2013

Annual Update Autumn 2013

Freedom of Speech in the United States

seventh edition

Thomas L. Tedford
The University of North Carolina at Greensboro

Dale A. Herbeck
Northeastern University

This update summarizes the free speech decisions of the U.S. Supreme Court for the 2012–2013 term, as well as several pertinent events and lower court decisions. The complete text of this update, links to the cases discussed, and a library of landmark free speech decisions can be found on the book's web site:

http://www.tedford-herbeck-free-speech.com

Chapter 6: Religio-Moral Heresy: From Blasphemy to Obscenity

Indecent Broadcasting

Chapter 9: Prior Restraint

WikiLeaks and Bradley Manning
Edward Snowden

Chapter 11: Constraints of Time, Place, and Manner

Protests on the Supreme Court Plaza

Chapter 12: Institutional Constraints: Freedom of Speech in the Schools, the Military, and Prisons

Student Speech Rights
Agency for International Development v. Alliance for Open Society International, Inc. (conditional government funding)

Chapter 14: Access

McBurney v. Young (state freedom of information act)

Looking to the Future

McCullen v. Coakley (buffer zones around abortion clinics)
United States v. Apel (protests on a public easement near a military base)
McCutcheon v. Federal Election Commission (campaign finance)

Nicole Lonergan, a communication studies major at Northeastern University, provided research assistance on this project.

The Roberts Court and Free Speech

John Roberts became the seventeenth chief justice of the United States Supreme Court in 2005. Since then, the Court has decided an impressive number of free speech cases. In about half of them, the Roberts Court strengthened the protection extended to speech, refusing to carve out new exceptions for low-value or offensive speech and rejecting government efforts to limit speech involving crush videos (*United States v. Stevens,* 2010), violent video games (*Brown v. Entertainment Merchants Association,* 2011), protests at funerals of fallen soldiers (*Snyder v. Phelps,* 2012), and lying about military honors (*United States v. Alvarez,* 2012). Free speech arguments did not always prevail, however. The Roberts Court held that restrictions on expression were constitutional and, as a result, diminished free speech rights for public school students (*Morse v. Frederick,* 2007), government employees (*Garcetti v. Ceballos,* 2006), and prisoners (*Beard v. Banks,* 2006).

Against this backdrop, 2012–2013 was an uneventful year in the Supreme Court for freedom of speech. Although the justices issued several landmark rulings (the most notable involved President Obama's health-care plan, same-sex marriage, and voting rights), none were directly concerned with the First Amendment. A few cases had free speech implications, however, including cases involving conditional government funding and a state freedom of information law. The Court has also granted certiorari on several cases raising significant free speech issues that will be decided during the 2013–2014 term. Finally, the Supreme Court issued new rules governing protests on the plaza outside the Supreme Court building. All these developments, plus some current events and notable lower court decisions, are covered in this update.

Chapter 6: Religio-Moral Heresy: From Blasphemy to Obscenity

Indecent Broadcasting

In *Federal Communications Commission v. Fox Television Studios* (2012), the Supreme Court struck down sanctions against Fox Television and ABC, Inc., for broadcasting a fleeting expletive and for airing a nude scene (text, pp. 176–177). The decision did not, however, resolve the larger question of whether the FCC's indecency policy violated the First Amendment.

It now appears the FCC may relax the rules and limit enforcement regarding the flagrant use of indecent language or blatant sexual content. The FCC has not issued a formal policy statement, but during Julius Genachowski's four-year tenure as chair of the commission (June 2009–May 2013), the agency has not taken a single enforcement effort against an affiliate that is owned and operated by a network.

During this period, the number of indecency complaints swelled. (A single incident can generate thousands of complaints.) In early 2013, the FCC eliminated more than 70 percent of the backlog by dismissing more than one million complaints that were either beyond the agency's authority or older than the statute of limitations. More recently, in April 2013, the FCC invited public comment on a proposal that would concentrate enforcement efforts on the most egregious violations.

President Barack Obama nominated Tom Wheeler to replace Genachowski in May 2013. During his confirmation hearings before the Senate Commerce Committee in June 2013, Wheeler noted that the courts had limited the FCC's ability to punish indecent

broadcasting, but suggested that the FCC might play a more constructive role. "I do believe," Wheeler explained, "that it is possible to call upon our better angels with some leadership. I remember Newton Minow [a former chairman of the FCC] talking about television as the 'vast wasteland.' He did that without regulatory authority. It caught the public's attention. Maybe it's possible to do the same kind of thing today and say, can't we do better." Morality in Media, the Parents Television Council, and other conservative organizations were not convinced. They called on the Senate to block Wheeler's confirmation until such time as he would pledge to rigorously enforce the laws and serve as the "guardian of decency."

