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## ***DUN & BRADSTREET V. GREENMOSS BUILDERS AS AN EXAMPLE OF JUSTICE POWELL'S APPROACH TO CONSTITUTIONAL JURISPRUDENCE***

Paul M. Smith\*

It is striking to read the detailed account of the Supreme Court's wrestling with *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>1</sup> over a two-year period that came just a few years after I had the honor of clerking for Justice Lewis F. Powell, Jr. The unpacking of this story by Lee Levine and Stephen Wermiel is invaluable because it so well illustrates the ways in which three important Justices did their jobs in the 1970s and 1980s.<sup>2</sup> We see Justice Brennan working strategically to reinforce and extend his earlier opinion in *New York Times Co. v. Sullivan*,<sup>3</sup> seeking ways to cobble together five votes from a Court that is far different from the Warren Court he once knew. We see Justice White, mercurial and idiosyncratic—first voting with Justice Brennan, then flirting with joining Justice Powell in narrowing the scope of *Gertz v. Robert Welch, Inc.*,<sup>4</sup> and ultimately filing a concurrence in the judgment calling for both *Sullivan* and *Gertz* to be overruled.<sup>5</sup> And we see Justice Powell, the classic moderate centrist, seeking to adjust the constitutional rules so as to give what he considered sufficient respect to competing values—here, the competing values of protecting freedom of speech and preserving the States' ability to use defamation law to protect reputations.

Given this welcome opportunity to comment on the Levine and Wermiel account, I thought I would use it to offer some thoughts about Justice Powell's approach to constitutional jurisprudence, particularly in First Amendment cases—an approach well illustrated by the story of

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1. 472 U.S. 749 (1985).

2. Lee Levine & Stephen Wermiel, *The Landmark that Wasn't: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1 (2013).

3. 376 U.S. 254 (1964).

4. 418 U.S. 323 (1974).

5. *Greenmoss Builders*, 472 U.S. at 765–74 (White, J., concurring).

*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>6</sup>

## I. JUSTICE POWELL AS A CENTRIST

It is hardly a great insight to note that Justice Powell was a centrist—though in his time on the Court the ideological divides were not so clear and other Justices—Stewart, Stevens, White, and Blackmun—each found themselves taking both “liberal” and “conservative” positions in various cases. What is distinctive about Justice Powell is not just that he shifted back and forth between liberal and conservative majorities but that he nearly always sought to find a way to avoid, or minimize, the choice by crafting a middle position.

Perhaps the most famous example of this approach was Powell’s opinion in *Board of Regents of the University of California v. Bakke*.<sup>7</sup> In that much-criticized but still influential opinion, he voted to invalidate a university’s affirmative action program that employed a quota or goal concerning the percentage of the class that should be made of minority students.<sup>8</sup> But he simultaneously endorsed consideration of race as one factor in the overall individualized determination about each applicant.<sup>9</sup> This splitting of the difference was designed to avoid the overt categorization of people by their race while still allowing some play in the joints for the reality that diversity in education would not be achieved without some awareness of race in the admissions process. It allowed the Court to avoid shutting down diversity efforts while recognizing at the same time how constitutionally problematic it is for the State to favor and disfavor people based on race.

The *Bakke* opinion was adopted as the model for affirmative action programs across the country for an entire generation. And it was adopted by Justice Powell’s intellectual heir on the Court, Justice Sandra Day O’Connor, when she wrote the majority opinion in *Grutter v. Bollinger*<sup>10</sup> upholding the affirmative action program of the University of Michigan Law School.<sup>11</sup> As I write this piece, the *Bakke/Grutter* era may be about

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6. 472 U.S. 749.

7. 438 U.S. 265 (1978).

8. *Id.* at 379.

9. *Id.* at 318–19.

10. 539 U.S. 306 (2003).

11. *Id.* at 343. To be sure, Justice O’Connor arguably was less clear than Justice Powell about limiting the justification for affirmative action to the producing of educational benefits through diversity in the classroom. As Charles Fried put it:

In 1978, in the *Bakke* case, Justice Lewis Powell ruled that the use of race—whether motivated by ameliorative purposes or bigotry—was constitutionally suspect and required the most

to come to an end as a Court that no longer includes Justice O'Connor is revisiting these questions in *Fisher v. University of Texas at Austin*.<sup>12</sup> But I expect Justice Powell always foresaw the day when his compromise approach would no longer carry the day. Indeed, he probably welcomed it. In any event, what is clear is that Justice Powell's *Bakke* opinion typifies his quest for rules that "split the difference" between competing considerations—including (as *Greenmoss* illustrates) in First Amendment cases.

