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Constitutional Civil Rights

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I. INTRODUCTION

The First Amendment presents some of the most nettlesome, yet interesting, issues for attorneys and federal judges. Once again this term, the Court of Appeals for the Eleventh Circuit dealt with some complex issues in cases involving nude dancing, freedom of the press, religious symbols, commerce, and the Confederate battle flag. The court even stirred nationwide controversy over its decision about a monument to the Ten Commandments in Alabama.

This Article highlights some of the key legal principles the court follows in ruling on First Amendment cases. The Article shows how the court, applying the same legal theories, reaches different results based on the facts of the case. This organization enhances the reader's understanding of these complex legal problems. This Article also considers in depth the issue of standing because the Eleventh Circuit stated this term that standing is "[p]erhaps the most fundamental doctrine that has emerged from the case-or-controversy requirement."[1]

II. FIRST AMENDMENT

A. *Standing*

In *Focus on the Family v. Pinellas Suncoast Transit Authority*,[2] Focus on the Family ("Focus"), an evangelical organization, sued Pinellas Suncoast Transit Authority ("PSTA") seeking injunctive relief. Focus contended that PSTA violated its First Amendment rights by prohibiting it from advertising its conference on homosexuality, called "Love Won

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1. Women's Emergency Network v. Bush, 323 F.3d 937, 943 (11th Cir. 2003).
2. 344 F.3d 1263 (11th Cir. 2003).

Out," on county bus stop shelters. A PSTA representative first agreed to let Focus advertise on the shelters and signed a contract, which prompted Focus to send artwork to the printer. When PSTA realized that the word "homosexuality" would appear in the advertisements, PSTA rejected them based on a provision in the contract that allowed it to control the content of the advertisements. Focus contended that this amounted to viewpoint-based restriction on its speech.[3]

The district court granted summary judgment to PSTA based in part on the position that Focus could not satisfy standing requirements for constitutional action because it could neither show actual nor future harm; therefore, Focus failed to prove injury in fact and causation.[4] The court of appeals reversed and concluded that Focus had standing.[5]

Focus suffered an injury for standing purposes because PSTA had stopped Focus from advertising after it had spent time, energy, and money on the project, and the conference was probably less well attended because of the lack of advertising.[6] These facts satisfied the requirement for an injury-in-fact or "an invasion of a legally protected interest which is . . . concrete and particularized,"[7] as required under the first prong of *Lujan v. Defenders of Wildlife*.[8]

With respect to the second prong of the *Lujan* test—the requirement for proof of a causal connection[9]—the court explained that proximate cause does not apply to the doctrine of standing.[10] Instead, the court said that "even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes."[11] Because Focus could show PSTA's direct involvement in rejecting the advertising campaign, it satisfied the causation prong.[12] The court of appeals cited the United States Supreme Court to expand on this point:

> The essence of the standing question, in its constitutional dimension, is "whether the plaintiff has 'alleged such personal stake in the outcome of the controversy' (as) to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." The plaintiff must show that he himself is injured by

3. *Id.* at 1268-71.
4. *Id.* at 1271.
5. *Id.* at 1268.
6. *Id.* at 1273.
7. *Id.* at 1272-73 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).
8. 504 U.S. 555, 560 (1992).
9. *Id.*
10. *Pinellas*, 344 F.3d at 1273.
11. *Id.*
12. *Id.*

> the challenged action of the defendant. *The injury may be indirect,* but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions.[13]

The record showed that a PSTA employee had told a Focus representative that PSTA rejected the advertisements because it did not like the word "homosexuality."[14] The record also showed that PSTA rejected them because of their "political controversialism, offensiveness and their potential to subject a discernible social group to ridicule [which were expressly designated in the agreement as unacceptable]."[15] Based on this evidence, the court found not only sufficient evidence of causation but also held that enjoining PSTA from enforcing the agreement could redress the wrong.[16] Likewise, on the third element of the standing issue—redressibility—the court followed the causation analysis and said that if the agreement caused Focus to suffer injury, enjoining the enforcement of the agreement could redress the injury also.[17] Thus, Focus satisfied the redressibility requirement for standing.[18]

