

First Amendment Overview

This paper gathers together a number of Supreme Court cases regarding key First Amendment issues in legal scholarship. These concepts are divided into the classic First Amendment categories of Speech, Press and Religion. These cases can either be included in a list topic of First Amendment cases, in a list of general "social issue" cases, or as proof that a general First Amendment topic (along the lines of the topic proposed by Dallas) includes ample ground.

Freedom of Speech

Hate Speech – *R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)*

Background

Teenagers allegedly burned a homemade cross inside the fenced yard of a black family that lived across the street from D; the incident took place in the middle of the night. D was prosecuted under the St. Paul "Bias-Motivated Crime Ordinance," which provided that "whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

The Supreme Court (5-4) concluded that the law was *impermissibly content-based*, because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."

The Supreme Court has previously held in *Chaplinsky* and after that the First Amendment does not protect "fighting words." (Court held that the statute in question only impacted "fighting words"--- this prevented overturning the ordinance on overbreadth grounds) Nevertheless, even though the government is regulating a supposedly "unprotected" category (such as fighting words), it may not do so in a content-based manner.

Justice Scalia gave two examples of what he considered to be impermissibly content-based regulations of "unprotected" categories: The government may proscribe libel, but it may not make the further content discrimination of proscribing only libel critical of the government. Similarly, a city council may not enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government.

But there is a caveat to the above rule. Scalia acknowledged that there is an exception to the rule that even unprotected categories enjoy complete freedom from content-based regulation: when "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists," and the content discrimination is allowed. Thus the state

could choose to prohibit only "the most lascivious displays" of sexual activity, rather than all constitutionally-obscene materials; or, the federal government can (as it does) criminalize only those threats of violence that are directed against the President because in each case, the proscribed speech represents the most extreme instance of the reason why the whole category is unprotected in the first place (i.e., it is the "most obscene," or it is the "most dangerously violent").

Analysis

This case raises the classic dilemma that free speech entails a freedom to hate and pits civil libertarians against the postmodern critical theorists. The case implicates not only racism, but hate crime legislation for sexism, heterosexism, and religious persecution. Additionally, objectivists take exception with that very concept of regulating some types of speech.

The debate on this decision is focused on the underlying value conflict because of its limited scope. While hate crime legislation is unconstitutional under *R.A.V.*, hateful motivations may be used to enhance penalties for other crimes (e.g. racially-inspired murder can be punished more harshly than other murders). This is problematic for those seeking a non-critical debate because from the perspective of most links we can think of there is little difference between hate crime legislation and hate crime enhancements.

Ultimately, we think this case is essential to a courts topic, whether focused on the First Amendment or as part of a "social issues potpourri" due to the wealth of legal scholarship on the case and the centrality of the social issues it raises.

Bibliography

Bell, Jeannie, "Oh Say, Can You See: Free Expression by the Light of Fiery Crosses," 39 Harvard Civil Rights-Civil Liberties Law Review 335 (2004)

Article argues cross burning should be treated as a hate crime, which may be prosecuted rather than as constitutionally protected hate speech. Argues 1A scholars do not put cross burning in the correct historical perspective and race theorists do not analyze the 1A issues correctly.

McMasters, Paul, "Must a civil society be a censored society?," Human Rights, published by the American Bar Association, Fall 1999, Vol. 26, No. 4

Argues we should never take steps to censor speech and RAV is correctly decided. Also argues hate speech laws encourage appropriation of victims group's identities.

