This update summarizes the free speech decisions of the U.S. Supreme Court for the 2010–2011 term, discusses the shield legislation pending in Congress, 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/

Chapter 4: Defamation and Invasion of Privacy
Snyder v. Phelps (funeral picketing)

Chapter 5: Religio-Moral Heresy: From Blasphemy to Obscenity
Brown v. Entertainment Merchants Association (violent video games)

Chapter 7: Commercial Speech
Sorrell v. IMS Health, Inc. (pharmaceutical marketing)

Chapter 8: Prior Restraint
WikiLeaks and Classified Documents

Chapter 9: Special Problems of a Free Press
Shield Law Developments
Federal Communications Commission v. AT&T Inc. (Freedom of Information Act)
Milner v. Department of the Navy (Freedom of Information Act)

Chapter 13: Broadcasting, Cable, and Access Theory
Arizona Free Enterprise Club’s Freedom Club Pac v. Bennett (campaign finance)

Chapter 14: The Internet
File Sharing Developments

Looking to the Future
Fox Television Stations, Inc. v. Federal Communications Commission (fleeting expletives)
Golan v. Holder (copyright)

The Supreme Court’s decisions concerning freedom of speech for the 2010–2011 term are significant both in number and in consequence. The First Amendment dominated the term. The Justices issued important decisions dealing with a broad range of issues: funeral protests, violent video games, drug marketing, and politicians who decline public funding. The Roberts Court continued to demonstrate a strong commitment to the freedom of expression guaranteed by the First Amendment. The Justices held that this guarantee requires tolerating offensive voices and violent video games, protects commercial expression, and prohibits the government from intervening in the marketplace of ideas, even when powerful financial interests threaten to dominate political campaigns.

Chapter 4: Defamation and Invasion of Privacy

U.S. Supreme Court


Subject: The First Amendment protects a peaceful protest on a matter of public concern, held near the funeral of a military service member.

Summary of Decision: The Supreme Court has made it very difficult for people in public life to recover damages in libel and privacy suits. To win a defamation claim, a public figure must prove actual malice. Compounding matters, there is little chance of winning a privacy lawsuit if the information disclosed is newsworthy. Some public figures have tried a different avenue for collecting damages, namely, the tort of intentional infliction of emotional distress. This tort has some of the same characteristics as false-light invasion of privacy (which creates shame and humiliation), for it concerns outrageous, extreme forms of expression deliberately intended to inflict emotional injury.

In Hustler v. Falwell (1988; text, p. 109), the Supreme Court held that public persons who sue for intentional infliction of emotional distress must prove deliberate falsehood and actual malice, as they are required to do in libel and false-light privacy actions. The decision was unanimous, but quite limited. As framed by Chief Justice Rehnquist, the question in Hustler was “whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most.” Since everyone acknowledged that Rev. Jerry Falwell—a well-known televangelist and cofounder of the Moral Majority—was a public figure, the Court did not consider the circumstances under which a private person might sue for the intentional infliction of emotional distress. It did consider this question in Snyder v. Phelps, a difficult case involving picketing during a funeral.

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 the church’s web site and in protests at funerals held for United States servicemen killed in Iraq and Afghanistan. As a direct result of 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 hometown, Westminster, Maryland, to be held the following week at St. John Catholic Church. Notices were placed in local newspapers announcing the time and location of the funeral. Although he did not know Corporal Snyder, Rev. Phelps issued a press release announcing that congregants would picket the funeral to publicize their message. During the funeral, Rev. Phelps and six members of his family carried signs that expressed messages 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 dutifully complied with local laws and obeyed police directions that required the picketers to remain several hundred feet away from the church. When the picketers returned to Kansas, one of Rev. Phelps’ daughters, Shirley Phelps-Roper, posted “The Burden of Lance Cpl. Matthew Snyder” to 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 on seclusion, intentional infliction of emotional distress, and civil conspiracy. Phelps asked the court to dismiss the claim, but the judge ruled that all three claims could go to the jury. After hearing the evidence, the jury decided in favor of Snyder on all three claims 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, resulting in a $5 million judgment.) In his defense, Phelps asserted that the First Amendment protected his speech. This 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. 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. The Court nonetheless noted, “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.’” Because Phelps’ speech was protected, the Fourth Circuit reversed the district court judgment and assessed costs against Snyder in the amount of $16,510.

Snyder appealed to the Supreme Court, but the Justices sided with the funeral protestors by a vote of 8 to 1. Writing for the majority, Chief Justice John Roberts cited Justice Brennan’s stirring defense of free speech in New York Times v. Sullivan (1964; text pp. 83–90). “The First Amendment,” he wrote, “reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” This is particularly true when the speech deals with a matter of public affairs because “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”

Distinguishing between public and private concerns requires an examination of the “content, form, and context” of the speech. While acknowledging that the protestors’ placards “may fall short of refined social or political commentary,” the Chief Justice stressed that “the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.” The fact that the speech occurred in connection with a private funeral does not “transform the nature of Westboro’s speech.” The message, the Chief Justice firmly concluded, is “fairly characterized as constituting speech on a matter of public concern and the funeral setting does not alter that conclusion.”
Like Chief Justice Rehnquist’s decision in *Hustler*, Chief Justice Robert’s decision in *Snyder* rejects the idea that speech can be punished simply because it is “outrageous.” According to the Court, “outrageousness” is a “a highly malleable standard with “an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.” Rather than limiting speech because some people might find it outrageous, the *Hustler* and *Snyder* decisions hold that speech cannot be suppressed simply because it is painful. In the words of Justice Roberts, “As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

Taken together, the two decisions make it extremely difficult to win a lawsuit alleging the intentional infliction of emotional distress. In *Hustler*, the Supreme Court held that public figures such as Jerry Falwell must demonstrate actual malice in order to prevail. This result left open the possibility that a private person might recover damages if the speech involved a private matter and if the injury involved more than hurt feelings or a tarnished reputation. The *Snyder* decision will undoubtedly make it more difficult for private figures to prevail because it embraced the discussion of controversial issues and rejected the idea that outrageous speech is unworthy of First Amendment protection.