The court further held that the district court erred in its denial of standing based on Focus's failure to show the need for prospective injunctive or declarative relief.[19] To have standing to obtain forward-looking relief, a plaintiff must show that he will suffer more illegal conduct in the future.[20] A "merely conjectural or hypothetical . . . threat of future injury" is not enough.[21] However, the court explained that "[s]tanding does not have to be maintained throughout all stages of litigation. Instead, it is to be determined as of the time the complaint is filed."[22] Focus could show the need for declaratory relief because it alleged that it intended to have another conference in the future and would once again seek to advertise the conference.[23] Because Focus could show injury-in-fact, causation and redressibility, and the need for

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13. *Id.* (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 260-61 (1977) (emphasis in original)).
14. *Id.*
15. *Id.* at 1274.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 1274-75.
21. *Id.* at 1275 (quoting Wooden v. Bd. of Regents, 247 F.3d 1262, 1284 (11th Cir. 2001)).
22. *Id.* (quoting NAACP v. City of Parma, 263 F.3d 513, 524 (6th Cir. 2001)).
23. *Id.* at 1275-76.

prospective relief, the court reversed the district court and held that Focus was entitled to be heard on its First Amendment claims.[24]

In two other cases, the court of appeals held that the plaintiffs had no standing to challenge the actions of the government on First Amendment grounds.[25] In *Women's Emergency Network v. Bush*,[26] a nonprofit organization and several individuals challenged Florida's authorization of license plates stating "Choose Life" and the use of state funds generated from the sale of the license plates to help adoption agencies. A Florida statute authorized specialty license plates and the use of the money collected from the purchase of the tags for specific purposes.[27] Plaintiffs claimed that (1) the statute violated their freedom of speech by not offering a similar forum for pro-choice car owners, (2) it discriminated based on the viewpoint of the recipients of the money, and (3) it created an excessive entanglement of religion by delegating an important governmental function to religious organizations.[28]

In holding that the plaintiffs had no standing, the court first noted that state taxpayers ordinarily lack sufficient interest to challenge laws of general applicability because "their injury is not significantly different from that suffered by taxpayers in general."[29] However, a relaxed standard applies in Establishment Clause violations alleged by taxpayers.[30] Under this relaxed standard, the taxpayer must demonstrate "a logical link between his taxpayer status and the challenged legislative enactment, and a nexus between his taxpayer status and the precise nature of the alleged constitutional infringement."[31] Under the taxpayer standing analysis, plaintiff Becker showed that he resided in Palm Beach County, he paid taxes in the county, and the county expended municipal funds in negotiating a contract with the religious organization Catholic Charities. However, he could not show any injury because the mere negotiation of a contract with a religious organization does not create an Establishment Clause issue.[32] Because the government had never entered into a contract with Catholic Charities, there was no contract to consider, and the court of appeals could not say that

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24. *Id.* at 1276.
25. Women's Emergency Network v. Bush, 323 F.3d 937, 950 (11th Cir. 2003); Doe v. Pryor, 344 F.3d 1282, 1287-88 (11th Cir. 2003).
26. 323 F.3d 937 (2003).
27. FLA. STAT. § 320.08058(30) (2002).
28. 323 F.3d at 941-42.
29. *Id.* at 943.
30. *Id.*
31. *Id.*
32. *Id.* at 943-45.

the government's actions were unconstitutional.[33] Thus, plaintiff's injuries were speculative and failed to satisfy *Lujan's* injury-in-fact requirement.[34] Moreover, under theories of individual standing and organizational standing, because plaintiffs had never attempted to present their pro-choice view on license plates under the same Florida statute, they could not show that the state had denied them the right to express their viewpoint.[35] The court stated that "[t]he First Amendment protects the right to speak; it does *not* give [a]ppellants the right to stop others with opposing viewpoints from speaking."[36]

In *Doe v. Pryor*,[37] concerning gay rights, plaintiffs sued the Attorney General of Alabama as chief law enforcer of the state and claimed that an Alabama statute that criminalized deviant sexual intercourse violated their First Amendment rights.[38] The court of appeals ruled the plaintiffs had no standing to challenge the law because they failed to show they suffered any injuries fairly traceable to the action of the defendant.[39]

