

2009 update

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Freedom of Speech in the United States

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This update summarizes the free speech decisions of the U.S. Supreme Court for the 2008–2009 term, highlights developments related to proposed federal shield law legislation and the Freedom of Information Act, and describes several pending cases of note. The complete text of this update, links to the cases discussed, and links to landmark free speech decisions can be found on the book's web site:

http://www.bc.edu/free_speech/

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The Supreme Court decisions concerning freedom of speech for the 2008–2009 term represent work in progress. The decisions are important, not so much in their own terms, but for the clues they might offer about the future. The most anticipated case of the term, *Federal Communications Commission v. Fox Broadcasting*, involved indecent broadcasting. The justices decided that the FCC had given sufficient reasons to justify tightening the rules on “fleeting expletives.” The decision did not end the controversy, however, as the Court remanded the case, along with *Federal Communications Commission v. CBS Corporation* (a case involving Janet Jackson’s “wardrobe malfunction” during the Super Bowl halftime show), to the appellate courts to determine whether the FCC’s new policy on indecent

broadcasting violated the First Amendment. Whatever the outcome, it is likely that the losing party will appeal and the justices will need to decide whether they want to revisit regulation of indecent broadcasting.

Campaign finance has emerged as a significant public concern. The Supreme Court had issued significant decisions in 2006, 2007, and 2008 (text, pp. 378–385). Another major decision had been anticipated during the 2008–2009 term, but the Justices surprised most observers when they scheduled a second round of oral argument, addressing a broader range of issues, in *Citizens United v. Federal Election Commission*. Some legal scholars have inferred that the decision to expand the discussion means the Court may be contemplating dramatic changes to the law regulating campaign finance. Adding credibility to this theory, each of the three campaign finance decisions that the Roberts Court previously issued has either struck down or narrowed a law regulating campaign contributions and/or expenditures.

Also contributing to the anticipation for the 2009–2010 term is the fact that the justices have already granted certiorari for two new cases that raise significant First Amendment issues. One of these cases, *Salazar v. Buono*, involves a controversial Latin (or Christian) cross erected on a cliff in the Mojave National Preserve, a federal park in California. In an effort to protect the cross from an Establishment Clause challenge, Congress enacted several measures, including a land exchange that transferred responsibility for the land on which the cross stands to a private entity. The other case, *United States v. Stevens*, considers whether films depicting cruelty towards animals are a category of speech that are not protected by First Amendment—like obscenity, child pornography, or fighting words.

Finally, it is also worth noting that when the Supreme Court decides these cases, a new justice, Sonia Sotomayor, will have replaced Justice David Souter, who retired at the end of the 2008–2009 term. This is a consequential appointment, as several recent First Amendment cases were decided by 5-to-4 decisions. If Sotomayor has ideas about freedom of speech that are different from Justice Souter's, her appointment might have a dramatic impact on First Amendment jurisprudence. Anyone interested in the freedom of speech should pay particular attention to the 2009–2010 term.

Chapter 9: Special Problems of a Free Press

Shield Law Developments

Following the Supreme Court's 1972 decision in *Branzburg v. Hayes* (text, pp. 244–245), many media professionals urged Congress to pass a national journalists' privilege law—often described as a “shield law” because of the protection it would provide for reporters. These efforts languished over time, but subpoenas compelling reporters to testify in a series of high profile cases reinvigorated the debate (text, pp. 245–246). A shield law bill passed the House of Representatives by a wide margin in October 2007, but a Republican filibuster effectively killed the measure in the Senate. Then–Attorney General Michael Mukasey had warned that President Bush would likely veto the bill if it did pass.

The election of Barack Obama energized supporters of a shield law, as Obama is on record as supporting such legislation. New shield law bills were introduced in both the House of Representatives and the Senate. The House passed the Freedom of Information Act of 2009 by a voice vote on March 31, 2009. (Such votes are commonly used to pass noncontroversial legislation.) At the Senate Judiciary Committee hearings in June 2009, Attorney General Eric Holder told the Senators that “The Department (of Justice) and (the Obama) Administration can support such a bill.” Anyone interested in journalists' privilege should stay abreast of developments, as the Attorney General's testimony suggested President Obama will sign a shield law so long as it does not limit the Department of Justice's ability to protect “national security.”

