This update summarizes the free speech decisions of the U.S. Supreme Court for the 2009–2010 term, highlights legislation being debated in Congress dealing with libel tourism and shield laws, 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’s decisions concerning freedom of speech for the 2009–2010 term are few in number but large in consequence. The most anticipated case of the term, Citizens United v. Federal Election Commission, involved electioneering communication and the decision did not disappoint legal commentators. This was not the first time that the Roberts court struck down or narrowed a law regulating campaign contributions and/or expenditures. It seems clear that a majority of justices are willing to revisit the First Amendment questions raised by laws governing campaign finance. In another important case, United States v. Stevens, the Justices extended First Amendment protection to depictions of cruelty to animals. This case is notable because the Supreme Court refused to create a new category of speech (like obscenity, child pornography, or fighting words) that is not protected by the First Amendment.

It now appears that the Court’s 2010–2011 term will be especially significant, as the Justices have already agreed to hear three cases with First Amendment implications. One of these cases, Milner v. Department of the Navy, involves the nine exemptions to the Freedom of Information Act (FOIA). The other two cases, Schwarzenegger v. Entertainment Merchants Association and Snyder v. Phelps, probe the outer limits of speech protected by the Free Speech Clause. To resolve Schwarzenegger, the Justices will need to decide how much First Amendment protection to extend to violent video games. In Snyder, the Supreme Court will consider whether the First Amendment reaches offensive protests at military funerals. Taken together, Schwarzenegger and Snyder will help define when speech loses its constitutional protection.

Finally, it is worth noting that when the Supreme Court decides these cases, a new Justice, Elena Kagan, will have replaced the venerable John Paul Stevens, who retired at the end of the 2009–2010 term. Kagan’s appointment is consequential, as the Court is closely divided (as is reflected in the number of 5-to-4 decisions) and as Justice Stevens was generally regarded as a reliable vote for freedom of speech. Although he was appointed by a Republican President (Gerald Ford), Justice Stevens came to be regarded as one of the leading voices for the liberal wing of the Supreme Court.

In her academic scholarship, Ms. Kagan has generally favored an expansive interpretation of the First Amendment. As Solicitor General, however, Ms. Kagan signed legal briefs on behalf of the United States government that argued for limits on free speech. In United States v. Stevens, for example, the government’s brief argued that the First Amendment did not protect depictions of animal cruelty and that a balancing test should be employed to determine whether these disturbing videos should be suppressed. The Supreme Court rejected this reasoning, which Chief Justice Roberts denounced as both “startling and dangerous” in his majority opinion. In Holder v. Humanitarian Aid Project, the government’s brief defended a statute that made it a crime to provide any form of assistance to terrorist groups. Although the government ultimately prevailed, the Chief Justice criticized the government’s position in this case too. It is, of course, impossible to know whether the positions espoused in these briefs reflect Ms. Kagan’s beliefs or whether she was simply representing the best interests of her client, the United States government.

With the potential for significant decisions and the certainty of a new Justice, anyone interested in freedom of speech should pay particular attention to the 2010–2011 term. It promises to be an interesting year. Predicting how the Justices will rule is a hollow exercise, but the cases already before the Supreme Court raise the possibility of one or more decisions with lasting First Amendment implications.
Chapter 3: Political Heresy: Sedition in the United States since 1917

U.S. Supreme Court

Subject: 18 U.S.C. Section 2239, which prohibits the knowing provision of “any service, training, [or] expert advice or assistance” to a designated foreign terrorist organization, is constitutional.

Summary of decision: Under the United States Criminal Code, it is a crime to “knowingly provid[e] material support or resources to a foreign terrorist organization.” The phrase “material support” refers to “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.” Under this statute, the government brought 150 indictments, including charges filed against John Walker Lindh (a United States citizen captured in Afghanistan who was accused of fighting for the Taliban), the Lackawanna Six (U.S. citizens accused of training at terror camps in Afghanistan), and Sami Omar Al-Huassayen (a native of Saudi Arabia studying in the United States who was accused of running a website that posted radical Islamist materials) among others. There have been 75 convictions, most in less dramatic cases in which individuals provided material support in the form of money. Anyone convicted under the law faces up to 15 years in prison.

The law grants authority to define a “terrorist organization” to the Secretary of State and provides for judicial review. In 1997, Secretary of State Madeleine Albright exercised this authority and designated 30 groups as foreign terrorist organizations. This list included some well-known groups such as al-Qaeda, Abu Nidal, and the Shining Path, as well as two obscure groups, the Partiya Karkerên Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE). The PKK was founded in 1974 with the aim of establishing an independent state for the Kurds in southeastern Turkey. The LTTE was founded in 1976 with the aim of establishing an independent state for the Tamils in Sri Lanka. While acknowledging that both these groups had engaged in legitimate political and humanitarian activities, the Secretary of State also found that they had engaged in terrorist attacks that had harmed United States citizens.

Six domestic organizations (including the Humanitarian Law Project) and two U.S. citizens who wished to provide monetary contributions and other tangible aid to the PKK and LTTE challenged the law in 1998. According to the plaintiffs, the material support law was unconstitutional for two reasons: “First, it violated their freedom of speech and freedom of association under the First Amendment, because it criminalized their provision of material support to the PKK and the LTTE, without requiring the Government to prove that plaintiffs had a specific intent to further the unlawful ends of those organizations. Second, plaintiffs argued that the statute was unconstitutionally vague.” Although they had not been prosecuted, the plaintiffs feared that they might be criminally charged for providing humanitarian assistance, such as training for individuals on how to file human rights complaints with the United Nations or instructions for conducting peace negotiations.

While the original lawsuit was pending, the September 11, 2001, attacks on the World Trade Center and the Pentagon occurred. Congress quickly responded by adopting the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (also known as the USA PATRIOT Act, text pp. 68–69). This law broadened the definition of “material support or resources” to include “expert advice or assistance.” In 2003, the plaintiffs filed a second lawsuit against the new law. The two lawsuits bounced between...
the district and appellate courts before they were eventually consolidated into a single case. After twelve years of complicated litigation, the case was finally decided on June 21, 2010.