To show that a criminal statute may chill expression protected by the First Amendment, a plaintiff must show "'that either (1) [they were] threatened with prosecution; (2) prosecution is likely; or (3) there is a credible threat of prosecution.'"[40] In *Pryor* plaintiffs could not show that they had been threatened with prosecution or that there was any credible threat of prosecution.[41] Indeed, the Attorney General had expressly conceded in a supplemental brief that the Supreme Court's ruling in *Lawrence v. Texas*[42] made the Alabama statute on private, consensual oral and anal sex unconstitutional.[43]

B. Religious Symbols

Chief Justice Roy S. Moore of the Alabama Supreme Court placed a two-and-one-half ton monument of the Ten Commandments in the rotunda of the Alabama State Judicial Building under cover of darkness

33. *Id.* at 945.
34. *Id.* at 944.
35. *Id.* at 945-46.
36. *Id.* at 947.
37. 344 F.3d 1282 (11th Cir. 2003).
38. *Id.* at 1283.
39. *Id.* at 1287-88.
40. *Id.* at 1287 (quoting Pittman v. Cole, 267 F.3d 1269, 1283-84 (11th Cir. 2001)).
41. *Id.*
42. 539 U.S. 558.
43. *Pryor*, 344 F.3d at 1287.

and without consulting his colleagues. In taking this action, he fulfilled a campaign promise to restore the moral foundation of law.[44]

Three attorneys in Alabama, who regularly entered the judicial building while practicing law, sued Moore, asserting that his actions violated the Establishment Clause and sought declaratory relief to force Moore to remove the monument. The plaintiffs contended that the monument offended them and made them feel like outsiders because they did not share Justice Moore's religious beliefs. Two of the plaintiffs went to the judicial building less frequently because of the monument. One plaintiff avoided the building by buying law books rather than doing legal research in the building's law library and by hiring a runner to deliver documents to court offices in the building.[45]

After a seven-day bench trial, district court Judge Myron Thompson entered judgment for plaintiffs and ordered Moore to remove the monument. Thompson reasoned that Moore's actions violated the Establishment Clause because he had a nonsecular purpose for displaying the monument and the monument's primary effect advanced religion. Judge Thompson found that Moore erected the monument not simply to honor the Ten Commandments, but also to honor the Judeo-Christian God.[46]

The court of appeals began its review by noting that when a plaintiff brings a challenge under the Establishment Clause, the court must consider the challenge on a case-by-case basis by analyzing specific facts rather than by using bright-line rules.[47] With this in mind, the court carefully analyzed the record and dealt with two major legal issues: whether plaintiffs had standing to sue, and whether placing the monument in the Alabama State Judicial Building violated the Establishment Clause.[48]

On the first issue the court began by stating the elements necessary for standing:

> [T]o satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defen-

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44. Glassroth v. Moore, 335 F.3d 1282, 1284-85 (11th Cir. 2003).

45. *Id.* at 1288.

46. *Id.* See Judge Thompson's excellent and thorough opinion in *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002).

47. *Glassroth*, 335 F.3d at 1288.

48. *Id.* at 1291-92.

> dant, and that the injury will likely be redressed by a favorable decision.[49]

Plaintiffs have standing if the law or practice about which they complain directly affects them, such as forcing them to "'assume special burdens' to avoid 'unwelcome religious exercises.'"[50] On this issue the court held that two of the three plaintiffs had standing because they had altered their behavior to avoid the monument, and they would continue to suffer from the monument's presence in the rotunda because they could not completely avoid it in their law practice.[51] The court further held that by requiring Chief Justice Moore to remove the monument, the court could redress plaintiffs' injuries.[52]

The court then turned to the more complex issue of the alleged Establishment Clause violation.[53] The Establishment Clause prohibits any law with respect to an establishment of religion.[54] According to the court of appeals, the Supreme Court has come to an understanding of the general meaning of this clause in this way:

> [the] government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.[55]

The First Amendment protects not only adherents to various branches of Christianity but also the infidel and the atheist as well.[56]

The court then noted that the Ten Commandments have an inherently religious nature, and a government's use of them must satisfy the three-step analysis of *Lemon v. Kurtzman*.[57] The court explained that "[t]he *Lemon* test requires that the challenged practice have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion."[58] The court held that Moore's own statements about the monument demonstrated

