Annual Update

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This update considers the impact of Justice Antonin Scalia's death on the Supreme Court, discusses a privacy lawsuit brought by professional wrestler Hulk Hogan against Gawker Media Group, and summarizes the free speech decisions that the Supreme Court issued during the 2015–2016 term. The complete text of this update and a library of landmark free speech decisions can be found on the book's web site:

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

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Justice Anthony Scalia

The most noteworthy event of the 2015–2016 term may have been the unexpected death of Antonin Scalia, the longest serving justice on the Supreme Court, on February 13, 2016, at age 79. Nominated by President Ronald Reagan in 1986, Justice Scalia adhered to originalism, a judicial philosophy that interpretations of the Constitution should be based on what reasonable persons at the time the Constitution was adopted would have understood it to mean. In *District of Columbia v. Heller* (2008), for example, several residents of Washington, D.C., challenged the District's strict ban on handguns. Defenders of the law argued that the right to "bear arms" that the Second Amendment guarantees is narrowly limited to those serving in the militia. Writing for a 5-to-4 majority, Justice Scalia argued for a broader interpretation that protected private activities, including self-defense and hunting, by offering historical evidence.

Famous for asking tough questions during oral arguments, Scalia was widely recognized as the intellectual leader of the Court's conservative wing (consisting of Justice Scalia, Chief Justice Roberts, Justice Thomas, and Justice Alito). His death probably changed the outcome of several cases. With only eight justices, several cases resulted in 4-to-4 ties (including *Friedrichs v. California Teachers Association*), thus upholding the lower court decisions.

President Barack Obama nominated Merrick Garland, chief judge of the United States Court of Appeals for the District of Columbia, to succeed Justice Scalia on March 16, 2016. Senate Republicans refused to hold confirmation hearings on anyone President Obama nominated, arguing that Justice Scalia's successor should be selected after the 2016 elections and effectively blocking Garland's appointment, as the Constitution requires the advice and consent of the Senate for any presidential appointment to the Supreme Court.

The new president could nominate a successor on Inauguration Day (January 20, 2017), but it would take time to select a nominee, conduct hearings, and schedule a vote. In the interim, it appears the Court has recognized that operating with eight justices might cause problems, as it has agreed to hear fewer cases and has left several thorny issues off the 2016–2017 docket. Several notable cases (including a major case on access to contraception) were remanded back to the lower courts with instructions to consider potential compromises.

The new justice will be more than a ninth vote to break ties. The Roberts Court made several 5-4 decisions on cases involving freedom of expression, in which Justice Scalia voted with the majority. The new justice could tip the balance and change the outcome of cases involving government employee speech (*Garcetti v. Ceballos,* 2006), student speech (*Morse v. Frederick,* 2007), and campaign speech (*Davis v. Federal Election Commission,* 2007; *Citizens United v. Federal Election Commission,* 2010, and *McCutcheon v. Federal Elections Commission*).

Chapter 5: Privacy

Gawker and Invasion of Privacy

Wrestler Hulk Hogan (Terry Gene Bollea) sued Gawker Media Group in October 2012 after Gawker posted a video of the wrestler having sex with Heather Clem, the wife of Hogan's then–best friend, radio disk jockey Todd Alan Clem. Todd Clem secretly filmed the sex, transferred the file to a DVD labeled "Hogan," and left the DVD in a desk drawer. An anonymous third party mailed the DVD to Gawker, which posted a brief excerpt from the video on its news and gossip web site. Roughly 10 seconds of the excerpt involved explicit sexual acts.

The next day, Hogan asked Gawker to remove the post. When Gawker refused, Hogan sued in a Florida state court, alleging that publication of embarrassing facts about his private life violated Hogan's expectation of privacy. The distinction between defamation and privacy was crucial, Hogan asserted, because a plaintiff suing for a privacy violation did not need to prove actual malice or recklessness. He acknowledged that he did need to prove that the allegations were neither "newsworthy" nor a matter of public concern.

