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### First Amendment Decisions - 2002 Term

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## First Amendment Decisions - 2002 Term

Cover Page Footnote

vol. 20 (2)

## FIRST AMENDMENT DECISIONS – 2002 TERM

*Joel Gora*<sup>1</sup>

### INTRODUCTION

I always find it a wonderful opportunity to talk about the Supreme Court's First Amendment decisions in order to try to indicate some trends and patterns. The First Amendment was not "first" in the heart of the Supreme Court last term; it was zero and five.<sup>2</sup> This was the first term in many that the Court dealt with a variety of First Amendment issues, and in none of these cases did the First Amendment claim or claimant prevail.<sup>3</sup> In every case, the

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<sup>1</sup> Professor of Law and Associate Dean, Brooklyn Law School; B.A., Pomona College; LL.B., Columbia University School of Law.

<sup>2</sup> *Virginia v. Black*, 123 S. Ct. 1536 (2003) (holding that a ban on cross burning done with an intent to intimidate does not violate the First Amendment); *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 123 S. Ct. 1829 (2003) (holding States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used); *United States v. Am. Library Ass'n, Inc.*, 123 S. Ct. 2297 (2003) (holding the Children's Internet Protection Act does not impose an unconstitutional condition on libraries that receive E-rate and LSTA subsidies by requiring them, as a condition on that receipt, to surrender their First Amendment right to provide the public access to constitutionally protected speech); *Virginia v. Hicks*, 123 S. Ct. 2191 (2003) (holding the Richmond Redevelopment and Housing Authority's trespass policy was not facially invalid under the First Amendment's overbreadth doctrine); *FEC v. Beaumont*, 123 S. Ct. 2200 (2003) (holding that applying the direct contribution prohibition to nonprofit advocacy corporations is consistent with the First Amendment). One other case last term implicated First Amendment concerns. *See Eldred v. Ashcroft*, 537 U.S. 186 (2003) (upholding copyright extension law as not violating First Amendment interests).

<sup>3</sup> *Id.*

Court either rejected or qualified the First Amendment argument.<sup>4</sup> In my opinion, the Court gave a certain amount of deference to the executive and legislative branches. In each of the five cases I am going to talk about, the Court reached out, heard an appeal from the government, and reversed a decision of a lower court that had ruled in favor of the First Amendment. This is the pattern: there seems to be a certain amount of deference for the government, government concerns, and government arguments that are advanced to try to limit free speech and First Amendment rights. In closing, I will attempt to indicate whether the same deference towards the government will be given and whether less protection afforded for First Amendment rights will be a problem in the coming term.

## HATE SPEECH

The first case I will discuss deals with the age-old problem of hate speech. The case is *Virginia v. Black*.<sup>5</sup> The Supreme Court

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<sup>4</sup> *Black*, 123 S. Ct. at 1549-50 (finding that a state, consistent with the First Amendment, may ban cross burning done with an intent to intimidate); *Telemarketing Assocs.*, 123 S. Ct. at 1836 (finding that the First Amendment protects the right to engage in charitable solicitation, but fraudulent charitable solicitation is unprotected speech); *Am. Library Ass'n*, 123 S. Ct. at 2306 (finding that use of internet filtering software does not violate patrons' First Amendment rights because filtering software may be disabled upon request); *Hicks*, 123 S. Ct. at 2199 (finding that the overbreadth doctrine could not be applied to a public housing authority's trespass policy because the record did not show that the policy as a whole prohibited a substantial amount of protected speech in relation to its many legitimate applications); *Beaumont*, 123 S. Ct. at 2210-11 (finding that restrictions on political contributions have been treated as merely "marginal" speech restrictions).

<sup>5</sup> 123 S. Ct. at 1536.

had before it a Virginia statute that made it a crime to burn a cross with the intent to intimidate a person or group of persons.<sup>6</sup> The statute further provided that, “any cross burning was prima facie evidence of an intent to intimidate.”<sup>7</sup> The Court had to decide whether states could outlaw such cross burning.<sup>8</sup> In the past, the Court has decided a number of cases addressing whether a government can restrict hateful speech, speech that denigrates people on the basis of race, religion, national origin, sexual orientation, or gender.<sup>9</sup> This was the first case in a long time where the Court had to deal with the question of whether the government can prohibit cross burning when done with intent to intimidate. The Court answered this question in the positive, so long as there is very clear proof that the intent of the cross burner is intimidation.<sup>10</sup> The Court sent the case back for further review, but with the basic message that there is nothing wrong with the government seeking to prohibit the expressive use of this type of symbol where it can be proven that it was done with intent to

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<sup>6</sup> *Id.* at 1541-42. VA. CODE ANN. § 18.2-423 (2003) states in pertinent part:

It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

<sup>7</sup> *Black*, 123 S. Ct. at 1542.

<sup>8</sup> *Id.* at 1541.

<sup>9</sup> *See, e.g., R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992) (finding an ordinance prohibiting otherwise permitted speech solely on basis of its content is facially unconstitutional).

