COURTSIDE

Supreme Court Closes Term with First Amendment Decisions

BY PAUL M. SMITH, DONALD B. VERRILLI, JODIE L. KELLEY, AND JULIE M. CARPENTER

As it closed the 2001 Term, the Supreme Court issued a number of free speech rulings in a variety of contexts.

Speech and Judicial Elections

In No. 01–521, *Republican Party of Minnesota v. White*, the Court held unconstitutional a provision in the Minnesota Code of Judicial Conduct, drawn from the ABA Model Code of Judicial Conduct, which prohibited any "candidate for judicial office" from "announc[ing] his or her views on disputed legal or political issues." The majority opinion in this five-to-four case was written by Justice Scalia and joined by the Chief Justice and Justices O'Connor, Kennedy, and Thomas. The opinion acknowledged that the "announce clause" had been narrowly interpreted to allow some criticism of prior judicial decisions, to apply only to issues likely to come before the candidate as a judge, and to allow general discussions of case law and judicial philosophy. But the Court recognized that even with these limitations, the clause prohibited "a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*."

The Court held that such direct censorship of speech relating to a judicial election is subject to strict scrutiny and that none of the justifications proffered by the state met that standard. The state claimed that restricting speech in this way would preserve both the impartiality of the judiciary and the appearance of impartiality. But the Court reasoned that the announce clause bore no relation to impartiality in the sense of favoritism to particular parties. It noted that the term "impartial" might instead be used to mean lacking a preconception in favor of or against a particular legal conclusion. But it found such an interest less than compelling, noting that it is virtually impossible, and probably undesirable, to find judicial candidates with no existing ideas about legal issues.

Finally, the Court considered a third meaning of "impartial" as synonymous with being "open-minded" about reconsidering one's preconceptions. It held, however, that statements made during judicial election campaigns "are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible." Candidates may have taken many positions before announcing for office and, as judges, will take many more. Thus, the justification of promoting open-mindedness by stifling statements about the law during judicial election campaigns is "woefully underinclusive."

The Court rejected the argument that limiting campaign statements promotes due process by limiting the reasons for a judge to consider his reelection prospects when weighing a case. It stated that such a danger is inherent in any system of electing judges, and such systems have existed as long as the Fourteenth Amendment. By contrast, attempts to regulate speech during judicial campaigns have a much shorter constitutional pedigree.

Justice O'Connor concurred, offering a criticism of use of elections to select judges and saying that a state, having accepted the risks of bias inherent in elections of judges, cannot use those risks to justify speech restrictions.

Justice Kennedy also wrote a concurring opinion, stating that he would hold this kind of speech restriction invalid without even applying a strict-scrutiny compelling interest/narrow tailoring analysis.

Justice Ginsburg authored the primary dissenting opinion. She argued that because judgeships are not "representative" offices, the usual rationale for protecting speech in election campaigns does not carry over. To the contrary, she stated, even if it chooses to elect its judges, a state may choose to promote due process by limiting the criteria to be considered to general qualifications for office—without discussion of a candidate's likely position on specific cases. In so doing, she said, a state would be adopting the same criteria applied in the nonelective federal system of judicial nomination and confirmation. Justice Stevens added a dissent of his own, arguing that it makes no sense to give the states the choice of (1) allowing full-blown election campaigns for judgeships, with the predictable result of intensifying the likely diminution of judicial impartiality, or (2) eliminating judicial elections altogether.

Labor Litigation and the Right to Petition

In No. 01–518, *BE&K Construction Co. v. NLRB*, the Court addressed the constitutionality of a decision of the National Labor Relations Board decision sanctioning an employer for filing a lawsuit with an allegedly retaliatory motive against two unions. In a majority opinion authored by Justice O'Connor, the Court held that the NLRB should have applied the two-part test established in the antitrust context in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,[1] which requires a determination that a lawsuit was both objectively baseless and subjectively intended to accomplish an illegal objective.

Justice Breyer, in an opinion concurring in part and concurring in the judgment joined by Justices Stevens, Souter, and Ginsburg, wrote that the Court was correct to require a determination of objective baselessness. But he would have left open the possibility that the NLRB, looking back at a lawsuit already determined to be nonmeritorious by the courts, could determine that the plaintiff had violated labor laws without a finding of objective baselessness if the evidence of retaliatory motive was sufficiently strong.

