Freedom of Speech in the United States

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Annual Update — Autumn 2020

This update summarizes the free speech decisions issued by the U.S. Supreme Court during the 2019–2020 term. The justices made consequential rulings limiting presidential power, expanding the rights of gay and transgender workers, and protecting young immigrants referred to as Dreamers. They also turned back an effort to narrow abortion rights while also expanding the role of religion in public life. The 2019–2020 term included a "buffet of blockbusters," although the Court had comparatively little to say about the freedom of speech.

Several freedom of speech issues that may be the subject of future rulings have emerged, however. The Trump presidential election campaign filed defamation suits against three major media outlets. The Department of Justice sought a prior restraint to prevent publication of a book critical of the president. The Supreme Court remanded a challenge to an Alaska law that strictly regulated campaign contributions. Two additional significant cases, one involving student speech and another involving computer software, might be heard by the justices during the 2020–2021 term. Finally, the death of Associate Justice Ruth Bader Ginsburg and the confirmation of her replacement, Associate Justice Amy Coney Barrett, have the potential to change the ideological balance of the Supreme Court dramatically.

The complete text of this update and a library of landmark free speech decisions can be found on the website for the book:

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

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Death of Justice Ruth Bader Ginsburg

Ruth Bader Ginsburg served as an associate justice on the U.S. Supreme Court from August 1983 until her death in September 2020. The daughter of immigrants, she attended Cornell University and graduated at the top of her class in 1954. She enrolled at Harvard Law School in 1956, but later transferred to Columbia Law School when her husband, Marty, accepted a job in New York City. Although she had a stellar academic record, Ginsburg had trouble finding a position at any of the leading law firms. She eventually secured a judicial clerkship and then worked at Columbia Law School's Project on International Procedure (1961–1963). She eventually secured a position at Rutgers Law School (1963–1972) and later cofounded the influential Women's Rights Project of the American Civil Liberties Union. Between 1973 and 1976, Ginsburg won five of the six gender discrimination cases she argued before the Supreme Court. Commenting on her skills as an advocate, Associate Justice Antonin Scalia later wrote, "She became the leading (and very successful) litigator on behalf of women's rights—the Thurgood Marshall of that cause, so to speak." This comparison was apt because Marshall, as a young attorney representing the NAACP Legal Defense Fund, had been a leading advocate in building the case against racial discrimination.

To address a growing backlog of cases, Congress adopted the Omnibus Judgeship Act of 1978, which increased the number of federal district and appellate judges and emphasized adding women and minorities. President Carter, elected in 1976, made diversity in judicial appointments a priority and nominated Ginsburg to the U.S. Court of Appeals for the District of Columbia in 1980. President Bill Clinton nominated her to replace Associate Justice Byron White when he retired in 1993. In that era, nominations were less contentious than they are now, and Congress approved Ginsburg's nomination by a vote of 96–3 on August 3, 1993. At the time of her confirmation, she was only the second woman to serve on the Supreme Court. (The first was Associate Justice Sandra Day O'Connor, appointed by President Ronald Reagan in 1981.) Although Ginsburg was 61 years old when she joined the Supreme Court, she served as an associate justice for 27 years, until her death in 2020.

Justice Ginsburg was widely viewed as a centrist when she was nominated. Over the years that followed, however, the Supreme Court shifted to the right, and she became the intellectual leader of the liberal wing and one of the most influential justices. In later years, she became famous for her dissenting opinions in *Ledbetter v. Goodyear Tire & Rubber Co.* (a 2007 case involving gender discrimination), *Shelby County v. Holder* (a 2013 decision involving the Voting Rights Act), and *Burwell v. Hobby Lobby* (a 2014 decision involving the Religious Freedom Restoration Act of 1993). These passionate dissents led to the creation of an Internet meme, "The Notorious R.B.G.," which Justice Ginsburg embraced and that was popularized in the title of a best-selling book, *Notorious RBG: The Life and Times of Ruth Bader Ginsburg*, by Irin Carmon and Shana Knizhnik. Ginsburg was also the regular subject of *Saturday Night Live* sketches, a *Time* magazine cover, a 2018 biopic (*On the Basis of Sex*), and an operetta (*Scalia/Ginsburg*).

