RECENT DEVELOPMENTS

REVEALING THE INADEQUACY OF THE PUBLIC FORUM DOCTRINE: *International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992).

Holding that airports were non-public fora, the Supreme Court, in *International Society for Krishna Consciousness, Inc. v. Lee*,[1] ("*ISKCON*"), employed public forum analysis to disallow a prohibition on leafletting but uphold a ban on solicitation in the major airports of the New York City metropolitan area. Rather than clarifying public forum doctrine, however, the Court's opinion added to the doctrine's shortcomings and revealed the inadequacy of public forum analysis in First Amendment disputes. Public forum doctrine was originally introduced in 1972[2] as a shorthand method of analyzing "[t]he crucial question [of] whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[3] Instead of considering this fundamental question, however, *ISKCON* employed the public forum doctrine as a jurisprudence of categories. Classifying government property as public or non-public fora, the decision postulated that First Amendment protection was a function of the category into which the property fell—regardless of the compatibility of the time, manner, and place of expression. Public forum analysis, designed as a shorthand analytical tool, is an inadequate replacement for this fundamental compatibility inquiry. *ISKCON*, therefore, should have rejected public forum doctrine in favor of a direct examination of whether the time, the manner, and the place of expression were compatible.

Public forum analysis conditions the standard of review of First Amendment restrictions on government property upon the property's public or non-public forum status.[4] A forum be-

1. The decision was rendered in separate judgments on the petition and the cross-petition. *See* International Society for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992)(No. 91-155); Lee v. International Society for Krishna Consciousness, Inc., 112 S. Ct. 2709 (1992)(No. 91-339)(*per curiam*). Concurring and dissenting opinions appear separately. *See* International Society for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2711 (1992). Collectively, these separate judgments will be referred to as "*ISKCON*."

2. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1717, 1733 (1987).

3. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

4. *ISKCON*, 112 S. Ct. at 2705.

comes public by tradition or designation. The former includes places such as streets, parks, and sidewalks, which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[5] The latter "consists of public property which the State has opened for use by the public as a place for expressive activity."[6] In both public fora categories, regulation of speech must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[7] Regulation of non-public fora, however, need only be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[8]

The *ISKCON* Court relied on public forum doctrine to examine a First Amendment restriction on public property. The petitioner, the International Society for Krishna Consciousness (the "Society") challenged the constitutionality of a Port Authority of New York and New Jersey[9] (the "Authority") regulation prohibiting the repetitive distribution of literature or solicitation of money at the John F. Kennedy, La Guardia, and Newark Airports. The Society, a non-profit religious corporation, promotes the theology of Krishna Consciousness. The Krishna religion mandates *sankirtan*, a ritual in which members go "into public places, disseminating religious literature and soliciting funds to support the religion."[10] *Sankirtan* is "the very lifeblood and principal means of support of [the] religious movement."[11]

The regulation promulgated by the Authority effectively pro-

5. Perry Educators' Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1982)(quoting Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939)).

6. *Id.* at 45.

7. *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

8. *Id.* at 46.

9. The original complaint named both the Authority and Walter Lee, the now-deceased superintendent of the Port Authority Police responsible for enforcing the Authority's regulations. The Authority was dismissed as a defendant in International Society for Krishna Consciousness v. New York Port Authority, 425 F. Supp. 681, 684 (S.D.N.Y. 1977). The Authority, however, remained as the party controlling the defense of Mr. Lee. *See* International Society for Krishna Consciousness v. Lee, 925 F.2d 576, 577 (2d Cir. 1991).

10. *ISKCON*, 925 F.2d at 577.

11. *Id.* at 578.

hibited *sankirtan* within the airports' public terminal areas.[12] The regulation stated in pertinent part:

> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
> (a) The sale or distribution of any merchandise, including but not limited to, jewelry, food stuffs, candles, flowers, badges and clothing.
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
> (c) The solicitation and receipt of funds.[13]

The Authority permitted *sankirtan* outside the terminal buildings.[14]

Because both parties agreed that *sankirtan* is protected First Amendment speech,[15] the standard of review applied to the Authority's regulation was the fundamental issue. After a series of hearings,[16] the district court by summary judgment held that the terminals were public fora, and therefore subject to that category's stricter standard of review. Because the regulation was not narrowly tailored to further a compelling state interest, the district court held it unconstitutional.[17] The Second Circuit stood ready to join several of its sister circuits in affirming that airport terminals were public fora.[18] The Supreme Court's de-

12. *Id.* The Authority leases most of the airports' space to commercial airlines. The unleased portions are collectively the "public terminal areas." *Id.*

13. *Id.* at 578-579.

14. *ISKCON*, 112 S. Ct. at 2704.

15. *Id.* at 2705; *see also* Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

16. In its initial suit in 1975, the Society sought access to both the public terminal areas and the spaces leased by private airlines. The airlines privately settled with the Society, leaving only the claims against the Authority. International Society for Krishna Consciousness, Inc. v. Lee, 721 F. Supp. 572, 573 (S.D.N.Y. 1989).

17. The court found that the terminals were traditional public fora:

> [L]ined with all types of services 'from banks to barbers to Bloomingdale's [,] . . . the terminals here possess the characteristics of a bustling metropolitan boulevard . . . . [T]he mere presence of a roof [does not] preclude the terminals' designation as public fora when, in every other relevant respect, they are virtually identical to public streets and thoroughfares.

Id. at 576-77. Neither the terminals' devotion to facilitating air travel nor the presence of captive audiences or pedestrian congestion support a finding other than a public fora. *Id.* Were these arguments accepted, the "clogged and narrow arteries of downtown Manhattan might as easily be denied public forum status" because they are "devoted to facilitating pedestrian travel, contain captive audiences waiting outside concert halls or movie theaters and are congested." *Id.* at 578.

18. *ISKCON*, 925 F.2d at 580. At least five circuits have ruled that airport terminals are public fora. *See* Jamison v. St. Louis, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); Jews for Jesus, Inc. v. Board of Airport Comm'rs, 785 F.2d 791 (9th

cision in *United States v. Kokinda*,[19] however, convinced a divided Second Circuit panel to uphold the Authority's in-person ban on solicitation of money.[20] The Supreme Court affirmed the Second Circuit decision in two separate judgments. A 5-4 majority in judgment No. 91-155 found the terminals to be non-public fora and upheld the solicitation ban as reasonable. Judgment No. 91-339, *per curiam*, invalidated the ban on the distribution of literature.

Writing for the majority in No. 91-155, Chief Justice Rehnquist concluded that terminals were not within the public forum category.[21] Airports are not traditional public fora because as modern ports they "hardly qualif[y] for the description of having 'immemorially. . . time out of mind' been held in the public trust."[22] Nor are terminals public fora by designation: "[T]he frequent and continuing litigation evidencing the operators' objections belies any such claim" that the terminals have been intentionally opened for expressive activity.[23]

The Chief Justice thus subjected the regulation of terminals to the reasonableness standard of non-public fora—a standard he found satisfied. Because " 'pedestrian congestion is one of the greatest problems facing the three terminals,' the Port Authority could reasonably worry" about the disruptive effects of solicitation.[24] The Chief Justice, in a separate dissenting opinion in No. 91-339,[25] also upheld as reasonable the ban on the distribution of literature because "[l]eafletting presents risks of congestion similar to those posed by solicitation . . . [as well as]

Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983); Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); Chicago Area Military Project v. Chicago, 508 F.2d 921 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975).

19. 497 U.S. 720 (1990). *Kokinda* upheld a postal regulation prohibiting in-person solicitation on postal premises. The forum at issue was a sidewalk connecting the parking lot to the postal building. The Second Circuit read *Kokinda* as "distinguish[ing] between passageways or other facilities that exist solely to facilitate the public's carrying on of a particular endeavor—subway or air travel for example—and passageways or facilities that enable the public to carry out the multitude of purposes persons pursue in their daily life—the typical Main Street." *ISKCON*, 925 F.2d at 581.

20. *ISKCON*, 925 F.2d at 577.

21. *ISKCON*, 112 S. Ct. at 2706 (Rehnquist, C.J., with whom White, O'Connor, Scalia, and Thomas, JJ., join in No. 91-155).

22. *Id.* at 2706 (quoting Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939)).

23. *Id.* at 2707.

24. *Id.* at 2709 (quoting *ISKCON*, 925 F.2d at 582).

25. *Id.* at 2710 (Rehnquist, C.J., with whom White, Scalia and Thomas, JJ., join, dissenting in No. 91-339).

some risks unique to leafletting."[26]

Justice O'Connor concurred with the Chief Justice's opinion in No. 91-155; however, she wrote separately to concur in judgment No. 91-339 invalidating the ban on leafletting.[27] Although Justice O'Connor agreed that airports are non-public fora, she found that the multitude of shops in the terminals[28] proved that the Authority is "operating a shopping mall as well as an airport."[29] Viewed against this "multipurpose environment" of the terminals, Justice O'Connor found the ban on distribution of literature unreasonable because mere leafletting creates less problems of congestion and fraud than does solicitation.[30] A solicited individual must stop to consider whether to contribute, assess the fraudulence of the solicitor, and then possibly reach for a wallet.[31] This is more intrusive than mechanically accepting a pamphlet.[32]

Justice Kennedy, like Justice O'Connor, upheld the ban on solicitation, but disallowed the ban on leafletting.[33] Justice Kennedy's concurrence, however, argued that terminals are public fora.[34] Adopting the district court's analogy between terminals and busy streets,[35] Justice Kennedy viewed terminals as "public thoroughfares full of people and lined with stores and other commercial activities."[36] He found the terminals and sidewalks sufficiently similar "to suggest that the airport corridor should be a public forum for the same reasons that streets

26. *Id.* Additional risks include the eyesore, safety hazards, and additional cleanup work associated with passengers dropping leaflets on the terminal floors. *Id.*

27. *Id.* at 2711 (O'Connor, J., concurring in judgment No. 91-155 and concurring in judgment No. 91-339).