## II. JUSTICE POWELL AND THE FIRST AMENDMENT

The instinct to find a middle path played a significant role in Justice Powell's First Amendment jurisprudence. Indeed, it is fair to say that Justice Powell's voice played an important role in nearly every important free speech and free press case during his fifteen-year tenure, generally in the service of finding a way to respect legitimate governmental and private interests and giving sufficient respect as well to First Amendment values.

As Gerald Gunther has put it:

Over the fifteen years since, Lewis Powell has made ever greater contributions to coherent first amendment analysis. In no other area has he demonstrated more persuasively that a balancing approach can provide not only the more intellectually satisfying analysis but also the one most sensitive to individual rights. Balancing is often denigrated as being too ad hoc, as providing too little general guidance, as too ready to sustain first amendment infringements. It need not be that: admirable first amendment balancing features an alert and generous perception

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compelling justification, a justification that the wish to approach proportionality or to overcome past discrimination could not satisfy. This was, in Justice Powell's words, "discrimination for its own sake." Race could be considered, however, to achieve diversity in the classroom in deference to a university's First Amendment right to academic freedom.

Charles Fried, *Courting Confusion*, N.Y. TIMES, Oct. 21, 2004, at A29. It was the dissenters in *Bakke*, Fried noted, who justified affirmative action as a tool to overcome the legacy of slavery and racism. *Id.* In *Grutter*, Fried argued, the Court:

[R]evisited the issue in the same setting as the *Bakke* case—and promptly seized both horns of the dilemma. Swearing allegiance to Justice Powell's principles and delivering a lecture about the evil of quotas, it nonetheless endorsed the law school's transparent evasion of those principles, emphasizing the necessity of ensuring substantial minority representation not only in the classroom but also in industry, the military and public life—the very purposes he had denounced.

*Id.*

12. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3144 (U.S. Feb. 21, 2012) (No. 11-345).

of the free speech elements in each controversy and a fair and careful evaluation of each asserted state justification for restraint.<sup>13</sup>

Justice Powell moved the Court toward a balanced approach to free speech in two ways—through concurrences and through the majority opinions he happened to be assigned.

First, there was the series of concurrences that began almost immediately in 1972 with the famous Powell concurrence in *Branzburg v. Hayes*.<sup>14</sup> These concurrences, which continued with *Young v. American Mini Theatres, Inc.*<sup>15</sup> *Zurcher v. Stanford Daily*,<sup>16</sup> *FCC v. Pacifica Foundation*,<sup>17</sup> and *Herbert v. Lando*,<sup>18</sup> all followed a familiar pattern. All of these cases were ones in which a Court majority rejected a First Amendment claim by the media. Justice Powell voted with the majority, usually with the controlling vote, and either joined in the majority's reasoning or only in the result. Either way, he sought to recast the majority's rejection of the First Amendment claim as less than absolute. In *Branzburg*, *Zurcher*, and *Herbert*, which all involved some sort of claim that the press needed to be shielded from inquiry into its inner workings lest First Amendment values be sacrificed, Justice Powell's view was always that reporters could be called to tell grand juries about sources,<sup>19</sup> could have their offices searched pursuant to a warrant,<sup>20</sup> and could have their editorial processes uncovered through

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13. Gerald Gunther, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 409, 411 (1987).

14. 408 U.S. 665 (1972).

15. 427 U.S. 50 (1976).

16. 436 U.S. 547 (1978).

17. 438 U.S. 726 (1978).

18. 441 U.S. 153 (1979).

19. *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring). *Branzburg* actually involved three different cases. In one, reporter Paul Branzburg had been directed by the courts of Kentucky to disclose to a grand jury information about drug manufacture and use that he had personally witnessed after giving guarantees of confidentiality. *Id.* at 667 (majority opinion). In another, reporter Paul Pappas had been ordered by the courts of Massachusetts to disclose to a grand jury information about his visit inside a Black Panther Party headquarters during a time of civil disturbance. *Id.* at 672–73. In the third, reporter Earl Caldwell had persuaded the Ninth Circuit that the First Amendment shielded him from having to testify to a grand jury about his confidential interactions with Black Panthers in California. *Id.* at 675–78. Justice White wrote the opinion of the Court, rejecting the notion that reporters enjoy any greater privilege shielding them from grand jury subpoenas than any other citizen. Justice Powell joined the opinion while seeming to contradict it by calling for weighing of First Amendment values in every case. *Id.* at 710 (Powell, J., concurring).