In a widely anticipated decision in the war on terror, the Supreme Court rejected both of the plaintiff’s First Amendment claims on a 6-to-3 decision. Writing for the majority (the five conservative justices—Antonín Scalia, Anthony M. Kennedy, Clarence Thomas, and Samuel A. Alito Jr.—joined by retiring Justice John Paul Stevens), Chief Justice Roberts argued that material assistance, even if it is intended for benign purposes, could help terrorist groups. According to the Chief Justice, “Such support frees up other resources within the organization that may be put to violent ends.” For this reason, he said, there is good reason to defer to Congress and the president, who are “uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not.”

Chief Justice Roberts dispensed with the First Amendment issue by distinguishing between political speech and the “material support” of terrorism. “Congress has not,” the Chief Justice noted, “sought to suppress ideas or opinions in the form of ‘pure political speech.’ Rather, Congress has prohibited ‘material support,’ which most often does not take the form of speech at all.” To the Chief Justice, the difference was clear and unambiguous: “We in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.” To the contrary, the Chief Justice concluded, “We simply hold that, in prohibiting the particular forms of support that plaintiffs seek to provide to foreign terrorist groups . . . [the material support law] does not violate the freedom of speech.”

Justice Stephen Breyer (joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor) offered a spirited dissent. To emphasize the depth of his disagreement with the majority, he took the unusual step of reading a summary of his dissent from the bench. According to Justice Breyer, the law unconstitutionally infringes on political speech, which is at the core of the protection of free expression. In this case, the restrictions were particularly problematic, as the government had failed to demonstrate how the plaintiff’s teaching peaceful activities could be construed as materially supporting terrorism. Moreover, by saying that an important consideration was whether a humanitarian group’s speech was “coordinated with” a terrorist organization, Justice Breyer charged that the majority offered the grounds for finding speech associated with a terrorist group to be criminal, even for a lawyer that the group engaged to argue the lawfulness of its actions. Rather than interpreting the statute broadly, Justice Breyer would “read the statute as criminalizing First-Amendment-protected pure speech and association only when the defendant knows or intends that those activities will assist the organization’s unlawful terrorist actions.”

As might be expected, the Supreme Court’s decision has received a mixed reaction. The Obama administration hailed the outcome and said the material support law was an essential measure in the fight against terrorism. For their part, humanitarian groups quickly denounced the decision. Some of their sentiment is evident in a statement attributed to former President Jimmy Carter, founder of the Carter Center: “We are disappointed that the Supreme Court has upheld a law that inhibits the work of human rights and conflict resolution groups. The ‘material support law’—which is aimed at putting an end to terrorism—actually threatens our work and the work of many other peacemaking organizations that must interact directly with groups that have engaged in violence. The vague language of the law leaves us wondering if we will be prosecuted for our work to promote peace and freedom.” First Amendment experts have been cautious. Although the distinction developed by Chief Justice Roberts works in theory, some have warned that it may prove difficult to apply in practice.
Chapter 4: Defamation and Invasion of Privacy

Libel Tourism Developments

As a result of decisions such as *New York Times v. Sullivan* (text, pp. 83–86), it is extremely difficult for aggrieved parties to win claims for allegedly defamatory statements brought in United States courts. To seek more favorable treatment, some plaintiffs have sought relief in foreign countries such as England, Brazil, Australia, Indonesia, and Singapore, which have lower standards for proving defamation. This forum shopping has been characterized as “libel tourism” because it involves lawsuits that are brought in foreign countries against United States citizens. In many cases, neither party to the lawsuit is a citizen or a resident of the country in which the defamation action is filed.

An early example of libel tourism involves the 2003 book *Funding Evil: How Terrorism is Financed—and How to Stop It*, in which Dr. Rachel Ehrenfeld, an Israeli-born writer and United States citizen, alleged that billionaire Saudi businessman Sheikh Khalid bin Mahfouz (residing in Ireland) and his sons, Abdulrahman bin Mahfouz and Sultan bin Mahfouz, were fundraisers for Islamic terrorist groups. Although *Funding Evil* was published and distributed in the United States, 23 copies were purchased from online bookstores in Great Britain. Those sales allowed the Mahfouzes to sue Ehrenfeld in Britain, which does not have the equivalent of the “actual malice” rule set out in *Sullivan*. Although she was aware of the lawsuit, Ehrenfeld chose not to travel to Great Britain to defend herself, and the court issued a default judgment in favor of the Mahfouzes. The High Court of Justice found Ehrenfeld’s accusations were false, ordered her to apologize and pay $250,000 in damages and costs, and prohibited her from selling additional copies of *Funding Evil* in Great Britain. Ehrenfeld attempted to have the judgment declared unenforceable by a United States court, but her lawsuit was dismissed. The court determined it had no jurisdiction over the Mahfouzes unless and until they came to the United States to enforce their claim.

In an effort to protect U.S. citizens like Ehrenfeld, several states have adopted libel tourism laws. New York was the first state to act. Illinois, Florida, and California quickly followed suit. The laws differ, but they all prevent the enforcement of defamation judgments unless it can be proved that the judgment is valid under United States law. Under the California Libel Tourism Act, for example, California courts will not recognize a foreign court decision “unless the court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions.” Assuming the Mahfouzes were public figures, they would have to demonstrate that Ehrenfeld acted with “actual malice” before a California court would enforce the judgment rendered by the British court.

Because state laws provide only a patchwork of protection, a federal libel tourism bill was introduced in Congress in 2008. That bill was not adopted, but it was reintroduced the following year. The latest version of the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH Act) is notable on two counts. First, the law would bar enforcement of a foreign defamation judgment if the speech at issue was not defamatory under U.S. law. Second, the law creates a cause of action that allows an author or publisher to go to court and seek a declaratory judgment holding a foreign judgment unenforceable under American law, even if the foreign party has not attempted to enforce the judgment in the United States.

Congress unanimously passed the SPEECH Act. President Obama signed the measure into law on August 13, 2010. The SPEECH Act was supported by many groups committed to freedom of speech, including the American Civil Liberties Union, the American Library Association, and the Reporters Committee for Freedom of the Press. Anyone interested in defamation law will want to stay abreast of developments in this area.
Chapter 6: Provocation to Anger and Words That Wound

U.S. Supreme Court


Subject: 18 U.S.C. Section 48, a provision criminalizing depictions of animal cruelty, violates the Free Speech Clause of the First Amendment.

