2001

The Calm After the Storm: First Amendment Cases in the Supreme Court's 2000-2001 Term

Joel Gora

THE CALM AFTER THE STORM: FIRST AMENDMENT CASES IN THE SUPREME COURT'S 2000-2001 TERM

Joel Gora[1]

INTRODUCTION

It is a pleasure to be here again. As compared to last term, the term that we are commenting on now was a good one for the First Amendment.[2] A year ago First Amendment claimants tended to lose their cases in the Supreme Court.[3] This past year, however, claimants prevailed six out of eight times.[4] In addition, the kinds of liberal/conservative schisms that have been seen in some of the employment cases were less prevalent in the First Amendment cases.[5] In fact, there tended to be a switching of sides. There were some cases where the First Amendment claim was accepted by the liberal justices, and rejected by the conservative justices, and others where the reverse was true. If you look at the overall pattern, there has been a sea of change in the past generation on who is in favor of the First Amendment.

---

1. Professor of Law, Brooklyn Law School; B.A., Pomona College; LL.B., Columbia University School of Law. I would like to express my appreciation to Nicole Kaplan, Brooklyn Law School Class of 2003, for her outstanding work on this article.

2 U.S. CONST. amend I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3 *See* Los Angeles Police Dept. v. United Reporting Publ'g Corp., 528 U.S. 32 (1999); Nixon v. Shrink-Missouri Gov't. PAC, 528 U.S. 377 (2000); and Hill v. Colorado, 530 U.S. 703 (2000).

4 *See* Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001); Bartnicki v. Vopper, 532 U.S. 514 (2001); U.S. v. United Foods, Inc., 531 U.S. 405 (2001); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Lorillard Tobacco Co. v. Reilly, 531 U.S. 525 (2001); and Cook v. Gralike, 531 U.S. 510 (2001).

5 *See e.g., Circuit City v. Adams*, 530 U.S. 105 (2001).

A generation ago, the First Amendment stalwarts were the liberals on the Court, epitomized by Justices Hugo L. Black and William O. Douglas. They generally tended to be very skeptical of government efforts to restrict free speech and freedom of the press.[6] Nowadays, liberals can be found on the government side of the claims, not uniformly or routinely, but enough at least to raise some eyebrows. If you look at the this past term, in the eight cases noted, the justices who ruled for the First Amendment most frequently were the conservative justices; with Justice Anthony M. Kennedy ruling that way seven out of eight times.[7] Chief Justice William H. Rehnquist, and Justices Clarence Thomas and Antonin Scalia, ruled in favor of the First Amendment five out of eight times.[8] The Justice who ruled in favor of the First Amendment claim least often was Justice Ruth Bader Ginsburg, who upheld the First Amendment claim only three out of the eight cases.[9] It is interesting to note where some of these cases fit into that change in direction. Liberal justices are often willing to accommodate the government's claim as to why speech needs to be restricted just as often as their conservative counterparts were a generation ago.

The cases that will be discussed have been grouped according to themes. The winning cases will be addressed first, followed by the two cases where the First Amendment claim was rejected. The first three cases where the First Amendment claim prevailed are *United States v. United Foods, Inc.*,[10] *Lorillard Tobacco Co. v. Reilly*[11] and *Bartnicki v. Vopper*.[12] These cases dealt with instances where the Court was concerned with

---

[6] *See* Gregory v. Chicago, 394 U.S. 111 (1969); Brandenburg v. Ohio, 395 U.S. 444 (1969).

[7] In *Lorillard Tobacco*, Justice Kennedy wrote a separate opinion concurring in part and concurring in the judgment. *Lorillard Tobacco*, 533 U.S. at 571.

[8] *See United Foods*, 533 U.S. at 405; *Good News Club*, 533 U.S. at 98; *Lorillard Tobacco*, 533 U.S. at 525 2404; *Cook*, 531 U.S. at 510; FEC v. Colo. Republican Fed. Campaign Committee, 533 U.S. 431 (2001).

[9] *See Legal Services*, 531 U.S. at 533; *Bartnicki*, 532 U.S. at 514; *Cook*, 531 U.S. at 510.

[10] 531 U.S. 533.

[11] 531 U.S. 98.

[12] 532 U.S. 514.

commercial speech or with the flow of information to the public.[13] The second three cases where the First Amendment claim also prevailed are *Legal Services Corporation v. Velazquez*,[14] the *Good News Club* case[15] and *Cook v. Gralike*.[16] The common theme in these cases is that the Court was concerned that the government was either discriminating against points of view it disagreed with, or the government was basically trying to affect the outcome of the debate, or put its thumb on the scale of the debate.[17] The final two cases are the two cases where First Amendment claimants lost. One involved prisoners in *Shaw v. Murphy*[18] and one involved politicians in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*.[19]

I. COMMERCIAL SPEECH & PRIVATE SPEECH THAT IS A MATTER OF PUBLIC CONCERN

The first case I want to discuss is *United States v. United States Foods Corporation*.[20] This is not so much a right to speak case as it is a right not to speak case. The Court has long interpreted the First Amendment protection of freedom of speech as including a cognate protection of freedom from speech.[21] In the famous old World War II case, *West Virginia Board of Education v. Barnette*, the Court struck down compulsory flag saluting on the ground that making young children salute the flag violates their conscience. The Court held that compulsory flag saluting is a form of compulsory speech, which violated the first

---

[13] *See United Foods*, 533 U.S. at 405; *Lorillard Tobacco*, 533 U.S. at 525; and *Bartnicki*, 532 U.S. at 514.

[14] *Legal Services*, 531 U.S. at 533.

[15] *Good News Club*, 533 U.S. at 98.

[16] *Cook*, 531 U.S. at 510.

[17] *See, e.g., Legal Services*, 531 U.S. at 542.

[18] 532 U.S. 223 (2001).

[19] 533 U.S. 431.

[20] *United Foods*, 533 U.S. at 405.

[21] *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977).