20. *Zurcher*, 436 U.S. at 568–70 (Powell, J., concurring). *Zurcher* involved a search of the editorial offices of the Stanford Daily student newspaper seeking photographs of a demonstration that had occurred on the Stanford campus. *Id.* at 550–52 (majority opinion). As with *Branzburg*,

discovery in libel litigation.<sup>21</sup> In each case Justice Powell indicated that reporters should have access to a judicial remedy. The relevant judicial officer should weigh the importance of the information sought against the First Amendment costs of allowing the inquiry, and reach and suitable decision on the particular facts presented.

The *Branzburg* concurrence was quite influential. Justice White, writing for the Court, had said that there is no basis in the First Amendment for a privilege protecting reporters from being subpoenaed by a grand jury and asked to reveal their confidential sources.<sup>22</sup> Justice Powell, the fifth vote for the majority, joined the Court's opinion but then wrote a concurrence saying that in each case courts deciding whether to enforce subpoenas should consider First Amendment values.<sup>23</sup> This caused many courts over the years to impose a pretty heavy burden of justification on law enforcement officials seeking to compel testimony about confidential sources.<sup>24</sup>

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Justice White wrote the opinion of the Court, holding that there is no special protection for the press from searches pursuant to warrants. Justice Powell concurred in the White opinion while stating that magistrates deciding whether to authorize searches of editorial offices should consider independent First Amendment values. *Id.* at 569–70 (Powell, J., concurring).

21. *Herbert*, 441 U.S. at 178 (Powell, J., concurring). *Herbert* involved the question of whether a plaintiff in a libel suit against a newspaper or media company may use discovery to inquire into the editorial processes of the defendant. *Id.* at 155 (majority opinion). Here again, Justice White wrote the opinion of the Court, and Justice Powell joined that opinion while saying that First Amendment values should be weighed on a case-by-case basis. *Id.* at 177–80 (Powell, J., concurring).

22. *Branzburg*, 408 U.S. at 682.

23. *Branzburg*, 408 U.S. at 710 (Powell, J., concurring).

24. See Adam Liptak, *A Justice's Scribbles on Journalists' Rights*, N.Y. TIMES, Oct. 7, 2007, <http://www.nytimes.com/2007/10/07/weekinreview/07liptak.html> (“Though Justice Powell’s concurrence was almost perfectly opaque, press lawyers seized on it and for decades convinced countless lower courts that *Branzburg* had in fact been a victory for the press.”). Examples of such cases include *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998), *Shoen v. Shoen*, 5 F.3d 1289, 1292–93 (9th Cir. 1993), and *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987). This pattern largely ended with Judge Posner’s opinion for the Seventh Circuit in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), in which he noted that the majority in *Branzburg* had not endorsed a reporter’s privilege and then refused to do so in the present case. *Id.* at 532–35.

Justice Powell’s use of concurrences to affect the merits of a case was not always so successful. In a remarkable, though obscure, 1981 decision involving the liability of ship owners to longshoremen, Justice White wrote a majority opinion that did not clearly decide which of two groups of conflicting circuit decisions was right. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981). Justice Brennan concurred based on his reading of the opinion as supporting the more liberal rule of liability. *Id.* at 179–80 (Brennan, J., concurring). Justice Powell concurred based on his reading that it supported the more restrictive rule of liability. *Id.* at 180–81 (Powell, J., concurring). Justice White did not clarify the matter and simply allowed his opinion to issue. More effective, but more difficult to explain, was Justice O’Connor’s use of the technique to modify the meaning of *her own opinion*. In *Bush v. Vera*, 517 U.S. 952 (1996), O’Connor wrote and signed the controlling plurality opinion holding a congressional district map unconstitutional under the Fourteenth Amendment. She then added her *own* concurring opinion elaborating on some points