<sup>10</sup> *Black*, 123 S. Ct. at 1550.

intimidate.<sup>11</sup>

In reaching its decision, the Court pointed out that the history of cross burning goes back to the 14th Century and noted that cross burning can be a symbol of ideas, association, or a rallying point for the people that subscribe to it.<sup>12</sup> On the other hand, it can also be a threat of violence, a message that a person against whom the threat is directed should fear for their very life if necessary.<sup>13</sup> In this country, cross burning has been associated with the rather odious history of racism and racial violence; however, it is not based only on race, but on religion as well.<sup>14</sup> As a result, the Court was sensitive to the fact that cross burning can come in two guises: as communication of a message or as a threat or intimidation.<sup>15</sup>

The problem with the statute in this case was that it singled out a particular threat.<sup>16</sup> It was not the general threat or intimidation; it was threatening someone by burning a cross.<sup>17</sup> In effect, the state was discriminating in favor of one point of view that racism is bad, while not being concerned with other points of view.<sup>18</sup> The Court had to deal with the cross burning issue in this manner because in a case decided about ten years prior, *R. A. V. v.*

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<sup>11</sup> *Id.* at 1552.

<sup>12</sup> *Id.* at 1544-45.

<sup>13</sup> *Id.* at 1546-47.

<sup>14</sup> *Id.* at 1545-46.

<sup>15</sup> *Black*, 123 S. Ct. at 1546.

<sup>16</sup> *Id.* at 1548.

<sup>17</sup> *Id.* at 1549.

<sup>18</sup> *Id.* at 1549-50.

*City of St. Paul*,<sup>19</sup> it held that if states want to ban hate speech, they cannot pick and choose which hate speech they will ban; states had to be “equal opportunity prohibitors” of hate speech.<sup>20</sup>

This case seemed to pose a problem for the cross burning statute at issue in *Black*. In *R. A. V.*, the Court held that the statute would pose a problem if it made it a crime to intimidate someone by burning a cross because of the race or religion of the target of the intimidation.<sup>21</sup> However, in the *Black* case, the statute punished anyone who burned a cross in an intimidating way for any point of view against anybody.<sup>22</sup> So, if your target was Black, Jewish, or Catholic, a union member, a Democrat, or a gay person, the statute would apply.<sup>23</sup> The Court stated it was not favoring one point of view: *anybody* who burns a cross for *any* reason in an effort to intimidate a person that one does not like on *any* grounds can be subject to punishment under the Virginia statute, and the Court held to do so was acceptable under the First Amendment.<sup>24</sup> Since threats are not protected under the First Amendment, the Court said the use of cross burning to intimidate is akin to a threat and, as

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<sup>19</sup> 505 U.S. at 377.

<sup>20</sup> *Id.* at 391.

<sup>21</sup> *Id.* at 393.

<sup>22</sup> *Black*, 123 S. Ct. at 1549.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* The Court explained:

[T]he Virginia statute does not single out for opprobrium only that speech directed toward one of the specified disfavored topics. It does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion, or because of the victim’s ‘political affiliation, union membership, or homosexuality.’

a result, the singling out of cross burning was not violative of the First Amendment.<sup>25</sup> Six Justices supported the decision; there was no majority opinion.<sup>26</sup> The aforesaid position was taken by four of the Justices,<sup>27</sup> while two other Justices, Justice Scalia and Justice Thomas dissented.<sup>28</sup>

An interesting point to note is that Justice Thomas actually felt that the statute was valid.<sup>29</sup> He was the one Justice who would have upheld the statute because he said that the history of cross burning in America is so vile and 'so linked to violence and terrorism that it could not be viewed as simply another way of expressing a point of view.<sup>30</sup> Another interesting point to note is

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<sup>25</sup> *Id.* ("Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.").

<sup>26</sup> *Id.* at 1541. Justice O'Connor wrote the plurality opinion in which Justices Breyer, Rehnquist, and Stevens joined. Justices Scalia and Thomas filed separate opinions.

<sup>27</sup> *Black*, 123 S. Ct. at 1549-50. Justices Breyer, O'Connor, Rehnquist, and Stevens reasoned that cross burning is a threatening expression, therefore proscribable, but invalidated the portion of the law that allowed the act of cross burning to be considered *prima facie* evidence of intent to intimidate. *Id.*

<sup>28</sup> *Id.* at 1552, 1562. Justice Scalia dissented in part because of the rebuttable presumption in the *prima facie* provision of the Virginia statute. He also noted that the Virginia Supreme Court had not handed down a binding construction of the provision, and it was therefore improper for the Supreme Court to pass upon its constitutionality. However, Justice Scalia did concur in the judgment and in the plurality's analysis of the First Amendment. *Id.* at 1557 (Scalia, J., dissenting). Justice Thomas disagreed with the Court's decision to treat the statute as a First Amendment violation, reasoning that the Virginia statute prohibited conduct, not speech, and was therefore constitutionally valid without regard to First Amendment jurisprudence. *Id.* at 1566 (Thomas, J., dissenting).

