First Amendment Rights

An Encyclopedia

NANCY S. LIND AND ERIK T. RANKIN

VOLUME TWO:
Contemporary Challenges to the First Amendment

Library of Congress Cataloging-in-Publication Data

Lind, Nancy S., 1958–
First Amendment rights : an encyclopedia / Nancy S. Lind and Erik T. Rankin.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-61069-212-0 (hardcopy : alk. paper) — ISBN 978-1-61069-213-7 (ebook) 1. United States. Constitution. 1st Amendment. 2. Freedom of speech—United States. 3. Freedom of the press—United States. 4. Freedom of religion—United States. I. Rankin, Erik. II. Title.
KF4770.L56 2013
342.7308'503—dc23 2012021801

ISBN: 978-1-61069-212-0
EISBN: 978-1-61069-213-7

17 16 15 14 13 1 2 3 4 5

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130 Cremona Drive, P.O. Box 1911
Santa Barbara, California 93116-1911

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VOLUME ONE

Timothy O. Lenz. "First Amendment Approaches," *Encyclopedia of American Civil Rights and Liberties.* Ed. Otis Stephens Jr., John Scheb II, and Kara Stooksbury. Westport, CT: Greenwood Press, 2006: 373–377.

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The Roberts Court and the First Amendment: The First Six Terms

Thomas E. McClure

Each year the Supreme Court begins a new term on the first Monday in October that lasts until the end of June of the following year. John Roberts was sworn in as **Chief Justice** just days before the Court convened the session that began in October 2005. During the first six terms John Roberts presided over the Supreme Court, the Court rendered a total of 33 decisions arising under the First Amendment.

During this period the Court experienced the retirement of two justices and the addition of three. From October 2005 through June 2011, there were four configurations of the Roberts Court. **Associate Justices** Antonin Scalia, Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsberg, and Stephen Breyer continuously served during this period. For its first four months, the Roberts Court was an eight-member tribunal that also included Justices John Paul Stevens and David Souter. In 2006, Justice Samuel Alito joined the court replacing Sandra Day O'Connor who had resigned just months before Roberts became Chief Justice.[1] Justice Sonia Sotomayor filled Justice Souter's seat in 2009, and Justice Stevens was replaced by Justice Elena Kagan in 2010. Table 1.1 displays a list of the justices of the Roberts Court.

Most observers identify the six justices who served during the entirety of the first six terms as falling into identifiable political ideologies. Roberts, Scalia, and Thomas are considered conservative, whereas Ginsberg and Breyer are viewed as liberal. Kennedy is a moderate conservative who usually votes with the conservatives but sometimes votes with the liberals.

Even though the Chief Justice's name is attached to the Court over which he presides, the Supreme Court's judicial philosophy sometimes shifts each time a new associate justice is seated. While some argue that each new appointment creates a new Court,[2] the ideological bent of the Roberts Court has not substantially changed during the 2005–2011 period despite personnel changes. Alito, a conservative, filled a seat that was vacated before Roberts became Chief Justice. Liberals Sotomayor and Kagan generally share the ideology of their predecessors, Souter and Stevens.

The Court's First Amendment activity has centered on free expression and they have decided a few freedom of religion cases. The Roberts Court heard oral

Table 1.1 Justices of the Roberts Court, 2005–2011.

Justice	Appointing President	Term on Court
John G. Roberts, Chief Justice	George W. Bush	2005–
John Paul Stevens	Gerald Ford	1975–2010
Antonin Scalia	Ronald Reagan	1986–
Anthony M. Kennedy	Ronald Reagan	1987–
David Souter	George H.W. Bush	1990–2009
Clarence Thomas	George H.W. Bush	1991–
Ruth Bader Ginsberg	Bill Clinton	1993–
Stephen G. Breyer	Bill Clinton	1994–
Samuel Anthony Alito, Jr.	George W. Bush	2006–
Sonia Sotomayor	Barack Obama	2009–
Elena Kagan	Barack Obama	2010–

arguments and issued decisions in 29 free expression cases and four religious freedom cases. Prior to Roberts's appointment, critics predicted that a Roberts Court would dilute religious liberty by altering the substantive jurisprudence of church and state relations under the First Amendment.[3] Contrary to these expectations, the Court imposed procedural limitations but left the substantive law intact.