In *Young*<sup>25</sup> and *Pacifica*,<sup>26</sup> which involved more content-based regulation of speech, Justice Powell's goal was to moderate the degree of the rejection of the First Amendment claim. *Young* involved a zoning ordinance limiting the locations in which "adult" movie theaters could be located in the City of Detroit.<sup>27</sup> Justice Stevens, writing for a five-Justice majority, upheld the law, reasoning that the First Amendment provides somewhat lesser protection to sexually explicit and erotic speech than to core political speech.<sup>28</sup> Justice Powell did not join in that creation of a First Amendment double-standard, instead concluding that a zoning ordinance, albeit one that draws distinctions based on the content of speech, imposes only incidental burdens on speech.<sup>29</sup> He applied the standard test for incidental burdens on speech, derived from *United States v. O'Brien*.<sup>30</sup>

Similarly, in *Pacifica*, involving the constitutionality of the FCC's punishment of a daytime broadcast of George Carlin's notorious "Filthy Words" monologue, Justice Stevens again wrote the lead opinion for the Court and again argued that sexually explicit but non-obscene speech is less valuable than other forms of speech and should be accorded lesser protection.<sup>31</sup> Justice Powell in his concurrence again did not join that portion of the Stevens opinion, instead reasoning that the uniquely intrusive character of broadcasting sufficed to justify the FCC in demanding that a program as vulgar and offensive as the Carlin monologue be broadcast only in the late evening when it is less likely to be heard by children.<sup>32</sup> One effect of this concurrence was to create a perception that the authorization of FCC regulation of indecency was limited to broadcasts like the Carlin monologue—and not just fleeting expletives or images. To use the Justice's colorful term, the monologue was "verbal shock treatment."<sup>33</sup>

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raised in the plurality opinion. *Id.* at 990–95 (O'Connor, J., concurring).

25. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

26. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

27. *Young*, 427 U.S. at 50.

28. *Young*, 427 U.S. at 70.

29. *Id.* at 73–84 (Powell, J., concurring).

30. 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

31. *Pacifica*, 438 U.S. at 743 (citing *Young*, 427 U.S. 50).

32. *Pacifica*, 438 U.S. at 755–62 (Powell, J., concurring).

33. *Id.* at 757.

Then there is the series of important majority opinions written by Justice Powell in First Amendment cases. These also fall into two categories. Some were ringing endorsements of First Amendment claims, particularly on behalf of corporations. In *First National Bank of Boston v. Bellotti*<sup>34</sup> and again in *Pacific Gas and Electric Co. v. Public Utilities Commission of California*,<sup>35</sup> Justice Powell, writing for the Court, strongly rejected efforts by government to prevent corporations from spending money to speak out on the issues of the day or to require them to sponsor and distribute the speech of others. And in *Erznoznik v. City of Jacksonville*,<sup>36</sup> Justice Powell wrote a majority opinion invalidating as overbroad an ordinance barring all exhibition of nudity in films shown in drive-in theaters.<sup>37</sup>

The other category is the celebrated pair of cases in which Justice Powell attempted to craft categorical rules that balance First Amendment interests with competing interests. One of those, of course, was *Gertz v. Robert Welch, Inc.*,<sup>38</sup> the libel case that plays a central role in the story told by Levine and Wermiel. In *Gertz*, Justice Powell, in his early days as a Justice, took on the task of laying out a series of rules governing how the Constitution applies to defamation claims brought by private persons—*i.e.*, persons who are neither public officials nor public figures. With the Court badly fractured, he worked to find a middle path that neither extended *New York Times Co. v. Sullivan*<sup>39</sup> to this very different context nor withheld constitutional protection altogether when the media are sued by private figures. The solution, Justice Powell announced for a five-Justice majority, was to require some showing of fault—*i.e.*, at least negligence—in all private figure cases, and to require *Times v. Sullivan* “actual malice” (knowing or reckless falsehood)<sup>40</sup> if a state wanted to impose either presumed or punitive damages.<sup>41</sup>

Although Justice Powell apparently began to feel that he had “legislated” too broadly in *Gertz* when *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>42</sup> came along some years later, the reality is that the two-level system of constitutional protection provided to the

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34. 435 U.S. 765 (1978).

35. 475 U.S. 1 (1986).

36. 422 U.S. 205 (1975).

37. *Id.* at 217.

38. 418 U.S. 323 (1974).

39. 376 U.S. 254 (1964).