Summary of decision: Congress adopted 18 United States Code Section 48 in 1999 to criminalize the creation, sale, or possession of certain depictions of animal cruelty. This provision defines a depiction of animal cruelty as one “in which a living animal is intentionally maimed, mutilated, tortured, wounded or killed” if that conduct violates federal or state law where “the creation, sale, or possession [of the depiction] takes place.” Because this language would reach a broad range of conduct, the law contains an exceptions clause that exempts any depiction that has “serious religious, political, scientific, educational, journalist, historical, or artistic value.”

Based on the legislative record, it is clear that Congress adopted Section 48 in an effort to criminalize “crush videos” that depict women—sometimes wearing high-heeled shoes—ritualistically killing small animals. Most people would find this behavior deeply disturbing, but these depictions appeal to individuals with a specific sexual fetish. Although all 50 states have laws against animal cruelty that might be applied to crush videos, it is difficult to successfully prosecute such cases as the participants rarely disclose either their identities or the location where the acts occurred. By adopting a federal statute, Congress gave law enforcement officials a potent weapon to combat this unique form of animal cruelty.

Robert J. Stevens promoted pit bull dogs. His business, “Dogs of Velvet and Steel,” sold information about such dogs, including videos depicting dogfighting. As part of a criminal investigation, undercover agents bought three videos from Stevens. In two of the videos, pit bulls were engaged in organized dogfights. In the third, a pit bull was used to hunt a wild boar, among other animals. At his trial, Stevens claimed that the videos offered a historical perspective on dogfighting. The jury was not convinced. Stevens was convicted and sentenced to 37 months in prison. Stevens admitted to selling the videos, but appealed on First Amendment grounds. A federal judge disagreed, but the Third Circuit Court of Appeals, sitting en banc, held on a 10-to-3 vote that Section 48 violated the First Amendment’s guarantee of freedom of speech. The Third Circuit declined to recognize a new category of unprotected speech for depictions of animal cruelty and rejected the government’s attempt to analogize depictions of animal cruelty to child pornography. The government appealed and the Supreme Court granted certiorari.

The Supreme Court affirmed the Third Circuit and ruled that Section 48 was unconstitutional, on an 8-to-1 decision. Writing for the majority, Chief Justice John Roberts acknowledged that the Supreme Court has “permitted restrictions upon the content of speech in a few limited areas.” Citing Chaplinsky v. New Hampshire (text, pp. 163–165), the Chief Justice noted that these “historic and traditional categories” are “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” As noted in the text (p. 165), the unprotected categories of worthless speech include obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. Although animal cruelty has long been illegal, Chief Justice Roberts argued that depictions of animal cruelty did not fit into one of the existing categories, and said that the Justices were unwilling to create a new category. More than 25 years have passed since New York v. Ferber (text, p. 145), the last Supreme Court decision to place a category of speech outside the protection of the First Amendment.

Unwilling to carve out an exception for depictions of animal cruelty, the Chief Justice applied existing standards to Section 48. Under First Amendment doctrine, a statute is overbroad if
“a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate speech.” Section 48, according to the Chief Justice, created a criminal prohibition of “alarming breadth.” Beyond the definitional considerations, Section 48 banned depictions of illegal conduct that is illegal in any jurisdiction. For example, hunting is illegal in the District of Columbia. Because Section 48 bans depictions of illegal activity, the law might be construed to ban the distribution of periodicals about hunting that is legal in other jurisdictions.

In an effort to defend the law, the government argued that Section 48 would only be invoked in cases involving “extreme cruelty.” When he signed the bill, President Clinton announced that the Executive Branch would only apply Section 40 to depictions “of wanton cruelty to animals designed to appeal to a prurient interest in sex.” The Chief Justice was not satisfied with this assurance as the “First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” Moreover, the very fact that President Clinton felt it necessary to issue a signing statement was an “explicit acknowledgement of the potential constitutional problems” with the statute.

Within weeks of the Stevens decision, the Prevention of Interstate Commerce in Animal Crush Videos was introduced in Congress. To address the overbreadth problems identified by Chief Justice Roberts, the proposed legislation is narrowly tailored to focus on crush videos. In its present form, the bill would make it a crime to sell, offer, or distribute an animal crush video in interstate or foreign commerce. The bill defines an “animal crush video” as “any obscene photograph, motion-picture film, video recording, or electronic image that depicts actual conduct in which one or more living animals is intentionally crushed, burned, drowned, suffocated or impaled in a manner that would violate a criminal prohibition on cruelty to animals under Federal law or the law of the State in which the depiction is created, sold, distributed, or offered for sale or distribution.”

The House of Representatives passed the bill by a vote of 416 to 3 on July 21, 2010. It is, however, still too early to predict how the bill will fare in the Senate. If it is adopted, another constitutional challenge is possible.

The language of the bill responds to the overbreadth concerns set out in United States v. Stevens, but critics have argued that the reference to “obscene” content is problematic. At face value, it is hard to see how crush videos contain the prurient appeal required for speech to be obscene in Miller v. California (text, pp. 135–138). While a handful of people might find crush videos arousing, most would likely find the content to be disgusting. Other critics have found an irony in the proposed legislation. Not only would the bill ban depictions of animal cruelty, it would ban the use of such images by animal rights groups, who often use them to advocate for animals. If adopted, this law against animal cruelty might eliminate one of the more effective emotional appeals used by animal rights advocates.
Chapter 8: Prior Restraint

Wikileaks and Classified Documents

In 1971, Daniel Ellsberg covertly copied and distributed a secret government report titled “History of the United States Decision-Making Process on Vietnam Policy.” When excerpts of this classified material began appearing in the New York Times and Washington Post, the Nixon administration was quick to respond. Even though the documents were largely historical accounts of events under prior presidencies, Attorney General John Mitchell went to court and sought restraining orders against the newspapers on the grounds that publication of the “Pentagon Papers” posed a threat to national security. Lower federal courts issued conflicting decisions. The Supreme Court agreed to hear the case on an expedited appeal. In New York Times Co. v. United States and United States v. Washington Post (text, pp. 225–227), the Justices ruled prior restraints were unjustified in this instance and allowed the newspapers to resume publication of the “Pentagon Papers.”

