KEY CASES

(“– ” denotes a significant limit on government authority, “+” indicates otherwise.)

ESTABLISHMENT: RELIGIOUS REVOLUTION? (PART I)

+ Zelman v. Simmons-Harris, 536 U.S. 639, 122 S.Ct. 2460 (2002) (upholding a tuition voucher program primarily for low-income children in Cleveland in light of its formal neutrality toward religion and other educational options, even though much of the voucher funds were likely to end up in parochial schools and without restriction to secular use)

+ Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997 (1997) (upholding provision of supplemental, secular, remedial instruction to low-income-area children in both public and private schools, even though some such instruction would take place on parochial-school property)

> See also + Mitchell v. Helms, 530 U.S. 793, 120 S.Ct. 2530 (2000) (parochial schools were permissibly included in a federal-state program that loans educational materials and equipment to public and private schools for secular instruction, but fracturing over the proper test for such direct-aid programs)
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> +/– Bowen v. Kendrick, 487 U.S. 589, 108 S.Ct. 2562 (1988) (rejecting a facial challenge to a federal statute that authorized grants to both secular and religiously affiliated institutions providing counseling on teenage sexual relations and pregnancy, even without an express statutory restriction to secular uses; but remanding for an as applied attack to determine whether grants were in fact being used for religious purposes or funding pervasively sectarian institutions)

–/+ Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 115 S.Ct. 2510 (1995) (under the speech clause, university engaged in improper viewpoint-based exclusion of a religious group from student-activities-fund payments, and feared establishment clause violation was unfounded and so could not justify the exclusion)

> See also + Good News Club v. Milford Central Sch., 533 U.S. 98, 121 S.Ct. 2093 (2001) (under the speech clause a privately run religious children’s club could not be excluded from meeting in a public school facility’s limited public forum after school hours, even though the school contended that access would violate the establishment clause because the group engages in prayer and religious instruction)

– Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649 (1992) (public secondary school officials could not invite clergy to conduct “nonsectarian” prayers at official graduation ceremonies)

> See also – Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 120 S.Ct. 2266 (2000) (public school’s policy invalidly permitted student-led prayer at school football games, as approved by the student body in elections determining whether to have invocations and who would deliver them)
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> – Edwards v. Aguillard, 482 U.S. 578, 107 S.Ct. 2573 (1987) (facially invalidating a Louisiana statute which prohibited teaching either evolution or creation science in public

schools without instruction in the other, because the statute lacked a clear secular purpose and had the primary purpose of advancing or endorsing a particular religious belief)

–/+ County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 109 S.Ct. 3086 (1989) ((a) permitting a private religious group to display a creche on the grand staircase inside a county courthouse during the Christmas season unconstitutionally endorsed religion; but (b) erecting an 18-foot privately owned menorah outside the entrance to the city-county building and next to the city's 45-foot Christmas tree and a sign stating "Salute to Liberty" did not)

FREE EXERCISE: RELIGIOUS REVOLUTION? (PART II)

+ Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S.Ct. 1595 (1990) (those using peyote for sacramental purposes were not entitled to an exemption from a generally applicable criminal law punishing possession of certain drugs)

Compare – Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 109 S.Ct. 1514 (1989) (state could not deny unemployment compensation to an individual who refused to take a job that required Sunday work in violation of his sincere and non-bizarre Christian religious belief, even if he was not a member of an organized denomination and his belief was "personal" and not based on the tenets of an established recognized sect)

–/+ City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157 (1997) (Congress exceeded its power to enforce the free exercise clause when it attempted to revive a compelling-interest test, and impose a least-restrictive-means test, for all substantial burdens on religious exercise imposed by state or local government action)

– Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S.Ct. 2217 (1993) (city violated the free exercise clause by effectively singling out religiously motivated animal sacrifice for prohibition)

DISASSOCIATION: BOWLING ALONE

– Boy Scouts of Am. v. Dale, 530 U.S. 640, 120 S.Ct. 2446 (2000) (Boy Scouts could not be ordered under a state's public-accommodations anti-discrimination law to reinstate a former scoutmaster who was expelled after the organization learned that he was openly gay)

Compare + City of Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1591 (1989) (First Amendment associational rights do not cover recreational dancing among dance-hall patrons, and so rationality review applied to a city ordinance restricting admission to persons aged 14 to 18)

+ Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940 (1987) (Rotary International was subject to injunctive and declaratory relief under a state civil rights statute for revoking the charter and terminating the membership of a local Rotary Club that had admitted women as members)