Chapter 9: Prior Restraint

WikiLeaks and Bradley Manning

WikiLeaks describes itself as a "not-for-profit media organization" created for the purpose of disseminating original documents from anonymous sources and leakers. According to the organization's web site, "WikiLeaks will accept restricted or censored material of political, ethical, diplomatic or historical significance. We do not accept rumor, opinion, other kinds of first hand accounts or material that is publicly available elsewhere."

Originally, WikiLeaks operated as a standard "wiki" where readers could post and edit materials. During this phase, readers made most of the editorial decisions and WikiLeaks exercised little editorial control. WikiLeaks changed, however, with the release of "Collateral Murder" in April 2010. This video, which WikiLeaks edited, was highly critical of the war in Iraq. More recently, WikiLeaks has worked with traditional news organizations such as the *New York Times,* the *Guardian* (England), and *Der Spiegel* (Germany) to publicize and evaluate diplomatic cables.

It would be difficult for the government to use prior restraint against WikiLeaks. Once content has been posted to the Internet, it is widely available and can be downloaded by anyone with access. It would be difficult, if not impossible, to remove all this information from the Internet. In addition, an unknown number of web sites "mirror" the content available on WikiLeaks. Recognizing this fact, some legislators have suggested that a better strategy would be for the U.S. government to seize the domain names (the Internet addresses) that WikiLeaks is using, effectively rendering the content unavailable.

Although officials in the Obama Administration have roundly denounced WikiLeaks, the government has made no effort to shutter or otherwise restrict access to the web site, though it has aggressively used laws such as the Espionage Act to prosecute the release of classified information. The list of individuals that the Obama Administration has prosecuted includes Shamai Leibowitz (a linguist at the Federal Bureau of Investigation), John Kiriakou (an operative at the Central Intelligence Agency), and Thomas Drake (an official at the National Security Agency). In previous years, these laws had generally been used against individuals such as Aldrich Ames, a CIA officer who later became a spy and released secrets to the Soviet Union.

The laws that were used to prosecute Ames were applied to Bradley Manning, an Army private who leaked more than 700,000 government files to WikiLeaks. After the government learned his identity, Manning was charged with violating the Espionage Act, stealing government property, and disobeying orders (text, p. 252), charges that could have led to 90 years in prison. Before his trial, Manning pleaded guilty to 10 of 22 charges. In

the summer of 2013, a military court convicted Manning on almost all the remaining counts, but he was acquitted on the most serious charge, aiding the enemy. Manning was sentenced to 35 years for the biggest leak of classified documents in U.S. history. (Others have leaked single documents or discrete pieces of information; Manning released an entire archive.) Some legal scholars have speculated that the stiff sentence awarded to Manning may discourage others who might be tempted to leak classified documents.

If it was illegal for Manning to leak the documents, is it legal for organizations such as WikiLeaks to publish the documents? The answer to this question might be found in *Bartnicki v. Vopper* (text, p. 113), a case involving illegal wiretapping in which an unknown individual illegally intercepted and recorded cell phone conversations between members of a teachers' union. Excerpts from those conversations were then broadcast by a local radio personality. When the union members sued for damages, the Supreme Court found in favor of the broadcaster. Even though the information had been illegally obtained, the Court reasoned, the broadcaster was not liable because the information dealt with a matter of public concern. Justice John Paul Stevens, in his majority opinion, said, "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."

Edward Snowden

Even as the Manning trial was occurring, public attention shifted to a different leak. Edward Snowden, a computer specialist for Booz Allen, a contractor for both the CIA and the NSA, released details of a mass surveillance program to several media outlets. Based on Snowden's information, the *Washington Post* and the *Guardian* exposed details about PRISM, a secret NSA program that mined phone records and online communications for suspicious behavior. In the days that followed, more details were released about the extent of the U.S. government's clandestine surveillance programs. These stories soon became an international sensation. A heated public debate about the appropriate balance between national security and online privacy broke out.

Anticipating a hostile reaction from the U.S. government, Snowden fled to Hong Kong before the story broke. As the controversy grew, he tried to find a sympathetic country that would grant him asylum. The Obama Administration revoked his U.S. passport and pressured Hong Kong officials to extradite Snowden to face criminal charges. While several countries considered his request for asylum, Snowden flew to the Soviet Union. After he spent more than a month in the transit section of Moscow's Sheremetyevo Airport, Russian officials granted Snowden temporary asylum for one year. The decision strained U.S.-Soviet relations. President Obama cancelled a planned September 2013 meeting with Russian President Vladimir Putin.

