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THE SUPREME COURT AND FREE SPEECH

Decisions of 1990-91 Term Chip Away at First Amendment Rights

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"The Court, for the first time, upholds viewpoint-based suppression of speech solely because it is imposed on those dependent upon the government for economic support...the First Amendment could be read to tolerate any limit on employee's speech "so long as that restriction is limited to the funded workplace."

-- Justice Blackmun, dissenting in *Rust v. Sullivan*.

Although nude dancing is expressive conduct, states may ban it in the interest of "protecting public order and morality." [xxxxx Get fuller quote xxxxxx]

-- Chief Justice Rehnquist, writing for the majority in *Barnes v. Glen Theatre*.

INTRODUCTION

In recent years, as the Supreme Court has steadily rolled back the expansive civil liberties rulings of the Warren era -- in criminal procedure, equal protection, privacy and other areas -- freedom of expression has been left relatively untouched. In fact, in the last several years a court dominated by appointees of Presidents Nixon and Reagan has held that the First Amendment protects both burning the American flag as a form of symbolic protest¹ and *Hustler* magazine's attacks on Jerry Falwell's mother.²

In the term that ended in July, however, the Supreme Court handed down four significant freedom of speech decisions that appear to represent a change in course for the Court: *Barnes v. Glen Theatre, Inc.*, *Rust v. Sullivan*, *Secretary of Health and Human Services v. Coalition for the Unborn Victims of Violence*, and *Masson v. New Yorker Magazine, Inc.* At least three of these decisions represent a significant departure from previous First Amendment decisions, to which the Court appears to have no intention of returning.

¹ *Texas v. Johnson*, 491 U.S. 397 (1989).

² *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

Barnes v. Glen Theatre, Inc.³

In *Barnes*, the Supreme Court upheld as constitutional an Indiana public indecency statute that banned public nudity and was enforced against nude dancing unless the dancers wore pasties and G-strings. The Court of Appeals for the Seventh Circuit had concluded that non-obscene nude dancing performed for entertainment is expression protected by the First Amendment, and that the statute improperly infringed on expressive activity because its purpose was to prevent the dancers from expressing messages of sexuality and eroticism.

Although it agreed that erotic dancing is expressive conduct entitled to First Amendment protection (if only "marginally" so), the Supreme Court concluded that the statute did not impermissibly infringe that protected activity. It did so by analytically separating nude dancing into two components, and examining them separately: erotic dancing, which the Court implied could not be directly prohibited, and the element of public nudity accompanying that dancing, which the Court held could be proscribed to further the state's interest in public morality regardless of the context in which that public nudity occurred, even when expressive conduct is involved.

The technique of separating the content of expression from its means, and permitting those means to be curtailed for reasons ostensibly "unrelated" to the suppression of free expression, had been applied by the Court first in a 1968 case permitting the conviction of a draft card burner for the conduct of destroying his draft card (regardless of his intent to communicate an anti-governmental message by so doing), but never before so broadly. (More than 50 years ago, the Court struck down the application of anti-littering laws to handbilling, using a speech-sensitive analysis that is entirely foreign to the mechanical logic of *Barnes*.)

Moreover, the Court's uncritical acceptance of the legitimacy of a state's asserted interest in protecting order and morality as sufficient to justify the criminal punishment of expressive conduct is a new, and ominous, theme. The Court had relied on the 5-4 decision a few terms ago upholding the criminalization of homosexual sodomy in finding that states have broad leeway to punish conduct deemed by legislative majorities to be "immoral and unacceptable", but had never before held that this interest justified suppression of *expressive* conduct by consenting adults.