Amendment rights of the children involved.[22] The Court has stuck with that doctrine in a number of settings, including not only personal conscience refusals to speak, but also refusals to speak in commercial or institutional settings.[23] That is what this case involved.

United Foods is a large agricultural company, which, because of a federal statute, the Mushroom Promotion Research and Consumer Information Act,[24] was required to contribute funds to support generic advertising of mushrooms.[25] Although we have not seen many mushroom ads, we have seen the milk ads with the mustache, and the beef ads. These types of ads represent the sort of generic industry advertising often required by government standards, and the component members of the industry are expected to contribute funds to pay for this advertising. United Foods did not want to contribute money for generic mushroom ads. United Foods felt that the generic advertising detracted from its own wonderful product, which was not your average mushroom. Rather than contributing to advertisements for the industry, United Foods wanted to use their funds to support their own advertisements for mushrooms.[26] They claimed the government Act required them to subsidize speech that they disagreed with and did not want to subscribe to, and this requirement violated their First Amendment rights.[27]

The fact that the speech in issue was commercial speech led to some suggestion in the arguments that commercial enterprises should not have a right not to speak. The argument was that the government is regulating business when it regulates commercial speech, and therefore the government should have a greater opportunity to control and dictate the terms of business, including advertising.[28] Indeed, a few years earlier in a case

---

[22] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[23] *Wooley*, 430 U.S. at 714.
[24] 7 U.S.C. §§ 6101-6112 (1990).
[25] *United Foods*, 533 U.S. at 408.
[26] *Id.*
[27] *Id.* at 409.
[28] *Id.* at 2339.

called *Glickman v. Wileman Brothers*,[29] the Court upheld a seemingly similar program which required producers in the fruit tree industry to contribute funds for generic advertising.[30] In *Glickman*, the Court rejected a claim that the government improperly compelled commercial speech under the First Amendment. However, in the mushroom case the Court accepted that claim,[31] reasoning that unlike the fruit tree industry, which was highly regulated by the government and where the advertising features were part of that heavy regulation, the mushroom industry did not have the same kind of systemic regulation. As a result, this requirement was basically only about requiring members of this industry to produce funds to subsidize the message that the government thought ought to be subsidized.[32] Therefore the Court held that the requirement that speech the speaker disagrees with be subsidized was impermissible under the First Amendment.[33] It violated the right not to speak.

In reaching its conclusion, and distinguishing this case from the earlier *Glickman* case, the Court noted that, for example, in states where lawyers can be required to be members of a unified bar and have to pay dues to that bar, they can only be required to pay dues that directly support regulation of the practice, and not dues that support the bar's lobbying on public issues.[34] The Court said the same is true of members of labor unions, and the same for commercial speakers and corporations like United Foods.[35]

United Foods was a six-to-three decision in which Justice Kennedy, the Court's most vigorous First Amendment champion, wrote the opinion. The dissenters, Justice Steven G. Breyer and Justice Ginsburg, took the position that this was regulation of business, it was not regulation of speech. Indeed, this regulation

---

[29] Glickman v. Wileman Brothers, 521 U.S. 457 (1997).
[30] *Id.* at 477.
[31] *United Foods*, 533 U.S. at 417.
[32] *Id.* at 412.
[33] *Id.* at 413.
[34] *Id.* at 414.
[35] *Id.* at 427.

was regulation of the funding of speech.[36] According to the dissenters' point of view, the government had more leeway and more justification in regulating the funding of speech. This was a point of view that would prevail in the campaign finance case,[37] which will be discussed later. However, in this case the majority recognized that the right not to speak is available to commercial speakers. It is not just available to people who are compelled to utter words they may not want to. The right not to speak is also available to people in organizations that are compelled to subsidize and pay for the messages they chose not to support.[38]

This was the first victory for the First Amendment.

Another victory was won for commercial speakers in the case of *Lorillard Tobacco v. Reilly*.[39] This was a long-awaited test case about the extent to which state and local government can regulate the sale, advertising and promotion of tobacco products.[40] The case dealt with a Massachusetts statute that regulated the marketing and advertising, including billboards and point-of-sale activities, of tobacco products.[41] The tobacco industry representatives challenged the regulations on a number of grounds. The first argument that the tobacco representatives made was a preemption argument. In passing the Federal Cigarette Labeling and Advertising Act,[42] Congress essentially stated that states are barred from restricting advertising or promotion of cigarettes based on smoking and health concerns. Any regulation of advertising of tobacco products based on smoking and health concerns is limited to federal regulation.[43] In other words, states are preempted from enacting regulation where cigarettes are concerned.[44] A majority of the Court, in an opinion by Justice O'Connor, accepted that argument and said

---

[36] *Id.* at 2347 (Breyer, J., dissenting).
[37] *FEC*, 533 U.S. at 431.
[38] *United Foods*, 533 U.S. at 415.
[39] *Lorillard Tobacco*, 533 U.S. at 525.
[40] *Id.* at 532.
[41] MASS. REGS. CODE tit. 940, §§ 21.01-21.07, 22.01-22.09 (2000).
[42] 15 U.S.C.S. § 1331 et seq.
[43] *Lorillard Tobacco*, 533 U.S. at 541.
[44] *Id.* at 543.

there was clear congressional intent to preempt regulation of the advertising of cigarettes.[45]

The government argued that the restrictions were billboard placement restrictions that precluded the billboard advertisement of cigarettes within a thousand feet of a school or a playground or other similar sensitive locations.[46] Moreover, the government argued this was not really regulation of the content of the advertising; it was a regulation of the manner or location of the advertising and therefore was not preempted.[47] In rejecting this argument, the Court said there is a preemption of anything having to do with the advertising of cigarettes, whether it is the content or the method of advertising.[48] Thus, those parts of the local statute were displaced on a preemption theory and could not be enforced.[49] However, this still left other parts of the statute that regulated matters that were not preempted. Two matters were significant. The first was advertising of any kind having to do with tobacco products other than cigarettes, including cigars and smokeless tobacco. The second was the regulation of the sale of tobacco products.