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49. *Id.* at 1292 (quoting Bennett v. Spear, 520 U.S. 154, 162 (1997)).
50. *Id.* (quoting ACLU v. Rabun County Chamber of Commerce, Inc. 698 F.2d 1098, 1107 (11th Cir. 1983) (per curiam)).
51. *Id.*
52. *Id.* at 1292-93.
53. *Id.* at 1293.
54. *Id.*
55. *Id.* (quoting County of Allegheny v. ACLU, 492 U.S. 573, 590-91 (1989)).
56. *Id.* at 1294-95.
57. *Id.* at 1295; *see Lemon*, 403 U.S. 602 (1971).
58. *Glassroth*, 335 F.3d at 1295.

that he did not have a secular purpose for placing the monument in the Alabama Judicial Building.[59]

The court further noted that the monument had the primary effect of advancing religion.[60] The effect prong of the *Lemon* test "asks whether . . . the practice under review in fact would convey a message of endorsement or disapproval to an informed, reasonable observer."[61] Once again, Moore's own statements about the monument supported this conclusion.[62] He said that the monument "reflects the sovereignty of God over men."[63] As a consequence, the court held that Moore's actions failed the first two prongs of the *Lemon* test and violated the First Amendment.[64]

The court then distinguished the Supreme Court's decision in *Marsh v. Chambers*[65] because Moore argued that *Marsh* authorized him to place the monument in the building.[66] In *Marsh* the Supreme Court denied a challenge under the *Lemon* test to the Nebraska legislature's practice of having prayer to open legislative sessions.[67] Because of the long heritage of such practices in our republic, including opening prayers in the United States Congress, Nebraska's legislature did not violate the Constitution by having an opening prayer.[68] Unlike *Marsh*, Moore could not prove "an 'unambiguous and unbroken history' of displaying religious symbols in judicial buildings."[69] The court would not approve a broad reading of *Marsh* to support Moore's actions.[70]

In *King v. Richmond County*,[71] a Ten Commandments case at the other end of the spectrum of public controversy, the court applied the *Lemon* test to the seal of the clerk of superior court for Richmond County, Georgia, and held that it did not violate the Establishment Clause.[72] The seal outlines the Ten Commandments and includes a sword and the name of the court. The clerk only uses it to authenticate documents such as real estate records, witness subpoenas, and attorney

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59. *Id.* at 1296-97.
60. *Id.* at 1297.
61. *Id.* (quoting King v. Richmond County, 331 F.3d 1271, 1279 (11th Cir. 2003)).
62. *Id.*
63. *Id.*
64. *Id.*
65. 463 U.S. 783 (1983).
66. *Glassroth,* 335 F.3d at 1297-98.
67. 463 U.S. at 786, 795.
68. *Id.*
69. *Glassroth*, 335 F.3d at 1298.
70. *Id.*
71. 331 F.3d 1271 (11th Cir. 2003).
72. *Id.* at 1275-78.

licenses. The seal does not appear on the clerk's letterhead or website and is not displayed anywhere in the courthouse. Clerks have used the seal for 130 years.[73]

In applying the *Lemon* test, the court explained that the first element of the test—the purpose prong—requires the court to ascertain the purpose of the government practice at issue.[74] Richmond County could not offer any evidence of what the government intended 130 years earlier about the purpose of the design of the seal.[75] The court did not find this fatal to the county's defense because the county offered a plausible secular purpose for the seal's design.[76] It argued that the Ten Commandments on the shield "enabled illiterate citizens to recognize the legal validity of documents displaying the Seal."[77] This argument satisfied the government's initial burden under the purpose prong.[78]

The court explained that under the effect prong, the second element of the *Lemon* test, "even when evidence of religious purpose is lacking, the Establishment Clause prohibits the government from 'appearing to take a position on questions of religious belief relevant in any way to a person's standing in the political community.'"[79] The context of the government's use of the alleged religious symbol is the touchstone of the effect prong.[80] In this case, because of the small size and limited use of the seal and because the outline of the Ten Commandments was not the only symbol on the seal, the seal did not fail the effect prong.[81] Such contextual factors "make it less likely that a reasonable observer would believe that the government intended to send a message of religious endorsement."[82] Thus, because the seal did not have the purpose or primary effect of endorsing religion, it did not violate the Establishment Clause.[83]

C. *Adult Entertainment*

In *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida*,[84] the court reviewed a zoning ordinance and a public nudity