Confirmation of Justice Amy Coney Barrett

Shortly before her death on September 18, 2020, Justice Ginsburg dictated a statement to her granddaughter, in which she said, "my most fervent wish is that I will not be replaced until a new president is installed." Despite this request, on September 26, 2020, President Donald Trump nominated Amy Coney Barrett, a judge on the United States Court of Appeals for the Seventh Circuit, to fill the vacancy. Over the strenuous objection of leading Senate Democrats, who wanted to wait until after the presidential election to fill the vacancy, the Senate Republicans scheduled hearings on the nomination within weeks. Justice Barrett was confirmed on a 52 to 48 Senate vote on October 30, 2020. With the exception of Senator Susan Collins of Maine, all the Republican senators voted in favor of the nomination. All the Democratic senators voted against it.

Amy Coney Barrett graduated from Rhodes College in 1994 and the University of Notre Dame Law School in 1997. She clerked for Judge Laurence Silberman of the U.S. Court of Appeals for the District of Columbia (1997–1998) and for Justice Antonin Scalia of the U.S. Supreme Court (1998–1999). She then briefly practiced law (1999–2002) before becoming a law professor at George Washington University Law School, where she taught for a year before returning to her alma mater and joining the faculty of the Notre Dame Law School in 2002. She remained there until 2017, when President Trump nominated her to the Seventh Circuit Court of Appeals. Almost immediately after her confirmation to that court, Barrett was rumored to be one of three finalists under consideration for the seat created by the retirement of Justice Anthony Kennedy, a vacancy that was ultimately filled by Justice Brett Kavanaugh.

The 2020 confirmation of Justice Barrett to the Supreme Court is significant because it has the potential to shift the ideological balance of the Court. During the 2019–2020 term, the Court was evenly divided between four liberal justices (Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan) and four conservative justices (Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh), allowing Chief Justice Roberts to cast the decisive fifth vote in several important cases. For example, the chief justice sided with liberals to grant conditional residency to young immigrants who illegally entered the United States as minors and protect them from deportation (*Department of Homeland Security v. Regents of the University of California*), to uphold a ban on large church gatherings during the pandemic (*Calvary Chapel Dayton Valley v. Sisolak*), and to uphold a major precedent on abortion (*June Medical Services v. Russo*). It is widely believed that Justice Barrett will be a reliable conservative vote. If so, Chief Justice Roberts will no longer be able to provide a decisive fifth vote in cases where the Court splits on ideological lines.

It is less clear how Justice Barrett's confirmation will impact future free speech decisions. She served on the Seventh Circuit for only three years and, during that time, considered only a handful of appeals involving First Amendment claims. During her confirmation hearings, she sidestepped questions from Senator Amy Klobuchar (a Democrat from Minnesota) about whether *New York Times v. Sullivan* (1964) should be overturned and whether reporters should be shielded from having to reveal their sources. The Reporters Committee for Freedom of the Press reviewed Barrett's decisions and publications on issues related to freedom of the press and concluded: "That record is relatively light. Judge Barrett has joined very few published opinions addressing First Amendment issues and has written fewer. Her academic work, for its part, is primarily focused on questions of judicial method rather than particular areas of the law."

Chapter 5: Defamation

Trump Sues Critics for Defamation

As a presidential candidate, Donald Trump promised to "open up" libel laws to make it easier for public officials to sue for defamation. If elected, he pledged, he would reform the law: "So when the *New York Times* writes a hit piece which is a total disgrace or when the *Washington Post*, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected." Two years after winning the election, responding to the 2018 publication of a book by Michael Wolf that was critical of his administration, Mr. Trump lamented, "Our current libel laws are a sham and a disgrace and do not represent American values or American fairness."