There is a great divide of opinion as to whether the Roberts Court is a "free speech Court." After reviewing the cases decided in its sixth term, Professor Michael McConnell, a former U.S. Circuit Judge, concluded "this term's cases make it clear that the Roberts Court has emerged as the most consistently and strongly pro-speech protective Court in American history."[4] Law school dean and distinguished professor Erwin Chemerinsky, following his examination of the same term, stated, "[M]y claim is that the Roberts Court's overall record suggests that it is not a free speech Court at all."[5] Who is correct? A careful review of the Court's record reveals that the truth lies between these two extremes.

The first part of this chapter argues that during its first six terms, the Roberts Court did not alter the substantive constitutional law governing church and state. However, it did limit access to the federal courts to **litigants** challenging governmental action on the basis of the **establishment clause**.

The second part contends that the Roberts Court expanded free speech, although there are notable instances in which the Court approved governmental restrictions of expression. The first subsection presents the cases in which the Court expanded free speech. The second subsection argues that the Roberts Courts is a pro-speech Court. The third part of the chapter discusses the major cases in which

free expression challenges were rejected. Finally, the fourth part contends that the Roberts Court is not the most strongly pro-speech Court in history.

The Roberts Court's Record on Religious Freedom

The First Amendment begins with the following text: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first phrase, known as the establishment clause, prohibits the government from creating a government-sponsored religion. It also forbids Congress from favoring one religion over another, religion over nonreligion, or nonreligion over religion. The second phrase of the First Amendment, known as the **free exercise clause**, guarantees a person's right to accept any religious belief and, in many instances, to engage in religious rituals without the interference of the government. Both of these clauses apply to the states.[6] Although the Roberts Court did not interpret the free exercise clause[7] during its first six terms, it has decided three establishment clause cases.[8]

When his nomination was pending, commentators speculated that Roberts's appointment to the high court would dramatically transform establishment clause jurisprudence by permitting increased state support of religion.[9] In support of this argument, they pointed to briefs authored by Roberts when he served as a deputy solicitor general. These observers predicted that a Roberts Court would chip away at existing doctrine to diminish religious liberty.[10]

Contrary to these expectations, the Roberts Court did not alter the substantive law under the establishment clause. Indeed, during the first six terms, the Court chose not to decide an establishment clause case on the merits. However, the Court limited the ability of taxpayer litigants to assert establishment clause challenges.

Article III of the Constitution grants the federal courts jurisdiction to adjudicate "cases" or "controversies." This requires litigants to have **standing** to bring claims. In other words, they must have a personal stake in the outcome of the litigation to have federal courts decide their case.

To maintain standing, the **plaintiff** must have suffered an "**injury in fact**." Three requirements must be met to show injury in fact. First, the plaintiff experienced an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there is a causal connection between the injury and the challenged conduct of the defendant; that is, the injury is not the result of the independent action of some third party not before the court. Third, it must be likely, not merely speculative, that the injury will be redressed by a favorable decision.[11]

Ordinarily, a litigant does not have standing to object to a government program simply because he or she is a taxpayer. In *Flast v. Cohen,*[12] the Supreme Court carved an exception to the taxpayer standing principle in cases challenging

legislation on the basis of the establishment clause. Under *Flast,* a taxpayer has standing to bring an establishment claim when two conditions are met. First, there must be a logical link between the plaintiff's taxpayer status and the type of legislation attacked. Second, there must be a nexus between the plaintiff's taxpayer status and the precise nature of the constitutional infringement alleged.

The Roberts Court dismissed two cases that raised establishment clause claims, holding that the plaintiffs lacked standing. In *Hein v. Freedom from Religion Foundation*[13] and *Arizona Christian School Tuition Organization v. Winn,*[14] both 5–4 decisions, the Court refused to expand the *Flast* exception beyond its facts.

