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Book Review: Jerry Falwell V. Larry Flynt: The First Amendment on Trial. by Rodney A. Smolla.

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another fundamental way. The paradigm suggests that politicians want to do what most citizens want, and that they as much as the citizenry feel injured when the Court strikes down controversial statutes, or at least that they are likely to retaliate against the Court for offending their constituents. An alternative hypothesis is that Congress wants a powerful Supreme Court, even if—perhaps sometimes especially if—the Court makes politically unpopular decisions. The Supreme Court is Congress's lightning rod. The real reason Congress is reluctant to whip the Supreme Court in the wake of controversial decisions is not that the Court has more power or prestige than Congress can control. Quite the contrary. The Court shields the members of both Congress and the state legislatures from the need to make politically unpopular decisions. *Roe v. Wade* makes it possible for a member of Congress to have it both ways on the abortion question. How many congressmen and how many state legislators publicly criticize *Roe* and perhaps in some cases even privately believe that it was wrong, but secretly hope that it is never overruled? *Roe* shields them from a great political danger; the Republican candidate for Governor of Virginia, among others, has cause to wish that *Webster* had not removed part of that shield.

On this hypothesis, one would not generally expect to see Congress reducing the jurisdiction of the Supreme Court in the wake of a controversial decision. Legislators need a Supreme Court that is making controversial decisions so that they themselves do not have to make them. In such situations, activism enhances the Court's safety even if it decreases its popularity. Whether one applauds or deplores this covert alliance between judges and politicians, it undoubtedly helps to explain the Court's ability to hand down unpopular decisions.

JERRY FALWELL v. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL. By Rodney A. Smolla.¹ New York: St. Martin's Press. 1989. Pp. xi, 336. \$18.95.

*L.A. Powe, Jr.*²

Almost too good to be true: *Hustler Magazine v. the Moral Majority*; *Larry Flynt v. Jerry Falwell*—two men who offer proof that if you go far enough along a social and political spectrum, the

1. James Gould Cutler Professor of Constitutional Law and Director of the Institute of Bill of Rights Law at William and Mary.

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ends will indeed meet. That the pair deserved each other was a fitting irony. That they could enrich attorneys without screwing up the law ought to be proof of a beneficent god.

The legal joinder of Falwell and Flynt began in a mock Campari ad wherein *Hustler* had Falwell tell an interviewer that his "first time" was in an outhouse with his mother. Written in small print at the bottom was "ad parody—not to be taken seriously." Falwell, however, in the best postmodernist manner, eschewed literalism. He sued for invasion of privacy, libel, and intentional infliction of emotional distress. Trial in the friendly confines of a Roanoke federal court near Falwell's Lynchburg home nevertheless produced a directed verdict on the absurd privacy claim and a fatal jury determination that the parody could not reasonably be understood as referring to real events. Falwell's sole success was on the emotional distress count, where the jury awarded a measly \$200,000, half in compensatory damages and \$50,000 each in punitive damages against Flynt and *Hustler*.

To the surprise of most observers, everyone at the Big Court voted to protect *Hustler*. The Court was unwilling to force *Hustler's* parody into any of the recognized exceptions to the first amendment. It rejected Falwell's basic argument that the parody was "so outrageous" that the Court could safely hit *Hustler* while leaving Thomas Nast (the Court's historical example)—or more relevantly Oliphant, Herblock, and Trudeau—alone: "in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment."

The litigation and its sidebars make for a pretty good story and that is exactly what Professor Rodney Smolla has written. Taking up a genre typically avoided by law professors, Professor Smolla has given the lay public an interesting, well-written discussion of a specific lawsuit, with very short chapters but lots of information about first amendment doctrine. While the early part of the story is marred by excessive quotation from the depositions (neither Falwell nor Flynt can match Smolla's style), the compensation is that for a change the discussion of the law is neither inaccurate nor ham-handed.³

The rules of this genre require the author to justify his choice of a case, and often the justification is simply that the case is inherently interesting. Smolla could easily have let it go at that: his case has obvious human interest, and central characters who are controversial opposites. Religion, obscenity, good versus evil—what more

3. Because good indexes are a pleasure to see and typically overlooked in a review, I also believe Smolla deserves credit for a very good index.

could an author ask? Alas, Smolla goes further. For him this is a modern replay of the *Scopes* trial, one of the great trials of the century.

