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# 2003-2004 Supreme Court Term: Another Losing Season for the First Amendment

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## 2003-2004 SUPREME COURT TERM: ANOTHER LOSING SEASON FOR THE FIRST AMENDMENT

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Today I will discuss the Supreme Court's First Amendment jurisprudence for the past Term. When I spoke last year, and reported on the Term, the score was zero wins, five losses for First Amendment claimants in the Supreme Court; not a good year if you support the First Amendment.<sup>2</sup> This year there were four cases and in only one of them did the First Amendment prevail.<sup>3</sup> Two cases involved freedom of speech; two cases involved freedom of religion.<sup>4</sup>

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<sup>2</sup> See Joel Gora, *First Amendment Decisions – 2002 Term*, 20 TOURO L. REV. 251 (2004) (discussing the United States Supreme Court's First Amendment cases from the 2002-2003 term).

<sup>3</sup> *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2788 (2004) (holding that the Child Online Protection Act was overbroad and violated the First Amendment).

<sup>4</sup> See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 224 (2003) (upholding Titles I and II of the Bipartisan Campaign Reform Act of 2002 as not violating the First Amendment); *Ashcroft*, 124 S. Ct. at 2788 (holding that the Child Online Protection Act was overbroad and violated the First Amendment); *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2312 (2004) (holding that Newdow had no standing to challenge the school district's policy of reciting the Pledge of Allegiance in the classroom and therefore, never reaching the issue of whether use of the phrase "one Nation under God" violated the First Amendment's Establishment Clause); *Locke v. Davey*, 540 U.S. 712, 725

### A. Free Speech and the Internet

Let us begin with *Ashcroft v. ACLU*.<sup>5</sup> This was the free speech high point, if you will, of the term. Namely, this was the one and only case where free speech interests prevailed, albeit by a narrow five-to-four majority. This case was the third installment in the government's never-ending war against smut on the Internet.

The first installment was a case called *Reno v. ACLU*.<sup>6</sup> Janet Reno was the Attorney General during the Clinton Administration. The case involved challenges to the Communications Decency Act, which was Congress' first effort to regulate sexual material on the Internet.<sup>7</sup> The Court majority in the case struck down the key feature of the Communications Decency Act, the control of sexual material available to minors, on the grounds that it was vague and overbroad.<sup>8</sup>

Congress went back to the drawing board and crafted the Child Online Protection Act.<sup>9</sup> The Act tried to narrow the scope of regulation and tried to focus more on materials that would be harmful to minors rather than simply available to minors. It tried to define the scope of the Act in a way that was somewhat parallel to the definition of grown-up obscenity — appeals to prurient interests, lack of redeeming value, use of community standards,

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(2004) (holding that the “denial of funding for vocational religious instruction alone” does not violate the Free Exercise Clause).

<sup>5</sup> 124 S. Ct. 2783 (2004).

<sup>6</sup> 521 U.S. 844 (1997).

<sup>7</sup> *Id.* at 849.

<sup>8</sup> *Id.* at 879.

<sup>9</sup> 47 U.S.C. § 231 (2001).

and the like.<sup>10</sup>

That case, *Ashcroft v. ACLU*, went up to the Supreme Court about two years ago.<sup>11</sup> The issue was the validity of the community standards requirements because the statute said the material was prohibited if it failed these tests with regard to community standards.<sup>12</sup> That caused a big discussion within the Court about which community standard applied — national, state, local communities where the material was received, or a theoretical community standard. The Court felt that the use of a community standard, while permissible, had to be defined more specifically than it was in the statute and sent the case back for yet another turn.<sup>13</sup>

This Term, the Court dealt with the return of *Ashcroft v. ACLU*. Again the question was to what extent adult material can be restricted on the Internet in order to protect the interests of minors.<sup>14</sup> Here the Court let technology be the First Amendment guide because everyone agreed that trying to restrict Internet access to sexual material by minors was a compelling state interest. The question was whether this law, which basically made it a felony to put out material that could be made available, or was harmful to minors, was a fair and effective way to achieve that compelling objective, or were there other ways less restrictive of

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<sup>10</sup> § 231(e)(6).

<sup>11</sup> 535 U.S. 564 (2002).

<sup>12</sup> *Id.* at 566; § 231(e)(6)(A).

<sup>13</sup> *ACLU*, 535 U.S. at 586.

<sup>14</sup> *Ashcroft*, 124 S. Ct. at 2788.