In *Hein,* the Court held that taxpayers lacked standing to challenge the federal executive branch's use of congressional appropriations to fund conferences that promoted religious community groups over secular ones. In a **plurality opinion** authored by Justice Alito, the Court held that taxpayers may only challenge programs that have specifically been authorized by Congress but not programs created and paid for by the executive branch using discretionary funding. Justices Scalia and Thomas **concurred** in the court's judgment, contending that *Flast v. Cohen* should be overruled. Justice Souter's **dissent** argued that there was no basis in either reason or precedent to limit the *Flast* exception to taxpayer claims against the legislative branch but not to the executive branch.

In *Winn,* Justice Kennedy, writing for the majority, held that taxpayers did not have standing to challenge an Arizona law that provides tax credits for contributions to "school tuition organizations" that use the donations to furnish scholarships to students who attend religious and nonreligious private schools. The majority limited the *Flast* exception to cases in which the taxpayers can show that their own tax contributions were used to support religion. Justice Kagen vigorously dissented and predicted that the Court's decision would devastate taxpayer standing in establishment clause litigation.

The Roberts Court considered a third establishment clause case but failed to reach a decision on the merits. In *Salazar v. Buono,*[15] a 5–4 decision, a federal district court declared that a cross constructed on public land as part of a veterans of foreign wars (VFW) memorial violated the establishment clause and entered an injunction requiring the removal of the cross. In response, Congress authorized a transfer of the land on which the cross was located to a private owner who agreed to maintain the cross at that location. The district court then issued an injunction preventing the proposed transfer. The Supreme Court reversed the injunction and **remanded** the case back to the district court to consider the context in which the land transfer statute was enacted.

During its first six terms, the Roberts Court did not alter the landscape of the law interpreting the two religion clauses of the First Amendment. Despite predictions to the contrary, the Rehnquist Court's approach to religious freedom has not been replaced. However, the Court has construed the law of standing as to limit

the ability of taxpayers to raise establishment claims in federal court. This may be motivated in part by the conservative majority's general view of the establishment clause.[16] As a consequence, it is quite likely that there will be fewer attacks on government activities favoring religion. Nonetheless, taxpayer status continues to remain a basis for standing to make establishment clause challenges because the *Flast v. Cohen* exception to the injury in fact requirement was not overruled.

The Roberts Court's Record on Freedom of Speech

The Roberts Court probably will be remembered for several notable cases in which it protected free expression and created precedent for the expansion of speech. However, the Court's record is mixed. During its first six terms, the Court approved the government's suppression of speech twice as often as it struck down restrictions on expression. Indeed, the Court upheld restrictions on speech 19 times and struck the limitations on expression 10 times. All four conservative justices and Justice Kennedy, a moderate conservative, joined the majority in most of the free speech

Table 1.2 Conservatives joining pro-speech majorities, 2005–2011.

Case	Roberts	Scalia	Kennedy	Thomas	Alito
Campaign Finance: *Randall v. Sorrell*	x	x	x	x	x
Campaign Finance: *WI Right to Life I*	x	x	x	x	x
Campaign Finance: *WI Right to Life II*	x	x	x	x	x
Campaign Finance: *Davis v. FEC*	x	x	x	x	x
Animal Cruelty: *U.S. v. Stevens*	x	x	x	x	
Campaign Finance: *Citizens United v. FEC*	x	x	x	x	x
Funeral Protest: *Snyder v. Phelps*	x	x	x	x	
Violent Videos: *Brown v. Enter. Merchants*	x	x	x		x
Commercial Speech: *Sorrell v. IMS Health*	x	x	x	x	x
Campaign Finance: *AZ PAC v. Bennett*	x	x	x	x	x

cases. Fourteen of the free speech case majorities included four liberal justices, and three of the four liberal members of the Court joined the majority in two cases.

Cases Expanding Freedom of Speech

The conservative justices make up the majority in most of the pro-free speech cases. The Chief Justice as well as Justices Scalia and Kennedy ruled against governmental restrictions in all 10 pro-speech cases. Justice Thomas concurred in the outcome of these cases 90 percent of the time, and Justice Alito voted to strike the restriction of speech in all but two of the pro-speech cases. Table 1.2 displays the votes of the conservative justices in the 10 pro-speech cases.