Freedom of Information Act Developments

On January 21, 2009, President Obama instructed the heads of all federal departments and agencies that the Freedom of Information Act (FOIA) “should be administered with a clear presumption: In the face of doubt, openness prevails.” The administration’s goal is to respond to all requests “promptly and in a spirit of cooperation.” More specifically, the president instructed that information should not be withheld for fear that “public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.”

As part of his initiative, the president directed Attorney General Eric Holder to prepare new FOIA Guidelines “reaffirming the commitment to accountability and transparency.” The new guidelines, issued March 19, 2009, during Sunshine Week, clearly state that the FOIA should be administered with an eye to openness and that Government agencies should not withhold information “simply because [an agency] may do so legally.” If full disclosure is impossible, the Guidelines encourage agencies to make “partial disclosure.”

The attorney general also rescinded the October 12, 2001, Memorandum from Attorney General John Ashcroft to Departments and Agencies (text, p. 253), under which government agencies could withhold information on any “sound legal basis.” According to the 2009 Guidelines, the Department of Justice will defend the decision to deny a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” By rescinding the “sound legal basis” standard, Attorney General Holder clearly signaled that the Obama administration believes that government records should be presumed public.

Chapter 10: Constraints of Time, Place, and Manner

U.S. Supreme Court

Case: *Pleasant Grove City, Utah v. Summum*, 2009 U.S. LEXIS 1636 (February 25, 2009).

Subject: The placement of a permanent monument in a public park is a form of government speech and is not subject to public forum analysis.

Summary of decision: Summum, a nonprofit religious organization, sought permission to place a monument in Pioneer Park, a 2.5-acre public space in Pleasant Grove City, Utah, in 2003. The proposed monument would have celebrated the “Seven Aphorisms,” the basic principles of the Summum faith. (The Aphorisms include the principles of psychokinesis, correspondence, vibration, opposition, rhythm, cause and effect, and gender.) Pioneer Park already had at least eleven privately donated displays, including a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

The city council denied Summum’s request on the grounds that the proposed monument did not meet the basic selection criteria: the monument was not related to the history of Pleasant Grove and the religious group did not have longstanding ties to the community. After a second request was denied in 2005, Summum brought suit in federal court alleging, among other things, that the city had violated the organization’s First Amendment rights. When Pleasant Grove opened the Pioneer Park to private monuments, Summum claimed, the city created a public forum, and the public forum doctrine prevented the city from discriminating against its monument. The U.S. Court of Appeals for the Tenth Circuit agreed, and issued an injunction directing Pleasant Grove to permit Summum to erect its monument in the park.

The Supreme Court unanimously reversed the Tenth Circuit. Justice Samuel Alito authored the decision, joined by Chief Justice John Roberts and Justices John Paul Stevens, Antonin Scalia, Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, and Stephen Breyer. While acknowledging that “a park is a traditional public forum for speech and other transitory expressive acts,” Justice Alito

reasoned that “the display of a permanent monument in a public park is not a form of expression to which forum analysis applies.” Instead of relying on public forum analysis, Justice Alito declared, “the placement of a monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.”

In support of his government speech approach, Justice Alito observed that “Governments have long used monuments to speak to the public.” Ancient kings, he continued, “erected statues of themselves to remind their subjects of their authority and power” and, in places such as Pleasant Grove, the items on display in public parks “play an important role in defining the identity that a city projects to its own residents and to the outside world.” As a speaker, the government “is entitled to say what it wishes” and to select the views that it wishes to express with its monuments, even in instances where government receives private assistance to defray the cost of delivering the government-controlled message.

Justice Alito was careful, however, to note that there were some limits on government speech. “For example,” he cautioned, “government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately ‘accountable to the electorate and the political process for its advocacy.’” In other words, if the voters don’t agree with the position that public officials advocate, they might vote them out of office.

Although the majority opinion was unanimous, six of the justices also issued four concurring opinions. While none of the justices thought Pleasant Grove had to accept Summum’s monument, the large number of concurring opinions suggest that this is hardly a simple case. The complexity is most evident in the concurring opinion of Justice David Souter, the only justice not to join in the majority opinion. While he agreed with the result, Justice Souter voiced reservations about the “recently minted” government speech doctrine. He urged the Court to “go slow in setting its bounds, which will affect existing doctrines in ways not explored.” In particular, Justice Souter worried about “how this relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis.”