First Amendment rights.<sup>15</sup>

The majority of the Court said that the availability of blocking software that parents could install on their home computer, which would block out any material that had certain words in it or certain images on it, was a less restrictive alternative to criminal punishment.<sup>16</sup> The law basically provided for criminal punishment of anybody who, for commercial purposes, knowingly posted material that was harmful to minors.<sup>17</sup> It allowed for a defense if the person could show that he or she had tried to see whether the users were minors or not, particularly by requiring credit cards and other identification online, so there would be some restriction on getting the material.<sup>18</sup> But what that meant was that the communicators of this material would have to ask everybody for a credit card or identification in order to permit them access to sexually-oriented material; and that would, of course, have a chilling effect on grown-ups who might not want to give their credit card or identification, particularly if they were using a computer at work to access *Playboy.com* or something like that. So the concern was that this defense was not really a genuine defense that would enable people to avoid the statute in a meaningful way. Accordingly, the majority focused on technology: the fact that parents could install the blocking software on their own computers would achieve the congressional goal with

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2792.

<sup>17</sup> *Id.* at 2789; § 231(e)(2).

<sup>18</sup> *Id.* at 2789.

a less restrictive impact on the First Amendment.

The Court noted that not only was use of the blocking software less restrictive on First Amendment rights, but also that it was more restrictive in terms of allowing minors access to adult material.<sup>19</sup> A clever teenager with a credit card could get the material under the statute, but now that parents can use the software, the child cannot get the material at all. So, the Court was excited in some respects about the censorship potential of this blocking software.

The Court also pointed out the statute's limitation in only restricting materials that originated within the United States whereas blocking software is global; you can restrict material that comes from anywhere.<sup>20</sup> So broad censorship operates under a different theory when it is censorship achieved by the parents. It is the private choice by the parents rather than the public dictate of the state and Congress. Therefore, the majority felt that was the better rationale for finding that Congress was pursuing a valid, compelling objective, but there were less restrictive alternatives available to do so.<sup>21</sup>

There was a concurring opinion from the liberal perspective. Justice Anthony M. Kennedy, normally a strong First

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<sup>19</sup> *Ashcroft*, 124 S. Ct. at 2792.

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

<sup>21</sup> *Id.* at 2793. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002) (holding that a ban on virtual child pornography was unconstitutionally broad); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 827 (2000) (holding that the government did not meet its burden of showing the least restrictive means were used in addressing a problem where First Amendment rights were affected).

Amendment partisan, wrote the Court's opinion. A concurring opinion written by Justice John Paul Stevens and joined by Justice Ruth Bader Ginsberg took an even more speech-friendly position. It questioned whether criminal penalties were appropriate at all and reasoned that Congress could have achieved its goal using less drastic remedial measures given that it was dealing with restrictions on speech.<sup>22</sup>

One of the most significant things about the opinion was that the majority seemed to assume that the material with sexual content was sufficiently protected by the First Amendment so that a strict scrutiny standard would apply to judge governmental efforts to restrict that material.<sup>23</sup> That was the first time the Court appeared to apply a strict standard to material dealing with sexual content. As a result of applying that strict standard, the Court put the burden of persuasion clearly on the shoulders of the government to justify not only that a compelling interest supported restricting the material, but also that proposed alternatives would not be as effective as the statute.<sup>24</sup> It is an important case for those who have a specific interest in this area, but it is also important in general as a First Amendment case recognizing broad protection for speech with sexual content.

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<sup>22</sup> *Ashcroft*, 124 S. Ct. at 2796 (Stevens, J., concurring) ("Criminal prosecutions are, in my view, an inappropriate means to regulate the universe of materials classified as 'obscene,' since 'the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct.' ") (quoting *Smith v. United States*, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting)).

<sup>23</sup> *Id.* at 2791.

<sup>24</sup> *Id.*

There was a dissenting opinion written by Justice Stephen G. Breyer.<sup>25</sup> Justice Breyer, having been a senior staff official of Congress before he became a judge and perhaps more sympathetic to the congressional work product than the other Justices, felt that the burden of the statute on free expression was modest given the importance of protecting children against access to the sexual materials online.<sup>26</sup> He stated that the requirement of having to supply identification or a credit card in order to gain access to this material was not so burdensome that it should serve as the justification for striking down the statute.<sup>27</sup> Also, he felt the congressional act was one of reasonable balance with the children and families on the one hand, and the speech and interests of people who communicated sexual materials on the other hand.<sup>28</sup> Justice Antonin Scalia also dissented on the grounds that strict scrutiny was not at all appropriate for a case dealing with commercialized pornography.<sup>29</sup> In his mind, this material was not a value protected by the First Amendment and the government had broader regulatory powers over it.<sup>30</sup>

So the Court struck down the statute as violating the First Amendment, but the question remains: what type of regulation is permissible to deal with material containing sexual content on the

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<sup>25</sup> *Id.* at 2797 (Breyer, J., dissenting).

<sup>26</sup> *Id.* at 2798 (refusing to accept the majority's "conclusion that Congress could have accomplished its statutory objective . . . in other, less restrictive ways").

<sup>27</sup> *Ashcroft*, 124 S. Ct. at 2800-01 (Breyer, J., dissenting).

<sup>28</sup> *Id.* at 2803.

<sup>29</sup> *Id.* at 2797 (Scalia, J., dissenting).