<sup>29</sup> *Id.* at 1566 (Thomas, J., dissenting) ("In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.").

<sup>30</sup> *Id.* at 1564 (Thomas, J., dissenting) ("In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.").

that Justice Thomas, who is not known for active participation during oral arguments to the Court,<sup>31</sup> felt so strongly about this issue that he peppered the defendants' lawyer with a number of questions which then became the basis for his opinion. Justice Thomas indicated that he would clearly uphold the statute at issue despite the protections afforded by the First Amendment.<sup>32</sup>

There were three dissenters, the "liberals" of free speech, Justices Souter, Kennedy, and Ginsburg. The dissenters stated they were against racism just as much as the next person, but that the government singled out a particular symbol of racism or racial antagonism or violence.<sup>33</sup> They feared the statute was not just protecting against threats or intimidation, but it was also suppressing ideas that are communicated in a symbolic fashion.<sup>34</sup> To put it another way, the dissenters felt that the statute was not primarily about preserving or protecting peace; rather, its primary purpose was to prevent disfavored communication and hateful

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<sup>31</sup> See, e.g., Joan Biskupic, *After a Quiet Spell, Justice Thomas Finds Voice*, THE WASHINGTON POST, May 24, 1999, at A1 (stating that, "[Thomas] was quiet in his early years, rarely speaking during oral arguments.").

<sup>32</sup> *Black*, 123 S. Ct. at 1562-69 (Thomas, J., dissenting).

<sup>33</sup> *Id.* at 1559 (Souter, J., dissenting) ("Although the Virginia statute in issue here contains no such express basis of limitation on prohibited subject matter, the specific prohibition of cross burning with intent to discriminate selects a symbol with particular content from the field of all proscribable expressions meant to intimidate.").

<sup>34</sup> *Id.* at 1561-62 (Souter, J., dissenting). The dissenters noted:

[T]he provision will encourage a fact-finder to err on the side of finding intent to intimidate when the evidence of circumstances fails to point with any clarity to either the criminal intent or to the permissible one. . . . To the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas.

points of view.<sup>35</sup> As such, the dissenters did not find a compelling interest to justify the singling out of this particular symbol or method of communication.

Ultimately, the case was remanded because the statute not only made it a crime to burn the cross with intent to intimidate, but also allowed the act of burning the cross to serve as *prima facie* evidence of the required intent needed to satisfy the statute.<sup>36</sup> The Court decided that this presumption, that there was intent to intimidate, must be found beyond a reasonable doubt in each case.<sup>37</sup> Therefore, it was really a defect of procedure, not a defect of entitlement, that caused the Court to reverse the convictions of the individuals who had been convicted under this cross burning statute.<sup>38</sup> This case demonstrates loss number one for the First Amendment, or victory number one if you are on the opposite side of the fence. The consequence of the *Black* decision is to limit the effect of the *R. A. V.* case and to allow the government to regulate the use of symbols associated with violence.

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<sup>35</sup> *Id.* at 1562 (Souter, J., dissenting) (“[The *prima facie* evidence] has a very obvious significance as a mechanism for bringing within the statute’s prohibition some expression that is doubtfully threatening though certainly distasteful.”).

<sup>36</sup> *Id.* at 1552.

<sup>37</sup> *Black*, 123 S. Ct. at 1551 (“The *prima facie* evidence provision . . . ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.”).

<sup>38</sup> *Id.* at 1551-52.

## CHARITABLE SOLICITATION

A more positive theme I want to discuss is found in *Illinois v. Telemarketing Associates, Inc.*,<sup>39</sup> which involved charitable solicitation.<sup>40</sup> For a number of years, the Court has wrestled with the question of state efforts to regulate charitable solicitation.<sup>41</sup> Those efforts usually took the form of limits or prohibitions on the amount of charitable solicitation that can go towards fundraising expenses.<sup>42</sup> Many states wanted to say if you are a charity, you cannot spend on expenses on fundraising costs more than 50% of what you raise.<sup>43</sup> You have to spend at least 50% on the objects of your charity for educational purposes or the like.<sup>44</sup> In a number of cases going back to the early 1980s, the *Schaumburg* case,<sup>45</sup> the

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<sup>39</sup> 123 S. Ct. at 1829.

<sup>40</sup> *Id.* at 1832 (“This case concerns the amenability of for-profit fundraising corporations to suit by the Attorney General of Illinois for fraudulent charitable solicitations.”).

<sup>41</sup> *See, e.g., Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980) (finding that the Village Code violated the First Amendment as it only granted solicitation permits to charitable organizations that used 75% of their receipts for charitable purposes).

<sup>42</sup> *See, e.g., Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781 (1988) (striking down three-tiered regulatory scheme aimed at outlawing “unreasonable” fees retained by professional fundraisers).