The lone dissenter, Justice Samuel Alito, thought the majority went too far. “Our profound national commitment to free and open debate,” he argued, “is not a license for the vicious verbal assault that occurred in this case.” It is worth remembering that Justice Alito also cast the lone dissenting vote in *United States v. Stevens* (2010), a decision that struck down a federal law that criminalized the creation, sale, or possession of certain depictions of animal cruelty. It is always dangerous to draw sweeping generalizations based on two opinions, and particularly risky in this instance as Justice Alito is one of the newer members of the Court. At the very least, however, the two dissents demonstrate that Justice Alito is less sympathetic to speech at the margin—expression that might be offensive or that contains offensive depictions such as animal cruelty—than the other Justices are. The two dissents suggest that in the future, Justice Alito might be willing to engage in some line-drawing and to allow restrictions on peripheral speech that he believes to be less worthy of First Amendment protection.

Chapter 5: Religio-Moral Heresy: From Blasphemy to Obscenity

U.S. Supreme Court

Case: *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729; 2011 U.S. LEXIS 4802 (June 27, 2011). (Originally filed as *Video Software Dealers Association v. Schwarzenegger*. Arnold Schwarzenegger was governor of California from 2003 through 2011. While the case was pending, he chose not to seek a third term and was succeeded by Edmund “Jerry” Brown.)

Subject: California’s ban on the sale or rental of violent video games to minors is unconstitutional.

Summary of Decision: On October 7, 2005, California Governor Arnold Schwarzenegger signed into law Assembly Bill 1179, a measure that 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 California 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* (1968; text, pp. 132–133), California claimed 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 (2) a compelling government interest. The Ninth Circuit held that the state had 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.

The Ninth Circuit also questioned whether the law served a compelling state interest. California asserted that 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.

Although efforts to regulate violent video games 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. Many commentators were surprised, therefore, when the Supreme Court agreed to hear the case, as the Justices seldom grant certiorari where there is no conflict among the lower courts. There was considerable speculation that the Court might be ready to reconsider how the First Amendment applies to depictions of violence, especially those marketed to children.

On the last day of the term, more than seven months after the oral argument, the Supreme Court held the California law was unconstitutional in a 7-to-2 decision. Justice Scalia authored the majority opinion, which was joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. Justice Alito, joined by Justice Roberts, filed a concurring opinion. Justices Thomas and Breyer filed separate dissenting opinions. The split was unusual, as the majority included conservative, liberal, and moderate members of the Court. Despite the lopsided vote, each of the four opinions represents a distinct approach to the case.

Justice Scalia’s majority opinion includes two important claims. First, it claims that “video games qualify for First Amendment protection.” To prove this point, Justice Scalia analogized
video games to protected books, plays, and movies. Like these traditional forms of expression, “video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).” As such, video games could only be regulated by the state if the content fell into one of the “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”

In an attempt to defend the law, California argued that the law restricting the sale of violent video games was similar to a New York law restricting the sale of obscene content to minors, which the Supreme Court had declared constitutional in *Ginsberg v. New York*. Justice Scalia rejected this analogy by distinguishing between obscene and violent content. Although there is a long tradition of protecting children from sexually explicit speech, he noted, comparatively little effort has been made to protect children from violent content. To illustrate this point, Justice Scalia observed that many literary classics—Grimm’s *Fairy Tales*, Homer’s *Odyssey*, and Golding’s *Lord of the Flies*—include violent scenes and actions.

Second, the California law does not withstand traditional First Amendment analysis. “Because the Act imposes a restriction on the content of protected speech,” Justice Scalia noted, “it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.” In this instance, the social scientific evidence was insufficient to prove a compelling state interest. According to Justice Scalia, “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.”

Moving beyond the scientific evidence, Justice Scalia’s opinion also claimed the statute was underinclusive. California legislators targeted video games, but they “declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns.” To Justice Scalia, this focus suggested that state was more interested in singling out video games than in combating violence. If the state were really interested in solving the problem, Justice Scalia reasoned, it would ban the sale of violent video games, not condition sale on the presence of a parent or an adult.

In his concurring opinion, Justice Alito (joined by Chief Justice Roberts) pursued a very different route but came to the same conclusion. Unlike the majority, Justice Alito acknowledged there was “a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie.” Rather than engaging in the debate, Justice Alito resolved the case on narrower grounds. Clearly uncomfortable with the breadth of Justice Scalia’s majority opinion, Justice Alito simply held “the California law does not define ‘violent video games’ with the ‘narrow specificity’ that the Constitution demands.” Because the language used in the statute did not provide “fair notice” about what is prohibited, Justice Alito held that it was unconstitutional without declaring “whether a properly drawn statute would or would not survive First Amendment scrutiny.”

The two dissenting opinions are notable for different reasons. Justice Clarence Thomas reiterated his belief that the First Amendment “does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians.” This dour view of children’s rights fits with another of his dissenting opinions, *Morse v. Frederick* (2007), in which he argued that the Supreme Court should overrule the *Tinker v. Des Moines Independent Community School District* (1969) decision, which extended speech rights to public school students.

Unlike the other Justices, Justice Breyer found the social scientific evidence on the effects of violent video games to be compelling, which led him to a conclusion very different from Justice

Scalia’s when he applied the strict scrutiny test. “The interest that California advances in support of the statute,” Justice Breyer wrote, “is compelling.” Moreover, the law imposes no more than a “modest restriction on expression” because no one is prevented from playing a video game. The law only “prevents a child or adolescent from buying, without a parent’s assistance, a gruesomely violent video game.”

The same day that the Supreme Court ruled in Brown v. Entertainment Merchants Associations, the Justices announced that they would hear a challenge to another government effort to protect children from harmful expression. That case, Federal Communications Commission v. Fox Television Stations (discussed later in this Update), involves a regulation designed to protect children from “indecent” expression that is broadcast over the public airwaves. The FCC case bears watching because, as several commentators have noted, it will force the Court to against consider how far the government can go under the First Amendment in regulating speech with the goal of protecting children.