The Massachusetts statute included some severe regulations regarding the sale of tobacco products.[50] This is where the Court had to address the First Amendment and where it

---

[45] *Id.* at 542. ("In the preemption provision, Congress unequivocally precluded the requirement of any additional statements on cigarette packages beyond those provided in § 1333. 15 U.S.C. § 1334(a). Congress further precludes States or localities from imposing any requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes. § 1334(b).")

[46] MASS. REGS. CODE tit. 940, § 21.04(5)(a) (2000):

> Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school.

[47] *Lorillard Tobacco*, 533 U.S. at 550.

[48] *Id.* at 551.

[49] *Id.*

[50] *See*, MASS. REGS. CODE tit. 940, §§ 21.01-21.07, 22.01-22.09 (2000). *See also*, *Lorillard Tobacco*, 533 U.S. at 562-63.

engaged in a generic First Amendment analysis. The Court had to decide how a 1,000-foot limitation on the placement of advertising for smokeless tobacco and cigars should be addressed by the Court under the First Amendment.[51] Some observers thought that this would be an occasion where the majority of the Court might show a certain restlessness toward its test or formula for judging commercial speech issues; the so-called *Central Hudson* case formula.[52] Some thought the Court might be willing to revisit *Central Hudson* and grant greater protection for commercial speech than the *Central Hudson* balancing formula gives. However, that was not the case. Rather than using this case as an occasion to revisit and revise the *Central Hudson* test, the Court applied the *Central Hudson* test.[53] The four element test is: 1) whether the lawful activities are advertised in a non-misleading way; 2) whether the government interest is substantial; 3) whether the regulation advances the government's interest; and 4) whether the regulation is no more extensive than necessary to advance that government interest.[54] In addressing first the '1,000-foot rule,' the Court said the first three elements of the test were met. The court held that the regulation directly advanced the government's interest in trying to reduce smoking, especially by children.[55] However, the Court said the fourth part

---

[51] *Lorillard Tobacco*, 533 U.S. at 562.

[52] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566; *See Lorillard Tobacco*, 533 U.S. at 555-56.

[53] *Central Hudson*, 447 U.S. at 566.

[54] *Id.*

[55] *Lorillard Tobacco*, 533 U.S. at 556.

of the test, that regulation be no more extensive than necessary to advance the government interest, was not satisfied here.[56]

According to the Court, the ban in this case was almost a total ban on outdoor advertising because if you put all of the thousand-foot zones together, the statistics showed that almost 90 percent of the area in most major cities in the state of Massachusetts would be advertising-free zones.[57] The Court believed this was not a carefully tailored approach because it amounted to almost a total ban of advertising in major metropolitan areas which was not justified by the important interest in preventing children from smoking or in discouraging adult smoking.[58] Applying a traditional application of the *Central Hudson* balancing formula for commercial speech restrictions, the majority held that the restriction was impermissible.[59]

In terms of point-of-sale advertising requirements, the Court also believed there was a careless balancing of the interests

---

[56] *Id.* at 565.

[57] *Id.* at 562. The Court went on to state:

> In the District Court, petitioners maintained that this prohibition would prevent advertising in 87% to 91% of *Boston, Worchester, and Springfield, Massachusetts. 84 F. Supp. 2d at 191.* The 87% to 91% figure appears to include not only the effect of the regulations, but also the limitations imposed by other generally applicable zoning restrictions...[t]he [Mass.] Attorney General disputed petitioners' figures but "conceded that the reach of the regulations is substantial." *218 F.3d at 50.* Thus, the Court of Appeals concluded that the regulations prohibit advertising in a substantial portion of the major metropolitan areas of Massachusetts.

[58] *Id.* The Court went on to state:

> In some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. The breadth and scope of the regulations, and the process by which the [Mass.] Attorney General adopted the regulations, do not demonstrate a careful calculation of the speech interests involved.

See also Id. at 2426 ("The uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring.")

[59] *Lorillard Tobacco*, 533 U.S. at 565.

regarding restrictions on where cigarette advertisements could be placed in the cigarette store.[60] According to the Court, once the customer is in the store, the storeowner is dealing with people who want to be there. Therefore, there is less justification to try to protect children and others in that setting.[61]

The one part of the statute that the Court upheld was the section that regulated the actual marketing of the cigarettes.[62] The statute provided for a ban on cigarette displays that enabled a customer to simply reach in and grab a pack and say, "I want these".[63] The concern was that children could more easily reach those cigarettes in a candy store.[64] It appears the ban was intended for vending machines because sales of cigarettes in stores were required to be conducted by attendant personnel, and vending machines were the exact opposite. The Court upheld

---

[60] *Id.* at 566. ("We conclude that the point-of-sale advertising regulations fail both the third and fourth steps of the *Central Hudson* analysis.")

[61] *Id.* ("Advertising cannot be 'placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of' any school or playground. 940 Code of Mass. Regs. §§ 21.04(5)(b), 22.06(5)(b) (2000)."); The Court went on to state:

> [T]he State's goal is to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising. The 5 foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.

[62] *Id.* at 570. The Court stated:

> We conclude that the sales practices regulations withstand First Amendment scrutiny. The means chosen by the State are narrowly tailored to prevent access to tobacco products by minors, are unrelated to expression, and leave open alternative avenues for vendors to convey information about products and for would-be customers to inspect products before purchase.

[63] *Id.* at 576. ("[T]he regulations bar the use of self-displays and require that tobacco products be placed out of the reach of all consumers in a location accessible only to salespersons. MASS. REGS. CODE tit 940 §§ 21.04(2)(c)-(d), 22.06(2)(c)-(d) (2000).")

