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Supreme Court 2000-2001 Term: First Amendment Cases

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Supreme Court 2000-2001 Term: First Amendment Cases

Cover Page Footnote

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SUPREME COURT 2000-2001 TERM: FIRST AMENDMENT CASES

*Erwin Chemerinsky*¹

I. INTRODUCTION

The Supreme Court decided eight cases concerning the First Amendment this past term.² Before I begin discussing the most significant of these cases, I wish to identify some general themes. One is what a large part of the docket the First Amendment is for the Supreme Court. Of the seventy-eight cases decided last term by the Court, eight of them dealt with the First Amendment. The year before that the Supreme Court decided seventy-three cases, and ten of those dealt with the First Amendment. My guess is that in no other court in the country does the First Amendment occupy such a large percentage of the docket. In terms of all of the areas of constitutional or statutory law, it is the largest single component of the Supreme Court's docket. The next largest component of the docket is Fourth Amendment cases. While there were eighteen First Amendment Supreme Court cases over the last two years, there were just nine Fourth Amendment cases in the same two year period; many fewer.³

What is also notable about the large number of First Amendment cases the Supreme Court hears is how the number has remained constant over the last decade or two, while the overall Supreme Court docket has shrunk. Presently the Supreme Court is deciding only half as many cases as it did a decade ago, and a third as many as it decided in the years before that. Exactly one decade ago, in the 1990-1991 term, the Supreme Court decided 157 cases. The year before that it was 162 cases. In contrast, for the past two years the Court decided only seventy-eight and seventy-three cases, respectively.

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² The focus of this article is cases decided during the October 2000 Term.

³ The two years referred to here are October Terms 1999 and 2000.

For the entire decade of the 1980s, the Supreme Court averaged just fewer than 160 decisions a term, whereas for the entire decade of the 1990s, the Court averaged just over eighty decisions per term. This reduction, in itself, is significant. It means that more major legal issues go a longer time before being resolved, and more conflicts among the circuits and in the states exist for a longer time before being settled. In light of this reduction in the docket, the fact that the First Amendment caseload has stayed so constant is also, in itself, significant. It may be because the First Amendment holds intellectual interest for the Justices. It may also be because the First Amendment directly or indirectly touches so many other issues of law.

The other general comment I wish to make about the cases in the First Amendment area is in terms of the ideological division of the Court. There is a real difference between the division of the Court in the cases concerning the speech clauses and the cases concerning the religion clauses. With regard to the speech clauses, the current Court does not follow a consistent ideological pattern. In so many areas of constitutional law, it is easy to predict what the Supreme Court is going to decide based on the ideology of the Justices. For instance, the recent federalism cases have all been five to four decisions; the five in the majority being Chief Justice Rehnquist, Justices O'Connor, Scalia, Kennedy and Thomas, and the four dissenters being Justices Stevens, Souter, Ginsburg and Breyer. This kind of clear division is not apparent in the freedom of speech cases. In fact, right now, often the most conservative Justices on the Court, Rehnquist, Scalia and Thomas, are the most pro-speech Justices on the Court. This began to develop in the early 1990s and, if anything, has become more evident recently.

On the other hand, in the cases concerning the religion clauses, the conservatives do have a consistent position. Their view tends to allow much more government involvement with religion and religion's involvement in government. Examples include allowing more aid to parochial schools and allowing for religious groups' presence in the schools. In this area, it is the more liberal Justices on the Court who tend to be the dissenters. I will show you how this theme plays out by focusing on the cases of the last few years. Finally, I will also alert you to the cases on the docket for the present term concerning the speech and religion clauses.

II. THE SPEECH CLAUSE CASES

Bartnicki v. Vopper

Five speech cases from last term are particularly significant. I think it is notable how they are each from different areas of free speech law, and each therefore may affect different areas of your practice. The first, and the one that I regard as the most important concerning speech, is *Bartnicki v. Vopper*.⁴ This case involved the tension between free speech and the press, on the one hand, and privacy on the other. It has interesting facts. Gloria Bartnicki worked for the Pennsylvania State Education Association.⁵ Her job was to help the local teacher's unions around the state as they were negotiating new contracts.⁶ She was in Wyoming, Pennsylvania, to help the teacher's union there.⁷ One day she was in her car talking on her cell phone and she was speaking to the president of the local teacher's union. He was at home and he was talking on his land line telephone. It is clear they thought they were having a private conversation. They were discussing the negotiation strategy relative to the school board. At one point in the conversation, the president of the local teacher's union, Peter Kane, said, if the school board didn't agree to their demands, "we're gonna to have to go to their, their homes. . . . To blow off their front porches. . . ." ⁸ Clearly, this statement was hyperbole in the context of a private conversation.

Without their knowledge, their conversation was illegally intercepted and illegally recorded.⁹ The reception recording violated both federal and state wiretapping laws.¹⁰ A copy of the tape ended up in the hands of the president of a local taxpayer's organization.¹¹ The taxpayer's organization was opposing the pay

⁴ 532 U.S. 514 (2001).

⁵ *Id.* at 518.

⁶ *Id.*

⁷ *Id.*

⁸ *Bartnicki*, 532 U.S. at 518-19.

⁹ *Id.* at 518.

¹⁰ *Id.* at 520 (violating Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. § 2511(1)(a) and (c) (1994 & Supp. V); 8 PA. CONS. STAT. § 5703 (2000)).

¹¹ *Id.* at 519.

raise for the teachers.¹² Nothing in the record indicates how he came to have a copy of the tape; he said it had just appeared.¹³ He then gave the tape to Fred Vopper, who was a radio talk show host on a local talk show. Vopper played the tape on his radio talk show.¹⁴ Subsequently, Bartnicki and Kane sued the radio station and Vopper, the radio talk show host, under a whole series of federal and state causes of action.¹⁵ The defendants raised the First Amendment as their defense.¹⁶ They claimed that the broadcast of the tape was activity protected by freedom of speech and freedom of the press.¹⁷

The Supreme Court, in a six to three decision, ruled in favor of the defendants.¹⁸ Justice Stevens wrote the opinion for the Court.¹⁹ Chief Justice Rehnquist wrote the dissent, joined by Justices Scalia and Thomas.²⁰ Justice Stevens, writing for the majority, began by emphasizing the narrowness of the Court's holding.²¹ He concluded, in the last paragraph, by again talking about how narrow the Court's ruling was.²² Justice Stevens said that what the press, the radio station and Vopper did was protected by the First Amendment for two reasons. First, the radio station and its personnel did not participate in the illegal interception or illegal recording of the conversation.²³ Second, Justice Stevens said, the tape involved a matter of public importance; it concerned labor management negotiations between a teacher's union and a school board.²⁴ The Court seems to have borrowed from the doctrine of free speech rights of public employees when it is speaking about matters of public concern. Here, the Court is using the doctrine in a case regarding privacy and the First Amendment.

¹² *Id.*

¹³ *Bartnicki*, 532 U.S. at 519.

¹⁴ *Id.*

¹⁵ *Id.* at 519-20; *id.* at 520 (seeking actual damages, statutory damages, punitive damages, attorney fees and costs).

¹⁶ *Id.* at 520.

¹⁷ *Id.*

¹⁸ *Bartnicki*, 532 U.S. at 535.

¹⁹ *Id.* at 517.

²⁰ *Id.* at 541.

²¹ *Id.* at 517.

²² *Id.* at 535.

²³ *Bartnicki*, 532 U.S. at 535.