U.S. Supreme Court

Case: *Locke v. Karass*, 2009 U.S. LEXIS 590 (January 21, 2009).

Subject: A public employees union may charge nonmembers a service fee that includes litigation expenses that do not directly benefit the local bargaining unit.

Summary of decision: The Maine State Employees Association (MSEA) represents all public employees in the state of Maine. Under existing labor law, a union such as the MSEA that serves as an exclusive bargaining representative can collect a “service fee” from all employees it represents, even those who choose not to become members of the union. Since all employees share in any benefits obtained by the union, the United States Supreme Court has consistently held that service fees do not violate the First Amendment, so long as the fees are limited to legitimate bargaining expenses. To calculate the appropriate fee for nonmembers, the Supreme Court has instructed unions to deduct the pro rata cost of nonchargeable activities, such as political, public relations, and lobbying expenditures, from normal union dues.

There is still some ambiguity about whether litigation fees are chargeable expenses; that is, whether nonmembers can be required to contribute to a pooled fund that covers litigation expenses. Court decisions establish that any expenditures for litigation related to a *local* union’s collective bargaining activities can be included in the service fee. It is less clear, however, whether the service fee can include litigation expenses that do not have such a direct connection to the local bargaining unit. The confusion is most evident in *Lehnert v. Ferris Faculty Association* (1991), a fractured Supreme Court decision

in which a majority of the justices could not agree on whether national litigation expenses could be charged to the service fee.

The uncertainty about litigation expenses was the basis of *Locke v. Karass*. When setting the service fee for nonmembers, the MSEA included an affiliation fee paid to the Service Employees International Union, the *national* union. Since the law was clear on some nonchargeable expenses, the MSEA did not charge nonmembers for any of the national organization's political, public relations, and lobbying expenditures. However, it did charge nonmembers for its contribution to the national organization's litigation fund, thus requiring nonmembers to fund litigation for the benefit of other bargaining units and national affiliates. Although the amount of money was small (less than one dollar a month per employee), twenty nonmembers objected to paying this portion of the service fee on principle, arguing that, under the First Amendment, they were not required to pay for services that did not directly benefit the local union.

The Supreme Court unanimously held that the litigation expenses could be included in nonmembers' service fee. In an opinion by Justice Breyer, the Court held that "a local union may charge a nonmember an appropriate share of its contribution to a national's litigation expenses if (1) the subject matter of the national litigation bears an appropriate relation to collective bargaining and (2) the arrangement is reciprocal—that is, the local's payment to the national affiliate is for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.'" There was, Justice Breyer continued, "no sound basis" for distinguishing between "litigation activities and other national activities the cost of which this Court has found chargeable."

U.S. Supreme Court

Case: *Ysursa v. Pocatello Education Association*, 2009 U.S. LEXIS 1632 (February 24, 2009).

Subject: A ban on political payroll deductions, as applied to local governmental units, does not infringe the First Amendment rights of labor unions.

Summary of decision: For many years, public employees in Idaho could authorize payroll deductions to pay union dues or to contribute to union political activities through a political action committee. In 2003, the Idaho legislature enacted the Voluntary Contribution Act. Among other things, this law added a prohibition on payroll deductions for "political activities" to the state's right-to-work law. The new law defined this term to include "electoral activities, independent expenditures, or expenditures made to any candidate, political party, political action committee or political issues committee or in support of or against any ballot measure."

Six public employees unions successfully challenged the law as it applied to cities, counties, and school districts. While local governments might choose to eliminate payroll deductions, a federal judge and the Ninth Circuit Court of Appeals held that the Idaho law was a content-based law on speech and, as such, should be assessed using a strict scrutiny standard. Because local governments administer their own payroll systems, the Ninth Circuit concluded that the state had a "relatively weak interest" in banning political payroll deductions. The court concluded, therefore, that the Idaho statute was unconstitutional as applied to local governments.

