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BY JAMES C. GOODALE

The Strange Case of Justice Breyer

After the U.S. Supreme Court came down with its last decision in June, *Ashcroft v. American Civil Liberties Union*, PBS Newshour commentator Margaret Warner asked rhetorically: why in the world was Supreme Court Justice Stephen G. Breyer in the dissent?

The case was a great First Amendment victory. The Court decided, 5-4, that the Child's On-Line Protection Act, a law regulating pornography on the Internet, was unconstitutional.

But there was Justice Breyer dissenting, along with Chief Justice William H. Rehnquist, Justices Antonin Scalia and Sandra Day O'Connor, voting to uphold the law. His dissent ran 17 pages — longer than the majority opinion. And this is not the only time he has voted against the First Amendment in recent years.

Against the First Amendment?

He took a similar position in a couple of cable cases called *Denver Area Educational Telecommunication Consortium Inc. v. FCC* and *U.S. v. Playboy Entertainment Group*, also involving the regulation of pornography. And he voted to uphold the constitutionality of the Campaign Finance Act against a First Amendment challenge.

While the Campaign Finance Act case may represent a triumph for common sense over the corrupting influence of soft money, it was not a great First Amendment victory.

What gives with Justice Breyer? As a liberal judge one would think he would be anti-government and pro-First Amendment. The reverse seems to be true.

In passing the Child's On-Line Protection Act, Congress took another stab at regulating pornography on the Internet. An earlier attempt in 1996 was declared unconstitutional by the Court in a major First Amendment victory (*Reno v. ACLU*).

After that defeat, Congress went back to the drawing board to design a law to protect children from on-line pornography harmful to minors. It required every owner of an adult pornography site to use a credit card ID system or other age verification device.

This meant that adults as well as children had to use a card to view a site. But there was no need for adults to use the card. They were entitled to go to the site without a card.

A law intending to protect children ended up infringing on the rights of adults. It prevented adults from going to the site as well as children.

The question for the Court was whether there was a better way to protect children from pornography without interfering with the rights of adults. If there is another way for Congress to achieve its goals without violating the First Amendment it must do exactly that.

Justice Anthony M. Kennedy, writing for the majority, said indeed there is another way: parents can use filters. With filters, adults can go to adult Web sites, as they are entitled to, without being treated like children. At the same time, children are protected because they cannot get through the filters.

This is what First Amendment cases have come to in the Supreme Court in the last few decades. Forget about crying fire in a crowded theater or thinking about clear and present danger. The Court has developed another test to prevent Congress from violating the First Amendment when it passes legislation.

Best Alternative

It scrutinizes legislation to see if Congress has adopted the best alternative to reach its goals without violating the First Amendment. The Legislature must choose the least restrictive alternative. If courts can find a better way (i.e. filters) to protect the First Amendment than legislation (i.e. credit cards), the legislators lose.

The Court calls this test "strict scrutiny." It carefully scrutinizes legislation to see if the least restrictive alternative has been used to carry out compelling state interests such as protecting children from pornography.

Justice Breyer, who is still the new boy on the Court, finds the whole process objectionable. It denigrates the role of Congress. He believes the Court should not second-guess Congress. It should not look for a better way, particularly if it is not as effective as the choice Congress has made.

He thinks if Congress has come up with a perfectly good solution to protect children from pornography (i.e. credit cards), which has a minimal effect on adult speech rights, it should be the end of the matter. Filters are not as effective as credit cards: parents won't buy them, kids will by-pass them.

Further, he believes any judge can think of a choice (filters) that Congress has not made. The Court's test, therefore, means the First Amendment always wins. (What's wrong with that?)

The problem with Justice Breyer's approach is that the First Amendment commands courts to second-guess lawmakers. It says Congress shall "make no law ...abridging freedom ...of the press."

Lawmakers pass popular laws. They want to protect kids from pornography. Their concern is not necessarily the First Amendment.

Justices Kennedy and Breyer have been dueling over this test since Justice Breyer came on the Court. Justice Kennedy has not been sparing of his criticism of Justice Breyer. (See his remarks in *Denver*.) He has made it abundantly clear that he does not think Justice Breyer fully appreciates the First Amendment jurisprudence that got the Court to its present position.

First Amendment lawyers and scholars too have been puzzled by Justice Breyer's approach to the First Amendment. Because at first he had little experience with the subject, they expected him in time to "turn around." Indeed, after his first term, Justice Breyer reportedly told friends as a first term justice he had a lot to learn about the First Amendment.

But with the Child's On-Line Protection Act case, he appears to have dug himself into a position that is highly respectful of congressional action. In fact, it is similar to the position taken by the religious right on the issue of protecting children.

It believes protection of children (i.e. filters) can not be entrusted to parents. The government must control smut by acting affirmatively (i.e. credit cards).

If Justice Breyer has his way and if the next justice appointed to the Court also supports Congress over the First Amendment, there could be a major swing to the right by the Court in deciding First Amendment cases.

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