Table 1.3 Liberals joining pro-speech majorities, 2005–2011.

2005–2008 Terms	**Stevens**	**Souter**	**Ginsberg**	**Breyer**
Campaign Finance: *Randall v. Sorrell*				x
Campaign Finance: *WI Right to Life I**	x	x	x	x
Campaign Finance: *WI Right to Life II*				
Campaign Finance: *Davis v. FEC*				
2009 Term	**Stevens**	**Ginsberg**	**Breyer**	**Sotomayor**
Animal Cruelty: *U.S. v. Stevens*	x	x	x	x
Campaign Finance: *Citizens United v. FEC*				
2010 Term	**Ginsberg**	**Breyer**	**Sotomayor**	**Kagan**
Funeral Protest: *Snyder v. Phelps*	x	x	x	x
Violent Videos: *Brown v. Enter. Merch.*	x		x	x
Commercial Speech: *Sorrell v. IMS Health*			x	
Campaign Finance: *AZ PAC v. Bennett*				

* *Wisconsin Right to Life v. Federal Election Commission I* did not decide the First Amendment claim but rather remanded the case to the district court for a decision on the merits.

Justice Sotomayor is the only liberal justice to consistently vote with the majority in pro-expression cases. Since joining the Court, she has been part of the majority in every case in which the Court ruled in favor of the party asserting a First Amendment challenge, except the campaign finance cases. Table 1.3 displays the votes of the liberal justices in the 10 pro-speech cases.

The Roberts Court expanded free speech protection in five areas: (1) matters of public concern in which the speaker inflicted injury upon a private person, (2) minors' access to offensive material, (3) commercial speech, (4) abhorrent expressions, and (5) campaign finance.

Inflicting Emotional Injury While Communicating Matters of Public Concern: Funeral Protests

In *Snyder v. Phelps,*[17] the father of a serviceman killed in the line of duty won a $5 million jury verdict in a case filed in state court against a group of protesters from Westboro Baptist Church who picketed near the deceased son's funeral service. The Westboro signs displayed messages such as "God Hates The USA/Thank God for 9/11," "You're Going to Hell," "God Hates You," "Priests Rape Boys," "Fag Troops," and "Thank God for Dead Soldiers." Westboro also posted inflammatory denunciations of the Snyders on the Internet.[18]

Chief Justice Roberts, writing for an 8–1 majority, held that the First Amendment shielded speakers from state **tort** liability for communicating emotionally hurtful messages when the message is on a matter of public concern presented through peaceful picketing on public property. The Court afforded Westboro's speech "special protection" that could not be overcome by the jury's finding that the message expressed by Westboro was outrageous.

Minors' Access to Offensive Material: Violent Videos

In *Brown v. Entertainment Merchants Association*[19] an association representing the video game and software industries made a pre-enforcement challenge to a California law that prohibited the sale or rental of "violent video games" to minors and required that video games be placed in packaging that was labeled "18."

In a 7–2 decision, the Court struck down the statute because it violated the First Amendment right of free expression. Justice Scalia, writing for the Court, stated that the act restricts the dissemination of protected speech. He wrote that the law did not withstand **strict scrutiny** because the state could not demonstrate that it was narrowly drawn to serve a compelling state interest. Minors are entitled to a significant measure of First Amendment protection, and in only narrow and well-defined circumstances may the government bar dissemination of protected materials to them. Scalia concluded that California was unable to show

a direct causal link between violent video games and harm to minors. The Court noted that the statute was not narrowly tailored to further the state's interests.

Commercial Speech: Prescriber-Identifying Information

The Court in *Sorrell v. IMS Health, Inc.*[20] struck down an essential part of Vermont's prescription confidentiality law, which prohibited pharmacies from revealing prescriber-identifying information for marketing purposes. Data miners and an association of pharmaceutical manufacturers filed suits claiming that their First Amendment rights were violated.