When Idaho appealed to the Supreme Court, the Justices reversed the Ninth Circuit on a 6-to-3 decision. Writing for the majority, Chief Justice John Roberts held that the Idaho law did not infringe on the First Amendment rights of labor unions. As he framed the case, "Idaho's law does not restrict political speech, but rather declines to promote that speech by allowing public employee checkoffs for political activities." According to the chief justice, the First Amendment "does not impose any affirmative obligation" to provide payroll deductions for union members. In this instance,

the legislature was not acting to suppress dangerous ideas, but rather to serve “the State’s interest in avoiding the reality or appearance of government favoritism or entanglement with partisan activities.”

In three separate dissenting opinions, Justices Stephen Breyer (who also concurred in part), John Paul Stevens, and David Souter espoused a different view. As they read the law, Idaho was prohibiting payroll deductions for political activities as a way of targeting the union’s political activities. Justice Souter’s dissent was the most pointed: The law, he said, “deals with unions, the statute amended regulates unions, and all this legislation is placed in the State’s labor law codification. Union speech, and nothing else, seems to have been on the legislative mind.”

Chapter 13: Broadcasting, Cable, and Access Theory

U.S. Supreme Court

Case: *Federal Communications Commission v. Fox Television Stations*, 2009 U.S. LEXIS 3297 (April 28, 2009)

Subject: The Federal Communications Commission did not act arbitrarily or capriciously when it changed its policy to permit fleeting expletives to be considered indecent under federal law.

Summary of decision: In *Federal Communications Commission v. Pacifica Foundation* (1978), the Supreme Court upheld the FCC’s authority to regulate indecent broadcasting over the public airwaves (text, pp. 373–375). Since *Pacifica*, the FCC’s indecency rules had recognized an exception for “isolated, non-literal, fleeting expletives,” especially if they occurred during a live broadcast.

The FCC began to rethink the “fleeting expletives” exemption after Bono, Cher, and Nicole Richie used indecent language during live broadcasts of awards shows. Responding to viewer complaints, the FCC’s Enforcement Bureau ruled that Bono’s utterance qualified as “a fleeting expletive,” as it did not describe sexual activity or excretory function. The full Commission reversed the Bureau’s decision in March 2006, ruling that Bono’s use of the word “fuck” was indecent and profane.

Following the *Bono* precedent (also known as the *Golden Globes* precedent), the FCC held that the speech in the Cher and Richie cases was indecent and profane, and that repeated use of objectionable words was not necessary to trigger punishment under the indecency policy. No fines were imposed, but the FCC’s rulings made it quite clear that in the future broadcasters would be held responsible for indecent speech, even if it was unintentionally broadcast during live coverage of newsworthy events.

Fox Television and the other networks challenged the FCC’s policy. In a 2-to-1 decision issued in June 2007, the Second Circuit Court of Appeals agreed with the broadcasters and set aside the FCC’s decision as “arbitrary” and “capricious” under the Administrative Procedures Act. Before making a final ruling on the network’s First Amendment arguments, however, the court remanded the case and offered the FCC another opportunity to provide a “reasonable explanation” justifying the new policy.

Rather than trying to satisfy the Second Circuit, the FCC appealed to the Supreme Court, which agreed to hear the case. In a 5-to-4 decision in April 2009, the Court held that the FCC had adhered to the Administrative Procedures Act when it changed its policy for fleeting expletives. Justice Scalia wrote the majority opinion, joined on the essential points by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. (Six of the nine justices wrote separate opinions.)

Justice Scalia began by acknowledging that the Administrative Procedures Act permits the “setting aside of agency action that is ‘arbitrary’ or ‘capricious.’” It does not, however, allow a court to “substitute its judgment for that of the agency,” nor does it require the agency to explain why the new policy is better than the old policy. Having explained the standard, Justice Scalia argued that the FCC’s new enforcement policy was neither arbitrary nor capricious, for three reasons. First, he said, “the Commission forthrightly acknowledged that its recent actions have broken new ground, taking account of inconsistent ‘prior Commission and staff action’ and explicitly disavowing them as ‘no longer good

law.” Second, “the agency’s reasons for expanding the scope of its enforcement activity were entirely rational.” Finally, “the agency’s decision not to impose any forfeiture or other sanction precludes any argument that it is arbitrarily punishing parties without notice of the potential consequences of their action.”