Lawsuits for defamation are generally brought under state law, however, and the standards for such cases did not change. Moreover, with the notable exception of Justice Clarence Thomas, the Roberts Court has shown little interest in changing libel laws. "This has been a very, very pro–First Amendment court in my view," writes Floyd Abrams, a leading authority on freedom of speech. The Roberts Court, he continued, is "more of a First Amendment court than it may ever have been in American history. In the last few decades, the conservatives on the court have adopted a very broad reading of the First Amendment."

On February 26, 2020, the Trump reelection campaign sued the *New York Times* for defamation for publishing an editorial alleging the campaign had colluded with Russia to win the 2016 election. On March 2, 2020, the campaign sued the *Washington Post* for defamation for publishing two opinion pieces alleging the campaign had accepted assistance from foreign governments. On March 6, 2020, it sued CNN for defamation, for an opinion piece arguing that Special Prosecutor Robert Mueller should have charged the president with obstruction of justice. In each instance, the Trump campaign asked for "millions of dollars" in compensatory damages from the media outlets. Because the campaign sued on behalf of the president, the legal costs can be paid from a special account funded by donors.

It is extremely unlikely that Mr. Trump will succeed in any of these cases. The Supreme Court decision in *New York Times v. Sullivan* (1964) sets a high bar, as it "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The Court's holding in *Sullivan* is properly celebrated as a landmark decision, as it extends First Amendment protection to almost all criticism of elected public officials.

Even so, some legal commentators worry that lawsuits might have a chilling effect on any media organizations that regularly criticize the president. The *New York Times*, *Washington Post*, and CNN have extensive financial resources, but smaller outlets might be afraid to speak out for fear of legal action by the Trump campaign. Simply filing the suits, these commentators argue, also serves to erode confidence in the press, which Mr. Trump routinely denounces as "fake news." Jameel Jaffer, director of the Knight First Amendment Institute at Columbia University, sent the following tweet on March 6, 2020: "Their suits will likely fail in court but in the meantime they'll gratify Trump's base, distract the press and public, and deter speech and journalism that are vital to our democracy. That's presumably the point."

Chapter 9: Prior Restraint

U.S. District Court for the District of Columbia

Case: *United States v. Bolton*, 2020 WL 5866623 (D.D.C. October 1, 2020).

Subject: Should the court issue a prior restraint to prevent publication of a book that had not cleared the National Security Agency's prepublication review process?

Summary of Decision: John Bolton was appointed by President Donald Trump to serve as National Security Advisor on April 9, 2018. After Bolton served in this role for 17 months, Trump tweeted that he had informed Bolton that his "services are no longer needed." Bolton disputed this account, insisting that he had offered to resign. Two months after the fallout, Bolton signed a book contract with publisher Simon & Schuster for a tell-all account about his time in the Trump administration, *The Room Where It Happened: A White House Memoir.*

As a condition for his appointment, Bolton had signed several nondisclosure agreements with the government. In one of these agreements, Bolton promised that he would "never divulge classified information to anyone unless: (a) [he has] officially verified that the recipient has been properly authorized by the United States Government to receive it, or (b) [he has] been given prior written notice of authorization from the United States Government . . . that such disclosure is permitted." In another agreement, Bolton promised to "submit for security review . . . any writing or other preparation in any form . . . that contains or purports to contain any SCI [sensitive classified information] or depictions of activities that produce or relate to CI [classified information] or that [he has] reason to believe are derived from SCI, that [he] contemplate[s] disclosing to any person not authorized to have access to SCI or that [he has] prepared for public disclosure."

Bolton submitted his book manuscript to the National Security Council (NSC) for prepublication review in December 2019. In the following months, Bolton revised the manuscript to address extensive feedback from Ellen Knight, the NSC's senior director for Records Access and Information Security Management. Knight had a conversation with Bolton on April 27, 2020, in which she said all classified information had been removed from the manuscript. She did not provide written approval, however, and the government reopened the process for a supplemental review in May 2020. John Eisenberg, Deputy White House Counsel and the NSC's legal advisor, sent Bolton a letter on June 8, 2020, claiming the manuscript still contained classified information. By that time, Bolton had delivered the manuscript to the publisher.

