

In the

ORIGINAL

# Supreme Court of the United States

-----X  
PRINCETON UNIVERSITY and

STATE OF NEW JERSEY,

Appellants,

v.

CHRIS SCHMID,

Appellee.  
-----X

1576  
No. 80-1376 80 31

Washington, D. C.

November 10, 1981

Pages 1 thru 42

ALDERSON



REPORTING

400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

1                   IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :

3 PRINCETON UNIVERSITY and :

4 STATE OF NEW JERSEY, :

5                   Appellants, :

6                   v.                   :       No. 80-1576

7 CHRIS SCHMID,                   :

8                   Appellee.                   :

9 - - - - - :

10

11                                   Washington, D. C.

12                                   Tuesday, November 10, 1981

13

14                   The above-entitled matter came on for oral  
15 argument before the Supreme Court of the United States at  
16 2:09 o'clock p.m.

17

18 APPEARANCES:

19

20                   NICHOLAS deB. KATZENBACH, Esq., Armonk, N.Y.;;  
21                   on behalf of the Appellants.

22

23                   SANFORD LEVINSON, Esq., Austin, Tex.;;  
24                   on behalf of the Appellee.

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
NICHOLAS deB. KATZENBACH, Esq., on behalf of the Appellants	3
SANFORD LEVINSON, Esq., on behalf of the Appellee	23
NICHOLAS deB. KATZENBACH, Esq., on behalf of the Appellants - rebuttal	41

1

P R O C E E D I N G S

2

CHIEF JUSTICE BURGER: We will hear arguments next  
3 in Princeton University and New Jersey against Schmid.

4

Mr. Katzenbach, I think you may proceed when you're  
5 ready.

6

ORAL ARGUMENT OF NICHOLAS deB. KATZENBACH, ESQ.

7

ON BEHALF OF THE APPELLANTS

8

MR. KATZENBACH: Thank you, Mr. Chief Justice, and  
9 may it please the Court:

10

This case involves the rights of a private  
11 university under the federal Constitution, the First and  
12 Fifth and Fourteenth Amendments, to determine without state  
13 governmental interference the expressive activities of  
14 strangers that it permits upon its property.

15

QUESTION: Well, Mr. Katzenbach, doesn't it also  
16 involve whether Princeton should be here at all?

17

MR. KATZENBACH: It does, Justice Rehnquist. The  
18 question has been raised of standing and I'll address that  
19 right now if you wish. Is there any particular part of it  
20 that you would wish me to address or do you want me to --

21

QUESTION: Ordinarily in a state prosecution for  
22 trespass the matter is tried in the criminal courts, and in  
23 this case the Supreme Court of New Jersey said, although we  
24 think perhaps the federal Constitution would not prohibit  
25 trespass, we interpret our state constitution to forbid this



1 type of prosecution. So the indictment is dismissed or the  
2 prisoner freed.

3 And then how does Princeton get in here?

4 MR. KATZENBACH: Princeton gets in, Your Honor,  
5 because it was invited by the Supreme Court of New Jersey to  
6 intervene in the case. I think that the word "Intervenor"  
7 means that you're there as a party.

8 QUESTION: But does that mean you're here too, as  
9 well as --

10 MR. KATZENBACH: I think so, yes, because if we  
11 were a party in that case under state law and properly so,  
12 unless there's some constitutional reason, a due process  
13 reason, which has not been suggested in this case, as to why  
14 we would not be there, then I think we have participated in  
15 a decision where we were bound, a decision in which we  
16 participated, in which we have an interest, and in which we  
17 are bound by the result.

18 QUESTION: Then you couldn't enforce or even try to  
19 enforce your rule again without -- which you might have been  
20 able to do if you hadn't been a party.

21 MR. KATZENBACH: That's correct, I believe. If we  
22 had been invited to participate, for example, as amicus, I  
23 think it would have been open to us following the opinion  
24 there, and assuming that it was not appealed to this Court,  
25 it would have been open to Princeton to have sought an

1 injunction against Mr. Shmid or the American Labor Party  
2 from coming onto the campus at Princeton, and that would  
3 have proceeded through the Supreme Court of the state and  
4 then on here on appeal.

5           Now, that -- if that were the law of this Court,  
6 then obviously we should not have accepted the invitation of  
7 the Supreme Court to be an intervenor, because we lost our  
8 rights of appeal as a result.

9           QUESTION: That also creates -- is sufficient to  
10 create a case or controversy between you and somebody.

11           MR. KATZENBACH: I think it is real, yes, Your  
12 Honor, I do. I think that we have sacrificed rights,  
13 Princeton has sacrificed rights in this case if, as I  
14 believe, they are bound by that decision which they were  
15 invited to intervene in and which they fully participated  
16 in.

17           And I see it to be no different, unless there's a  
18 constitutional reason, from moving, as we did, for rehearing  
19 in the state court. The state did not happen to join in  
20 that motion. That motion was denied because none of the  
21 justices wished to hear it.

22           If it had been heard and the decision reversed,  
23 then that would be the same position that it would be in if  
24 this Court were to remand it on the ground that the New  
25 Jersey constitution violated rights of the property owner

1 under the First and Fifth Amendments.

2           QUESTION: Is it possible Princeton made an  
3 imprudent decision to accept the invitation to intervene  
4 instead of declining that and volunteering to file a brief  
5 amicus?

6           MR. KATZENBACH: Is it possible that was a  
7 mistake? I hope not.

8           (Laughter.)

9           MR. KATZENBACH: Because it certainly was invited  
10 to intervene. And New Jersey, Mr. Chief Justice, has a  
11 very, very liberal view of intervention. And it is not  
12 unusual even in criminal cases to have intervention,  
13 although it is unusual for private parties to be in that.  
14 Normally the courts will invite a municipality or a borough  
15 or somebody else who has some interest in a criminal  
16 prosecution, even though not technically a criminal  
17 prosecutor, to intervene.

