COURTSIDE

PAUL SMITH, NORY MILLER, AND JODIE KELLEY

The U.S. Supreme Court finished its 2000–01 Term with a series of First Amendment decisions and promises of more to come in the following year.

Bartnicki v. Vopper

As discussed elsewhere in this issue,[1] the Court issued a major ruling in *Bartnicki v. Vopper*,[2] involving the question whether the First Amendment permits a lawsuit penalizing the press for distribution of a tape of an illegally intercepted cellular phone call. The case involved a situation where the press had no role in the illegal interception and the conversation related to a public controversy. The Court held that, at least in such a situation, the press could not constitutionally be punished for truthful speech on a matter of public importance, based solely on the fact that the information derived from someone else's illegal conduct.

Good News Club

In *Good News Club v. Milford Central School*,[3] the Court held that if a public school opens its facilities for use by outside groups, it may not discriminate against a particular group on the ground that it intends to engage in religious speech and observances. In so doing, the Court accepted for purposes of its analysis the parties' assumption that the school district's decision to open the school for public use after school hours had created a "limited public forum" instead of a "traditional or open public forum." It noted that the government, when operating a limited public forum, need not allow all types of speech, but it may not engage in viewpoint discrimination.

The Court held that the school district had indeed engaged in viewpoint discrimination, because it allowed use of the school by secular groups seeking to teach moral values and character development (such as scouting groups) but excluded groups seeking to do the same thing in a religious manner. It disagreed with the school district's argument that a prayer meeting, as a religious exercise, is categorically different from, and not comparable to, the activities of the secular groups. As the Court put it, "we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons."[4]

Finally, the Court rejected the argument that such viewpoint discrimination was justified by Establishment Clause concerns. The Court saw no basis for the claim that allowing religious organizations an equal opportunity to use school facilities after hours would implicate the Establishment Clause.

United Foods

In *United States v. United Foods, Inc.*,[5] the Court held that the government may not constitutionally coerce businesses in a particular industry to subsidize commercial speech with which they disagree. It upheld the claim by a mushroom grower that it had a First Amendment right to refuse to contribute to a governmentally organized fund used for promotion of mushrooms. In so doing, the Court distinguished and narrowed its prior decision in *Glickman v. Wileman Brothers & Elliott, Inc.*,[6] which upheld mandatory contributions for generic advertising by the California fruit growers.

As the Court explained, the mandatory payments in *Glickman* were part of a much broader program of cooperative marketing that had replaced many aspects of independent business activity. In that context, the *Glickman* Court saw "mandated participation in an advertising program with a particular message [as] the logical concomitant of a valid scheme of economic regulation."[7] In *United Foods*, by contrast, the mushroom growers operated autonomously and nearly all the assessments were used for generic advertising. Thus, the essence of the law was a required contribution to speech, which the Court saw as a violation of the First Amendment, as analyzed in prior cases like *Abood v. Detroit Board of Education*[8] (involving mandatory union dues) and *Keller v. State Bar of California*[9] (involving mandatory bar dues).

Colorado Republican Federal Campaign Committee

In the *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*,[10] the Supreme Court upheld, against a First Amendment challenge, the limits in the Federal Election Campaign Act on campaign spending by political parties that is "coordinated" with the campaigns of candidates for federal office. The Court was persuaded that such limits serve the purpose of preventing circumvention of the limits on contributions to candidates that have previously been upheld. It noted that individuals are permitted to contribute much greater sums to parties than to candidates' campaigns, that donors often contribute to parties with tacit understandings that particular candidates will benefit, and that parties have adopted procedures to "connect" donors' contributions with particular candidates. Given these facts, the Court said, if coordinated spending by parties were unlimited, campaign contributions would effectively be funneled through parties, thus circumventing the much stricter limits on contributions directly to candidates.

Justice Thomas, joined by Justice Scalia, Justice Kennedy, and the Chief Justice, dissented.

Lorillard Tobacco

In *Lorillard Tobacco Co. v. Reilly*,[11] the Court invalidated certain Massachusetts regulations governing the advertising and sale of tobacco products. These regulations barred any outdoor advertising within 1,000 feet of a park, public playground, or school, as well as point-of-sale ads lower than five feet off the ground. The Court first held that these regulations, as applied to cigarettes, were preempted by the Federal Cigarette Labeling and Advertising Act, which mandates certain warnings on cigarette packages and forbids states to impose any "requirement or prohibition

Paul Smith, Nory Miller, and Jodie Kelley are partners in the Washington, D.C., office of Jenner & Block.

based on smoking and health . . . with respect to the advertising and promotion of cigarettes."[12]

The Court went to hold that, as applied to smokeless tobacco products and cigars, which are not addressed by the federal statute, the state restrictions on advertising violated the First Amendment. The Court applied the *Central Hudson* test traditionally used to assess restrictions on commercial speech.[13] First, with respect to the ban on advertising within 1,000 feet of parks and schools, it held that this restriction failed the fourth part of the *Central Hudson* test, which addresses whether the state's limitation on speech is more extensive than necessary to serve the governmental interests asserted.[14] The 1,000-foot rule meant, in practice, a virtually complete ban in certain metropolitan areas. The Court concluded that such a restriction on truthful speech about a product legally sold to adults imposed too great a burden on retailers and their adult customers.