28. Justice O'Connor noted that

> [t]he airports house restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices, and private clubs. The International Arrivals Building at JFK Airport even has two branches of Bloomingdale's.

Id. at 2712 (O'Connor, J., concurring).

29. *Id.* at 2713 (O'Connor, J., concurring).

30. *Id.*

31. United States v. Kokinda, 497 U.S. 720, 733-34 (1990).

32. *ISKCON*, 112 S. Ct. at 2713-14 (O'Connor, J., concurring).

33. *Id.* at 2715 (Kennedy, J., concurring in both judgments, with whom Blackmun, Stevens, and Souter, JJ., join as to the Part I finding that terminals are public fora, disallowing the ban on distribution of literature, and concurring in judgment No. 91-339 only).

34. *Id.*

35. *See supra* note 17.

36. *ISKCON*, 112 S. Ct. at 2719 (Kennedy, J., concurring).

and sidewalks" are treated as such.[37]

Applying the stricter public forum standard, Justice Kennedy found that the complete ban on leafletting was not narrowly tailored because the Authority could easily control leafletting problems through more narrow time and place restrictions.[38] With respect to solicitations, Justice Kennedy agreed with Justice O'Connor's discussion of the increased danger and upheld the restriction.[39] Justice Souter, in a separate opinion, agreed with Justice Kennedy's public forum analysis. In applying the standard of review, however, he found neither restriction tailored narrowly enough to satisfy the stricter public forum standard.[40]

Justice Kennedy's opinion complained that public forum doctrine was becoming a "jurisprudence of categories . . . inconsistent with the values underlying the speech and press clauses of the First Amendment."[41] Justice Kennedy, however, failed to follow his argument to its logical end. *ISKCON*'s public forum doctrine is inconsistent with the values of the First Amendment because it (1) restricts the number of locations entitled to heightened First Amendment protection, (2) permits the government to define the extent of its First Amendment obligations, (3) fails to provide a workable designated public forum category, (4) creates distinctions without an apparent constitutional basis, and (5) obfuscates the First Amendment issues presented in public forum cases. The doctrine, therefore, should be replaced by a direct consideration of the compatibility of time, manner, and place of expression.

First, *ISKCON*'s public forum doctrine severely restricts the number of public places subject to heightened First Amendment protection. With respect to traditional public fora, the Chief Justice rejected Justice Kennedy's analogy between terminals and sidewalks;[42] rather, he argued that "given the lateness with which the modern air terminal has made its appearance, it hardly qualifies" as a traditional forum.[43] The

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 2724 (Souter, J., with whom Blackmun and Stevens, JJ., join, concurring in judgment No. 91-339 and dissenting in No. 91-155).
41. *Id.* at 2715 (Kennedy, J., concurring).
42. *Id.* at 2706 (Rehnquist, C.J.).
43. *Id.*

Chief Justice's narrow interpretation of "traditional" closed this category to new entrants and yielded a static doctrine with little relevance to a rapidly-changing society.

Closing the traditional public forum category to new fora reflects a dangerous trend in recent precedents toward narrowing the scope of the traditional category.[44] The Chief Justice provided an additional reason why terminals are not public fora: "a traditional public forum . . . has as a 'principal purpose . . . the free exchange of ideas.' "[45] As Justice Kennedy observed, however, "[i]t would seem apparent that the principal purpose of streets and sidewalks, like airports, is to facilitate transportation, not public discourse."[46] Because few locations are designed for such a purpose, this principal-purpose prerequisite greatly reduces the number of traditional fora.

Second, with respect to the designated forum category, Chief Justice Rehnquist's opinion stripped such fora of any heightened First Amendment protection. The Chief Justice stressed that the creation of a designated public forum requires an intentional act: "The government does not create a public forum by inaction or by permitting limited discourse."[47] This reasoning is circular and self-justifying as shown by the Chief Justice's argument: terminals are not designated public fora because the Authority's objections to their designation proves that they were not intentionally designated.[48] By empowering the government to choose the limits of a designated forum by adjusting the forum's intended openness, Chief Justice Rehnquist deprived these fora of heightened First Amendment protection. A protection existing at the pleasure of the government is not a constitutional protection from the government.

Third, although the Court could invigorate the designated

44. For example, sidewalks, the quintessential traditional public forum, have been stripped of public forum protection based upon their purpose and location. *See* United States v. Kokinda, 497 U.S. at 720, 733-34 (1990)(holding that a sidewalk constructed to provide passage between a post office and its parking lot, and not as a public passageway, is not a public forum); Greer v. Spock, 424 U.S. 828 (1976)(holding that sidewalks within a military base are not public fora).

45. *ISKCON*, 112 S. Ct. at 2706 (Rehnquist, C.J.)(citing Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788, 802 (1985)).

46. *Id.* at 2717 (Kennedy, J., concurring).

47. *Id.* at 2706 (citing *Cornelius*, 473 U.S. at 802). Even granting limited access does not create a public forum because the state may limit a forum's First Amendment uses with non-public uses subject only to a reasonableness standard. *Kokinda*, 497 U.S. at 734.

48. *ISKCON*, 112 S. Ct. at 2706-07 (Rehnquist, C.J.); *see also supra* note 23 and accompanying text.

public forum category by restricting government's power to "un-designate" a forum, this view is contrary to public policy.[49] The state, aware of its limited ability to un-designate a forum, has a strong incentive to refrain from designating public fora.[50] This restriction also provides a disincentive for the state to clarify regulations regarding permissible speech. Defining permissible speech in a given forum would transform that location into an irrevocable limited public forum with respect to that speech. Neither restricting government's power to un-designate a forum nor following the Chief Justice's opinion which grants government this power, therefore, provides a workable designated public forum doctrine.

Without the category of designated public forum, the doctrine becomes unworkable because of its inability to limit or designate the type of expression permitted in a particular forum. The Chief Justice agreed with this analysis in his dissent in *Southeastern Promotions, Ltd. v. Conrad*,[51] a decision predating the creation of the designated public forum category. Referring to the majority's finding that a Chattanooga municipal auditorium and theater were public fora in which the city could "exercise no selective role whatsoever in deciding what performances may be booked," the Chief Justice warned of consequences unforeseen and perhaps undesired by the Court:

> May an opera house limit its productions to operas, or must it also show rock musicals? May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential producer on a first come, first served basis?[52]

Because the designated public forum category, essential to public forum analysis, is unworkable, public forum doctrine should be abandoned in favor of an inquiry into the fundamental First Amendment question.

Fourth, the Chief Justice's public forum analysis created three distinctions without any apparent basis in the First Amendment. First, the doctrine denies modern fora protection

49. Brief *Amicus Curiae* of the American Civil Liberties Union and the New York Civil Liberties Union in Support of the Society, at 10, *ISKCON*, 112 S. Ct. 2701 (1992)(No. 91-155).

50. *Id.*

51. 420 U.S. 546 (1975)(Rehnquist, J., dissenting).

52. *Id.* at 572-73.

because such fora are by definition modern.[53] The First Amendment never discusses preferential treatment for older versus newer loci. Favoring sidewalks over terminals because airports are more modern is as foreign to the First Amendment as providing television with less First Amendment protection than newspapers because of the former's more recent status. Second, the doctrine gives preference to the status quo—a forum deserves greater protection because it has traditionally been used for free speech.[54] Social progress, however, changes appropriate places for public expression. For example, the library in *Brown v. Louisiana*[55] was not an appropriate place of protest prior to its relevance as a center of segregation during the civil rights movement.[56] Similarly, the increasing importance of airports to modern society may make them an increasingly appropriate place for expressive activity. Third, public forum doctrine provides no middle ground.[57] Speech must either satisfy the strict public forum standard or the relaxed non-public forum test. The Court provides no explanation why attaching a non-public forum label to terminals frees the government from satisfying a middle ground standard.[58]

Fifth, the public forum analysis in *ISKCON* eclipsed, rather than clarified, the First Amendment claim because the analysis focused on the characteristics of a location rather than on the appropriateness of the claim.[59] Following a detailed discussion explaining that terminals are non-public fora, the Chief Justice noted that the Society had ready access to an alternative means

53. *See* Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1304-05, 1355 (1979)(criticizing public forum doctrine).

54. *See* Post, *supra* note 2, at 1728-29.

55. 383 U.S. 131 (1966).

56. Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788, 820 (1985)(Blackmun, J., dissenting).

57. *See* Daniel A. Farber and John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1241-43 (1984).

58. *See generally Cornelius*, 473 U.S. at 821 (Blackmun, J., dissenting).