The Department of Justice went to court and requested a temporary restraining order that would prevent Bolton from "proceeding with the publication of his book in any form or media without first obtaining written authorization from the United States government through the prepublication review process." In a 27-page civil lawsuit, the Department of Justice argued that publication of the book violated Bolton's nondisclosure agreement and compromised national security.

Federal Judge Royce C. Lamberth excoriated Bolton's decision to publish the book before it had been cleared by the government, but denied the Trump administration's request for a preliminary judgment on June 20, 2020. In his opinion, Lamberth noted that the government was likely to succeed on the merits of the case. If he was unhappy with the process, Bolton should have sought relief in the courts. Instead, Lamberth observed, he had unilaterally opted out of the review process and tried to publish the book. "This was Bolton's bet," Lambert argued, "If he is right and the book does not contain classified information, he keeps the

upside [of publicity and sales]; but if he is wrong, he stands to lose his profits from the book deal, exposes himself to criminal liability, and imperils national security." In this instance, the judge concluded, "Bolton was wrong."

Although he was critical of Bolton's decision to publish his memoir before the review was complete, Lamberth refused to issue an injunction barring publication because more than 200,000 copies of the book had already been shipped to booksellers. By the time the government sough the injunction, reviews of the book and lengthy excerpts were available online. Several reporters had already read the book. An interview with Bolton was scheduled to be broadcast as a prime time special. "By the looks of it, the horse is not just out of the barn—it is out of the country," Lamberth wrote.

The judge also dismissed the government's claim that an injunction would prevent further spread of the book. "In the Internet age," Lamberth wrote, "even a handful of copies in circulation could irrevocably destroy confidentiality. A single dedicated individual with a book in hand could publish its contents far and wide from his local coffee shop. With hundreds of thousands of copies around the globe—many in newsrooms—the damage is done." Lamberth concluded, "There is no restoring the status quo."

President Trump denounced Lamberth's decision, tweeting, "Bolton broke the law and has been called out and rebuked for so doing, with a really big price to pay. He likes dropping bombs on people, and killing them. Now he will have bombs dropped on him!"

The Room Where It Happened was published on June 23, 2020. Bolton subsequently made multiple media appearances, including interviews by Brett Baier, Stephen Colbert, and Wolf Blitzer. Given the extensive media coverage, his book quickly became a *New York Times* best seller. Still, many commentators believe the Department of Justice may succeed in recovering Bolton's $2 million advance, any royalties from the book, and any income from the sale of movie and television rights, because Bolton disclosed classified information.

This was not the only effort to block a book critical of President Trump. Robert S. Trump, the president's younger brother, sought a temporary restraining order to block publication of a damning book by Mary Trump, the president's niece. The book, *Too Much and Never Enough: How My Family Created the World's Most Dangerous Man,* promised an insider account of life in the Trump family.

This lawsuit is different from the Department of Justice's effort to prevent publication of the Bolton book. Unlike Bolton, Mary Trump was not a government employee with access to classified information, and was not required to submit her book for prepublication review. Robert Trump claimed that Mary Trump had signed a nondisclosure agreement (NDA) in 2001 that barred her from writing a book about her family, as part of the settlement of her grandfather's estate. President Trump alluded to the NDA in an interview with Axios. "She's not allowed to write a book," he said. "You know, when we settled with her and her brother, who I do have a good relationship with—she's got a brother, Fred, who I do have a good relationship with — but when we settled," Mr. Trump added, she "signed a nondisclosure."