<sup>43</sup> *Id.* at 784. The Court explained:

Responding to a study showing that in the previous five years the State’s largest professional fundraisers had retained as fees and costs well over 50 percent of the gross revenues collected in charitable solicitation drives, North Carolina amended its Charitable Solicitations Act . . . [to prohibit] professional fundraisers from retaining an unreasonable or excessive fee.

*Id.*

<sup>44</sup> *Id.*

<sup>45</sup> 444 U.S. at 620.

*Munson* case,<sup>46</sup> and the *Riley* case,<sup>47</sup> the Court had struck down, in each instance, flat statutory percentages or limits on the amount of funds or percentage of funds that charitable organizations could spend on raising funds.<sup>48</sup> The concern was that society wants the charity to be in the business of supporting charity, not supporting their own employees. It seemed like it would be difficult for the government to regulate the amount of funds that were spent for charities' solicitation.

The litigation in *Telemarketing Associates* was a result of a longstanding dispute between the State of Illinois and a telemarketing group. The Illinois Attorney General sued professional fundraisers hired by a charitable organization for fraud, alleging that they fraudulently misrepresented the portion of charitable donations which they retained as fundraising costs.<sup>49</sup> In this case, there was a group that was raising money for a Vietnam veterans organization called VietNow. The government filed suit against the group after it discovered that 85% of the money raised went to fundraising costs, while only 15% went to supporting veterans' activities, charities, and benefits.<sup>50</sup> The Court held that "[s]tates may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about

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<sup>46</sup> *Sec'y of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

<sup>47</sup> 487 U.S. at 781.

<sup>48</sup> *Telemarketing Assoc.*, 123 S. Ct. at 1835 ("Each of the three decisions invalidated state or local laws that categorically restrained solicitation by charities or professional fundraisers if a high percentage of the funds raised would be used to cover administrative or fundraising costs.").

<sup>49</sup> *Id.* at 1834.

<sup>50</sup> *Id.* at 1833.

how their donations will be used.”<sup>51</sup> Other decisions have stated the opposite, namely that the government cannot interfere when a group spends all of the money it raises on itself.<sup>52</sup> The decisions that went this way noted that charitable solicitation is First Amendment work.<sup>53</sup> In these decisions, the Court stated that whether the object of your charity is a hospital, law school, university, or veterans group, it is speech protected by the First Amendment and freedom of association.<sup>54</sup> This is why government interference was found unconstitutional.<sup>55</sup> Had it only been that the veterans group was spending a lot of what it raised, Illinois would not have had much of a case.

In *Telemarketing Associates*, the problem was that the veterans group was not being honest about the percentage of money it was keeping for itself and the percentage that was going to veterans’ activities. The group did not lie, but it engaged in statements that were misrepresentations of that percentage.<sup>56</sup> So, the question before the Court was whether, despite the First Amendment, the government could commence an action against

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<sup>51</sup> *Id.* at 1843.

<sup>52</sup> See, e.g., *Schaumburg*, 444 U.S. at 620 (finding that a village code violated the First Amendment because it only granted solicitation permits to charitable organizations that used 75% of their receipts for charitable purposes); *Munson*, 467 U.S. at 947 (finding that state statute imposing percentage limitation on corporation charitable solicitation was unconstitutional); *Riley*, 487 U.S. at 781 (finding that state statute prohibiting professional fundraisers from retaining unreasonable or excessive fees unconstitutionally infringed on First Amendment rights).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Telemarketing Assocs.*, 123 S. Ct. at 1833.

them, not for spending too much on their fundraising activities, but for being disingenuous about it, for misrepresenting it.<sup>57</sup> The Supreme Court unanimously decided that the answer was “yes.” The First Amendment is not a bar to honestly brought fraud suits against the charity where the charity misrepresents or is alleged to have misrepresented the amount of money that goes to fundraising versus the amount of money that goes to the charitable purpose itself.<sup>58</sup>

This decision makes sense. A fraud can be prosecuted, even fraud in the area of the First Amendment, although it has to be done much more carefully in such cases. Thus, we want a vigorous, uninhibited and robust debate on public issues. We do not want people to speak only if they can prove what they are saying is true beyond a reasonable doubt. On the other hand, where solicitation of funds is involved, the Court has always allowed an extra margin for government regulation because money is changing hands.<sup>59</sup> Even though the three cases I referred to prohibit the government from setting percentages or limits on the amount of money that charities can use for their own fundraising activities, the First Amendment does not prohibit the ability of the government to prosecute for fraud.<sup>60</sup> As such, the Court reversed

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<sup>57</sup> *Id.* at 1832-33.

<sup>58</sup> *Id.* at 1843.

<sup>59</sup> *See, e.g., Schaumburg*, 444 U.S. at 620; *Munson*, 467 U.S. at 947; *Riley*, 487 U.S. at 781.