[64] *Lorillard Tobacco*, 533 U.S. at 570. ("Unattended displays of tobacco products present an opportunity for access without the proper age verification required by law.")

those restrictions on the ground that they were not about speech; they were about business and required no First Amendment justification in order to permit them.[65] Therefore, advertising restrictions on cigarettes and advertising restrictions on other tobacco products were eradicated by the preemption rule and the First Amendment analysis respectively. However, "non-speech" was involved in the restrictions on the sale of tobacco, and those restrictions were upheld.[66]

There are one or two points to be commented on regarding the other opinions. Justice Thomas, along with Justice Kennedy, has turned out, in many instances, to be quite a vigorous proponent and supporter of free speech, particularly commercial speech. He takes the position that as long as the advertising is for a lawful product and it is not false or misleading, commercial speech should be judged by the same First Amendment standards as any other kind of speech.[67] If the advertising is lawful and not fraudulent, the Court should not engage in any of these diluted balancing tests. According to Justice Thomas, commercial speech should be assimilated into the First Amendment family, not treated as a stepchild, and provided it with full First Amendment protection.[68]

---

[65] *Id.* at 566. ("The Court of Appeals recognized that self-service displays 'often do have some communicative commercial function,' but noted that the restriction in the regulations 'is not on speech, but rather on the physical location of actual tobacco products.' citing 218 F.3d at 53.")

[66] *Id.* at 570-71.

[67] *Id.* at 572. (Thomas, J., concurring in part and concurring in judgment) ("[W]hen the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'")

[68] *Id.* at 575. (Thomas, J., concurring in part and concurring in judgment) ("I have observed previously that there is no 'philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than noncommercial speech.' [quoting 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in judgment)]. Indeed, I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech.")

The dissenters took the position, with respect to the First Amendment issue, that more proof was required.[69] They would have given the government more of an opportunity to try to prove its First Amendment case for the restriction on advertising and billboards.[70] As to the other restrictions, they went along with them on the grounds that they were restrictions of business and not restrictions of free speech.[71]

This is a case with interesting implications for state and local government efforts to regulate tobacco and other tobacco product advertising. The type of ban and zoning restrictions that were an issue in the Massachusetts case are also prevalent in New York City, Chicago, and in Los Angeles.[72] Many of those regulations will likely fall in cleanup litigation as a result of the Court's decision in the *Lorillard* case.

This was the second victory for the First Amendment.

The third case I will be discussing in this area is *Bartnicki v. Vopper*.[73] This is one of the two cases with a surprisingly liberal outcome. This is a case that pits freedom of the press against privacy in a contemporary setting. The case involved an illegal interception of cell phone conversations between two labor union officials in Pennsylvania who were in the midst of a heated labor dispute.[74] "The suit involved the repeated intentional

---

[69] *Id.* at 603. (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part):

> While the ultimate question before us is one of law, the answer to that question turns on complicated factual questions relating to the practical effects of the regulations. As the record does not reveal the answer to these disputed questions of fact, the court should have denied summary judgment to both parties and allowed the parties to present further evidence.

[70] *Lorrilard Tobacco,* 533 U.S. at 603.

[71] *Id* at 604.

[72] *See* Greater New York Metropolitan Food Council v. Giuliani, 195 F.3d 100 (2d Cir. 1999), *cert. denied,* 529 U.S. 1066 (2000). *See* Federation of Advertising Industry Representatives, Inc. v. City of Chicago 189 F.3d 633 (7th Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000).

[73] 532 U.S. 514.

[74] *Id.* at 518.

disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know - or at least had reason to know - that the interception was unlawful."[75] They were talking about strategy, and some of the talk became rough and tumble. In one instance they said that if the school board and the superintendent did not start yielding to their demands, they might have to bomb some front porches. Somehow the cell phone conversation was intercepted. It got into the hands of a local anti-tax activist, who then turned it over to the local radio station, which played some of the excerpts of the cell phone conversation.[76]

This was a clear violation of federal and state statutes passed in the late '60s and early '70s making unauthorized wiretapping a criminal offense, and subjecting to civil damages anyone who in an unauthorized way disclosed telephone conversations, electronic communications, cell phone conversations, or the like.[77] Consequently, the union people whose private conversation was now public matter filed suit under the damages sections of the federal and state statutes. They were met, not surprisingly, with a First Amendment defense; that freedom of the press privileged the radio station to report this information despite the fact that doing so would violate the federal and state statutes against disclosure.[78]

The lines were sharply drawn. The Supreme Court decision, a six-to-three decision written by Justice John Paul Stevens, agreed with the press and said that in these particular

---

[75] *Id.*

[76] *Id.* at 519.

[77] *Id.* at 523; *See* Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, entitled Wiretapping and Electronic Surveillance.

[78] *Bartnicki*, 523 U.S. at 520. The Court went on to state:

> Respondents contended that they had not violated the statute because (a) they had nothing to do with the interception, and (b) in any event, their actions were not unlawful since the conversation might have been intercepted inadvertently. Moreover, even if they had violated the statute by disclosing the intercepted conversation, respondents argued, those disclosures were protected by the First Amendment.

circumstances, imposing liability on the defendant would interfere with First Amendment rights. The cell phone conversation was a matter of public concern and the defendant, the radio station employee, had not obtained the taped material illegally.[79] As long as the person receiving the information did not have dirty hands in the matter and as long as the information contained matters of public concern, this would be the Court's standard. The Court said that clearly. This conversation among people involved in a contemporary and newsworthy labor dispute was a matter of public concern and there was a First Amendment freedom of the press privilege to report that information.[80]

A case that was important a generation ago, the Pentagon Papers case,[81] involved newspapers' receiving stolen information and then reporting the information they had received. The government attempted to enjoin the publication of that information. The case became a landmark decision in the Supreme Court thirty years ago this year. The Supreme Court ruled six-to-three that there could be no injunction or prior restraint against publication of the material, even though the material was probably stolen from the government, unless the government could show grave and irreparable injury to the national interest.[82] It is remarkable how recurrent the theme of that case is these days. In any event, since this was the civil side of the coin it was not at all clear that precedent dictated the outcome in *Bartnicki*. It was not clear from the Court's prior decisions that just because the government could not enjoin publication of secret material, once the material was published the person who was victimized by the publication could not sue for damages.[83] After all, there have been a couple of cases where the press was told it was no better than anyone else when it came to obeying the law.[84] The press also had to obey the law where