59. *See generally* United States v. Kokinda, 497 U.S. 720, 737 (1990)(Brennan, J., dissenting). The constitutional issue is whether regulation of speech is appropriate rather than whether the location's characteristics are those of a public forum. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 990-91 (2d ed. 1988)(citing United States Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114 (1981)). *Greenburgh* upheld a regulation prohibiting the deposit of unstamped mailable matter in letter boxes because "the undeniable availability of other equally effective methods of distributing handbills such as placing them under doors . . . made the Postal Service's rule seem too unthreatening to warrant strict scrutiny." *Id.* at 990. Holding that mailboxes were non-public fora, however, the majority failed to provide guidance on the real issue: When do the alternative means of distribution justify lesser scrutiny? *Id.*

of communication, that is, sidewalks outside the terminals, and that "the governmental interest [was superior] . . . in light of the characteristic nature and function of the [terminals]."[60] This balance between the government interest and the costs of regulating speech received only abbreviated discussion.[61] Treating the costs and benefits of restricting speech as secondary to a place's public forum label eclipses the true First Amendment issue.

Rather than analyze the characteristics of a location, a more appropriate test directly considers this balance of the costs and benefits of regulating speech: "[T]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[62] In judging a regulation's constitutionality, the degree of incompatibility must be balanced against First Amendment freedoms.[63]

A balancing test offers numerous advantages. The test does not limit heightened First Amendment protection to a closed set of historically-determined fora, but extends this protection to all appropriate loci. With respect to the designated public forum appropriate for limited expression, the test permits expression to be curtailed based upon a balance between government interests and First Amendment freedoms, rather than purely upon government whim. A balancing test, moreover, removes disincentives to clarify speech restrictions in designated public fora.

A direct balancing of the governmental and First Amendment interests solves additional problems of public forum analysis. Such balancing provides the flexibility Chief Justice Rehnquist requested in *Southeastern Promotions, Ltd. v. Conrad*,[64] while eliminating questionable distinctions based on history and status quo. Rather than obfuscating the First Amendment issue, a balancing test provides a necessary middle-ground standard that focuses more clearly and candidly on the one key question: whether solicitation or leafletting is incompatible

60. *ISKCON*, 112 S. Ct. at 2708-09 (Rehnquist, C.J.).

61. *Id.* at 2712 (O'Connor, J., concurring).

62. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

63. There are a variety of balancing tests. *See, e.g.*, Farber and Nowak, *supra* note 57, at 1244.

64. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 573 (1975)(Rehnquist, J., dissenting).

with the purpose of a terminal. As noted by Justice Blackmun, "[t]he guarantees of the First Amendment should not turn entirely on either accident of history or the grace of the Government."[65]

R. Alexander Acosta

ESTABLISHMENT OF RELIGION AND HIGH SCHOOL GRADUATION CEREMONIES: *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

The Religion Clause of the First Amendment contains two provisions, one prohibiting the establishment of religion and the other prohibiting laws that interfere with religious free exercise.[1] While some insist that the government must temper efforts to accommodate religious freedom to avoid action that promotes a religion, others argue that the sole purpose of the prohibition against government establishment is to guarantee religious free exercise.[2] Amid much controversy, the Supreme Court has on several occasions addressed government accommodation of and involvement with religion in the context of the public schools.[3] The Court's latest foray into that realm, *Lee v. Weisman*,[4] stirs new controversy over the role of religion in public schools, yet does little to quell existing confusion about the relationship between the Free Exercise and Establishment Clauses.

Despite the promise of a conservative Court, the *Weisman* decision continues the Court's current departure from the history and tradition of the Constitution. The Court's reasoning is strained, its logic well short of convincing. The ruling has been described as "forming the foundation for some future multicultural and humanist Constitution, draw[ing] little upon the thinking of those who drafted our present Constitution."[5] The

65. Cornelius v. NAACP Legal and Educational Fund, 473 U.S. 788, 822 (1985)(Blackmun, J., dissenting).

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

2. *See, e.g.*, Richard John Neuhaus, *Is Prayer to Remain Privatized? Traditions Reaching Back to the Founders Are Laid Waste*, L.A. TIMES, July 3, 1992, at B7.

3. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

4. 112 S. Ct. 2649 (1992).

5. *The Borked Court*, NAT'L REV., July 20, 1992, at 12.

Court remains "given more to liberal activism than to adherence to the principles of the Constitution as originally understood."[6]

Weisman involved a challenge to a policy of the Providence, Rhode Island School Committee and Superintendent that permits principals to include a member of the clergy in graduation ceremonies. The principals provide the clergy with a pamphlet to guide their preparation of inclusive, sensitive, nonsectarian prayers for civic occasions.[7] After unsuccessfully seeking a temporary restraining order to stop such a prayer at Deborah Weisman's middle school graduation, Deborah's father Daniel sought a permanent injunction to prohibit prayers at Deborah's future high school graduation.[8] The United States District Court for the District of Rhode Island enjoined school officials from including prayers in graduation ceremonies, holding that the practice violated the Establishment Clause.[9] The United States Court of Appeals for the First Circuit affirmed.[10] The Supreme Court granted certiorari[11] and affirmed the decision of the Court of Appeals, reasoning that the school officials' involvement in the preparation of the prayer and the coercive nature of the graduation exercises compelled the finding of an Establishment Clause violation.[12]

Writing for the majority, Justice Kennedy[13] avoids the important question of the scope of permissible government accommodation and involvement with religion, dismissing any need to reconsider the test set forth in *Lemon v. Kurtzman*.[14] Though the Court puts some slight distance between itself and the much-criticized *Lemon* opinion, that small comfort is largely

6. Robert H. Bork, *Even Now, a Fight Over the Course of the High Court*, STAR TRIB. (Minneapolis), July 14, 1992, at 11A.

7. *See Weisman*, 112 S. Ct. at 2652.

8. *See id.* at 2652-54.

9. *See* Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990). The District Court applied the three-part Establishment Clause test set forth in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), which requires government action, in order to pass Establishment Clause scrutiny, to (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. *See* Weisman v. Lee, 728 F. Supp. at 71. The court held that the prayers violated the second prong of the *Lemon* test. *Id.*

10. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990).

11. 111 S. Ct. 1305 (1991).

12. *See* Lee v. Weisman, 112 S. Ct. 2649, 2660-61 (1992).

13. Justice Kennedy was joined by Justices Blackmun, Stevens, O'Connor, and Souter.

14. *Weisman*, 112 S. Ct. at 2655. The *Lemon* test is described *supra* note 9.

overshadowed by the strained characterizations of the government's involvement as "pervasive"[15] and the graduation environment as "subtl[y] coercive."[16]

The majority opinion equates the principals' invitation to Rabbi Gutterman with "state-sponsored and state-directed religious exercise" decreed by statute.[17] Of course, Justice Kennedy notes that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government,"[18] but the logic is reminiscent of *Shelley v. Kraemer*.[19] By providing a pamphlet to guide the clergy, Justice Kennedy concludes, the principals directed and controlled the content of the prayer.[20] Kennedy argues that religious exercise is totally restricted to the private sphere;[21] because the principals wielded the equivalent of statutory authority in directing and controlling the content of the prayer, the government had interfered with private religious freedom.[22]

Justice Kennedy proceeds to compare and contrast the government's role as protector of free speech with that of protector of freedom of conscience and religion.[23] Building on the conclusion that the principals' actions were as compelling as a legislative decree, Kennedy argues that school-sponsored religious exercise is antithetical to the government's "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."[24] Realistically, the government cannot serve two masters: protection of religious freedom and participation in religious exercise.

By contrast, free speech actually may be protected by government involvement that promotes the full expression of

15. *Id.*
16. *Id.* at 2656.
17. *Weisman*, 112 S. Ct. at 2655.
18. *Id.* at 2656 (quoting Engel v. Vitale, 370 U.S. 421, 425 (1962)).
19. 334 U.S. 1 (1948)(holding that state courts' application of common-law rules enforcing racially discriminatory private agreements constituted state action subject to scrutiny under the Fourteenth Amendment). Despite the normative fairness or justness of the *Shelley* decision, many believe that the reasoning was unsupported by the text or historical understanding of the Constitution. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 151-53 (1990).
20. *Weisman*, 112 S. Ct. at 2656.
21. *Id.*
22. *See id.* at 2657.
23. *Id.*
24. *Id.* at 2658.

ideas.[25] Justice Kennedy suggests that the delicate, hands-off approach that distinguishes the Establishment Clause from the Speech Clause becomes exceedingly important when protection is required against "subtle coercive pressure in the elementary and secondary public schools."[26]

Therefore, Justice Kennedy introduces a new psychological test of coercion into First Amendment Establishment Clause jurisprudence. Kennedy emphasizes that peer pressure motivates all students to stand as a group, or at least to remain respectfully silent during graduation prayers.[27] Without pointing to any indicators of judicial competence to engage in such an inquiry, Justice Kennedy cites psychological research supporting the view that adolescents are more susceptible to peer pressure than mature adults.[28] Application of the new psychological coercion test, coupled with the holding that the state controlled and directed a religious exercise, leads Justice Kennedy to conclude that the school system's graduation ceremonies established religion in violation of the First Amendment.[29]

In a concurring opinion, Justice Blackmun endorses an even more strict approach to separation of church and state.[30] Surveying the Court's previous dealings with the issue,[31] he con-

25. *See id.* at 2657 (citing Keller v. State Bar of California, 496 U.S. 1, 10-11 (1990)(reasoning that government officials, unlike state bar officers, are expected to espouse the views of the majority of their constituents, notwithstanding the fact that they are paid by public funds); Meese v. Keene, 481 U.S. 465, 480-81 (1987)(holding that a statute requiring the registration of foreign advocacy materials in order to inform recipients of their origin did not violate the First Amendment); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)(noting that public employees are as free to participate in political activities and expression as other private citizens)).