Paul M. Smith (psmith@jenner.com), Donald B. Verrilli (dverrilli@jenner.com), Jodie L. Kelley (jkelley@jenner.com), and Julie M. Carpenter (jcarpenter@jenner.com) are all partners in the Washington, D.C., office of Jenner & Block.

Zoning Laws Restricting Location of Adult Speech

Continuing to refine the limits of permissible regulation of "secondary effects" of sexually oriented speech, the Court reversed and remanded a decision that a zoning ordinance violated the First Amendment in *City of Los Angeles v. Alameda Books, Inc.*, No. 00–799. Following a 1977 study on the secondary effects of adult businesses, Los Angeles had passed an ordinance requiring dispersal of adult businesses throughout the city. It later relied on that study to amend the ordinance to prohibit two adult businesses—a bookstore and an arcade, for example—from operating as one business in one shop. Two bookstore/arcade businesses sought a declaratory judgment that the ordinance violated the First Amendment.

Writing for the plurality and joined by Justices Rehnquist, Scalia, and Thomas, Justice O'Connor focused on the evidentiary burden necessary under *Renton v. Playtime Theatres* for a government to demonstrate at summary judgment that the ordinance is designed to serve a substantial interest. While agreeing that the 1977 secondary effects study was susceptible of several inferences, the Court held that at the summary judgment stage, Los Angeles was not required to *prove* that its theory—that a concentration of businesses in one store will attract more customers, and therefore more secondary effects—was the "necessary consequence" of the study. Thus, at the summary judgment stage, so long as the City drew logical inferences from the study and so long as the measure would logically serve the governmental interest in reducing crime, the City had carried its evidentiary burden. But the Court said plainly that at trial, the municipality's evidence must "fairly support" the rationale for the ordinance, and if the plaintiffs "succeed in casting doubt on a municipality's rationale . . . the burden shifts back to the municipality" to justify the ordinance with additional evidence.

Justice Kennedy did not join the Court's opinion, but his concurrence in the reversal and remand provided the crucial fifth vote. Noting his dissatisfaction with the term "content neutral" to describe zoning ordinances aimed at adult speech, Kennedy emphasized that a city may not reduce speech in order to reduce the secondary effects of that speech. He faulted the plurality opinion for not taking into account the effect of the ordinance on speech. He argued that a "zoning measure can be consistent with the First Amendment if it is likely to cause a significant decrease in secondary effects and a trivial decrease in the quantity of speech." He then concluded that at least hypothetically, the L.A. ordinance could accomplish those two results, so that summary judgment would be improper, but cautioned that if the assumptions leading to that hypothetical result could be "proved unsound at trial, then the ordinance might not withstand intermediate scrutiny."

Justice Souter dissented, joined by Justices Stevens and Ginsberg, and joined in part by Justice Breyer. Arguing first that this kind of secondary-effects ordinance was not "content-neutral" but was what he called "content-correlated," Justice Souter pointed out that readily available empirical evidence can demonstrate whether negative secondary effects exist, whether they are caused by adult businesses, and whether zoning can be expected to ameliorate them. Given the availability of such evidence, "We must be careful about substituting common sense assumptions for evidence, when the evidence is as readily available as public statistics and municipal property evaluations, lest we find out when the evidence is gathered that the assumptions are highly debatable."

Souter then noted that the City presented no evidence to justify its argument that a bookstore with video booths produces additional negative effects, especially since the 1977 study treated bookstore/arcade combinations as a single business. Without any information to conclude that the breakup of bookstores and arcades would have any effect on crime, and with the very clear connection between imposing twice the operational costs on the owner of a previously joined bookstore and arcade, Souter concluded that L.A.'s ordinance "sounds like a good strategy for driving out expressive adult businesses. It sounds, in other words, like a policy of content-based regulation."

The case was remanded for both parties to demonstrate the existence or lack of secondary effects, and whether they are caused or not by adult businesses. Given the division on the Court as to how that evidence, whatever it may be, should be evaluated, it is likely the Court will be faced with this case or another one like it in the near future.

Adult Speech on the Web

On May 13, 2002, the Supreme Court issued a decision in *Ashcroft v. ACLU*, No. 00–1293, a case involving a constitutional challenge to the Child Online Protection Act (COPA). The decision is perhaps most notable for what it did not decide, and for the number and variety of opinions generated. Indeed, despite the five separate opinions written, the only thing on which a majority of the Court appeared to agree was the need to leave the injunction against enforcement of COPA intact while the Third Circuit considers more fully the grounds on which the district court originally entered an injunction.