<sup>30</sup> *Id.*



Internet?<sup>31</sup> As I said, this is Congress' second strike at it. It may try a third time and maybe three strikes and you are out, and we will have to accept the fact that the easiest way to prevent minors from seeing material on the Internet is to simply turn off your computer. In any event, it was a high point for the First Amendment, especially considering that the Court found strong First Amendment protection for sexually-oriented material.

### B. Separation of Church and State

The second case I want to discuss is one of two religion cases. This case, *Locke v. Davey*,<sup>32</sup> involved a state prohibition on the use of state-supplied educational funds to pursue education leading to a career in the ministry.<sup>33</sup> Washington State, like many other states, provides scholarships and other subsidies to college students, but students studying for the ministry are excluded from that benefit.<sup>34</sup> There was a movement at the end of the Nineteenth Century to put restrictions of this kind in state constitutions to avoid excessive governmental support of religious doctrines.<sup>35</sup> Washington's restriction on using public funds for religious education was part of that tradition.

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<sup>31</sup> *Id.* at 2795 (stating “[o]n a final point, it is important to note that this opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials.”).

<sup>32</sup> 540 U.S. 712 (2004).

<sup>33</sup> *Id.* at 715.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 723.

A fellow who wanted to attend college to become a minister challenged the law.<sup>36</sup> Had he studied any other subject or leaned towards any other profession, these educational funds would have been available to him.<sup>37</sup> But by choosing to study for the ministry, those funds were denied.<sup>38</sup> He challenged the restriction on the ground that it violated his rights to free exercise of religion.<sup>39</sup>

The First Amendment protects religion in two ways. The first part of the First Amendment says, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>40</sup> These two clauses, the Establishment Clause and the Free Exercise Clause, are two sides of the coin of separation between church and state. The idea is the Establishment Clause prohibits the government from supporting religion, and the Free Exercise Clause prohibits the government from punishing or burdening religion. The question is: if something is permitted by the Establishment Clause, that is, if the government can support religion in a certain way without violating the clause, is it required to do so in order not to violate the Free Exercise Clause? That basically is what Mr. Davey argued since the Court had previously held it was permissible for states to make educational funding available for people studying to be ministers if the state decides to;

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<sup>36</sup> *Id.* at 718.

<sup>37</sup> *Locke*, 540 U.S. at 717.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 718.

<sup>40</sup> U.S. CONST. amend. I.

such funding does not violate the Establishment Clause.<sup>41</sup> He argued, therefore, one has a right under the Free Exercise Clause not to be excluded from such benefits.<sup>42</sup> Since the state could give funds to a person without violating the Establishment Clause, funds had to be given to a person studying theology or else the restriction violated the Free Exercise Clause.<sup>43</sup> Had the Court accepted that argument, it would have had a very powerful consequence. Take for example the whole school voucher movement<sup>44</sup> and any other situation where the government makes funds available to educational activities generally. Since the government could make the funds available to the religious activity without violating the Establishment Clause, would a government be required to make them available to a religious activity in order to avoid violating the Free Exercise Clause?

In a seven-to-two decision written by Chief Justice William H. Rehnquist, the Court said the answer was no.<sup>45</sup> It said there is a

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<sup>41</sup> *Locke*, 540 U.S. at 719 (stating that states may make funds available to individuals pursuing degrees in devotional theology) (citing *Witters v. Wash. Dep't Servs.*, 474 U.S. 481 (1986)).

<sup>42</sup> *Id.* (stating that it would be constitutional to give money to Promise Scholars who pursue a degree in devotional theology, but the question presented to the Court was whether Washington State was obligated to do so in accordance with its own constitution).

<sup>43</sup> *Id.* at 720-21.

<sup>44</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). This decision upheld Ohio's pilot program that allowed parents residing in the Cleveland school district to decide which school, public or private, they wanted their children to attend by providing money to parents who chose to send their children to private school. The pilot program was enacted in response to the failing education system in the Cleveland school district area. The Supreme Court held that the pilot program did not violate the Establishment Clause. *Id.* at 643-44.

<sup>45</sup> *Locke*, 540 U.S. at 725.

gap between what is permitted by the Establishment Clause and what is required by the Free Exercise Clause.<sup>46</sup> So, just because it would be allowable for a state to support studying to be a minister does not mean the state is required to support being a minister.<sup>47</sup> The exclusion of a religious calling or education for that calling from otherwise generally available public funds did not violate Mr. Davey's free exercise of religion.<sup>48</sup>

Davey also argued that the prohibition on funding education looking towards a career in religion was a product of animus towards religion.<sup>49</sup> The argument invoked a twelve-year-old Supreme Court case where state law disallowed the practice of the Santeria religion by specifically targeting it.<sup>50</sup> In that case, the Court said the law was not neutral, that it was based on animus towards a specific religion and it violated the right to free exercise of religion.<sup>51</sup> Davey claimed the same thing was true in his case.<sup>52</sup> But the Court said no, this was not a criminal law;

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 720.