In the summer of 2010, the Wikileaks web site (http://www.wikileaks.org) began publishing excerpts from more than 70,000 secret documents about the war in Afghanistan. To guarantee full distribution of the “Afghan War Diary,” Wikileaks shared some of the files with selected newspapers and magazines (including the New York Times, the Guardian in England, and Der Spiegel in Germany). The documents, allegedly stolen by whistle-blower Bradley Manning, cover the period from January 2004 to December 2009. Among the findings in the files are suggestions that Pakistan’s spy service supports insurgents in Afghanistan, that a top-secret “black” unit has been tasked with killing or capturing top Taliban leaders, that money targeted for humanitarian aid had disappeared, and that civilian fatalities in Afghanistan are significant. Much of this information was already known, but critics were quick to cite the official documents as proof that United States intervention in Afghanistan has failed and that troops should be withdrawn.

The Obama administration denounced Wikileaks for facilitating the release of classified documents in violation of federal law. The government did not seek a prior restraint or otherwise attempt to prevent publication of the documents, but National Security Adviser James Jones issued a statement that began: “The United States strongly condemns the disclosure of classified information by individuals and organizations which could put the lives of Americans and our partners at risk, and threaten our national security.” To minimize this danger, the Obama administration encouraged the media to censor or obscure any information that could harm United States military personnel or Afghans who had aided them. In an attempt to address this concern, Wikileaks claims, it has withheld about 15,000 documents.

The “Afghan War Diary” is significant to First Amendment scholars because it demonstrates that new communication technology have made prior restraints all but impossible. In the “Pentagon Papers” case, Ellsberg and the newspaper’s editors were few in number and only traditional media outlets had the means to efficiently disseminate content. The government was also aided by the length of the “Pentagon Papers”: it took weeks for reporters to digest the content and for newspapers to publish any appreciable portion of the documents. All these factors change, however, in the Internet age. Even if the Obama administration had tried to suppress publication of the “Afghan War Diary,” it would have been difficult for the government to enforce a prior restraint, as anyone with Internet access might easily post the material. Because there are no page limits in web sites, Wikileaks was able to post more than 200,000 pages, more than 70,000 documents. Further complicating matters, the Internet does not respect national boundaries; material posted in foreign countries is readily available in the United States. (The founder of Wikileaks, Julian Assange, was born in Australia and currently resides in Great Britain.) Once the content is posted, anyone with Internet access can read the material. “The potential implications of this change are unfathomable. For the law of prior restraint,” News Media and the Law observed, “there is no going back.”
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 federal journalists’ privilege law—often described as a “shield law”—to protect reporters. Although these efforts failed, 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 has publicly stated that he supports such legislation. New shield law bills were introduced in both the House of Representatives and the Senate. The House passed the Free Flow of Information Act of 2009 by a voice vote on March 31, 2009. (Such votes are commonly used to pass noncontroversial legislation.) After months of delay while committee members debated amendments, the Judiciary Committee finally voted on December 11, 2009, to present a shield law bill to the full Senate. If the Senate passes the bill, reconciliation will be required, as there are differences between the bill passed by the House and the version pending in the Senate. If the sponsors can agree on common language, both the House and Senate would need to vote again before the president could sign the shield law. Attorney General Eric Holder is already on record as stating, “The Department [of Justice] and [the Obama] Administration can support such a bill.”

As of August 2010, the Senate had not voted on the bill. Before the Senate acts, several outstanding issues need to be resolved, including the thorny definition of journalists eligible for protection. Some senators want to limit protection to paid employees of recognized media outlets. This definition would exclude bloggers, concerned citizens, and other interested parties who occasionally post content on the Internet. Other senators want to define “journalist” more broadly so as to include anyone who disseminates information to the public. Concerns have also been voiced about controversies involving national security, such as Wikileaks. All these issues will need to be resolved before a vote can be taken.

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.”

While the Obama administration has pledged to be the most open in history, a January 2010 report by the *Washington Post* found federal agencies continue to fight requests for disclosure. As in the past, agencies often invoke exemptions pertaining to national security and internal decision-making. According to the report, 319 lawsuits were filed under FOIA in 2009. To put this figure in perspective, the report noted that 289 lawsuits were filed in 2007 and that 298 were filed in 2008. White House officials questioned the numbers and highlighted the release of records. During 2009, the Obama administration released once-secret memos about interrogation methods, White House visitor logs, and data about birds and aviation safety.
Chapter 13: Broadcasting, Cable, and Access Theory
Second Circuit Court of Appeals


Subject: New indecency rules adopted by the Federal Communications Commission are unconstitutionally vague and violate the Free Speech Clause of the First Amendment.

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. Relying on the Bono precedent (also known as the Golden Globes precedent), the FCC subsequently 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 (APA). 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 appease the Second Circuit, the FCC appealed to the Supreme Court, which agreed to hear the case. In a 5-to-4 decision issued in April 2009, the Court held that the FCC had adhered to the APA 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.)

Because the FCC had not violated the APA, the Supreme Court remanded the case to the Second Circuit Court for a decision on the broadcaster’s claim that changes to the “fleeting expletive” policy violate the First Amendment. After hearing arguments on the constitutional question, the Second Circuit announced its ruling on July 30, 2010. In a unanimous three-judge decision that was peppered with the language at issue, the Second Circuit held the FCC’s ban on indecent broadcasting “is impermissibly vague and that the FCC's decisions interpreting the policy only add to the confusion.” To illustrate this point, the opinion offered a variety of real examples based on previous FCC rulings. The Commission concluded that the word “bullshit” in NYPD Blue was impermissible, but allowed “dick” and “dickhead.” Similarly, the FCC had deemed the repeated use of “fuck” and “shit” permissible in Saving Private Ryan, but had objected to a single “fucking” during the Golden Globe Awards. Such inconsistency, the Second Circuit concluded, creates a “chilling effect that goes far beyond the fleeting expletives at issue here.”