18           QUESTION: Mr. Katzenbach, you heard our colloquy  
19 about mootness in the last case. Is there not a similarity  
20 between this case, in that you've now adopted a regulation  
21 that would have permitted this man to come on and distribute  
22 leaflets?

23           MR. KATZENBACH: I don't believe so, because I  
24 don't believe that -- it is clear to me, Mr. Justice  
25 Stevens, that the regulations that Princeton now has, which

1 are in the brief, are not consistent with the interpretation  
2 of the New Jersey constitution made by the court below. And  
3 I think that's very obvious.

4           QUESTION: Well, is that the test? Or is it if he  
5 did precisely the same thing he did here that gave rise to  
6 the trespass prosecution, would he now violate your present  
7 regulation?

8           MR. KATZENBACH: Yes, because he never even asked  
9 for permission.

10          QUESTION: I see.

11          MR. KATZENBACH: And presently the rules still say  
12 you must ask for permission. So I think he would still be  
13 precisely in violation.

14          QUESTION: Your new regulation was a response to  
15 this case, was it not?

16          MR. KATZENBACH: Not to the decision, Mr. Chief  
17 Justice.

18          QUESTION: But to the problem.

19          MR. KATZENBACH: To the problem, yes. It was a  
20 response to the problem and they decided, for whatever  
21 reasons, they decided to at least try a new regulation. But  
22 the new regulation is, as I say, tougher in some respects,  
23 more liberal in others.

24          QUESTION: You still require permission.

25          MR. KATZENBACH: But it still requires permission.



1 QUESTION: Which the court below said was  
2 improper.

3 MR. KATZENBACH: Well, at least which they did not  
4 require in this case.

5 QUESTION: But you can say the same of the City of  
6 Mesquite, that they decided it be better to repeal a part of  
7 their ordinance than to try and enforce it.

8 MR. KATZENBACH: There's a difference, surely,  
9 between changing the rule of a private organization. If you  
10 change work rules, for example, that wouldn't moot the  
11 question under the old rules, nor would you ordinarily be  
12 allowed to put in evidence of a change of rules. And I  
13 don't see -- I think these rules present the same problem,  
14 Justice Rehnquist, as the other rules.

15 QUESTION: Is there anything in the New Jersey  
16 constitution or law or the federal Constitution to prevent  
17 Princeton from putting a 20-foot wall around and in effect  
18 making it like a monastery of the middle ages, if they  
19 wanted to?

20 MR. KATZENBACH: There may be a borough ordinance,  
21 Mr. Chief Justice, on the height of walls. But apart from  
22 that, I don't know --

23 QUESTION: Make it an eight-foot wall.

24 MR. KATZENBACH: -- that they would prevent it.  
25 Nor am I clear that under the New Jersey constitution that

1 if they said if you wanted to keep everybody out that you  
2 couldn't do so. The test that they apply there is one that  
3 talks about, the more you invite the public, the more you  
4 allow free speech, the more you allow controversy, the more  
5 governmental regulation we will have.

6 QUESTION: Why is New Jersey required to respect  
7 private property at all, except under the eminent domain  
8 clause?

9 MR. KATZENBACH: I missed a word there, Justice.  
10 Required to what?

11 QUESTION: Respect private -- or set up a system of  
12 private property at all, except under the eminent domain  
13 clause.

14 MR. KATZENBACH: Well, I would suppose that if your  
15 suggestion is that the state could -- if it isn't private  
16 property, then I assume it is state property. I don't know  
17 what's in between.

18 QUESTION: Yes. Well, assume that there are no --  
19 the state does not pass any trespass statutes.

20 MR. KATZENBACH: It doesn't have to.

21 QUESTION: That it doesn't provide for any recorder  
22 of deeds, and it simply says all hand shall be held in  
23 common by the residents of the states.

24 MR. KATZENBACH: I would suppose that would be a  
25 taking.

1 QUESTION: Well, but if it started out that way it  
2 wouldn't be a taking.

3 MR. KATZENBACH: Well, I suppose today at least it  
4 would be a taking.

5 QUESTION: I thought a major part of your argument  
6 was that New Jersey's refusal to apply its trespass laws may  
7 not violate your property rights, but your free speech  
8 rights.

9 MR. KATZENBACH: That is. But it's not a refusal,  
10 really, Mr. Justice White, to enforce the trespass laws. It  
11 is saying that somebody has a right to be on our property.  
12 We could not even take self-help, is my point.

13 QUESTION: But you object to it on grounds, as I  
14 understand it, on free speech grounds, not just property  
15 rights.

16 MR. KATZENBACH: We object to it on both, and I  
17 think with one possible exception, if we could not prevail  
18 on the free speech grounds it would very unlikely be a  
19 taking. And the one exception is that in Lloyd and Tanner  
20 it said if there's no need to go on the property then it  
21 would constitute a taking. And so to that narrow extent,  
22 since the court found as a fact that there was no need for  
23 communication purposes to go on the campus of Princeton,  
24 that that might be a taking.

25 But I basically, fundamentally, I believe that it

1 is a First Amendment right, Justice White, and that is  
2 basically what we're arguing. Where property is, as it is  
3 in the case of a university, used for expressive purposes,  
4 then for the state to impose on that property expressive  
5 purposes, expressive purposes of others, is to interfere  
6 with your expressive rights.

7 I grant the exceptions that can be made to that  
8 where the channels of communications are clogged. Where it  
9 is felt necessary for state power to do so, I believe that  
10 it can be done. I have no quarrel with PruneYard. I would  
11 have no quarrel with the prior -- with Marsh. I would have  
12 no quarrel with prior decisions of this Court, even where  
13 they have been overruled..

14 QUESTION: Mr. Katzenbach, can I interrupt again.

15 QUESTION: You put PruneYard and Marsh together?

16 MR. KATZENBACH: I put PruneYard and Marsh  
17 together, Justice Marshall, for only one purpose, sir. I  
18 put them together because in each instance they said we will  
19 treat this as though it is public property and the property  
20 owner will have the obligations of government with respect  
21 to that property, to act neutrally and to have only time,  
22 place and manner. It was for that purpose that I was  
23 putting them together.