²⁴ *Id.*

Justice Stevens said that in a context such as this one, where the media does nothing illegal in intercepting and recording the conversation, and the contents of the recording are a matter of public concern, then broadcasting the tape is protected by the First Amendment.²⁵

Justice Breyer wrote a separate concurring opinion joined by Justice O'Connor.²⁶ He said he was writing separately to express the narrowness of the Court's holding.²⁷ He said this tape involved a matter of public importance because there were threats of violence on the tape; when Kane said they were going to the president of the school board's house to blow away his front porch, that was a threat of violence.²⁸ Although it was clearly hyperbole and a very private conversation, Justice Breyer said the First Amendment protects under these circumstances.²⁹

I emphasize that both the majority and the concurring opinion stress the narrowness of the Court's decision. However, I do not think the decision is so narrow, and I think it could have real effects in practice. Before *Bartnicki*, the Supreme Court had considered the balance of freedom of speech and press versus privacy only in the context of information that had been gained from government records.³⁰ In 1975, in a case called *Cox Broadcasting v. Cohn*, the Court dealt with a Georgia law that prohibited disclosing a rape victim's identity without her consent.³¹ A reporter broadcasted a victim's name that he had obtained from readily available court records.³² The action was brought against the reporter and the station.³³ The Supreme Court said that since the information had been lawfully obtained from government records and it had been truthfully reported, there could be no liability.³⁴

²⁵ *Id.*

²⁶ *Id.* (Breyer, J., concurring).

²⁷ *Id.*

²⁸ *Bartnicki*, 532 U.S. at 536.

²⁹ *Id.* at 540.

³⁰ See *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

³¹ *Cox Broadcasting*, 420 U.S. at 471-72.

³² *Id.* at 472-73.

³³ *Id.* at 474.

³⁴ *Id.* at 496.

In a more recent case from 1989, *Florida Star v. B.J.F.*, the Court considered a similar statute whereby Florida also prohibited disclosing a rape victim's identity without her consent.³⁵ In *Florida Star*, the newspaper reporter obtained the rape victim's name from police records that were lawfully available to the press, and the victim's name was published in the newspaper.³⁶ An action for invasion of privacy was brought against the sheriff's department and the newspaper.³⁷ The Supreme Court again ruled in favor of the press, saying that since the information was lawfully gained from government records and truthfully reported there could be no liability for invasion of privacy.³⁸

Before *Bartnicki*, the Supreme Court had never dealt with privacy claims where the information came from non-governmental sources. Many lower courts had interpreted *Cox Broadcasting* and *Florida Star* narrowly, based upon the special circumstance of government records being available and freely reportable.³⁹ Now the Supreme Court has extended this holding to cover non-governmental sources.⁴⁰ In addition, no prior case had ever dealt with illegally obtained information. There was no doubt in this case that the intercepted recording was illegal.⁴¹ Nonetheless, the Supreme Court said that the freedom of speech and press rights trump the privacy claims.⁴² Chief Justice Rehnquist, in dissent, lamented that this holding might chill speech; people might be much less willing to have open conversations on cellular telephones knowing that their conversations could be broadcast.⁴³ This, according to Chief Justice Rehnquist, will have a negative effect in terms of the goals of the First Amendment.⁴⁴ The majority, of course, rejected that argument.

³⁵ 491 U.S. at 524.

³⁶ *Id.* at 527.

³⁷ *Id.* at 528.

³⁸ *Id.* at 541.

³⁹ See, e.g., *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *vacated by* 532 U.S. 1050 (2001).

⁴⁰ *Bartnicki*, 532 U.S. at 514.

⁴¹ *Id.* at 521.

⁴² *Id.* at 535.

⁴³ *Id.* at 541 (Rehnquist, C.J., dissenting).

⁴⁴ *Id.* at 542.

Legal Services Corp. v. Velazquez

The second case regarding speech is *Legal Services Corp. v. Velazquez*.⁴⁵ I believe that this case also may have a practical effect in terms of the litigation that will result from it. As you may know, Congress has put restrictions on what lawyers who receive Federal Legal Services funds can do.⁴⁶ For example, lawyers who receive money from the Federal Legal Services Corporation ("FLSC"), may not bring class action suits, may not bring challenges to state laws restricting abortions, and may not represent undocumented immigrants.⁴⁷

Velazquez concerned a certain restriction that Congress had placed on lawyers which prohibited lawyers receiving FLSC money from representing clients who wanted to bring challenges to the validity of welfare regulations and welfare laws.⁴⁸ Those receiving FLSC money could represent individual claimants, but only insofar as the representation was to claim benefits for them under the existing law.⁴⁹ The federal law said that those who take FLSC money were not allowed to bring a challenge to the validity of the welfare statutes or regulations.⁵⁰

The Supreme Court, in a five to four decision, declared this restriction unconstitutional.⁵¹ Justice Kennedy said that Congress, by means of this law, had imposed a viewpoint restriction on speech; Congress had said that lawyers who take FLSC money could not make certain arguments.⁵² Justice Kennedy said, in essence, that what the government was trying to do was to control both sides of the litigation.⁵³ The government, Kennedy reasoned,

⁴⁵ 531 U.S. 533 (2001).

⁴⁶ *Id.* at 536-38.

⁴⁷ *Id.* at 537-38.

⁴⁸ *Velazquez*, 531 U.S. at 538. The relevant portion of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 504, 110 Stat. 1321-53, prohibits funding of any organization "that initiates legal representation or participants in any other way, in litigation lobbying, or rule making involving an effort to reform a federal or state welfare system"

⁴⁹ *Id.*

⁵⁰ *Id.* at 538-39.

⁵¹ *Id.* at 549.

⁵² *Id.* at 543.

⁵³ *Velazquez*, 531 U.S. at 543 ("[T]he Government seeks to use an existing medium of expression and to control it. . . .").

already had its lawyer, the one to defend the regulations, and now the government was trying to control what the challenger's lawyer could say.⁵⁴

It is interesting to note how the Court distinguished this case from the decision a decade earlier of *Rust v. Sullivan*.⁵⁵ *Rust* was a 1991 case that challenged a federal law that said a Planned Parenthood that received federal funds could not provide abortion counseling or abortion referrals to its clients.⁵⁶ The Supreme Court, in *Rust*, upheld the federal law in a five to four decision.⁵⁷ Chief Justice Rehnquist, writing for the Court, said that when the government puts up the money, the government could put conditions on the funds.⁵⁸ If the government wants to fund Planned Parenthood only on the condition that if they take the money they may not do abortion counseling and abortion referrals, the government is permitted to do that.⁵⁹

In *Velazquez*, the attorneys for the United States argued that the restrictions with regard to legal services lawyers are no different from those upheld in *Rust*; it is Congress deciding what it will and what it will not fund.⁶⁰ Justice Kennedy, however, expressly distinguished *Rust*, saying that in *Rust* the government was the speaker, and when the government is the speaker, it can control its message.⁶¹ According to the Court, in the context of *Velazquez*, it is the private lawyer who is the speaker, and if the legal services lawyer is the speaker, then the government cannot control what that other speaker says.⁶² To me that seems a questionable distinction. I doubt that the doctors or the employees

⁵⁴ *Id.* at 542.

⁵⁵ 500 U.S. 173 (1991).

⁵⁶ *Id.* at 177.

⁵⁷ *Id.* (Rehnquist, C.J., delivered the opinion of the court in which Scalia, White, Kennedy, and Souter, JJ., joined. Blackmun, Marshall, Stevens, and O'Connor, JJ., dissented).

⁵⁸ *Id.* at 194.

⁵⁹ *Id.* at 196.

⁶⁰ *Velazquez*, 531 U.S. at 540-41.

⁶¹ *Id.* at 541.