<sup>50</sup> *Locke*, 540 U.S. at 720 (refusing to extend the Court's holding in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) to the facts of *Locke*).

<sup>51</sup> *Lukumi*, 508 U.S. at 542. The Court stated:

The ordinances by their own terms target [the Santeria religion]; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense.

*Id.*

<sup>52</sup> *Locke*, 540 U.S. at 720. (stating Davey's argument as a contention that "under the rule . . . enunciated in [*Lukumi*], the program is presumptively unconstitutional because it is not facially neutral with respect to religion.").

this was a law which denied a subsidy.<sup>53</sup> Although the government could grant the funds if it wanted to, the government was privileged to withhold them if it chose to and the withholding did not violate the First Amendment.<sup>54</sup> Thus, it was a seven-to-two decision rejecting the free exercise claim and finding a gap between what the Establishment Clause allows and what the Free Exercise Clause requires.

There was a dissent written by Justice Antonin Scalia and joined by Justice Clarence Thomas. Their point of view was that the restriction demonstrated hostility and animus toward religion; it came out of a century-old tradition where states put provisions like this in their state constitutions because they did not want to fund religious education, specifically targeting certain religions and their educational activities, and the Court should recognize what was going on here and treat it accordingly.<sup>55</sup> But the majority found that the government was not required by the Free Exercise Clause to include religious education of this kind within a general education-funding program.<sup>56</sup> Had the Court granted the free exercise claim and held that programs had to include religious education, it would have had a real effect on compelling, or at least

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<sup>53</sup> *Id.* (distinguishing *Locke* from *Lukumi* and stating that the Promise Scholarship Program imposed “neither criminal nor civil sanctions on any type of religious service or rite” but rather “[t]he State has merely chosen not to fund a distinct category of instruction.”).

<sup>54</sup> *Id.* at 719 (stating “there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology”).

<sup>55</sup> *Id.* at 733 (Scalia, J., dissenting) (stating “[t]his case is about discrimination against a religious minority.”).

<sup>56</sup> *Id.* at 725.

strongly urging, governments to include religion in all of those programs. Now the government has a little more room to perhaps pick and choose.

### C. “One Nation Under God”

The second religion case I want to discuss is *Elk Grove Unified School District v. Newdow*, an Establishment Clause case.<sup>57</sup> This is a case where somebody claimed that a government practice impermissibly supported and therefore, established religion.<sup>58</sup> Most everyone is familiar with the Pledge of Allegiance: “I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”<sup>59</sup> The “under God” was challenged by the father of a young ten-year-old school child.<sup>60</sup> The father was apparently very bright and argued his own case. He lost, but not on First Amendment grounds. Rather, the Court held that he lacked standing to bring suit.<sup>61</sup> It has been suggested that the Court, over the years, has used lack of standing

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<sup>57</sup> 124 S. Ct. 2301 (2004). Newdow and his daughter were atheists. He brought an action against the school district arguing that the “group recitation of the Pledge of Allegiance” in the classroom violated the First Amendment because “the Pledge contain[ed] the words ‘under God.’” *Id.* at 2305.

<sup>58</sup> *Id.* at 2305.

<sup>59</sup> 4 U.S.C. § 4 (2002).

<sup>60</sup> *Newdow*, 124 S. Ct. at 2305.

<sup>61</sup> *Id.* at 2312. The Court dismissed the case due to Newdow’s lack of standing “to sue as next friend” for his daughter. *Id.*

to avoid deciding tough cases.<sup>62</sup>

Most of the cases dealing with religious activity in the public schools have rejected the idea and found the public schools — grammar schools, intermediate schools, and high schools — are not a place for religious activity, with some exceptions.<sup>63</sup> If you look at the cases going back thirty or thirty-five years, banning school prayer and things like that, most of the decisions are against allowing religion in school.<sup>64</sup> This decision would have been a close case, I think, if the Court had to decide it on the merits. But the claim that “under God” constitutes an impermissible establishment of religion was turned aside on standing grounds.<sup>65</sup>

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<sup>62</sup> *Id.* at 2312-13 (Rehnquist, C.J., concurring) (stating that in the past the Court “judicially self-imposed limits on the exercise of federal jurisdiction”).

<sup>63</sup> Compare *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (holding that a school district violated the Establishment Clause by “permitting student-led, student-initiated prayer at football games”), and *Lee v. Weisman*, 505 U.S. 577, 586-87 (1992) (holding that a principal who “decided that an invocation and a benediction should be given” by a rabbi at a secondary public school graduation ceremony violated the Establishment Clause), and *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 279, 295 (5th Cir. 1999) (reversing the district court’s ruling and holding that the school district’s Clergy in the Schools program violated the Establishment Clause because only Clergy members were invited to participate); with *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (holding that the school district violated the Free Speech Clause of the First Amendment when the superintendent “denied the Good News Club access to the school’s limited public forum on the ground that the Club was religious in nature”).