The point is not merely overdrawn; it just won't hold.⁴ True, the Supreme Court's decision (including a couple of perhaps surprising votes) adds interest to the *Falwell* case. But in other respects *Falwell* doesn't compare with *Scopes*. *Falwell's* attorney (Norman Roy Grutman) is no Bryan, and Flynt's (Alan Issacman) is no Darrow; nor, for all his gifts, is Smolla a Mencken. I also doubt that the public was aware of *Falwell's* suit in any way comparable to the widespread publicity attending the monkey trial. *Falwell* may have been selected to give Ronald Reagan's benediction at the 1984 Republication Convention (after the ad), but that still does not help Smolla make *Falwell* an "American classic" and he should not have tried (or, I suspect more accurately, he should have better resisted the blandishments of his publisher). Realistically, the *Falwell* case is big enough for a book designed to persuade lay readers to love the first amendment as Smolla and I do. That should suffice to justify the effort.

Had *Falwell* come out the other way, *New York Times v. Sullivan* would likely have been replaced as the dominant first amendment decision by *Pacifica*, a case that is fun to hammer at almost all levels, but also one that is not easily confined to broadcasting.⁵ Smolla has a perceptive ear; he understands that for many *Pacifica* should not be a mere exception to the first amendment—"it should be the usual first amendment rule." There is a world of difference between a presumption against censorship and a presumption in its favor. *Pacifica*, with its switched presumptions, can be a crucial case in any argument demanding that free speech be sacrificed in the name of other desirable social goals. Although Smolla was probably thinking about right-wingers when he wrote this book, he could now also look left at the efforts of many universities to suppress "racist, sexist, or homophobic" statements.⁶

Smolla knows that some protected expression is not the sort of

4. Smolla gives an *Inherit the Wind* history of *Scopes* that leaves fundamentalist ministers in a pile of corpses with William Jennings Bryan after Darrow's withering cross-examination. Stephen Jay Gould offers an entirely different perspective, noting that *Scopes* "abetted a growing fundamentalist movement and led directly to the dilution or elimination of evolution from all popular high school texts in the United States." HEN'S TEETH AND HORSE'S TOES 282 (1983). I am indebted to my colleague Doug Laycock for calling Gould's discussion to my attention.

5. Krattenmaker & Powe, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1214-21, 1228-43, 1281-88 (1978).

6. Finn, *The Campus: "An Island of Repression in a Sea of Freedom,"* 88 COMMENTARY No. 3, at 17 (Sept. 1989).

talk that our parents wished to hear in their living rooms. He takes obvious pleasure in concluding that Justice Stevens probably likes the "*Bill Cosby Show*" (sic.) but didn't laugh much at George Carlin's monologue. How else could Stevens miss Carlin's point so completely? You can't shock an audience without using words that shock them, and the choice matters when shock is the thought expressed.

To his credit, Smolla does not hide behind the usual argument that someone awful like Flynt must be protected so that George Will can feel secure on Sunday mornings. Even if law professors can be seduced by this sort of slippery slope argument,⁷ it is not clear that the public can also be fooled, and Smolla's forthright defense of Flynt makes no attempt to do so. Possibly because he speaks and writes so well, Smolla understands the necessity of pushing at the breaking point of the speech envelope. It is no small pleasure to read a scholar defending Larry Flynt without holding his nose.

If it has been too long since you last read a first amendment scholar defending offensive speech on its own merits, then *Jerry Falwell v. Larry Flynt* will be a refreshing change.

WOMEN'S RIGHTS IN FRANCE. By Dorothy McBride Stetson.¹ [Contributions in Women's Studies, number 74]. Westport, Connecticut: Greenwood Press. 1987. Pp. xvi, 239. \$35.00.

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For over one hundred and fifty years after the Revolution, French women and their male allies campaigned unsuccessfully for legal, economic, and political equality. Women in France obtained the vote only in 1944-45. In 1946 a clause giving women equal rights in law was incorporated into the Constitution of the Fourth Republic; it was reconfirmed in 1958 by the Fifth Republic. Between 1965 and 1975 most of the long-sought reforms, especially of the constrained legal status of married women, were granted by the government. These included, for married women, complete empowerment with regard to property and personal decisions and

7. Less so after Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

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