A New York state court judge, Hal Greenwald, issued a temporary restraining order that prohibited Mary Trump and her publisher, Simon & Schuster, from distributing or printing the book while the judge considered a permanent injunction. Attorneys for Mary Trump and the publisher appealed the decision on the grounds that it constituted "a prior restraint on core political speech that flatly violates the First Amendment." The next day, a different New York judge narrowed the order on Mary Trump, allowing Simon & Schuster to publish the book, which sold more than a million copies.

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

Third Circuit Court of Appeals

Case: *B.L. v. Mahanoy Area School District*, 964 F.3d 170, 2020 U.S. App. LEXIS 20365, 2020 WL 3526130 (June 20, 2020); affirming *B.L. v. Mahanoy Area School* District, 376 F.Supp. 3d 429, 2019 U.S. Dist. LEXIS 46771, 2019 WL 1298378 (M.D. Pa. 2019) (March 21, 2019).

Subject: Can a school punish a student for speech that substantially disrupts work and discipline if the speech occurs off campus?

Summary of Decision: B.L. is a student at Mahanoy Area High School (MAHS) in Mahanoy, Pennsylvania. As a freshman, she made the junior varsity cheerleading team. She hoped to make the varsity team during her sophomore year, but she was once again placed on the junior varsity team. That snub, coupled with other frustrations in her life, provoked her to make an intemperate response on Snapchat, a social media application that allows users to send private messages.

The speech at issue was a snap of B.L. and a friend with their middle fingers raised. The text "fuck school fuck softball fuck cheer fuck everything" was superimposed on the image. B.L. added a second snap: "Love how me and [another student] get told we need a year of jv before we make varsity but that doesn't matter to anyone else?" The snaps, which expire after they are viewed, were visible to B.L.'s 250 Snapchat friends, most of whom were also MAHS students.

A teammate forwarded a screenshot of one of the snaps to one of the coaches of the cheerleading team. Other students also complained to the other coach. After reviewing the snap, the coaches decided the content violated Mahanoy High School's cheerleading rules, which B.L. had signed after joining the team. These rules require cheerleaders to "have respect for [their] school, coaches, . . . [and] other cheerleaders"; to avoid "foul language and inappropriate gestures"; and to refrain from sharing "negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet."

As a punishment, the coaches removed the student from the cheerleading team. B.L. appealed the decision to the athletic director, the principal, the superintendent, and the school board without success. School officials upheld the punishment, but promised that B.L. could try out the next year.

Having exhausted their appeals, B.L. and her parents sued MAHS in the United States District Court for the Middle District Court of Pennsylvania. Among other things, B.L. claimed that her suspension violated the First Amendment, that the school's rules were overbroad and viewpoint discriminatory, and that the rules were unconstitutionally vague. The court ruled in B.L.'s favor, concluding, on the basis of *Tinker v. Des Moines Independent Community School District* (1969), that the snap was off-campus speech and therefore not subject to discipline. Further, the district court reasoned, B.L.'s speech did not cause any actual or foreseeable disruption.

The school district appealed, but the Third Circuit Court of Appeals ruled in favor of B.L. on June 30, 2020, holding that her speech was worthy of First Amendment protection. To support this ruling, the Third Circuit made three arguments. First, school districts have limited authority to punish off-campus expression. Although the *Tinker* decision gives school officials the power to punish disruptive student speech in a school setting, that authority does

not extend to speech beyond "the schoolhouse gates." Second, B.L.'s speech did not occur in a school setting. More specifically, the speech did not occur in a school-sponsored forum and did not bear the imprimatur of the school. B.L. was not on school grounds when she sent the snap; she did not use any school resources; and she shared the message on a platform that was unaffiliated with the school. Finally, punishing students for off-campus speech violates the freedom of speech guaranteed by the First Amendment.

