436 U.S. at 455–56 (quoting *id.*).

[9] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[10] 514 U.S. 476 (1995).

[11] 527 U.S. 173 (1999).

In *44 Liquormart, Inc. v. Rhode Island*,[12] decided between *Coors* and *Greater New Orleans Broadcasting*, all nine Justices agreed that Rhode Island's ban on liquor-price advertising was unconstitutional, but could not agree on a rationale; the case produced no majority opinion on the First Amendment question.[13]

In *Coors*, which struck down a federal ban on displaying alcohol content on beer labels, Justice Thomas's majority opinion applied the *Central Hudson* test and found that the ban did not directly advance the government's interest in preventing "strength wars," and was, moreover, more extensive than necessary. Justice Stevens, concurring in the judgment only, argued that the *Central Hudson* test was inappropriate, because the reasons for applying lesser scrutiny to restrictions on commercial speech were not relevant in the context of "an unadorned, accurate statement" of alcohol content on a beer label.[14] He pragmatically linked the justification for a separate commercial speech doctrine with the differences between commercial and other types of speech: "As a matter of common sense, any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead."[15] Since the label was accurate and informative, and had no potential to mislead, Justice Stevens suggested that the government had no more legitimate interest in suppressing the alcohol-content information than it would in suppressing political speech. The reliance on *Central Hudson* and the commercial speech doctrine merely "makes th[e] case appear more difficult than it is."[16]

A year after *Coors*, the Court in *44 Liquormart, Inc. v. Rhode Island*[17] unanimously invalidated Rhode Island's ban on advertising liquor prices. The case produced four separate opinions but no substantive majority opinion;[18] the lead opinion, by Justice Stevens, was joined by three *different* coalitions of Justices in each of its three First Amendment sections. Justices Kennedy and Ginsburg joined Stevens in a reiteration of his *Coors* concurrence, arguing that the *Central Hudson* test was inappropriate for legislation

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12 517 U.S. 484 (1996).

13 A majority did join the portion of the opinion rejecting the state's argument that the Twenty-First Amendment authorized the statute despite its infirmity under the First Amendment. *See id.* at 514–16.

14 *Coors*, 514 U.S. at 494 (Stevens, J., concurring in judgment). He had made the same argument in *Central Hudson* itself, concurring only in the judgment in that case as well. *See Cent. Hudson*, 447 U.S. at 579–83.

15 *Coors*, 514 U.S. at 494.

16 *Id.* at 493.

17 *44 Liquormart*, 517 U.S. 484.

18 As noted, Justice Stevens spoke for a majority on the Twenty-First Amendment issue. He also spoke for a majority in recounting the facts and the litigation history. *Id.* at 489–95. Even his bland historical review of the history of commercial speech regulation and precedent, however, did not command a majority. *Id.* at 495–500.

imposing a blanket ban on truthful, non-misleading commercial messages "for reasons unrelated to the preservation of a fair bargaining process" in a commercial transaction.[19] Those three Justices were joined by Justice Souter in concluding that in any case, the Rhode Island statute did not pass the *Central Hudson* test.[20] Finally, Justice Souter defected, but Justice Thomas added his vote to a section that would have overruled *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[21] which had applied *Central Hudson* quite leniently and had also suggested both that the state could prohibit advertising of any product it could ban outright, and that there was a "vice" exception to the protection for commercial speech.[22] Three Justices wrote separately, concurring only in the judgment: Justice Scalia questioned the validity of *Central Hudson* but suggested that the Court did not have the "wherewithal" to overrule it or to replace it;[23] Justice Thomas argued that *Central Hudson* should not apply when the state's asserted interest is "to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace";[24] and Justice O'Connor, joined by Chief Justice Rehnquist and Justices Souter and Breyer, would have simply invalidated the statute under *Central Hudson*.[25]

This configuration of Justices is astonishing in many ways. Justices Thomas and Stevens appear to have switched places, with Thomas backing away from the simple *Central Hudson* test he applied in *Coors*, and Stevens willing to use *both* the approach he used in his concurrence in *Coors and* the *Central Hudson* test. Indeed, it is difficult to understand why Justice Thomas did not join that part of Justice Stevens's opinion rejecting the *Central Hudson* test. That Thomas made common cause at all with Stevens and Ginsburg (as well as Kennedy), in an opinion opposed by the unlikely coalition of O'Connor, Rehnquist, Souter, and Breyer, is unusual in itself. Justice Scalia, he of the certain answers, seems at a loss to understand exactly why the Rhode Island statute is unconstitutional, although he agrees that it is. Despite the multiple opinions, the Court is unanimous in invalidating the statute. What can we conclude from this but that some restrictions on commercial speech raise extremely difficult theoretical questions but very easy practical ones?

By 1999, the Court had apparently given up on finding a theoretical rationale for its commercial speech doctrine. In *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*,[26] the Court unanimously struck down a

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[19] *Id.* at 501.

[20] *Id.* at 504–08.

[21] 478 U.S. 328 (1986).

[22] *44 Liquormart*, 517 U.S. at 508–14.

[23] *Id.* at 518 (Scalia, J., concurring).

[24] *Id.* (Thomas, J., concurring). Justice Thomas did join the non-First Amendment parts of Justice Stevens's opinion, as well as the section that would have overruled *Posadas*.

[25] *Id.* at 528 (O'Connor, J., concurring).

[26] 527 U.S. 173 (1999).

federal statute prohibiting private casino gambling advertising even in states that permitted private casino gambling. This time, Justice Stevens wrote for himself and seven other Justices. He acknowledged that there was both judicial and scholarly criticism of *Central Hudson*, but found that "there is no need to break new ground," because *Central Hudson* clearly invalidated the statute.[27] Theory be damned. Only Justice Thomas adhered to his earlier insistence that *Central Hudson* should not be used even when it produced the correct result.[28]

The Rehnquist Court has struck down two other restrictions on commercial speech, but neither case was unanimous. Both support the contention that the Justices are using pragmatist tools rather than high theory to grapple with complex and difficult questions. In *Thompson v. Western States Medical Center*[29] the Court invalidated a federal restriction on advertising "compounded drugs." Echoing *Greater New Orleans*, Justice O'Connor's majority opinion found "no need . . . to break new ground" and held the statute unconstitutional under *Central Hudson*.[30] Even Justice Thomas joined the majority opinion, noting in a concurrence that he still believed the *Central Hudson* test inappropriate but agreed with how the majority had applied it.[31] Four Justices dissented and would have upheld the statute under *Central Hudson*. But it was not the four whom the reader might have guessed after learning that O'Connor and Thomas were in the majority: Justice Breyer's dissenting opinion was joined by *Chief Justice Rehnquist*, Justice Stevens, and Justice Ginsburg (Justice Souter, usually in agreement with the three other liberals, joined the majority in invalidating the statute). Again, this odd line-up suggests that theory and first principles do not drive the results.

Finally, in *Lorillard Tobacco Co. v. Reilly*,[32] a fractured Court invalidated two different Massachusetts restrictions on tobacco advertising and upheld a third. At issue was a ban on outdoor advertising—including advertising inside the store which could be seen from outside—within 1000 feet of a school or playground; a requirement that point-of-sale advertising be placed at least five feet off the floor; and restrictions on sales practices including a ban on self-service sale of tobacco products.[33] The Court applied the *Central Hudson* test, noting again that there was no need to re-examine the test.[34] The Court focused on prongs three (does the restriction directly

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[27] *Id.* at 184.