24 Here the New Jersey court has a totally different  
25 rule. It has a rule where it measures content against



1 content to decide whether it can be said. It does not say  
2 you must admit people on your property to say anything you  
3 want. They say you must admit people on your property to  
4 say things that are consistent with your use of the  
5 property, and that means consistent with your intellectual  
6 use of the property.

7           And they say that deciding what is offensive to  
8 your views or is not offensive to your views is a problem  
9 for the judiciary, it is a problem for the police officers  
10 to resolve, and it is not something which it normally would  
11 be under a trespass statute, for you to resolve for  
12 yourself.

13           QUESTION: Mr. Katzenbach, it seems to me that  
14 you're arguing that the test they propose might lead to  
15 situations in which the intruder makes an expression that's  
16 offensive to what the University wants to express and  
17 thereby offend the University's rights of expression. But  
18 in this particular case, what is the basis for suggesting  
19 that what Mr. Schmid did had any conflict whatsoever with  
20 any expressive policy of the University?

21           MR. KATZENBACH: Whether what Mr. Schmid did or  
22 not, the rule that they put --

23           QUESTION: But do we have anything --

24           MR. KATZENBACH: Well, I think, yes, I do. Let me  
25 --

1           QUESTION: The reason the case is here is because  
2 if you lose he can go back and do exactly the same thing all  
3 over again.

4           MR. KATZENBACH: And so can anybody else.

5           QUESTION: And how does that interfere with  
6 anything that you want to do with your property, just this  
7 limited thing that he's done?

8           MR. KATZENBACH: If Princeton is restricted, as the  
9 New Jersey court says it is, to governmental standards of  
10 time, place and manner, and it got that way because  
11 Princeton had such an open policy and let people upon the  
12 campus, then I assume that that is the only control. And I  
13 think there are situations, as open as Princeton is and as  
14 dedicated to those purposes, there are situations on a  
15 college campus where unquestionably what is said is highly  
16 offensive to the students and to the members of the faculty  
17 and to the other members of the community.

18           I believe that for members of the American Nazi  
19 Party to proselytize upon the campus of Princeton would be  
20 highly offensive to the great majority of students there.  
21 If somebody on the campus, a student or a member of the  
22 faculty, wanted to adopt those views and express them, or  
23 even if they wished to invite somebody who did that, I  
24 believe that that decision on their part would be respected  
25 by other members of the community.

1 I think that is a very different thing from the  
2 State of New Jersey saying to Princeton, whether you want to  
3 hear him or not, he's got a right to be here.

4 QUESTION: Well, Mr. Katzenbach, you said a moment  
5 ago if Princeton is to be reduced to the status of a  
6 governmental body like New Jersey. Actually, Princeton is  
7 in a sense a creature of New Jersey, is it not? Doesn't it  
8 have a charter?

9 MR. KATZENBACH: Yes, just as the Dartmouth College  
10 did.

11 QUESTION: Yes. So that I mean, isn't it in a  
12 sense a business or a private institution that is regulated  
13 by the laws of the state, subject to any constitutional  
14 provisions of the U.S. Constitution that are to the  
15 contrary?

16 MR. KATZENBACH: If I understand you correctly,  
17 Justice Rehnquist, you are suggesting that it is in effect  
18 no different than a state university.

19 QUESTION: Yes.

20 MR. KATZENBACH: And I don't accept that, because I  
21 think that it is different from a state university. It is  
22 not totally regulated by the state. It has a charter that  
23 goes back, as the Dartmouth case did. And in that case, as  
24 I recollect, this Court said that they had all the rights of  
25 a private institution. They were not just a creature of

1 government.

2           QUESTION: I suppose that if GM has a plant in New  
3 Jersey it derives its authority in some way from the state,  
4 either as a foreign corporation doing business or a New  
5 Jersey corporation. If so, would they fall under this ban  
6 that has been discussed?

7           MR. KATZENBACH: I would think not. There are --

8           QUESTION: In other words, they could say, we're  
9 making automobiles here, not speeches.

10          MR. KATZENBACH: Yes, but I think we're -- yes.  
11 And I don't see -- they would -- if the general public were  
12 invited onto the GM premises at various times, under the New  
13 Jersey decision then people would have rights to make  
14 various speeches there if those rights didn't interfere with  
15 the assembly line and so forth and so on.

16          It is an enormously broad principle that they have  
17 adopted by saying every private property owner in the state  
18 is subject to some measure --

19          QUESTION: I wonder if that's a fair statement of  
20 the opinion. Isn't the opinion the equivalent of a New  
21 Jersey statute that said in effect, unless a university  
22 adopts regulations that contain standards for inviting  
23 people to come onto the campus, reasonable standards, then  
24 it must allow a certain number of people to come on for a  
25 limited purpose?



1           It doesn't say anybody can come on whenever they  
2 want to. It does say that if you adopt regulations that are  
3 reasonable there may be no problem.

4           MR. KATZENBACH: But time, place and manner only.

5           QUESTION: Well, I don't know exactly what they  
6 mean.

7           MR. KATZENBACH: That's what they say for  
8 Princeton, at least.

9           QUESTION: Well, they say contain no standards  
10 aside from the requirement for invitation. They say you had  
11 no standards whatsoever, and they say in a standardless case  
12 you lose, but once you've got standards presumably the court  
13 would take a look at the standards.

14          Because the case as it came to them, the only  
15 standard, as I understand it, was permission, which is  
16 essentially no standard.

17          MR. KATZENBACH: Permission plus invitation.

18          QUESTION: Right. And they say you've got to do  
19 something more than that.

20          MR. KATZENBACH: They said you have to do something  
21 more than that.

22          QUESTION: Right.

23          MR. KATZENBACH: Why do you have to do something  
24 more than that? What right of who is violated by your not  
25 doing something more than that?

1           QUESTION: Well, they say that if you want to  
2 operate a university -- say that the legislature passed such  
3 a statute that said, until you pass some kind of a  
4 regulation you must let people on for reasonable expressive  
5 activities. Would that be an unconstitutional statute?