The Second Circuit decision is notable for a second reason. As part of their attack on the tightened indecency rules, the television networks had questioned the ongoing validity of FCC v. Pacifica Foundation (text, pp. 373–375), a 1978 Supreme Court ruling that first upheld the
FCC’s authority to regulate indecent content broadcast over the public airwaves. In the *Pacifica* decision, the Supreme Court held that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.” This is so, the Justices continued, because (1) “the broadcast media have established a uniquely pervasive presence in the lives of all Americans” and because (2) “broadcasting is uniquely accessible to children, even those too young to read.” This reasoning, according to the Second Circuit, is no longer compelling due to the “explosion of media sources” and the availability of new parental controls that can be employed to limit what children can watch on television. While acknowledging that precedent binds lower courts, the Second Circuit suggested, “The Supreme Court may decide in due course to overrule *Pacifica.*” If that happens, broadcasting will be entitled to the same measure of protection as other forms of communication.

The FCC has a variety of options; it will be interesting to see how the government proceeds. The agency could accept the Second Circuit’s decision; it could seek an *en banc* review by the full Second Circuit; or it could appeal to the Supreme Court. Such an appeal is not without risk, however, as the Supreme Court might do as the Second Circuit suggested and revisit the underlying basis of the *Pacifica* decision. In his concurring opinion in *Federal Communication Commission v. Fox Television Stations* (2009), Justice Clarence Thomas argued that new technology had broadened the broadcast spectrum, thereby undermining the scarcity rationale that is traditionally invoked to justify stricter regulation of broadcasting. If the case is appealed to the Supreme Court, and if the Justices do reconsider *Pacifica*, the decision might have dramatic implications for the future regulation of broadcasting.

**U.S. Supreme Court**


**Subject:** Provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) restricting “electioneering communication” violate the Free Speech Clause of the First Amendment.

**Summary of decision:** Citizens United, a conservative political group critical of Hillary Clinton’s 2007–2008 presidential campaign, prepared a 90-minute documentary denouncing her candidacy. *Hillary: The Movie* was released in January 2008, a date neatly timed to coincide with several Democratic primary elections and party caucuses, and screened in some theaters. Citizens United planned to run television commercials promoting the movie and to make it available through the 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 BCRA (also known as the McCain-Feingold Act, text, pp. 362–365), which applies to material that (1) is broadcast on television or radio; (2) airs within the 60 days before a federal general election or the 30 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 (FEC), 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 whomever 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* “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.” Even if the movie was overtly critical of her candidacy, Citizens United claimed, it qualified for First Amendment protection because it was clearly political speech. Citizens United also challenged the disclosure and disclaimer requirements. 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).

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 remained relevant, as Citizens United plans to make additional movies and to engage in more electioneering communication. The Supreme Court granted certiorari and heard oral arguments in March 2009. To the surprise of many legal commentators, the Justices scheduled a second round of oral arguments for September 2009. Many legal commentators speculated that the Roberts Court would use *Citizens United* to issue a broader ruling that would dramatically change the law of campaign finance. This prediction proved prescient when, in the words of a *New York Times* headline, “Justices Turn Minor Movie Case into a Blockbuster.”

In a 5-to-4 decision announced on January 21, 2010, the Supreme Court eased restrictions on “independent spending” by corporations, unions, and other organizations in political campaigns. The case was decided along the usual ideological fault lines, with Chief Justice Roberts and Justices Kennedy, Scalia, Thomas, and Alito forming the majority. In his the lengthy opinion of the Court, Justice Anthony Kennedy argued that Section 230’s prohibition on such expenditures was invalid and could not be applied to *Hillary: The Movie*. “If the First Amendment has any force,” Justice Kennedy reasoned, “it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” As part of this decision, the majority explicitly overruled *Austin v. Michigan Chamber of Commerce* (1990) and portions of *McConnell v. Federal Election Commission* (text, pp. 382–383). In *Austin*, the Supreme Court had previously upheld a Michigan law that prohibited corporations from using treasury money to support or oppose candidates. The overruled portions of *McConnell* had upheld provisions of the BCRA restricting independent corporate contributions.

The dissenters were led by Justice John Paul Stevens, who penned a 90-page opinion that invoked the “longstanding consensus on the need to limit corporate campaign spending.” Removing the limits on “independent spending,” warned the four dissenters (Justices Stevens, Ginsberg, Breyer, and Sotomayor), would allow those with financial resources to dominate the election process. “At bottom,” Justice Stevens continued, “the Court’s opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt.” With a sense of irony, he concluded, “While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”

The Supreme Court’s decision in *Citizens United*, it should be emphasized, only dealt with some provisions of the BCRA. The limits on large donations given directly to political parties or candidates, for example, remain in effect. This does not mean, however, that the decision is without consequence. To the contrary, *Citizens United* struck down the BCRA’s limitations on “independent spending.” The decision calls into doubt more than 20 state laws that limit such spending in state and local elections. The laws limiting direct contributions remain in effect, but special interests are now free to speak so long as they do not coordinate their spending with candidates or campaigns.
One measure of the significance of the decision is the fact that President Obama highlighted the decision in his 2010 State of the Union Address, an event that Chief Justice Roberts and several associate justices attended. “Last week, the Supreme Court reversed a century of law to open the floodgates for special interests—including foreign companies—to spend without limit in our elections,” the President warned. “Well, I don’t think American elections should be bankrolled by America’s most powerful interests, and worse, by foreign entities. They should be decided by the American people, and that’s why I’m urging Democrats and Republicans to pass a bill that helps to right this wrong.” While the President spoke, Justice Samuel Alito mouthed “not true.” Weeks later, the Chief Justice told a group of law students that he found the whole incident “very troubling” and lamented the fact that the State of the Union Address had “degenerated to a political pep rally.”