[28] *Id.* at 197 (Thomas, J., concurring in judgment).

[29] 535 U.S. 357 (2002).

[30] *Id.* at 368.

[31] *Id.* at 377 (Thomas, J., concurring).

[32] 533 U.S. 525 (2001).

[33] The Court also ruled five to four that, as applied to cigarettes, the restrictions were pre-empted by federal law. Since federal law did not apply to cigars or smokeless tobacco products, the Court nevertheless had to consider the First Amendment challenge to the restrictions. *Id.* at 553.

[34] *Id.* at 554.

advance the state's interest) and four (is the restriction no more extensive than necessary). Justice O'Connor's majority opinion was joined by a shifting coalition, with every Justice joining at least one part.

Six Justices agreed that the 1000-foot limit satisfied prong three, while the remaining three thought it might fail that prong. All nine believed that the showing the state had made in support of the 1000-foot limit failed to satisfy prong four, but five of them voted to invalidate the restriction outright and the other four would have remanded to give the state a further opportunity to show why the restriction was necessary. All nine also agreed that the sales practice restrictions (no self-service) were constitutional, but split six to three on the rationale. And on the point-of-sale limits (height requirements for advertising), the Justices could not even agree on whether it was a restriction on speech or conduct. You can't tell the players without a scorecard:

	WHR	**JPS**	**SOC**	**AS**	**AK**	**DS**	**CT**	**RBG**	**SB**
1000-Foot Limit	meets prong 3; fails prong 4	meets prong 3; might fail prong 4: remand	meets prong 3; fails prong 4	might fail prong 3; fails prong 4	might fail prong 3; fails prong 4	meets prong 3: fails prong 4 but remand	fails prong 4; should apply strict scrutiny	meets prong 3; might fail prong 4: remand	meets prong 3: might fail prong 4: remand
Point-of-Sale Limits	fails prongs 3 & 4	not speech: valid	fails prongs 3 & 4	fails prongs 3 & 4	fails prongs 3 & 4	fails prongs 3 & 4	fails prongs 3 & 4	not speech: valid	not speech: valid
Sales Practices	meets *Central Hudson*: Valid	not speech: valid	meets *Central Hudson*: valid	meets *Central Hudson*: valid	meets *Central Hudson*: valid	meets *Central Hudson*: valid	meets *Central Hudson*: valid	not speech: valid	not speech: valid

It is hard to derive any grand principles from cases like this one.

The Rehnquist Court has also upheld one restriction on commercial speech, with a similar odd division of Justices. In *Florida Bar v. Went For It, Inc.*,[35] the Court upheld a state law prohibiting lawyers from sending targeted direct-mail solicitations to victims and their relatives for thirty days following an accident or disaster. Justice O'Connor authored the majority opinion, joined by the Chief Justice and Justices Scalia, Thomas, and Breyer, applying *Central Hudson*. Justice Kennedy's dissent, joined by Justices Stevens, Souter, and Ginsburg, also applied *Central Hudson*, but echoed Justice Stevens's reminders in *Coors* that when commercial speech involves "the suppression of information and knowledge" and "transcends

[35] 515 U.S. 618 (1995).

the financial self-interests of the speaker," the requirements of *Central Hudson* ought to be applied with "exacting care."[36] It is unusual enough to find Justice O'Connor joining a largely conservative coalition while Justice Kennedy joins a liberal one; Justice Breyer's agreement with the conservatives, upholding a restriction on speech, is even more unusual. Again, this should signal that we are not dealing with philosophical disagreement about the basic structure of the constitutional regime, but about the practical realities of different types of speech in different contexts.

In addition to the advertising-restriction cases, the Rehnquist Court has confronted two cases in which producers of agricultural products were required to contribute to a government-mandated advertising program. The Court held that *Central Hudson* does not apply in this context, and instead analyzed it as a question of compelled speech. In the first case, *Glickman v. Wileman Bros. & Elliott*,[37] the Court upheld the advertising program; in the second, *United States v. United Foods, Inc.*,[38] it found a First Amendment violation. Both cases had somewhat atypical configurations of Justices. In *Glickman*, Souter wrote a dissenting opinion joined by the Chief Justice and Justices Scalia and Thomas; in *United Foods*, Justices Stevens and Souter joined the largely conservative majority in invalidating the program, while Justices Breyer, Ginsburg, and O'Connor dissented. Again, a scorecard helps:

	WHR	**JPS**	**SOC**	**AS**	**AK**	**DS**	**CT**	**RBG**	**SB**
Glickman	invalid	valid	valid	invalid	valid	invalid	invalid	valid	valid
United Foods	invalid	invalid	valid	invalid	invalid	invalid	invalid	valid	valid

The fact that two Justices—Stevens and Kennedy—found the cases distinguishable despite their superficial similarity suggests that at least these two Justices are making fine practical distinctions, and the apolitical nature of the coalitions adds to the suspicion that this is a context in which practical concerns loom large.

The next section examines all of these cases in substantive detail to demonstrate that practical considerations rather than core principles indeed motivated many (or all) of the Justices.

C. Pragmatism in Action

It is all very well to point to coalitional oddities, shifting votes, and fractured cases to suggest that something different is going on in the com-

[36] *Id.* at 636–37 (Kennedy, J., dissenting).

[37] 521 U.S. 457 (1997).

[38] 533 U.S. 405 (2001).

mercial speech area than is driving the Rehnquist Court's other constitutional doctrines. To confirm that the Court is acting pragmatically, however, we need to look at the opinions themselves. When we do, we find that they are rife with careful attention to fact and context and short on sweeping statements of principle.

From the beginning, the Rehnquist Court has focused on "commonsense" considerations. Majority or dissenting opinions have quoted the *Virginia Board* statement on the "commonsense differences" between commercial and other types of speech in three of the cases.[39] In addition, both the majority and dissenting opinions in *Went For It* used the term "commonsense" to describe the analysis or conclusion they favored.[40] The dissent in *Went For It* further suggested that the majority's conclusion "makes little sense," but noted that "it is not first principles but their interpretation and application that have gone awry."[41] These references suggest that concrete, atheoretical concerns play a significant role in analyzing commercial speech restrictions.

These concrete practical concerns are apparent in the Court's use of empirical evidence and studies in several of the cases. In *Went For It*, for example, the Court distinguished earlier cases by relying heavily on a two year study by the Florida Bar, including hearings, surveys, and public commentary. The study, which the Court called "noteworthy for its breadth and detail,"[42] showed that the Florida public viewed post-accident direct-mail solicitations "as an intrusion on privacy that reflects poorly upon the [legal] profession."[43] In finding that the Florida statute permitted adequate alternative channels of communication—that is, did not restrict speech more broadly than necessary—the Court also relied on "empirical survey information suggesting that Floridians have little difficulty finding a lawyer when they need one."[44] The majority relied on similarly extensive empirical studies in *Lorillard* to conclude that limiting exposure to tobacco advertising directly advanced the state's interest in reducing underage use of cigars and smokeless tobacco products, thus satisfying the third prong of the *Central Hudson* test.[45] In *44 Liquormart*, the Court credited the district court findings of fact based on empirical studies of liquor consumption patterns, rejecting the appellate court's finding of "inherent merit" in the state's argument that competitive price advertising would lower prices and thus in-

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[39] *Glickman*, 521 U.S. at 480 (Souter, J., dissenting); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 498–99 (1996) (Stevens, J., plurality); Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995).

