

# SUPREME COURT OF THE UNITED STATES

No. 90-1056

CHARLES W. BURSON, ATTORNEY GENERAL AND  
REPORTER FOR TENNESSEE, PETITIONER v.  
MARY REBECCA FREEMAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
TENNESSEE, MIDDLE DIVISION  
[May 26, 1992]

JUSTICE KENNEDY, concurring.

Earlier this Term, I questioned the validity of the Court's recent First Amendment precedents suggesting that a State may restrict speech based on its content in the pursuit of a compelling interest. *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U. S. \_\_\_, \_\_\_-\_\_\_ (1991) (KENNEDY, J., concurring in judgment). Under what I deem the proper approach, neither a general content-based proscription of speech nor a content-based proscription of speech in a public forum can be justified unless the speech falls within one of a limited set of well-defined categories. See *ibid.* Today's case warrants some elaboration on the meaning of the term "content-based" as used in our jurisprudence.

In *Simon & Schuster*, my concurrence pointed out the seeming paradox that notwithstanding "our repeated statement that 'above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,'" *id.*, at \_\_\_-\_\_\_ (slip op., at 3-4), (quoting *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 95 (1972)), we had fallen into the practice of suggesting that content-based limits on speech can be upheld if confined in a narrow way to serve a compelling state interest. I continue to believe

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that our adoption of the compelling interest test was accomplished by accident, *id.*, at \_\_\_\_ (slip op., at 2), and as a general matter produces a misunderstanding that has the potential to encourage attempts to suppress legitimate expression.

The test may have a legitimate role, however, in sorting out what is and what is not a content-based restriction. See *Simon & Schuster, supra*, at \_\_\_\_ (slip op., at 5) ("we cannot avoid the necessity of deciding . . . whether the regulation is in fact content-based or content-neutral"). As the Court has recognized in the context of regulations of the time, place, or manner of speech, "[g]overnment regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U. S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984)) (emphasis added in *Ward*). In some cases, the fact that a regulation is content-based and invalid because outside any recognized category permitting suppression will be apparent from its face. In my view that was true of the New York statute we considered in *Simon & Schuster*, and no further inquiry was necessary. To read the statute was sufficient to strike it down as an effort by government to restrict expression because of its content.

Discerning the justification for a restriction of expression, however, is not always so straightforward as it was, or should have been, in *Simon & Schuster*. In some cases, a censorial justification will not be apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech or ideas. There the compelling interest test may be one analytical device to detect, in an objective way, whether the asserted justification is in fact an accurate description of the purpose and effect of the law. This explanation of the compelling interest analysis is not explicit in our decisions; yet it does appear that in time, place, and manner cases, the regulation's justification is a central inquiry. See, e.g., *Ward v. Rock Against Racism, supra*, at 791; *Clark v. Community for Creative Non-Violence, supra*, at

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293; *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 648–649, and n.12 (1981). And in those matters we do not apply as strict a requirement of narrow tailoring as in other contexts, *Ward v. Rock Against Racism*, *supra*, at 797, although this may be because in cases like *Ward*, *Clark*, and *Heffron*, content neutrality was evident on the face of the regulations once the justification was identified and became itself the object of examination.

The same use of the compelling interest test is adopted today, not to justify or condemn a category of suppression but to determine the accuracy of the justification the State gives for its law. The outcome of that analysis is that the justification for the speech restriction is to protect another constitutional right. As I noted in *Simon & Schuster*, there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right. 502 U. S., at \_\_\_\_ (slip op. at 1–2, 5). That principle can apply here without danger that the general rule permitting no content restriction will be engulfed by the analysis; for under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote. Voting is one of the most fundamental and cherished liberties in our democratic system of government. The State is not using this justification to suppress legitimate expression. With these observations, I concur in the opinion of JUSTICE BLACKMUN and the judgment of the Court.