⁶² *Id.* at 542 ("[I]t does not follow. . . that viewpoint-based restrictions are proper when the government does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.") (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)).

of Planned Parenthood saw themselves as government employees or government speakers any more than a lawyer who receives legal services money sees himself or herself as a government employee or speaker. Yet, the Court does not overrule *Rust*, but rather distinguishes it.⁶³

I think these cases reflect an inconsistency in First Amendment jurisprudence, and a general confusion in the area of the so-called 'unconstitutional conditions' doctrine. The 'unconstitutional conditions' doctrine says the government cannot condition a benefit on someone having to give up a constitutional right.⁶⁴ When I teach First Amendment law I show my students that the unconstitutional condition cases are just 'flat out' inconsistent; at times the Court finds conditions impermissible, and in other seemingly indistinguishable cases, the Court finds the conditions permissible. I would line up *Velazquez* and *Rust* as conflicting cases that I, at least, cannot reconcile. I believe that a result of *Velazquez* will be challenges to many of the other restrictions on legal services lawyers. If this particular restriction is impermissible, then what about the limit on bringing class action suits, or challenges to abortion laws, or the ability to represent undocumented immigrants? My own prediction (it is free, and worth what it costs), is that the Court is likely to say that restrictions that are subject-matter based violate the First Amendment, but restrictions that are content-neutral are permissible.

Take, for example, the restriction that says that those who receive FLSC money cannot bring challenges to abortion laws; that is a content-based, or viewpoint-based, restriction on speech. The Supreme Court repeatedly has emphasized that content-based restrictions on speech have to meet strict scrutiny.⁶⁵ In contrast,

⁶³ *Id.* at 543.

⁶⁴ *See, e.g., Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (holding, in the context of government employment, "our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected. . . freedom of speech' even if he has no entitlement to that benefit.") (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

⁶⁵ *See, e.g., United States v. Playboy Entm't Group*, 529 U.S. 803, 812 (2000) (explaining that the government's restriction on programming content "can only stand if it satisfies strict scrutiny. . . . If a statute regulates speech based on its

the restriction on bringing class action suits is content-neutral, and content-neutral restrictions on speech need only meet an intermediate scrutiny test.⁶⁶ I think the Court is more likely to uphold content-neutral restrictions.

Shaw v. Murphy

The third speech case is *Shaw v. Murphy*,⁶⁷ which is an important case for those involved in prisoner litigation. *Shaw* involved a prisoner at one institution who sent a letter containing legal advice to a prisoner at another institution.⁶⁸ The prison authorities intercepted the letter and did not deliver it.⁶⁹ The writer of the letter sued, arguing that the actions of the prison officials violated his First Amendment rights.⁷⁰ The United States Court of Appeals for the Ninth Circuit ruled in favor of the prisoner, holding that this was a violation of the First Amendment.⁷¹

The statistics of the Ninth Circuit reversal rate by the Supreme Court is very high and, if ever that is true, it seems to be when the Ninth Circuit is ruling in favor of prisoners. Here, the Court reversed the Ninth Circuit, and reversed it unanimously.⁷² Justice Thomas, writing for the Court, said that when courts evaluate prisoner's free speech claims, they should use only the very deferential rational-basis test; the government should prevail as long as its actions are rationally related to a legitimate penological interest.⁷³ This is the test that the Supreme Court

content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.") (internal citations omitted).

⁶⁶ See, e.g., *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 186 (1997) (setting forth the intermediate scrutiny test for content-neutral cable regulations).

⁶⁷ 532 U.S. 223 (2001).

⁶⁸ *Id.* at 225-26. Murphy sent Tracy a letter, which included the following: "I do want to help you with your case against Galle. It wasn't your fault and I know he provoked whatever happened! Don't plead guilty . . ." *Id.* at 226.

⁶⁹ *Id.* at 226.

⁷⁰ *Id.* at 226-27.

⁷¹ *Id.* at 227 ("[The court] premised its analysis on the proposition that 'inmates have a First Amendment right to assist other inmates with their legal claims.'") (citing *Shaw v. Murphy*, 195 F.3d 1121, 1124 (9th Cir. 1999)).

⁷² *Shaw*, 532 U.S. at 224.

⁷³ *Id.* at 225, 228, 229.

announced in *Turner v. Safley*,⁷⁴ to be used generally when evaluating prisoners' constitutional claims.⁷⁵ Justice Thomas stressed the need for judicial deference to prison authorities.⁷⁶

The extent of the deference to the government is reflected in the fact that Justice Thomas never explained what the government's legitimate interest was in this case. What really was the permissible purpose in keeping a prisoner from sending a letter containing legal advice to an inmate in another institution? There was no claim by the government that the letter was in any way inflammatory. There was no allegation that the letter was going to disrupt prison order or discipline. The government did not even claim that the legal advice was bad. Without even explaining the government's permissible purpose, the Court nonetheless reversed the Ninth Circuit and ruled in favor of the defendants.⁷⁷ I believe that the government does have to articulate a legitimate purpose. I do not think this case will be a precedent in saying the government does not have to have a permissible purpose, but I do think that the case reflects the tremendous deference by this Court to prison authorities, and the lack of concern it has for prisoner's free speech claims.

***Federal Election Comm'n v. Colorado Republican
Federal Campaign Committee***

The fourth speech case is *Federal Election Comm'n v. Colorado Republican Federal Campaign Committee*.⁷⁸ In order to understand this case, it must be remembered that for the last quarter century the Supreme Court has drawn a distinction between government restrictions of contributions in election campaigns as opposed to government restrictions of expenditures in election campaigns. In *Buckley v. Valeo*,⁷⁹ in 1976, the Supreme Court said that spending money in an election campaign is speech protected

⁷⁴ 482 U.S. 78 (1987).

⁷⁵ *Id.* at 89.

⁷⁶ *Shaw*, 532 U.S. at 228-30; *id.* at 230 ("Under *Turner* and its predecessors, prison officials are to remain the primary arbiters of the problems that arise in prison management.").

⁷⁷ *Id.* at 231-32.

⁷⁸ 533 U.S. 431 (2001).

⁷⁹ 424 U.S. 1 (1976).

by the First Amendment.⁸⁰ The Court in *Buckley* also said, however, that the government does have a compelling interest in restricting the size of campaign contributions.⁸¹ The Court said that large contributions risk corruption and the appearance of corruption.⁸² However, the *Buckley* Court said, the government does not have the same compelling interest in restricting expenditures.⁸³ The Court said that expenditures are more clearly tied to speech; expenditures provide for the speech,⁸⁴ and expenditures do not have the same risk of corruption and appearance of corruption.⁸⁵

Over and again, in the last twenty-five years, the Court has reaffirmed this distinction between contribution limits being permissible and expenditure limits being impermissible.⁸⁶ A year ago, in 2000, in a case called *Nixon v. Shrink Missouri Political Action Committee*,⁸⁷ the Supreme Court reaffirmed the distinction.⁸⁸ That case involved a Missouri law that restricted contributions in state elections.⁸⁹ The law limited contributions for statewide offices, such as Governor and Attorney General, to a thousand dollar maximum, and limited contributions for more local candidates, such as for the state assembly, to two hundred and fifty dollars.⁹⁰ The Supreme Court, in a six to three decision, upheld the Missouri law.⁹¹ Justice Souter wrote the opinion for the Court and

⁸⁰ *Id.* at 51.

⁸¹ *Id.* at 29.

⁸² *Buckley*, 424 U.S. at 26 ("It is unnecessary to look beyond the Act's primary purpose – to limit the actuality and appearance of corruption resulting from large individual financial contributions – in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation.").

⁸³ *Id.* at 45.

⁸⁴ *Id.* at 48.

⁸⁵ *Id.* at 45-47.

⁸⁶ See *FEC v. Colorado Republican Party*, 533 U.S. 431 (2001); see also *Nixon v. Shrink Mo. Political Action Comm.*, 528 U.S. 377 (2000); *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986); *Bowsher v. Synar*, 478 U.S. 714 (1986); *FEC v. National Conservative P.A.C.*, 470 U.S. 480 (1985).

⁸⁷ 528 U.S. 377 (2000).