[40] *Went For It*, 515 U.S. at 634 (describing "commonsense conclusion" that alternative means of communication exist); *id.* at 643 (Kennedy, J., dissenting) (recommending a "commonsense" evaluation of less restrictive alternatives).

[41] *Id.* at 636 (Kennedy, J., dissenting).

[42] *Id.* at 627 (majority opinion).

[43] *Id.* at 626.

[44] *Id.* at 634.

[45] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556–61 (2001).

crease alcohol sales.[46] In *Coors*, the Court invalidated the statute in part because the government justified it only by reference to "various tidbits" of "anecdotal evidence and educated guesses."[47] And in *Western States Medical Center*, the majority criticized the dissent for relying on "one magazine article and one survey" to support "the questionable assumption" that doctors prescribe unnecessary medications at their patients' requests.[48]

Further evidence of a pragmatist approach is that the Court looks very carefully at the statute and its effects, drawing fine distinctions among different restrictions on speech rather than issuing bold policy proclamations. It has distinguished between "routine" and non-routine legal tasks,[49] between beer and malt liquor,[50] and between advertising targeted towards adults and towards children.[51] Both the majority and the dissent in *Lorillard* focused on effects, honing in on the size of the geographic area that would be off-limits to tobacco advertising under the Massachusetts 1000-foot rule; the Justices disagreed only about whether the case should be remanded to give the state an opportunity to show that the geographic effect was less extensive than it seemed.[52] The majority even noted that because "the impact of a restriction on speech will undoubtedly vary from place to place," the application of the fourth prong of the *Central Hudson* test "tends to be case specific."[53] In *Coors* and *Greater New Orleans Broadcasting*, the Court pointed in detail to inconsistencies within each statutory scheme to bolster its conclusion that the scheme did not advance the asserted governmental interest. This attention to detail and picayune attitude toward congressional statutes contrasts sharply with the sweeping hostility toward assaults on state sovereignty (where even extensive congressional factfinding will not save a statute),[54] as well as with the relatively laissez-faire approach toward

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[46] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 493–94 (1996); *see also id.* at 505–06 (noting that although "common sense supports the conclusion" that price advertising would lower prices, the evidence suggested that lower prices would not "significantly" raise the demand for alcohol). Thus, "common sense" cannot prevail in the face of contrary empirical evidence. Where there is no empirical evidence, the Court uses common sense in its assumptions: "While it is no doubt fair to assume that more advertising would have some impact on an overall demand for [a product], it is also reasonable to assume that much of that advertising would merely channel [consumers] to one [purveyor] rather than another." Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 189 (1999).

[47] Rubin v. Coors Brewing Co., 514 U.S. 476, 490 (1995).

[48] Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002).

[49] *Went For It*, 515 U.S. at 623.

[50] *Coors*, 514 U.S. at 491.

[51] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556–61, 564 (2001).

[52] *See id.* at 561–63; *id.* at 602–03 (Stevens, J., dissenting).

[53] *Id.* at 563.

[54] *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). The Court has more recently upheld congressional abrogation of state sovereign immunity grounded on equal or lesser factfinding, *see* Tennessee v. Lane, 124 S. Ct. 1978 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003), but those cases are a misapplication of earlier precedent. *See* Suzanna Sherry, *The Unmaking of a Precedent*, 2003 SUP. CT. REV. 231.

most federal commercial regulation (where even inroads on state judicial procedures will not invalidate a statute).[55] In keeping with the intermediate test of *Central Hudson*, the Court in the commercial speech area avoids both of these extremes, necessitating a careful examination in each case.

Finally, the chronological pattern of the cases shows the progression one might expect in a pragmatist, common-law-like regime of constitutional interpretation. After an initial pronouncement that commercial speech is entitled to somewhat limited protection, it took the Court four years of cases to solidify its early instincts into an identifiable test. (Indeed, one later case describes *Central Hudson* as "[taking] stock of [the] developing commercial speech jurisprudence."[56]) But even after the adoption of the *Central Hudson* test, individual Justices continued to object to the lack of connection between the test and the rationales for treating commercial speech differently.[57] Starting in 1999, however—nineteen years after *Central Hudson*—the four-part test had become comfortable enough, and had produced enough precedent, that all the Justices except Justice Thomas agreed that there was no need to rethink it.[58] Were the test more rigid, this agreement might signal a hardening or a move toward formalism; but with the flexible intermediate scrutiny—which does sometimes produce disagreements over results—it instead suggests a Court that is willing to stop fighting about terminology and instead look hard at what is actually at stake in each case.

D. Conclusions

What the previous analysis teaches us is that regulation of commercial speech raises genuinely difficult questions that cannot be answered by mechanical recourse to ideology, theory, or first principles. The Court recognizes "commonsense" differences between at least some commercial speech and other types of speech, and there are infinite ways in which legislatures might respond to the unique problems of commercial speech. Small differences matter greatly. Consider the distinctions between such statutes as one prohibiting fraudulent advertising, one requiring certain disclaimers, one

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[55] *See, e.g.*, Pierce County, Wash. v. Guillen, 537 U.S. 129 (2003). The Court has invalidated only two modern statutes under this lax analysis. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). In both cases, Congress was attempting to regulate an activity that could not be called "commercial" and that had no effect on the national economy not shared by every intrastate tort, crime, or family or educational policy. These cases thus do not indicate any tightening of the lenient standard applied to federal commercial regulation.

[56] 44 Liquormart Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (Stevens, J., principal opinion).

[57] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 491–92 (1995) (Stevens, J., concurring in judgment); *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in part and concurring in the judgment); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in the judgment).

[58] *See Greater New Orleans Broad.*, 527 U.S. 173; Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002); *Lorillard*, 533 U.S. 525.

requiring additional information to prevent misconceptions, one prohibiting price advertising, one prohibiting advertising aimed at a particularly captive or vulnerable audience, or one prohibiting advertising of a disfavored product (or a statute that combines aspects of several of these). Whether each of these hypothetical statutes is constitutional depends on a close examination of the statute, its purposes, and its context. Prohibiting advertising of alcohol on television programs distributed to schools is different from prohibiting such advertising on broadcast television between three and eight p.m., and both are different from prohibiting such advertising in newspapers (which are also read by many children, especially the young teenagers most likely to experiment with drinking). A Court that foolishly tried to lay down bright-line mechanical rules in this area would soon find itself either straying from its own rules—by overruling or distorting precedent—or reaching absurd results.[59] It is therefore laudable that the Court has, by and large, not attempted such a synthesis, but has rather approached each case in a pragmatist, common-law fashion, building up a body of guiding (but not rigidly constraining) precedent. The inevitable cost is that some decisions, or some Justices, reach a surprising or unpleasant result some of the time—but the losers in those cases, unlike liberal Democrats in the series of federalism cases and *Bush v. Gore*, do not feel as though the Court is steamrolling them.

III. REGULATING THE ELECTORAL PROCESS

Cases dealing with state regulation of the electoral process raise similarly varied and difficult questions. Leaving aside the thorny question of campaign finance,[60] the (second) Rehnquist Court has decided four cases in which those challenging state election laws argued that such laws infringed their rights under the First Amendment. Different coalitions of Justices upheld one state law and invalidated three. While neither the distribution of Justices nor the rhetoric of the decisions demonstrates the Court's pragmatism with the same clarity as do the commercial law cases, the election cases nevertheless provide some similar evidence. The Court upheld Minnesota's ban on "fusion" ballots, in which one candidate may be listed as the candidate for more than one party.[61] But it struck down Ohio's ban on anonymous campaign literature,[62] California's blanket primary (which allowed voters to select the party in whose primary they voted on an office-

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[59] For an example of the former, see *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *see also* Sherry, *supra* note 54.