<sup>60</sup> *Telemarketing Assocs.*, 123 S. Ct. at 1833 (“While bare failure to disclose [the percentage of charitable donations fundraisers retain for themselves] directly to potential donors does not suffice to establish fraud, when

the matter and sent it back to the Illinois court for further proceedings, rejecting the effort to dismiss the case on First Amendment grounds.<sup>61</sup>

What is interesting about the case is that if one had read some of the press accounts of the argument, it seemed like it was closely divided between those who felt this was an impermissible effort to restrict the charitable solicitation and those who thought the prosecution for fraud was a valid concern; yet, when the case emerged, it was a nine-to-nothing decision.<sup>62</sup> It may have been that there was some good advocacy on the government's side, or maybe Justice Ginsburg's opinion, which gathered unanimous support, clarified issues in a way that had not been so clear prior to oral argument. In any event, it is clear that despite the rules the Court has handed down protecting charitable solicitation under the First Amendment, those rules do not protect charities against charges of fraudulent solicitation, and state and local governments are entitled to prosecute where they can validate alleged fraud.<sup>63</sup> This was a rare case where the Court allowed prosecution despite First Amendment concerns.

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nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim.”).

<sup>61</sup> *Id.* at 1843.

<sup>62</sup> Justice Ginsburg delivered the unanimous opinion and Justices Scalia and Thomas filed concurring opinions.

<sup>63</sup> *Telemarketing Assocs.*, 123 S. Ct. at 1833.

*Nike, Inc. v. Kasky*<sup>64</sup>

I want to spend a moment on a case the Court did not decide, but it relates to this theme of both solicitation and misrepresentation. That is the case of *Nike, Inc. v. Kasky*. There is not a lengthy First Amendment opinion in this case because the Court dismissed it after deciding that it should not have agreed to hear the case.<sup>65</sup> The *Nike* case raises fascinating First Amendment issues that are going to come back up to the Court.

The worldwide company, Nike, Inc., whose well-known logo is the “Swoosh,” has been attacked for years by activists claiming their workers are laboring under substandard conditions in foreign countries.<sup>66</sup> As a result of these criticisms, Nike put out a series of editorial responses in which it stated that its workers were well treated, not mistreated, and the claims against them were false.<sup>67</sup> One of Nike’s critics found a California statute that allowed suit against a business for misrepresentation.<sup>68</sup> Even

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<sup>64</sup> 123 S. Ct. 2554 (2003) (per curiam).

<sup>65</sup> *Id.* The Court dismissed the writ of *certiorari* as improvidently granted in its per curiam decision. The concurring opinion of Justice Stevens and Justice Ginsburg explains three reasons why the Court could not hear the case, with Justice Souter concurring as to third. First, the Court did not have appellate jurisdiction to hear the case because the California Supreme Court never entered a final judgment. Second, neither party had standing to invoke the jurisdiction of the federal courts. Finally, the case presented novel First Amendment questions that could not be decided by the Court at this stage. *Id.* at 2555.

<sup>66</sup> *Id.* at 2554.

<sup>67</sup> *Id.* at 2555.

<sup>68</sup> *Id.* at 2554-55. The California resident sued Nike under §§ 17200 and 17500 of California’s Unfair Competition Law and False Advertising Law. CAL. BUS. & PROF. CODE § 17200 (2003) states: “unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and

though the government of California chose not to sue, the Nike critic did. The Nike critic sued on a kind of private attorney general theory, seeking damages if he could prove that Nike misrepresented its position that it did not employ laborers under substandard conditions.<sup>69</sup> Nike argued that the critic raised an issue against it regarding speech which constituted political speech. As such, Nike argued that the critic could not subject it to a truth test for political speech, only commercial speech, which was not the case here.<sup>70</sup>

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unfair, deceptive, untrue or misleading advertising . . . ." CAL. BUS. & PROF. CODE § 17500 (2003) states in pertinent part:

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised.

<sup>69</sup> *Nike*, 123 S. Ct. at 2555. In fact, the critic did not sue for personal damages sustained by him individually, but, upon information and belief of Nike's false statements regarding their working conditions, on behalf of the general public of the State of California. *Id.*

<sup>70</sup> *Id.*

The California Supreme Court found that it was commercial speech.<sup>71</sup> Even though the subject was labor conditions, it was expressed in the context of trying to sell new products.<sup>72</sup> As such, since the court found Nike's speech to be commercial, less First Amendment protection was available, and Nike could be subjected to punishment for the allegedly deceitful speech.<sup>73</sup> Nike took the case up to the Supreme Court and it looked like it was going to be an extremely important decision about two issues: (1) whether commercial speech should still be treated less favorably under the First Amendment than political speech; and (2) whether monetary damages or penalty suits could be implemented against the company for putting out information to protect its product against its critics.

We will have to wait for the answers to those questions, and they are questions that relate to globalization and the political disputes that globalization has generated. The United States Supreme Court essentially found that it could not properly decide the case on various grounds. One ground for the Court deciding not to hear the case was that since California had not even had a trial yet, it had merely sustained the complaint against the First

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<sup>71</sup> *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (2002) (finding the messages in question were commercial speech because they were directed by a commercial speaker to a commercial audience for the purpose of promoting sales of products).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 259.