Chapter 7: Commercial Speech

U.S. Supreme Court


Subject: A Vermont law that restricts access to personal information in nonpublic prescription drug records violates the First Amendment.

Summary of Decision: In 2007, the Vermont legislature adopted a Prescription Confidentiality Law, also known as Act 80. The central provision of this law prohibited “A health insurer, a self-insured employer, an electronic transmission intermediary, a pharmacy, or other similar entity” from selling, licensing, or bartering any “prescriber-identifiable information for marketing or promoting a prescription drug” without obtaining the prescriber’s permission.

The findings that accompanied the measure suggest the Vermont legislature was trying to curtail a practice known as “detailing.” According to the findings, pharmacies and the other entities identified in the law routinely collected prescriber-identifying information when filling prescriptions and processing payments. This information is valuable, so much so that it is routinely sold to “data miners,” companies that analyze the data and evaluate prescription practices. In turn, the data miners generate reports that are sold to pharmaceutical companies, which use the information for marketing purposes. Through this “script tracking,” the manufacturers and their sales representatives are able to discover a doctor’s prescribing patterns and the inclination to prescribe a particular drug. Using this information, the manufacturers can develop doctor-specific campaigns carried out by “detail men,” sales reps who can respond to questions about the “details” concerning the use, interactions, and side effects of the drugs they are selling. These sales reps also provide free samples, promotional literature, and gifts to doctors. With the exception of voluntary guidelines created by the American Medical Association and other professional groups, there are no regulations on these marketing campaigns.

Research suggests “detailing” is highly effective because many doctors, in making treatment decisions, rely on information that the pharmaceutical companies provide. Because detailing is expensive, it is only cost effective when used to promote high-profit brand-name drugs protected by patent. As a result, doctors often prescribe expensive brand-name drugs that are no more effective than older, less expensive, generic alternatives. To address this problem, many states—including Vermont, New Hampshire, and Maine—have adopted laws restricting the sale and use of prescriber-identifiable data for pharmaceutical marketing.
The Vermont law at issue did not prohibit the disclosure of prescription information, nor did it ban detailing. Rather, it required pharmacies and other regulated entities to obtain the consent of the doctor before selling information about prescribing practices to the data mining companies. When presented with this choice, most doctors chose not to grant their consent, which meant their prescription records could not be shared with third parties. Detailing was still permissible, but absent the information that identified the prescriber, it was much less effective. By making it harder to collect this raw data, the Vermont legislature hoped to eliminate script tracking, discourage targeted marketing campaigns, and increase the use of generic drugs. In theory, the effect of the law would be to decrease the cost of prescriptions and make health care more affordable.

As might be expected, companies that had a financial interest in collecting and using prescription information challenged the Vermont law. The first lawsuit was filed by three data mining companies—IMS Health, Inc., Verispan LLC, and Source Healthcare Analytics, Inc. The second lawsuit was filed by an association of pharmaceutical manufacturers that produce brand-name drugs—the Pharmaceutical Research and Manufacturers of America. The lawsuits were combined. A federal district court upheld the Vermont law, but the Second Circuit Court of Appeals declared the law an unconstitutional restriction on the data mining companies’ and drug manufacturers’ commercial speech. In reaching its decision, the Second Circuit ignored a First Circuit decision upholding similar laws in New Hampshire and Maine.

The Supreme Court had refused to hear the data mining companies’ appeal of the First Circuit decision, which had upheld the New Hampshire law in June 2009. When the Second Circuit struck down the Vermont law, there was a conflict between two federal circuits. Vermont officials filed a writ of certiorari and asked the Supreme Court to resolve the tension in November 2010. The data mining companies and the drug manufacturers’ association also urged the Court to hear the case. Although they were satisfied with the Second Circuit’s decision, they hoped the Supreme Court would definitively rule that such state laws were unconstitutional. The Justices agreed to hear the case and, on a vote of 6 to 3, upheld the Second Circuit decision declaring the Vermont law unconstitutional.

Justice Kennedy wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Sotomayor. As Justice Kennedy framed the case, Vermont sought to impose a content-based regulation on protected commercial speech. For such a measure to withstand constitutional scrutiny, Justice Kennedy continued, “the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.”

The interests that Vermont asserted fell under two broad headings: (1) protecting medical privacy, including “physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship,” and (2) improved public health and reduced health care costs. Neither interest was sufficient to satisfy the majority. With respect to the privacy interest, Justice Kennedy noted that the pharmacies and other named parties could still collect and share information that identified prescribers. The Vermont law only limited the use of this information for marketing purposes. Justice Kennedy was equally critical of the second interest. Although lower costs and promoting public health were legitimate ends, Vermont sought to pursue those ends by restraining the speech of certain speakers. Such restrictions were impermissible, Justice Kennedy continued, because “‘the fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech.”

The problem, according to Justice Kennedy, was that Vermont tried to control health care costs by intervening in the marketplace of ideas. The law prevented data miners and sales reps from gathering and using prescriber-identifying information to sell their expensive, brand-name drugs.
This heavy-handed approach was too much for Justice Kennedy, who concluded his opinion by noting, “The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.”

The dissenters—in an opinion by Justice Breyer, joined by Justices Ginsburg and Kagan—saw the case very differently. Instead of viewing the Vermont law as an attempt to regulate commercial speech, Justice Breyer saw “a case where the government seeks typical regulatory ends (lower drug prices, more balanced sales messages) through the use of ordinary regulatory means (limiting the commercial use of data gathered pursuant to a regulatory mandate).” As he framed the controversy, there was no First Amendment issue because the Vermont law neither “forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view.” Instead of applying the strict scrutiny test used to assess content-based restrictions on speech, Justice Breyer would apply “the standard appropriate for the review of economic regulation,” which was less rigorous. In the penultimate paragraph of his opinion, Justice Breyer warned that applying a heightened standard of review to this type of commercial speech would open a “Pandora’s Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message.”