The court rejected Vermont's argument that the law was merely a commercial regulation rather than a regulation of speech. The Court then analyzed the legislation using heightened judicial scrutiny. In a 6–3 majority decision, authored by Justice Kennedy, the Court held that the act violated the First Amendment because it was not narrowly tailored to achieve the state's objectives of protecting medical privacy and improving public health care.

Abhorrent Expressions: Depictions of Animal Cruelty

In *Stevens v. United States,*[21] the **defendant** operated a website through which he sold videos of pit bulls engaging in dog fights and attacking other animals. He was convicted of violating a federal statute that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty.[22] The statute defined acts of animal cruelty as ones "in which a living animal is intentionally maimed, mutilated, tortured, wounded or killed" if that conduct violates the law where the creation, sale, or possession takes place.[23]

Chief Justice Roberts, speaking for an 8–1 majority, held that the federal law was **overbroad** and therefore violated the First Amendment. The Court noted that the act's ban on a "depiction of animal cruelty" nowhere requires that the depicted conduct be cruel. For instance, killing or wounding is not necessarily cruel. The statute's requirement that the activity be illegal does not limit the scope of the law to cruel conduct because many laws govern the treatment of animals but are not designed to guard against animal cruelty, such as fishing and hunting licenses. Finally, the court observed that the scope of the act is not limited by the requirement of illegality because of the wide variance of laws across the nation, such as a ban on hunting in the District of Columbia.

Campaign Finance: Limitations on Political Contributions and Spending

The Roberts Court has ruled in favor of plaintiffs' First Amendment challenges to campaign finance laws throughout the Court's first six terms. In *Randall v. Sorrell,*[24] the Court struck down Vermont's limits on contributions because they were unduly restrictive. In *Federal Election Commission v. Wisconsin Right to Life,*[25] the Court found that the Bipartisan Campaign Reform Act of 2002 (BCRA) limitation on

independent expenditures by corporations and unions[26] violated the First Amendment. Both decisions were plurality opinions.

Davis v. Federal Election Commission[27] was the first campaign finance case decided by the Roberts Court that commanded a single majority opinion. In *Davis,* the court held that the "millionaires' provision" of the BCRA[28] violated the First Amendment. This provision permitted congressional candidates to exceed contribution caps when they compete against a self-funded candidate who spends more than $350,000 of his or her own funds in the election. The Court ruled that leveling the electoral opportunities was not a legitimate governmental purpose and thus could not justify a substantial burden on speech.

The most significant campaign finance case is *Citizens United v. Federal Election Commission,*[29] a case in which the Court held that BCRA's restriction on independent corporate expenditures[30] is a ban on speech that violates the First Amendment. Justice Kennedy, writing for a 5–4 majority, reiterated prior precedents holding that money is protected speech[31] and therefore, campaign finance restrictions must be justified by a compelling government interest. Only corruption and the appearance of corruption could justify interference with campaign funding. Because corporations are considered "persons" and are therefore entitled to protection under the Constitution, the First Amendment prohibits spending restrictions on corporate independent campaign expenditures, and by implication union independent campaign spending.

In the following term, the Court handed down another campaign finance decision, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett.*[32] Chief Justice Roberts wrote the 5–4 majority opinion in which the Court struck down the Arizona public financing election law. The law provided that when a privately funded candidate's spending reached a specified threshold, the state would provide additional funding to a publicly financed candidate. The Court stated that this scheme has a **chilling effect** on the privately financed candidate's campaign spending and, therefore, speech.

The Roberts Court Is a Free Speech Court

The Roberts Court's First Amendment rulings against governmental restrictions on expression will have lasting consequences on free speech. The decisions are unpopular to many because of the controversial nature of the speech protected. Some members of the political right applaud the campaign finance and pharmacy disclosure cases but denounce the funeral protest and violent video ban cases. Many members of the left subscribe to the reverse point of view.

It is not only the contentious nature of the protected expression that leads to the conclusion that the Roberts Court is a free speech court but also the lasting impact of the Court's reasoning in these cases. The Court crafted approaches that significantly