The similarity between the Manning and Snowden cases is striking. In both cases, individuals with security clearances leaked classified information to the media. Rather than trying to suppress or limit publication of the information, the Obama Administration aggressively pursued the leaker. Manning was charged with leaking an entire cache of documents. Like Manning, Snowden has also been charged with theft of government property and multiple violations of the Espionage Act. Manning was tried and convicted, and will likely serve his sentence in Fort Leavenworth, the U.S. military's most famous prison. If Snowden is extradited, he too will have to answer to criminal charges. If convicted, he can expect to be sentenced to a lengthy term in a civilian prison.

Chapter 11: Constraints of Time, Place, and Manner

Protests on the Supreme Court Plaza

On June 13, 2013, the Supreme Court issued a new regulation prohibiting all demonstrations within the Supreme Court Building or on the grounds. The prohibition applies to all "demonstrations, picketing, speechmaking, marching, holding vigils or religious services and all other like forms of conduct that involve the communication or expression of views or grievances, engaged in by one or more persons, the conduct of which is reasonably likely to draw a crowd or onlookers." It does not apply to perimeter sidewalks around the Supreme Court Building or to casual use of the plaza by tourists or visitors.

The new regulations were adopted days after a federal judge narrowed the applicability of a 1949 federal law that restricted protests on the Supreme Court plaza. The location of the contested space helps explain the significance of the new regulations. The oval plaza is approximately 252 feet in length from north to south at the largest point and approximately 98 feet wide. It is situated between the perimeter sidewalk around the building and the steps leading up to the front entrance of the Supreme Court. The sidewalks around the building are made of concrete, but the plaza is visually distinct because it is made of marble. To enter the plaza, it is necessary to climb several small steps. The plaza is open to the public and is used by thousands of visitors each year to enter the building.

The Supreme Court Police have the authority "to police the Supreme Court Building and grounds and adjacent streets to protected individuals and property" and to protect the safety of the justices and guests of the Court. This power comes from 40 U.S. Code Section 6135, a statute which makes it "unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement."

In *United States v. Grace,* a 1983 decision (text, p. 284) holding that the peaceful use of the sidewalks for the purposes of expression was protected so long as it did not interfere with the work of the Court, the Supreme Court had ruled that the law was unconstitutional as applied to the perimeter sidewalks. The *Grace* decision did not, however, consider demonstrations within the boundaries of the sidewalks (such as the plaza) or within the interior of the Supreme Court Building.

To comply with the *Grace* decision, the Supreme Court Police draw a distinction between demonstrations on the sidewalks and on the plaza. *Grace* opened the sidewalks to expressive activities, but the plaza has remained closed to demonstrations. The Supreme Court Police claim they have only made two exceptions to this prohibition: (1) press conferences (which typically last for less than one hour) by attorneys and parties in cases who have just appeared before the Court and (2) commercial or professional filming (conducted on weekends or after working hours) approved by the Court's information officer.

Harold Hodge, Jr., a student at the college of Southern Maryland, challenged the rules restricting use of the plaza. On January 28, 2011, he wore a sign, "approximately 3 feet long and 2 feet wide," that read "The U.S. Gov. Allows Police To Illegally Murder and Brutalize African Americans And Hispanic People." When Hodge stopped on the plaza, about 100 feet from the main entrance to the Supreme Court Building, an officer of the Supreme

Court Police informed him that he was violating the law and ordered him to leave the plaza. When he ignored three warnings from the officer, Hodge was arrested and charged with violating Section 6135. The charges were dropped when Hodge promised to stay away from the Supreme Court Building and grounds for six months.

On January 28, 2012, Hodge filed a lawsuit against Pamela Talkin, Marshal of the U.S. Supreme Court, challenging the constitutionality of the law prohibiting demonstrations. Hodge wanted to return to the plaza for a variety of expressive activities, but the lawsuit claimed that the fear of prosecution "deterred and chilled" him from doing so. Talkin and the government defended Section 6135 as necessary to promote two interests: (1) unimpeded access to the Court and (2) avoiding the appearance of the Supreme Court being swayed by protestors.

Neither argument, U.S. District Court Judge Beryl Howell ruled, was persuasive. The law was overbroad, Judge Howell argued, because it "could apply to, and provide criminal penalties for, any group parading or assembling for any conceivable purpose, even, for example, the familiar line of preschool students from federal agency daycare centers, holding hands with chaperones, parading on the plaza on their first field trip to the Supreme Court." Judge Howell did not understand how the government could broadly prohibit expression in front of a courthouse, even the Supreme Court, "in the name of concerns about 'ingress and egress' and 'preserving the appearance of the Court as a body not swayed by external influence.'"