Commenting on the two decisions, Supreme Court reporter Lyle Denniston said the majority and dissenting opinions were “like ships passing in the night.” Justice Kennedy’s majority opinion declared that the Vermont law was an unconstitutional restriction on commercial speech, while Justice Breyer’s dissenting opinion asserted that the state had the power to regulate commerce for the public good. The Sorrell decision broke no new ground, although the majority opinion did hint that data mining might raise privacy issues. As Justice Kennedy noted, the “capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure.” For the moment, at least, the Court chose not to consider that issue.

Chapter 8: Prior Restraint

WikiLeaks and Classified Documents

The controversial WikiLeaks web site continues to make news. In April 2010, WikiLeaks posted “Collateral Murder,” a classified video of an Apache helicopter firing on and killing a group of civilians, including two Reuters journalists. In July 2010, WikiLeaks posted the “Afghan War Diaries,” a collection of more than 70,000 documents related to United States involvement in Afghanistan. In October 2010, WikiLeaks released 400,000 new documents that constitute the “Iraq War Logs.” More recently, WikiLeaks began publishing files related to prisoners detained at the Guantanamo Bay Detention Camp. This controversial facility, which is part of a U.S. naval base in Cuba, has been used to house detainees from the wars in Afghanistan and Iraq. The new documents purportedly contain details about the location and organization of al-Qaeda, the terrorist organization responsible for the September 11, 2001, attacks on the United States.

The Obama Administration has publicly denounced WikiLeaks. In the words of James Clapper, director of National Intelligence, “The actions taken by WikiLeaks are not only deplorable, irresponsible, and reprehensible—they could have major impacts on our national security. The disclosure of classified documents puts at risk our troops, law enforcement, diplomats, and especially the American people.” The Office of Management and Budget has apparently warned government...
employees and contractors not to access classified documents available on the web site. There are persistent rumors that the federal government might try to indict Julian Assange, WikiLeaks editor-in-chief, for violating the Espionage Act of 1917, which makes it a felony for an unauthorized person to possess or transmit “information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.”

The only person charged to date in connection with WikiLeaks, however, is U.S. army private Bradley Manning, the individual who allegedly leaked the “Collateral Murder” video and the “Afghan War Diaries.” As a soldier assigned to an Army unit in Iraq, Manning had ready access to the Secret Internet Protocol Router Network, which the United States government uses to transmit classified information. Among other things, Manning is accused of illegally transferring classified data to his personal computer, adding unauthorized software to a classified computer system, and communicating national defense information to an unauthorized recipient with reason to believe such disclosure could injure the United States. One of the charges against Manning, “aiding the enemy,” is a capital offense, although prosecutors have said they will not seek the death penalty.

It is important to note that Manning is being charged with disseminating classified information, which is very different from prosecuting an individual (or an organization) who received classified information from publishing that information. The question remains, however, whether the United States government might be willing to prosecute either Assange or WikiLeaks.

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 their efforts failed (due in part to a dispute over the definition of a journalist), 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. Even if Congress had acted, it appeared likely that President George W. Bush would have vetoed the measure.

The election of Barack Obama energized supporters of a shield law, as candidate Obama had publicly stated that he supported such legislation. New shield law bills were introduced in both the House of Representatives and the Senate. On March 31, 2009, the House passed the Free Flow of Information Act of 2009 by a voice vote. (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.

Before the legislation reached the Senate floor, however, thousands of secret documents about the war in Afghanistan appeared on the WikiLeaks web site. This development had implications for the pending shield law, as it raised new questions about who qualified as a journalist eligible for protection under the law, whether the mandates would extend to blogs, and whether the measure would protect data-dump web sites. Lucy Dalglish, executive director of the Reporter’s Committee for Freedom of the Press, observed, “People react to WikiLeaks in an almost hysterical way.” Although the bill had an exception for national security and would not have protected a WikiLeaks-type organization, the controversy effectively ended any hope that Congress will act on a federal shield law in the foreseeable future.
U.S. Supreme Court


Subject: Corporations do not have a right of “personal privacy” under Exemption 7(C) of the Freedom of Information Act.

Summary of Decision: In August 2004, AT&T informed the federal government that it had been overcharging for services related to the Erate (Education-rate) program that Congress had created to enhance schools’ and libraries’ access to advanced telecommunications and information services. The Federal Communications Commission (FCC) was responsible for administering the Erate program. Upon learning of the overcharging, the agency’s Enforcement Bureau opened an investigation. As part of its inquiry, the Bureau ordered AT&T to provide emails and billing information, identify employees involved in the overbilling, and report on whether these employees had violated company policy. The investigation concluded in December 2004, when the FCC and AT&T reached a financial settlement. AT&T—without admitting any liability—agreed to reimburse the federal government $500,000 and to institute a plan designed to prevent future overcharging.

Several months later, a trade association called CompTel—which included companies competing with AT&T—filed a request under the Freedom of Information Act (FOIA) for the propriety information that AT&T had provided to the government. The FCC determined that some of the information requested was exempt from disclosure under Exemption 3, which relates to “trade secrets and commercial or financial information.” This ruling did not satisfy AT&T, which asserted additional information was protected from disclosure under Exemption 7, a provision that exempts “records or information compiled for law enforcement purposes” that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” The FCC rejected AT&T’s appeal for additional protection, holding that AT&T’s position that it is “a ‘private corporate citizen’ with personal privacy rights that should be protected from disclosure that would ‘embarrass’ it . . . within the meaning of Exemption 7(C) . . . [was] at odds with established [FCC] and judicial precedent.” In the judgment of the FCC, “Exemption 7(C) has no applicability to corporations such as [AT&T].”

AT&T appealed. The Third Circuit ruled in its favor, reasoning that “personal” is the adjective form of the term “person,” which Congress has defined to include corporations. By this construction, Exemption 7(C) includes the “personal privacy” of corporations, meaning that more of the information that AT&T had provided to the government during the investigation was exempt from disclosure. The FCC appealed to the Supreme Court. The Justices unanimously reversed the Third Circuit in a decision announced March 1, 2011. (Justice Kagan recused herself because she had played a role in the case while serving as Solicitor General.)