COPA prohibits commercial websites from making available to minors sexually explicit material falling into the legal category of "harmful to minors." The Act further provides that it is an affirmative defense that a website restricts access to "harmful" material to users providing credit cards, adult access codes, or digital certificates that verify age.

The district court entered a preliminary injunction, concluding that the burdens on protected speech outweigh any potential benefits. *See ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999) (*COPA I*). The Third Circuit affirmed, but based its decision on an entirely different rationale. The Court concluded that the Act's incorporation of "contemporary community standards" into the definition of "harmful to minors" rendered the Act unconstitutional, because "[u]nlike a 'brick and mortar outlet' with a specific geographic locale, and unlike the voluntary physical mailing of material from one geographic location to another . . . the Web is not geographically constrained." *ACLU v. Reno*, 217 F.3d 162, 175 (3d Cir. 2000) Thus, "to avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system where any material that might be deemed harmful by the most puritan of communities in any state is shielded by such a verification system." *Id.*

The Supreme Court reversed. Only three of the seven sections of the primary opinion, authored by Justice Thomas,

were joined by four other Justices (Justices O'Connor, Scalia, Breyer, and Chief Justice Rehnquist) and thus constituted an opinion of the Court. The first of those sections (section I) recites the procedural history of the case; the second (section II) recites the history of the Court's obscenity decisions; and the third is a three-paragraph conclusion. In that last section, the Court held "only that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." In doing so, the Court stressed that the scope of its decision was "quite limited," and that the court of appeals must determine on remand "whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis once adjudication of the case is completed below."

The Court divided on a number of critically important questions, including whether COPA incorporates a national (as opposed to local) community standard (section III.A.); whether COPA's focus only on commercial speech and its requirement that the material covered appeal to the prurient interest and be devoid of social value sufficiently address concerns with the use of the community standards test on the Internet (section III.B.); whether prior decisions involving other media in which a publisher could control the communities into which content was distributed control this case (section III.C.); and whether plaintiffs had demonstrated "substantial overbreadth" on the current record (section III.D.).

With respect to the first question, Justices Thomas, Rehnquist, and O'Connor concluded that it was unnecessary to determine whether COPA incorporated a national, as opposed to a local, community standard, noting only that the Constitution does not *mandate* the use of a local standard. Justices O'Connor and Breyer filed separate concurring opinions; Justice O'Connor argued that it was both constitutional and desirable to read COPA as incorporating a national standard; Justice Breyer asserted that a national standard may be constitutionally mandated. Justice Kennedy, in a concurring opinion joined by Justices Souter and Ginsburg, declined to reach the issue, but asserted that even a purportedly national standard is bound to vary by community, and noted that the court below may have been correct in concluding that this raises constitutional questions (albeit questions that could not be resolved without a broader analysis).

Justices Thomas, Rehnquist, and O'Connor also found comfort in Congress's attempt to narrow COPA's reach, concluding that the incorporation of the *Miller* test substantially limits the amount of material covered by the Act and thus minimizes concerns that any application of a local community standard renders the statute unconstitutional. Justices Kennedy, Souter, and Ginsburg disagreed, arguing that, although the use of community standards did not by itself invalidate the Act, it might do so depending on the breadth of the statute—and that issue was to be resolved on remand.

The same three Justices also found unpersuasive Justice Thomas's reliance on the Court's prior decisions in *Hamling* and *Sable*. Those cases, Justice Thomas concluded, stand for the proposition that publishers must tailor their content to the community to which such content is provided. If the Internet does not allow such tailored distribution, Justice Thomas indicated, the speaker should choose a different medium. A majority of the Court disagreed. Justices Kennedy, Souter, and Ginsburg (in concurrence), Justice O'Connor (concurring separately), and Justice Stevens (in dissent) all concluded that the Court's prior decisions in *Hamling* and *Sable* are not applicable, given that an Internet publisher has no ability to restrict distribution of content once it is posted.

Justice Thomas's opinion finally concluded that plaintiffs in this case had not demonstrated that the statute was substantially overbroad on its face. Justices Kennedy, Souter, and Ginsburg agreed that plaintiffs had not demonstrated substantial overbreadth in attacking the community standards prong in isolation, but they asserted that with the development of a fuller record, "[t]here is a very real likelihood that the Child Online Protection Act . . . is overbroad and cannot survive [a facial] challenge." Justice O'Connor also agreed that substantial overbreadth had not yet been demonstrated, but noted that an as-applied challenge might succeed, as might a facial challenge to obscenity statutes on the Internet.