[60] *See* Buckley v. Valeo, 424 U.S. 1 (1976) (establishing the core principles governing limits on campaign contributions and expenditures). The more recent campaign finance cases, including *McConnell v. FEC*, 540 U.S. 93 (2003), follow a pattern of pragmatic attention to context similar to that identified in the text. Because of the number and complexity of the cases, however, demonstrating the pattern is beyond the scope of this paper. (In other words, the proof does not fit in the margin.)

[61] Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).

[62] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

by-office basis, rather than choosing a single party for each primary),[63] and a Minnesota statute prohibiting judicial candidates from announcing their position on disputed legal or political issues.[64]

The Justices on the political wings of the Court were more predictably allied in these cases, although the center still vacillated and the outcomes did not seem politically motivated. Justice Scalia and Chief Justice Rehnquist voted together in all four cases, as did Justices Stevens and Ginsberg (whose votes were the exact converse of the first pair). But that does not explain why Scalia and Rehnquist thought the bans on anonymous campaign literature and fusion ballots were constitutional while the blanket primary and "announce clause" were unconstitutional, nor why Stevens and Ginsburg found the opposite. Other Justices varied in their assessments, but none voted the same way in all the cases ("C" means the Justice found the restriction constitutional; "U" means the Justice found it unconstitutional):

	WHR	JPS	SOC	AS	AK	DS	CT	RBG	SB
McIntyre: **ban on anonymous campaign literature**	C	U	U	C	U	U	U	U	U
Timmons: **ban on fusion ballots**	C	U	C	C	C	U	C	U	C
Jones: **blanket primary**	U	C	U	U	U	U	U	C	U
White: **judicial announce clause**	U	C	U	U	U	C	U	C	C

The variance in votes between the fusion-ballot ban and the blanket primary is particularly interesting, as both devices regulate political parties. Nonetheless, eight of the nine Justices found one valid and the other invalid, although they disagreed among themselves about which was which. Again, this suggests that context and fine distinctions matter more than high principles.

That intuition is confirmed by the opinions themselves. In *McIntyre*, for example, Justice Scalia's dissent notes that the case does not involve a "bedrock principle," but is rather "at the periphery of the First Amendment."[65] Justice Stevens, dissenting in *Timmons*, recognizes that the Court's election jurisprudence "reflects a certain tension," and thus "there is 'no litmus-paper test for separating those restrictions that are valid from

[63] Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).

[64] Republican Party of Minn. v. White, 536 U.S. 765 (2002).

[65] 514 U.S. at 378 (Scalia, J., dissenting).

those that are invidious.'"[66] Instead, Stevens notes, "hard judgments must be made."[67] The *Timmons* majority takes the same approach, suggesting that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms."[68] Scalia's opinion for the Court in *California Democratic Party v. Jones* similarly focuses on context and detail, noting that the determination of whether a particular statute serves a particular state interest "is not to be made in the abstract."[69] In several of the cases, the Justices engage in self-conscious "minimalism,"[70] explicitly declining to decide more than the particular narrow question raised by the case.[71]

McIntyre also provides powerful evidence that, in this area at least, an attempt to resolve cases by resort to a popular grand theory—originalism—is doomed to failure. Both Justice Thomas and Justice Scalia, in this 1994 case, still purport to adhere to an originalist approach. Justice Thomas indeed concurs in the judgment only, refusing to join the majority's prosaic analysis and instead invalidating the ban on anonymous campaign literature by showing that such literature has historically been thought valuable and protected. But Justice Scalia *also* claims to engage in a purely originalist analysis, and dissents because he reaches a conclusion opposite that of Justice Thomas: He does not believe that the historical evidence supports a finding that anonymity is protected by the First Amendment. While differences of opinion among Justices are common, in this area as in others, the alleged benefit of originalism (and other grand theories) is that it provides clear answers and thus reduces judicial discretion and disagreement. *McIntyre* belies that claim—and no Justice tries to use originalism in any of the later cases in this line.[72]

These are difficult cases. Is a prohibition on judicial candidates' announcing their positions necessary if judges are to maintain their crucial countermajoritarian role in American democracy? Does the ban on fusion ballots interfere with a party's internal workings any less than a blanket

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[66] 520 U.S. at 379 (Stevens, J., dissenting).

[67] *Id.*

[68] *Id.* at 359.

[69] Cal. Democratic Party v. Jones, 530 U.S. 567, 584 (2000).

[70] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

[71] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 353 (1995) ("We recognize that a State's enforcement interest might justify a more limited identification requirement . . . ."); *id.* at 358 (Ginsburg, J., concurring) (commenting that "[i]n for a calf is not always in for a cow," so other statutes might be upheld); *Timmons*, 520 U.S. at 383 (Souter, J., dissenting) (leaving open the possibility that a state could make a persuasive argument based on the need to preserve the two-party system); *Jones*, 530 U.S. at 577–78 n.8 (leaving open the possibility that open primary, unlike blanket primary, might be constitutional).

[72] For a similar argument about the use of originalism in *McIntyre* and other cases, see Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809 (1997).

primary? If anonymous campaign literature is permitted, will campaigns become rife with fraud? Judges who agree on core principles of free speech can still disagree on these questions. It is thus not surprising that even as the Justices disagree strongly with one another on these propositions, they eschew the sort of sweeping statements of principle that are so prevalent in the federalism cases and even in the cases involving the religion clauses. A judge's theoretical views on the value of free speech might determine his position on flag-burning—much as theoretical disagreements seem to drive the results in the federalism and religion cases—but they will not be of much use on the sorts of questions raised by these election cases. (And perhaps if the Justices paid more attention to contextual subtleties, and less to bright lines, provocative rhetoric, and meaningless incantations, the federalism and religion cases might be more persuasive as well.)

IV. PORNOGRAPHY

A. Introduction

The Rehnquist Court cases involving restrictions on speech that is sexual in nature but not obscene (including nudity and "indecency") are perhaps the most interesting because they straddle the line between principle and practice. For some Justices, restriction of pornography represents the same difficult practical questions raised by regulation of commercial speech or the electoral process: how to balance important governmental interests in protecting children or preventing crime against rights of expression. These Justices demand the same attention to context, empirical evidence, and factual differences between statutes. Other Justices, however, have a more visceral reaction to indecent speech, conceding on the one hand that it is protected under the Court's precedent but then refusing to engage in any but the most superficial analysis in evaluating government restrictions. For these latter Justices, it seems, the commitment to a pragmatist approach wavers in the face of a prior emotionally or politically driven commitment, and it shows in their opinions. Finally, some Justices recognize that emotional reactions to pornography are too likely to overcome good judgment and therefore demand adherence to a rigidly speech-protective test. Some Justices vacillate among these positions. The result is that the cases exhibit both a less consistent adherence to pragmatism and a more explicit discussion of the virtues of pragmatism.

In general, however, we can discern some of the same patterns in these cases that we see in the other cases I have discussed. Between 1994 and 2003, the Court has decided eight cases involving restrictions on pornography (defined here as speech that is sexual or "indecent" but not legally ob-

scene).[73] Like the commercial speech and electoral regulation cases, the outcomes vary widely. The Court invalidated three statutes and upheld three others. In one case it upheld one section of the statute and invalidated two sections. Finally, in one case it merely overturned a lower court ruling of unconstitutionality on one ground, explicitly leaving open the possibility that the statute might nevertheless violate the First Amendment for other reasons. And, as in the commercial speech context, the Court has had great difficulty agreeing on a rationale even where it agrees on a result: Four of the cases contain no majority opinion at all on the First Amendment question, and one produced a majority opinion on only one of the three issues in the case. In two others, although there was a majority opinion, at least one Justice concurred in the result only. Finally, some of the coalitions of Justices are nothing short of bizarre if one begins with the conventional wisdom on judicial politics and allegiances.