The decision in *Citizens United* will not be the last chapter in this story. Now that five justices have declared limits on independent spending unconstitutional, the Supreme Court may be willing to consider other issues related to campaign finance. The Justices will likely have the opportunity to review some of the state laws called into question by the *Citizens United* decision. The Republican National Committee has already filed a lawsuit seeking to overturn limits on direct corporate contributions to political parties. Supporters of campaign finance reform have promised new legislation to limit the pervasive influence of special interests. New bills have already been introduced into Congress that would limit the effect of *Citizens United* or impose new limits on campaign spending. One measure drawing bipartisan support, the Fair Elections Now Act, would allow qualified candidates for federal office to receive public funding and to solicit small donations. No matter what one thinks about the constitutionality of such legislation, campaign finance is clearly an active area that anyone with an interest in the freedom of speech should monitor closely.
Chapter 14: The Internet

File Sharing Developments

The entertainment industry has gone to great lengths to curtail the illegal downloading of copyrighted content. As part of its campaign, the industry has won lawsuits against MP3.com (*UMG Recordings v. MP3.com*, text, pp. 420–421), Napster (*A & M Records, Inc. v. Napster*, text, pp. 421–422), and Grokster (*Metro-Goldwyn-Mayer Studios v. Grokster*, text, pp. 423–424). The illegal downloading of copyright content remains a serious problem, however, although studies disagree on the larger economic impact. In an effort to discourage such infringement, the entertainment industry began to initiate lawsuits against users. College students were prominent targets because research suggests they are among those most likely to download copyrighted material. When confronted with the prospect of expensive litigation and the potential for losing a significant judgment, most of these suits were settled out of court, with the defendant agreeing to pay several thousand dollars in damages and promising to stop file sharing. Two defendants—Jammie Thomas-Rasset and Joel Tenenbaum—refused to settle and went to trial.

*Capitol Records v. Thomas* received considerable attention in the media because it is widely believed to be the first file sharing case that went to trial. Jammie Thomas, now Thomas-Rasset, was the mother of four children, residing in Brainerd, Minnesota. The Recording Industry of Association of America (RIAA) sent her a cease-and-desist letter in August 2005. When Thomas-Rasset refused the settlement offer contained in the letter, the RIAA sued her for downloading and sharing 24 songs using KaZaA. At her first trial, the jury found Thomas-Rasset guilty of copyright infringement and awarded $220,000 ($9,250 per song) in statutory damages. (Under federal copyright law, statutory damages can range from $750 to $150,000 per infringement.) Thomas-Rasset appealed this decision and the judge granted her a new trial due to faulty jury instructions. At her second trial, the jury again found Thomas-Rasset guilty of copyright infringement; this time, it awarded $1.92 million in statutory damages ($80,000 per song). Thomas appealed the award as being so excessive that it violated her rights under the Due Process Clause. Federal district judge Michael Davis agreed that the award was “monstrous and shocking” and held that “statutory damages must bear some relation to actual damages.” He reduced the amount of damages from $1.92 million to $54,000 ($2,250 per song), adding that even that amount was a “higher award than the Court might have chosen to impose in its sole discretion.” Thomas-Rasset has already announced that she plans another appeal.

In the second case, a Boston jury found Joel Tenenbaum, a graduate student at Boston University, guilty of illegally downloading 30 songs and awarded $675,000 in damages ($22,500 per song) to the five major recording companies who were party to the lawsuit. On appeal, Tenenbaum argued that the jury’s award was excessive. He too asserted a violation of his rights under the Due Process Clause. Federal district judge Nancy Gertner agreed that the award was “unprecedented and oppressive” and reduced the damages to $67,500, or one-tenth of the initial award. (The minimum amount of damages allowed by law is $750; the adjusted damages awarded are $2,250 per song, or three times the minimum.) Although there was no question as to Tenenbaum’s guilt, Judge Gertner held that “The Due Process Clause does not merely protect large corporations, like BMW and State Farm, from grossly excessive punitive awards. . . . It also protects ordinary people like Joel Tenenbaum.”

Anyone interested in file sharing will want to stay abreast of new developments in the Thomas-Rasset and Tenenbaum cases. Although federal judges reduced the amount of statutory damages awarded by juries, both Thomas-Rasset and Tenenbaum have appealed. For their part, copyright holders have complained that the reduced damage awards trivialize the real economic and artistic harm that the illegal distribution of copyrighted material causes. The outcome of these cases...
suggests that the legal debate over file sharing has shifted from the copyright infringement to the appropriate amount of damages. Thomas-Rasset and Tenenbaum argued that copyright holders were entitled to receive modest awards based on the actual damage that file sharing caused. This argument would translate into minimal rewards, as the record labels receive 70 cents for each song downloaded from iTunes. Copyright holders have responded that awards based on actual damages are insufficient to deter illegal file sharing. To stop this activity, copyright holders argue for damage awards based on statutory damages, reasoning that large judgments against people such as Thomas-Rasset and Tenenbaum are the only way to send a message and stop this pervasive form of copyright infringement.
Looking to the Future

It now appears likely that the Supreme Court will rule on several cases with significant First Amendment implications during the upcoming 2010–2011 term. The Justices have already agreed to hear three cases, Milner v. Department of the Navy, Schwarzenegger v. Entertainment Merchants Association, and Snyder v. Phelps. If the government decides to appeal the Second Circuit’s decision in Fox Television Stations v. Federal Communications Commission, the Supreme Court may choose to revisit the regulation of indecent broadcasting. Milner deals with freedom of information. The other three cases—Schwarzenegger (violent video games), Snyder (offensive picketing during military funerals), and Fox Broadcasting (indecent language broadcast over the public airwaves)—all deal with speech that is arguably at the outer edge of First Amendment protection. Taken with the Supreme Court’s decision last year in United States v. Stevens (the dogfighting case discussed above), these cases may provide new insights into the boundaries of free speech.