Amendment defense and there was no finality to the appeal.<sup>74</sup> We do not know if that was the Court's theory because there was no opinion from the Court stating this. There were a few Justices who wrote on that.<sup>75</sup> The second thought was that Mr. Kasky, the Nike critic, did not have standing to sue.<sup>76</sup> He was not a government agency enforcing the law, he was an interloper with no warrant to proceed.

## PORNOGRAPHY

The third case I want to discuss is *United States v. American Library Association*.<sup>77</sup> What would any term of the Supreme Court be without a little pornography case? This case involves part of the federal government's never ending war against pornography on the Internet.<sup>78</sup> This is the third case that the Court has had in about six years dealing with federal efforts to regulate pornography or sexually-oriented materials on the Internet either for grown-ups or, more recently and more pointedly, to regulate them for children, to keep young people from having access to those materials.<sup>79</sup> The first case dealing with this issue, *Reno v. ACLU*,<sup>80</sup> involved the Communications Decency Act,<sup>81</sup> wherein the

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<sup>74</sup> *Nike*, 123 S. Ct. at 2555.

<sup>75</sup> *Id.* at 2555-57.

<sup>76</sup> *Id.* at 2557.

<sup>77</sup> 123 S. Ct. at 2297.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 2301.

<sup>80</sup> 521 U.S. 844 (1997).

<sup>81</sup> 47 U.S.C. § 223(a)(1)(B) (2003) provides:

Court basically noted that the Internet is an important new medium of free speech and open communication.<sup>82</sup> The Court struck down very broad restrictions on communicating indecent or sexual material on the Internet.<sup>83</sup>

In more recent cases, the Court has taken a more balanced view and has given more deference to government concerns.<sup>84</sup> That is true in the *American Library Association* case. This case involved the Children's Internet Protection Act ("CIPA").<sup>85</sup> CIPA provides that any library receiving federal assistance must have filters on its computers to filter out sexual material.<sup>86</sup> CIPA further provides that library patrons are to be blocked from typing in websites like "Playboy.com."<sup>87</sup> If library patrons want to access

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Whoever . . . by means of a telecommunications device knowingly . . . makes, creates, or solicits and . . . initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

<sup>82</sup> *Reno*, 521 U.S. at 850 ("The Internet is 'a unique and wholly new medium of worldwide human communication.'") (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

<sup>83</sup> *Id.* at 882.

<sup>84</sup> *See, e.g., Am. Library Ass'n*, 123 S. Ct. at 2297.

<sup>85</sup> Children's Internet Protection Act, 20 U.S.C. §§ 9134(f), 254(h)(6) (2003). CIPA forbade public libraries to receive federal assistance for internet access unless there was software to block or filter obscene or pornographic computer images in order to protect minors from such images. *Id.*

<sup>86</sup> *Am. Library Ass'n*, 123 S. Ct. at 2301-02.

<sup>87</sup> *Id.* at 2302 (citing *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 428 (E.D. Pa. 2002)).

Playboy's website and others like it, they are required to ask the librarian, and he or she will provide a code for access to the site.<sup>88</sup>

The question before the Court was whether the government, through its spending powers, could require libraries to be censors of Playboy's website or other similar websites.<sup>89</sup> The majority of the Court held that censoring such websites was not violative of the First Amendment, based on two theories.<sup>90</sup>

The minority had argued that a library is like a public forum.<sup>91</sup> The library is a place to communicate ideas and points of view; therefore, censorship of such ideas and points of view by the library is impermissible.<sup>92</sup> The Court did not find this argument persuasive.<sup>93</sup> Libraries are in the business of picking and choosing books and ideas. During this process, they do not create a public forum for every person in the library with a card to use it to receive or communicate any and all ideas they want.<sup>94</sup> The Court found that a library is a government-funded activity which provides a place for research, scholarship, and learning. It is not a place for every speaker who wants to speak on the Internet and every Internet speaker that wants to speak to someone on a public library

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<sup>88</sup> *Id.* at 2306.

<sup>89</sup> *Id.* at 2307-08.

<sup>90</sup> *Id.* at 2309.

<sup>91</sup> *Am. Library Ass'n*, 123 S. Ct. at 2303-04 (citing *Am. Library Ass'n*, 201 F. Supp. 2d at 466).

<sup>92</sup> *Id.* at 2303.

<sup>93</sup> *Id.* at 2304-05.