26. *Id.* at 2658.

27. *See id.* at 2658. Justice Kennedy maintains that this type of peer pressure "can be as real as any overt compulsion" to a student dissenter who believes that standing or remaining silent signifies participation in the prayers. *Id.* Because graduation is such an important life achievement, Kennedy concludes that the state was "exact[ing] religious conformity from a student as the price of attending her own high school graduation." *Id.* at 2660.

28. *Id.* at 2659 (citing Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOC. REV. 385 (1963); Clasen & Brown, *The Multidimensionality of Peer Pressure in Adolescence*, 14 J. YOUTH & ADOLESCENCE 451 (1985); and Brown, Clasen, & Eicher, *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents*, 22 DEV. PSYCHOL. 521 (1986)).

Justice Blackmun in concurrence goes a step further, citing Sigmund Freud to support the argument that "[t]he mixing of government and religion can be a threat to free government, even if no one is forced to participate." *Id.* at 2665-66 (Blackmun, J., concurring) (citing SIGMUND FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO (1922).

29. *Id.* at 2661.

30. *Id.* at 2661 (Blackmun, J., concurring).

31. *Id.* at 2662-64 & nn.1-4.

sistently argues that the government must not participate or affiliate itself with any religious organization.[32] Blackmun reasons that religion cannot exist without democracy, and democracy cannot survive when influenced by religion; freedom of religion is lost without a strong, independent religious community, and that community cannot survive when mingled with the secular.[33] Therefore, Justice Blackmun embraces a Jeffersonian strict wall of separation between church and state.[34]

Justice Souter, concurring, also addresses the question of whether coercion is a necessary element of an Establishment Clause violation, and seeks further to resolve whether government endorsement of religion over nonreligion violates the Establishment Clause.[35] Justice Souter, like Justice Blackmun, refuses to adopt the position that noncoercive government activity is constitutional, arguing that "the extratextual evidence of original meaning [does not] stand so unequivocally at odds with the textual premise inherent in existing precedent [condemning government activity without regard to coercion] that we should fundamentally reconsider our course."[36] Dismissing the history of presidential endorsement of prayer as merely political[37] or as too insignificant to matter,[38] Souter concludes that government participation in a nonsectarian prayer at graduation, whether coerced or not, is unconstitutional.[39]

Moreover, reviewing the First Amendment's ratification history[40] and the Court's Establishment Clause jurisprudence,[41] Justice Souter concludes that the Framers intended that gov-

32. *Id.* at 2662-67. In contrast to Justice Kennedy, Justice Blackmun maintains that although government coercion is sufficient to prove an Establishment Clause violation, it is not required. *See id.* at 2664 (citing Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963)(Douglas, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 72 (1985)(O'Connor, J., concurring in judgment); Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973)).

33. *See id.* at 2666-67.

34. Thomas Jefferson wrote a letter to the Danbury Baptist Association in 1802 expressing his view that the First Amendment erected "a wall of separation between church and State." *Id.* at 2662 n.1. It should be noted that Jefferson's view of the wall of separation was neither clearly supported by the Framers of the Constitution nor historically followed by Congress or the Supreme Court. *See, e.g.*, ARCHIBALD COX, THE COURT AND THE CONSTITUTION 199, 202, 209 (1987).

35. *Weisman*, 112 S. Ct. at 2667 (Souter, J., concurring).

36. *Id.* at 2671.

37. *See id.* at 2675-76.

38. *See id.* at 2678.

39. *Id.*

40. *See id.* at 2668-70.

41. *See id.* at 2667-68.

ernment endorsement of religion over nonreligion would also be unconstitutional.[42] Permitting a distinction between unconstitutional, sectarian religious practices and "ecumenical" activities that might be constitutional would be an invitation for courts to enter the field of comparative theology.[43]

In a cynical dissent, Justice Scalia, relying on the history of prayer in our society and the original understanding of the Framers, exposes the "incoherent" logic of the majority opinion.[44] Noting that Justice Kennedy had previously asserted that the meaning of the Establishment Clause was to be determined by reference to historical practices and understandings,[45] Justice Scalia finds irony in the fact that the majority opinion is "conspicuously bereft of any reference to history."[46] He describes the psychological coercion test as a "bulldozer of [the Court's] social engineering,"[47] and an illustration of why original understanding, rather than "the changeable philosophical predilections of the Justices," must control constitutional interpretation.[48]

Chiding the majority for reliance on psychological inquiries, Justice Scalia posits that a fair application of the psychological coercion test at its logical extreme would bar recitation of the Pledge of Allegiance at graduation ceremonies because the government cannot coerce political orthodoxy.[49] Moreover, because reference to God is included in the pledge, it must be the "next project for the Court's bulldozer."[50]

Describing the Court's Establishment Clause jurisprudence

42. *Id.* at 2670.

43. *See id.* at 2671. One might legitimately question why the Court is better qualified to engage in the psychological evaluation that Justice Kennedy suggests instead of comparative theology, but at least Justice Souter is internally consistent, condemning government endorsement of religion over nonreligion, but not requiring a finding of coercion.

44. *Weisman*, 112 S. Ct. at 2678, 2681 (Scalia, J., dissenting). Justice Scalia was joined in dissent by Chief Justice Rehnquist and Justices White and Thomas.

45. In *Allegheny County v. Greater Pittsburgh ACLU*, Justice Kennedy wrote that "[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause." 492 U.S. 573, 657, 670 (1989)(Kennedy, J., concurring in judgment in part and dissenting in part).

46. *Weisman*, 112 S. Ct. at 2678 (Scalia, J., dissenting).

47. *Id.* at 2679.

48. *Id.*

49. *See id.* at 2682 (citing West Virginia Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

50. *Id.*

as "bedeviled,"[51] Scalia finds no warrant for the Court's expansion of Establishment Clause prohibitions to include "peer-pressure" type coercion where no threat of penalty is involved.[52] Justice Scalia insists that the question is not one of philosophy—whether the majority or minority should suffer, but one of constitutionality—whether the Constitution compels the Court's holding.[53] Relying on the history of religion in the United States and on Constitutional tradition, he concludes that it does not.[54]

The effect that *Weisman* will have on the future of prayer in schools is difficult to assess.[55] Justice Scalia may be correct in predicting that *Weisman* "is only a jurisprudential disaster and not a practical one."[56] Perhaps school officials might take measures to inform dissenters that respectful silence will not be construed as participation, and that the state in no way wishes to pressure or coerce anyone's participation.[57] More likely, the youth of the country will show themselves more psychologically mature than Justice Kennedy believes them to be.[58] Although the future is difficult to predict, the persistence of the faithful and the resilience of the practical leave little doubt that a eulogy for school prayer is quite premature.

More uncertain are the implications of *Weisman* for the relationship of the Establishment Clause and the Free Exercise

51. *Id.* at 2685.
52. *See id.* at 2683-84.
53. *See id.* at 2686.
54. *Id.*
55. One commentator has suggested that "*Weisman* will confirm in the minds of many that the ostensibly 'value-free' public schools . . . cannot be friendly to the religious beliefs of most Americans . . . . [and] will spur the 'school choice' movement . . . ." Terry Eastland, *Prayer and Psycho-law*, WASH. TIMES, June 26, 1992, at F1.
56. *Weisman*, 112 S. Ct. at 2685 (Scalia, J., dissenting).
57. *See id.*
58. Although Justice Kennedy makes much of the belief that school-age children are more susceptible to peer pressure than adults, *Weisman*, 112 S. Ct. at 2658-59, Justice Souter's description of presidential invocations in Thanksgiving Day addresses as easily ignored or rarely noticed may more appropriately apply to invocations at graduation for all the attention they receive from the happy students. *See id.* at 2678 (Souter, J., concurring). The assertiveness of America's students following *Weisman*, or the lack thereof, may prove the true level of religious concern among the youth.

It is interesting that the respondent, Daniel Weisman, in describing the atmosphere of a previous Rhode Island graduation ceremony, stated that he, not his daughter, "stood with the rest of the audience, staring at *his* feet and, in *his* words, feeling stripped-naked, humiliated and the victim of a psychological beating. . . . '[I]t was terribly uncomfortable and inappropriate . . . to have an activity sponsored by the state attack *me* on the basis of *my* religion.' " Henry J. Reske, *And May God Bless*, A.B.A. J., Feb. 1992, at 47 (emphasis added). Will the Court next undertake to ascertain adults' susceptibility to peer pressure or psychological coercion?