B. Overview of the Cases

The cases run the gamut of regulation of pornography. Two—*Denver Area Educational Telecommunications Consortium, Inc. v. FCC*[74] and *United States v. Playboy Entertainment Group, Inc.*[75]—involve federal attempts to limit pornography on cable television, with mixed results. Four raise questions about pornography and the Internet: *Reno v. American Civil Liberties Union* ("*ACLU I*"),[76] *Ashcroft v. Free Speech Coalition*,[77] *Ashcroft v. American Civil Liberties Union* ("*ACLU II*"),[78] and *United States v. American Library Ass'n*.[79] All four challenged federal statutes, and again, some restrictions were upheld and some were not. There is also one case on nude dancing[80] and one on adult bookstores;[81] in both cases the challenged local ordinance was upheld.

In *Denver* and *Playboy*, the Court dealt with successive congressional attempts to ensure that minors did not have access to pornography on cable television. The four Internet cases similarly considered a series of federal statutes attempting to keep children from viewing pornography on the

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[73] I am not considering *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994). That case involved the question whether a federal statute prohibiting the interstate transportation or distribution of child pornography contained a scienter requirement as to the age of the performer(s). Although the Court very briefly considered and rejected a First Amendment challenge to the statute, the case turned primarily on statutory interpretation. Because of the publication schedule for this article, I am also excluding cases decided during the 2003–2004 Term.

[74] 518 U.S. 727 (1996).

[75] 529 U.S. 803 (2000).

[76] 521 U.S. 844 (1997) (*ACLU I*).

[77] 535 U.S. 234 (2002).

[78] 535 U.S. 564 (2002) (*ACLU II*).

[79] 539 U.S. 194 (2003).

[80] Erie v. Pap's A.M., 529 U.S. 277 (2000).

[81] Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).

Internet. Precedent had already established that while adults are constitutionally entitled to view sexually explicit material unless it is legally obscene, the government may restrict children's access to non-obscene pornography. Indeed, protecting children from unsuitably pornographic material is a very strong (perhaps compelling) governmental interest. Since the government is also precluded from entirely limiting adults to viewing only that which is suitable for children, however, the issue in these six cases was the extent to which the challenged restrictions unnecessarily trammeled adult constitutional rights in order to protect children. A difficult enough issue when it comes to bookstores or mail delivery, that question becomes more technologically complex in the context of cable television—easily accessible to children, and often without adult supervision—and even more so in the context of the Internet, which has no unproblematic way to exclude particular individuals. Thus, the issue in all of the cable and Internet cases is paradigmatically pragmatic: Given a particular technology, what is the appropriate trade-off between children's welfare and adult constitutional rights?

Unsurprisingly, the Justices could not agree on the correct trade-off, nor did they reach the same outcome in each case. *Denver* upheld a section of the federal cable statute that *permitted* cable operators to refuse to carry "patently offensive" sexual programming on leased channels. But a different majority invalidated two other portions of the statute: a section *requiring* cable operators who chose to carry such programming to place it on a single channel and to block access to the channel absent a viewer's advance written request for the channel, and a section permitting operators to refuse to carry the offensive programming on *public access* channels.[82] Congress responded to *Denver* by requiring cable operators who chose to carry sexually-oriented programming either to "fully scramble or otherwise fully block" the channels on which such programming was the primary fare, or to time-segregate them by limiting their transmission to the hours between ten p.m. and six a.m.[83] In *Playboy*, a five to four majority invalidated the new restrictions.[84]

The Internet cases follow a similar elliptical pattern. The Court invalidated parts of the Communications Decency Act ("CDA")[85] in *ACLU I*, holding that Congress could not broadly prohibit all transmission (whether by Web site or by e-mail) of indecent but non-obscene material whenever a minor might have access to it, because that would unduly restrict adult ac-

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[82] Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 753 (1996) ("segregate and block" holding); *id.* at 760 (public access holding).

[83] *See* 47 U.S.C. § 561 (1994 & Supp. III) (scrambling requirement); Blocking of Indecent Sexually-Oriented Programming Channels, 61 Fed. Reg. 9648, 9650 (May 11, 1996) (codified at 47 C.F.R. § 76.227) (transmission timing restrictions).

[84] United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 827 (2000).

[85] 47 U.S.C. § 223 (Supp. 1997).

cess.[86] In response, Congress enacted the Child Online Protection Act ("COPA"),[87] which narrowed the reach of the restrictions to commercial Web sites that purvey material that (1) appeals to minors' prurient interests, (2) lacks socially redeeming value, and (3) is offensive under contemporary community standards. While a definitive ruling on the constitutionality of the statute is yet to come, a divided Court in *ACLU II* held that the mere use of the "community standards" criterion "[did] not, *by itself* render the statute substantially overbroad for purposes of the First Amendment."[88] Meanwhile, *Free Speech Coalition* invalidated a congressional attempt to ban "virtual" child pornography (that is, child pornography made without the participation of any child)[89] and *American Library Ass'n* upheld the conditioning of federal funds to libraries on the library's installation of an Internet filter to block pornographic sites.[90]

Finally, in *Pap's A.M.* the Court upheld a local ordinance that banned nude dancing, and in *Alameda Books* it upheld one that prohibited more than one adult entertainment establishment operating in the same building.[91] Both cases relied heavily on very similar precedent.

I will discuss how the Justices reached these various holdings in later sections. For now, it is important to note two things. First, most of these cases raise extremely difficult questions, at least in the context of the United States. In a society that is both as puritan and as prurient as we are, it is inevitable that we simultaneously want free access to pornography for adults and recoil in terror at the thought that children might see even fleeting sex or nudity. Striking the right balance between these two conflicting desires, especially in the context of ever-changing technology, is not going to be easy. As long as we are willing to tolerate neither limiting adult access to sexuality nor freely exposing children to it, navigating a constitutional path here raises challenges similar to those raised in the commercial speech and electoral contexts. What makes questions about pornography even more difficult is that American puritanism is not limited to protecting children: Because we view sexual activity and even nudity as something vaguely sordid, a part of the American psyche always leans toward restricting it even for adults. Moreover, for some citizens, this puritan distaste is overwhelming, thus leading to frequent legislative attempts to restrict pornography (or nudity) as much as possible, even when it comes to willing adults. All of these tensions play out in the cases.

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[86] Reno v. ACLU, 521 U.S. 844, 885 (1997) (*ACLU I*).

[87] 47 U.S.C. § 231 (1994 & Supp. V).

[88] Ashcroft v. ACLU, 535 U.S. 564, 585 (2002) (*ACLU II*).

[89] As the Court noted, such virtual child pornography could be produced in either of two ways: through the use of youthful-looking adult actors or through digital manipulation of innocent photographs of children. 535 U.S. 234, 239–40 (2000).

[90] United States v. Am. Library Ass'n, 539 U.S. 194, 211–13 (2003).

[91] Erie v. Pap's A.M., 529 U.S. 277 (2000); Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).