It is noteworthy that Justice Scalia’s opinion was grounded in administrative law and did not reach the larger constitutional question. Because the Second Circuit had focused on whether the change in policy was justified, it had not considered whether the FCC’s new policy violated the First Amendment. Reasoning that the Supreme Court’s role is “one of final review,” Justice Scalia’s opinion declined to “address the constitutional questions at this time.”

The main dissenting opinion was written by Justice Stephen Breyer, joined by Justices Stevens, Souter, and Ginsburg. The dissenters believed the FCC’s decision to change its indecency policy was “arbitrary” and “capricious” because it failed to address two important considerations. First, Justice Breyer noted, “the FCC said next to nothing about the relation between the change it made in its prior ‘fleeting expletive’ policy and the First-Amendment-related need to avoid ‘censorship,’ a matter as closely related to broadcasting regulation as is health to that of the environment.” Second, Justice Breyer continued, “the FCC failed to consider the potential impact of its new policy upon local broadcasting coverage.” The dissenters worried, in particular, that many small independent and public service broadcasters would reduce or suspend coverage of local events because they could not afford the technology required to “bleep” expletives.

The case now returns to the Second Circuit Court of Appeals for a decision on the broadcaster’s claim that changes to the “fleeting expletive” policy violate the First Amendment. A second case, *Federal Communications Commission v. CBS*, is currently pending before the Third Circuit Court of Appeals. Once the appellate courts have ruled, one or both of these decisions will likely be appealed to the Supreme Court. If that happens, the Court will have the opportunity to revisit the constitutional questions raised by the regulation of indecent broadcasting that were last considered in *Federal Communications Commission v. Pacifica Foundation* (1978).

Developments related to *Federal Communications Commission v. CBS Corporation*, 535 F.3d 167 (3d Cir. 2008).

As part of its broadcast of the 2004 Super Bowl, CBS Corporation aired a halftime show produced by MTV Networks. The show’s finale featured Janet Jackson and Justin Timberlake performing “Rock Your Body,” one of Timberlake’s signature songs, while engaging in a sexually suggestive dance choreographed to match the song’s lyrics. As Timberlake sang the last line, “gonna have you naked by the end of this song,” he tore away Jackson’s bustier. Her right breast was briefly exposed to an estimated ninety million viewers. CBS estimated the incident lasted nine-sixteenths of one second.

After reviewing the incident, the FCC imposed a \$550,000 fine on CBS and its affiliates—\$27,500 for each station owned and operated by the network—in March 2006. CBS appealed the fine, arguing that “fleeting, isolated or unintended images” should not be considered indecent. In August 2008, the Third Circuit Court of Appeals threw out the fine, ruling unanimously that the FCC had violated the Administrative Procedures Act because it had “arbitrarily and capriciously departed from its prior policy excepting fleeting broadcast material from the scope of actionable indecency.”

The Federal Communications Commission appealed to the Supreme Court, which granted certiorari. On May 4, 2009, the Supreme Court vacated the decision and, in a three-sentence opinion, remanded the case back to the Third Circuit Court of Appeals “for further consideration in light of *FCC v. Fox Television Stations*.” In that decision (described above), the Supreme Court had held that the FCC’s decision to adopt tougher indecency standards was neither “arbitrary” nor “capricious.” Although the speech at issue differs—*Fox Television* involves indecent language and *CBS Corporation*

involves nudity—the Court’s decision in *Fox Television* answered the administrative law concerns that the Third Circuit had voiced in *CBS Broadcasting*.

The case now returns to the Third Circuit Court of Appeals for a resolution of the constitutional issue. In its original decision, the Third Circuit had suggested that there was a second reason for striking down the fine. The FCC cannot, under the First Amendment, punish CBS for the expressive conduct of MTV, an independent contractor. In this case, the network neither planned nor knew how Timberlake and Jackson would end their performance. As in *FCC v. Fox Television Stations*, the network may also argue that the FCC’s restrictions on indecent speech violate the First Amendment. When the Third Circuit revisits the case, these free speech considerations will likely come to the foreground. No matter which side prevails, the losing party will certainly appeal to the Supreme Court.

U.S. Supreme Court

Case: *Citizens United v. Federal Election Commission*, 2009 U.S. LEXIS 4962 (June 29, 2009).