The decision does not open the Supreme Court Building and grounds to protest. Under a Washington, D.C., ordinance, it is unlawful to obstruct entrances to the building. The Supreme Court Police also have the authority to impose limits on the use of the building and grounds. The Supreme Court, however, was not content to rely on these provisions and quickly announced new regulations barring demonstrations on the plaza.

The new rules, which were approved by the chief justice, require visitors to "maintain suitable order and decorum." They also ban demonstrations on the Supreme Court building and grounds. It is not clear whether the new regulations would actually prevent Hodge from returning to the plaza. Although he would be engaging in protests, the new regulations contain an exception for "casual use by visitors or tourists that is not reasonably likely to attract a crowd or onlookers." In other words, he might be permitted to protest if his protest went unnoticed by other people on the plaza or in the surrounding area. John H. Whitehead, the attorney who represented Hodge, was quick to denounce the new rules as "repugnant to the First Amendment."

Chapter 12: Institutional Constraints: Freedom of Speech in the Schools, the Military, and Prisons

Student Speech Rights

The speech rights of public school students continue to provoke lively discussion. Lower court decisions have considered a range of issues, including schools attempting to punish students for off-campus expression and school districts requiring students to sign social media contracts as a condition for participating in extracurricular activities. Many cases involve teachers.

The case that has drawn the most attention in recent years—*B.H. v. Easton Area School District*—involved silicone bracelets of assorted colors emblazoned with the slogan "I ♥ boobies!" The bracelets, which are sold by Keep a Breast Foundation, are intended to raise public awareness about breast cancer. Many students, especially young women, wear the bracelets to support friends or family members who are fighting breast cancer, but school districts across the country have banned the bracelets on the grounds that they constitute lewd or offensive speech. Students have had bracelets snipped off or confiscated by school officials. Some districts have gone so far as to suspend students for wearing them.

With their parents' permission, two middle-school students in Easton, Pennsylvania, wore the bracelets to school despite a ban labeling the bracelets "distracting and demeaning." The students were suspended from school for one and a half days and banned from attending the upcoming Winter Ball. Working with the American Civil Liberties Union, the students challenged the suspension and the ban as violating the free speech rights guaranteed by the First Amendment. The Easton School District rigorously defended the ban, justifying it under the Supreme Court decision in *Bethel School District v. Fraser* (1986) (text, pp. 314–315) on the grounds that the bracelets were "vulgar, lewd, profane, or plainly offensive speech," and under the Supreme Court's landmark decision in *Tinker v. Des Moines Independent School District* (1969) (text, pp. 313–315). The latter case held that "students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but allowed school officials to ban speech that they believed might cause a "material and substantial" disruption. Even if the bracelets were innocuous, school officials claimed, they could be banned, as they might encourage students to wear apparel with more provocative language ("I ♥ Titties!") or to engage in more egregiously sexualized advocacy campaigns ("I ♥ Balls!").

A federal judge sided with the students and enjoined enforcement of the bracelet ban in 2011. The school district appealed. In a 9-to-5 en banc decision filed on August 5, 2013, a federal appellate court agreed that the bracelet ban violated the students' First Amendment rights. (The school district may appeal to the Supreme Court, however.)

The majority opinion, by Judge D. Brooks Smith, begins by establishing that the Keep a Breast Foundation used the bracelets as part of an effort to raise awareness of breast cancer. In *Fraser,* the Supreme Court had considered a "*plainly* lewd, vulgar, or profane" speech. The bracelets are "not plainly lewd," the judge argued, as they express support for an important social issue, a national breast cancer awareness campaign. Judge Smith also noted that *Tinker* required "a specific and significant fear of disruption, not just some remote apprehension of disturbance." The record of disruption in this instance, he concluded, "is even skimpier" than it had been in *Tinker.* Finally, he rejected the school district's slippery-slope argument that permitting the bracelets would lead to more scintillating attire. "Like all slippery-slope arguments," Judge Smith noted, "the School District's point can be inverted with equal logical force." In other words, if the school district could regulate language such as "boobies," nothing would prevent it from banning any other speech that officials deemed offensive, even if it dealt with an important social or political issue.

The dissenters took a decidedly different view of the bracelets. "In the middle school context," they complained, "the phrase can mean both '"I support breast-cancer-awareness measures' and 'I am attracted to female breasts.'" Building on this sexual double entendre, it was easy for the dissenters to conclude that the school district had good reasons for banning the bracelets.