The second preliminary point is that given these complexities, it is hardly surprising that disputes exist about the correct judicial approach. Pragmatism seems an appropriate response for those who view the issue as accommodating both adult rights and children's needs. But those in whom puritanism is stronger are more likely to take either a categorical approach, deeming pornography of low value and therefore as entitled to minimal protection, or a superficial approach, purporting to pay attention to context but really just skimming the surface to reach a comfortable conclusion. Finally, even pragmatists (as well as others), if they recognize the American tendency toward puritanism, might lean toward a categorical approach that is highly protective of speech, essentially tying themselves (or legislatures) to the mast to avoid the temptations of overregulation. We can see all of these variations in the cases, as I discuss in the final section.

C. Shifting Coalitions and Multiple Rationales

As with commercial speech, our first clue that pornography jurisprudence is not about core principles is the peculiar, and shifting, alliances of the Justices and the frequent failure to agree on a rationale. As noted earlier, four of the cases—*Denver*, *ACLU II*, *American Library Ass'n*, and *Pap's A.M.*—produced no majority opinion on the First Amendment issue. In this section, I offer a brief survey of the different coalitions in these cases, the oddity of some of the coalitions in the other cases, and the patterns of each Justice's votes, to show that many of the disagreements are at a very concrete and practical level. In the next section, I highlight the deeper theoretical disagreements.

In *Denver*, Justice Breyer's opinion on *each* of the three challenged sections of the statute attracted a *different* coalition. Justices Stevens and Souter joined his entire opinion; Justices Kennedy and Ginsburg joined the portion invalidating the mandatory segregate-and-block provision and concurred in the judgment invalidating the public access provisions, dissenting from the portion that upheld the permissive refuse-to-carry provisions; Justice O'Connor joined in both upholding the permissive provisions and invalidating the segregate-and-block provisions, but dissented on the public access provisions; and Chief Justice Rehnquist and Justices Scalia and Thomas concurred only in the judgment upholding the permissive provisions, dissenting from both invalidations. *ACLU II*, an eight to one decision with only Stevens finding COPA unconstitutional on its face, yielded five different opinions, none of which commanded a majority. Thomas wrote for himself, the Chief Justice, and Scalia; O'Connor joined part of Thomas's opinion and wrote separately on some issues; and Breyer and Kennedy (joined by Souter and Ginsburg) each wrote separate concurrences in the judgment. Rehnquist wrote for himself and O'Connor, Scalia, and Thomas in *American Library Ass'n*; they were joined in the judgment by Kennedy and Breyer, who each wrote separately (and did not join each other's opinions). Finally, in *Pap's A.M.*, O'Connor wrote a plurality opin-

ion joined by Rehnquist, Kennedy, and Breyer; the additional necessary votes came from a separate Scalia opinion (joined by Thomas) concurring in the judgment only.

Even the cases in which there was a majority opinion contained some surprises. The oddest case was *Playboy*, which invalidated provisions requiring cable operators either to fully block or scramble the sexual programming (a technological impossibility, at least at the time) or to time-segregate it. Justice Kennedy wrote the majority opinion, which was joined by Justices Stevens, Souter, Ginsburg, *and Thomas*. The unsurprising dissent in which the Chief Justice and Justices O'Connor and Scalia joined was written by none other than *Justice Breyer*. It is highly unusual, if not unique, for Justice Thomas to join the liberals (plus the centrist Kennedy) while Justice Breyer dissents along with the remaining conservatives.

Finally, most of the Justices varied in their reactions to the speech restrictions. While Rehnquist and Scalia never met a restriction they did not like,[92] and Stevens never met one he did, the rest of the Justices voted in favor of some challenges and against others, as this chart illustrates:

	WHR	JPS	SOC	AS	AK	DS	CT	RBG	SB
Denver	C	mixed	mixed	C	U	mixed	C	U	mixed
Playboy	C	U	C	C	U	U	C	U	U
ACLU I	mixed	U	mixed	U	U	U	U	U	U
Free Speech Coalit'n	C	U	mixed	C	U	U	U	U	U
ACLU II	C	U	C	C	C	C	C	C	C
Amer Library	C	U	C	C	C	U	C	U	C
Pap's	C	U	C	C	C	U	C	U	C
Alameda Books	C	U	C	C	C	U	C	U	U

This romp through the votes—which probably makes readers' eyes glaze over—is suggestive enough of the thesis that the Justices are fighting about practicalities not principles. A deeper look at *ACLU II* illustrates the concrete and second-level nature of some of these disagreements. The court of appeals had invalidated COPA on the ground that its definition of restricted speech included a reference to "community standards," which the appeals court found to be unconstitutionally vague on its face. By an eight-to-one vote, the Court reversed, holding that the mere use of the phrase "community standards" (in conjunction with two other requirements mirroring the three-part test for obscenity) did not make the statute facially unconstitutional.[93] But the Justices could not agree on what guidance to give

[92] Almost. They each voted to invalidate all or part of the challenged CDA provisions in *ACLU I*.

[93] Ashcroft v. ACLU, 535 U.S. 564, 585 (2002) (*ACLU II*).

lower courts facing subsequent challenges. The differences centered on the possible geographic reach of the "community." Thomas's opinion for himself, Rehnquist, and Scalia suggested that the statute would withstand constitutional scrutiny even if it were interpreted to permit or require the application of *local* community standards.[94] The other Justices in the majority disagreed, but each for a different reason and with different consequences. O'Connor thought that the Constitution required the application of *national* standards,[95] and Breyer thought that the legislative history did so—but without expressing a view on the constitutional requirements except to say that his interpretation avoided a "serious First Amendment problem."[96] Kennedy, joined by Souter and Ginsburg, agreed not only that the Constitution requires the application of national standards, but suggested that potential local variations in the application of such a standard might ultimately make the statute unconstitutional if challenged as applied rather than on its face.

Similar fine distinctions divide the Justices in other cases. In addition to the section-by-section disagreements in *Denver*, there were partial dissents in several other cases. In *ACLU I*, O'Connor and Rehnquist disagreed with the majority in only one circumstance: They would have upheld the CDA's ban on the knowing transmission of indecent material to minors "as applied to a conversation involving only an adult and one or more minors."[97] This limited circumstance—in which, for example, "an adult speaker sends an e-mail knowing the addressee is a minor" or "an adult and minor converse by themselves or with other minors in a chat room"[98]—is likely to be rare, and thus represents a very small percentage of the transmissions that would be covered by the CDA. Similarly, in *Free Speech Coalition*, Justice O'Connor agreed with the majority that criminalizing apparent child-pornography produced by using youthful adult actors was unconstitutional, but thought that such pornography used by producing computer-altered images of real children (so that no children ever engaged in sexual or suggestive acts) could be banned. A somewhat different type of disagreement arose in *American Library Ass'n*, which upheld the filtering requirement. Justice Kennedy's concurrence rested solely on the ease with which librarians could unblock the blocked sites, and Justice Breyer voted to uphold the statute but refused to join the plurality opinion because he would have applied a different level of scrutiny. Like some of the commercial speech cases, then, *American Library Ass'n* seems to raise extremely difficult theoretical questions but very easy practical ones for many of the Justices.

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[94] *Id.* at 581.

[95] *Id.* at 586 (O'Connor, J., concurring in part and concurring in the judgment).

[96] *Id.* at 590 (Breyer, J., concurring in part and concurring in the judgment).

[97] 521 U.S 844, 892 (1997) (O'Connor, J., concurring in part and dissenting in part).