<sup>64</sup> See *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 301 (holding that student led prayers at public school football games violated the Establishment Clause); *Lee*, 505 U.S. at 586-87 (holding that an invocation and benediction delivered by a rabbi at a public school graduation ceremony violated the Establishment Clause); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999). The court held the “Cleveland Board of Education’s practice of opening its meetings with a prayer” violated the Establishment Clause. *Id.* at 371. The court reasoned that this kind of practice “conveys the message of government endorsement of religion in the public school system.” *Id.* at 386.

<sup>65</sup> *Newdow*, 124 S. Ct. at 2312.

Chief Justice William H. Rehnquist wrote a concurrence<sup>66</sup> that was joined by Justice Sandra Day O'Connor and joined in part by Justice Clarence Thomas; Justice O'Connor also wrote a separate concurrence as did Justice Thomas. Two of them took the position that "under God" in the Pledge of Allegiance was part of a patriotic ceremony, not a religious activity; it was not governmental endorsement of religion, it was not governmental preference of any one religion.<sup>67</sup> It was an acknowledgment of the fact that the framers of the Constitution, the fathers and mothers of the country, were religious people and it is no different from having "In God We Trust" on the dollar bills in your wallet.<sup>68</sup> It is an amenity, a ceremony. A third Justice, Justice Thomas, wanted to revisit the entire jurisprudence of freedom of religion under the Fourteenth Amendment.<sup>69</sup> It is his view that the First Amendment, which has been incorporated in the Fourteenth Amendment, says Congress shall not establish religion.<sup>70</sup> It does not say the local school board cannot. So there is a little bit of a disconnection, he feels, between the restrictions on Congress enacting something and the restrictions on the local school board enacting something where religion is involved.<sup>71</sup> Of course, "under God" was enacted by Congress.<sup>72</sup> So there are three Justices who think "under God" is

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<sup>66</sup> *Id.* at 2312 (Rehnquist, C.J., concurring).

<sup>67</sup> *Id.* at 2319-20; *Id.* at 2323 (O'Connor, J., concurring).

<sup>68</sup> *Id.* at 2318 (Rehnquist, C.J., concurring).

<sup>69</sup> *Id.* at 2331 (Thomas, J., concurring).

<sup>70</sup> *Newdow*, 124 S. Ct. at 2331 (Thomas, J., concurring).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2306 (citing 4 U.S.C. § 4).



not a violation of the Establishment Clause.

Justice Scalia, who probably would agree with that, recused himself from this case because at some legal conference before the case was heard, he expressed the opinion that, of course, “under God” is okay, but then had the good sense not to participate in the case and decide that issue.<sup>73</sup> So there are four Justices who seem to be kindly disposed towards keeping “God” in the Pledge. The matter might be academic except, of course, for the Ten Commandments.

There was a Supreme Court decision in 1980, *Stone v. Graham*, where, in a two-page per curiam opinion, the Court summarily ruled that the posting of the Ten Commandments in a public school lobby violated the Establishment Clause.<sup>74</sup> It said that it is too much of an introduction of religion into government and into schools,<sup>75</sup> and that precedent stood for a while.

As some of you may have noted, earlier this week the Supreme Court granted review to two Ten Commandment cases. The cases involved a public display of the Ten Commandments, which is a hot issue all over the country; and there were two conflicting federal circuit court decisions. One decision said that

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<sup>73</sup> See Linda Greenhouse, *Atheist Presents Case for Taking God From Pledge*, N.Y. TIMES, Mar. 24, 2004, at A1.

<sup>74</sup> 449 U.S. 39 (1980). This case involved a Kentucky statute that required the posting of a copy of the Ten Commandments on the wall of each public school classroom. Even though the copies were purchased with private funds, the Supreme Court held that the statute violated the first prong of the *Lemon* test because the posting of the Commandments served no secular purpose. *Id.* at 42.

<sup>75</sup> *Id.* at 42.

the practice was acceptable;<sup>76</sup> the other said that the practice was improper governmental support of religion.<sup>77</sup> Sometime between now and next Touro conference, the Supreme Court will presumably have to decide whether the Ten Commandments, which is arguably secular and a part of history, can appear in governmental public places without violating the Establishment Clause or whether the Ten Commandments are so sectarian and focused on certain Judeo-Christian religious traditions that having them in a public place sponsored by the government violates the Establishment Clause.

#### **D. Campaign Finance and the First Amendment**

The last case I want to discuss is the campaign finance case. If you read the party caption of *McConnell v. Federal Election Commission*<sup>78</sup> closely, you will see that the American Civil Liberties Union was one of the nonprofit, nonpartisan organizations that was challenging the campaign finance law as plaintiffs. And in the interest of full disclosure, I should state that I was one of the ACLU's lawyers in the case.

