

Supreme Court Protects Controversial Speech

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Whatever one might say about the Rehnquist Court's constitutional jurisprudence generally, the current Court can hardly be called conservative, in either the judicial or political sense, when it comes to the First Amendment's guarantee of freedom of speech. From burning the American flag¹ to legal advocacy for the poor,² this "conservative" Court routinely extends First Amendment protection to speech giving voice to ideas antithetical to the conservative political agenda—expression that, in the case of flag burning, invoked sufficient hostility to fuel an effort to amend the Constitution.

Even more remarkable is that so many of the Court's important decisions affirming First Amendment protection have involved a form of speech—sexually explicit material—that was traditionally thought to be at the periphery of the First Amendment. It was only eleven years ago that Chief Justice Rehnquist (perhaps with tongue in cheek) described nude performance dancing as entitled only to the "bare minimum" of First Amendment protection.³ And it was Justice Stevens in *Young v. American Mini Theatres, Inc.*,⁴ who suggested that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." Indeed, the *Young* Court held that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment."

And yet, in case after case, the current Court has extended full First Amendment protection to sexually explicit speech, and has done so in rhetorical cadences that evoke our most fundamental values. In *American Civil Liberties Union v. Reno*,⁵ the Court deci-

sively invalidated the Communications Decency Act, which prohibited the knowing sending or display to minors of "patently offensive" material, including images or communications that depict sexual activity in a manner inappropriate for minors. Describing the Internet as a "vast democratic forum" with "content as diverse as human thought," the Court held that the government's interest in protecting children from harmful materials on the Internet "does not justify an unnecessarily broad suppression of speech addressed to adults."

In *United States v. Playboy Entertainment Group, Inc.*,⁶ the Court struck down a provision of the Telecommunications Act of 1996 that required cable operators providing channels dedicated to sexually explicit programming to use technical measures such as scrambling to ensure that it could never be received by a household that did not want it. Noting that "the history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive or even ugly," the Court held that the costs of imposing such technological constraints were unjustified.

The trend continued last Term in *Ashcroft v. Free Speech Coalition*,⁷ where the Court, to the surprise of many, invalidated a provision of the Child Pornography Prevention Act of 1996 that extended the federal prohibition against child pornography to images that appear to depict minors engaging in sexual activity but were produced without using any real children. Justice Kennedy's opinion for the Court extended full First Amendment protection to such images to the extent that they were not obscene under the familiar *Miller* test, reasoning that the government's interest in imposing such a sweeping ban on speech of potential value was unwarranted.

What does this say about the Rehnquist Court's understanding of the First Amendment? Most important, the Court's majority is not committed to the proposition that the First Amendment protects speech principally to ensure the proper functioning of our democratic

form of government. It believes that many forms of speech, even if they are not "political," are entitled to full protection. Indeed, it would appear that the Court is increasingly committed to a conception of the First Amendment that particularly values the importance of dissent and nonconformity in the nation's cultural as well as political life.

This Term promises to be another important one for the First Amendment, and another one in which government efforts to regulate sexually explicit speech will feature prominently. Here are some examples of First Amendment cases facing the Court this Term:

U.S. v. American Library Ass'n

In *United States v. American Library Association*, the Court is hearing an appeal by the United States from a decision of a three-judge district court holding unconstitutional a provision of the Children's Internet Protection Act that requires public libraries accepting federal money for Internet connections to install filtering software on their Internet terminals.

The law says the software must be designed to prevent adults from accessing obscenity and child pornography and to prevent minors from accessing "harmful to minors" speech as well. In practice, however, the evidence at trial showed that available software screens out much material that is constitutionally protected for adults and for minors, including thousands of websites that are not even sexually explicit.

The district court held that a federal statute providing funds to state or local government is unconstitutional if one of the conditions imposed on the recipients is conduct that would violate citizens' constitutional rights. It then held that if public libraries install Internet terminals providing general access, but then screen out one category of protected speech, that restriction must pass strict constitutional scrutiny. The court analogized the Internet in the library setting to a public forum created by the government, access to which cannot then be denied to speakers seeking to convey disfavored content.

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The court rejected arguments that a library's censorship of the Internet is properly analogized to content-based decisions that librarians routinely make about acquisition of print materials.

Applying strict scrutiny, the court held that the government had legitimate and substantial interests in preventing access to illegal speech and protecting patrons from inadvertent exposure to sexually explicit material. It held, however, that the government may not justify restrictions on protected speech in order to prevent dissemination of unprotected speech. It also held that less restrictive methods are available to libraries to keep out illegal speech and protect patrons from inadvertent exposure to controversial content.