<sup>94</sup> *Id.* at 2303-04.

terminal.<sup>95</sup>

In reaching this conclusion, the Court cited a couple of cases which, if correctly decided, would support its position. One case held that when public television stations sponsor a political debate among candidates, they do not have to let every candidate participate because the station is just presenting a program.<sup>96</sup> The same holds true when the federal government funds art through the National Endowment for the Arts.<sup>97</sup> The government does not have to fund “scuzzy” art; it can fund only wholesome art.<sup>98</sup> It is not a public forum; it is the government paying the piper and calling the tune. So, on that theory, the Court held it is permissible to make libraries that receive federal funds put filters on their computers.<sup>99</sup>

The other argument against this restriction was that it was an unconstitutional condition which, in effect, tells libraries, “your money or your life.”<sup>100</sup> If the library wants the federal benefit, it has to give up its First Amendment freedom and allow government censorship. The Court disagreed with this assertion. It found that the library is, in effect, a government program. As such, it is akin to when the government gives money to teach one type of subject, prohibiting you from spending money on teaching other subjects.<sup>101</sup>

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<sup>95</sup> *Id.* at 2305.

<sup>96</sup> *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 683 (1998).

<sup>97</sup> *See Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998).

<sup>98</sup> *Id.* at 585.

<sup>99</sup> *Am. Library Ass’n*, 123 S. Ct. at 2304-05.

<sup>100</sup> *Id.* at 2316 (Stevens, J., dissenting).

<sup>101</sup> *Id.* at 2308.

Therefore, the Court determined that the statute was constitutional and not in violation of the First Amendment.<sup>102</sup>

An interesting aspect to this decision is that Justices who are sometimes, but not invariably, First Amendment partisans, that being Justices Rehnquist, O'Connor, Scalia and Thomas, were joined by Kennedy and Breyer, two liberal Justices, in agreeing that the statute did not violate the First Amendment.<sup>103</sup> Justice Kennedy thought it was no big deal to ask the library to unlock Playboy.com because to do so was not an interference with free speech rights.<sup>104</sup> Justice Breyer thought that the government's interest in protecting children outweighed the impact on the adult who wants to access Playboy.com in the public library.<sup>105</sup>

There were some dissenters who found that this was pure, old-fashioned censorship.<sup>106</sup> They found that the government is censoring materials which are not illegal or hardcore obscenity, and by censoring these materials, the government was using its "power of the purse" to engage in impermissible censorship of valid ideas.<sup>107</sup> As it turns out, the power of the purse prevailed, and in a six-to-three decision, the Court upheld CIPA's requirement that public libraries use these filtering systems.<sup>108</sup>

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<sup>102</sup> *Id.* at 2308-09.

<sup>103</sup> *Am. Library Ass'n*, 123 S. Ct. at 2300.

<sup>104</sup> *Id.* at 2310 (Kennedy, J., concurring).

<sup>105</sup> *Id.* at 2312 (Breyer, J., concurring).

<sup>106</sup> *Id.* at 2320 (Souter, J., dissenting).

<sup>107</sup> *Id.*

<sup>108</sup> *Am. Library Ass'n*, 123 S. Ct. at 2309.

## PUBLIC HOUSING

The next First Amendment case I would like to discuss is *Virginia v. Hicks*.<sup>109</sup> The decision was unanimous, and Justice Scalia wrote the opinion.<sup>110</sup> In this case, there was a public housing project concerned about the number of people who were coming around committing crimes on the premises, parkways, and streets.<sup>111</sup> As a result, the public housing manager tried to privatize the streets by implementing a rule that anytime an individual came on the premises without permission or without a proper purpose, he or she would automatically be deemed a trespasser.<sup>112</sup> The rule was if you came on once without having the proper purpose, you were told not to come on again.<sup>113</sup> If you came on the second time, you would be arrested for trespassing.<sup>114</sup> There was some indication that the public housing manager had unfettered discretion to decide whether or not individuals were allowed to come onto the premises to hand out leaflets.<sup>115</sup> There was also some indication that there was a screening of ideas that was being undertaken by a government official.<sup>116</sup>

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<sup>109</sup> 123 S. Ct. at 2191.

<sup>110</sup> *Id.* at 2194.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 2195.

<sup>113</sup> *Id.*

<sup>114</sup> *Hicks*, 123 S. Ct. at 2195.

<sup>115</sup> *Id.* at 2197-98.

<sup>116</sup> *Id.* at 2196, 2198.

In this particular case, an individual named Hicks came onto the premises to see his family, not to hand out leaflets or conduct door-to-door lobbying for candidates.<sup>117</sup> Due to a family dispute, Hicks was once told to leave the premises. When he came back a second time, he was arrested for trespass.<sup>118</sup> The lower courts in Virginia upheld the First Amendment defense and found that although Hicks did not have a First Amendment purpose in visiting the housing project, other people might.<sup>119</sup> The courts viewed the rule requiring people to obtain permission from the manager as a prior restraint and pure censorship.<sup>120</sup> Therefore, the restrictive nature of the rule was found to be a violation of the rights afforded by the First Amendment.<sup>121</sup>

The United States Supreme Court reversed. It found that if there is anything wrong with the statute, it is that it is too broad; but in this case, Hicks was an individual with a family dispute.<sup>122</sup> As such, the Court found that the statute was operating in a way that was not in violation of the First Amendment, and just because it might have some possible First Amendment problems in another context dealing with another person, the statute is not substantially overbroad or defective.<sup>123</sup> The Court declined to wipe out the

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<sup>117</sup> *Id.* at 2198; *see also* Hicks v. Virginia, 548 S.E.2d 249, 252 (Va. Ct. App. 2001), *rev'd*, 123 S. Ct. 2191 (2003).