[98] *Id.*

One last aspect of the Internet cases in particular is notable, and suggests that the Court is engaged in a dialogue with Congress. With the Court's help, Congress seems to be learning from its mistakes. Its first attempt to regulate on-line pornography, the CDA, was invalidated in *ACLU I* by an overwhelming majority. Seven Justices voted to strike down the challenged portions in their entirety, and the remaining two would have invalidated most of them. In the next case, *Free Speech Coalition*, three Justices would have found the virtual-child-pornography statute entirely constitutional, and one would have upheld parts of it. And in the last two, *ACLU II* and *American Library Ass'n*, the Court upheld the challenged statute (or at least refused to find it facially unconstitutional). Moreover, *ACLU II* suggests a willingness to give Congress the benefit of the doubt as it struggles with difficult issues. Justice Kennedy's concurrence notes:

> Congress and the President were aware of our decision [in *ACLU I*], and we should assume that in seeking to comply with it they have given careful consideration to the constitutionality of the new enactment. For these reasons, even if this facial challenge appears to have considerable merit, the Judiciary must proceed with caution and identify overbreadth with care before invalidating the Act.[99]

This pattern suggests that the Court and the Congress are working together to sort out the necessary accommodations between shielding children and protecting adult constitutional rights. It is in stark contrast to federalism, in which the Court seems intent on using its abstract theory of federalism to strike at Congress repeatedly and indiscriminately.

Thus, the pornography cases illustrate all the ways in which a pragmatist approach to judging can manifest itself. There are cases in which Justices can agree on results but not rationales and cases in which they refuse to sign on to opinions because of the smallest of practical disagreements. Justices appear to vary their views freely depending on the particulars of the statute and thus form shifting and unusual alliances. And the Court and Congress both seem to approach these questions as difficult practical ones rather than high political ones.

There is, however, one way in which the pornography cases are quite different from the electoral and commercial speech cases. Because of the newness of the technology and the tendency toward puritanism, there may sometimes be fundamental disagreements about the level of protection that should be accorded this type of speech. The next section turns to these disagreements.

D. First Principles or Difficult Applications?

Well-established First Amendment jurisprudence takes a relatively categorical approach to content-based regulation of speech and a more nu-

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[99] *ACLU II*, 535 U.S. at 592–93 (Kennedy, J., concurring in the judgment).

anced approach to other regulations. In general, content-based restrictions are subject to strict scrutiny and therefore rarely upheld; content-neutral restrictions not aimed at suppressing ideas are subject to intermediate scrutiny, which provides more flexibility. As we have seen, both commercial speech and regulation of the electoral process—whether or not it is fair to consider them content-neutral—fall into the latter category. Overall, this scheme reflects the maturity of the Court's First Amendment jurisprudence. The core principle is that censorship of unpopular speech or ideas is presumptively unconstitutional. Application of this principle is relatively easy in the context of content-based restrictions, but much less clear-cut for regulations that are designed to deal with particularly thorny speech problems not connected with the underlying ideas. Restrictions on commercial speech and the electoral process, as well as "incidental" restrictions on speech, therefore raise the sort of difficult issues that demand sensitive and pragmatic treatment.

Regulation of sexual material, however, straddles the line: It is content-based, but—especially in the context of the cable and Internet cases—often justified by reasons other than disapproval of ideas conveyed. Nevertheless, because our desire to shield children from pornography is necessarily influenced by our own views of the value of the expression,[100] we cannot blithely assume that regulation of pornography steers clear of censorship. There are bound to be disputes among those who place a particular pornography regulation on one side of the line, those who place it on the other, and those who feel that the conventional free speech jurisprudence cannot successfully capture the nuances required in this context. We can see this played out most clearly in the cable TV cases, where these disputes intersect disputes about whether to treat different technologies differently.

In *Denver*, for example, several Justices disagreed vehemently about the appropriate standard that should be used to evaluate statutes governing cable television's airing of sexually explicit programming. Breyer rejected the categorical approach, refusing to import into the cable television context analytical tools developed in other contexts. Instead, he viewed the precedents as embodying an "overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."[101] This seems unusually deferential to legislative judg-

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[100] For example, while most people would probably agree that younger children should not be exposed to graphic sexual details, there is controversy over less graphic material, including nudity and portrayals of sexual activity that is suggestive rather than explicit, and printed words rather than graphic pictorial displays.

[101] Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 741 (1996) (Breyer, J., plurality); *see also id.* at 768 (Stevens, J., concurring) ("I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this.").

ments about individual rights. Justice Kennedy, on the other hand, argued that the Court "ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles."[102] He castigated the plurality for its "flight from standards," defending standards such as strict scrutiny as "the central achievement of our First Amendment jurisprudence: Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day."[103] Echoing Justice Scalia's distaste for anything other than the brightest of lines, Kennedy suggests that the plurality's approach "end[s] up being a legalistic cover for an ad hoc balancing of interests."[104] Yet Justice Kennedy was perfectly content to apply highly manipulable intermediate scrutiny to the regulation of commercial speech, voted to uphold the zoning ordinance in *Alameda Books* in an opinion that carefully recognized that characterizing the ordinance as "content neutral" was "imprecise,"[105] and has shown a refreshing sensitivity to fact-specific context in other areas of the law.[106] Why not here?

The solution to these two apparent inconsistencies—and the reason for the disagreement—is illustrated by Justice Souter's opinion, which points out the strengths of both positions. As he notes, "[r]eviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said."[107] But categorical rules do not work well in "so contextually complex a category" as the regulation of pornography on a new and changing medium, especially when "[n]either the speech nor the limitation at issue . . . may be categorized simply by content."[108] This is not simply an argument about the merits of pragmatism, it is an argument about the nature of the speech at issue. If Justice Kennedy sees the regulations as just another example of the censorship of unpopular speech, it is no wonder that he wants to apply strict scrutiny. For Justice Kennedy, permitting cable operators to refuse to carry sexual programming is as obviously censorship as permitting them to refuse to carry criticism of Republicans. Breyer and Souter are more willing to be pragmatist only because they view the restriction differently.

Justice Kennedy's view narrowly prevailed in *Playboy*, convincing Justice Souter (and three others), but not Justice Breyer. Characterizing the statute requiring sexually-explicit programming to be fully blocked or time-

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[102] *Id.* at 781 (Kennedy, J., concurring in part, dissenting in part and concurring in the judgment in part).

[103] *Id.* at 784–85.

[104] *Id.* at 786.

[105] 535 U.S. 425, 444–45 (2002) (Kennedy, J., concurring in the judgment).

[106] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Drayton, 536 U.S. 194 (2002); Romer v. Evans, 517 U.S. 620 (1996).

[107] *Denver*, 518 U.S. at 774 (Souter, J., concurring).

[108] *Id.* at 775.

segregated as content-based,[109] Kennedy's majority opinion argued that "[b]asic speech principles are at stake in this case."[110] The statute, in other words, was nothing less than censorship of unpopular speech. Justice Breyer, adhering to his earlier position, disagreed, suggesting that the case "involves the application, not the elucidation, of First Amendment principles."[111] Again, this is a disagreement about the nature of the restriction.[112]

Finally, the dispute between the majority and the dissent in *Pap's A.M.* illustrates the influence of attitudes toward sexuality and nudity on some Justices' First Amendment jurisprudence. What kind of a restriction is a ban on nude dancing? Justice O'Connor's plurality opinion finds it to be a content-neutral restriction. Justice Scalia's concurrence does not go even that far: For him, it is not a restriction on expression at all. These Justices therefore uphold the ban without demanding any evidence from the city that the ban furthers the stated goal of reducing secondary effects. Justice Souter, in dissent, suggests that intermediate scrutiny, applicable to this allegedly content-neutral restriction, should be more searching than the toothless variety applied by the plurality. Certainly, a comparison to the intermediate scrutiny applied in the commercial speech cases (including by the Justices in the majority in *Pap's A.M.*) shows the unusual laxness of the Court's application in this case. I would suggest that this difference results from the fact that some Justices consider commercial expression more important, or less offensive, than erotic expression. Thus, between the lines the case is really about first principles: Is erotic expression entitled to more than watered down First Amendment protection?