Chief Justice John Roberts wrote the majority opinion. He dismissed AT&T’s claim that the word “personal” in Exemption 7(C) incorporates the statutory definition of the word “person.” “Adjectives typically reflect the meaning of corresponding nouns,” Chief Justice Roberts noted, “but not always.” To illustrate this point, he offered a variety of examples. “The noun ‘crab’ refers variously to a crustacean and a type of apple, while the related adjective ‘crabbed’ can refer to handwriting that is ‘difficult to read’; ‘corny’ can mean ‘using familiar and stereotyped formulas believed to appeal to the unsophisticated,’ which has little to do with ‘corn’; and while ‘crank’ is ‘a part of an axis bent at right angles,’ ‘cranky’ can mean ‘given to fretful fussiness.’”

There are, the Chief Justice conceded, legal definitions of “person” that include corporations. When used in the context of FOIA, however, “personal privacy” suggests “a type of privacy evocative of human concerns—not the sort usually associated with an entity like, say, AT&T.” To justify this interpretation, Chief Justice Roberts reviewed both the legislative history of Exemption...
7 and previous interpretations of the language. Marshaling all of the evidence, the Chief Justice concluded, “The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations.” The concluding line of the opinion ironically notes, “We trust that AT&T will not take it personally.”

Although the case received comparatively little attention, the Supreme Court’s decision may have significant consequences. If AT&T had prevailed, it would have been more difficult for journalists and other public interest organizations that depend on FOIA to support their “watchdog” function to obtain information from regulatory agencies about corporations. In this instance, AT&T was trying to block the disclosure of embarrassing information about whether it had overcharged the government for Erate services. In other cases, journalists have successfully used FOIA to obtain information about aviation and mine safety, as well as health code violations in food processing and catering companies. AT&T and the Chamber of Commerce lamented the decision, however. To their way of thinking, the Supreme Court had changed FOIA, a law originally intended to give citizens access to government information, into a measure that competitors might use for corporate intelligence gathering. Some critics have even argued that the Federal Communications Commission v. AT&T decision may make corporations less likely to share information with the government, for fear that the information might ultimately be disclosed to third parties pursuant to FOIA requests.

**U.S. Supreme Court**

**Case:** *Milner v. Department of the Navy*, 131 S. Ct. 1259; 2011 U.S. LEXIS 2101 (March 7, 2011).

**Subject:** Maps describing the location of explosives do not qualify for withholding under Exemption 2 of the Freedom of Information Act, which only shields government records that relate to employee relations and human resources issues.

**Summary of Decision:** 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). Exemption 2 covers 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 regarding 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 more than 1,000 pages of information. After reviewing this material, the Navy released most of the documents to Milner, withholding only 81 pages as exempt from disclosure under 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, citing the High 2 Exemption. (The district court did not reach a decision on Exemption 7.) Milner appealed, but the Ninth Circuit Court also ruled in favor of the Navy, thereby allowing the
government to withhold the 81 documents. Milner appealed that decision to the Supreme Court. On an 8-to-1 decision, the Justices reversed the lower court.

Justice Elena Kagan’s majority opinion offers a masterful exercise in statutory construction. She begins by noting that the text of Exception 2 contains 12 simple words: “related solely to the internal personnel rules and practices of an agency.” Of these words, “personnel” is the most important. In the statute, “personnel” is used as an adjective to modify “rules and practices.” Hence, Justice Kagan continues, “An agency’s ‘personnel rules and practices’ are its rules and practices dealing with employee relations or human resources.” From this principle, it necessarily follows that the federal courts erred in creating the “High 2” interpretation of the exemption. “Our construction of the statutory language,” Justice Kagan writes, “makes clear that ‘Low 2 is all of 2 (and that High 2 is not 2 at all).”

Because Exemption 2 is limited to “personnel” matters, it does not shield the information that Milner requested from disclosure. In the words of Justice Kagan, “These data and maps calculate and visually portray the magnitude of hypothetical detonations. By no stretch of imagination do they relate to ‘personnel rules and practices,’ as that term is most naturally understood. They concern the physical rules governing explosives, not the workplace rules governing sailors; they address the handling of dangerous materials, not the treatment of employees.”

To preempt concerns that the Court’s decision would lead to the disclosure of national security information and sensitive materials, Justice Kagan added that the government had “other tools” at hand. Exemption 1 of FOIA prevents access to classified documents; Exemption 3 protects records that any other statute exempts from disclosure; and Exemption 7 protects “information compiled for law enforcement purposes.” Finally, if these statutory exemptions are insufficient, Justice Kagan noted, the government could always seek legislative relief from Congress.

The lone dissenter, Justice Stephen Breyer, was not impressed with this reasoning. Because the High 2 exemption had been in effect for more than 30 years, he advocated a more “practical approach” to interpreting the language. To support this view, Justice Breyer offered a long list of materials that had previously been protected from disclosure by High 2: “blueprints for Department of Agriculture buildings that store biological agents, documents that would help hackers access National Aeronautics and Space Administration computers, agency credit card numbers, Commodity Futures Trading Commission guidelines for settling cases, ‘trigger figures’ that alert the Department of Education to possible mismanagement of federal funds, security plans for the Supreme Court Building and Supreme Court Justices, vulnerability assessments of Commerce Department computer security plans, Bureau of Prisons guidelines for controlling riots and for storing hazardous chemicals, guidelines for assessing the sensitivity of military programs, and guidelines for processing Medicare reimbursement claims.”

The Supreme Court’s decision does not mean, however, that Milner will receive the maps he sought. Although the Justices eliminated the High 2 Exemption, they also remanded the case so that the lower court could consider whether the material was exempt from disclosure under Exemption 7. Whether or not the government ever releases the documents, the Milner decision is notable because it ends the expansive reading of Exemption 2 often used to withhold access to government records. “We’ve changed the Freedom of Information Act,” Glen Milner said in an interview after the decision. “We’ve eliminated the use of the High 2 exemption. It has been used more and more for Homeland Security type issues. It gets more broad and more broad with its use.” For this reason, open government advocates regard the Supreme Court decision as a significant victory.
Chapter 13: Broadcasting, Cable, and Access Theory

U.S. Supreme Court

Case: Arizona Free Enterprise Club's Freedom Club Pac v. Bennett, 131 S. Ct. 2806; 180 L. Ed. 2d 664; 2011 U.S. LEXIS 4992 (June 27, 2011). (The Supreme Court consolidated two cases and issued one opinion. The second case is McComish v. Bennett, 611 F.3d 510, 2010 U.S. App. LEXIS 13863 (9th Cir. 2010)).