6           MR. KATZENBACH: I believe it would.

7           QUESTION: I guess you have to be arguing that,  
8 yes.

9           MR. KATZENBACH: For two reasons. I think one is,  
10 if your business is expressive activity, then that  
11 regulation itself forces you to state what expressive  
12 activities you will or will not permit and what your reasons  
13 for it are. And that seems to me a violation of the First  
14 Amendment.

15          QUESTION: Tornillo.

16          MR. KATZENBACH: Yes, to require that.

17          QUESTION: It's like saying to a newspaperman that  
18 you should be required to put certain kinds of things in  
19 your paper.

20          MR. KATZENBACH: I think it goes that far. I think  
21 it almost says that the more letters to the editor that you  
22 print the more you have to print.

23          QUESTION: Mr. Katzenbach, I'd like to ask you  
24 about two different areas. One is, I'm not clear on how  
25 Princeton distinguishes the PruneYard case and distinguishes

1 itself from PruneYard, and explain to me what difference it  
2 makes that Princeton shops are selling physics and poetry  
3 instead of dry goods. Why isn't PruneYard applicable?

4       MR. KATZENBACH: Well, let me suggest, Justice  
5 O'Connor, I have no problem with PruneYard. I think  
6 PruneYard, first, involved a shopping center and no  
7 expressive activity, and I think that was quite clear, that  
8 the premises had never been used for expressive activity,  
9 even though there was some concern by at least some members  
10 of the Court in that regard when it came to the expressive  
11 activity.

12       Secondly, the basis for that decision in Justice  
13 Newman's court -- in his state court decision was that  
14 shopping centers had replaced downtown centers to a  
15 dangerous degree, and that the problems of communicating on  
16 political matters with large numbers of people were  
17 seriously impaired by the exclusion of those activities from  
18 shopping centers.

19       So there was, I think, a compelling state reason  
20 for requiring the owners to permit these activities on these  
21 premises.

22       And the third reason that I would urge, which is  
23 related to it, is that the California court, having made  
24 that decision, set a rule which just said all shopping  
25 centers, which may be somewhat vague, but all shopping

1 centers have to do this. And there is no test which  
2 analyzes the content of what the visitor on the premises  
3 wants to say as against the content of what the person whose  
4 expressive activities are involved wants to say.

5 QUESTION: So if New Jersey were to say that no  
6 college or university campus may exclude anyone, you would  
7 be satisfied?

8 MR. KATZENBACH: No, I would not, Justice O'Connor,  
9 unless there was a compelling state reason for it, and I  
10 can't see it. If the reason -- there would be a much  
11 stronger case here if the facts said there's no way of  
12 getting at the students at Princeton, they can't be informed  
13 about political activity, people are kept off the campus,  
14 there's no way of doing that.

15 Whether that case would survive a constitutional  
16 test or not, it would be an awful lot better than this  
17 case. This case, the court says there's absolutely no need  
18 for that, on need at all for that, but they can go on  
19 anyhow. I don't see -- I have difficulty seeing any state  
20 reason at all.

21 QUESTION: Mr. Katzenbach, are private universities  
22 in New Jersey subject to any kind of certification?

23 MR. KATZENBACH: Yes.

24 QUESTION: By the state?

25 MR. KATZENBACH: For accreditation on degree-giving



1 they are, yes.

2 QUESTION: Well, in that sense they tell you what  
3 kind of expression you can have, at least indirectly. They  
4 don't order you this course or that course. But you either  
5 live up to the standards or you're out of business.

6 MR. KATZENBACH: As a practical matter, Justice  
7 White, that's true.

8 QUESTION: Then how about a legal matter?

9 MR. KATZENBACH: But that doesn't stop you from  
10 --

11 QUESTION: How about a legal matter?

12 MR. KATZENBACH: Well, no. My point is I don't  
13 think they could stop you from teaching it. They can stop  
14 you from giving a degree course in it.

15 QUESTION: Isn't this -- doesn't the state insist  
16 that you live up to certain standards --

17 MR. KATZENBACH: Minimal standards.

18 QUESTION: -- in your expressive activities?

19 MR. KATZENBACH: Yes. And that is basically for  
20 fraud reasons, because of the -- and I don't have any  
21 problems with that kind of activity.

22 QUESTION: Fraud reasons? I don't know.

23 MR. KATZENBACH: But I think that I would have  
24 problems with it --

25 QUESTION: They're saying if you want to purport to

1 be an educational institution, you have to --

2 MR. KATZENBACH: Have certain minimal standards.

3 QUESTION: Exactly.

4 MR. KATZENBACH: And they do. And I think they do  
5 it so that those --

6 QUESTION: Is that really much different in terms  
7 of the First Amendment than --

8 MR. KATZENBACH: Oh, I think tremendously  
9 different.

10 QUESTION: Why? Why? They're just telling you  
11 what can or can't teach.

12 MR. KATZENBACH: Oh, they're not saying -- they're  
13 not saying somebody else can come on this campus, somebody  
14 else can come on your property, somebody else can do that,  
15 we're going to give him a right to do that. All they are  
16 saying on this, you must meet some minimal standards of  
17 education in your own way. That's really all the  
18 accreditation boils down to.

19 QUESTION: Would you say that New Jersey couldn't  
20 allow a police officer to come on the Princeton campus?

21 MR. KATZENBACH: Of course not, no. Of course  
22 not. I would agree that -- I'd have no problem with that  
23 kind of intrusion. I don't think, Justice Rehnquist, they  
24 could say a police officer could come on the campus of  
25 Princeton for the purposes of making speeches.

1 QUESTION: Or offering a course.

2 MR. KATZENBACH: Or offering a course or doing  
3 something of that kind. In the course of his duties, of  
4 course he can come. Of course you can have inspections of  
5 heating systems and sewer systems and other legitimate  
6 things you inflict on all property owners. Princeton stands  
7 in no special status there. No private university does in  
8 my judgment. So I have no problem with that.