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73. *Id.* at 1273-74.
74. *Id.* at 1276.
75. *Id.* at 1277.
76. *Id.* at 1276-78.
77. *Id.* at 1278.
78. *Id.*
79. *Id.* (quoting *Allegheny*, 492 U.S. at 594).
80. *Id.*
81. *Id.* at 1284-85.
82. *Id.* at 1285.
83. *Id.* at 1286.
84. 337 F.3d 1251 (11th Cir. 2003).

ordinance, both of which plaintiff alleged violated its First Amendment rights.[85] In analyzing these ordinances, the court undertook a comprehensive summary of Supreme Court cases on First Amendment rights to freedom of expression.[86] This opinion merits careful reading for anyone interested in this area of the law.

The court first noted that although the Supreme Court had used closely related and sometimes overlapping analyses for zoning ordinances and public nudity ordinances, these two types of regulatory actions required separate evaluations.[87] For a zoning ordinance that regulates operating conditions, the court should consider the standards for time, place, and manner regulations set forth in *Renton v. Playtime Theatres, Inc.*[88] and in *City of Los Angeles v. Alameda Books, Inc.*[89] For a *Renton* analysis, the court must first

> determine whether the ordinance constitutes an invalid total ban or merely a time, place, and manner regulation; second, if the ordinance is determined to be a time, place, and manner regulation, the court must decide whether the ordinance should be subject to strict or intermediate scrutiny; and third, if the ordinance is held to be subject to intermediate scrutiny, the court must determine whether it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication.[90]

For content-neutral public nudity ordinances, the court should consider the four-part test described in *United States v. O'Brien.*[91] Under *O'Brien* public nudity bans are constitutional "if they (1) are within the constitutional power of the government to enact; (2) further a substantial government interest; (3) are unrelated to the suppression of free expression; and (4) restrict First Amendment freedoms no greater than necessary to further the government's interest."[92]

In *Peek-A-Boo Lounge* the court first considered the zoning ordinance that imposed building requirements only on adult dancing establishments and authorized searches of these businesses without a warrant.[93]

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85. *Id.* at 1252-53.

86. *Id.* at 1255-64.

87. *Id.* at 1264.

88. 475 U.S. 41 (1986).

89. 535 U.S. 425 (2002) (clarifying how to interpret step three under *Renton* and prong two under United States v. O'Brien, 391 U.S. 397 (1968)); *Peek-A-Boo Lounge*, 337 F.3d at 1264.

90. *Peek-A-Boo Lounge*, 337 F.3d at 1264 (citing *Renton*, 475 U.S. at 46-50).

91. 391 U.S. 367 (1968). *See* Barnes v. Glen Theatre, 501 U.S. 560 (1991); City of Erie v. Pap's A.M., 529 U.S. 277 (2000).

92. *Peek-A-Boo Lounge,* 337 F.3d at 1264 (citing *O'Brien*, 391 U.S. at 367-77).

93. *Id.* at 1265.

It applied the third step under *Renton* and asked if the ordinance was narrowly tailored to the government's interest.[94] In considering this issue, the court looked to the evidence that the county used to justify the ordinance.[95] The county had no evidence of the secondary effects of nude dancing on the community that it might have reasonably believed to be relevant and which would rationally support the ordinance at the time it was enacted.[96] Although *Renton* does not require much evidence and does not require a municipality to have new studies or studies directed to the locale in question, it does require the municipality to show some link between the ordinance and the design of the ordinance to combat undesirable secondary effects in the community at the time of enactment.[97] Because of this failure, the court held the ordinance unconstitutional.[98]

The court then considered the second ordinance that regulated public nudity directly and nude dancing only incidentally.[99] Because this type of ordinance prohibits all public nudity without reference to nude dancing, its impact on expression is only incidental; therefore, the ordinance is content-neutral, and the *O'Brien* test applies.[100] Like the third part of the *Renton* analysis, the second prong of *O'Brien* examines the government's substantial interest in preventing deleterious secondary effects of adult entertainment on the community and the evidence used by the government to tailor the ordinance to combat those effects.[101] Because the county enacted the public nudity ordinance after it had enacted the zoning ordinance and found some evidence of secondary effects to support it, this ordinance did not fail for lack of supporting evidence at the time of enactment.[102] However, under *Alameda Books,* not only must the government have supporting evidence, but it must also afford a plaintiff the opportunity to dispute the government's rationale with plaintiff's own evidence.[103] If a plaintiff succeeds in casting doubt on the government's evidence, then the burden shifts back to the government to supplement the record with more