U.S. Supreme Court

Case: *Agency for International Development v. Alliance for Open Society International, Inc.,* 133 S.Ct. 2321, 2013 U.S. LEXIS 4699 (June 20, 2013)

Subject: The Leadership Act, a law that requires nongovernmental organizations receiving federal funding for overseas AIDS programs to adopt a policy explicitly opposing prostitution, violates the First Amendment.

Summary of Decision: The United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act) is a broad program of preventive, educational, and treatment efforts designed, in part, to stop AIDS/HIV from spreading and to treat those affected with the disease. Believing that sexual trafficking, especially prostitution, contributed to the spread of AIDS, Congress placed two conditions on any organization participating in the program: (1) no funds "may be used to promote or advocate the legalization or practice of prostitution" and (2) no funds may be awarded to an organization "that does not have a policy explicitly opposing prostitution." The case involves a legal challenge to the second condition, referred to as the "Policy Requirement."

The Alliance for an Open Society does not support prostitution, but, along with other organizations participating in the AIDS program, it feared that declaring its opposition to prostitution would inhibit its ability to work with prostitutes and other at-risk populations. Marine Buissonniere, Director of the Open Society Public Health Program, explained it this way: "Public health groups cannot tell sex workers that we 'oppose' them, yet expect them to be partners in preventing HIV."

Because neutrality on prostitution was not an option under the terms of the Policy Requirement, several organizations that sought funds under the Leadership Act challenged the provision as a violation of their freedom of speech. A federal district judge found merit in their argument and issued a preliminary injunction that prevented the government from cutting Leadership Act funding while the law was being challenged. The Second Circuit Court of Appeals affirmed that decision. By a vote of 6-to-2, the Supreme Court held that requiring recipients of Leadership Act funds to agree with the government's policy to oppose prostitution and sex trafficking violated a "basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" (Justice Elena Kagan recused herself because she had been involved with the case while serving as Solicitor General.)

Chief Justice John Roberts wrote the majority opinion. "Were it enacted as a direct regulation of speech," he noted, "the Policy Requirement would plainly violate the First Amendment." The case, however, raised a more difficult issue—"whether the Government may nonetheless impose" the Policy Requirement "as a condition on the receipt of federal funds."

To answer this question, the chief justice drew a distinction between "conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." He reasoned that Congress could selectively fund programs designed to address an issue of public concern without running afoul of the First Amendment. In this instance, however, the Policy Requirement went beyond the anti-AIDS program. "By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern," he concluded, the Policy

Requirement by its "very nature affects 'protected conduct outside the scope of the federal funded program.'"

The chief justice acknowledged the difficulty in distinguishing between "conditions that define a federal program and those that reach outside of it." In this case, however, the law had two distinctly different conditions. The Agency for International Development and the other organizations did not challenge the provision that prohibited funds from being used "to promote or advocate the legalization or practice of prostitution." This was enough, the chief justice argued, to prevent federal funds from being used for the prohibited purpose, but the Policy Requirement went one step further: it compelled grant recipients to espouse the government's position on prostitution as a condition of federal funding.

In his dissenting opinion, Justice Antonin Scalia (joined by Justice Clarence Thomas) rejected this line of analysis. "The Policy Requirement," Justice Scalia noted, "is nothing more than a means of selecting suitable agents to implement the Government's chosen strategy to eradicate HIV/AIDS." To this way of thinking, Congress was free to enlist the assistance of organizations that supported the government's position. According to Justice Scalia, Congress was not required to provide funds to organizations that opposed, or did not support, the government's position. The majority decision set a dangerous precedent, Justice Scalia warned, because it guaranteed that in the future there would be "frequent challenges to the denial of government funding for relevant ideological reasons."

The Supreme Court decision in *Agency for International Development v. Alliance for Open Society International* is important because Congress often attaches conditions to the receipt of federal funds. As a result of this decision, the lower courts will need to determine whether such conditions are an integral part of the program, or whether they go beyond the program to constitute compelled speech. Justice Scalia is surely correct when he predicts that this decision means there will be more cases questioning the limits on Congress's ability to attach conditions to federal spending.

Chapter 14: Access

U.S. Supreme Court

Case: *McBurney v. Young,* 133 S.Ct. 1709, 2013 U.S. LEXIS 3317 (April 29, 2013)

Subject: Virginia's Freedom of Information Act, which grants Virginia citizens access to the records of state agencies, does not violate the Privileges and Immunities Clause or the Commerce Clause of the U.S. Constitution.