9 Can Princeton discriminate to say that white  
10 speakers can come on the campus but not black speakers? I  
11 don't think so. It has nothing to do with free speech.

12 QUESTION: Mr. Katzenbach, I'd like to go back to  
13 the standing issue again, if I may. Isn't the question of  
14 whether Princeton has standing to appeal a federal question  
15 to this Court itself a federal question? Does it really  
16 matter to us whether New Jersey let Princeton come in?  
17 Don't we have to determine that question anew from a federal  
18 standpoint?

19 MR. KATZENBACH: I don't believe so, Justice  
20 O'Connor. I think in the past at least the precedent has  
21 been if there was standing in the court below, you were a  
22 party in the court below and you have an interest, then you  
23 have standing in this Court.

24 If that is not the rule, if the rule for standing  
25 is a federal one, then with respect I suggest you have to

1 make the standards of collateral estoppel and res judicata  
2 federal rules as well.

3 QUESTION: Well, the argument you gave a while ago,  
4 though, Mr. Katzenbach, would have purported to suffice that  
5 even if it's a federal question. I think you probably will  
6 find that it is a federal question.

7 But you say that if it's a standing question it's  
8 just an Article III question, a case or controversy. And  
9 you say that you've lost your -- that your bound by a  
10 judgment.

11 MR. KATZENBACH: That's right. And that was why I  
12 said if you don't give standing then you've got to do  
13 something about not being bound by a judgment, or it seems  
14 to me we have been left with a virtually --

15 QUESTION: Well, that doesn't mean, though, that  
16 it's not a federal question.

17 MR. KATZENBACH: No, it does not mean, you're  
18 correct about that. But as a federal question, you could  
19 adopt the state standard, which is what I -- it would be I  
20 think a more accurate way of saying what I attempted to say  
21 to you, Justice O'Connor.

22 If I might reserve the remainder of my time, unless  
23 the Court has further questions.

24 CHIEF JUSTICE BURGER: Mr. Levinson.

25 ORAL ARGUMENT OF SANFORD LEVINSON, ESQ.,

1

ON BEHALF OF THE APPELLEE

2

MR. LEVINSON: Mr. Chief Justice and may it please

3 the Court:

4

The ultimate constitutional issue in this case is  
5 simple: Whether Princeton University has a federal  
6 constitutional right to compel the State of New Jersey to  
7 violate its own constitution by applying its criminal law to  
8 convict Chris Schmid of criminal trespass in the  
9 circumstances of this case. That is the one judgment before  
10 this Court.

11

Princeton University, we begin by arguing, has two  
12 obstacles to run before this Court can even reach a decision  
13 on the merits. The first is jurisdictional and I do not  
14 propose to take much of your time because you have addressed  
15 that issue in your own questions and we've briefed it  
16 extensively.

17

QUESTION: Mr. Levinson, do you think that the  
18 result of this judgment is that, and the thrust of it is  
19 that Princeton is no longer permitted to keep this person  
20 off the campus? Could it use self-help against him?

21

MR. LEVINSON: That would certainly be one  
22 plausible reading.

23

QUESTION: So the case involves more than the  
24 constitutional right to have New Jersey enforce its trespass  
25 statute. It involves whether or not Princeton may by



1 self-help keep this person off.

2           MR. LEVINSON: That is a potential issue. A  
3 potential issue is whether New Jersey could sue Schmid  
4 subsequently, though I hasten to point out that we do not  
5 challenge the existing regulations of Princeton University,  
6 and Schmid and his political cohorts have been on the  
7 University campus following the rules. There's no  
8 objection.

9           We argue that this case is moot. But one other way  
10 of generating a case would be to file a civil suit against  
11 Schmid or someone similar for civil trespass and go back up  
12 the New Jersey courts.

13           This is a final judgment from a criminal  
14 conviction. There are \$15 and \$10 court costs at stake.  
15 Princeton University will not receive the fine. Indeed, one  
16 of the issues of this case is what would happen if the Court  
17 reverses the New Jersey opinion. New Jersey is not at the  
18 counsel's table. They make no request for their \$15. They  
19 specifically disaffirm in their brief a desire for the \$15.

20           The rules have changed. What is Princeton asking  
21 for other than an advisory opinion that at a time three and  
22 a half years ago they could do what they have subsequently  
23 repudiated? It's an interesting question, to be sure, but  
24 not a question which provokes federal jurisdiction in this  
25 Court.

1           QUESTION: Mr. Levinson, they haven't repudiated  
2 the position that the man has to ask to come on the campus.

3           MR. LEVINSON: We don't challenge that, Your  
4 Honor.

5           QUESTION: But they're barred from having such a  
6 provision.

7           MR. LEVINSON: They are barred from having -- they  
8 are barred, presumably. I confess that were they sue in  
9 tort under the old rule of absolutely standardless -- in  
10 fact, it's a non-rule. It said, unless we give you  
11 permission, and we will not tell you why we will or will not  
12 give you permission, if you are an uninvited stranger you  
13 can't get on campus. That was the old so-called rule.

14           It is true that the most plausible reading of the  
15 New Jersey Supreme Court is what Your Honor suggested in  
16 questioning to Mr. Katzenbach --

17           QUESTION: Do you know what -- in some cases from  
18 state courts when there's been a change of law after a  
19 judgment from the state court, we have, not always but  
20 sometimes, vacated and remanded for reconsideration in light  
21 of the new rule or the new statutory provision. Why  
22 wouldn't that be an appropriate -- we then would -- they  
23 could then decide whether or not --

24           QUESTION: These rules were before the judgment,  
25 though.

1 MR. LEVINSON: Yes, sir.

2 QUESTION: These rules were adopted before the  
3 judgment.

4 MR. LEVINSON: The rules were changed prior to the  
5 determination of the New Jersey Supreme Court.

6 QUESTION: That's right, they were. Well then, a  
7 fortiori wouldn't they then require or outlaw any  
8 requirement that they ask for permission? They didn't --  
9 certainly that rule, that prohibition, would seem to survive  
10 the change of the regulation.