Rust v. Sullivan, Secretary of Health and Human Services⁴

Rust v. Sullivan, Secretary of Health and Human Services has widely and justifiably been considered the most serious incursion on prior free speech doctrine issued during the term. The Court upheld, 5-4, regulations issued by the Secretary of Health and Human Services that prohibit family-planning services receiving federal funding pursuant to Title X of the Public Health Service Act from providing their clients with any information on abortion. The regulations upheld by the Court were ostensibly promulgated to enforce a statutory prohibition against the use of Title X funds "in programs where abortion is a method of family planning." For nearly 20 years, though, regulations implementing that statute had been limited to barring the use of federal funds only for abortion procedures, and had not attempted to prohibit counseling and the provision of information about abortion.

The new regulations cut far more deeply, and it was agreed by all parties that they deterred private parties from using wholly private funds for speech on certain subjects. The regulations went further than prohibiting a clinic from using federal Title X funds to provide information concerning abortion; they prohibited the provision of any advice whatever on the subject of abortion, even with a clinic's private or state funds, on the premises of a federally funded project. Thus, for example, Planned Parenthood, to accept any federal Title X funds, must inefficiently operate wholly separate clinics in different locations if they are to provide information about abortion.

³ 111 Supreme Court 2456 (1991).

⁴ 111 Supreme Court 1759 (1991).

Projects receiving Title X funds cannot refer a pregnant woman to an abortion provider, even upon specific request, and even though an abortion might be medically indicated (for example, for women with medical conditions such that full-term pregnancy and delivery might endanger their health). The regulations suggested that when asked about abortions, the response should be that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."

The petitioners, Title X grantees and doctors who supervise Title X funds, argued that the regulations violate the First Amendment by imposing viewpoint-discriminatory conditions upon government subsidies, and by requiring medical professionals to refrain from providing the advice that their professional judgment warrants be given. The Court rejected these arguments, broadly holding that the government lawfully can fund a program it believes to be in the public interest while not funding an alternative program, and that the limitations on the federal funds can follow any required matching private or state or local governmental funds, so long as the recipient of federal funds is formally "free" to set up an alternative, geographically separated, wholly private entity to exercise free speech rights.

In view of the increasing scope of federal grant activities in medicine, the arts, education, and elsewhere, the Court's holding threatens to eviscerate the vitality of free speech in the private sector, by the sleight-of-hand of denominating large sections of the private sector that receive limited federal grants as no longer "private" for free speech purposes.

The Court also held that the regulations do not infringe upon the doctor-patient relationship, stating that a doctor is not required to represent as his opinion one he does not hold, but only to refrain from speaking about a subject (abortion) that is simply outside the purview of the federal grant for prenatal health of women. In view of the fact that Title X funds may be used to direct pregnant women to a wide variety of services to assist their deliveries, however, the Court can only be viewed as sanctioning viewpoint discrimination with respect to the subject of abortion. Whether the decision reflects simply the Court's eagerness to dispense with *Roe v. Wade*, or a wider willingness to restrict free speech rights, is as yet unclear.

Cohen v. Cowles Media Co.⁵

In *Cohen v Cowles Media Co.*, Cohen was an aide to a Minnesota gubernatorial candidate who provided reporters with derogatory information about another candidate on the condition that they keep the source confidential, sued the publishers of two Minnesota newspapers when they went ahead and used his name anyway. The editorial staffs of both papers decided to publish Cohen's name notwithstanding the reporters' promise of confidentiality because of their editorial judgment that the public needed to know the source of the political charges in order to assess them.

The Minnesota Supreme Court considered whether Cohen could assert a promissory estoppel⁶ cause of action and whether such a cause of action would be barred by the First Amendment, and held that the enforcement of the promise of confidentiality under a promissory estoppel theory would violate the defendants' First Amendment rights.

The Supreme Court disagreed. As it had in *Barnes*, the Court held that the state law being applied (here,

⁵ 111 Supreme Court 2513 (1991).