Justice Stevens dissented. The use of community standards, he concluded, necessarily renders the Act overbroad. That factor has typically shielded speech, protecting speakers from the least tolerant members of society. Because speech on the Internet cannot be segregated geographically, however, the community standards prong becomes a sword. This, he concluded, is not permitted by the First Amendment.

The Right to Engage in Door-to-Door Advocacy

Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton, No. 00–1737 (U.S. June 17, 2002), involved a challenge by a society that coordinates the preaching activities of Jehovah's Witnesses throughout the United States. The group brought a facial challenge on First Amendment grounds against an ordinance passed by the Village of Stratton, making it a misdemeanor to engage in door-to-door advocacy without first obtaining a permit. To obtain a permit, a canvasser must apply to the mayor's office and provide, among other information, his or her name, home address, the name and address of his or her employer, and the specific address of each residence at which the canvasser attempts to solicit. The Court considered the challenge with respect to religious proselytizing, anonymous political speech, and the distribution of handbills.

The opinion of the Court was written by Justice Stevens and joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. The Court began by noting that "[f]or over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering." From these decisions, the Court concluded, several themes can be gleaned. First, the value of the speech is significant—door-to-door canvassing and pamphleteering have long been important vehicles for the dissemination of ideas. Second, municipalities do have a legitimate interest in the regulation of solicitations, especially where money is involved. Although these interests are legitimate, they are not paramount: "there must be a balance between these interests and the effect of the regulations on First Amendment rights." Finally, although the majority of prior cases involved Jehovah's Witnesses (whose religious beliefs require them to proselytize door to door) the type of

speech is essential to all manner of "poorly financed" causes.

The Court also noted, but did not resolve, the threshold question of the standard of review to decide the case because "the breadth of speech affected by the ordinance and the nature of the regulation make it clear" that the ordinance is invalid. Nonetheless, the nature of the Court's inquiry makes clear that some sort of intermediate scrutiny was applied.

The Court began by cataloging the interests asserted by the Village—the prevention of fraud and crime, as well as the protection of villagers' privacy—noting that these are "important interests that the Village may seek to safeguard" through regulation. These interests must be balanced, however, against the amount of speech affected and the degree to which the regulation furthers the government's asserted interest. On balance, the Court had no difficulty concluding that the ordinance was unconstitutional.

In particular, the Court was concerned with the breadth of the ordinance, which prohibits contact without a permit by, among others, Camp Fire Girls, political candidates, Trick or Treaters, and Jehovah's Witnesses. That fact alone, the Court concluded, raises serious constitutional concerns. Not only is religious speech affected, speech on political or social topics is also prohibited. Indeed, a resident who spontaneously wished to knock on her neighbor's door to discuss a matter of local concern could not do so lawfully without first obtaining a permit. The Court also concluded that the ordinance was not sufficiently tailored to the Village's stated interests. Concerns about fraud do not apply to the myriad cases in which money is not solicited. Villagers' privacy can as easily be protected by another section (that was not challenged) that requires canvassers to respect posted "No Solicitation" signs. And the ordinance would not prevent criminal activity, as "it seems unlikely that the absence of a permit would preclude criminals from knocking on doors."

In a concurring opinion joined by Justices Souter and Ginsburg, Justice Breyer emphasized that the Village had never before relied on the "crime prevention" rationale and, in any event, that rationale is "intuitively implausible." Joined by Justice Thomas, Justice Scalia filed an opinion concurring in the judgment, objecting not to the conclusion of the Court, but to the Court's description of some of the categories of people who would be offended or silenced by the ordinance. Chief Justice Rehnquist dissented. In his view, the Village's desire to prevent crime was a compelling rationale, as evidenced by a recent double murder in Hanover, New Hampshire (perpetrated by two teenagers who gained access to a residence by purporting to be conducting an environmental survey). Because the ordinance does not prohibit door-to-door canvassing, does not appear to grant discretion in the granting of a permit, and is not vague, Chief Justice Rehnquist would have upheld it as consistent with the First Amendment.

Endnote

1. 508 U.S. 49 (19).