---

[79] *Id.* at 521.
[80] *Id.* at 520.
[81] New York Times v. United States, 403 U.S. 713 (1971).
[82] *Id.* at 727.
[83] *Bartnicki*, 532 U.S. at 529.
[84] *Id.* at 533. n.19. (citing Branzburg v. Hayes, 408 U.S. 665, 691 (1972)).

confidential sources were concerned.[85] The press had to obey the law where keeping its contractual promises were concerned.[86] One would have thought that the argument would have been the same argument made by the plaintiff seeking damages, that the press had to obey the law here, that the press was not above the law. The Supreme Court majority asserted that the protection of the First Amendment, freedom of the press and the values it serves, includes permitting the press to inform the public about important matters of public concern. Moreover, these statutes also protect those concerns that trump the recognized and compelling nature of the privacy interest.[87]

The concurring opinion in *Bartnicki* emphasized the fact that the balance was very delicate. In *Bartnicki*, the press received information without any fault on its part and the information was of significant public concern.[88] Of course, that generic formula is subject to a good deal of manipulation in particular cases. It would be interesting to see in the future whether other kinds of matters that do not obviously seem to be of public concern will be viewed as fair game for reporting, even if the reporting is based on information obtained in violation of people's constitutional or statutory rights. Today, there is great concern about the privacy of cell phone, Internet, and E-mail communications. What is the ultimate effect of this decision that protects freedom of the press when the press reports information despite an invasion of privacy, on the effort to balance freedom of the press against and concerns of individual privacy? The common theme in these cases is the Court's concern with the First Amendment protection of the flow of information to the public.

---

[85] *Bartnicki*, 532 U.S. at 528.
[86] *Id.* *See also* Cohen v. Cowles Media Co., 501 U.S. 663 (1991).
[87] *Id.* at 534.
[88] *Id.* at 536-37.

II. VIEWPOINT DISCRIMINATION

The next case, *Legal Services Corporation v. Velazquez*,[89] is the first of the three cases that are in the category of viewpoint discrimination; government favoritism of one point of view over another. The attorney for Velazquez deserves a pat on the back for winning the case because in order to win he had to distinguish a case decided by the Court ten years ago, *Rust v. Sullivan*,[90] which seemed to many people to be exactly on point. Nevertheless, the Court agreed with counsel for Velazquez that *Rust* was distinguishable.

Legal Services involved funding legal service activities and restrictions on such funding.[91] In 1996, as part of the welfare reform package that went to Congress, restrictions were imposed on the kinds of arguments legal services lawyers could make in the context of representing welfare recipients in litigation over welfare benefits. Although Legal Services funded lawyers could argue that a particular client or plaintiff was entitled to a particular benefit at issue, they could not argue the regulations that restricted access to the benefits were unlawful, or unconstitutional. Legal Services funded lawyers and their clients challenged the restrictions imposed upon them.

The question in *Legal Services* was whether a restriction on the use of public funds that limited the use of those funds to making only certain arguments in court, was a violation of the First Amendment. The Supreme Court, in a five-to-four decision, with Justice Kennedy once again writing the majority opinion, held that the restriction, even on publicly funded legal services lawyers' activity, was a violation of the First Amendment.[92] In order to reach that conclusion, the Court

---

[89] 531 U.S. 533 (2001).

[90] 500 U.S. 173 (1991).

[91] *Id.* at 536. ("The restriction . . . prohibits legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law." This restriction was imposed by Congress when it enacted the Legal Services Corporation Act, 88 Stat. 378, 42 U.S.C. 2996).

[92] *Id.* at 549.

distinguished the well known case that was decided ten years ago, *Rust v. Sullivan*.[93]

Rust v. Sullivan involved government restrictions on what a government-funded doctor, working in a family planning clinic subsidized by federal funds, could advise his or her patient about the option of abortion as a method of family planning.[94] The statute stated that no public funds could be used to support advice concerning abortion.[95] The Supreme Court upheld the restriction in *Rust* in a five-to-four decision on the theory that "he who pays the piper calls the tune."[96] The Court held that the government was simply determining how it wanted its money spent, and the institutions receiving that money were free to set up parallel organizations funded with their own resources where a person could be counseled about having an abortion. Therefore, there was no First Amendment violation.[97]

Many observers thought *Rust* and *Legal Services* sounded alike, and therefore the same holding should apply. The only difference in the two cases seemed to be the plaintiffs. *Rust* involved doctors and *Legal Services* involved lawyers. This difference was really important, however. There were two elements in the Court's decision that struck down the restriction on the use of public funds to advocate the unconstitutionality of the public law. One reason the Court found a violation of the First Amendment in *Legal Services* was because it applied the traditional doctrine of viewpoint discrimination.[98] The Court saw in this restriction, unlike the restriction on abortion counseling, the government trying to silence a particular point of view, a point of view about the unconstitutionality or legality of the government's behavior.[99] This seems like a classic case of censorship. The government was stifling the message that the government was doing something bad. The Court in *Legal*

---

[93] 500 U.S. 173.
[94] *Id.* at 180.
[95] *Id.* at 179.
[96] *Id.* at 194.
[97] *Id.* at 199.
[98] *Legal Services*, 531 U.S. at 543.
[99] *Id.* at 540.

Services found the classic example of viewpoint discrimination.[100] That was one distinction.

The other distinction between *Legal Services* and *Rust* was that in *Legal Services*, the restriction on what the lawyer could say, as distinct from restrictions on what the doctor could say, undermined the ability of courts to do what they were supposed to do.[101] The Court viewed this disparity as an assault on the judiciary.[102] This restriction meant that a lawyer in court could not help the court reach the proper result in a case because that lawyer was barred or restrained from pointing out the legality or, perhaps unconstitutionality, of a regulation that was directly central to the issue before the court.[103] This second theme was strongly supported by Justice Kennedy. According to Justice Kennedy, there is not likely to be a broad application of this decision to all kinds of government funding. But certainly, funding that supports litigation is no longer subject to restrictions.