Question: Does the Bipartisan Campaign Reform Act of 2002 apply to a documentary, intended for theaters and video-on-demand service available to some cable subscribers, that is critical of a political candidate?

Summary of decision: This case involves *Hillary: The Movie*, a ninety-minute documentary produced by Citizens United, a conservative political group critical of Hillary Clinton’s 2007–2008 presidential campaign. According to Citizens United, the movie “includes interviews with numerous individuals and many scenes of Senator Clinton at public appearances. . . . It does not expressly advocate Senator Clinton’s election or defeat, but it discusses her Senate record, her White House record during President Bill Clinton’s presidency, and her presidential bid.”

The movie was released in January 2008, a date timed to coincide with several Democratic primary elections and party caucuses. *Hillary* was shown in some movie theaters and was available in DVD format. Citizens United also intended to run television commercials promoting the movie and to make the movie available through video-on-demand services offered by many cable networks.

Parts of Citizens United’s plan appeared to qualify as the sort of “electioneering communication” regulated by Section 203 of the Bipartisan Campaign Reform Act of 2002 (text, pp. 362–365), which applies to material that (1) is broadcast on television or radio; (2) airs within the sixty days before a federal general election or the thirty days before a federal primary; (3) refers to a clearly identified candidate for federal office, and (4) is targeted to reach that candidate’s electorate. Other provisions in the BCRA require any corporation or union that spends more than \$10,000 a year on electioneering communication to file a report with the Federal Election Commission, naming anyone who contributed \$1,000 or more toward preparation or distribution expenses. Finally, the BCRA requires a disclaimer in electioneering communication that is not authorized by a candidate or a political committee. The disclaimer must also provide the name and address of whoever is responsible for the content.

Citizens United asked a federal court to issue an injunction, barring the FEC from banning the ads and preventing the movie from appearing on video-on-demand, on the grounds that *Hillary* did not instruct viewers to vote against Senator Clinton. Even if the movie was critical of her candidacy, Citizens United claimed, it deserved to be protected as a form of political speech. Citizens United also challenged the disclosure and disclaimer requirements. A federal district court refused to issue a preliminary injunction. On March 24, 2008, the United States Supreme Court denied certiorari.

The case was returned to the district court. In July 2008, a three-judge panel ruled that Section 203 applied to *Hillary*, invoking the Supreme Court decision in *Federal Election Commission v. Wisconsin Right to Life* (2007). In that case, the Supreme Court had upheld the provisions concerning electioneering communication, though it limited their reach to “express advocacy or its functional equivalent.” According to Chief Justice Roberts’ majority opinion in *Wisconsin Right to Life*, “A court

should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” Applying the *Wisconsin Right to Life* rule to this case, the district court held that *Hillary* was clearly a form of electioneering communication, as “the Movie is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her. The Movie is thus the functional equivalent of express advocacy.”

Citizens United appealed to the Supreme Court. (A direct appeal was permissible because the district court decisions had been decided by three-judge panels.) Although the 2008 presidential election was over by the time the case was decided, the constitutional issue remains relevant because Citizens United plans to make additional movies and to engage in more electioneering communication in the future. The Supreme Court granted certiorari, heard oral arguments in March 2009, and scheduled a second round of oral arguments for September 2009.

The decision to rehear the case is interesting because the justices appeared to broaden the scope of the discussion. “For the proper disposition of this case,” the justices directed the parties to submit briefs considering whether the Court should “overrule either or both *Austin v. Michigan Chamber of Commerce* (1990), and the part of *McConnell v. Federal Election Commission* (2003) which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002.” In the first case, *Austin v. Michigan Chamber of Commerce* (1980), the Supreme Court upheld a Michigan law that prohibited corporations from using their general funds in state political battles. Portions of the second case, *McConnell v. Federal Election Commission* (2003), concern the provisions of the BCRA about electioneering communication.