Summary of Decision: Many states have adopted "public information laws" that guarantee citizens' access to records made by state agencies. Like eight other states, Virginia limits this access to residents (although the Virginia law does contain an exception for reporters and broadcasters.) Two nonresidents—a Rhode Islander (Mark J. McBurney) involved in a child support dispute in Virginia and a Californian (Roger W. Hurlbert) whose business required access to real estate tax records—challenged the Virginia law on the grounds that it violated both the Privileges and Immunities Clause and the Commerce Clause of the U.S. Constitution. A federal district court granted the state's motion for summary judgment. The Fourth Circuit Court of Appeals affirmed. In a unanimous decision, the Supreme Court joined the lower courts in holding that Virginia's Freedom of Information Act was constitutional.

The challenge to the Virginia law was based on two arguments. First, the petitioners argued that distinguishing between residents and nonresidents violated the Privileges and Immunity Clause in Article 4, Section 2, Clause 1 of the Constitution. Under this provision, "The Citizens of each State [are] entitled to all Privileges and Immunities of Citizens in the several States." The petitioners argued that the Virginia law was unconstitutional because it provided residents of the state more access to government records than it did to nonresidents.

Writing for the Court, Justice Samuel Alito noted that the Privileges and Immunities Clause had only been used to strike down state laws that "were enacted for the protectionist purposes of burdening out-of-state citizens." Although the Privileges and Immunities Clause might prohibit a state from giving its residents a competitive advantage, Justice Alito concluded, "the Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen." (Much of the information that the petitioners sought, it should be added, was available through other sources. "Requiring noncitizens to conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process," Justice Alito argued, "cannot be said to impose any significant burden on noncitizens.'")

The petitioners argued that the Virginia Law was unconstitutional for a second reason: it violated the Commerce Clause in Article I, Section 8, Clause 3 of the U.S. Constitution, which empowers Congress "[t]o regulate Commerce . . . among the several States." Because the power to regulate rests with the federal government, several Supreme Court decisions have held that the Commerce Clause "significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce." The Virginia law was unconstitutional, the argument continued, because it is a form of "economic protectionism" that benefits in-state businesses by burdening their out-of-state competitors.

Justice Alito also found little merit in this line of analysis. "The state Freedom of Information Act does not regulate commerce in any meaningful sense," he noted, "but instead provides a service that is related to state citizenship." Even if there was a "market" for public documents in Virginia, Justice Alito concluded, the state does not violate the Commerce Clause when, "having created a market through a state program, it 'limits benefits generated by [that] state program to those who fund the state treasury and whom the State was created to serve.'"

The Supreme Court decision in *McBurney v. Young* broke no new ground. If anything, the case is notable because none of the justices were willing to embrace a broad right of access to public information. Justice Alito authored a narrow opinion holding that the purpose behind the law— providing access to public records so that residents could monitor the performance of state agencies—allowed the legislature to restrict the use of the state's freedom of information law to Virginia residents. Those interested in access to government information will want to watch to see whether other states change their public information laws to embrace the resident-nonresident distinction used in the Virginia law.

Looking to the Future

The Supreme Court has already granted certiorari to three cases with significant First Amendment implications. In the first case, *McCullen v. Coakley,* the Supreme Court will consider a Massachusetts law creating a buffer zone that bans protests near reproductive

health care facilities. The second case, *United States v. Apel,* deals with protests on easements outside of Vandenburg Air Force Base. The final case, *McCutcheon v. Federal Elections Commission,* deals with aggregate limits on political campaign contributions, adding to the Roberts Court's list of campaign finance decisions.

U.S. Supreme Court

Case: *McCullen v. Coakley* (Supreme Court docket number No. 12-1168); the appellate court decision is *McCullen v. Coakley,* 708 F.3d 1 (1st Cir. 2013).

Subject: Does a Massachusetts law that makes it a crime to "enter or remain on a public way or sidewalk" near a reproductive health care facility violate the First or Fourteenth Amendment?

Summary of Decision: In response to a 1994 shooting at an abortion clinic in Brookline, Massachusetts, the state legislature enacted an abortion clinic buffer law that bans protests outside the entrances or driveways of a "reproductive health care facility" (RHCF). Four categories of persons are exempted from the law: (1) persons entering or leaving such a facility; (2) employees or agents of such a facility acting within the scope of their employment; (3) law enforcement, ambulance, firefighting, construction, utilities, public works, and other municipal agents acting within the scope of their employment; and (4) persons using the public sidewalk or street right-of-way adjacent to such a facility solely for the purpose of reaching a destination other than that facility.