The dissenters in *Legal Services* reasoned there was no abridgement as the issue was funding and not prohibition of speech. The government was simply trying to define the kind of program it wanted, as it did in *Rust*, and the government was entitled to define the program it was funding.[104] However, the majority reasoned that the government was not paying someone to give its message in this case. This was government supporting the private speech of a lawyer who had been subsidized to represent private clients. Therefore, the government had less right to dictate the outcome of that speech.[105]

One other final point to be made about the holding in *Legal Services* is in terms of its implication for the future. The area where there will be a good deal of litigation will have to do with public funding for the arts. One example is the dispute over

---

[100] *Id.* at 547.

[101] *Id.*

[102] *Id.* at 546. ("The restriction imposed by the statute here threatens severe impairment of the judicial function.")

[103] *Legal Services,* 531 U.S. at 546.

[104] *Id.* at 554.

[105] *Id.* at 542.

the Brooklyn Museum and the termination of certain funding.[106] This case will cast a good deal of doubt on the actions under review in that situation.

Similar to the reasoning of *Legal Services* is that of *Good News Club v. Milford*. This case represents the reasoning "what's good for the goose is good for the gander." In *Legal Services*, it was the liberal justices who reasoned that a certain viewpoint was being excluded, censored, picked on, and denigrated from the forum or discussion. Now, the conservatives in *Good News Club* made the same point and prevailed.[107] This case involved the use of schoolroom facilities immediately after school by a group called the "Good News Club." This club is a national Christian youth group organization that holds after school programs in several hundred schools across the country.[108] It is clear that these after-school programs have a very strong religious content.[109] Religion, is indeed, their purpose.

Many school boards, like the one in *Milford*, rejected requests to use schoolrooms after hours for groups like the Good News Club. This refusal was taken to court on the ground that it was a violation of the Club's free speech right and constituted impermissible viewpoint discrimination.[110] The Club alleged that the only reason for not letting it utilize the school's facilities was because the point of view they were espousing with the students was a religious point of view and that this is an impermissible basis for exclusion.[111] That was their argument, and it was the argument the Court accepted. What the Court said in *Good News Club* was that by permitting other non-student groups to use school facilities after hours, the school board had

---

[106] Brooklyn Inst. of Arts and Sciences v. City of New York and Giuliani, 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

[107] *Milford*, 533 U.S. at 98.

[108] *Id.* at 103.

[109] *Id.*

[110] *Id.*

[111] *Id.* (The Milford Board of Education adopted a resolution rejecting the Club's request after their attorney reviewed the materials and activities of the Club. The attorney found the activities were "the equivalent of religious instruction itself").

created a limited public forum. As long as someone wanted to have meetings or conduct activities that were in keeping with the nature of a public forum, and the purpose was within the uses to which a public forum could be dedicated, the group could not be excluded from those uses on the ground that their viewpoint was religion.[112]

In reaching the decision in *Good News Club*, the Court relied very centrally on a case from the Long Island area, from about ten years ago, known as the *Lamb's Chapel*[113] case. In *Lambs Chapel*, the Court held that the use of school facilities to show a movie with a religious theme could not be barred when other groups were allowed to show movies with other kinds of themes after school hours.[114] The Court said the same is true there as in *Good News Club*. There could be no viewpoint discrimination for groups that want to show movies, and no viewpoint discrimination for groups that want to involve children in their religious viewpoint discussions.[115]

There are a couple of important differences in these two cases that the dissenters pointed out. It is one thing for an adult group to show a movie with a religious theme. It is another thing for a group that is involved with students to have a meeting which is basically entirely religious.[116] The dissenters' position in *Good News Club* was that this was not an impermissible discrimination against protected points of view. The dissenters reasoned that this was an understandable effort to protect the schools against religious worship on school property.[117] The school's interest in preventing religious worship from occurring on school property is based partly on another section of the First Amendment, the Establishment Clause.[118] The Establishment

---

[112] *Id.* at 106.

[113] Lambs Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1973).

[114] *Id.* at 394.

[115] *Good News Club*, 533 U.S. at 107.

[116] *Id.* at 143-44.

[117] *Id.* (Souter, J., dissenting).

[118] *Id.* at 138.

Clause warrants that the government shall not favor religion.[119] The dissenters in *Good News Club* were very concerned that a setting which allowed a classroom to be used immediately after school by young children, which was supervised by off-campus adults with a religious point of view, might increase the potential of violating the Establishment Clause.[120] That was the essence of the dissent by Justices Stevens,[121] David H. Souter, and Ginsburg.[122]

It is quite possible that the Court's six-to-three decision, with Justice Thomas writing the opinion that permits the use of school property in this fashion, is going to have some significant spillover effect on some of the other battles that are raging over the proper accommodation between religion and the public schools. It is not possible that the cases banning school prayer are in jeopardy, but certainly other kinds of religious activity on school premises, that are less overt than school prayer[123] or the posting of the Ten Commandments,[124] may have stronger arguments on their behalf made as a result of this case.

The other significant aspect of the case, which is one of the central themes throughout the Court's church/state/school premise jurisprudence, has been that public schools, grammar schools, and high schools are different because of the presence of children. This is because children are more vulnerable to indoctrination and therefore these institutions have to be on guard to keep religious influences off campus and away from children as much as possible. However, here is a case where the religious activity was allowed on campus and involved children. The

---

[119] *See* U.S. CONST. amend. I.

[120] *Good News Club*, 533 U.S. at 128-45.

[121] *Id.* at 130. (Stevens, J., dissenting).

[122] *Id.* at 134.. (Souter, J., and Ginsburg, J., dissenting).