Writing for the majority, Judge Cheryl Ann Krause acknowledged that "B.L.'s snap was crude, rude, and juvenile, just as we might expect of an adolescent. But the primary responsibility for teaching civility rests with parents and other members of the community. As arms of the state, public schools have an interest in teaching civility by example, persuasion, and encouragement, but they may not leverage the coercive power with which they have been entrusted to do so. Otherwise, we give school administrators the power to quash student expression deemed crude or offensive—which far too easily metastasizes into the power to censor valuable speech and legitimate criticism." Instead of suppressing student speech, Judge Krause concluded, we should embrace student speech rights. In so doing, "we teach a deeper and more enduring respect for civility and the 'hazardous' freedom that is our national treasure and 'the basis of our national strength.'"

MAHS appealed to the Supreme Court. In its writ of certiorari, MAHS warned that the Third Circuit's decision was unprecedented and risked disastrous consequences. To date, MAHS argued, the federal appellates that have considered such questions have consistently held that *Tinker* allows public schools to punish off-campus speech that has a "close nexus" to the school environment. Under the Third Circuit's decision, MAHS warned, schools would lose all authority to punish off-campus expression, even if it is "closely connected to campus, seriously disrupts the school environment, and threatens or harasses other students or administrators." MAHS argued that to maintain order and discipline, *Tinker* should be extended to reach student speech that occurs off campus.

Justin Driver, a professor at Yale Law School and author of a book about student speech, has noted that "The Supreme Court has repeatedly ducked the question of off-campus speech, even though the lower courts—and educators—desperately need some guidance on this incredibly common question." It will be interesting to see whether the Supreme Court grants certiori and agrees to hear this case.

Chapter 13: Copyright

U.S. Supreme Court

Case: *Google LLC v. Oracle America Inc.*, cert. granted, 140 S.Ct. 520, 2019 U.S. LEXIS 6934, 2019 WL 6042317 (November 15, 2019); *Oracle America Inc. v. Google LLC*, 886 F.3d 1179, 2018 U.S. App. LEXIS 7794, 2018 WL 1473875 (March 27, 2018).

Subject: Does copyright protection extend to a software interface; or does the appropriation of a software interface constitute a fair use?

Summary of Decision: On March 16, 2020, the Supreme Court was scheduled to hear oral arguments in *Google v. Oracle*, a copyright case with significant First Amendment implications. The argument was delayed until March 24, 2020, then pushed back to the October 2020 term "in keeping with public health precautions recommended in response to COVID-19." This delay was unusual, as the Supreme Court seldom postpones or reschedules arguments,

even when other government institutions are closed due to weather or budget. It was not unprecedented, however, as the Court shortened its calendar in 1793 (yellow fever) and 1918 (Spanish flu).

The case involves 11,500 lines of computer code originally developed by Oracle. This code was part of an "application programming interface" (API) that allowed devices to share information across platforms. For example, an API allows users to "take a photo on their Apple phone, save it onto Google's cloud servers, and edit it on their Surface tablet."

Oracle argued that APIs are original creations protected by copyright law. Building on this premise, the lawsuit alleges that Google was guilty of copyright infringement because it used an API that was developed by Oracle in an early version of the Android operating system. Google admitted to using Oracle's code, but said that it subsequently developed its own code. Using Oracle's code was not copyright infringement, Google asserted, because APIs are not creative works and therefore not eligible for copyright protection. In this instance, the code was a series of instructions written in the Java language that a computer uses to complete a task. Consequently, Google concluded, any developer could use Oracle's APIs in their work.

The lawsuit originated in 2010 in federal district courts. Two juries found in favor of Google. In both instances, Oracle successfully appealed the verdict. In 2018, the U.S. Court of Appeals for the Federal Circuit held that the API could be copyrighted, and that Google's use of the API was not protected by the fair use doctrine.

Google appealed to the Supreme Court in January 2019. The justices asked the Trump administration to submit a brief. In response, the solicitor general backed Oracle and urged the Supreme Court not to hear the case. On the other side, tech giants such as Microsoft, IBM, and Mozilla filed amicus briefs supporting Google. The Court granted certiorari on November 15, 2019, and scheduled oral arguments for March 2020.