On the level of principle, we can view the pornography cases as the mirror image of the commercial speech cases. In the commercial area, surface disagreement masks underlying consensus: Although the Justices often bicker about whether the *Central Hudson* test is appropriate, they actually seem to have settled on an antipaternalism principle that is only tenuously connected to the particular *Central Hudson* formulation. The outcomes are thus often unanimous even when the opinions are not. Where disagreements on results do arise, they seem to derive from more practical considerations, as in *Lorillard*.

In the pornography context, the opposite is often true. The Justices appear on the surface to agree on first principles and a doctrinal structure. In a nutshell, the anti-censorship principle dictates that any deliberate (that is, content-based) suppression of speech is presumptively unconstitutional

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[109] United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811 (2000).

[110] *Id.* at 826.

[111] *Id.* at 835 (Breyer, J., dissenting).

[112] Justice Souter changed his approach again in *United States v. American Library Ass'n*, 539 U.S. 194 (2003), there arguing in dissent that the Court should apply the intermediate scrutiny of *Central Hudson* (although in this case he was dissenting from an opinion whose scrutiny was too lax rather than too strict, which might lead one to conclude that he viewed the application of intermediate scrutiny as less pragmatist than the majority's approach).

unless the speech falls in a narrow category such as obscenity. Pornography is emphatically not one of these categories. Regulations that are not content-based but have only an incidental—or accidental—effect on speech are subject to a more pragmatic balancing test. Despite this agreement, however, and despite paying lip service to these principles, the Justices most likely to uphold regulation of pornography do not in fact follow them. Instead, they deviate in one of two ways. As Justice Kennedy points out in *Denver* and *Playboy*, some Justices label as incidental a suppression of pornography that is in fact a deliberate assault on unpopular speech because of its content. This manipulation allows them to accept a less compelling justification to support the regulation. Beyond that, some Justices allow their distaste for pornography to influence the balancing test itself, placing a stronger thumb on the government side of the scale when evaluating regulation of pornography than when evaluating regulation of other types of speech. Thus while some disagreements over the validity of pornography regulation depend on practicalities, some do not.

The pornography cases, then, provide an interesting contrast to the commercial speech and electoral cases. The latter two sets of cases raise truly difficult questions of practical application, for which theory neither can nor need provide answers. Pornography regulation is more mixed. Sometimes it raises difficult practical questions, and sometimes it raises what should be easy theoretical ones about the desirability of censorship. It seems, however, that some Justices have trouble telling the difference.

V. THE PATH OF THE LAW

These groups of cases tell us as much about competing approaches to constitutional adjudication as they do about specific questions of free speech. We can identify at least four different approaches among the various opinions in these cases. First, there are traditional overarching theories (of the First Amendment or of the Constitution) such as originalism or strict scrutiny.[113] Second, there are cases in which a particular Justice's conclusion seems foreordained, driven by extra-legal factors, regardless of the approach purportedly followed.[114] Finally, there are two variations on

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[113] For originalist arguments, see *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 358–71 (1995) (Thomas, J., concurring in the judgment); *id.* at 371–85 (Scalia, J., dissenting). For strict scrutiny application, see *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, 518 U.S. 727, 781–812 (1996) (Kennedy, J., concurring in part, dissenting in part, concurring in the judgment in part). For opinions based on per se unconstitutional purpose, see *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518–28 (1995) (Thomas, J., concurring in part and concurring in the judgment); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in the judgment).

[114] The almost uniform votes of Chief Justice Rehnquist and Justice Scalia in favor of upholding government regulation of pornography indicate, as I have suggested in text, that their conclusions are driven more by an unwillingness to consider pornography as truly protected speech than by the doctrinal principles they purport to apply.

pragmatism: the relatively unguided balancing of the electoral cases (and a few of the pornography cases) and the more channeled pragmatism of commercial speech's four-part intermediate-scrutiny test. As I have suggested earlier, the first two approaches are generally unsatisfactory once the questions move beyond identifying basic principles.[115] Can we learn anything from comparing the two pragmatist approaches?

Channeling the contextual inquiry into the factors identified by the commercial speech test does appear to provide slightly greater predictability and coherence overall. Despite disagreements over rationales, and some disagreement over results, the cases evaluating limits on commercial speech yield sufficient guidance to legislatures on all but the most difficult questions. (The two cases on compelled advertising, which do not apply the *Central Hudson* test, do not provide much guidance.) In a nutshell, legislatures seeking to restrict advertising would be wise to provide empirical evidence that the advertising causes harms unrelated to its non-misleading influence on the choices of adult consumers. No such pithy advice can be condensed from the electoral cases; their more open-ended balancing yields results that are difficult to predict or even to synthesize with hindsight. It is difficult, for example, to explain satisfactorily why prohibiting fusion ballots is different in any relevant way from requiring a blanket primary (although the Court tried).

Before we jump to the conclusion that flexible standards are inherently preferable to open-ended balancing, however, we have to consider the possibility that questions raised by the electoral cases are simply more difficult than those raised by restrictions on commercial speech, and thus that the decreased predictability arises from the questions rather than the answers. In fact, this seems to be the case: Most of the commercial speech cases do not pit free speech against an equally weighty interest, while in many of the electoral cases legislatures were trying to protect the electoral process from fraud, manipulation, or capture by special interests.[116] It is not clear whether *any* test could provide predictable and coherent answers in this context. In short, the choice between guided standards and free-form balancing is itself pragmatic. Some questions lend themselves to structured answers, and some do not.

VI. CONCLUSION

Not every constitutional case requires recourse to first principles, and indeed, most require more subtlety than such recourse can produce. The

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[115] I say only "generally" unsatisfactory because sometimes pragmatic considerations indicate that a formalist approach is preferable in a particular context. The dispute in *Denver* about whether strict scrutiny or balancing is more appropriate is in effect a dispute about whether, because of the likely passions inflamed by the issue, pragmatism demands the application of a formalist test when it comes to free speech (either in general or in the context of pornography).

[116] The same argument can be made about the campaign finance cases.

Rehnquist Court's free speech cases provide an example of the benefits of a more nuanced and pragmatist approach in the context of a mature jurisprudence. Rigid tiers of scrutiny are simply not flexible enough to accommodate both the legitimate goals of the legislature and the need to guard against illicit attempts at pure censorship of unpopular ideas. Some form of balancing—whether identified as such or simply evident in the application of intermediate scrutiny—is necessary to avoid either too much or too little invalidation. Inevitably, Justices will disagree (as will the rest of us). But that disagreement is narrower, less bitter, and less able to force precedent in bad directions when it comes in the form of disputes over practicalities rather than principles. As the pornography cases illustrate, a careful attention to context also forces judges to confront difficult issues by rising above their own prejudices rather than sweeping them under the rug through superficial analysis and meaningless buzzwords. Perhaps other areas of the Rehnquist Court's jurisprudence could benefit from the lesson provided by these free speech cases.