11 MR. LEVINSON: The prohibition -- I think it is  
12 true that if Princeton had not changed its rules at all, not  
13 only would the trespass law not be enforceable, but  
14 certainly we would argue that a tort suit would be equally  
15 unenforceable.

16 But Princeton did change its rules well before the  
17 New Jersey Supreme Court decision, and the New Jersey  
18 Supreme Court went out of its way in effect to declare the  
19 present New Jersey rules perfectly constitutional under the  
20 constitution of New Jersey. And we do not challenge that.  
21 That is not an issue in this case.

22 QUESTION: Well, I'm not sure they said that. At  
23 least they said that those rules didn't affect this case  
24 because this case arose at a time when there were no rules.

25 MR. LEVINSON: Yes, sir, that's right, Justice

1 Stevens. But --

2 QUESTION: They didn't really pass on the validity  
3 of the new rule.

4 MR. LEVINSON: They did not legally pass on the  
5 validity in the sense of declaring that the rules are  
6 constitutional. But I think the most plausible reading of  
7 that particular opinion is that the new rules are precisely  
8 the kinds of rules that would pass muster in a proper case.

9 QUESTION: So that if the same problem arose again  
10 maybe Princeton would win?

11 MR. LEVINSON: Oh, yes, in New Jersey under the  
12 existing rules of Princeton University. I don't think  
13 there's any real doubt about that.

14 We would add one case to this Court's attention, a  
15 case not cited in our briefs. That is the University of  
16 Texas, Regents of the University of Texas System versus New  
17 Left Education Project, 414 U.S. at 807, where the  
18 University of Texas, in the midst of litigation about rules  
19 quite astonishingly similar to the instant rules, changed  
20 the rules.

21 This Court, with only Justice Douglas expressing  
22 some reservations, in a one-paragraph opinion ordered the  
23 court below to dismiss the case as moot. That precedent  
24 ought to be followed here. It would dispose of all the  
25 issues in the most economic way possible.

1           The second obstacle to this case has not been  
2 addressed by Princeton in their briefs or in oral argument,  
3 and that is Flagg Brothers versus Brooks, which we argue  
4 would have to be overruled or at least seriously limited in  
5 order to reach the merits of this case.

6           Where is the state action in a state refusing to  
7 use its trespass law to punish somebody for conduct? Flagg  
8 Brothers stands for the following proposition: State action  
9 exists if and only if the action can be attributed to the  
10 state. The action is attributed to the state if it orders  
11 conduct or indeed if it encourages conduct.

12          Chris Schmid was not ordered by the State of New  
13 Jersey to enter the Princeton campus. Chris Schmid was not  
14 encouraged by the State of New Jersey to enter Princeton's  
15 campus. It was an entirely private decision on his part.

16          And what the New Jersey Supreme Court has said is  
17 that it will stay the hand of state institutions in regard  
18 to such private conduct. That is the meaning, I believe, of  
19 the majority decision in Flagg Brothers versus Brooks. I  
20 would add --

21          QUESTION: Well, it has said it will stay the hand  
22 of the State of New Jersey in prosecuting Schmid.

23          MR. LEVINSON: Pardon me, Your Honor?

24          QUESTION: I mean, the holding was that it would  
25 stay the hand of the prosecutors in New Jersey from



1 prosecuting Schmid under an ordinance for trespass.

2           MR. LEVINSON: Yes, sir, that's correct. But under  
3 Flagg Brothers we would argue that is not the kind of state  
4 action which Princeton can assert, that if this case is  
5 properly styled as Princeton University versus Schmid,  
6 Princeton University and the State of New Jersey on the  
7 Appellant side, which is the style of this case, what  
8 Princeton University must show is state action residing in  
9 Appellee Schmid. And there is no such state action.

10           Perhaps Princeton University has an argument with  
11 the State of New Jersey. Obviously Princeton University has  
12 an argument with the State of New Jersey. But it would seem  
13 that it's precisely the kind of argument held by Brooks with  
14 the State of New York as to whether or not the State of New  
15 York could allow the garage in that case to sell the  
16 property without first granting a hearing.

17           And this Court held that that was not state  
18 action. Under color of state law, yes. State action, no.  
19 that we feel is a serious problem facing the Court should it  
20 reach the merits of this case.

21           In all candor, I might say that Appellee Schmid  
22 would endorse the overruling of Flagg Brothers versus Brooks  
23 and returning indeed to Logan Valley, because that would  
24 make state action what Princeton asks for, the use of  
25 coercive state processes to punish a person for exercising

1 free speech rights.

2           We do not argue that if you find state action  
3 Schmid loses. We argue that Schmid wins either way. But  
4 Flagg Brothers must be addressed both by Appellant Princeton  
5 and by this Court if their claims on the merits are to be  
6 reached at all.

7           In the PruneYard case neither of the parties  
8 briefed the issue. There is one mention of Flagg Brothers  
9 in one footnote of an amicus opinion. And therefore this  
10 Court did not address the issue. It is, we submit, a fresh  
11 issue before this Court on what the implications of Flagg  
12 Brothers are for cases like this one.

13           We therefore move to the issue on the merits, where  
14 we obviously are willing to defend a highly deferential New  
15 Jersey state decision, a decision deferential to the  
16 interests of Princeton University. As we point out in our  
17 brief and as the amicus brief of the American Association of  
18 University Professors points out at length, the New Jersey  
19 Supreme Court took full recognition of the legitimate rights  
20 of Princeton University.

21           What they correctly found is that Princeton  
22 University presented no reason whatsoever to keep Schmid off  
23 its campus, and the State of New Jersey has a strong  
24 tradition in support of political speech. That is not only  
25 the rational interest, but we would argue if need be the

1 compelling state interest that the state saw.

2           The brief mentions the republican form of  
3 government clause. That is obviously not judicially  
4 enforceable by this Court, going back to Luther versus  
5 Borden. But we would argue that the republican form of  
6 government clause points to the essential underpinning of  
7 what our system of government is about, which is a free,  
8 relatively unrestricted, relatively unstructured public  
9 dialogue.