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<sup>76</sup> *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted*, 125 S. Ct. 346 (2005). The circuit court found that Texas' display of the Ten Commandments, located between the Texas Supreme Court and Capitol Buildings, did not violate the First Amendment. The court was not persuaded that a reasonable viewer, touring the capital, would believe the government was endorsing religion. *Id.* at 182.

<sup>77</sup> *ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S. Ct. 310 (2005). The circuit court held that framed copies of the Ten Commandments in Kentucky's county courthouses and in certain Kentucky schools violated the Establishment Clause because a reasonable observer could find that Kentucky was endorsing religion. *Id.* at 460.

<sup>78</sup> 540 U.S. 93 (2003).

This, of course, was a decision dealing with the well-known McCain-Feingold campaign finance law, which had been debated in Congress for several years in the late Nineties until it was enacted in 2002 and signed by President Bush.<sup>79</sup> Almost two years later, the Supreme Court, in a five-to-four decision, upheld almost all the key features of the McCain-Feingold campaign finance law.<sup>80</sup> Justices Sandra Day O'Connor and John Paul Stevens co-authored the opinion for the Court.<sup>81</sup> Justice Stevens, of all the Justices, is the one that gives the least scrutiny under the First Amendment to campaign finance regulations.<sup>82</sup> In fact, Justice Stevens said spending money on politics is just like buying a business; it is economic activity, not political activity.<sup>83</sup> He said from his point of view, the government can regulate campaign funding the same way it regulates property, pretty much at will.<sup>84</sup> So you have a co-authored opinion, and one of the Justices is the Court's leading opponent of First Amendment rights

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<sup>79</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

<sup>80</sup> *McConnell*, 540 U.S. at 114.

<sup>81</sup> *Id.* Justice Stevens and Justice O'Connor delivered the opinion with respect to Title I and II of BCRA, an act that contains a series of amendments to the Federal Election Campaign Act of 1971. Chief Justice Rehnquist discussed Titles III and IV of BCRA. Justice Breyer delivered the opinion for Title VI. Justices Souter, Ginsburg, and Breyer joined the opinion in its entirety. *Id.*

<sup>82</sup> *Id.* at 135 (explaining that the treatment of contributions, though burdening freedom of speech, was justified by the importance of preventing actual corruption or even the perception of corruption that occurs in federal elections).

<sup>83</sup> *Id.* at 147 (stating "[f]or their part, lobbyists, CEO's, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials.").

<sup>84</sup> *Id.* at 137 (holding that Congress should be given deference in responding to concerns about the integrity of the political process).

in this area. Meanwhile, as you may recall, in some of the significant five-to-four decisions in the last few years, such as affirmative action and campaign finance, Justice O'Connor gave direction to the Supreme Court.<sup>85</sup> The position she takes is the position the Court takes on so many of these controversial rulings.

So in this five-to-four ruling, the position she took was in broad favor of the statute. She had signed on to a couple of opinions previously that indicated skepticism about the government regulating campaign funding, particularly regulations on funding for independent groups, which was one of the main features of the McCain-Feingold bill.<sup>86</sup> Nonetheless, she seemed to have abandoned those misgivings or had a change of heart or change of mind; perhaps she thought that since the political process had produced the bipartisan bill and the Republican president had signed it, maybe the Court owed the political system an extra measure of deference. However it came out, Justice Scalia said he was standing up for the First Amendment.<sup>87</sup>

The Court essentially said where Congress is regulating the funding of campaign speech, we have to give broad deference to congressional regulations because Congress knows best about

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<sup>85</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that using race as a factor in student admissions by the University of Michigan was constitutional); *McCConnell*, 540 U.S. at 93.

<sup>86</sup> See, e.g., *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604 (1996) (holding that the First Amendment prohibits the government from disallowing certain types of expenditures when the expenditures are not coordinated with any candidate).

<sup>87</sup> *McCConnell*, 540 U.S. at 248 (Scalia, J., concurring and dissenting) (stating that “[t]his is a sad day for the freedom of speech.”).

regulating elections.<sup>88</sup> There is that old adage that war is too important to be left to the generals. Well, maybe politics is too important to be left to the politicians. And yet, what the Court said was that when the politicians decide how to regulate the process by which they get re-elected, we have to give them a great deal of deference.<sup>89</sup> Well, I think normal conflict of interest rules would argue against giving them that deference.

In terms of what the Court said and did, there were two key features of the law, and I would like to discuss those briefly. One feature dealt with so-called “soft money” raising and spending by political parties. Soft money was money that was not, until now, regulated by federal campaign financing laws.<sup>90</sup> That was money that was used to support activities that did not relate directly to electing a federal candidate.<sup>91</sup> Parties would use the money for get-out-the-vote drives, voter registration, party recruitment or issue advocacy discussion, and for a wide range of things to help the party that would not directly help the candidate.<sup>92</sup> Because the funding was not focused on federal elections directly, the law prior to this Supreme Court decision was that parties could raise that

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<sup>88</sup> *Id.* at 154 (stating that there was substantial evidence to support the congressional need to regulate contributions made by individuals and companies).