Google and its supporters argue that allowing Oracle to copyright the API will constrain software developers and hamper the development of new communication technology. In response, Oracle claims that developers should pay Oracle to use the API that it developed. Beyond the question of whether the API is original, *Google v. Oracle* raises substantive questions about the "fair use" doctrine. The case also raises a larger free speech issue: A decision that limits the ability to use an API would make it more difficult for devices to connect, which, in turn, would limit the use of these devices to engage in discussion and debate.

Chapter 14: Access

U.S. Supreme Court

Case: *Thompson v. Hebdon*, 140 S.Ct. 348, 2019 U.S. LEXIS 7204, 2019 WL 6257598 (November 25, 2019); remanding *Thompson v. Hebdon*, 909 F.3d 1027, 2018 U.S. App. LEXIS 33235 (9th Cir. Alaska, November 27, 2018).

Subject: Does an Alaska law regulating campaign contributions violate the First Amendment?

Summary of Decision: Alaska law provides four limits on political contributions: (1) a $500 limit on contributions made by an individual to a political candidate, (2) a $500 limit on contributions made by an individual to an election-related group, (3) annual limits on what a political party may contribute to any one candidate (the dollar amount depends on the particular office), and (4) an aggregate limit of $3,000 on the total amount a candidate may accept from nonresidents of Alaska.

The Alaskan Republican Party and four individuals challenged these limits on First Amendment grounds. Two of the individuals wanted to contribute more than $500 to an individual candidate, the third wanted to give more than $500 to a political action committee, and the fourth was a nonresident who wanted to contribute more than $3,000 to a relative's campaign. For its part, the Alaskan Republican Party objected to the limit on the amount a campaign can accept from a political party.

The district court upheld all four limits. On appeal, a panel of the Ninth Circuit Court of Appeals upheld the first three limits, but ruled that the limit on contributions by out-of-state residents was unconstitutional, as it did not serve an "important state interest."

In a per curiam opinion, the Supreme Court reversed the Ninth Circuit decision and remanded the case to the lower court with instructions to consider whether the strict limits contained in the Alaska law were consistent with prior campaign finance decisions. In particular, the Court noted that the Ninth Circuit did not consider *Randall v. Sorrell* (2006), a Supreme Court decision that invalidated a Vermont law limiting an individual's contributions on a per-election basis to $400 to a candidate for a statewide office such as governor, $300 to a candidate for state senator, and $200 to a candidate for state representative.

Ignoring *Randall* was a problem, the per curiam opinion continued, because the Alaska law was similar to the unconstitutional Vermont law in three crucial respects. First, Alaska's limits on contributions to individual candidates was only $500, an amount "substantially lower" than the limits previously upheld by the Supreme Court. Second, Alaska's limits on contributions to individual candidates is "substantially lower than . . . comparable limits in other States." Third, the state's limits on contributions is not adjusted for inflation. This limit is a problem because limits that are "suspiciously low" will "almost inevitably become too low over time."

The Supreme Court appeared to be warning the Ninth Circuit that the Alaska law cannot withstand scrutiny using the standards set out in *Randall*. Consequently, the *Thompson* decision is likely to be a victory for opponents of the Alaska law's strict limits on campaign contributions. The decision is also significant in that the Supreme Court did not take the opportunity to raise the larger question of whether there should be *any* limits on campaign contributions. (Under current federal law, for example, campaign contributions to candidates for federal office are limited to $2,800.)

Commenting on the decision in his influential Election Law Blog, Rick Hasen, a leading expert on election law, characterized the decision in *Thompson v. Hebdon* as "a victory for supporters of reasonable campaign finance regulation, even though it was a loss." Campaign finance is definitely an area worth watching, as the Roberts Court has already held several state laws limiting campaign contributions to be unconstitutional. If the Ninth Circuit upholds the Alaska law, the case will likely return to the Supreme Court, giving the justices the opportunity to rule on the constitutionality of state laws that set limits on contributions to political campaigns.