⁸⁸ *Id.* at 382.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 398.

expressly relied on and reaffirmed *Buckley*,⁹² saying that because the law concerned a contribution limit, it was permissible.⁹³ The Court said that it is not going to get into the business of deciding what specific amounts may be justified in a given race, therefore the Court must defer to the political process.⁹⁴

Three Justices in the *Nixon* case, Scalia, Kennedy, and Thomas, dissented.⁹⁵ The dissent argued that the Court should overrule the *Buckley* distinction.⁹⁶ They said contributions in election campaigns are no different from expenditures.⁹⁷ The dissent reasoned that *Buckley*'s allowance for limits on contributions should be over-turned, that both types of limits are invalid restrictions on speech.⁹⁸ Interestingly, in *Nixon*, Justice Stevens wrote a concurring opinion in which he said he thought *Buckley* was wrongly decided in not allowing expenditure limits in addition to contribution limits.⁹⁹ He said he saw no difference between contributions and expenditures, but he would go the opposite way of the dissent and allow expenditure limits.¹⁰⁰ So it is clear that in *Nixon* there were five Justices who wanted to continue *Buckley*,¹⁰¹ one that would overrule it and permit expenditure limits,¹⁰² and three that would overrule it and not allow contribution limits.¹⁰³

That brings us to the *Colorado Republican* case.¹⁰⁴ What was involved was the question of whether coordinated expenditures by a political party on behalf of the candidate should be treated the same as contributions.¹⁰⁵ The Federal Election Campaign Act says that there is no difference between coordinated

⁹² *Nixon*, 528 U.S. at 382.

⁹³ *Id.* at 390.

⁹⁴ *Id.* at 395-97.

⁹⁵ *Id.* at 380.

⁹⁶ *Id.* at 406 (Kennedy, J., dissenting); *id.* at 410 (Thomas, J., dissenting).

⁹⁷ *Nixon*, 528 U.S. at 406-07; *id.* at 413.

⁹⁸ *Id.*

⁹⁹ *Id.* at 398-99 (Stevens, J., concurring).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 380-88 (Justice Souter, Chief Justice Rehnquist and Justices Stevens, O'Connor, Ginsburg, and Breyer).

¹⁰² *Nixon*, 528 U.S. at 399 (Justice Stevens).

¹⁰³ *Id.* at 406 (Justice Kennedy); *id.* at 410 (Justices Thomas and Scalia).

¹⁰⁴ 533 U.S. at 431.

¹⁰⁵ *Id.* at 437.

expenditures for a candidate and contributions to that candidate.¹⁰⁶ Indeed, what the Federal Election Commission has always said is, if coordinated expenditures were permissible it would be easy to circumvent contribution limits.¹⁰⁷ For example, a candidate would merely have to get a political action committee together, get it to raise the money, and then coordinate expenditures. The Supreme Court, in a five to four decision, upheld the regulation of the Federal Election Commission and held that it is permissible under the First Amendment to treat coordinated expenditures the same as contributions.¹⁰⁸ Justice Souter wrote the opinion for the Court, joined by Justices Stevens, O'Connor, Ginsburg, and Breyer.¹⁰⁹ The four dissenters were Chief Justice Rehnquist, Justices Scalia, Kennedy and Thomas.¹¹⁰

Justice Souter's majority opinion is unremarkable in that it is in accordance with the law as it stands. He goes back to *Buckley* and reaffirms the distinction between contributions and expenditures.¹¹¹ He says that coordinated expenditures are practically no different from contributions.¹¹² What I think is most notable about the case is that now Chief Justice Rehnquist has joined with Justices Scalia, Kennedy and Thomas and perhaps could be a fourth vote in the overruling *Buckley*, and in prohibiting the government from setting contribution limits. The dissent says that *Buckley* should be overruled,¹¹³ and both contribution and expenditure limits should be impermissible.¹¹⁴ What that means is that for right now, the law is set and stable, but perhaps with one vacancy on the Court, if either Justice Stevens or Justice O'Connor leaves the Court, then there will possibly be a fifth vote to join the

¹⁰⁶ 2 U.S.C. § 441a(a)(7)(B)(i) (2000) (the definition of "contribution" includes "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents. . .").

¹⁰⁷ *Colorado Republican Comm.*, 533 U.S. at 446.

¹⁰⁸ *Id.* at 465.

¹⁰⁹ *Id.* at 436.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 440-41.

¹¹² *Colorado Republican Comm.*, 518 U.S. at 447.

¹¹³ *Id.* at 465 (Thomas, J., dissenting).

¹¹⁴ *Id.* at 467.

dissenters, and subsequently, a major change in the law concerning campaign finance.

Lorillard Tobacco Co. v. Reilly

The fifth and final speech case I wish to discuss from last term is *Lorillard Tobacco Co. v. Reilly*.¹¹⁵ Many state and local governments have adopted laws and regulations concerning tobacco advertising. This case involves a Massachusetts regulation that says there cannot be outdoor advertisements, such as billboards, for tobacco products within a thousand feet of a school or playground within Massachusetts.¹¹⁶ It also says, as to stores selling tobacco products, any advertisements at the point of sale have to be five feet above ground level so as not to be at eye level with children.¹¹⁷

The Supreme Court, in a five to four decision, declared the regulations impermissible.¹¹⁸ Justice O'Connor wrote the opinion for the Court, drawing a distinction in terms of legal analysis between restrictions on cigarette advertising as opposed to restrictions on smokeless tobacco advertising.¹¹⁹ The Court declared both of these challenged regulations invalid, but, it said, in terms of legal analysis, a distinction needed to be drawn.¹²⁰ The reason is, there is already a federal statute that regulates cigarette advertising. The statute requires that advertisements of tobacco products and cigarettes must have warnings and that packages of cigarettes must have warning labels.¹²¹ Congress's purpose in enacting this law was to prevent the states from enacting conflicting regulations regarding cigarette advertisements.¹²² The Court reasoned that Congress wished to create national uniformity

¹¹⁵ 533 U.S. 525 (2001).

¹¹⁶ *Id.* at 534-36.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 565, 566. The portion of the regulation pertaining to cigar sales was upheld. *See id.* at 570.

¹¹⁹ *Id.* at 553.

¹²⁰ *Id.* at 531.

¹²¹ Federal Cigarette Labeling and Advertising Act, 79 Stat. 282, as amended 15 U.S.C. §§ 1331-1341 (2000).

¹²² *Lorillard*, 533 U.S. at 541.

concerning the law regulating cigarette advertising.¹²³ In light of this intent of Congress, federal law preempts a state statute that attempts to regulate cigarette advertising.¹²⁴

There are two interesting things to note about this case. One, is how the Court is clear that any attempt by state and local governments to regulate cigarette advertising is pre-empted by federal law.¹²⁵ This invalidates laws in Los Angeles, California, and in many states around the country that are trying to regulate cigarette advertising in some way. The dissent argues that what the state and local governments are trying to do is to regulate the time, place and manner of the advertisements.¹²⁶ According to the dissent, a restriction on outdoor advertising is really a zoning law, the kind that state and local governments often adopt.¹²⁷ The majority, however, rejects that characterization, and says it is a regulation of cigarette advertising that is pre-empted by federal law.¹²⁸

A second observation is the lack of concern for state's rights in the Court's preemption decision. The conservative majority of the current Court is very pro-state's rights when it comes to narrowing the scope of Congress' power under Section Five of the Fourteenth Amendment, in expanding sovereign immunity, and in invoking the Tenth Amendment.¹²⁹ One would think that a Court who leans so heavily towards state's rights would also narrow the federal preemption doctrine. One way to empower state and local governments is to have a much more limited preemption doctrine, but that has not been the case with this Court. In almost every case, of approximately ten heard in the

¹²³ *Id.* at 542-43.

¹²⁴ *Id.* at 542.

¹²⁵ *Id.* at 550.

¹²⁶ *Id.* at 592-94 (Stevens, J., dissenting).

¹²⁷ *Lorillard*, 533 U.S. at 594.

¹²⁸ *Id.* at 548-49.