+/– Board of Regents v. Southworth, 529 U.S. 217, 120 S.Ct. 1346 (2000) (state

university could demand a student activity fee to fund a viewpoint-neutral set of extracurricular activities, even if some funded expressive activities are ideologically objectionable to some students; but remanding for consideration of viewpoint neutrality in the school's process for funding or defunding groups by referendum)

SPEECH

Free Speech Fundamentals: burning things and the unsteady presumption against content-based regulation

– Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533 (1989) (burning an American flag at the culmination of a demonstration during the Republican National Convention (a) was expressive conduct covered by the First Amendment and (b) could not be punished under a Texas statute prohibiting anyone from "intentionally or knowingly desecrat[ing, i.e., deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action,] . . . a . . . national flag": the state interest in preventing breach of peace was not implicated on the record of this case, and the interest in preserving the flag as a symbol of nationhood and national unity was content-based and, under the statute applied here, would impermissibly protect the use of a symbol "only in one direction")

See also – United States v. Eichman, 496 U.S. 310, 110 S.Ct. 2404 (1990) (burning an American flag as a means of political protest could not be punished under the federal Flag Protection Act of 1989, which authorized criminal penalties for whoever "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States," but exempted "the disposal of a flag when it has become worn or soiled": the government's interest was still content-based, even if the text of the statute was less obviously restricted in that way)

– Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876 (1988) (as a public figure, Jerry Falwell could not recover damages for intentional infliction of emotional distress stemming from a magazine's ad parody without also demonstrating a false statement of fact made with actual malice under *New York Times v. Sullivan*, a finding incompatible with the jury's libel verdict in this case)

– Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389 (2002) (in light of the judicially defined categories of obscenity and child pornography, the Child Pornography Prevention Act was overbroad in prohibiting any visual depiction that "appears to be" a minor engaging in sexually explicit conduct, and any sexually explicitly image that is, inter alia, promoted "in such a manner that conveys the impression" that it depicts such conduct)

– R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S.Ct. 2538 (1992) (facially invalidating a St. Paul ordinance that criminalized "plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender": even if the ordinance covered only "fighting words," it selected an unjustifiable subset of that category based on disfavored subject matter and, in practical operation, viewpoint)

Compare + Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194 (1993) (state could constitutionally enhance a criminal sentence for battery where the defendant selected the victim based on race)

+/– Virginia v. Black, 538 U.S. __, 123 S.Ct. 1536 (2003) ((a) permitting Virginia to impose criminal penalties on those who burn crosses with an intent to intimidate, and (b) remanding for further consideration the convictions of two teenagers who burned a cross on a neighbor's lawn; but (c) affirming the reversal of a Klan leader's conviction where prima facie evidence of intent was established merely by the cross burning itself)

See also + Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. __, 123 S.Ct. __ (2003) (fraud complaint against for-profit charitable solicitors was improperly dismissed on First Amendment grounds, where state law required that the government prove by clear and convincing evidence that defendants knowingly made a false representation of material fact with intent to mislead and succeeded in doing so, and where the government alleged not only a failure to disclose that defendants would retain 85% of gross receipts but also affirmative misleading representations about how donations would be used)

Cf. – Bartnicki v. Vopper, 532 U.S. 514, 121 S.Ct. 1753 (2001) (media and an individual could not be held civilly liable under *content-neutral* wiretap laws for disseminating recorded cell phone calls between union officials, where the defendants did not participate in the unlawful interception of the calls, the information disseminated was truthful, and it related to a matter of public concern)

– Republican Party of Minn. v. White, 536 U.S. 765, 122 S.Ct. 2528 (2002) (invalidating Minnesota's prohibition on judicial candidates announcing their views on legal or political issues likely to come before them as judges)

The First Amendment on Sale(s): commercial speech comes of age

– 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495 (1996) (striking down Rhode Island's ban on liquor-price advertising, but fracturing over the proper standard of review)

– Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 119 S.Ct. 1923 (1999) (partial ban on truthful broadcast advertising for private casino gambling failed the third and fourth prongs of the *Central Hudson* test, considering the government's asserted interests in reducing social costs associated with casino gambling and assisting states that restrict casino gambling, as applied to broadcasts in a state where such gambling is legal)

–/+ Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121 S.Ct. 2404 (2001) (striking down state regulations banning outdoor ads for cigars and smokeless tobacco and certain indoor point-of-sale ads within 1,000 feet of a school or playground, though upholoding certain point-of-sale restrictions)