40. *Id.* at 280–81.

41. *Gertz*, 418 U.S. at 347.

42. 472 U.S. 749 (1985).



media in public official/public figure cases and in private figure cases in the wake of *Gertz* has been sufficiently durable as a compromise position. The Court has not had occasion to revisit this for nearly four decades, except in the context of what the *Greenmoss* Court called speech of “purely private concern.”<sup>43</sup>

The other great example of categorical balancing in Justice Powell’s First Amendment cases is *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>44</sup> There, as a conservation measure, New York regulators had ordered electric utilities to cease advertising designed to promote consumption of electricity.<sup>45</sup> They exempted “informational” advertising designed not to increase demand but to shift demand to times of low utilization.<sup>46</sup> Justice Powell, writing for the Court, distilled from prior commercial speech cases a four-part test that has governed the constitutionality of commercial speech regulation ever since:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>47</sup>

The Court held that the State’s energy conservation rationale was substantial and would be advanced by the speech regulation, but invalidated the regulation on the ground that it was overbroad—extending to speech about products like electrical heating systems than might not increase demand at all.<sup>48</sup>

Here, as in *Gertz*, Justice Powell went beyond merely calling for a balancing of interests and structured a test for allowing decision-making

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43. *Id.* at 759. In 2011, the Supreme Court returned to the question whether a particular expression should be given robust First Amendment protection because it involves matters of public concern or should instead receive lesser protection because it involves a matter of private concern. See *Snyder v. Phelps*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1207, 1215–19 (2011) (holding that picketing at a military funeral, although including personal attacks on the deceased, was speech about matters of public concern).

44. 447 U.S. 557 (1980).

45. *Id.* at 558.

46. *Id.* at 560.

47. *Id.* at 566.

48. *Id.* at 570.

about when the lesser protections accorded to commercial speech do and do not outweigh the government's regulatory interests. It is a test designed to assure that neither the First Amendment nor regulatory interests gets short shrift.

In *Greenmoss*, as Levine and Wermiel document, Justice Powell worked hard to adjust the rules he himself had laid out in *Gertz* based on a perception that they were too speech-protective when applied to speech by a private provider of business information like Dun & Bradstreet.<sup>49</sup> His focus was damages—the rules from *Gertz* that even in a case involving a non-public-figure plaintiff, actual damages had to be proved and punitive damages were forbidden unless actual malice had been shown.<sup>50</sup> Powell tried a number of limiting principles, focusing at times on the non-media nature of the defendant and later attempting to uncouple punitive from presumed damages and pronounce different standards for each. Ultimately, he wrote a plurality opinion that simply relied on the assessment that the speech at issue was not of public concern and thus did not warrant constitutional protections against imposition of presumed and punitive damages.<sup>51</sup> As we now know, that simple opinion was the end of a long road.

#### FINAL THOUGHTS

As this summary of Justice Powell's First Amendment jurisprudence indicates, his approach exemplified what Cass Sunstein has called judicial "minimalism."<sup>52</sup> Louis Bilionis aptly summarized the characteristics of such an approach:

The first feature is a close adherence to case-specific context that maximizes the identification of points and considerations that may be employed to construct a centrist and narrow resolution. The second is a preference for temporalizing maneuvers that permit decisions on socially controversial grounds to be deferred. The third is a predilection for doctrinal innovations that make standards of review more commodious, thereby facilitating more tightly contextual accommodations and compromises. The fourth feature is a reliance on rhetoric that presents the Court's decisions as moderate, centrist outcomes

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49. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–61 (1985).

50. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349–50 (1974).

51. *Greenmoss Builders*, 472 U.S. at 762–63.

52. CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

that respect and give fair weight to all legitimate competing interests, without undue favor to any side in the social conflict.<sup>53</sup>

A rather extreme, but perhaps not unfair, explanation of this approach is as follows:

“[O]ne function of the Supreme Court must be to keep the peace between rival social groups adhering to rival and incompatible principles of justice by displaying a fairness which consists in even-handedness in its adjudications” . . . . To fulfill that function, the Court “play[s] the role of a peacemaking or truce-keeping body by negotiating its way through an impasse of conflict, not by invoking our shared moral first principles. For our society as a whole has none.”<sup>54</sup>