Clause. Prior to the decision, four Justices had proclaimed dissatisfaction with the state of the Court's Establishment Clause jurisprudence,[59] and Justice Thomas was expected to join their ranks.[60] Although the Court in *Weisman* did retreat somewhat from rote application of the *Lemon* test, the majority declined to overrule or reconsider it.[61] Many expected a different approach from a Court increasingly dominated by "conservatives." The introduction of Justice Kennedy's psychological coercion test, along with his avoidance of the issue of whether coercion is a necessary element of an Establishment Clause violation, leaves the jurisprudence of church and state muddled and the permissible scope of government accommodation as unclear as ever.

In sum, *Weisman* reaffirms the dominant Supreme Court approach to constitutional interpretation, marked by erosion of the rule of law and a continuing insertion of political, result-oriented reasoning in the place of original understanding. Justices Kennedy, Souter, and O'Connor have made it clear that they will not stand consistently with the Court's constitutional traditionalists, Chief Justice Rehnquist and Justices Scalia and Thomas.[62] They appear willing to sacrifice a proper application of constitutional history and logic in favor of preserving whatever small institutional integrity the Court might risk by overturning a precedent, no matter how ungrounded the precedent is in the Constitution.[63] Of course, Justice Scalia exaggerates the imminent "bulldozing" of the Pledge of Allegiance, but perhaps only because such a decision would cross the line; it would no longer be politically correct. Nonetheless, a majority of the Court is willing to turn its back on a rich history of religious acceptance and respect by presidents, legislators,

59. *See* Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1989)(Kennedy, J., concurring in judgment in part and dissenting in part). Justice Kennedy was joined by Chief Justice Rehnquist and Justices Scalia and White.

60. *See, e.g.*, Erwin Chemerinsky, *The New Balance: Small Prayer For Church-State Split*, CONN. L. TRIB., July 27, 1992, at 20.

61. *Weisman*, 112 S. Ct. at 2655.

62. *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992). Justices O'Connor, Souter, and Kennedy, upholding a due process right to some abortions, stated that "[i]t is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual . . . by the express provisions of the first eight amendments to the Constitution. But of course this Court has never accepted that view." *Id.* at 2804-05 (citation omitted).

63. *See id.* at 2803-05.

courts, and high school graduates that spans the history of our republic.

Kevin E. Broyles

THE BEGINNING OF THE END OF PEREMPTORY CHALLENGES: *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

In *Batson v. Kentucky*,[1] the Supreme Court held that a prosecutor's use of peremptory strikes to exclude African-American jurors on account of their race was state action violating the Equal Protection Clause of the Fourteenth Amendment.[2] In *Edmonson v. Leesville Concrete Co., Inc.*,[3] the Court extended *Batson*—and took the definition of state action to its breaking point—by finding an equal protection violation where private litigants in a civil action exercised their peremptory strikes in a racially discriminatory manner. Last term, the Court completed this doctrinal evolution with its holding in *Georgia v. McCollum*[4] that even a criminal defendant's racially-motivated use of peremptory strikes is state action subject to equal protection attack. In light of *Batson*, *Edmonson*, and similar precedent,[5] the *McCollum* holding was arguably inevitable. Regrettably, the decision does violence to defendants' rights and may well have removed the last obstacle guarding against the eventual demise of peremptory challenges—an age-old institution once seen as a "necessary part of trial by jury."[6]

McCollum involved an assault by two white men and one white woman on two African-Americans. Prior to jury selection, the State moved to prohibit the defendants from utilizing their peremptory strikes in a racially discriminatory manner, alleging that the defense had expressed an intent to do so. The trial court denied the prosecutor's motion, and the State appealed.[7]

1. 476 U.S. 79 (1986).
2. Specifically, the Court held that a prosecutor's use of peremptory strikes violated a black defendant's equal protection rights when the strikes were used to exclude members of the defendant's race. In Powers v. Ohio, 111 S. Ct. 1364 (1991), the Court held that a criminal defendant may challenge a prosecutor's race-based peremptory strikes without regard to whether the defendant was of the same race as the excluded juror.
3. 111 S. Ct. 2077 (1991).
4. 112 S. Ct. 2348 (1992).
5. *See Powers*, 111 S. Ct. at 1364.
6. Swain v. Alabama, 380 U.S. 202, 219 (1965).
7. 112 S. Ct. at 2351.

The Supreme Court of Georgia affirmed the lower court's refusal, restricting *Edmonson* to civil litigants and refusing to extend the equal protection framework to criminal defendants when the United States Supreme Court had not yet addressed the issue.[8]

The United States Supreme Court, in a seven-to-two decision, reversed the Georgia Supreme Court, following the reasoning set forth in *Batson* and *Edmonson*. Writing for the majority, Justice Blackmun[9] began by noting that racial discrimination by a criminal defendant in the exercise of peremptory challenges inflicts the same harms addressed in *Batson*. Not only does such discrimination violate the equal protection rights of the excluded juror by subjecting the juror to "open and public racial discrimination," but it also works to "undermine . . . public confidence" in the criminal justice system by casting doubt upon the integrity of the courts.[10]

Racial discrimination, however, "though invidious in all contexts, violates the Constitution only when it may be attributed to state action."[11] Thus, the majority next considered whether a criminal defendant is a state actor when utilizing peremptory challenges. In making its determination, the majority employed the two-pronged test for state action articulated in *Lugar v. Edmonson Oil Co.*:[12] whether the action involves a right having its source in state authority, and whether the acting party can be fairly described as a state actor.[13]

To answer the first part of the test, Justice Blackmun employed the reasoning set forth in *Edmonson*. In that opinion, the Court found the origin of the right to peremptory strikes in state authority because it is only through the permission of the state government that the right exists.[14] Turning to the second prong of the test, Justice Blackmun again relied upon arguments made in *Edmonson*, noting that: (i) as with civil actions,

8. State v. McCollum, 405 S.E.2d 688 (Ga. 1991).

9. Justice Blackmun was joined by Chief Justice Rehnquist as well as Justices White, Stevens, Kennedy, and Souter. Chief Justice Rehnquist filed a concurring opinion. Justice Thomas filed an opinion concurring in the judgment. Justices O'Connor and Scalia filed dissenting opinions.

10. 112 S. Ct. at 2353-54.

11. *Edmonson*, 111 S. Ct. at 2082 (quoting Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972)).

12. 457 U.S. 922 (1982).

13. *Id.* at 937.

14. *See* 112 S. Ct. at 2354-55 (citing *Edmonson*, 111 S. Ct. at 2083). Peremptory challenges are not a constitutional right and, therefore, may be abolished at any time.

peremptory challenges could not exist in criminal proceedings without the "overt and significant participation" of the government in compiling jury lists, summoning jurors to court, administering oaths, and conducting voir dire; (ii) peremptory challenges perform the traditional government functions of selecting an impartial jury and protecting the rights of litigants; and (iii) the courtroom setting heightens the perception that removal of a juror subsequent to a peremptory strike is a state action.[15] According to Justice Blackmun, peremptory challenges empower a defendant to determine the composition of the government body "on which our judicial system depends." Thus, the defendant is a state actor, bound by constitutional limitations.[16]

The Court further held that the prosecutor had standing to challenge a defendant's use of peremptory strikes,[17] and that the restriction imposed by this decision did not unconstitutionally impair defendants' rights. According to the majority, despite its "very old credentials," the right to peremptory challenges is not constitutionally mandated and, therefore, may be denied with no impairment of the guarantee of a fair trial.[18]

Chief Justice Rehnquist and Justice Thomas filed separate concurring opinions. The Chief Justice expressed his disagreement with the *Edmonson* Court, but acknowledged that *Edmonson* controlled the state action question.[19] Justice Thomas, concurring in the judgement, likewise voiced his dissatisfaction with *Edmonson*, but also agreed with the Chief Justice that *Edmonson* precluded a different holding in *McCollum*. Justice Thomas went on to communicate his concern that the Court's recent decisions were eroding the vitality of the peremptory strike. Furthermore, he chastised the Court for prioritizing the rights of jurors over those of defendants, "leav[ing] defendants with less means of protecting themselves."[20]

In a heated dissent, Justice O'Connor attempted to distinguish *Edmonson* on the ground that it pertained to civil litigants while *McCollum* involved criminal defendants. Her opinion stressed the adversarial relationship between the government

15. *See id.* at 2355-56 (citing *Edmonson*, 111 S. Ct. at 2083-2086).
16. *See id.*
17. *See id.* at 2357.
18. *See id.* at 2357-59 (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965)).
19. *Id.* at 2359 (Rehnquist, C.J., concurring).
20. 112 S. Ct. 2359, 2360 (Thomas, J., concurring in the judgment).

and a criminal defense attorney, the same relationship that persuaded the Court in *Polk County v. Dodson*[21] that a public defender did not act "under color of state law" when performing an attorney's traditional functions. The holding in *Dodson*, Justice O'Connor asserted, precluded a finding that defense counsel was a state actor when performing a duty aimed at furthering the defendants' interests, such as exercising peremptory strikes.[22]

Justice Scalia filed a separate dissent. Conceding that *McCollum's* state action holding naturally follows from *Edmonson*, Justice Scalia maintained that *Edmonson* was wrongly decided and harshly reprimanded the Court for curtailing individual rights under the guise of Constitutional mandates.[23]

Evolution of the doctrine surrounding peremptory challenges has resulted in a rejection of their unfettered use. This is due in part to the Supreme Court's recent focus on the rights of excluded jurors. The Court no longer perceives defendants, or litigants generally, as the sole parties in need of protection from discrimination in the judicial system. Rather, the Court has recognized the equal protection rights of jurors and has undertaken to protect those rights by regulating the use of peremptory strikes.