94. *Id.* at 1266.
95. *Id.*
96. *Id.*
97. *Id.* at 1268-71.
98. *Id.* at 1269.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 1270.
103. *Id.*

evidence on its theory of secondary effects that support the ordinance.[104]

In this case, the plaintiffs, two adult lounges, challenged the sufficiency of the county's evidence by presenting evidence that disputed any secondary effects around the adult lounges in Manatee County.[105] The adult lounges showed that crime rates were lower near their businesses than in other areas and that property values had actually gone up rather than down.[106] The adult lounges also submitted three expert studies of Manatee County that showed there was no evidence connecting the businesses with negative secondary effects.[107] Based on the evidence, the court held that the adult lounges carried their burden of challenging the county's evidence, thus shifting the burden back to the county to offer new evidence.[108] Because the county failed to offer new evidence in the district court and because substantial questions of fact existed, the court held that summary judgment for the county was improper and reversed the district court.[109]

The court of appeals also directed the district court to consider the issue of the scope of the public nudity ordinance on remand.[110] The ordinance not only prohibited public nudity, but it also banned the use of G-strings, pasties, and thongs.[111] It defined nudity as "the wearing of any clothing covering less than one-third of the buttocks or one-fourth of the female breast."[112] With respect to this issue, the court noted that the fourth prong of *O'Brien* requires "that any incidental restriction on alleged First Amendment freedoms be no greater than is essential to further the government's interest."[113] In *City of Erie v. Pap's A.M.*,[114] the Supreme Court upheld an ordinance that required nude dancers to wear pasties and G-strings, noting that these limited dress requirements left ample opportunity for dancers to convey an erotic message.[115] However, the more stringent requirements of the Manatee County ordinance "could significantly impact that message."[116] Thus, the court

104. *Id.* at 1269.
105. *Id.* at 1270.
106. *Id.*
107. *Id.*
108. *Id.* at 1272.
109. *Id.*
110. *Id.* at 1273.
111. *Id.*
112. *Id.*
113. *Id.*
114. 529 U.S. 277 (2000).
115. *Id.* at 1273-74.
116. *Id.* at 1274.

of appeals directed the district court to consider whether the ordinance would fail under the intermediate scrutiny analysis because it put too many restrictions on a dancer's right to expression.[117]

In *Fly Fish, Inc. v. City of Cocoa Beach*,[118] a dance club challenged an adult entertainment ordinance on several grounds, alleging that (1) the ordinance authorized only three sites in the community for adult entertainment, (2) the ordinance gave unbridled discretion to city officials to grant a license, and (3) the licensing fee was unconstitutional.[119]

The court of appeals examined the restricted number of sites available under the zoning regulation following the requirements of *Renton*.[120] It noted that "under *Renton*, a zoning ordinance that restricts the location of adult entertainment establishments must serve a substantial government interest and 'leave open ample alternative avenues of communication.'"[121] In this case, the city made three sites available for four adult entertainment businesses.[122] In other words, plaintiff dance club had nowhere within the city limits to operate its business.[123] Although the court did not adopt a bright-line rule, it did hold that the ordinance was unconstitutional because the city did not provide sufficient sites for all the adult entertainment businesses operating within the city limits.[124]

The court of appeals also held that the time allowed under the ordinance for granting a license was unconstitutional because it was a prior restraint on protected expression.[125] It stated that "'[a] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.'"[126] The ordinance was unconstitutional because it gave city officials an indefinite time to grant the license, which meant that the city could deny a license by taking no action.[127] The ordinance stated that if the city did not act on the application within thirty days a license would be issued pending

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117. *Id.*
118. 337 F.3d 1301 (11th Cir. 2003).
119. *Id.* at 1304.
120. *Id.* at 1309.
121. *Id.* (quoting *Renton*, 475 U.S. at 50).
122. *Id.* at 1311.
123. *Id.* at 1312.
124. *Id.* at 1311.
125. *Id.* at 1312-13.
126. *Id.* at 1313 (quoting Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969)).
127. *Id.*

the city's approval; however, this type of conditional licensing is unconstitutional.[128]