¹²⁹ *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding that Congress cannot expand or create new constitutional rights while exercising its remedial § 5 Fourteenth Amendment legislative powers); *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (holding that Congress may not abrogate the state's sovereign immunity unless it is acting pursuant to its § 5 Fourteenth Amendment remedial power); *Printz v. United States*, 521 U.S. 898, 933 (1997) (using the Tenth Amendment to invalidate Congress's attempt to commandeer a state's executive official in order to carry out or execute a federal regulation).

past two years where preemption has been raised, the Supreme Court has ruled against the state or local government, and has found federal preemption.¹³⁰ This is one of those cases.

As to cigars and smokeless tobacco, there is no federal preemption because the federal law deals only with cigarette advertising.¹³¹ Justice O'Connor, writing for the majority, said the Court must analyze these statutes as restrictions on commercial speech under the First Amendment.¹³² Justice O'Connor reiterated the test used in commercial speech cases: a government regulation of commercial speech must be narrowly tailored and substantially related to an important governmental purpose.¹³³ If you are involved in commercial speech litigation on either side, it is now clear that this is the test: intermediate scrutiny. Justice O'Connor's majority opinion immediately concedes that the government has an important purpose here: discouraging consumption of tobacco products by children.¹³⁴ Therefore, the Court invalidated the laws on the ground that they were not narrowly tailored and substantially related to that interest.¹³⁵

As to the restrictions involving outdoor advertising and billboards, Justice O'Connor pointed out that the record showed that over ninety percent of all of the land in cities like Boston or Springfield was within a thousand feet of a school or a playground.¹³⁶ Justice O'Connor said that to prohibit tobacco

¹³⁰ See, e.g., *United States v. Locke*, 529 U.S. 89, 94 (2000) (holding that federal law preempted state regulation of oil tankers); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (holding that under conflict preemption, the state foreign trade law undermined the intended purpose of, and was preempted by, the federal Foreign Operations, Export Financing, and Related Programs Appropriations Act); *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (holding that respondent's state law claim was banned by the Warsaw Convention because it did not qualify as an "accident" under the treaty).

¹³¹ *Lorillard*, 533 U.S. at 553.

¹³² *Id.*

¹³³ *Id.* at 554 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

¹³⁴ *Id.* at 555.

¹³⁵ *Id.* at 561-65.

¹³⁶ *Lorillard*, 533 U.S. at 562.

advertising in such a large part of a city was not narrowly tailored to achieve the government's objective.¹³⁷

As to the restriction on point of sale advertisements that must be five feet or more above ground level, the Court said that that restriction also was not substantially related to the goal of protecting children.¹³⁸ Justice O'Connor said that there was nothing in the record that showed that children cannot see five feet above ground level, even if it is not exactly at eye level, so there is no indication that this restriction significantly furthers the government's goal of discouraging children to consume tobacco products.¹³⁹ It is a very broad decision limiting the ability of state and local governments to regulate tobacco products.

III. PENDING SPEECH CASES

I want to say a few words about the cases that are on the docket for this term concerning speech. Interestingly, what I think are the three most important speech cases are all sexual speech cases; they all involve the ability of the government to regulate sexually oriented expression. In this area, the Rehnquist Court has been more difficult to predict. In some cases, the Supreme Court has deferred to local governments and state governments in the regulation of sexual speech. An example from the year 2000 is *City of Erie v. Pap's A.M.*,¹⁴⁰ which was a case concerning nude dancing. Erie, Pennsylvania, was concerned about a nude-dancing establishment, so it adopted an ordinance prohibiting public nudity. It was clear that the goal of that ordinance was to shut down the 'Kandy Land' dance establishment.¹⁴¹ In fact, 'Kandy Land' closed down before the case got to the Supreme Court.¹⁴² I thought, for sure, the Supreme Court was going to dismiss the case as moot. When it still had briefings and oral arguments I said, 'maybe the Justices want to see the pictures, then they will dismiss

¹³⁷ *Id.*

¹³⁸ *Id.* at 566.

¹³⁹ *Id.*

¹⁴⁰ 529 U.S. 277 (2000).

¹⁴¹ *Id.* at 292.

¹⁴² *Id.* at 287.

the case.’ However, Justice O’Connor said that since the business still had the license and could reopen the club at any time, the case was not moot.¹⁴³

The Court in *City of Erie*, in a six to three decision, ruled in favor of the government and upheld the ordinance.¹⁴⁴ Justice O’Connor wrote for the plurality of four. She said that the government has an important interest in stopping the secondary effects of a nude-dancing establishment.¹⁴⁵ She said that nude dancing is alleged to bring crime into the area and that that is a sufficient non-speech justification to uphold the law.¹⁴⁶ As the dissent points out, however, there was nothing in the record whatsoever to support the idea that this nude-dancing establishment increased crime.¹⁴⁷ Justice O’Connor responded to that by saying that there does not have to be proof of that in the record, that city council members can take into account their own personal experiences, (I think she meant in observing the crime, not in visiting the dance club), and on that basis, can close it down.¹⁴⁸ I think the *City of Erie* case is significant in giving the government much more latitude to regulate sexual speech. Justice Scalia wrote an opinion concurring in the judgment, joined by Justice Thomas, saying that the law prohibiting public nudity is a neutral law of general applicability, so the speech clause cannot be used to challenge it.¹⁴⁹

At other times, however, the Court has been much more protective of sexual speech. An example, also from the year 2000, is a case called *United States v. Playboy Enterprises*.¹⁵⁰ This case involved a challenge to part of the Cable Act that said that cable companies had to prevent ‘signal bleed’ of sexual images.¹⁵¹ Signal bleed occurs when people can see images on cable channels

¹⁴³ *Id.* (“A case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.”).

¹⁴⁴ *Id.* at 283.

¹⁴⁵ *City of Erie*, 529 U.S. at 296.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 321 n.4 (Stevens, J., dissenting).

¹⁴⁸ *Id.* at 297-98.

¹⁴⁹ *Id.* at 307-08 (Scalia, J., concurring).

¹⁵⁰ 529 U.S. 803 (2000).

¹⁵¹ *Id.* at 806 (citing 47 U.S.C. § 561 (1994 & Supp. III)).

they do not subscribe to.¹⁵² The law said that the cable companies either had to completely prevent the signal bleed of sexual images or they had to restrict adult programming to the late night hours.¹⁵³ The Supreme Court, in a five to four decision, declared this part of the Act unconstitutional.¹⁵⁴ Justice Kennedy writing for the Court said that the provision was a content-based restriction on speech;¹⁵⁵ the law prohibits signal bleed of sexual images but not any other kind of images.¹⁵⁶ Justice Kennedy said that content-based restrictions have to meet the strict scrutiny test,¹⁵⁷ and this law does not.¹⁵⁸ This was the first time the Supreme Court had ever used strict scrutiny in evaluating a government regulation of non-obscene sexual speech. As you can see, the cases on sexual speech are pointing in conflicting directions.

Ashcroft v. Free Speech Coalition

The first of the three sexual speech cases before the Court this term is *Ashcroft v. Free Speech Coalition*,¹⁵⁹ which was argued to the Supreme Court in October 2001, and involves the Child Pornography Prevention Act of 1996.¹⁶⁰ The Child Pornography Prevention Act prohibits child pornography not only when actual children are used in the production, but also if those who appear to be children or computer-generated images of children are used.¹⁶¹

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Playboy*, 529 U.S. at 807.

¹⁵⁵ *Id.* at 811.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 813.

¹⁵⁸ *Id.* at 827.

¹⁵⁹ 535 U.S. 234, 122 S. Ct. 1389 (2002). After Prof. Chemerinsky's presentation, on April 16, 2002, the United States Supreme Court ruled that "the prohibitions of §§ 2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional." 535 U.S. at ___, 122 S. Ct. at 1406. The Court concluded that the government's intent in prohibiting child pornography is in protecting children. If there are no actual children involved, then the government does not have a sufficient interest to justify a ban. *Id.*

¹⁶⁰ 18 U.S.C. §§ 2251-2260 (2000).