The original Massachusetts law withstood numerous legal challenges. When the Supreme Court denied certiorari in 2005, opponents of the law seemed to have exhausted all their legal options. In 2007, however, the legislature extended the buffer zone from 18 to 35 feet. After Governor Deval Patrick signed the bill into law, Eleanor McCullen and six anti-abortion activists filed a new legal challenge against Martha Coakley, the attorney general of Massachusetts. McMullen claimed that the law, which limits "sidewalk counseling" outside the three abortion clinics in Massachusetts, prevents anti-abortion activists from engaging in close personal contact with their intended audiences and impedes their ability to communicate effectively.

The Supreme Court's last decision on a buffer zone law was *Hill v. Colorado* (text, pp. 290–291), a 6-to-3 decision, issued in 2000, upholding a Colorado law that made it unlawful for any person within 100 feet of the entrance to any health care facility to "knowingly approach" within 8 feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person." In *Hill,* the Court held that Colorado's buffer zone was a content-neutral regulation of speech that appropriately balanced patients' right to be free of unwanted communication against the protestors' speech rights.

Opponents of the buffer zone argue that the Massachusetts law is different from the Colorado law on several key points. While the Colorado law banned all speech, the Massachusetts law allows employees or agents of the RHCF to speak with impunity within the buffer zone. To buffer-zone opponents, the Massachusetts law constitutes viewpoint discrimination, as the ban on speech only applies to "those who wish to use public areas near abortion clinics to speak about abortion from a different point of view." If the Massachusetts and Colorado laws cannot be distinguished, the opponents argue, *Hill v. Colorado* should be limited or overruled.

This case may be affected by the changing composition of the Supreme Court. Justice John Paul Stevens wrote for the six-member majority in *Hill,* joined by Chief Justice Rehnquist and Justices O'Connor, Souter, Ginsburg, and Breyer. The three dissenters were Justices Scalia, Thomas, and Kennedy. All three dissenters remain on the Supreme Court, but four of the six justices in the majority have retired. In addition, Justice Kennedy, the decisive fifth vote in many important decisions, dissented in *Hill,* denouncing the Colorado law as "antithetical to our entire First Amendment tradition."

The justices' decision to hear *McCullen v. Coakley* raises several questions. Because the Court has been sympathetic to women seeking access to clinics in the past, the Court might use the Massachusetts case to definitively declare that buffer zones are constitutional. Because the composition of the Supreme Court has changed, however, the justices may weaken or even overturn the Hill decision, allowing anti-abortion activists to exercise their freedom of expression outside abortion clinics without restriction. No matter which side prevails, it will be difficult for the Supreme Court to find the appropriate balance between the right of access and the right to protest outside an RHFC.

U.S. Supreme Court

Case: *United States v. Apel* (Supreme Court docket number No. 12-1038); the appellate court decision is *United States v. Apel,* 676 F.3d 1202 (9th Cir. 2012)

Subject: Does a federal law, which prohibits a person from reentering a military base after being ordered to leave, apply to property where there is a public easement?

Summary of Decision: John Dennis Apel was convicted of three counts of trespassing on Vandenberg Air Force Base (AFB) and barred from returning to the base. He appealed his case to the Ninth Circuit Court of Appeals, which, in the meantime, had decided *United States v. Parker* (651 F.3d 1180 (9th Cir. 2011)), another case involving protests at Vandenburg AFB.

Vanderberg Air Force Base is crossed by two major highways. Highway 1, commonly known as the Pacific Coast Highway, runs through the eastern side and next to the main gate, near an area that the base commander has designated for public protest. To guarantee public access to these roads, the State of California and the County of Santa Barbara have an easement for the portions of the highways that overlap Vandenberg AFB. The easement also covers the designated protest area.

In *Parker,* the Ninth Circuit ruled that because of the easement, the federal government did not have an exclusive right of possession over the "designated protest area." Because the public had a right to be in this space, the Ninth Circuit ruled, Parker could not be prosecuted, even though there was a court order banning him from Vandenburg AFB.

Apel appealed his conviction, citing the Ninth Circuit's decision in *Parker.* Like Parker's, Apel's speech happened in the designated protest area that is included in the easement. Because the essential facts were the same, the Ninth Circuit overturned Apel's conviction. "Although we question the correctness of *Parker,*" the per curiam opinion noted, "it is binding . . . , and requires that Apel's conviction be REVERSED."