As to the licensing fee, the court noted that "when core First Amendment freedoms are made subject to a licensing scheme, only revenue-neutral fees may be imposed so that [the] government is not charging for the privilege of exercising a constitutional right."[129] The government may not profit from taxing protected rights.[130] The government has the burden of showing the fee is "reasonably related to recoupment of the costs of administering the licensing program."[131] Because the city failed to make an adequate record on its costs for administering the licensing program, the court held the fee unconstitutional.[132]

In *Artistic Entertainment, Inc. v. City of Warner Robins,*[133] the court of appeals held two ordinances designed to prohibit the consumption of alcohol on the premises of a nude dance club constitutional.[134] In the previous appeal, the court held that one of the city's licensing ordinances acted as an unconstitutional prior restraint on expression because it did not provide a reasonable time limit on the business's right to begin operating if the city failed to act on the application.[135] The city amended the ordinance after the remand, and the amendment gave the city council forty-five days to approve the license. If the city council did not act within that time, then the license would be approved and issued without further action.[136] This amendment cured the problem of the unconstitutional prior restraint of an indefinite time within which the city had to act on the license.[137]

D. Commerce and the First Amendment

In *Uptown Pawn & Jewelry, Inc. v. City of Hollywood,*[138] the court considered the city's policy of refusing to let pawn shops advertise on bus benches on the city's rights-of-way.[139] The first step of the court's

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128. *Id.* at 1313-14.
129. *Id.* at 1314.
130. *Id.* (citing Sentinel Communications v. Watts, 936 F.2d 1189, 1205 (11th Cir. 1991)).
131. *Id.*
132. *Id.* at 1315.
133. 331 F.3d 1196 (11th Cir. 2003). This was the third appeal of this case. *Id.* at 1199.
134. *Id.* at 1207.
135. *Id.* at 1199-1200.
136. *Id.* at 1203.
137. *Id.*
138. 337 F.3d 1275 (11th Cir. 2003).
139. *Id.* at 1276.

analysis involved determining whether the bus benches created a public forum or a nonpublic forum.[140] Restrictions on speech in a public forum require strict scrutiny, but restrictions on nonpublic forums pass constitutional muster if they are reasonable and are not viewpoint discriminatory.[141] Public forums commonly include streets and parks or areas expressly dedicated to speech activity by the government.[142] Because the city had not dedicated the bus benches to First Amendment activity and because the city as a proprietor used the bus benches to generate revenue, the reasonableness standard of a nonpublic forum applied.[143]

The court then considered the reasonableness of the city's policy and held it constitutional.[144] The reasonableness standard does not require the most reasonable limitation or the only reasonable limitation.[145] Moreover, the city did not have to show evidence of the reasonableness of the limitation in the record.[146] Common sense is enough under a reasonableness review, and the court held that common sense supported the city's desire to have only more desirable advertisers using the benches.[147] Also, the numerous alternative means available to the pawn shop to advertise supported the reasonableness of the city's limitation on what types of businesses could advertise on bus benches.[148]

In *Atlanta Journal & Constitution v. City of Atlanta Department of Aviation*,[149] the court of appeals rendered an en banc opinion on the city of Atlanta's control over the sale of newspapers in newspaper racks at Hartsfield Atlanta International Airport.[150] The city charged a profit-conscious fee of $20 per month for the use of each newsstand on airport property and restricted the number of newspaper publishers that could use the newsstands. The district court enjoined this scheme, finding that the fees were impermissible because the city charged more than its administrative costs for the use of the newsstand and because the plan gave unrestrained discretion in deciding which newspapers

140. *Id.* at 1277.
141. *Id.*
142. *Id.* at 1278.
143. *Id.* The plaintiff did not raise issues about viewpoint discrimination. *Id.* at 1277.
144. *Id.* at 1281.
145. *Id.*
146. *Id.* at 1280.
147. *Id.* at 1280-81.
148. *Id.* at 1281. The policy also prohibited advertisements for liquor, tobacco, x-rated movies, adult bookstores, and massage parlors. *Id.* at 1279.
149. 322 F.3d 1298 (11th Cir. 2003).
150. *Id.* at 1301.

could have permits. The plan prohibited individualized news racks, and only the *Atlanta Journal & Constitution, USA Today,* and *The New York Times* could lease the racks.[151]