⁶ The doctrine of promissory estoppel makes binding a promise made by a person that caused another person to take or forbear from taking certain action in reliance on the promise.

common law promissory estoppel) applies to all persons, and that no special exception needs to be made simply because the enforcement of the law may have incidental effects on the press' ability to gather and report the news. The Court summarily dismissed as incidental and constitutionally insignificant the argument that allowing Cohen to maintain his cause of action will inhibit truthful reporting because the media will have strong economic incentives to censor newsworthy information that they would otherwise provide to the public, in order to avoid liability in damages arising from truthful information that they publish. The ringing declaration that "editing is what editors are for,"⁷ which had previously been used to strike down state laws impairing the ability of newspapers to publish truthful information, was not even distinguished -- only ignored.

Masson v. New Yorker Magazine⁸

The press was relieved by the court's judgment in *Masson v. New Yorker Magazine*, because although its victory below was not affirmed, the court rejected the harsh standard requested by the petitioner that would have greatly increased the number of libel cases reaching trial.

Jeffrey Masson sued Janet Malcolm, an author who wrote a two-part article and a book based on her interviews with Masson. Masson also sued the publishers of the articles and the book, the *New Yorker* magazine and Alfred A. Knopf, respectively. Masson asserted that he was defamed by Malcolm's attribution of quotations to him that he claimed not to have uttered. All parties agreed that Masson was a "public figure" under *New York Times v. Sullivan*, so that Malcolm would prevail unless Masson proved she had published the derogatory statements knowing they were false or believing that they were probably false.

In order to have the case disposed of on summary judgment (i.e., without the enormous expenses of trial), Malcolm had admitted, for purposes of use of her motion only, that Masson had not used the precise words quoted, but argued that even so, she was entitled to prevail, if the allegedly rewritten quotes were substantively equivalent to things that Masson had concededly said. Under these circumstances, she argued, the *New York Times* test was met, since she could not be said to know that the charges she published were false.

Masson's theory of the case, on the other hand, was that except for corrections of grammar and syntax, publication of a quotation that does not contain the exact words spoken by the public figure constitutes the requisite degree of knowing falsity to constitute actual malice. If he had prevailed on this ground, then every libel case involving an allegedly defamatory quotation of the plaintiff could reach trial so long as the libel plaintiff claimed to have used different words. Such cases would never be subject to dismissal on summary judgment, and a libel plaintiff would prevail at trial as long as juries were persuaded that she was misquoted, even if she had made statements that amounted to the same charges and were equally as damaging.

The Court rejected this standard, recognizing the nearly impossible burden that it would impose on writers, who often must modify quotations for a variety of reasons. Instead, the Court held that a deliberate alteration of words spoken by a public figure will not constitute actual malice as long as the speaker's meaning is not materially changed, including any meaning conveyed by the manner or fact of expression.

Having adopted the standard of liability that the press sought, however, the court proceeded to disagree with both lower courts and concluded that as to five of the six quotations, a jury could find that Malcolm had materially changed Masson's meaning, and the case was remanded for further proceedings.

Conclusions

⁷ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁸ 111 Supreme Court 2419 (1991).

As a whole, this term's First Amendment cases show an increasing focus by the Court on governmental intent in First Amendment cases, requiring anti-speech intent to establish a First Amendment violation, and a correspondingly decreased willingness to examine the practical effect general laws have on free expression, depending on their application. In *Barnes and Cowles Media Company*, generally applicable laws were enforced against protected expression even though the effect would clearly be to deprive the public of expression that would otherwise be available. In *Rust*, the legislature's stated intention to encourage services to advance women's reproductive health was accepted at face value (and the bureaucracy's intent to deter speech about abortion was simply ignored), while rules whose effect is clearly to suppress medical advice and information were upheld.

The Court's previous focus on whether the law in question was restricting free speech in First Amendment cases seems in danger of being entirely supplanted by a standard that will permit far more regulation that effectively deters speech. Moreover, even though each of those opinions was supported by only a bare majority of the nine Justices, the retirement of Justice Thurgood Marshall, who was in the minority on each case, leaves little reason to believe the trend will change.

While *Masson* and the term's other First Amendment cases do not yet alter the central rules of core First Amendment cases, they reveal a disturbing willingness to cut sharply at the edges. The extent to which the trend continues remains to be seen.

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