¹⁶¹ *Id.* § 2256(8) defines child pornography as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image

Twenty years ago, in *New York v. Ferber*,¹⁶² the Supreme Court said that the government can prohibit child pornography because of the compelling governmental interest of protecting children being used in the production of child pornography.¹⁶³ Here, the law prohibits child pornography even if no children are used in the production, even if the image is of an adult who is childlike in appearance, or if it is a computer-generated image of a child.¹⁶⁴ The United States Court of Appeals for the Ninth Circuit declared the law unconstitutional as violating the First Amendment, saying the government does not have a sufficient interest in prohibiting child pornography that does not use children in its production.¹⁶⁵

The government claims a moral justification. The government also says it would be impossible for law enforcement to enforce child pornography laws because it would never be able to distinguish between computer-generated images and images of real children. You might have read, as I did, the accounts in the newspaper of the oral argument, and how the Court seemed very divided about this case.¹⁶⁶ Some members expressed concerns whether there is a sufficient government interest here if no child is used.¹⁶⁷ Others seem very sympathetic to the law.¹⁶⁸

or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct.”

¹⁶² 458 U.S. 747 (1982).

¹⁶³ *Id.* at 758.

¹⁶⁴ 18 U.S.C. § 2256(8).

¹⁶⁵ *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1094-95 (9th Cir. 1999), *aff'd*, 535 U.S. 234 (2002).

¹⁶⁶ See, e.g., Linda Greenhouse, *Justices Weigh Law Barring Virtual Child Pornography*, N.Y. TIMES, Oct. 30, 2001, at A13.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

Ashcroft v. ACLU

The second speech case pending this term is *Ashcroft v. ACLU*.¹⁶⁹ This case involves a federal law, the Child On Line Protection Act,¹⁷⁰ which is the successor to the Communication Decency Act of 1996.¹⁷¹ You may remember that the Communication Decency Act made it a federal crime to knowingly transmit indecent material over the Internet in a manner accessible to a minor.¹⁷² In 1997, in *Reno v. ACLU*,¹⁷³ the Supreme Court, in a seven to two decision, declared the Communication Decency Act unconstitutional.¹⁷⁴ Justice Stevens, writing for the Court, emphasized that the government could not restrict speech meant for adults to only that speech which would be acceptable for children.¹⁷⁵ Justice Stevens spoke of the importance of the Internet as a medium for communication.¹⁷⁶

Congress now has enacted a new law, the Child On Line Protection Act, the daughter of the Communication Decency Act, which applies to commercial Web sites, businesses that are accessible on line and that contain adult content.¹⁷⁷ The law restricts this content only if the requirements of the *Miller* test are

¹⁶⁹ *Ashcroft v. ACLU*, 535 U.S. 564, 122 S. Ct. 1700 (2002), *rev'g* 217 F.3d 162 (3d Cir. 2000). After Professor Chemerinsky's presentation at the PLI program, the Court decided this case on May 13, 2002. The Supreme Court reversed the Third Circuit and held that the phrase "contemporary community standards does not *by itself* render the statute substantially overbroad." *Id.* at ___, 122 S. Ct. at 1703. The court remanded the case for consideration of other First Amendment issues. *Id.* at ___, 122 S. Ct. at 1713.

¹⁷⁰ Pub. L. No. 105-277, 112 Stat 2681 (codified at 47 U.S.C. § 231 (2000)).

¹⁷¹ 47 U.S.C. § 223 (Supp. II 1996) (repealed 1997).

¹⁷² *Id.* § 223(a).

¹⁷³ 521 U.S. 844 (1997).

¹⁷⁴ *Id.* at 849.

¹⁷⁵ *Id.* at 874-75.

¹⁷⁶ *Id.* at 870.

¹⁷⁷ *ACLU*, 535 U.S. at ___, 122 S. Ct. at 1705; 47 U.S.C. § 231(a)(1), which prohibits any person from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, making any communication for commercial purpose that is available to any minor and that includes any material that is harmful to minors."

present; the material must appeal to the prurient interest of a child, and the material is offensive according to contemporary community standards.¹⁷⁸ The United States Court of Appeals for the Third Circuit declared this law unconstitutional as violating the First Amendment despite the fact that the law only applies to commercial sites and incorporates the language of the *Miller* test.¹⁷⁹ The Third Circuit emphasized the vagueness of the law, the same issue that the Supreme Court emphasized in *Reno v. ACLU*, especially the vagueness of the meaning of 'contemporary community standards.'¹⁸⁰

Los Angeles v. Alameda Books

The last sexual speech case pending before the Court this term is *Los Angeles v. Alameda Books*¹⁸¹ which puts before the Court the question, how much evidence must a local government have in order to justify regulating adult entertainment establishments?¹⁸² Los Angeles adopted an ordinance preventing two adult entertainment establishments from occupying the same building.¹⁸³ In this case, the challenger's building had both an adult arcade and an adult bookstore.¹⁸⁴ He argued that there was

¹⁷⁸ *ACLU*, 535 U.S. at ___, 122 S. Ct. at 1705; 47 U.S.C. § 231(e)(6); see *Miller v. California*, 413 U.S. 15, 31-32 (1973) (endorsing a community standards test and stating "[n]othing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact.").

¹⁷⁹ *ACLU*, 535 U.S. at ___, 122 S. Ct. at 1706-07.

¹⁸⁰ *ACLU*, 217 F.3d at 174-75.

¹⁸¹ 535 U.S. 425, 122 S. Ct. 1728 (2002), *rev'g* 222 F.3d 719 (9th Cir. 2000). This case was decided on May 13, 2002, after Professor Chemerinsky's presentation at the PLI conference. The Supreme Court in a five to four decision reversed the Ninth Circuit and remanded the case for trial. Generally, the issue on remand is about what kind of proof does the government need to have in order to restrict sexual speech.

¹⁸² 535 U.S. at ___, 122 S. Ct. at 1733 (The Court of Appeals had not reached the issue of whether the ordinance was content based because it said the city had not presented enough evidence to demonstrate that the ordinance was necessary to serve a substantial interest in preventing crime in the area of adult establishments.).

¹⁸³ 535 U.S. at ___, 122 S. Ct. at 1732.

¹⁸⁴ *Id.* at ___, 122 S. Ct. at 1733.

no evidence before the city council that having two adult establishments in the same building was more likely to cause undesirable effects than having one adult establishment in the building.¹⁸⁵ As I mentioned earlier, in *City of Erie*, the Supreme Court upheld the restriction on nude dancing, saying the government did not need to produce evidence regarding secondary effects of an adult establishment.¹⁸⁶ You may remember the case of *Young v. American Mini-Theaters*,¹⁸⁷ over twenty-five years ago, where the Court upheld a joint zoning ordinance that limited the number of bookstores and movie theaters within a city block.¹⁸⁸ Or you may remember *City of Renton v. Playtime Theater*,¹⁸⁹ from over fifteen years ago, where the Court upheld an ordinance that required that all the adult bookstores and movie theaters must be located in one corner of the city.¹⁹⁰

Will the Court continue this trend in *Alameda Books*? Will it say that if the local government believes it is desirable to prevent two adult entertainment establishments from being in the same building, the law has to be upheld? On the other hand, will the Court, as it has in so many areas of First Amendment law, say that there has to be some evidence to justify a restriction on speech? I believe the case is important in defining local government power over local entertainment establishments.

IV. THE RELIGION CASES

Santa Fe School District v. Doe

I now want to discuss the cases concerning the religion clauses of the First Amendment. Specifically, I want to talk about three cases from the last two years, and then alert you to what I regard as one of the most important cases on the docket for this

¹⁸⁵ *Id.*

¹⁸⁶ *City of Erie*, 529 U.S. at 296.