<sup>118</sup> Hicks, 123 S. Ct. at 2195.

<sup>119</sup> *See* Virginia v. Hicks, 563 S.E.2d 674, 680 (Va. 2002); *see also* Hicks, 548 S.E.2d at 251.

<sup>120</sup> Hicks, 563 S.E.2d at 679-80, 681.

<sup>121</sup> *Id.* at 680.

<sup>122</sup> *See* Hicks, 123 S. Ct. at 2199.

<sup>123</sup> *Id.*

whole statute on a theory of overbreadth.<sup>124</sup> It reminded us that striking down a law on behalf of somebody who themselves can be regulated or restricted is a potent medicine because then the whole law goes down.<sup>125</sup> The Court noted that if most of the uses of the law are proper, the Court should respect it.<sup>126</sup> Potential hypothetical uses of the trespass law and the potential impermissible uses under the First Amendment are too marginal to strike down the whole law.<sup>127</sup> All nine Justices went along with that reasoning and reaffirmed both that the overbreadth doctrine will not be used freely and that housing projects can seek to restrict access to their premises by people who do not wish to engage in First Amendment activity.<sup>128</sup>

## CAMPAIGN FINANCE

The final case where the Court rejected First Amendment claims turned out to be a harbinger of things to come. In *Federal Election Commission v. Beaumont*,<sup>129</sup> the Court had to decide whether a nonprofit, ideological advocacy organization, which happened to be a corporation, could be barred from making

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

<sup>126</sup> *Id.* at 2198.

<sup>127</sup> 123 S. Ct. at 2197.

<sup>128</sup> *Id.* at 2199.

<sup>129</sup> 123 S. Ct. 2200 (2003).

contributions to federal candidates.<sup>130</sup> Federal law had long barred corporations from making contributions or expenditures in connection with federal election campaigns. In 1986, however, the Court ruled that this ban could not be applied in all circumstances to nonprofit, ideological corporations and that such organizations have a First Amendment right to engage in independent, partisan campaign expenditures advocating for or against particular federal candidates.<sup>131</sup> The issue in *Beaumont* was whether to extend that right from making independent expenditures on behalf of specific federal candidates to making direct campaign contributions to such candidates.<sup>132</sup> The lower court believed that such ideological corporations posed none of the dangers associated with the concerns over corporate wealth in elections.<sup>133</sup>

The Supreme Court disagreed, holding that those concerns were applicable to nonprofit corporations as well.<sup>134</sup> The Court observed that “some of the Nation’s most politically powerful organizations, including the AARP, the National Rifle Association, and the Sierra Club” can raise large amounts of money and might be used as “conduits for circumventing” contribution limits.<sup>135</sup> Accordingly, a prophylactic rule barring all corporate contributions

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<sup>130</sup> *Id.* at 2204-05.

<sup>131</sup> *See* *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

<sup>132</sup> 123 S. Ct. at 2205.

<sup>133</sup> *Id.* at 2204-05.

<sup>134</sup> *Id.* at 2208.

<sup>135</sup> *Id.* at 2209-10.

to candidates, regardless of what type of corporations were involved, was appropriate.<sup>136</sup>

Two dissenters, Justices Scalia and Thomas, rejected the validity of a prophylactic rule as inconsistent with the kind of strict scrutiny required for the kind of First Amendment deprivations involved in this case.<sup>137</sup>

The *Beaumont* case indeed turned out to be a harbinger of things to come. For at the end of 2003, the Court applied the same deferential approach to uphold all of the major features of the Bipartisan Campaign Reform Act of 2002,<sup>138</sup> the so-called McCain-Feingold law, which imposed broad restraints on the ability of corporations, labor unions, wealthy individuals, and issue advocacy cause organizations to become at all involved in federal election campaigns or even election year issues.<sup>139</sup> In doing so, in my opinion, the Court gave short shrift to the critical, core First Amendment values at stake whenever government regulates political speech, regulation which would seem an uncomfortable fit with the textual fabric of the First Amendment.

## CONCLUSION

This is the first Term in memory when not a single First Amendment claim was valued or vindicated. That result may

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<sup>136</sup> *Id.* at 2207.

<sup>137</sup> 123 S. Ct. at 2212 (Thomas, J., dissenting).

<sup>138</sup> 2 U.S.C. § 441 (2003).

<sup>139</sup> *McConnell v. FEC*, 124 S. Ct. 619 (2003).

simply be a function of the particular cases the Court reviewed and the relatively small number of them.

On the other hand, if the recent campaign finance case is an example, the majority of this Court is prepared to give a significant degree of deference to the political branches where the First Amendment is concerned. A generation ago, that would have been an extraordinary observation.

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