Subject: A matching provision in the Arizona Clean Elections Act—which provides additional funds to a publicly funded candidate when expenditures by a privately financed candidate or independent groups exceed the funding initially allotted to the publicly financed candidate—burdens political speech and cannot survive First Amendment scrutiny.

Summary of Decision: In response to a series of campaign scandals, Arizona voters approved a Clean Elections Act by initiative in 1998. Under the Act, candidates for state office who raised a specified number of $5 contributions are eligible for voluntary public financing for both their primary and general election campaigns. As a condition for receiving public funding, candidates must agree, among other things, to limit their expenditure of personal funds to $500, to participate in one public debate, and to adhere to an overall expenditure cap.

The Act also includes a special “matching funds” provision. During the general election, publicly funded candidates are eligible to receive additional funds if a privately funded opponent receives contributions that, combined with independent groups’ expenditures, exceed the initial allotment of state funds made available to the publicly funded candidate. There are two limitations on the matching funds: (1) the total amount of public funding cannot exceed twice the initial subsidy and (2) 6 percent of the added subsidy is deducted to reflect fund-raising costs. By offering these additional funds, the Arizona law attempts to level the playing field and prevent a privately funded candidate, who is not bound by the overall expenditure cap, from gaining an unfair political advantage.

Five past and future candidates for Arizona state office and two independent groups challenged the constitutionality of the matching funds provision. In 2008, a federal district judge held that the law was unconstitutional, but the matching funds provision remained in effect for the 2008 election while the Arizona Elections Commission appealed to the Ninth Circuit Court of Appeals. In 2010, the Ninth Circuit reversed the district court, ruling that the provision “imposes only a minimal burden on First Amendment rights” because it “does not actually prevent anyone from speaking in the first place or cap campaign expenditures.” To the Ninth Circuit, this burden was justified because the matching funds provision “bears a substantial relation to the State’s important interest in reducing quid pro quo political corruption.” The Supreme Court did not allow matching funds in the 2010 state election, but it did not formally rule on the Arizona law until June 27, 2011.

The Supreme Court is sharply divided on campaign finance, as is demonstrated by the recent decisions in Citizens United v. Federal Elections Commission (2010), Davis v. Federal Elections Commission (2008), and Federal Election Commission v. Wisconsin Right to Life (2007). Once again, by a 5-to-4 decision, the Supreme Court struck down a campaign finance law. Chief Justice John Roberts wrote the majority opinion, joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Kagan wrote the dissenting opinion, joined by Justices Ginsburg, Breyer, and Sotomayor. As in the previous campaign finance cases, the Justices split along ideological lines, with the more conservative members of the Court holding that the campaign finance law was unconstitutional.
Chief Justice Roberts’ majority opinion compared the matching funds provision to the so-called “millionaire’s amendment” of the Bipartisan Campaign Reform Act (BCRA) of 2002. Under this matching funds provision, a candidate for federal office was allowed to accept larger contributions if he or she was running against a self-financed candidate who spent more than $350,000 of his or her own money on the campaign. The Supreme Court declared this provision unconstitutional in Davis v. Federal Election Commission. Chief Justice Roberts extended the logic to the Arizona law. “Much like the burden placed on speech in Davis,” the Chief Justice argued, “the matching funds provision ‘imposes an unprecedented penalty on any candidate who robustly exercises [his or her] First Amendment right[s].’” Once a privately funded candidate’s funding reaches the state’s initial grant to the publicly financed candidate, each additional dollar of campaign spending would produce an additional dollar for the publicly funded candidate. According to Chief Justice Roberts, “That plainly forces the privately financed candidate to ‘shoulder a special and potentially significant burden’ when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy. If the law at issue in Davis imposed a burden on candidate speech, the Arizona law unconstitutionally does so as well.”

Chief Justice Roberts took particular care to dismiss Arizona’s claim that the matching funds provision was necessary to “level the playing field” in terms of campaign funding. For such a scheme to work, the majority argued, the state would have to be actively involved in the electoral process. “‘Leveling the playing field,’ can sound like a good thing,” Chief Justice Roberts wrote. “But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the ‘unfettered interchange of ideas’—not whatever the State may view as fair.”

Justice Elena Kagan, writing for the dissenters, defended the matching funds provision of the Arizona law. According to the dissenters, “The First Amendment’s core purpose is to foster a healthy, vibrant political system full of robust discussion and debate. Nothing in Arizona’s anti-corruption statute, the Arizona Citizens Clean Elections Act, violates this constitutional protection.” Instead of faulting the law, Justice Kagan lauded the state’s effort to promote “the values underlying both the First Amendment and our entire Constitution by enhancing the ‘opportunity for free political discussion to the end that government may be responsive to the will of the people.’”

For public funding to work, a meaningful number of candidates must forego private funds and opt to participate. Because all candidates want to win, they will not accept lump sum grants that come with a competitive disadvantage. Justice Kagan explained the problem as follows: “Too small, and the grant will not attract candidates to the program; and with no participating candidates, the program can hardly decrease corruption. Too large, and the system becomes unsustainable, or at the least an unnecessary drain on public resources.” The trick, according to Justice Kagan, “is in finding the Goldilocks solution—not too large, not too small, but just right.” The dissenters thought Arizona had achieved such a balance. Candidates who accepted public financing received a lump-sum grant at the start of the campaign. If they were being outspent by privately financed candidates and by outside interest groups, the publicly funded candidates qualified for additional funds. The result, according to Justice Kagan, was “Less corruption, more speech. Robust campaigns leading to the election of representatives not beholden to the few, but accountable to the many.”