The court of appeals, en banc, agreed that the plan gave too much discretion to the city, even in this nonpublic forum context.[152] The First Amendment protects the distribution of newspapers as well as the publication of newspapers.[153] As the court explained, "A grant of unrestrained discretion to an official responsible for monitoring and regulating First Amendment activities is facially unconstitutional."[154] Such power must be controlled by structural and procedural safeguards that protect against abuse of First Amendment rights.[155] The discretion must be reasonable and not simply controlled by the marketplace.[156] Because the plan lacked these safeguards and gave too much power to the city, it was unconstitutional.[157]

The court, however, reversed the district court and the panel on the profit-conscious fee issue—the main issue in the case.[158] The court explained that both federal and state regulations require the Atlanta Department of Aviation to operate the airport in a self-sufficient manner and that Congress has authorized airport authorities to charge reasonable fees.[159] The court further noted that one-half of all airport revenue comes from concessions and parking.[160] In light of the need to generate revenue through concessions to support the airport, the court would not restrict the city to its administrative costs for leasing the newsstands.[161] Moreover, the court held that the city, acting as a proprietor, charged a reasonable fee to lease the newsstands and that the newspaper publishers had alternate distribution channels in the airport through newsstands to sell their papers.[162] It explained that "'[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to

151. *Id.* at 1304-05.
152. *Id.* at 1311.
153. *Id.* at 1305.
154. *Id.* at 1310.
155. *Id.* at 1311.
156. *Id.*
157. *Id.*
158. *Id.* at 1312.
159. *Id.* at 1302.
160. *Id.*
161. *Id.* at 1312.
162. *Id.* at 1309.

which its actions as a lawmaker may be subject.'"[163] If the government acts reasonably as a proprietor, then its actions will not offend the First Amendment.[164]

E. Symbolic Speech

The Confederate battle flag once again became an issue in *Scott v. School Board of Alachua County.*[165] A school principal suspended several students for displaying the Confederate flag at school after being told not to do so, and the students claimed that this action violated their rights to symbolic speech.[166] The court held that the school principal's unwritten ban of the flag at school did not violate the students' constitutional rights.[167]

The First Amendment has unique application in the context of a school.[168] The court explained that "[a]lthough public school students' First Amendment rights are not forfeited at the school door, those rights should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve."[169] A principal can censure a student's speech under two theories.[170] First, if principals reasonably fear that certain speech is likely to disrupt school discipline, then they are authorized to prohibit the speech.[171] Second, school administrators can restrict speech, even if disruption is unlikely, because they have the duty to train their students about the requirements of civility.[172] This need for civility as a public virtue in a democracy authorizes school administrators to prohibit the use of offensive or threatening modes of speech.[173] Furthermore, schools should teach students of all races how to live and work together and to avoid the use of symbols that evoke racial prejudice or feelings of hatred or resentment.[174]

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163. *Id.* at 1308 (quoting Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992)).
164. *Id.*
165. 324 F.3d 1246 (11th Cir. 2003).
166. *Id.* at 1247.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 1248.
171. *Id.* (citing Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969)).
172. *Id.* (citing Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986)).
173. *Id.* (citing *Fraser*, 478 U.S. at 683).
174. *Id.* at 1249.

In this case school officials presented evidence of racial tension in the school and racially motivated fights between students shortly before the time the principal banned the flag from the school grounds.[175] As a consequence, the principal's actions in suspending the students who persisted in displaying the Confederate flag did not violate the First Amendment.[176]

III. CONCLUSION

These cases on the First Amendment teach us something about our society and something about our legal system that is not necessarily apparent to the practitioner trying to decide how to plead a case, or to a federal judge trying to rule on a motion for summary judgment. About society, we see the ever increasing polarization over social issues that divide our country and that galvanize people and organizations into action. About our legal system, we see that the courts are the new battlefields for the action of these polarized groups. Whether it is a conservative, evangelical organization like Focus on the Family suing a county authority or a pro-abortion group suing the state over pro-life car tags, both "sides" look to the courts, especially the federal courts, to protect their rights. This reality imposes on the courts an obligation of special vigilance to protect the rights of all members of our free society, and it also shows the fundamental importance of the First Amendment to our freedom.

175. *Id.*
176. *Id.*