[123] *See, e.g.*, McCollum v. Board of Educ., 333 U.S. 203 (1948) (holding it unconstitutional for clergy to come into classrooms); Engel v. Vitale, 370 U.S. 421, (1962) (New York Board of Regents prayer declared unconstitutional); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (mandatory Bible readings held unconstitutional).

[124] *See* Stone v. Graham, 449 U.S. 39 (1980) (holding it unconstitutional to post the Ten Commandments in classrooms).

Court's six-to-three decision held that this type of religious activity was privileged under the First Amendment.[125] That does not bode well for those that want to keep schools from having more and more religious activity or involvement going on in them.

So, there was victory for First Amendment claimants to be sure. Perhaps this is a caution for the future in terms of the delicate balance between free speech and religious freedom on the one hand and not wanting the government to support religion, or establish religion on the other hand.

The next case to be scrutinized is one in which the Court had no trouble. This was one of the two unanimous cases, a case called *Cook v. Gralike*.[126] It is one more case that addresses the ongoing battle of term limits. You may recall that a few years ago the Supreme Court held that state efforts to dictate term limits for members of Congress violated federal rights under the Federal Constitution.[127] The 'term limits' movement, in its attempt to place term limits on members of Congress, was dealt a significant blow by that decision. This is the sequel.

The 'term limits' proponents asserted that if they could not force term limits on Congress, they would do the next best thing, force Congressional candidates to take a position about whether they support an amendment to the Constitution to permit term limits. Further, they hoped to place these candidates' positions on the ballot next to their respective names, a kind of scarlet letter.[128] This was challenged on two grounds. One ground was that this action was beyond the power of the states to regulate the manner of federal elections.[129] Of course the states have authority to regulate elections: when to vote and where to vote and the like, even if there is a federal election. However, the Court said that broad state power over election regulation does not include the power to try to dictate who is going to win

---

[125] *Good News Club*, 533 U.S. at 120.
[126] 531 U.S. 510 (2001).
[127] *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).
[128] *Cook*, 531 U.S. at 525.
[129] *Id.* at 521-22.

by attaching an unfavorable label to a person who takes one position and a favorable label on the person who takes the other position.[130]

The concurring Justices were explicit in articulating their decisions, unlike the majority, with Chief Justice Rehnquist's concurrence based on the First Amendment.[131] They said the government was penalizing the candidates who were not in favor of term limits because of their point of view.[132] According to the concurring Justices, this was basically punishment for a point of view and it was impermissible. Whatever the justification, the unanimous decision was that it was impermissible for states to put a scarlet letter next to the name of the person who refused to take the state's position.[133] This was a very fine example of the Court being sensitive to efforts by the government to put its thumb on the scale and to try to dictate one outcome rather than another.

III. FAILED FIRST AMENDMENT CLAIMS

In the final two cases I will discuss today, the First Amendment claims failed. One case unanimously failed and the other case was a sharply divided five-to-four decision.

The unanimous case was *Shaw v. Murphy*.[134] The case is a continuation of the Court's very restricted attitude towards prison rights litigation and prison rights generally. Here too, there has been a sea of change in the past generation. A generation ago the courts, under the guidance of the liberal Warren court,[135] tended to be receptive to prisoner rights claims of one kind or another.[136] Now the current Court is less receptive.

In *Shaw v. Murphy*, there was a First Amendment claim by a prisoner regarding restrictions on and punishment for

---

[130] *Id.* at 525.
[131] *Id.* at 530-32. (Rehnquist, C.J., concurring).
[132] *Id.*
[133] *Id.* at 527.
[134] *Shaw*, 532 U.S. 223 (2001).
[135] Named for former Chief Justice Earl Warren.
[136] *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969).

internal prison correspondence. A few years ago the Court indicated in a case called *Turner v. Safley*,[137] that such claims would be judged by the most deferential form of balancing tests, which are very favorable to the prison authorities, and very hostile to the prisoners.[138] The question here was should you nonetheless permit the prisoner a slightly heightened First Amendment scrutiny where the content of the correspondence has some First Amendment protection.[139] Namely, in this instance, one prisoner was advising another prisoner how to defend himself in a prison disciplinary suit; a form of inmate legal advice.[140] The question was whether such correspondence should be given a slightly greater protection and requires slightly more scrutiny of the justifications given to try to restrict that correspondence. The Court's unanimous answer was no.[141]

The Court basically said that permitting heightened scrutiny in this situation would open up a can of worms because if it did, the nature of the content of prison correspondence would lead to the use of different formulas and tests to measure the propriety of restricting that content. If the Court allowed a slightly heightened review for legal assistance mail, what about religious theory mail or political communications mail? The Court reasoned it would be imposing a great deal of extra burden on prison authorities and judicial authorities without a great deal of payoff for the prisoners.[142] So, once again, there was a unanimous decision written by Justice Thomas. The Court rejected the First Amendment claim.[143]

The final case is the campaign finance case, *Federal Election Commission v. Colorado Republican Federal Campaign*

---

[137] 482 U.S. 78 (1987).

[138] *Id.* at 87.

[139] *Shaw*, 532 U.S. at 227. (The decision below in the Ninth Circuit based its analysis on the proposition that "inmates have a First Amendment right to assist other inmates with their legal claims").

[140] *Id.* at 225.

[141] *Id.* at 231.

[142] *Id.*

[143] *Id.* at 232.

Committee,[144] where a much more sharply contested court, in a five-to-four decision, rejected the First Amendment claim of the Colorado Republican Party. In the interest of full disclosure, it should be indicated that the author is not neutral on these particular issues. I worked on a brief on behalf of the American Civil Liberties Union[145] in this case, in favor of the side that lost, the Republican side. The case involved Supreme Court law going back to a well-known case called *Buckley v. Valeo*,[146] which involved a challenge to the federal campaign financing laws enacted after Watergate.[147] I was one of the lawyers involved in the challenge to those laws, so the reader is going to get a brief, but not a necessarily unbiased presentation on the issue.