Acknowledging the legitimacy of concern over jurors' rights and the wisdom of *Batson*'s restrictions on prosecutorial use of peremptory strikes, strong arguments militate against *Edmonson*'s placing of similar restrictions on private litigants. Moreover, even accepting *Edmonson*'s rejection of those arguments with respect to civil litigants, there remain doctrinal and practical reasons not to extend *Edmonson* to criminal defendants.

An essential underpinning of the *McCollum* decision was *Edmonson*'s holding that private litigants are state actors when exercising peremptory strikes. On that point, however, *Edmonson* is open to serious question. *Edmonson* reasoned that because peremptory challenges are a state-created right and are exercised in a official forum, their use by any party is state action.[24] These facts, however, are not dispositive of the state action

21. 454 U.S. 312 (1981).

22. *See McCollum*, 112 S. Ct. at 2361-64 (O'Connor, J., dissenting).

23. *See id.* at 2364-65 (Scalia, J., dissenting).

24. *See supra* note 14 and accompanying text.

question. In *Flagg Bros. Inc. v. Brooks*,[25] the Court determined that a private party's exercise of a state-created right does not necessarily constitute state action. A "sufficiently close nexus" between the private conduct and the state must exist for an action to be deemed a state action.[26] This "nexus" does not exist when peremptory strikes are utilized by a private litigant. A court's participation in assembling a pool of prospective jurors and conducting voir dire would still take place even absent peremptory strikes. Furthermore, courts do not participate in the most important aspect of peremptory challenges, the decision regarding which jurors to strike. The court's role is limited to the removal of stricken jurors, a purely ministerial function, and even this may take place outside of the courtroom.[27]

Nor should the courtroom setting affect whether peremptory strikes constitute state action. Recognizing this as significant would in effect transmute nearly everything that took place during the suit into state action, including witness examinations and closing arguments. The facts and circumstances of each case must be taken into consideration before an action can be attributed to the state.[28]

Assuming the validity of *Edmonson*'s holding that civil litigants are state actors when utilizing peremptory challenges, that holding should not be controlling as to the status of criminal defendants. In fact, the unique position of criminal defendants gives rise to strong arguments that defendants are *not* state actors when exercising their strikes. Building on Justice O'Connor's opinion, one can persuasively argue that this view

25. 436 U.S. 149 (1978)(finding the proposed sale of debtor's goods by a private party was not state action although it was done pursuant to statute).

26. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

27. *See* Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 816, 817 n.49 (1989). Goldwasser distinguishes the use of peremptory challenges from two cases in which courts found state action where a court enforced private conduct. Goldwasser distinguishes Shelley v. Kraemer, 334 U.S. 1 (1948)(holding that a court's enforcement of a racially restrictive covenant on the sale of property was state action), on the ground that the lower court forced unwilling participants to comply with a covenant that was racially discriminatory on its face. Peremptory challenges, on the other hand, are facially neutral and voluntary. *See* Goldwasser, *supra*, at 816-19.

Goldwasser then went on to distinguish Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982)(holding that the court's assistance in executing a pre-judgment attachment made the attachment a state action), on the ground that court aid in the exercise of peremptory challenges is purely ministerial, not essential. *See* Goldwasser, *supra*, at 819-20.

28. *See* Burton v. Wilmington Park Auth., 365 U.S. 715, 722 (1961).

is most consistent with the Constitution's view of the criminal process.

The model envisioned by the Constitution is not a model of symmetry between two equal parties. Instead, constitutional safeguards exist to protect defendants against the imbalance of power created by the unlimited resources available to the state in its prosecution. The Fifth Amendment right to remain silent; the Sixth Amendment rights to an impartial jury and to confront adverse witnesses; the Fourteenth Amendment due process burden placed upon the State to prove its case beyond a reasonable doubt; and the due process right articulated in *Brady v. Maryland*,[29] requiring the prosecution to disclose evidence favorable to the defense, are just a few examples of the Constitution's attempts to even the scales.

Peremptory strikes are easily analogized to these defense-oriented protections. Historically, courts and commentators have thought defendants' peremptory challenges more important than those of the prosecution.[30] Even today, it is common for disparity to exist between the number of challenges given to a criminal defendant and those given to the prosecution.[31] This may be in part a recognition that criminal defendants have a personal stake in the verdict and, therefore, should be able to exercise a strike based on purely personal reactions.

In addition, peremptory strikes serve as an important tool allowing defendants to protect against subtle biases among jurors. Challenges for cause are not effective in completely eliminating racial bias on juries. That they do not, or at least that the public continue to doubt their efficacy, is evidenced by the public outrage witnessed when an acquittal is rendered by a jury composed solely of members of the defendant's race. If challenges for cause effectively eliminated bias, members of a jury should, theoretically, find crimes committed by a member of any race equally heinous. That the public often believes that juries do not supports the premise that a bias existed among the jurors which was not so blatant as to allow removal of a juror for cause. Even if this were not true, the public percep-

29. 373 U.S. 83 (1963).

30. *See* Swain v. Alabama, 380 U.S. 202, 242 (1965). In fact, in the United States, early statutes regarding peremptory challenges granted them only to the defendant. *See* Goldwasser, *supra* note 27, at 828 (citing JON M. VAN DYKE, JURY SELECTION PROCEDURES 145 (1977)).

31. *See* Goldwasser, *supra* note 27, at 828 & n.118.

tion that bias existed damages belief in the integrity of the judicial system.

If such a bias does exist, peremptory challenges are the only means to remove such hidden partiality. They recognize that race may unconsciously shape jurors' attitudes, perceptions, and deliberations, often to the detriment of the defendant. The elimination of defendants' ability to strike jurors based on race deprives them of an important means of protection. Ironically, as Justice Thomas recognized, minority defendants may be the most adversely affected by the Court's decision.[32] Although *McCollum* involved white defendants using their strikes against black jurors, it seems impossible not to hold equally unconstitutional a black defendant's strikes against white jurors if based on race.[33] Extensions such as this should be considered before applauding *McCollum* as a victory for minority classes.

The decision in *McCollum* removed the last barrier to the eventual demise of peremptory challenges. By permitting race-based equal protection attacks against the peremptory strikes of all parties in both civil and criminal trials, the Court opened the doors to an array of equal protection attacks by other protected classes. This trend can already be seen in cases such as *United States v. DeGross*,[34] where the Ninth Circuit held that peremptory challenges could not be exercised on the basis of gender. It is easy to envision such attacks being made based on religion and national origin as well.

The criminal justice system in this country strives to protect the defendant to the greatest extent possible. Peremptory challenges have been one of the most important methods of effectuating that policy. By placing restrictions upon such strikes, the Court in *McCollum* made a conscious decision to favor the rights of the excluded jurors over those of the defendant, dealing a deadly blow to the efficacy of peremptory challenges and distorting the scheme established by the Constitution.

Patricia F. Kaufman

32. 112 S. Ct at 2359 (Thomas, J., dissenting)("On the contrary, I am certain that black criminal defendants will rue the day that this court ventured down this road that inexorably will lead to the elimination of peremptory strikes.").

33. *McCollum*, 112 S. Ct. at 2360-61, 2360 n.2.

34. 960 F.2d. 1433 (9th Cir. 1992).

THE DORMANT COMMERCE CLAUSE AND THE INTERSTATE SHIPMENT OF WASTE: *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 112 S. Ct. 2019 (1992).

Waste disposal presents one of the most pressing problems in the United States today. While the country generates steadily increasing volumes of waste,[1] its safe disposal options have decreased dramatically.[2] The rise in interstate shipments of waste compounds the trash problem. Some receiving states, fearing the depletion of their available landfill space, have attempted to restrict waste imports.[3] But after the Supreme Court's landmark ruling in *City of Philadelphia v. New Jersey*,[4] which held that states cannot directly prohibit waste imports without violating the Dormant Commerce Clause,[5] several states have had to seek new ways to restrict the trash influx.[6] Last term, in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*,[7] the Supreme Court expanded on the reasoning in *Philadelphia* and broadly interpreted the Commerce Clause[8] to strike down a state statute which would have had the effect of limiting waste imports.[9] The Court's broad interpretation in *Fort Gratiot* correctly reinforces the fundamental proposition of

1. According to the Environmental Protection Agency, the generation of waste has grown steadily between 1960 and 1988. *See* OFFICE OF SOLID WASTE, U.S. ENVTL. PROTECTION AGENCY, PUB. NO. EPA/530-SW-90-0420A, CHARACTERIZATION OF MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1990 UPDATE, EXECUTIVE SUMMARY ES-9, ES-13 (1990).

2. *See* MUNICIPAL SOLID WASTE TASK FORCE, U.S. ENVTL. PROTECTION AGENCY, PUB. NO. EPA/530-SW-89-019, THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION 6, 14 (1989)(predicting that by 1991 over one-third of the nation's existing landfills would be filled to capacity).

3. *See, e.g.*, Lefrancois v. Rhode Island, 669 F. Supp. 1204, 1211 (D. R.I. 1987)(upholding a ban on out-of-state waste designed to preserve space in a state-owned landfill).

4. 437 U.S. 617 (1978).

5. *See id.* at 627-28.