Delgado and Stefancic, "The Boundaries of Free Speech: Understanding Words That Wound", 2004

Revisits Delgado's seminal work: Delgado, Richard, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 Harv. C.R.-C.L. L. Rev. 133 (1982). Describes the paternalistic approach taken by many advocates of regulating hate speech and the 'tough love' approach of conservative libertarians. Also discusses hate speech regulation in an international context

Demaske, Chris, "Modern Power & the First Amendment: Reassessing Hate Speech," 9 Communications Law & Policy J. 273 (Summer, 2004, #3)

Modern power dynamics indicate that free speech doctrine needs to be reconsidered—this requires the Court to think about the role of group identity and how speech can be resistant and oppressive. The article also advocates a different way to analyze 1A questions and reject the content neutral analysis traditionally used to assess these kinds of questions

Holdowsky, Jonathan, "Out of the Ashes of the Cross: The Legacy of R.A.V. v. St. Paul," 30 New England L. Rev. 1115 (1996)

Lower courts have applied RAV in ways that are arbitrary, incoherent and self-serving. Court needs to clarify (perhaps overturn) its holding.

Butler, Judith, "Constitutions and 'Survivor Stories': Burning Acts: Injurious Speech", 3 U Chi L Sch Roundtable 199, 1996

A reading of the RAV decision that explores the power dynamics of the decision and the violence that precipitates hate speech.

Tsesis, Alexander, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS (2002)

The dangers of hate speech are compounded when it is systematically developed over time. This becomes part of the culturally acceptable dialogue which leads to the persecution of minorities.

Pornography – *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986)

Background

Indianapolis enacted an anti-pornography ordinance drafted by feminist scholars Andrea Dworkin and Catherine MacKinnon. The ordinance contained four prohibitions. People may not "traffic" in pornography, "coerce" others into performing in pornographic works, or "force" pornography on anyone. Anyone injured by someone who had seen or read pornography had a right of action against the maker or seller.

"Pornography" under the ordinance is defined as "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented as being penetrated by objects or animals; or
- (5) Women are presented in scenarios of degradation, injury abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
- (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display."

The Seventh Circuit (Judge Easterbrook) invalidated the ordinance on the First Amendment ground that the ordinance is impermissibly aimed at viewpoint and the Supreme Court summarily affirmed.

The Seventh Circuit summed up the dilemma of free speech eloquently, stating:

Depictions of pornography tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, "pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex, which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]." Yet this simply demonstrates the power of pornography as speech

Analysis

Another classic case within the scholarship. Not only does this case problematize the promise of freedom through free speech for those not within the majority, but unlike *R.A.V.* the holding is fully unique because there is no civil rights based anti-pornography act of any kind.

This case raises gender literature, heterosexism literature (gay porn was banned under this statute too), in addition to the legal literature.

Bibliography

Sunstein, "Pornography and the First Amendment," 1986 Duke L.J. 589 (1986).

Sunstein counters "content neutrality" in the context of antiporn legislation by positing that such legislation is "directed at the harm rather than at viewpoint." Invoking the footnote of *Carolene Products*, Sunstein contends that the economic advantages of the porn industry actually function to limit the marketplace of free speech and justify antiporn legislation.

MacKinnon, "Pornography, Civil Rights, and Speech," 20 Harv.C.R.-C.L.L.Rev. 1 (1985). Dworkin, "Against the Male Flood: Censorship, Pornography, and Equality," 8 Harv. Women's L.J. 1 (1985).

MacKinnon and Dworkin outline the premise of their statute and argue that pornography's societal harms extend beyond the individual viewing the work and therefore justify regulation. They also contend that pornography underlies violence against women.

Rosen, "SYMPOSIUM: DEMOCRACY IN ACTION: THE LAW & POLITICS OF LOCAL GOVERNANCE: Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances," 21 J. L. & Politics 223 (2005).

Tailoring antiporn ordinances to permit sub-state polities (but not states or the federal government) to enact content-based regulations may advance rather than impede foundational free speech values.

Allen, Pornography and Power, *Journal of Social Philosophy*, Winter 2001, 512-31 (2001)

"Insofar as pornography is empowering, it is a possible site for resistance, but insofar as the genre is structured to a large extent by relations of masculine dominance and feminine subordination, it is also a possible site of the application and articulation of oppression. Finally, what might allow pornography to go from being a possible to being an actual site for resistance is precisely the resources that are generated by the collective power of feminism as a social movement."

Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (1995); Meyer, "Sex, Sin, and Women's Liberation: Against Porn-Suppression," 72 *Tex.L.Rev.* 1097 (1994).

Pornography can empower women as greater sexual citizens

Compelled Speech – *Rumsfeld v. Forum for Academic and Institutional Rights*, 126 S. Ct. 1297 (2006)

Background

An association of law schools and law school faculties challenged the constitutionality of the Solomon Amendment. The Solomon Amendment denies federal funding to an institution of higher education that "has a policy or practice . . . that either prohibits, or in effect prevents" the military "from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. A. § 983(b). In other words, for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access.

The Court held that: (1) institutions could not comply with the Solomon Amendment by applying a general nondiscrimination policy to exclude military recruiters as it did not focus on the content of a school's recruiting policy, but instead, looked to the result achieved by the policy and compared the access provided military recruiters to that provided other recruiters; (2) because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute did not place an unconstitutional condition on the receipt of federal funds; (3) the Solomon Amendment did not dictate the content of law schools' speech at all, which was only "compelled" if, and to the extent, the school provided such speech for other recruiters; (4) there was nothing approaching a Government-mandated pledge or motto that the law schools had to endorse; and (5) accommodating the military's message did not affect law schools' speech, because the schools were not speaking when they host interviews and recruiting receptions, i.e., the accommodation did not sufficiently interfere with any message of the law schools.

Analysis

This case pits military readiness and the ability to regulate academic institutions against traditional notions of free speech and discrimination. It is due to the dimension of military readiness that this case is a more debate-friendly case than the previous major compelled speech case *BSA v. Dale*.

This case is very recent and not a lot of literature is out there yet numerous articles are in the pipeline over the next several months. A number of articles were written advocating the reversal of the Third Circuit ruling in favor of the law schools. These articles form the basis of the Affirmative. Often cited was the argument that military recruitment and readiness was of such paramount importance that it satisfied the strict scrutiny standard. Additionally, articles argued that a holding classifying the Solomon Amendment as regulation of speech rather than content risks constraining the powers of Congress too

greatly. On the other side, this case energized the law school community and gay rights community.

Bibliography

Larkin, "NOTE: The Wisdom of Solomon? Splitting the First Amendment Baby in Forum for Academic & Institutional Rights v. Rumsfeld," 3 Geo. J.L. & Pub. Pol'y 639 (2005)

A review of the Third Circuit's decision and the decision to apply strict scrutiny to the Solomon Amendment. According to the article, military recruiting is of such paramount importance that intermediate scrutiny was appropriate

<http://www.hlrecord.org/media/storage/paper609/news/2003/11/20/Opinion/Guest.Opinion.Solomon.Fight.Reveals.FreeAssociation.Duplicity-564351.shtml?norewrite200605102017&sourcedomain=www.hlrecord.org>

Suggests that the Supreme Court's decision is important to preserving homosexual rights because this case is the opposite of the decision in Dale – allowing government policies to compel speech is key to combating discrimination in other contexts

<http://www.acsblog.org/featured-events-2327-eskridge-polsby-debate-solomon-amendment-case.html>

A series of blog posts by two law professors debating the merits of the Solomon Amendment

http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Rumsfeld_v_Forum_for_Academic_and_Institutional_Rights

A good website featuring the briefs and analysis on the case

Campaign Finance – *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)