¹⁸⁷ 427 U.S. 50 (1976).

¹⁸⁸ *Id.* at 71.

¹⁸⁹ 475 U.S. 41 (1986).

¹⁹⁰ *Id.* at 46-48.

year. The first case is *Santa Fe School District v. Doe*,¹⁹¹ which involves the question of whether student-delivered prayers at high school football games violate the First Amendment. The case comes from a small town in Texas. I have often thought that in order to fully appreciate the significance of high school football in some communities, you probably need to come from Oklahoma or Texas. I do not think any of the Justices come from Oklahoma or Texas, and that may explain why they struck down student-delivered prayers at high school football games. This case concerned a town that had a long-standing practice of having a student deliver a prayer before the varsity football games.¹⁹² When a challenge was brought, saying that it was an impermissible establishment of religion, the school changed its policy.¹⁹³ It then adopted an approach where two elections were held each year; first, the students voted whether they wanted to have an invocation before the football games, second, they elected a student chaplain to deliver the invocation.¹⁹⁴ The students always voted for an invocation and always voted for a student chaplain, there was always a prayer and virtually always, it was an explicitly Christian prayer.¹⁹⁵

The Supreme Court, in a six to three decision, declared that student-delivered prayer before football games are impermissible.¹⁹⁶ Justice Stevens wrote the opinion for the Court. I think what is significant about Justice Stevens' opinion is, he does not choose any particular theory of the Establishment Clause, instead he shows how student-delivered prayers at football games are impermissible under any theory of the Establishment Clause. The current Court is deeply divided when it comes to the appropriate theory to be applied under the Establishment Clause. Therefore, Justice Stevens tried to show how all the Establishment Clause theories were violated. He said the prayer before the football game is government-coerced religion because many students have to be at the football games to get academic credit:

¹⁹¹ 530 U.S. 290 (2000).

¹⁹² *Id.* at 297.

¹⁹³ *Id.* at 298.

¹⁹⁴ *Id.* at 297.

¹⁹⁵ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 297.

¹⁹⁶ *Id.* at 301.

band members, cheerleaders and football players.¹⁹⁷ He said there is great social pressure to be at the football game, the government was not being neutral, and he emphasized that the school was encouraging and facilitating the prayer.¹⁹⁸

The argument was made to the Court that to prohibit the prayer was an impermissible, content-based restriction on speech.¹⁹⁹ In many cases over the last decade the Supreme Court has re-characterized traditional religion issues as speech cases, and has said that excluding religious speech violates the First Amendment.²⁰⁰ Justice Stevens rejected that argument. He said the government here was not creating a public forum.²⁰¹ It was not opening its facilities to any speech, since it was not allowing the selected student to say whatever he or she wished, the student was restricted to giving an invocation, which is clearly a religious message. According to Justice Stevens, the speech claim does not work.²⁰²

I think the long-term significance of this case is that whenever a school participates in encouraging or facilitating prayer it is violating the First Amendment. What I think this case leaves open is the question of student-delivered prayers, for instance, at graduation, situations where the speech is the student's choice. Imagine that a school has a policy of having a valedictorian speak at graduation. One year the valedictorian decides to give a prayer. Is that impermissible? Interestingly, there is a conflict among the circuits on that issue. That was one of the issues presented in the certiorari petition in this case, however, the Court did not grant certiorari on that issue. They denied certiorari on the issue where there was a split among the circuits, whether or not student delivered prayers at graduation are permissible, but they granted certiorari on the issue where there was no split among the circuits, whether or not prayers at high school football games are permissible.

¹⁹⁷ *Id.* at 311.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 315.

²⁰⁰ *See, e.g.,* *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 397 (1993) ("Overt viewpoint-based discrimination contradicts the Free Speech Clause of the First Amendment.") (Kennedy, J., concurring).

²⁰¹ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 303.

²⁰² *Id.* at 304.

Chief Justice Rehnquist wrote the dissent joined by Justices Scalia and Thomas, and it is a notable dissent. Chief Justice Rehnquist said that to exclude prayer is undue hostility to religion.²⁰³ This, I believe, is the approach the conservatives take in most prayer cases. They say the very exclusion of religion violates the First Amendment and that religious speech has to be put on the same footing as secular speech. However, only three Justices took that position in this case.

Mitchell v. Helms

The second case concerning the Establishment Clause, and I believe by far the most important is *Mitchell v. Helms*, decided June 28, 2000.²⁰⁴ *Mitchell* concerns whether or not government aid to parochial schools is permissible.²⁰⁵ In a couple of cases in the 1970s and 1980s, *Meek v. Pittinger*²⁰⁶ and *Wolman v. Walters*,²⁰⁷ the Supreme Court said that the government could not give instructional equipment such as audio-visual equipment or computers to parochial schools because instructional equipment might be used for religious education.²⁰⁸ The Court in *Wolman* also said that any governmental monitoring of the use of the equipment could cause 'excessive entanglement' with religion.²⁰⁹ *Mitchell* involves the State of Louisiana giving instructional equipment to parochial schools.²¹⁰ The Fifth Circuit declared the aid unconstitutional based on the precedent just mentioned.²¹¹

The Supreme Court, without a majority opinion, reversed the Fifth Circuit.²¹² Six Justices voted to overrule *Meek* and *Wolman*, however, there was no agreement as to the test to use. The Court's decision was actually split four to two to three.

²⁰³ *Id.* at 318.

²⁰⁴ 530 U.S. 793 (2000).

²⁰⁵ *Id.* at 801.

²⁰⁶ 421 U.S. 349 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

²⁰⁷ 433 U.S. 229 (1977), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

²⁰⁸ *Id.* at 250; *Meek*, 421 U.S. at 363.

²⁰⁹ 433 U.S. at 251. In *Meek*, the Court found it did not have to decide this issue. *Meek*, 421 U.S. at 363 n.13.

²¹⁰ *Mitchell*, 530 U.S. at 801.

²¹¹ *Id.* at 807.

²¹² *Id.* at 836.

Justice Thomas wrote the plurality opinion for four, joined by Chief Justice Rehnquist, Justices Scalia and Kennedy.²¹³ Justice Thomas said that neutrality is the requirement of the Establishment Clause.²¹⁴ He said that as long as the government treats parochial schools the same as it treats public schools when it gives assistance, there is no violation of the Establishment Clause.²¹⁵ Justice Thomas said that there is no violation of the Establishment Clause if the assistance is used for religious education, as long as parochial schools are not favored or disfavored, and as long as no particular religion is favored or disfavored.²¹⁶ Indeed, Justice Thomas suggested that to deny aid to parochial schools when secular private schools were getting the aid, would itself be a violation of the First Amendment.²¹⁷

Justice O'Connor wrote a concurring opinion joined by Justice Breyer.²¹⁸ Justice O'Connor said that equality has never been the sole test of the Establishment Clause.²¹⁹ She said that for her the test should be, the government could give aid to parochial schools as long as the schools did not use the aid for religious instruction.²²⁰ Justice O'Connor said that here, since there was no evidence in the record that the schools used the aid for religious education, there was no violation of the Establishment Clause.²²¹ Justice Souter wrote for the dissent joined by Justices Stevens and Ginsburg.²²² Justice Souter said that the Court should adhere to its prior test; the government cannot give the parochial schools the type of aid that they might use for religious education purposes.²²³

What, then, does *Mitchell* mean? Four Justices say that any aid to religious schools is permissible as long as the aid goes to schools of all religions, and as long as religious schools are treated

²¹³ *Mitchell*, 530 U.S. at 801.

²¹⁴ *Id.* at 810.

²¹⁵ *Id.*

²¹⁶ *Id.* at 809-10.

²¹⁷ *Id.* at 827.

²¹⁸ *Mitchell*, 530 U.S. at 836 (O'Connor, J., concurring).