Compare + Florida Bar v. Went for It, Inc., 515 U.S. 618, 115 S.Ct. 2371 (1995) (upholding Florida bar rule prohibiting attorneys from soliciting, by targeted mailings, personal injury clients within 30 days of their injury)

More on Intrusive Expression: abortion protests and (presumptively) unwilling audiences

+ Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495 (1988) (rejecting a facial challenge to a city ordinance prohibiting targeted residential picketing as a reasonable, content-neutral regulation of speech in a public forum that left open ample alternative channels of communication—like walking up and down the block)

Compare – Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 122 S.Ct. 2080 (2002) (invalidating a content-neutral ordinance criminalizing door-to-door canvassing on private residential property without registration and a permit, at least with respect to religious proselytizing, anonymous political speech, and handbilling)

+ Hill v. Colorado, 530 U.S. 703, 120 S.Ct. 2480 (2000) (upholding a state statute criminalizing the knowing approach within 8 feet of another person without consent when near a health-facility entrance and in order to pass "a leaflet or handbill to, displa[y] a sign to, or engag[e] in oral protest, education, or counseling with such other person")

See also +/– Schenck v. Pro-Choice Network of Western N.Y., 519 U.S. 357, 117 S.Ct. 855 (1997) ((a) upholding a "fixed buffer zone" injunction that prohibited demonstrations within 15 feet of clinic doors, driveways, and so on, but (b) invalidating a "floating buffer zone" that prohibited demonstrations within 15 feet of people or vehicles entering or leaving the clinics, which permitted sidewalk counselors to approach clinic patrons and employees to initiate "non-threatening" conversation, but required them to retreat if asked to stop)

+/– Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 114 S.Ct. 2516 (1994) ((a) upholding an injunction against abortion protestors that created a 36-foot buffer zone around clinic entrance and driveway, and (b) noise restrictions, but invalidating other restrictions including (c) a 300-foot no-approach zone, (d) a ban on images observable from within the clinic, and (e) a 300-foot buffer zone around residences of clinic staff)

New Media: the speech clause enters cyberspace and cable television

– Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329 (1997) (finding no basis in precedent for reduced judicial scrutiny of internet regulation, and facially invalidating sections of the Communications Decency Act that criminalized certain (a) transmissions to children under age 18 of "indecent" messages; and either (b) communications sent to a specific person or persons under 18, or (c) displays available to children under 18, that depict or describe sexual or excretory activities or organs in patently offensive terms as measured by contemporary community standards—despite defenses for access restrictions)

+ Ashcroft v. ACLU, 535 U.S. 564, 122 S.Ct. 1700 (2002) (Child Online Protection Act is not unconstitutionally overbroad just because it uses "community standards" to help identify commercial web content that is "harmful to minors," but remanding for consideration of other objections)

+ Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 114 S.Ct. 2445 (1994) ("Turner I") (subjecting to only intermediate scrutiny "must carry" provisions imposed on cable

operators that protect local broadcast television stations, and finding sufficiently important government interests at stake, but denying summary judgment and remanding); Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 117 S.Ct. 1174 (1997) ("Turner II") (after remand, upholding the "must carry" provisions)

+/– Denver Area Educational Telecoms. Consortium, Inc. v. FCC, 518 U.S. 727, 116 S.Ct. 2374 (1996) ((a) upholding a federal statute authorizing cable system operators to prohibit programming they reasonably believe contains certain descriptions or depictions of sexual or excretory activities or organs, but invalidating provisions (b) mandating segregated channels and blocking for such programming on leased-access channels, where otherwise permitted by the operator, absent viewer request, and (c) authorizing operators to prohibit, inter alia, such programming on public-access channels)

– United States v. Playboy Entertainment Group, 529 U.S. 803, 120 S.Ct. 1878 (2000) (striking down a federal statute and regulation that required cable television operators delivering sexually explicit channels to either fully scramble them or limit transmission to hours between 10 p.m. and 6 a.m.)