10           And that is what the State of New Jersey, the very  
11 state protected, even if not protected by judicial  
12 enforcement, protected in the federal Constitution -- and  
13 surely a state supreme court can construe its own state  
14 constitution to protect those basic republican institutions  
15 of our society. And that's what they did in this case,  
16 taking full measure of every interest that Princeton  
17 University could properly put before it.

18           And thus we argue we would be delighted if this  
19 Court reached the merits in spite of the jurisdictional and  
20 state action hurdles, because it would seem inconceivable  
21 that a state could not act so as to protect the political  
22 dialogue.

23           In PruneYard versus Robbins, the United States  
24 participated in oral argument before this Court to point out  
25 its grave reservation as to the constitutionality of the

1 National Labor Relations Act and the Civil Rights Act of  
2 1964 should the shopping center be upheld in that case.  
3 Similar issues are present here.

4           What Princeton University argues on page 8 of its  
5 reply brief and in oral argument this afternoon is that  
6 there is "the right of a private university to determine its  
7 educational policy," with educational policy being whatever  
8 is defined as such by Princeton or any other university.  
9 This point is also made at length in the amicus brief of the  
10 American Association of University Professors.

11           What if the policy were to affirm the special  
12 authority of white males by hiring only white males to  
13 teach? Indeed, what if in furtherance of some notion of an  
14 alleged educational policy Princeton sought to use New  
15 Jersey trespass law in the context of attempting to keep out  
16 uninvited blacks, though issuing a genuine invitation to all  
17 whites and to invited blacks?

18           Could New Jersey truly not refuse its aid? Or does  
19 the Constitution compel the giving over of public power to  
20 such indefensible private ends?

21           The Bob Jones case will be before this Court later  
22 in this term and raises serious constitutional issues, for  
23 the constitutional issues are those of the free exercise  
24 clause. If Princeton University came before this Court  
25 arguing that Presbyterian doctrine forced the policy adopted

1 in 1978, that would present a truly challenging question of  
2 constitutional law. That does not raise questions of  
3 academic freedom at all, however. It raises questions of  
4 the free exercise of religion, an issue blessedly not before  
5 the Court in this case.

6           Neither the holding nor the opinion of the New  
7 Jersey Supreme Court reaches as far as Princeton would have  
8 us believe. The decision of the Court below is extremely  
9 narrow. In its holding, after a careful detailed  
10 examination of the relationship between Schmid's speech  
11 interest and the actual policies in operation at Princeton  
12 University, it found Schmid's interest more weighty.

13           To evade recognition of the narrowness of the  
14 holding below, Princeton constantly asks this Court in its  
15 brief and in its argument to decide cases not before it even  
16 as plausible hypotheticals. On the other hand, all of the  
17 arguments put forth in our argument are all too plausible,  
18 because Princeton University has not offered and cannot  
19 offer a cogent distinction between what it asks for in this  
20 case and any future request to be exempt from the most basic  
21 statutes found necessary by Congress, state legislatures, or  
22 the peoples of the states acting through their constitutive  
23 document in order to provide elemental social justice.

24           One final argument must be addressed before my  
25 conclusion, and that is the purported use by the court below



1 of inadmissible content distinctions. The court below does  
2 distinguish among categories of speech. But so, of course,  
3 does this Court. For example, political speech versus  
4 commercial speech, not to mention offensive speech or  
5 obscene speech.

6           Categorical distinctions, whatever their  
7 difficulties, are wholly different from genuine content  
8 distinctions which say that, for example, within a given  
9 category certain speech is acceptable while other speech is  
10 not. One cannot say, for example, that political speech  
11 about domestic policy is protected, though debate about  
12 foreign policy is not, or that one can only praise but not  
13 criticize public policy. That is the meaning of *Brainin* and  
14 *Moseley*.

15           But it is far too late in the day to argue that all  
16 speech is one undifferentiated whole so that the deceptive  
17 huckstering of a commercial salesperson is the  
18 constitutional equal of a political address.

19           In summary, then, this case raises a host of  
20 complex issues, not the least of them procedural. These  
21 complexities can be most easily avoided through recognizing  
22 this as the moot controversy that it is.

23           But my concluding remarks return to the merits,  
24 because there Princeton's arguments are not only wrong on  
25 the law but profoundly dangerous to the meaning of the

1 United States Constitution. The decision of the New Jersey  
2 Supreme Court does not open up the Princeton campus to those  
3 wishing to expound on the merits of their pizzas or used  
4 cars, but to Chris Schmid, who wishes to engage his fellow  
5 citizens in discourse relating to the polity of which we are  
6 all a part.

7 It has become the duty of this Court to reject  
8 Princeton's claim of exemption from New Jersey's  
9 constitution and to reassert instead the right of the state  
10 to assure the preservation of the public discussion that  
11 undergirds our republican form of government. Indeed, this  
12 case presents an example of our uniquely federal system at  
13 its best. The fact that the United States Constitution as  
14 interpreted by this Court has not been held to provide by  
15 its own force access to non-state-controlled property save  
16 for company towns does not preclude a state from structuring  
17 its laws to afford additional protection for important  
18 public values.

19 States are not, to be sure, free to act without  
20 limits. But their willingness to be imaginative and  
21 creative in responding to the exigencies of modern life  
22 should not be stifled unless constitutionally compelled.  
23 There is much to be learned from New Jersey's and  
24 California's --

25 QUESTION: Mr. Levinson, could Congress do the same

1 thing here in the District of Columbia with respect to  
2 Georgetown or George Washington or Catholic University?

3 MR. LEVINSON: If one assumes, as I recall, that  
4 the Constitution does give Congress the power to regulate  
5 the District of Columbia, I would argue yes. If Georgetown  
6 came before this Court arguing no, the reason would be free  
7 exercise, not academic freedom.

8 QUESTION: George Washington?

9 MR. LEVINSON: George Washington, without a doubt.

10 QUESTION: Without a doubt what?

11 MR. LEVINSON: That Congress could pass a law in  
12 behalf of defending the values --

13 QUESTION: Saying that, George Washington, you must  
14 allow on your campus certain kinds of speech but you can  
15 keep other speech off?