6. *See, e.g.*, Industrial Maintenance Serv. v. Moore, 677 F. Supp. 436, 443 (S.D. W.Va. 1987)(holding that a Governor's order directing a state agency to deny a license to a solid waste facility receiving out-of-state waste violated the Commerce Clause); Shayne Bros. v. Prince George's County, 556 F. Supp. 182, 187 (D. Md. 1983)(holding that a county ordinance that required prior approval by county officials before disposing out-of-county waste was invalid under the Commerce Clause); *see also* Chemical Waste Management v. Hunt, 112 S. Ct. 2009, 2016 (1992)(holding that Alabama's attempt to charge an additional fee for the disposal of out-of-state hazardous waste violated the Dormant Commerce Clause).

7. 112 S. Ct. 2019 (1992).

8. The Commerce Clause grants Congress the exclusive power "[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

9. *See* 112 S. Ct. at 2028.

the Dormant Commerce Clause doctrine: States may not isolate themselves from the national market.[10] The decision should also encourage states to cooperate in finding safe and efficient solutions to the national waste disposal problem.

The Supreme Court has interpreted the negative or dormant aspects of the Commerce Clause, coupled with the Supremacy Clause,[11] as prohibiting states from regulating interstate commerce too stringently, even in the absence of congressional action.[12] Dormant Commerce Clause concerns reach their peak when states seek to "advanc[e] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state."[13] The Dormant Commerce Clause doctrine thus mandates strict scrutiny of state legislation that results in economic protectionism.[14]

The Court has also recognized that state statutes designed to serve legitimate health and safety goals may only incidentally affect interstate commerce. Accordingly, the Supreme Court employs a more relaxed balancing test to evaluate state statutes that do not discriminate against interstate commerce and are narrowly tailored to achieve health and safety goals.[15] Thus, under the Dormant Commerce Clause, the crucial question is whether the state statute is protectionist legislation requiring strict scrutiny, or a narrowly tailored health and safety provision with benefits that outweigh any incidental effect on interstate commerce.

The State of Michigan began extensive regulation of waste in 1978 when it enacted its Solid Waste Management Act, requiring each of its counties to adopt a plan that would provide for disposal of all the solid waste that a county estimated it would

10. *See* Baldwin v. G.A.F. Selig, Inc., 294 U.S. 511, 527 (1935).

11. U.S. CONST. art. VI, § 2.

12. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

13. H.P. Hood and Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949).

14. *See* 112 S. Ct. at 2027; Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)(holding that a state statute prohibiting export of baitfish must be examined under "the strictest scrutiny").

15. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)("Where a statute regulates even-handedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive to the putative local benefits."); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)(upholding Detroit's Smoke Abatement Code despite its potentially requiring any ships passing in interstate waters to modify their boilers).

generate in the next 20 years.[16] In 1987 the Michigan Department of Natural Resources issued a permit to the plaintiff, the Fort Gratiot Sanitary Landfill, to operate in St. Clair County.[17] In December 1988, Michigan amended the Solid Waste Management Act by enacting Waste Import Restrictions, which prohibit the import of waste "not generated in the County in which the disposal facility is located unless . . . [the out-of-county waste] is explicitly authorized in the approved county solid waste management plan."[18] Because the St. Clair County plan did not authorize the acceptance of out-of-state waste, in February, 1989, the operators of the Fort Gratiot landfill applied for permission to accept out-of-state waste. St. Clair County refused, even though the Fort Gratiot operators agreed to reserve enough landfill space to dispose of all of St. Clair County's trash for the next 20 years.[19]

The landfill operators took their dispute to federal court, seeking to enjoin enforcement of the state's Waste Importation Restrictions and to declare the Restrictions unconstitutional. Limiting private landfill owners to servicing only local markets, the operators argued, would violate the Dormant Commerce Clause.[20]

The District Court for the Eastern District of Michigan held that the Michigan Waste Importation Restrictions did not discriminate against interstate commerce on their face because they applied "equally to Michigan counties outside the county adopting the plan as well as out-of-state entities."[21] Because each county had the discretion to accept out-of-county waste, the district court found that the Waste Importation Restrictions did not discriminate against interstate commerce. Applying the more relaxed balancing test, the court found that the effects on

16. *See* 1978 Mich. Pub. Acts No. 641 (codified as amended at MICH. COMP. LAWS ANN. §§ 299.401-299.437 (1984 & Supp. 1991)).

17. *See* 112 S. Ct. at 2028.

18. *Id.* at 2021-22 (quoting 1988 Mich. Pub. Acts, No. 475, § 1 (codified as amended at MICH. COMP. LAWS ANN. §§ 299.413a, 299.430(2)(1984 & Supp. 1991))).

19. *See* 112 S. Ct. at 2022. Neither the Supreme Court nor the Court of Appeals makes clear whether the landfill operators' promise to reserve capacity for the next twenty years would last for twenty years from the date of the application or only for the time left in the county's original twenty-year plan. *See id.*; Bill Kettlewell Excavating v. Michigan Dep't of Natural Resources, 931 F.2d 413, 414 (6th Cir. 1991).

20. 112 S. Ct. at 2022.

21. Bill Kettlewell Excavating v. Michigan Dep't of Natural Resources, 732 F. Supp. 761, 764 (E.D. Mich. 1990)[hereinafter *Kettlewell I*], *aff'd*, 931 F.2d 413 (6th Cir. 1991)[hereinafter *Kettlewell II*], *rev'd sub nom.* Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992).

interstate commerce were "not clearly excessive in relation to the public health and environmental benefits derived by Michigan from the statute[,]"[22] and the court concluded on balance that the Waste Importation Restrictions passed muster under the Commerce Clause. The court thus denied the operators' motion for summary judgment and dismissed the case.[23] The Sixth Circuit agreed with the district court's analysis and affirmed.[24]

The Supreme Court reversed.[25] Justice Stevens, writing for the majority,[26] held that the Waste Importation Restrictions were unconstitutional because they unambiguously discriminated against interstate commerce and could not be justified under strict scrutiny.[27] Rejecting the argument that Michigan was merely regulating intrastate commerce, Justice Stevens applied the Court's Dormant Commerce Clause precedents and stated that the Court examines the ultimate effects of the state legislation.[28] He concluded that the Waste Importation Restrictions discriminated against interstate commerce because Michigan effectively prohibited the import of waste by prohibiting its importation into each of the state's political subdivisions.[29]

The Supreme Court held that Michigan's statutory scheme could not survive strict scrutiny, because Michigan could not supply any compelling justification for curtailing the import of out-of-state garbage.[30] There was no evidence that out-of-state refuse was more dangerous than the waste produced in Michigan. If protecting health and safety was Michigan's true goal, there were less restrictive alternatives available that did not discriminate against interstate commerce. Michigan could, for example, limit the total amount of waste its landfills could accept

22. *Kettlewell I*, 732 F. Supp. at 764.
23. *Id.* at 766.
24. *Kettlewell II*, 931 F.2d at 418.
25. 112 S. Ct. at 2023.
26. Justices White, O'Connor, Scalia, Kennedy, Souter, and Thomas joined the opinion of the Court.
27. *See* 112 S. Ct. at 2019.
28. *See id.* at 2025-26; *see also* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951)(holding that an ordinance banning milk that had not been pasteurized in facilities less than five miles from Madison was unconstitutional under the Dormant Commerce Clause because it discriminated in effect against interstate commerce); Brimmer v. Rebman, 138 U.S. 78, 82-83 (1891)(holding that, if the effect of a special statute for meat slaughtered more than 100 miles away was discriminatory against the citizens of other states, then the statute violated the Commerce Clause).
29. *See* 112 S. Ct. at 2024.
30. *See id.* at 2028.

each year from all sources.[31] Justice Stevens concluded for the Court that "the Waste Importation Restrictions unambiguously discriminated against interstate commerce and were appropriately viewed as protectionist measures that could not withstand strict scrutiny under the Commerce Clause."[32]

Chief Justice Rehnquist dissented[33] and would have remanded the case to allow Michigan "to present evidence on the economic, environmental, and other effects of the legislation."[34] The Chief Justice stressed the comprehensiveness of Michigan's waste regulations and suggested that the Waste Importation Restrictions were at least arguably aimed at legitimate health and safety concerns.[35] He favored upholding the Waste Import Restrictions by expanding on the reasoning in *Sporhase v. Nebraska*.[36] In *Sporhase*, the Supreme Court upheld parts of a comprehensive regime designed to preserve a state's natural resources,[37] noting that "[o]bviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of [a publicly produced and owned resource] out of the state."[38] Chief Justice Rehnquist was willing to believe that Michigan's comprehensive regulation of waste had transformed private landfills into a "resource [that] has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."[39]

Responding to this dissent, Justice Stevens distinguished the state rules reviewed in *Sporhase* from the Michigan garbage statute by pointing out their differing subject matter.[40] *Sporhase* involved the regulation of groundwater, a realm in which states have traditionally played a larger role in ownership and control, while *Fort Gratiot* involved private landfills "which are neither publicly produced nor publicly owned."[41]

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31. *See id.* at 2027.
32. *Id.* at 2028.
33. Justice Blackmun joined in the Chief Justice's dissent.
34. 112 S. Ct. at 2029.
35. *See id.* at 2028.
36. 458 U.S. 941 (1982); *see* 112 S. Ct. at 230.
37. *See* 458 U.S. at 956-57.
38. *Id.* at 955-56.
39. *Id.* at 957, *quoted in* 112 S. Ct. at 2030.
40. *See* 112 S. Ct. at 2026-27 & nn.6-7.
41. *Id.* at 2026 n.7.