Finally, the court held that the existence in the statute of a provision authorizing discretionary disabling of filtering software by librarians did not cure the constitutional problems.

Federal Election Comm'n v. Beaumont

On November 18, 2002, the Court granted certiorari in *Federal Election Commission v. Beaumont*, No. 02-403, which involves the First Amendment rights of nonprofit advocacy corporations to make direct campaign contributions in connection with federal elections.

The Federal Election Campaign Act⁸ prohibits corporations and labor unions from directly making expenditures or contributions in connection with federal elections. In *FEC v. Massachusetts Citizens for Life, Inc.*,⁹ the Supreme Court held the prohibition on independent expenditures unconstitutional as applied to a nonprofit political advocacy corporation. The Court identified three characteristics of the nonprofit corporation that were key to its holding: "It was formed for the express purpose of promoting political ideas, and cannot engage in business activities," "it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings," and it "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities."¹⁰ Following this decision, the FEC excepted corporations with these characteristics from the coverage of the independent expenditure limitation, but the statute and regulations continue to prohibit contributions from all corporations unless made from a separate fund, such as a PAC.

North Carolina Right to Life (NCRL), a nonprofit advocacy corporation that did not qualify for the regulatory exception to the expenditure limitation, challenged the constitutionality of the statutory and regulatory provisions limiting both its expenditures and its contributions. The district court held these provisions unconstitutional as applied to the NCRL, but declined to hold them facially unconstitutional. The Fourth Circuit affirmed.

In concluding that the restrictions on NCRL's expenditures and contributions burdened fundamental free speech and association interests, the Fourth Circuit emphasized the importance of nonprofit advocacy organizations to the political debate. The appellate court noted that NCRL engages in activities that "embody participatory democracy," raising money through bake sales, walk-a-thons, and raffles; publishing a newsletter, candidate surveys, and voter guides; holding conventions; and providing counseling and referrals. The appellate court recognized that the Supreme Court has accorded less First Amendment protection to the right to make contributions (as opposed to independent expenditures). It nevertheless concluded that restricting the contributions of advocacy groups burdens First Amendment rights, noting that such contributions by advocacy groups serve as proxies for individuals who contribute to the group to take advantage of the group's greater knowledge of political developments and to give their individual contributions more effect.

Based on Fourth Circuit precedent, the appellate court concluded that NCRL was indistinguishable from the nonprofit advocacy corporation in *MCFL*, and held that the independent expenditure provisions could not be constitutionally applied to NCRL. It then rejected the FEC's argument that the contribution limitation should be treated differently. The court dismissed the notion that there could be a risk of corruption from contributions by a nonprofit advocacy corporation that has neither shareholders nor investing members and that receives most of its donations from private individuals. In addition to finding the absence of a compelling governmental interest, the court concluded that the limitation was not narrowly tailored because it amounted to a ban, rather than just a limitation, on contributions from small nonprofit corporations.

Judge Gregory dissented from the portion of the opinion related to the

contribution limitation, reasoning that the majority's decision was inconsistent with *FEC v. National Right to Work Committee*.¹¹ *NRWC* dealt with a specific provision of the exception to the corporate contribution ban (namely, from whom a nonprofit advocacy group could solicit contributions to its PAC), but in that context discussed more broadly the ban itself. Judge Gregory reasoned that this discussion, as well as the fact that the *MCFL* Court distinguished *NRWC* on the ground that it involved a ban on contributions rather than expenditures, compelled the conclusion that the contribution limitation was constitutional.

On the Solicitor General's petition, the U.S. Supreme Court granted review on the contribution question. This case once again presents the Court with the clash between the First Amendment rights of individuals and organizations to participate in the electoral process and the ability of legislatures to protect the integrity of that process by regulating campaign contributions. This case will likely turn on the amount of discretion that the Court affords the Congress on the question of campaign finance and whether the Court continues to maintain the distinction drawn by *Buckley v. Valeo* between expenditures (which receive more First Amendment protection) and contributions (which receive less).

This case could be the prologue to the bigger battle brewing over McCain-Feingold, on which a specially constituted three-judge district court in the District of Columbia heard arguments on December 3-4, 2002. Depending on the timing of the lower court decision in that case and whether the Supreme Court expedites review, it still may be heard this Term as well.