To date, the Roberts Court has considered three campaign finance cases and held that each of the provisions challenged violated the First Amendment. In *Randall v. Sorrell* (2006), the Court invalidated a Vermont law that strictly regulated campaign contributions and limited total campaign expenditures (text, pp. 380–381). In *Wisconsin Right to Life v. Federal Election Commission* (2007), the Court narrowed provisions of the BCRA limiting electioneering communication (text, pp. 383–385). Finally, in *Davis v. Federal Election Commission* (2008), the Court struck down the “Millionaire’s Amendment,” a provision of the BCRA that applied to campaigns with self-financing candidates (text, pp. 381–382). Taken together, the three decisions suggest a majority of the justices have grown skeptical of campaign finance regulations. Several legal experts believe the Supreme Court might use the *Citizens United* case to issue a ruling that dramatically changes the law of campaign finance. At the very least, the Court might be prepared to further narrow Section 230’s ban on electioneering communication. Anyone interested in either the First Amendment or political campaigns should stay abreast of developments in this case.

Looking to the Future

Several cases on the Supreme Court’s docket for the 2009–2010 term raise significant First Amendment issues. The Justices may have an opportunity to hear a case involving indecent broadcasting after the Second and Third Circuits issue their decisions in *Federal Communication Commission v. Fox Broadcasting* and *Federal Communication Commission v. CBS Corporation*. The Supreme Court might deny certiorari in the indecency cases, but is already scheduled to hear a second round of oral arguments in *Citizens United v. Federal Election Commission* on September 9, 2009. The decision might usher in dramatic changes in campaign finance law.

The Supreme Court has also agreed to hear appeals in two new cases that raise significant First Amendment issues. It is impossible to predict how the Court will rule in either case, but both have the potential to become consequential decisions. The first case, *Salazar v. Buono*, raises questions

about free speech in public forums (pp. 265–269) and the Establishment Clause (text, pp. 122–123, pp. 307–310). The second case, *United States v. Stevens*, revisits the old question of whether some expression is so worthless as to be unworthy of constitutional protection (text, p. 460). In this instance, the expression at issue involves films depicting cruelty towards animals.

U.S. Supreme Court

Case: *Salazar v. Buono* (Supreme Court docket number 08-472; the lower court decision is *Buono v. Kempthorne*, 527 F.3rd 758 (9th Cir. 2008). Dirk Kempthorne was Secretary of the Interior in the Bush Administration from 2006 to 2009. Ken Salazar, President Obama’s choice for Secretary of the Interior, succeeded Kempthorne in 2009.)

Questions: Does an individual have standing to bring an Establishment Clause suit challenging the display of a religious symbol on government land? Can Congress avoid the Establishment Clause by transferring title for public land to a private party?

Description: The Veterans of Foreign Wars erected a Latin (or Christian) cross of wood on Sunrise Rock in the Mojave National Preserve in 1934 as a memorial to soldiers who had died during World War I. Over the years, the cross has been rebuilt several times. In its current form, the cross is constructed of white pipes and is approximately eight feet high. In 1999, Frank Buono, a former Preserve employee, filed suit in federal court after a request to construct a Buddhist shrine near the cross was denied. In his lawsuit, Buono argued that because the cross is a religious symbol, displaying it on government property violated the Establishment Clause.

In January 2002, while the case was before a federal district court, Congress attempted to save the cross by designating Sunrise Rock as a “national memorial.” Later that year, defenders of the cross inserted language in an appropriations bill, barring the use of federal funds “to dismantle national memorials commemorating United States participation in World War I.” In September 2003, the government went even further and arranged for a land swap that transferred ownership of a one-acre parcel of land, including Sunrise Rock, to veterans groups, in exchange for a five-acre parcel of land elsewhere in the Preserve. Through the land transfer, defenders of the memorial sought to transfer control over the land to a private party and place the cross beyond the reach of the Establishment Clause.

The United States Court of Appeals for the Ninth Circuit was not impressed by these efforts. The Mojave Preserve consists of 1.6 million acres in southeastern California. More than 90 percent of the land is federally owned. “Even without knowing whether Sunrise Rock is federally owned,” the court theorized, a reasonable observer “would believe—or at least suspect—that the cross rests on public land because of the vast size of the preserve.” The Ninth Circuit also observed that the government retained control over the land under the terms of the transfer agreement. Despite the government’s “Herculean efforts” to save the cross, the court ultimately concluded that “the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing Establishment Clause violation.”