The *Fort Gratiot* majority correctly applied the Dormant Commerce Clause doctrine to prevent a state from using its political subdivisions to isolate itself from national problems. Ample precedent under the Commerce Clause supports examining local laws based on their ultimate effects, and applying this reasoning to the Dormant Commerce Clause is a logical extension.[42] By using this broad effects test, the Court signaled that a state may not circumvent the Dormant Commerce Clause's ban on protectionism simply by allowing each of its political subdivisions to do in concert what the state as a whole may not do. States with excess capacity still can regulate volume for reasons of safety and health, and they may even close their landfills altogether.[43] They may not, however, preserve inexpensive disposal for their own citizens while limiting outsiders on health and safety grounds, thus effectively isolating themselves from the national waste disposal problem.

Justice Stevens did not directly address the Chief Justice's broader assertion that Commerce Clause concerns should be at their lowest ebb in this case because the Michigan regulations are "likely to work to Michigan's economic disadvantage."[44] By restricting the volume of waste disposed in its landfills, Chief Justice Rehnquist argued, Michigan will increase disposal costs for in-state waste producers, because landfills would have to recover fixed costs on the lower trash volume. Chief Justice Rehnquist further asserted that the Waste Importation Restrictions will hurt Michigan because "[t]he regulation also will require some Michigan counties—those that until now have been exporting their waste to other locations in the State—to confront environmental and other risks that they previously have avoided."[45] Thus, for the Chief Justice, the statute adversely affects a significant portion of the State's population, and "in [such] circumstances 'a State's own political processes will serve as a check against unduly burdensome regulations.' "[46]

42. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964)(holding that effects on interstate commerce under the Commerce Clause should be interpreted broadly to allow Congress the authority to enact the Civil Rights Act of 1964); Wickard v. Filburn, 317 U.S. 111, 128-29 (1942)(holding that a small wheat farmer had a cumulative effect on interstate commerce, even though his crop was consumed exclusively on his farm).

43. *See* 112 S. Ct. at 2024, 2027; City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978).

44. 112 S. Ct. at 2029.

45. *Id.*

46. *Id.* (quoting Kassel v. Consolidated Freightways, 450 U.S. 662, 675 (1981)).

Justice Stevens largely ignored this argument by the Chief Justice. Justice Stevens's review of precedent concluded that a statute's potential for discrimination against some local interests could not compensate for the statute's harmful effect on interstate commerce, because all protectionist legislation is likely to harm some local concerns.[47]

While Chief Justice Rehnquist's arguments about the adverse effects on Michigan residents were largely unrelated to Justice Stevens's line of reasoning, the majority opinion would have been more convincing had Justice Stevens exposed some of the flaws in the Chief Justice's assumptions. First, concerning the effect of reduced volume on disposal prices, Justice Stevens appeared to make the opposite conclusion—that limiting the volume of trash accepted will cause Michigan landfills to compete for the local waste by *reducing* disposal prices, to the benefit of Michigan waste producers—but he does not explain this analysis.[48] Second, Justice Stevens did not convincingly parry the Chief Justice's argument that the Waste Import Restrictions would hurt Michigan counties that had been shipping waste to other Michigan counties, as nothing in the Michigan regulations prevented Michigan's garbage-exporting counties from continuing to avoid this problem by simply shipping their waste out of state. Finally, Justice Stevens did not expose the impracticality of the Chief Justice's reliance on the state's political processes to correct potential discrimination. If the residents of a county find the Waste Import Restrictions too burdensome, they can explicitly authorize waste imports for their county. Thus Michiganders who find the Waste Import Restrictions unduly burdensome will not use the political process to repeal them.

The *Fort Gratiot* decision also prevents the inefficient waste disposal that can result when states or counties discriminate

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Chief Justice Rehnquist has traditionally been a supporter of federalism. He wrote the dissenting opinion in City of Philadelphia v. New Jersey, 437 U.S. at 629 (1978)(Rehnquist, J., with whom the Chief Justice joined, dissenting), and wrote the opinion for the Court in National League of Cities v. Usery, 426 U.S. 833, 852 (1976)(holding that concerns about federalism prevented Congress from using the Commerce Clause to enforce federal minimal wage legislation against the States), *overruled by* Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 537 (1985)(upholding federally-imposed wage and hour provisions of the Fair Labor Standards Act).

47. *See supra* text accompanying note 28 (reviewing Justice Stevens's marshalling of precedents).

48. *See* 112 S. Ct. at 2024.

against out-of-state trash. In *Baldwin v. G.A.F. Selig, Inc.*,[49] Justice Cardozo eloquently framed this efficiency underpinning of the Commerce Clause as follows: "[The Commerce Clause] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division."[50] If states were allowed to enact legislation to protect their low cost landfills, then their citizens would be insulated from rising disposal prices and thus never encouraged to reduce waste. Faced with protectionist legislation, citizens from formerly waste-exporting states would have to reduce waste production or increase in-state waste disposal far more than what legitimate health and safety concerns might require. Thus, by striking down Michigan's protectionist legislation, the Supreme Court promoted economic efficiency by requiring states with comparative advantages in certain resources and methods of production to share their bounties with their fellow states.[51]

The ruling in *Fort Gratiot* will encourage states to cooperate to find a solution to their waste disposal problems. Had the Court reached the opposite conclusion, those states with excess landfill capacity would be tempted to close their borders to avoid the inconvenience of disposing out-of-state waste. Because the states may no longer effectively seal their borders and restrict outside waste, they will have to cooperate to reduce trash volume and explore new disposal techniques. Informal agreements, interstate compacts, and federal legislation are methods the states might employ to solve their garbage problems.[52] Waste-exporting states will still have an incentive to cooperate, as they will suffer the most if the landfills are filled or closed.

Some commentators have suggested that the reasoning underlying both *Philadelphia* and *Fort Gratiot* is flawed because it leaves open the market participant exception, under which the states can take over the landfills and thereby evade Commerce Clause scrutiny.[53] Under the market participant doctrine, a

49. 294 U.S. 511 (1935).

50. *Id.* at 522-23.

51. *See* Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988)(arguing that the primary purpose behind the Commerce Clause is the protection of economic integration and efficiency).

52. *See* Michael R. Harpring, Comment, *Out Like Yesterday's Garbage: Municipal Solid Waste and the Need for Congressional Action*, 40 CATH. U. L. REV. 851, 886-87, 890 (1991).

53. *See, e.g.*, Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097,

state subdivision that acts as a market participant rather than a market regulator "is not subject to the restraints of the Commerce Clause."[54] This exception might swallow the rule in the trash context because a county could take over native landfills, offer disposal on preferential terms to its own citizens, and thus effectively exclude outsiders.

The market participant doctrine has its limits, however. A state may not close off all outside access to its natural resources and thereby regulate the market.[55] While some localities have used the market participation doctrine to impose different requirements for non-resident disposal at their government-owned landfills, this exception has been expressly conditioned on the requirement that outsiders must be allowed to construct private landfills in the state.[56] Under *Fort Gratiot*, states could use the market participant doctrine to discourage outsiders from using government-owned landfills, but they could not completely exclude outside waste from entering their state.[57]

In conclusion, the Supreme Court's decision in *Fort Gratiot* correctly expanded the protection afforded by the Dormant Commerce Clause to prevent states from effectively isolating themselves from national problems. While Justice Stevens could have strengthened his majority opinion by exposing the dissent's flawed reasoning, the opinion will still encourage states to take efficient and cooperative action to combat the country's trash disposal problem.

William C. Waller

1138 (1988)(noting that the market participation doctrine is "often criticized"); Theodore Y. Blumoff, *The State Proprietary Exception to the Dormant Commerce Clause: A Persistent Nineteenth Century Anomaly*, 1984 S. ILL. L.J. 73, 76-77.

54. White v. Massachusetts Council of Constr. Employees, 460 U.S. 204, 208 (1983).

55. *See* South-Central Timber Dev. v. Wunnicke, 467 U.S. 82, 97 (1984)(holding that if a state's participation has the effect of regulating the downstream market, the state is a regulator and cannot use the market participant doctrine).

56. *See* Swin Resource Sys. v. Lycoming County, 883 F.2d 245, 250 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1127 (1990)(holding that county's extra charge for disposing out-of-state waste at county-owned landfill did not violate the Commerce Clause, provided that out-of-county residents could compete in the county landfill market); Lefrancois v. Rhode Island, 669 F. Supp. 1204, 1211 (D.R.I. 1987)(holding that a state ban on out-of-state dumping at a state-owned landfill did not violate the Commerce Clause as long as private individuals could open their own landfills).

57. For more discussion of how states may still use the market participation doctrine to implement a limited preference for their own citizens as long as they do not completely exclude outsiders, see William L. Kovacs & Anthony A. Anderson, *States as Market Participants in Solid Waste Disposal Services—Fair Competition or the Destruction of the Private Sector?*, 18 ENVTL. L. REV. 779, 809-10 (1988).