<sup>89</sup> *Id.* at 137 (explaining that measures taken to protect the legitimacy of the electoral process should not be presumed unconstitutional).

<sup>90</sup> *Id.* at 123. “As a result, prior to the enactment of BCRA, federal law permitted corporations and unions, as well as individuals ... to contribute ... ‘soft-money’ — to political parties for activities intended to influence state or local elections.” *Id.*

<sup>91</sup> *Id.* at 122-23.

<sup>92</sup> *McConnell*, 540 U.S. at 123.

money from sources and in amounts that would be restricted if it were going directly to help federal candidates.<sup>93</sup> So that was called soft money. Hard money was regulated money; soft money was unregulated money that can be used for things not directly related to federal campaigns. The McCain-Feingold bill essentially outlawed soft money from federal politics.<sup>94</sup> What that means is no political party can raise any money except regulated money, hard money. No state or local political party can spend any money that has any impact on a federal election except hard, federally regulated money.<sup>95</sup>

Those restrictions were attacked both on free speech grounds and freedom of association grounds.<sup>96</sup> The rights of supporters to associate by supporting their parties financially, the right of parties to use those funds to get their message out, all of this was claimed as First Amendment activity.<sup>97</sup> It was also a restriction on state and local parties, who were also challenging the federal limitations.<sup>98</sup> This Court, for a while, was throwing out federal laws that seemed to step on the toes of state and local

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 161-62; 2 U.S.C. § 441i (a)(1) (2004), which states in part:

In general. A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

<sup>95</sup> *McCormell*, 540 U.S. at 162.

<sup>96</sup> *Id.* at 138.

<sup>97</sup> *Id.* at 158-59.

<sup>98</sup> *Id.* at 161.

interests safeguarded by the Tenth Amendment. Yet, the federalists disappeared in this case. The Court gave trifling responses to the argument that efforts to regulate local political parties by Congress violated federalism. The Court said well, if it has anything to do with federal elections, it is federal and Congress can regulate it.<sup>99</sup> As to the justification for the regulations, the Court said there are special perquisites for large contributors to a party.<sup>100</sup> But that is not corruption or even the appearance of corruption, but the appearance of undue access or interest. The Court says Congress is allowed to take that into account and to be concerned about that when it writes those laws.<sup>101</sup> In other words, the Court said Congress has to have some room to maneuver in this area.

Normally, the First Amendment speaker has to have room to maneuver, but here the Court says Congress has to have that right. It has to be allowed to enact prophylactic legislation so it can target problems, but target them in ways to avoid or circumvent the situation.<sup>102</sup> Well, that too seemed to be a strained, impermissible justification in a First Amendment case. The First Amendment requires the government to show compelling interests and that no less restrictive alternatives are available to achieve

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<sup>99</sup> *Id.* at 187. "Congress has a fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption of federal electoral processes through the means it has chosen." *Id.*

<sup>100</sup> *McConnell*, 540 U.S. at 188 (stating "party affiliation is the primary way by which voters . . . have special access to and relationships with federal officeholders.").

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

<sup>102</sup> *Id.* at 170-71.

those interests.<sup>103</sup> None of that was required by the Court of Congress in this case to sustain the soft money restrictions on political party raising and spending. Now, it almost seems a bit like the Court flipped the burden of proof. In a First Amendment case, the burden of proof is on the government to justify the law; and in this case, it felt like the burden of proof was on the challengers to undermine the law, which is normally the case with economic regulations but not normally the case with First Amendment regulations.<sup>104</sup> The soft money restrictions were upheld top to bottom under the rationale just suggested.<sup>105</sup>

The other feature of the case was the part that did not regulate political parties; it regulated independent groups like the ACLU, the National Rifle Association, and the Sierra Club, as well as corporations, and even individuals.<sup>106</sup> Any group that put out any message on the radio or television or cable within sixty days of the general election, or within thirty days of the primary election was subject to new restrictions on what were called “electioneering communications,” also known as free speech.<sup>107</sup>

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<sup>103</sup> See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (citing *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997)).

<sup>104</sup> *McConnell*, 540 U.S. at 137. The Court stated “when reviewing Congress’ decision to enact contribution limits, ‘there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words strict scrutiny.’ ” *Id.* (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000)). Thus, the Court held that § 323 of the Bipartisan Campaign Reform Act of 2002 required a “less rigorous standard of review” than strict scrutiny. *Id.* at 141.

<sup>105</sup> *Id.* at 224 (upholding “BCRA’s two principal, complementary features: the control of soft money and the regulation of electioneering communications.”).

<sup>106</sup> *Id.* at 187, 189 (stating that BCRA § 203 “restricts corporations’ and labor unions’ funding of electioneering communications.”).

<sup>107</sup> *Id.* at 189.