According to the Court, the issue was whether restrictions on campaign expenditures are subject to strict scrutiny because they directly restrict speech since they restrict spending money to get your message out, but restrictions on contributions to politicians are subject to lesser scrutiny because they are lesser or secondary speech since they are giving someone else the ability to speak. There is also a concern with corruption when you make a contribution to someone else.[148] Normally an expenditure for a candidate made in consultation with him or her is viewed as an overt contribution to that candidate. Otherwise, there would be a way to circumvent contribution limits. You could call up your friend, the candidate, and say how much advertising do you need and where do you want it placed. I will take care of it. The court has said that is really a contribution. This has been accepted for a long time.[149]

This case falls in the middle because the expenditures by political parties were made in consultation with their candidates. Therefore, the question is what about when the party is doing the spending, when it uses party contributions to send messages that

---

[144] 533 U.S. 431.
[145] Brief Amicus Curiae (#00-191).
[146] 424 U.S. 1 (1976).
[147] *Id.* at 6.
[148] *Id.* at 45.
[149] *Id.*

may be of direct benefit to the candidate?[150] The reason that it is a bit of a concern is that parties, unlike candidates who can only receive $1,000 from each contributor, can receive up to $20,000 per contributor in the course of a year. The concern was if the parties take the bigger checks and then run advertising that benefits candidates, is this going to be a way to circumvent the $1,000 limit on individuals who contribute to the candidate? The majority's answer was yes, it is.[151]

There is concern about the circumvention problem, and therefore, even though the party is spending money it has raised, independent of the candidate, and even though the party is spending money for messages that may or may not be directly linked to the candidate, as long as the candidate has some involvement in the party's spending, then according to the majority, it is as if the candidate is spending the money and anybody who contributes to it can be subject to various kinds of limitations.[152] The Republican Party argued that parties are different than other speakers because their relationship with candidates is so joined at the hip. The Republican Party asserted that if there was limited ability to support its candidates, that would be more of a First Amendment invasion than if a limit were imposed on some third person's ability to support the candidate.[153] The Court essentially rejected that argument and said parties have no greater rights in this area than individuals or associations; they probably do not have any lesser rights but they do not have any greater rights.[154] Therefore, because of the concern of circumventing contribution limits on money given directly to a candidate's party, spending that is coordinated with candidates has to be subject to the same kind of restraint.

Justice Souter wrote the decision. He was joined by Justices Ginsburg, Breyer and Stevens. The swing Justice in this case was Justice Sandra Day O'Connor, who left the conservative

---

[150] *FEC*, 121 S. Ct. at 2357.
[151] *Id.* at 2371.
[152] *Id.*
[153] *Id.* at 2361.
[154] *Id.* at 444 n.6.

side with which she is normally aligned, and joined the Justices who were in favor of upholding this restriction. The dissenters, Justices Thomas, Kennedy, Scalia and Chief Justice Rehnquist took the position that parties are different, and that the concerns about undue influence on contributions to parties can be dealt with in less restrictive ways than by restricting the ability of parties to support the candidates that subscribe to their agenda.[155]

This was a victory for the campaign finances reform forces, and a defeat for the campaign finance less restrictive forces. It should be pointed out that this case did not involve so-called soft money contributions to parties. Soft money contributions to parties do not come under the normal regulations of the campaign funding laws. They can be made by unions, or by corporations, neither of which can give to candidates directly, and they can be made by individuals in rather large amounts. Soft money contributions do not go for things that directly support candidates; they go for things that support parties. The question in this area will be whether the so called McCain-Feingold legislation will be put on the front burner after September 11th.[156] Moreover, will laws be passed to regulate that kind of campaign financing by political parties, and how will the court view those issues? Will they view them as predominantly raising concerns of undue influence and corruption or will they view them as being impermissible restrictions on the rights of parties and others to engage in core First Amendment activity? The answers to those questions will not be known until laws like McCain-Feingold are passed; which may or may not occur.[157]

---

[155] *Id.* at 489.

[156] S. 27, 107th Cong. (2001). (The McCain-Feingold bill is also known as the Bipartisan Campaign Reform Act of 2001).

[157] The bill was passed and became law in March, 2002. Lawsuits challenging the Act's constitutionality were filed the same day.

IV. CONCLUSION: PREVIEW OF NEXT TERM

Just to finish with a brief preview of what you will see this coming year. The Court has granted review in four cases that will raise interesting First Amendment issues; two cases involve pornography and children and the Internet. One of them involves a question of the proper community standards by which to judge pornographic material in this day and age where the community is global. In other words, how can we transplant the old notion of community standards to judge pornography in our global Internet community?[158] The other Internet issue has to do with virtual pornography.[159] If you create virtual electronic pictures of children engaged in sexual activity, but you have not exploited any real children to do so, can you be prosecuted under child pornography restrictions on the Internet? So we will see the answer to those two questions. As to the other two cases, one involves pornography, namely: How much evidence of harm caused by businesses that engage in sexually-oriented activity has to be shown before communities can regulate those businesses under their zoning laws?[160] Finally, the fourth case does not deal with sex, but rather park permits and judicial review, and what kind of requirements can be imposed on local officials who want to censor access to public places like the park.[161] It should be an interesting season for the First Amendment.

---

[158] American Civil Liberties Union v. Reno, 217 F.3d 162 (3d Cir. 2000), *cert. granted,* 121 S. Ct. 1997 (2001) (No. 00-1293) (renamed Ashcroft v. American Civil Liberties Union), *argued on* November 28, 2001.

[159] Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), *cert. granted* (2001) (No. 00-795) (renamed Ashcroft v. Free Speech Coalition), *argued on* October 30, 2001.

[160] Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000), *cert. granted,* 121 S. Ct. 1223 (2001) (No. 00-799), *argued on* December 4, 2001 .

[161] Thomas v. Chicago Park District, 227 F.3d 921 (7th Cir. 2000), *cert. granted,* 121 S. Ct. 2191 (2001) (No. 00-1249), *aff'd by* 122 S. Ct. 775 (2002).