At the trial, Gawker asserted that Hogan was an internationally famous celebrity who had publicly boasted about his sexual exploits. His affair with Heather Clem had received

extensive media coverage, as had rumors about the existence of a sex tape. Further, Gawker claimed, the First Amendment afforded it the right to publish the video because Hogan was newsworthy and his sex life was a "matter of public concern." In response, Hogan argued that there was a difference between his iconic persona as a wrestler and his personal life. The antics of Hogan's famous character might be fair game, but the intimate details of Terry Bollea's sex life were a private matter.

After a two-week trial, a six-person jury decided in favor of Hogan and awarded him $55 million in compensatory damages, $60 million for the intentional infliction of emotional distress, and another $25 million in punitive damages. The $140 million verdict produced a broad range of responses. Some commentators applauded the outcome. Others predicted it would have no impact on gossip web sites. Still others warned that it threatened freedom of speech.

Two developments since the trial are worthy of mention.

First, in May 2016, Peter Thiel, cofounder of PayPal and chairman of the Clarion Capital hedge fund, was revealed to have contributed $10 million towards Hogan's legal expenses. This fact was notable because a Gawker-controlled web site had outed Thiel as gay in 2007. Defending his involvement in Hogan's lawsuit, Thiel asserted, "It's less about revenge and more about specific deterrence. . . . I saw Gawker pioneer a unique and incredibly damaging way of getting attention by bullying people even when there was no connection with the public interest." The critics were not persuaded, however, warning that Thiel had created a "blueprint" that the wealthy could use to launch "weapons-grade attacks on America's free press."

Second, before all appeals could be exhausted, Gawker.com filed for bankruptcy protection and asked the court to delay the first damage payment. The court refused. Gawker was sold to Univision, which shuttered the web site on August 22, 2016. Although many celebrated Gawker's demise, Philip Bump, a columnist for the *Washington Post,* lamented it: "There are so many good writers out there who are better, directly or indirectly, thanks to the site's fearlessness, aggressiveness and attitude. Gawker made its opponents better. Gawker and its writers, despite some steps backward, made the web better. It made the web what it is."

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

U.S. Supreme Court

Case: *Friedrichs v. California Teachers Association,* 136 S.Ct. 1083, 2016 U.S. LEXIS 2264 (March 29, 2016); the appellate court decision is *Friedrichs v. California Teachers Association,* 2014 U.S. App. LEXIS 24935 (9th Cir. 2014).

Subject: Public-sector agency shop arrangements do not violate the First Amendment's protection of freedom of speech and assembly.

Summary of Decision: Under California law, public employees who opt not to join a union must pay an "agency fee," an amount equivalent to the dues that union members pay to cover the cost of collective bargaining. Public employees are able to opt out and obtain a refund (estimated at 30 percent of their dues) of their share of union money that is spent on lobbying or campaigning for political candidates. By distinguishing between money spent

on collective bargaining and money spent on political activities, the California law allowed unions to negotiate on behalf of all members of the bargaining unit without compelling nonmembers to pay for union expenses that go beyond the common bargaining issues of wages, hours, and conditions in the workplace. More than 20 states have similar laws.

For decades, conservative legal foundations have challenged agency fees in an effort to weaken public employee unions. In this case, the lawsuit was brought by the Center for Individual Rights on behalf of nine nonunion teachers (Rebecca Friedrichs was the lead plaintiff) and the Christian Educators Association International. Arguing that all activities of public sector unions are inherently political, the plaintiffs in Friedrichs asserted that any fee would necessarily violate their First Amendment rights, meaning that nonunion teachers could not be required to pay union dues (which included agency fees and supported political activities).

Because the U.S. Supreme Court had upheld the constitutionality of agency fees in *Abood v. Detroit Board of Education* (1977), the lower courts ruled in favor of the California Teachers Union. The Ninth Circuit decision, a single paragraph, concluded that "the questions presented in this appear are so insubstantial as not to require further argument."