This decision in Arizona Free Enterprise Club v. Bennett holds that matching funds schemes are unconstitutional. Chief Justice Roberts took particular care, however, to qualify the majority decision. “We do not today call into question the wisdom of public financing as a means of funding political candidacy,” he stressed. “That is not our business.” It will now be up to the lower courts...
to carefully examine the myriad of variations that distinguish the various states’ public funding schemes. Meanwhile, professors and commentators will debate the merits of the Roberts Court’s efforts to change the law of campaign finance.

Chapter 14: The Internet

File Sharing Developments


The illegal downloading of copyright content remains a serious problem, although studies disagree on the economic impact. In an effort to discourage infringement, the entertainment industry has begun to initiate lawsuits against users. College students were prominent targets because research suggests they are among those most likely to download copyrighted material. When defendants were confronted with the prospect of expensive litigation and the potential for losing significant judgments, most of these suits were settled out of court, with the defendants agreeing to pay several thousand dollars in damages and promising to stop file sharing.

To date, only two file-sharing cases involving users have gone to court. In both cases, Capitol Records v. Thomas and Sony Music v. Tenenbaum, juries found the users guilty of direct copyright infringement and awarded presumed damages to the copyright holder. For a variety of reasons, three different juries ultimately heard the case against Jammie Thomas-Rassett. Each concluded that she had illegally downloaded 24 songs. The first jury assigned damages of $9,250 per song; the second assigned damages of $80,000 per song, and the third assigned damages of $62,500 per song. Joel Tenenbaum was found guilty of illegally downloading 30 songs; the jury assigned damages of $22,000 per song.

In both Thomas and Tenenbaum, the trial judges reduced the jury awards. In Thomas, the judge held that the jury’s award violated the Eighth Amendment, which prohibits the imposition of “excessive fines” and “cruel and unusual punishment.” In Tenenbaum, the judge held that the jury award was unconstitutionally excessive under the Due Process Clause. In both instances, the judges reduced the damages to $2,250 per song. The judge’s decisions suggest the outstanding question is not whether file sharing using P2P software constitutes copyright infringement, but rather what constitutes appropriate presumed damages. In dicta, both judges encouraged Congress to rethink the statutory damages provision of the Copyright Act as applied to file sharing.

Although copyright holders obtained thousands of out-of-court settlements and substantial jury awards, the two major trade groups of the entertainment industry, the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA) ultimately discontinued the campaign against users in December 2008. (The cases already in process continued.) Despite the settlements and the courtroom successes, the campaign against users ultimately proved ineffective in decreasing illegal downloading. Compounding matters, the lawsuits were not cost effective; they alienated consumers; and they generated bad publicity. While the RIAA and MPAA did not rule out the possibility of additional lawsuits against heavy downloaders who ignore warnings, they opted to switch strategies. Instead of pursuing legal remedy, the trade associations entered into negotiations with Internet Service Providers (ISPs), in the hope that the ISPs would take a more active role in fighting illegal file sharing. The ISPs initially resisted
these efforts, but opposition faded over time, especially when ISPs such as Comcast began to merge with copyright holders such as NBC.

In July 2011, the RIAA and the MPAA announced an agreement with several major ISPs, including AT&T, Comcast, Time Warner Cable, and Verizon. Under the terms of the agreement, the ISPs will send up to four warning letters to a customer who owns an account suspected in illegally downloading content. If the downloading continues, the ISPs will take appropriate punitive measures that might include redirecting the user to a page with material on copyright abuse, restricting or “throttling” the speed at which files download, and, in an extreme cases, terminating the account. This last punishment has been analogized to turning off the electricity or water service to a home. Because college and university students often obtain Internet access through their institutions, copyright holders also pressured the U.S. Congress to insert language into the Higher Education Act of 2008 requiring colleges to “effectively combat” copyright violations with “a variety of technology-based deterrents” and to offer “alternatives to illegal downloading.”

Several European countries—and notably Great Britain—already adopted so-called “three strikes” laws that require ISPs to monitor their networks for copyright infringement. Under the British Digital Economy Act, copyright holders would submit a list of IP addresses that are suspected of infringement to the appropriate ISP. Once it received the list, the ISP would send a notification letter warning the user to stop downloading. If the user refuses to comply, the ISP would send a second warning. If the user ignores this warning, the ISP could limit the user’s Internet access. In an extreme case, the ISP would share the user’s personal information with the copyright holder, who could then initiate a copyright infringement suit. A British court dismissed a challenge to the Digital Economy Act in 2011. The law goes into effect in 2012.

It is too early to know whether these efforts to involve ISPs will significantly reduce illegal file sharing. If the past is any guide, enterprising downloaders with technological savvy will simply develop new ways to obtain copyrighted material. Students of free expression should, however, keep up with developments in this area. As is always the case, new communication technology raises hard questions about copyright law. It is not certain, therefore, how file sharing cases will ultimately be resolved and whether the new technology will transform the music and movie industries.

**Looking to the Future**

The Supreme Court has already granted certiorari on two cases with significant First Amendment implications. In the first case, *Fox Television Stations v. Federal Communications Commission*, the Justices will consider whether the FCC’s “indecency enforcement regime” violates the free speech or due process clauses of the Constitution. In the second case, *Golan v. Holder*, the Court will consider whether Congress can restore copyright protection to works that have passed into the public domain. Both decisions have the potential to be significant.
U.S. Supreme Court

Case: Fox Television Stations, Inc. v. Federal Communications Commission (Supreme Court docket number No. 10-1293); the appellate court decision is Fox Television Stations, Inc. v. Federal Communications Commission, 613 F.3d 317 (2nd Cir. 2010). The opinion in the second case, ABC, Inc. v. FCC, is available at 404 Fed. Appx. 530 (2nd Cir. 2011) The Federal Communications Commission order that is under review in ABC is reported at 23 F.C.C.R. 314 (F.C.C. 2008).

Subject: Are the FCC’s rules regulating indecent broadcasting so vague as to be unconstitutional?