While I would not agree that Justice Powell saw the world solely in terms of competing interests or claims, it certainly is true that he often tried to give something to both sides. In some cases, such as *Branzburg*, *Herbert*, and *Zurcher*, the method was to call for a kind of ad hoc balancing on a case-by-case basis. Such a rule is easy to criticize. After all, it calls up a judge to weigh apples against oranges in an unstructured decision-making process. But it has the virtue of assuring that neither competing interest entirely trumps the other in every case. And the post-*Branzburg* history of confidential source cases<sup>55</sup> shows how lower courts can sometimes provide the structure for the balance themselves by developing tests to apply. The other method, of course, is formulating the test at the Supreme Court level, as in *Gertz* and *Central Hudson Gas & Electric Corp.* And as I have already suggested, such tests have proved to be both workable and long-lived accommodations.

It may well be that such an approach is unpalatable to those who “expect their constitutional jurisprudence to proceed forthrightly and confidently from . . . principles” that reflect our shared constitutional values.<sup>56</sup> Certainly there were times when Justice Powell’s caution and willingness to see both sides were frustrating to me as a young, generally liberal law clerk who admired the Warren Court and its leader, Justice William Brennan. But those traits also serve to explain how I always felt strongly that if Justice Powell and his approach to judging were to hold sway, the Republic would go on just fine.

Interestingly, minimalist centrism stands in contrast with the approach

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53. Louis Bilonis, *Grand Centrism and the Centrist Judicial Personam*, 83 N.C. L. REV. 1353, 1356 (2005).

54. *Id.* at 1355 (quoting ALASDAIR MCINTYRE, *AFTER VIRTUE* 253 (2d ed. 1984)).

55. See *supra* note 24 for a discussion of cases.

56. Bilonis, *supra* note 53, at 1357.

generally adopted by the current “swing Justice,” Justice Anthony Kennedy. Although he certainly at times acts as a moderating influence on those Justices inclined to adopt absolute constitutional rules,<sup>57</sup> he is more often himself the proponent of sweeping rules. His centrist reputation primarily comes from the fact that he favors rules in different contexts that sometimes align him with the conservatives on the Court and sometimes with the liberals. He is, for example, the author both of the soaring rhetoric in *Lawrence v. Texas*,<sup>58</sup> the landmark gay rights case, and of the majority opinion in *Florence v. Board of Chosen Freeholders of the County of Burlington*,<sup>59</sup> where the Court held that there is no constitutional problem raised by strip-searching a man erroneously jailed for not paying a fine.<sup>60</sup>

Justice Kennedy's willingness to adopt robust rules is nowhere better illustrated than in free speech cases, where he is probably the most consistent supporter of speech rights since Justice Brennan. It is difficult, for example, to imagine Justice Powell writing Justice Kennedy's concurrence in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*,<sup>61</sup> where he objected to the application of strict constitutional scrutiny to a content-based burden on free speech, arguing that such a law is categorically unconstitutional.<sup>62</sup> A more recent example is *United States v. Alvarez*,<sup>63</sup> where Justice Kennedy wrote a plurality opinion applying strict constitutional scrutiny to a law that banned only intentionally false statements about having received a medal during military service.<sup>64</sup> As *Alvarez* illustrates, the real judicial minimalist these days in First Amendment cases is Justice Breyer—who concurred in the result in *Alvarez*, applying an ad hoc balancing test.<sup>65</sup>

If another *Greenmoss* were to come along next Term, one might expect to see Justice Kennedy reprising the role of Justice Brennan and Justice Breyer making stabs at finding the right intermediate rule. Justice Scalia might well be the one echoing Justice White's critique of *Sullivan*

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57. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 387–95 (2003) (Kennedy, J., dissenting) (acknowledging diversity as a legitimate educational goal and stating that affirmative action could be justified by a showing that there is no alternative method of reaching that goal).

58. 539 U.S. 558 (2003).

59. \_\_\_ U.S. \_\_\_, 132 S. Ct. 1510 (2012).

60. *Id.* at 1522–23.

61. 502 U.S. 105 (1991).

62. *Id.* at 124–28 (Kennedy, J., concurring).

63. \_\_\_ U.S. \_\_\_, 132 S.Ct. 2537 (2012).

64. *Id.* at 2548.

65. *Id.* at 2551–56 (Breyer, J., concurring).

and *Gertz*. But the odds are good that the Court would come out again about where it did the last time.