Turning to the rule that point-of-sale ads must be at least five feet from the floor, the Court held that this rule violated the third prong of *Central Hudson* (which asks whether the regulation "directly advances" the governmental interest[15]) as well as the fourth. It reasoned that some children are five feet tall, and the rest "certainly have the ability to look up and take in their surroundings."[16]

Shaw v. Murphy

In *Shaw v. Murphy*,[17] the Court held that inmates do not have a special First Amendment right to transmit legal advice to other inmates. It saw no basis to augment the First Amendment protection accorded to this one category of speech above the limited level of protection afforded to all other forms of communication among prisoners.

The Supreme Court granted review before the end of the Term in three First Amendment cases.

Ashcroft v. ACLU

The Court has granted certiorari to review the Third Circuit's decision upholding a preliminary injunction enjoining enforcement of the Child Online Protection Act, 47 U.S.C. § 231 (COPA), which prohibits any party from making available to minors, for commercial purposes, material that is harmful to minors.[18] Applying strict scrutiny, the Third Circuit concluded that, although protecting children from harmful material is a compelling governmental interest, the means employed by the government were invalid. In particular, the Third Circuit found fault with the Act's incorporation of "contemporary community standards" into the Act's definition of "harmful to minors," reasoning that because "the Web is not geographically constrained," publishers would be forced to abide by the standards of the most restrictive community.[19] For this reason, the court concluded that although the *Miller* obscenity test continues to be a useful tool outside the Internet context, "Miller . . . has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications."[20]

Thomas v. Chicago Park District

The Court granted review in *Thomas v. Chicago Park District*,[21] which involves the First Amendment rights of would-be demonstrators in a public park. The questions presented relate to the administrative and judicial standards and procedures that must be in place if the government wants to impose a permit requirement for demonstrations in such a public forum.

Alameda Books

City of Los Angeles v. Alameda Books,[22] involves the question of what kind of legislative record is needed to validate a law restricting the operations of "adult entertainment" businesses —in this instance, a law prohibiting operation of more than one such business at a single location. More specifically, the question is whether the law is invalid because the city did not study the negative effects of such combinations of businesses, and relied instead on statutes enacted elsewhere that had been upheld by the courts.

Endnotes

1. *See* Paul Smith & Nory Miller, *When Can the Courts Penalize the Press Based on Newsgathering Midconduct*?, 19 COMMUNICATIONS L., Summer 2001, at 1.
2. 121 S. Ct. 1753 (2001).
3. 121 S. Ct. 2093 (2001).
4. *Good News Club*, 121 S. Ct. at 2102.
5. No. 00-276, 2001 U.S. LEXIS 4904 (U.S. June 25, 2001).
6. 521 U.S. 457 (1997).
7. *United Foods, Inc.*, 2001 U.S. LEXIS 4904, at *14 (U.S. June 25, 2001) (discussing *Glickman*).
8. 431 U.S. 209 (1977)
9. 496 U.S. 1 (1990).
10. 121 S. Ct. 2351 (2001).
11. Nos. 00–596, 00–597, 2001 U.S. LEXIS 4911 (June 28, 2001).
12. 15 U.S.C. § 1334(b).
13. Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980).
14. *Central Hudson*, 447 U.S. at 566.
15. *Id.*
16. *Reilly*, 2001 U.S. LEXIS 4911, at *73.
17. 121 S. Ct. 1475 (2001).
18. ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000), *cert. granted*, Ashcroft v. ACLU, 121 S. Ct. 1997 (May 21, 2001) (No. 00-1293).
19. *ACLU*, 217 F.3d at 174–75.
20. *Id.* at 180 (referring to Miller v. California, 413 U.S. 15 (1973)).
21. 227 F.3d 921 (7th Cir. 2000), *cert. granted*, 121 S. Ct. 2191 (May 29, 2001) (No. 00-1249).
22. 222 F.3d 719 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 1223 (Mar. 5, 2001) (No. 00-799).