²¹⁹ *Id.* at 839.

²²⁰ *Id.* at 860.

²²¹ *Id.* at 864-66.

²²² *Id.* at 867 (Souter, J., dissenting).

²²³ *Mitchell*, 530 U.S. at 890-95.

the same as secular schools.²²⁴ These four say it does not matter if the school uses the aid for religious instruction.²²⁵ Two Justices say that the government cannot give aid to parochial schools if the schools actually use that aid for religious instruction.²²⁶ Three Justices want to adhere to the prior rule; the aid cannot be the type of aid that the schools may use for religious instruction.²²⁷

What rule of law do you use if you are litigating in this area? What rule of law do you use if you are a judge who is deciding a similar case? You must follow the narrowest holding from the case, that of the five Justices on the Court who agree that the government cannot give aid to religious schools if the aid is actually used for religious instruction. Three of those five Justices would go even further, but five would agree to that composition. I believe, for now, with the current composition of the Court, that is the controlling line.

Good News Club v. Milford Central School

The third and final case concerning religion from last term is *Good News Club v. Milford Central School*,²²⁸ which arose here in New York. An elementary school opened its facilities to community groups right after the school day.²²⁹ The Good News Club, an overtly religious group, wanted to come into the school on the same basis as secular groups did, and wanted to engage in religious activities; Bible reading, prayer and the like.²³⁰ The school board refused to allow the Club access to the school, saying it would violate the Establishment Clause to do so.²³¹ The Good News Club sued on free speech grounds.²³² It argued that to exclude it from using the facilities was to discriminate against it

²²⁴ *Id.* at 809. The four justices being Chief Justice Rehnquist, Justices Thomas, Scalia, and Kennedy.

²²⁵ *Id.* at 809-10.

²²⁶ *Id.* at 857. The two justices being Justices O'Connor and Breyer.

²²⁷ *Id.* at 890-95. The three justices being Justices Souter, Stevens and Ginsburg.

²²⁸ 533 U.S. 98 (2001).

²²⁹ *Id.* at 102.

²³⁰ *Id.* at 103.

²³¹ *Id.*; *id.* at 112.

²³² *Id.* at 104.

based on the religious content of its expression.²³³ The United States District Court here in New York ruled against Good News Club and in favor of the school board.²³⁴ The United States Court of Appeals for the Second Circuit affirmed.²³⁵ The Supreme Court, in a six to three decision, reversed the Second Circuit.²³⁶ Justice Thomas wrote for the Court. Justices Stevens, Souter and Ginsburg dissented.²³⁷

There were two parts to Justice Thomas' majority opinion; first, he said that to exclude the religious group violated its speech rights.²³⁸ Justice Thomas said this case involved a viewpoint restriction on speech.²³⁹ He said that while secular groups could come into the school and discuss issues from a secular perspective, the school board was prohibiting the religious group from coming into the school and discussing those same issues from a religious perspective.²⁴⁰ The Court says this is a violation of the Free Speech Clause because of the content restriction on speech.²⁴¹ It is one of the many cases I alluded to earlier where the Court has re-characterized the traditional religion question as a speech question.

Second, Justice Thomas says that it does not violate the Establishment Clause to allow the religious group to have access to the facilities on the same terms as the secular groups.²⁴² The dissent objected to the majority considering this issue at all, since neither the District Court nor the Second Circuit had ever ruled on the Establishment Clause question.²⁴³ The lower courts did not reach the question because they had found no violation of speech.²⁴⁴ Nonetheless, Justice Thomas said that as long as religious groups have the same access to the facility, no more and

²³³ *Good News Club*, 533 U.S. at 105.

²³⁴ *Id.* at 104.

²³⁵ *Id.* at 105.

²³⁶ *Id.* at 102.

²³⁷ *Id.* at 101.

²³⁸ *Good News Club*, 533 U.S. at 109.

²³⁹ *Id.*

²⁴⁰ *Id.* at 112.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Good News Club*, 533 U.S. at 139 (Souter, J., dissenting).

²⁴⁴ *Id.*

no less than the secular groups, then the Establishment Clause is not violated.²⁴⁵

The dissenters here objected and said that this is an elementary school and these children cannot sort out who is expressing the message, the government or a private group.²⁴⁶ The dissent stressed that the access was to take place right after the school day.²⁴⁷ Justice Thomas, however, explicitly said that it does not matter that it is an elementary school, and it does not matter that the Club will meet right after the school day, it does not violate the Establishment Clause to give the religious group equal access.²⁴⁸

I believe there could still be a basis for challenging a religious group's use of school facilities after this case, but it would have to be an 'as applied' challenge. Imagine a situation where teachers participate in the religious group. Imagine that announcements are made over the school loudspeaker. Imagine that there is some argument that the government is coercing or endorsing religion, facts not present in the *Good News Club* case. Under those circumstances, courts can still strike down a religious group's use of school facilities under the Establishment Clause, but I think such challenges will be very difficult.

V. PENDING ESTABLISHMENT CLAUSE CASE

Zelman v. Simmons-Harris

Finally, I want to mention the case that is on the docket for this term concerning religion. The case is called *Zelman v. Simmons-Harris*, and involves the constitutionality of a school voucher program in Cleveland, Ohio.²⁴⁹ A federal court order required the state to intervene in the Cleveland schools due to local

²⁴⁵ *Id.* at 114.

²⁴⁶ *Id.* at 142-43 (Souter, J., dissenting).

²⁴⁷ *Id.* at 144.

²⁴⁸ *Good News Club*, 533 U.S. at 115-17.

²⁴⁹ 122 S. Ct. 2460 (2002), *rev'g* 234 F.3d 945 (6th Cir. 2000). In June 2002, after Professor Chemerinsky's presentation at the PLI program, the Supreme Court, in a five to four decision, reversed the Sixth Circuit and upheld the Ohio school voucher program.

school board mismanagement of the district.²⁵⁰ In response, the Ohio legislature created a school voucher program in Cleveland.²⁵¹ The United States Court of Appeals for the Sixth Circuit declared the voucher program unconstitutional in December of 2000.²⁵² The Sixth Circuit emphasized that because of the way in which the Ohio law was structured, parents could use the vouchers for private secular schools or parochial schools, but they could not use the vouchers for public schools.²⁵³ The Sixth Circuit said that this impermissibly encourages parents to send their children to parochial schools and violates the Establishment Clause.²⁵⁴

It is possible that the Supreme Court in this case will rule broadly about the voucher issue. Many have speculated that the Court has been looking for the opportunity to do so. On the other hand, it is quite possible that the Supreme Court is going to rule very narrowly about this particular voucher program and whether it impermissibly encourages parents to send their children to parochial schools. I think it is safe to say, without question, there are four Justices who will vote to uphold the voucher program; Justices Thomas, Rehnquist, Scalia and Kennedy, the four who were the plurality in *Mitchell*. They believe that any aid to parochial schools is permissible as long as the aid is neutrally available. I think it is also safe to say that there are three Justices, Justice Stevens, Justice Souter and Justice Ginsburg, who will vote against the voucher plan. These three were the dissenters in *Mitchell*.

The key question is, how will Justices O'Connor and Breyer vote? Will they, as they often have, allow the aid to go to the parochial schools? Or will they say, because of the unique nature of this particular voucher program, which seems to encourage parents to send their children to parochial schools rather than to public schools, that the program is impermissible and leave the question of other school voucher plans to be decided another day? My guess is that this case will be one of the last cases decided by the Supreme Court, at the end of June. Ultimately, this

²⁵⁰ *Id.* at 2463.

²⁵¹ *Id.*

²⁵² *Simmons-Harris*, 234 F.3d at 948.

²⁵³ *Id.* at 959-60.

²⁵⁴ *Id.* at 959.

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term's cases reflect the likely themes for the foreseeable future; a Court that is surprisingly protective of speech, but quite willing to allow government aid to religion.

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