Subsidies: government grants with strings attached

+ Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759 (1991) (federal agency could condition public funding for family planning projects on their refraining from counseling, referral, advocacy, etc., regarding abortion as a method of family planning, where grantees were free to engage in such activities outside the subsidized project, although grantees were required to help finance such projects with non-government funds (note: Justice O'Connor dissented on statutory grounds and constitutional doubt))

– Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 115 S.Ct. 2510 (1995) (university engaged in improper viewpoint-based exclusion of a religious group from student-activities-fund payments)

+ National Endowment for the Arts v. Finley, 524 U.S. 569, 118 S.Ct. 2168 (1998) (upholding against a facial challenge a statutory requirement that the National Endowment for the Arts "consider[] general standards of decency and respect for the diverse beliefs and values of the American public" in assessing grant applications)

– Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 121 S.Ct. 1043 (2001) (federal government could not condition Legal Services Corporation funding on the recipient's agreement not to challenge or seek changes in existing welfare laws)

Miscellany: revealing skin and concealing identities

– McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 115 S.Ct. 1511 (1995) (accepting a leafleteer's challenge to a state prohibition on distributing anonymous (i.e., unsigned) campaign literature)

+ Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456 (1991) (upholding Indiana's generally applicable public indecency statute insofar as it required nude dancers in adult entertainment venues to wear pasties and G-strings (note: the plurality applied the *O'Brien* test, Justice Souter applied the secondary effects theory from Renton, and Justice Scalia accepted a government interest in morality and rejected any scrutiny for such general conduct regulations))

> See also + City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382 (2000) (likewise upholding a city-wide ban on public nudity that was challenged by a nude-dancing establishment, but again fracturing over the rationale: a majority concluded that *O'Brien* was the appropriate test but only four Justices thought that the city survived it, thereby making Justice Scalia's concurrence necessary to reaching a majority on the judgment)

Coming Attractions

(Cases pending before the Supreme Court as of May 16, 2003. Questions presented are taken from cert petitions or jurisdictional statements, unless bracketed.)

Virginia v. Hicks, No. 02-371

Certiorari granted January 24, 2003; oral argument April 30, 2003.

Case below: Commonwealth v. Hicks, 264 Va. 48, 563 S.E.2d 674 (2002).

Questions Presented: [(1) Whether a criminal defendant may invoke the overbreadth doctrine even though (a) his own offense did not involve any expressive conduct, and (b) his conduct was not proscribed by that portion of the government statute, regulation or policy he challenges as overbroad. (2) Whether the Constitution recognizes a distinction between actions taken by government as landlord and actions taken by government as sovereign.]

Nike, Inc. v. Kasky, No. 02-575

Certiorari granted January 10, 2003; oral argument April 23, 2003.

Case below: Kasky v. Nike, Inc., 27 Cal. 4th 939, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002), modified (Cal. May 22, 2002).

Questions Presented: (1) When a corporation participates in a public debate – writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance – may it be subjected to liability for factual inaccuracies on the theory that its statements are "commercial speech" because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions? (2) Even assuming the California Supreme Court properly characterized such statements as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

Overton v. Bazzetta, No. 02-94

Certiorari granted December 2, 2002; oral argument March 26, 2003.

Case below: Bazzetta v. McGinnis, 286 F.3d 311 (6th Cir. 2002).

Questions Presented: (1) Whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments. (2) Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections are reasonably related to legitimate penological interests. (3) Whether the restrictions on

non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment.

FEC v. Beaumont, No. 02-403

Certiorari granted November 18, 2002; oral argument March 25, 2003.

Case below: Beaumont v. FEC, 278 F.3d 261 (4th Cir. 2002).

Question Presented: The Federal Election Campaign Act of 1971, 2 U.S.C. 441b, prohibits corporations and labor unions from making direct campaign contributions and independent expenditures in connection with federal elections. The question presented is whether Section 441b's prohibition on contributions violates the First Amendment to the Constitution if it is applied to a nonprofit corporation whose primary purpose is to engage in political advocacy.

United States v. American Library Ass'n, Inc., No. 02-361

Probable jurisdiction noted November 12, 2002; oral argument March 5, 2003.

Case below: American Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (three-judge panel).

Question Presented: The Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A–335, provides that a library that is otherwise eligible for special federal assistance for Internet access in the form of discount rates for educational purposes under the Telecommunications Act of 1996, 47 U.S.C. 254(h) (Supp. V 1999), or grants under the Library Services and Technology Act, 20 U.S.C. 9121 et seq., may not receive that assistance unless the library has in place a policy that includes the operation of a "technology protection measure" on Internet-connected computers that protects against access by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 47 U.S.C. 254(h)(6)(B) and (C) (Supp. V 1999); 20 U.S.C. 9134(f)(1). [¶] The question presented is whether CIPA induces public libraries to violate the First Amendment, thereby exceeding Congress's power under the Spending Clause.