What are electioneering communications?<sup>108</sup> They are any broadcast advertisements that refer to any person running for any federal office. If you put out that advertisement, you are subject to this new law regulating so-called electioneering communications. If you are a corporation, it is a federal felony to put that advertisement on television, whether you are a for-profit corporation, stock corporation, or even an ACLU nonprofit membership corporation. Virtually every significant cause or organization in America is a corporation, a nonprofit corporation. This law drew no distinction between General Motors, a multibillion-dollar conglomerate, and the ACLU or the AFL-CIO and prohibiting their right to speak; they were barred from using their own members' money to put out a message to President Bush whether they were for or against certain issues.<sup>109</sup> The ACLU was barred from putting out a message that the Patriot Act should not be renewed if the message mentioned the President or for example, New York Senators Shumer or Clinton if they were up for re-election. So, if someone puts out an advertisement urging Senator Clinton to vote against the Patriot Act renewal, or an advertisement on television criticizing President Bush or urging Senator Shumer to vote against the Act's renewal, the head of the ACLU goes to

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<sup>108</sup> 2 U.S.C. § 434(f)(3)(A)(i)(I) (2004) states in pertinent part: "The term 'electioneering communication' means any broadcast, cable, or satellite communication which . . . refers to a clearly identified candidate for Federal office . . .".

<sup>109</sup> *McConnell*, 540 U.S. at 190 (stating that § 203 of the BCRA "restricts corporations' and labor unions' funding of electioneering communications."). See 2 U.S.C. § 441(b) (2000) (stating in pertinent part: "It is unlawful for any . .

jail for authorizing a broadcast advertisement by a corporation that mentions the President of the United States during an election season. In any event, the Court said this was not really a freedom of speech case in terms of the message; this is a regulation of the source of the message.<sup>110</sup> Since the source of the message is mostly corporations and labor unions, Congress can regulate them extensively even where free speech and legislation are concerned and that was the justification.<sup>111</sup>

Congress was concerned that there were all these advertisements on television;<sup>112</sup> most of them criticized members of

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. corporation . . . to make a contribution or expenditure in connection with any election to any political office . . .”).

<sup>110</sup> *Id.* at 204. The Court held that “under BCRA, corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs [political action committees], for that purpose. Because corporations can still fund electioneering communications with PAC money, it is ‘simply wrong’ to view the provision as a ‘complete ban’ on expression rather than a regulation.” *Id.* (citing *Fed. Election Comm’n, v. Beaumont*, 539 U.S. 146, 162 (2003)).

<sup>111</sup> *Id.* at 203. “Congress’ power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law.” *Id.* The Court has “repeatedly sustained legislation aimed at ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.’ ” *Id.* at 205 (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

<sup>112</sup> *Id.* at 207. The Court held that § 316(b)(2) of the Federal Election Campaign Act is not underinclusive just because this provision “does not apply to advertising in the print media or on the Internet.” *Id.* The Court also explained that:

records developed in this litigation and by the Senate Committee adequately explain the reasons for this legislative choice. Congress found that corporations and unions used soft money to finance a virtual torrent of televised election-related advertisements during the periods immediately preceding federal elections, and that remedial legislation was needed to stanch that flow of money.

Congress and it has been suggested that was one of the reasons the statute went sailing through. The Court said corporations, labor unions, and even the nonprofits like the ACLU, which can be regulated too, run most of these advertisements.<sup>113</sup> The Court said, given that no one is kept from speaking, because although you cannot speak, you can form some other organization that can speak, the right can therefore be exercised in some other way.<sup>114</sup> For those reasons, the Court sustained not only the soft money regulation for political parties but also the so-called issue advocacy regulations against independent groups and corporations, nonprofit organizations and labor unions, and even individuals.<sup>115</sup> This is not just about corporations and labor unions. The law also said anyone who spends more than \$10,000 in a year putting out a radio advertisement that mentions, for example, Senator Shumer, is regulated by the federal government as well.<sup>116</sup> And although you are not prohibited from getting together with some of your friends and putting out an advertisement praising or criticizing some member of Congress, you have to follow the government's rules; you have to disclose where you got that money from; you have to

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*Id.*

<sup>113</sup> *Id.* at 203.

<sup>114</sup> *McConnell*, 540 U.S. at 188. "Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation." *Id.* Furthermore, the Court opined "the ability to form and administer separate segregated funds authorized by FECA § 316 . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy." *Id.* at 203.

<sup>115</sup> *Id.* at 224.

<sup>116</sup> *Id.* at 194-95.

provide all the details.<sup>117</sup>

So it was not just a defeat for organized speech; it was also a defeat for individual speech as well. The Court not only approved these new, long-debated campaign finance restrictions on parties and on independent groups, but did so in a way unfriendly to the First Amendment, which gives me concern for the future of this and other First Amendment areas. So I will conclude by once again reprising what Justice Scalia said because it was, to my mind, a sad day for the First Amendment.<sup>118</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 248 (Scalia, J., dissenting).

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