U.S. Supreme Court

Case: Milner v. Department of the Navy (Supreme Court docket number 09-1163); the appellate court decision is Milner v. Department of the Navy, 575 F.3d 959 (9th Cir. 2010). Question: Does Exemption 2 of the Freedom of Information Act, which allows a government agency to keep secret documents about the internal personnel rules and practices of an agency, include sensitive government information that might be used to circumvent government policy? Description: The Freedom of Information Act (FOIA) requires federal agencies to disclose information unless it is exempted under clearly delineated statutory language. Under the FOIA, an agency may withhold a document, or portions thereof, only if the requested material falls into one of nine statutory categories (text, pp. 251–252). This case, Milner v. Department of the Navy, involves Exemption 2, a category that includes internal personnel rules and practices. Since the FOIA was adopted in 1966, some federal courts have expanded this Exemption to create two distinct classes of material: Low 2 and High 2. The Low 2 Exemption covers rules and practices regarding trivial material of a housekeeping nature, such as physical training rosters, office smoking policies, and vacation schedules, which are not of genuine or significant public interest. The High 2 Exemption protects more sensitive, nontrivial, yet unclassified information, the disclosure of which may allow interested parties to circumvent the agency’s regulation.

Glen Scott Milner filed a FOIA request seeking information about Indian Island, a small island in Puget Sound that the United States Navy uses for munitions storage and as a testing range. In response to Milner’s request, the Navy identified 17 document packets containing 1,000 pages of information. After reviewing this material, the Navy released most of the document to Milner, withholding only 81 pages as exempt from disclosure on Exemption 2 (agency personnel rules and practices) and Exemption 7 (confidential law enforcement records) of FOIA. Milner filed suit under FOIA to compel release of the remaining documents, but the district court ruled in favor of the Navy under Exemption 2. (The district court did not reach a decision on Exemption 7.) Milner appealed and the Ninth Circuit ruled in favor of the Navy on a 2-to-1 decision, thereby allowing the government to withhold the 81 documents. The Supreme Court added the case to the 2010–2011 docket on June 28, 2010.

To resolve this case, the Supreme Court will likely rule on the legitimacy of the High 2 Exemption. This is a timely question as the federal appellate courts have come to conflicting decisions about High 2. Some circuits have refused to recognize the High 2 Exemption, thereby limiting the amount of material that can be withheld. Other circuits, including the Ninth Circuit, have expanded Exemption 2 to include the High 2 material. Judge William Fletcher, the dissenting
judge in the Ninth Circuit decision, framed the larger issue as follows: “The majority’s determination to expand Exemption 2 to protect information that the Navy has not seen fit to classify distorts Congress’s careful balance and defies the Supreme Court’s instructions that FOIA exemptions ‘must be narrowly construed’ and are ‘explicitly exclusive.’”

The issue may seem rather abstract, but it has profound practical implications. The Low 2 Exemption allows agencies to withhold low-value information that deals with trivial matters. In recent years, however, the High 2 Exemption has been invoked to withhold the release of unclassified information of a sensitive nature. Several important High 2 cases, for example, involve information about the location of hazardous or toxic substances, emergency response plans, and plans governing the disposal of hazardous substances. This information is not sensitive enough to be classified, yet it does have genuine value. If it were released, government officials have claimed, terrorists or others bent on evil might use it to threaten homeland security or commit criminal acts. In response to such doomsday scenarios, journalists and other concerned parties have charged that broadening the Exemption to include High 2 information would allow federal agencies to withhold all manner of information. “It is easy to imagine ridiculous applications,” the Society of Professional Journalists argued in an amicus brief, “such as concealing all wasteful Pentagon spending because it might inspire anti-government riots.”

Anyone interested in freedom of information should pay particular attention to this case. As the war on terror has escalated, government agencies—especially the Department of Defense—have come to rely on the High 2 Exemption to block the release of unclassified documents. If the Supreme Court legitimates the High 2 Exemption, it would have the effect of decreasing the amount of information available to concerned citizens such as Glen Milner. President Obama, it should be remembered, has instructed the heads of all federal department and agencies that the FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.” This case forces the issue as it will require the Supreme Court to decide how much information can be legally withheld under Exemption 2.

U.S. Supreme Court

Case: Schwarzenegger v. Entertainment Merchants Association (Supreme Court docket number 08-1448); the appellate court decision is Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009).

Question: Does the First Amendment bar laws on violent content in video games sold to minors?

Description: On October 7, 2005, California Governor Arnold Schwarzenegger signed into law Assembly Bill 1179, a measure which made it illegal to “sell or rent a video game that has been labeled as a violent video game” to anyone under the age of 18. Under the law, a violent video game is one “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being.” To clearly identify such games, a separate provision required any “violent video game” imported or distributed in California to be identified with a 2-inch by 2-inch or larger label displaying the numeral “18” on the cover. Any retailers who violated the law’s mandates would be subject to fines of up to $1,000.

The Video Software Dealers Association and the Entertainment Software Association, two trade groups composed of companies in the video game industry, sought an injunction that would prevent California from enforcing the law. In their motion, the plaintiffs argued that (1) video games are a form of expression protected by the First Amendment, (2) the law’s definition of “violent video games” was unconstitutionally vague, and (3) the labeling provisions were a separate violation of the First Amendment. In an attempt to defend the law, California asserted that the court should
depart from traditional First Amendment doctrine, as the law was intended to protect minors. Under the “variable obscenity” doctrine set out in *Ginsberg v. New York* (text, pp. 132–133), California argued that a state could prohibit the sale of sexually explicit speech to minors. Just as the state could regulate the sale of nonobscene speech to minors, California analogized, it should be allowed to regulate the sale of violent content.

The United States Court of Appeals for the Ninth Circuit rejected California’s attempt to “broaden obscenity to cover violent material as well as sexually explicit material.” Instead, the Ninth Circuit applied traditional First Amendment doctrine and held that the law was a content-based regulation on speech that should be assessed using a strict scrutiny standard. Under this standard, California would need to prove the law was (1) narrowly tailored to serve a (2) compelling government interest. In this instance, the Ninth Circuit held California failed on both counts. Instead of considering less restrictive means such as an educational campaign aimed at retailers and parents, and/or stronger parental controls, the state opted for “the most effective” means, which it claimed was a law backed by a $1,000 penalty. Because the state had not demonstrated that less restrictive means were ineffective, the court concluded the law was not narrowly tailored. Looking beyond the remedy, the Ninth Circuit also questioned whether law served a compelling interest. California asserted violent video games are harmful to minors, but the Ninth Circuit concluded that the “the evidence presented by the State does not support the Legislature’s purported interest in preventing psychological or neurological harm. Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology as they relate to the State’s claimed interest.” In the penultimate section of the opinion, the Ninth Circuit also held the labeling provision was an unconstitutional form of compelled speech.