The plaintiffs in Friedrichs freely admitted that the lower courts lacked the authority to overrule the Supreme Court's decision in *Abood*. It was clear from the outset, however, that their goal was to get the case to the Supreme Court, in the hope that the Court would take the opportunity to overrule the distinction it had previously drawn among the types of fees that public-sector unions could charge nonmembers. *Abood* remains good law, but many Court watchers thought the precedent was on shaky ground, as the five conservative justices seemed likely to hold that agency fees were unconstitutional. The Court had upheld agency fees in *Harris v. Quinn* (2014), but cautioned that it is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." If nonunion teachers could convince five justices that the agency fees were the equivalent of compelled speech, the Court might limit or overturn *Abood*.

After oral arguments in January 2016, it appeared that five justices, including Scalia, would rule in favor of Friedrichs. Before the case was decided, however, Justice Scalia died. The case ended in a 4-to-4 tie, upholding the Ninth Circuit decision on agency fees. The outcome elated union officials and disappointed the nonunion teachers. Both sides, however, promised to renew the argument after Justice Scalia's replacement was confirmed. In the meantime, the political battle over agency fees and union representation will be fought in state legislatures.

U.S. Supreme Court

Case: *Heffernan v. City of Paterson, New Jersey,* 136 S.Ct. 1412, 2016 U.S. LEXIS 2924 (April 26, 2016); the appellate court decision is *Heffernan v. City of Paterson, New Jersey,* 777 F.3d 147, 2015 U.S. App. LEXIS 967 (3d Cir. N.J., 2015).

Subject: The First Amendment prohibits the government from demoting a public employee based on a supervisor's mistaken belief that the employee supports a political candidate.

Summary of Decision: Jeffrey Heffernan was a high-ranking detective in Paterson, New Jersey, where he worked in the office of James Wittig, the chief of police. Heffernan was also

a close personal friend of Lawrence Spagnola, a candidate challenging incumbent mayor Jose Torres, who happened to be Wittig's immediate supervisor. Despite the friendship, Heffernan was not involved in the Spagnola campaign; and because he did not live in Paterson, he was not eligible to vote in the election.

Before the 2006 mayoral election, a small Spagnola sign was stolen from the front lawn of Heffernan's bedridden mother. Acting on her behalf, Heffernan went to a distribution point and obtained a larger Spagnola sign. While there, he spoke to Spagnola's campaign manager and some of his campaign workers.

Although Heffernan was off duty at the time, a fellow officer reported that he had seen him holding a Spagnola sign. Incorrectly assuming that Heffernan had engaged in "overt involvement in political activities" on behalf of the mayor's opponent, city officials demoted him from detective to patrol officer and assigned him to nighttime foot duty. Heffernan sued the city in federal court, arguing that he had been disciplined on the mistaken belief that he had engaged in political speech. In so doing, he said, the city had deprived Heffernan of his First Amendment rights. The city moved for summary judgment, arguing that, because Heffernan had not actually engaged in protected political speech, his demotion had not violated his First Amendment rights.

In *Waters v. Churchill* (1994), the Supreme Court had held that a government employer could dismiss an employee for speech that involved purely personal matters. In Heffernan, the justices held that the reverse was also true. If motive mattered in Waters, the government could not punish an employee if it was mistaken in believing that he had engaged in protected political speech. Writing for the six-justice majority, Justice Breyer sided with Heffernan, holding that "the government's reason for demoting Heffernan is what counts here." It doesn't matter, Justice Breyer concluded, whether "the employer makes a factual mistake about the employee's behavior." The majority remanded the case back to the lower court to determine whether Heffernan's speech had impeded the efficiency or the effectiveness of police operations.

In his dissent, Justice Clarence Thomas, joined by Justice Samuel Alito, argued that "federal law does not provide a cause of action to plaintiffs whose constitutional rights have not been violated." Because Heffernan had not exercised his First Amendment rights, he could not argue that city officials had demoted him based on his speech. After all, Justice Thomas continued, "Heffernan denied supporting or associating with Spagnola's campaign and disclaimed any intent to communicate support for Spagnola by retrieving the campaign sign." After this tidy summation of the facts, Justice Thomas concluded, "demoting a dutiful son who aids his elderly, bedridden mother may be callous, but it is not unconstitutional."