Illinois v. Ryan

On November 4, 2002, the Supreme Court granted certiorari in *Illinois v. Ryan*, No. 01-1806, a case in which the Court will revisit the intersection of the First Amendment and state laws on charitable solicitations. In *Ryan*, the Illinois attorney general brought charges against two professional fundraising companies, alleging that it amounted to fraud for them to not to disclose that their contracts with their client-charities called for them to retain 85 percent of the money raised on the charity's behalf. There were no suggestions that the charitable organiza-

tion failed to receive the amounts for which it contracted, or that the fundraisers made affirmative misrepresentations to potential donors. Instead, the state alleged only that the fundraisers' statements were deceptive and false because they did not affirmatively advise donors of what percentage of the donation would go to the charity. The lower court dismissed the complaint on First Amendment grounds. The Illinois Supreme Court affirmed, concluding that several decisions by the U.S. Supreme Court make clear that charitable solicitations are protected by the First Amendment, and that the state may not impose percentage-based limitations on the ability to engage in such activity.¹² The U.S. Supreme Court granted *certiorari* to consider the question "does First Amendment categorically prohibit state from pursuing fraud action against professional fundraiser who represents that donations will be used for charitable purposes but in fact keeps the vast majority (in this case 85 percent) of all funds donated?"

Commonwealth of Virginia v. Black
In *Commonwealth of Virginia v. Black* (No. 01-1107), the Court will revisit the highly charged issue of cross-burning. Ten years ago, in *R.A.V. v. St. Paul*, the Court struck down on First Amendment grounds a St. Paul ordinance criminalizing burning a cross when it is intended to arouse anger in people based on "race, color, creed, religion or gender." Since that time, many states have experimented with a variety of statutes designed to remedy the constitutional flaw in such a statute.

Virginia has a statute that bans cross-

burning with the intention to intimidate, which was applied in two cases that are now up for review. In the first, a Ku Klux Klan rally was held on private property with the consent of the owner. During the rally, a large cross was erected and burned, within the sight of several surrounding families. Barry Black, an imperial wizard of the KKK was arrested and convicted. In the second case, two men were convicted of burning a cross in the yard of a neighboring African-American family in Virginia Beach.

The Virginia Supreme Court ruled that the statute violated the First Amendment because cross-burning is expressive, noting that, "under our system of government, people have the right to use symbols to communicate." In its briefs, the Commonwealth argued that the Virginia statute covers only the intent to intimidate and not the point of view of the protester. The Commonwealth observed that cross-burning is a "virulent" form of intimidation. Thus, one question will be whether the message of cross-burning can be separated from any intent to intimidate. The case has attracted the attention of numerous amici, including fifteen states and the U.S. Department of Justice. The Court heard arguments in the case on December 11, 2002.

Casino Ass'n of Louisiana

Although the Court has not yet decided whether to grant *certiorari*, it has called for a response from the State of Louisiana in a challenge to that state's ban on campaign contributions by persons "substantially interested in the gaming industry" and their spouses.¹³

The Louisiana Supreme Court invalidated the statute, as it applied to video poker, on First Amendment grounds in 1999. But three years later, the court held that the ban, as it applied to "those interested in the casino industry," did not violate the First Amendment because the casino groups could make independent expenditures and because the ban was simply a campaign limit of \$0. The petitioners argue that Louisiana's "selective ban on campaign contributions is not a campaign limit, and that this ban is inconsistent with the First Amendment." They also note the proliferation of selective campaign contribution bans and inconsistent decisions by state courts as to whether these bans are "permissible under the First Amendment."

Endnotes

1. *Texas v. Johnson*, 491 U.S. 397 (1989).
2. *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001).
3. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).
4. 427 U.S. 50 (1976).
5. 521 U.S. 844 (1997).
6. 120 S. Ct. 1878 (2000).
7. 122 S. Ct. 1389 (2002).
8. 2 U.S.C. § 441b(a).
9. 479 U.S. 238 (1986).
10. *Id.* at 263-64.
11. 459 U.S. 197 (1982).
12. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Federation of the Blind of North California, Inc.*, 487 U.S. 781 (1988).
13. *Casino Ass'n of Louisiana, Inc. v. State of Louisiana*, No. 02-466.

NOMINATIONS SOUGHT FOR HEARNE AWARD

The ABA Commission on Mental and Physical Disability Law is seeking nominations for the Fifth Annual Paul G. Hearne Award. A \$1,000 cash award, and a commemorative plaque will be awarded to an individual or an organization that has performed exemplary service in furthering the rights, dignity, and access to justice for people with disabilities. To receive a nomination form, call Cathleen West at (202) 662-1572, send her an e-mail at westa@staff.abanet.org, or download a form from the Commission's website at www.abanet.org/disability.