In its appeal to the Supreme Court, the U.S. government challenged the Ninth Circuit's exclusive possession analysis, claiming that the easement did not remove the area from federal jurisdiction. Even if it did, the government argued, Apel was not being charged with the common law crime of trespassing, but with an entirely different offense: unlawful

reentry to a military installation. The government also claimed that the lower court decisions in *Parker* and *Apel* threatened the safety and orderly operation of many U.S. military bases and would impose significant costs on the public. Apel's brief defended the lower court decisions, labeled the national security concerns raised by the government as unfounded, and asserted the right of citizens in a public forum such as the designated protest area along Highway 1. The Supreme Court has granted certiorari.

This case raises several interesting questions. First, and foremost, other federal circuit courts have used a less exacting version of the exclusive possession test. This disagreement between the federal circuit courts might explain why the Supreme Court was willing to hear the case. Clarifying the appropriate standard would provide guidance to the lower courts. Beyond the thorny questions raised by the easement, the justices might use the case to clarify the rules governing protestors' use of public forums.

U.S. Supreme Court

Case: *McCutcheon v. Federal Election Commission,* (Supreme Court docket number No. 12-536); the appellate court decision is *McCutcheon v. Federal Election Commission,* 893 F.Supp. 2d 133 (D.D.C. 2012).

Subject: Do biennial limits on contributions to noncandidate political committees violate the First Amendment?

Summary of Decision: Shaun McCutcheon is a wealthy Alabama businessperson who supports the Republican Party and its candidates, but campaign finance laws limit the amount he can contribute to federal candidates, campaign committees, or political action committees that donate to candidates (the base limits), as well as the total amount that he can contribute during a two-year period (the aggregate limits). For example, during the 2013–2014 cycle, McCutcheon can contribute up to $2,600 to each Republican candidate he chooses to support, until he reaches the legal ceiling of $48,600 for donations to candidate organizations. The aggregate limits—the ceiling on total contributions during a two-year cycle—lie at the heart of the case. "By preventing a person from making 'too many' otherwise legal and innocuous contributions," McCutcheon's petition for certiorari argued, "aggregate limits effectively penalize those who wish to exercise their First Amendment rights robustly."

Just as McCutcheon wants to give more money, the Republican National Committee (RNC) wants to receive all contributions that would be permissible under the base limits, but are not allowable because they exceed the aggregate limits on contributions to candidates and parties. In their brief, the RNC argued that donors should not be bound by the aggregate limit. To support the claim that these campaign contributions were worthy of First Amendment protection, the RNC cited recent Roberts Court decisions that struck down a range of campaign finance laws.

A three-judge panel of the U.S. District Court for the District of Columbia upheld the aggregate limits on campaign spending. This decision is notable because the court did not invoke the strict scrutiny test that is generally applied to limits on political expression. Rather, the court held, the limits are subject to a lower standard of review because they deal with the right of association. The contributions only become speech when they are used to fund expressive activities.

Having established the appropriate standard, the district court continued to the merits of the case. The government had a legitimate interest, the court noted, in preventing both corruption and the appearance of corruption. The aggregate limits further those interests because they prevent the evasion of the base limits. Eliminating the aggregate limits would allow a donor to give a large sum to a number of different political action committees supporting the same candidate. Those committees, in turn, might use the money for coordinated expenditures that are no different from direct contributions to the candidate. In such instances, the court concluded, it would be easy for the candidate to discern "precisely where to lay the wreath of gratitude."

To date, the Roberts Court has heard five cases involving various campaign finance laws. In each case, the Court struck down the law on a 5-to-4 decision, holding that the restriction violated the First Amendment. The thread connecting the cases is the idea that restrictions on political speech should be rigorously evaluated. The five justices in the majority have applied the strict scrutiny test, questioned the interests that the government asserted, and carefully assessed the burden that the law places on candidates and parties.

Still, there is a larger issue to consider. Since the *Buckley v. Valeo* decision in 1976, the Supreme Court has distinguished between campaign contribution limits and expenditure limits. In *Buckley,* the Court held that contribution limits are permissible because they prevent both corruption and the appearance of corruption. In contrast, limits on overall campaign spending are unconstitutional because they do not further those interests. *McCutcheon v. Federal Election Commission* provides the justices with the ideal opportunity to reconsider this distinction. Justices Kennedy, Scalia, and Thomas are already on record as opposing *Buckley*'s approval of contribution limits. The question is whether Chief Justice John Roberts and Justice Samuel Alito will join them to produce the five votes necessary to either overturn *Buckley* or to undermine the distinction between contributions and expenditures. Consequently, this case has received a great deal of attention in the press and twenty amicus briefs have been filed with the Supreme Court. Anyone interested in the complicated relationship between money and politics will want to pay particular attention to this case.