16 MR. LEVINSON: Yes, you could keep those who wish  
17 to sell pizzas or engage in commercial speech off, but  
18 Congress could, I think, require George Washington at least,  
19 and perhaps at most, to adopt the kinds of rules adopted by  
20 Princeton University subsequent to the initiation of this  
21 case and de facto upheld by the New Jersey Supreme Court in  
22 its decision that is before you, yes.

23 QUESTION: I'm not sure I tracked you on these  
24 illustrations, because there are public streets running  
25 through all of the campuses I think that have been

1 mentioned. I am not so sure about Georgetown.

2 But take as a hypothetical a campus which is one  
3 square mile, or a half square mile, entirely college  
4 property, no public streets; private highways and private  
5 sidewalks running through. Now this is operated by an  
6 order of the Catholic Church.

7 Are you telling us that they must permit people to  
8 come on there and make speeches advocating abortion?

9 MR. LEVINSON: I am stating that the decision on  
10 appeal before this Court certainly does not extend that far,  
11 because the opinion bends over backward to look at the  
12 educational policy of the institution in question.

13 QUESTION: Then what are you submitting?

14 MR. LEVINSON: What I am submitting is that the  
15 college raised in the hypothetical by Chief Justice Burger  
16 could put forth serious free exercise claims that might well  
17 lead this Court to say that public power had gone too far.

18 I think it's only fair to say that in our brief, in  
19 some distinction from the brief of amicus the American  
20 Association of University Professors, we emphasize the fact  
21 that on Princeton's campus are required to live 3,000  
22 registered, potentially registered voting adults. And if a  
23 state found in the hypothetical posed that it was necessary  
24 to order such entrance onto campus in order to reach registered  
25 voters or potentially registered voters, the brief of

1 Appellee suggests that that would be defensible. The brief  
2 of amicus American Association of University Professors is,  
3 I think it fair to say, somewhat more deferential to the  
4 interests of an educational institution per se.

5 QUESTION: Let me change my hypothetical from the  
6 advocacy of abortion to advocacy of Marxism. Eliminate the  
7 free exercise. Must they allow a Marxist from the Soviet  
8 Union to come over and say why we should convert to  
9 Marxism?

10 MR. LEVINSON: A Marxist? The facts of the case  
11 before us deal with someone participating in the American  
12 political process, trying to pass out information for  
13 candidates.

14 QUESTION: I was asking the hypothetical question  
15 to test your argument.

16 MR. LEVINSON: If a state legislature or Congress  
17 in your initial hypothetical or the people in their  
18 constitution said that the importance of the free trade in  
19 ideas and exposure to diversity that has been emphasized as  
20 the root meaning of academic freedom in opinions by this  
21 Court over many years, that that commitment to diversity of  
22 expression required entre to a private university, yes, sir,  
23 I would defend the ability of a state to do that.

24 QUESTION: And you would say -- and I take it you  
25 would say if it were -- you would say there would be a



1 difference between Catholic University and American  
2 University? You would say you would value the religious  
3 freedom claim higher than the free speech claim?

4 MR. LEVINSON: I am saying that in one there is a  
5 free exercise claim --

6 QUESTION: Yes.

7 MR. LEVINSON: -- that poses serious constitutional  
8 problems.

9 QUESTION: And American University comes in and  
10 says, I am not making a free exercise claim, I'm making a  
11 free speech claim. I don't want to be told what kind of  
12 speech to be airing on the campus.

13 MR. LEVINSON: If a university, to return to a  
14 hypothetical raised in the court below, if a university on  
15 whose campus were forced to live 3,000 students, said we  
16 wish only Republican ideas, contemporary Republican rather  
17 than classical republican ideas, to be heard on this campus  
18 during a political campaign, I would not support the right  
19 of a university to in effect prevent access to registered  
20 voters by non-Republicans.

21 I certainly do not think that the university must  
22 teach non-Republican values in its classrooms or even  
23 appoint non-Republicans to the faculty. But it cannot  
24 structure the marketplace of ideas --

25 QUESTION: What about the army base that has 10,000

1 soldiers living on it?

2 MR. LEVINSON: There it seems to me that this  
3 Court, over dissent, has emphasized the special nature of  
4 military communities and the necessity of members of the  
5 armed forces not to be distracted, in effect, by political  
6 controversies of the day, which is precisely the opposite of  
7 that which one would say about the kind of university  
8 depicted, for example, in Justice Powell's opinion in the  
9 Bakke case or in every other opinion by this Court that has  
10 addressed the meaning of academic freedom.

11 If there are no further questions, then I would  
12 submit that the judgment below, if not dismissed, should  
13 certainly be affirmed.

14 CHIEF JUSTICE BURGER: Do you have anything  
15 further, Mr. Katzenbach?

16 ORAL ARGUMENT OF NICHOLAS deB. KATZENBACH, ESQ.

17 ON BEHALF OF THE APPELLANTS -- REBUTTAL

18 MR. KATZENBACH: Just one brief comment, Mr. Chief  
19 Justice. I hope that the members of this Court do not think  
20 that it is the claim of Princeton University that it can  
21 discriminate on race because of educational philosophy or  
22 that it can keep people off the campus because of  
23 educational philosophy, or that a court cannot inquire in  
24 the enforcement of a public policy statute into that issue  
25 to determine whether or not it is a genuine question of

1 educational policy and philosophy.

2 CHIEF JUSTICE BURGER: Thank you, gentlemen. The  
3 case is submitted.

4 (Whereupon, at 3:03 o'clock p.m., the case in the  
5 above-entitled matter was submitted.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

PRINCETON UNIVERSITY AND STATE OF NEW JERSEY vs. CHRIS SCHMID  
NO. 80-1376

---

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Ayer Connelly



RECEIVED  
SUPREME COURT, U.S.  
MARSHALS OFFICE

1981 NOV 18 AM 11 12