The new Secretary of the Interior, Ken Salazar, decided to continue the fight by appealing to the Supreme Court. The government’s brief contained two arguments. First, the government sought to have the case dismissed on the ground that Buono lacked standing to sue. According to the government’s brief, Buono had no ideological objection to the display of the cross on public property, did not suffer the “injury in fact” required to make a constitutional claim, and was simply offended that Sunrise Rock is not an “open forum on which other persons might display other symbols.” Second, the brief argued, even if Buono did have standing, the Ninth Circuit had erred in holding that the transfer of ownership did not resolve the Establishment Clause issue.

On February 23, 2009, the Supreme Court agreed to hear the case. The Court could avoid the Establishment Clause question by deciding that Buono lacks standing. If Buono is ruled to have standing, the decision will set a precedent for future lawsuits in which individuals challenge religious symbols on government property, especially cemeteries and parks. There are also questions about whether the cross violates the Establishment Clause and whether the government can evade the limitations imposed by the Establishment Clause by transferring the land to a private party. While the case is being litigated, the cross is covered with a plywood box.

U.S. Supreme Court

Case: *United States v. Stevens* (Supreme Court docket number 08-769; the lower court decision is *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008)).

Question: Does 18 U.S.C. Section 48, a law criminalizing depictions of animal cruelty, violate the Free Speech Clause of the First Amendment?

Description: Robert Stevens was convicted of “knowingly selling depictions of animal cruelty with the intention of placing those depictions in interstate commercial for commercial gain, in violation of 18 U.S.C. § 48.” Although Congress intended the law to be applied to “crush videos,” depictions of a sexual fetish in which women step on small animals, the language of Section 48 reaches “any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place.” In this instance, the depictions were two videos of pit bulls engaged in organized dogfights and a third video in which, among other things, a pit bull was used to hunt a wild boar.

Stevens appealed his conviction. The Third Circuit Court of Appeals, sitting en banc, held on a 10-to-3 vote that Section 48 violated the First Amendment guarantee of freedom of speech. Because the government admitted that depictions of animal cruelty did not fall into an existing category of unprotected speech, the Third Circuit explored whether it would be appropriate to create an entirely new category for such expression. To inform his analysis, Judge D. Brooks Smith, in his majority opinion, considered whether the reasons used for exempting child pornography from First Amendment protection in *New York v. Ferber* (1982; text, p. 145) might be extended to justify an exemption for depictions of cruelty to animals. “The attempted analogy to *Ferber* fails,” Judge Smith ultimately concluded, “because of the inherent differences between children and animals.”

Having established that depictions of animal cruelty qualify for First Amendment protection, Judge Smith argued that Section 48 was a content-based regulation on speech that must be assessed using a strict-scrutiny test. In this instance, he said, the law does not pass strict scrutiny “because it serves no compelling government interest, is not narrowly tailored to achieve such an interest, and does not provide the least restrictive means to achieve that interest.” To illustrate the overbreadth claim, Judge Smith observed that the law would criminalize videos of bullfighting in Spain or even hunting out of season if the conduct was illegal in the state in which the material was marketed.

The United States appealed the Third Circuit decision to the Supreme Court. In the government’s brief, the Solicitor General argued that “certain narrow categories of speech are excluded from First Amendment protection because they have minimal, if any, expressive value, and they cause great harm.” The government then drew an analogy between depiction of illegal acts of animal cruelty and “other kinds of unprotected speech, such as child pornography and obscenity.” Even if the law might reach some protected speech, the government asserted, Section 48 was not overbroad as the law “covers a core of depictions—including crush videos and animal fighting video—whose regulation is plainly constitutional.” Because the law exempts speech with “serious religious, political, scientific,

educational, journalistic, historical, or artistic value,” the government argued that Section 48 could not be applied to depictions of activities such as bullfighting or hunting.

The Supreme Court granted certiorari on April 20, 2009. The decision to hear the case has drawn considerable attention because the last Supreme Court decision recognizing a new category of speech that is not protected by the First Amendment was *New York v. Ferber*, the 1982 decision that held that child pornography was unworthy of constitutional protection. Students of the First Amendment should pay particular attention to this case. While the speech at issue is disturbing, the Supreme Court’s decision may provide additional insight into the boundaries separating protected and unprotected speech, as well as the appropriate standards for assessing content-based regulation of expression.