Description: In Federal Communications Commission v. Pacifica Foundation (1978), the Supreme Court upheld the FCC’s authority to involve indecent broadcasting over the public airwaves (text, pp. 373–375). Since Pacifica, the FCC’s indecency rules have recognized an exception for “isolated, non-literal, fleeting expletives,” especially those that occur 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. The result was a new policy, announced in March 2006, that closed the “fleeting expletives” exemption and generally prohibited the use of “fuck” and “shit” (and derivations). This policy would be enforced with significant fines. The FCC said the prohibition covered all indecent speech, even speech that was unintentionally broadcast during live coverage of newsworthy events.

Fox Television and the other networks challenged the FCC’s policy. In a July 2010 decision, the Second Circuit Court of Appeals held the FCC’s ban on indecent broadcasting “is impossibly 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 the television show NYPD Blue was impermissible, but allowed “dick” and “dickhead.” Similarly, the FCC had deemed the repeated use of “fuck” and “shit” permissible in the movie Saving Private Ryan, but had objected to a single reference to “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.”

In a separate decision dealing with indecent broadcasting, the Second Circuit considered a controversial episode of NYPD Blue that originally aired on February 25, 2003. In “Nude Awakening,” a young boy (Theo Sipowicz) mistakenly enters a bathroom while his father’s girlfriend (Connie McDowell) is preparing to enter the shower. Viewers can see the woman’s bare buttocks and part of one breast. As the boy opens the door, the camera cuts to a shot taken from behind and through the woman’s legs, framing the boy’s stunned face. The scene ends with the boy’s voice, heard through the closed door, saying “sorry,” and the woman, looking embarrassed, responding, “It’s okay. No problem.” Deeming this content “patently offensive as measured by contemporary community standards for the broadcast medium,” the FCC fined each of the 44 stations that broadcast the episode $27,000 (for a total fine or $1.2 million). The stations appealed, and the Second Circuit ruled in their favor. “Although this case involves scripted nudity,” the Second Circuit ruled, “the case turns on an application of the same context-based indecency that Fox found ‘impermissibly vague.’” Since that decision had already held that the FCC’s indecency rules were unconstitutional, the court vacated the fines levied on the stations.

Although the two Second Circuit decisions are separate, they were combined in the writ of certiorari that the government submitted. By joining the cases, the government argued, the Justices could consider the indecency rules as applied to live programming (awards ceremonies) and to scripted shows (NYPD Blue). Joining the cases broadened the issue before the court and framed the issue so that the Justices could rule on the entire indecency regime. The Supreme Court granted certiorari on June 27, 2011, but limited the case to a single question: whether the “current indecency
enforcement regime” violates the First or Fifth Amendment to the Constitution. (Justice Sotomayor recused herself because she had been a member of the Second Circuit when the case was considered there.)

U.S. Supreme Court
Case: Golan v. Holder (Supreme Court docket number No. No. 10-545); the appellate court decision is Golan v. Holder, 609 F.3d 1076 (10th Cir. 2010).
Subject: Does the Copyright Clause of the Constitution prohibit Congress from taking works out of the public domain?
Description: In 1994, Congress passed legislation ratifying a series of global trade pacts that comprised the Uruguay Round General Agreement on Tariffs and Trade. Among these pacts were Article 18 of the Berne Convention for the Protection of Literary and Artistic Works, a 1971 treaty that sought to regularize copyright law. When Congress ratified Article 18 of the Berne Convention, it restored copyright protection to some foreign works that had been in the public domain in the United States: “failure to comply with formalities, lack of subject matter protection, or lack of national eligibility.” The law did not, however, restore copyright protection to works that had passed into the public domain because their copyrights had expired.

The law was challenged by a diverse group of plaintiffs including educators, orchestra conductors, performers, film archivists, and motion picture distributors who regularly used material that had already passed into the public domain. The named plaintiff, Lawrence Golan, is a professor and conductor of the student orchestra at the University of Denver. Before Congress restored copyright protection, Golan’s students were able to play twentieth-century Russian classics by composers Sergei Prokofiev, Dmitri Shostakovich, and Igor Stravinsky without obtaining permission. After copyright protection was restored, these works could not be legally performed without a license. Because budgets are right and permissions are expensive, works such as Prokofiev’s Peter and the Wolf have disappeared from many concert halls. Implementing Article 18 also restored copyright protection to books by C. S. Lewis, H. G. Wells, and Virginia Woolf; films by Federico Fellini, Alfred Hitchcock, and Jean Renoir; and paintings by M. C. Escher and Pablo Picasso. Although no one knows for certain how many works are involved, the U.S. Copyright Office estimates the number would be in the millions.

The original challenge to the law, filed in 2001, has bounced between federal district and appellate courts for nearly a decade. The most recent ruling, a 2010 decision by the Tenth Circuit Court of Appeals, held that “Congress acted within its authority under the Copyright Clause” when it restored copyright protection. To support this holding, the Tenth Circuit applied a strict scrutiny test and concluded that the law “does not violate plaintiffs’ freedom of speech under the First Amendment” because it advances an important governmental interest—securing foreign copyrights for works by U.S. authors—and because it is narrowly tailored. The plaintiffs filed a writ of certiorari, arguing among other things, that the Tenth Circuit decision violated a “bedrock principle” that once copyright protection has expired, it cannot be revived. The Supreme Court granted certiorari on March 7, 2011. (Justice Kagan recused herself because she had defended the law while serving as solicitor general for the Obama Administration. Her recusal means the case will be decided by an eight-member Court. A 4-4 split would affirm the Tenth Circuit’s decision, upholding the law without establishing a precedent.)

In October 2011, the Supreme Court will hear arguments on two questions. First, does the Copyright Clause of the United States Constitution (article 1, section 8, clause 8) prohibit Congress
from taking works out of the public domain? Second, does the 1994 Act violate the First Amendment rights of those who use works that had previously passed into the public domain? In *Eldred v. Ashcroft* (2003; text pp. 340–341), the Supreme Court held that Congress had the authority to extend the duration of copyrighted works. That case did not, however, consider whether Congress could restore protection to works that had already passed into the public domain. The two questions have already generated a considerable amount of debate within the scholarly community. Anyone with an interest in intellectual property law will want to stay abreast of developments in this area.