Some cities (St. Louis and Indianapolis) and states (Oklahoma, Louisiana, Minnesota, Michigan, and Illinois) had already attempted to limit access to violent video games. While these legislative initiatives have proven politically popular, federal courts have consistently held that such measures are unconstitutional restrictions on the freedom of speech. Like the Ninth Circuit, the Seventh Circuit (*American Amusement Machine Association v. Kendrick*, 244 F.3d 572, (7th Cir. 2001)) and Eighth Circuit (*Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954, (8th Cir. 2003)) have rejected restrictions on violent video games, as have several district courts. The California case is, however, the first time the Supreme Court has agreed to hear arguments. Some commentators were surprised when the Justices added the case to the 2010–2011 docket on April 26, 2010, one week after the Court decision in *United States v. Stevens*. That case, it should be remembered, struck down a federal law against animal cruelty, on First Amendment grounds.

Interest in *Schwarzenegger v. Entertainment Merchants Association* is building. It has already been identified as one of the most important cases before the Justices. Adding to the anticipation is the fact that the Supreme Court likes to consider questions that have produced contradictory decisions in the lower courts. In this instance, the lower courts are in agreement, leading to considerable speculation about how the Justices might rule. The Supreme Court might affirm the Ninth Circuit ruling to definitively resolve the issue and spare judges from the need to review efforts to regulate violent video games. Other commentators have warned, however, that the Justices might accept California’s claim that violent content should be assessed by the lower standard that is invoked to prohibit the sale of sexually explicit material to minors. If the Supreme Court follows this approach and applies a standard modeled after the variable obscenity doctrine, there might be sufficient evidence to justify the California statute. Either of these outcomes would be noteworthy: it has been said that this is “the single most important challenge gaming has ever face” and that “the medium itself is at stake.”


**U.S. Supreme Court**

**Case:** *Snyder v. Phelps* (Supreme Court docket number 09-751); the appellate court decision is *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009)).

**Question:** Does the First Amendment bar a private individual from recovering damages for the intentional infliction of emotional distress and invasion of privacy caused by a political protest staged near his son’s funeral?

**Description:** Rev. Fred W. Phelps, Sr., and the members of his Westboro Baptist Church of Topeka, Kansas, are “fire and brimstone” fundamentalists who believe that God hates homosexuals. Because of our national toleration of homosexuality, Phelps and his followers believe, God is punishing the United States, particularly U.S. military forces. They have voiced this position on a web site (http://www.godhatesfags.com) and by protesting funerals for United States servicemen killed in Iraq and Afghanistan. In response to these protests, more than 40 states and the federal government have adopted laws that regulate demonstrations at funerals.

Marine Corporal Matthew Snyder was killed in Iraq on March 3, 2006. His family arranged for funeral services in his home town, Westminster, Maryland, to be held the following week. Notices were placed in local newspapers announcing the time and location of the funeral. Although he did not know Snyder, Rev. Phelps issued a press release announcing that members of his family would picket the funeral to publicize their message. During the funeral, Rev. Phelps and six members of his family carried signs that expressed message such as “You’re going to hell,” “God hates you,” “Semper fi fags,” and “Thank God for dead soldiers.” Through the protest, Rev. Phelps and his followers complied with local laws and obeyed police directions that required the picketers to remain several hundred feet away from the church.

Once the picketers returned to Kansas, one of Rev. Phelps’ daughters, Shirley Phelps-Roper, published “The Burden of Lance Cpl. Matthew Snyder” on the church’s web site. In this self-proclaimed “epic,” Phelps-Roper alleged that Albert Snyder and his ex-wife had “taught Matthew to defy his creator,” “raised him for the devil,” and “taught him that God was a liar.” After the funeral, Snyder discovered these allegations when searching his son’s name on Google.

Citing both the picketing and the epic, Snyder sued Rev. Phelps and the Westboro Church under Maryland law for intrusion into a secluded event, intentional infliction of emotional distress, and civil conspiracy. After a civil trial, the jury ruled in favor of Snyder and awarded him $2.9 million in compensatory damages and another $8 million in punitive damages. (The judge later reduced the punitive damages to $2.1 million.) Phelps asserted at his trial that his speech was protected by the First Amendment. This constitutional claim formed the basis of his appeal.

Although the speech at issue was “utterly distasteful,” the Fourth Circuit Court of Appeals ruled in favor of Rev. Phelps. The Court’s decision works from the premise that homosexuality is a matter of “public concern” linked to the “issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens.” To the Fourth Circuit, the message conveyed on the signs was “rhetorical hyperbole, and not actual, provable facts about Snyder and his son.” The epic was harder to discount, if only because the title referred to Matthew Snyder by name. This reference notwithstanding, the Court concluded that “the epic cannot be divorced from the general context of the funeral protest.” In the final analysis, the Fourth Circuit aptly concluded, “judges defending the Constitution ‘must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people.”
Albert Snyder appealed to the Supreme Court. The Justices added his case to the 2010–2011 docket on March 8, 2010. In previous cases, the Supreme Court has ruled that the First Amendment requires some “breathing space” for contentious speech. This case is interesting because the Justices will need to determine exactly how much space is necessary. In making this determination, the Supreme Court will be forced to declare how far states and private entities can go in restricting picketers before violating the picketers’ free speech rights. The 

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case is a particularly good vehicle for making this choice because the picketers’ message is so outrageous and the setting, a military funeral, is so solemn.

Beyond the amount of protection required, the case also raises an interesting question about the intentional infliction of emotional distress that may require the Justices to revisit the decision in 

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(text, p. 109). In that case, the Supreme Court concluded that “public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice,’ i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.” In an effort to distinguish this precedent, Snyder’s appeal argues that the 

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decision dealt with two public figures and should not be applied to lawsuits involving two private parties. If the Justices recognize this distinction, private persons like Snyder would not need to demonstrate actual malice to recover damages, making it substantially easier for private persons to prevail in lawsuits alleging the intentional infliction of emotional distress.