Background

The Supreme Court upheld the constitutionality of the McCain-Feingold Act (the BCRA Amendments to the Federal Election Campaign Act of 1971). Plaintiffs argued that these amendments, violated the First Amendment protection of Free Speech. The Court upheld the total ban of soft-money contributions by tracking congressional efforts “to purge national politics of what was conceived to be the pernicious influence of ‘big money’ campaign contributions” and declared that the BCRA amendments were a “modest” effort at reform. Specifically, the Court found that (1) "soft" money prohibitions under 2 U.S.C.S. § 441i(a) were justified by Congress's desire to prevent the actual and apparent corruption of federal candidates and officeholders; (2) restrictions under § 441i(b) on state and local party committees' use of soft money were necessary to prevent those committees' use as a conduit for soft money; (3) § 441i(d)'s limits on contributions to tax-exempt organizations applied only to funds not raised in compliance with FECA; (4) restrictions under 2 U.S.C.S. § 434 did not have to be limited to "express advocacy" and could encompass issue advertising; (5) limits on independent expenditures under 2 U.S.C.S. § 441a(d)(4) were invalid; and (6) recordkeeping requirements under 47 U.S.C.S. § 315(e) were virtually identical to existing regulations and were valid.

Analysis

The issues raised in this case are central to any political debate. Campaign finance reform may limit the influence of big money, but it also regulates access to politics to those capable of raising funds through “acceptable” methods. In other words, when candidates need to raise money in small doses, traditional party structures arguably become more essential to the process.

This case is a good example of the problems with a topic based on overturning cases rather than declaring statutes unconstitutional. The Supreme Court’s decision, like almost every modern Court decision, is convoluted and provides numerous options for technically “overturning” the decision in a way that avoids the intended purpose of including the case in the topic. In this case, the district court's judgment was reversed insofar as it (1) found that BCRA's restrictions on soft money were unconstitutional, (2) struck down requirements for disclosure of executory contracts for political advertising, and (3) held unconstitutional BCRA's recordkeeping requirements. The judgment was otherwise affirmed. This piecemeal holding means that technically an overturn could include rejecting the untouched holdings of the district court.

Bibliography

Abrams, Speaking Freely, 2005. Abrams, “look Who’s Trashing the First Amendment,” Columbia Journalism Review Nov/Dec 1997, pp. 53-57. NYT, “The Way We live Now:

Questions for Floyd Abrams: Fighting with the Right,” April 7, 2002, p. 17. Smith, Bradley A., *Unfree Speech: The Folly of Campaign Finance Reform*, 2001

Grant and Rudolph, Value Conflict, Group Affect, and the Issue of Campaign Finance, *American Journal of Political Science*, Volume 47 Page 453 - July 2003. Doolittle, The Case for Campaign Finance Reform, Hoover Press : Anderson DP5 HPANNE3300 20-04-00 rev1 page 307. Grant, Reforming American Election Campaign Finance, *The Political Quarterly* 2004 75:2 132.

http://mccain.senate.gov/index.cfm?fuseaction=Issues.ViewIssue&Issue_id=17

<http://www.prospect.org/web/page.ww?section=root&name=ViewPrint&articleId=4723>

[additional research is being done into this case and related campaign finance issues]

Freedom of Press

Access – *M.K.B. v. Warden*, 124 S. Ct. 1405 (2004)

Background

An Algerian native was detained in late 2001 for overstaying his student visa and filed a writ of habeas corpus in January 2002. The case was sealed without notice, hearings, or findings. However, the case came to light completely accidentally through an inadvertent posting on PACER (an electronic legal docket service). Petition for cert was filed by the detainee (under seal) arguing that the public should not have been excluded from access to his case. In February 2004, the Supreme Court denied the petition without explanation. Afterward the case, without any warning or explanation became posted on the 11th Circuit's docket

Analysis

While not trying to overlap with the War on Terror topic area, this case raises the issues surrounding terrorism while remaining specific to First Amendment issues. Based on our initial searches, there is not much literature on this specific case, but the role of the press vs. the need for national secrecy is generally available literature and this is the best case around which to center this debate.

This case raises some procedural questions about the topic. There is no Supreme Court decision in this case, but rather a denial of cert. Such a denial can represent that the Court did not disagree with the lower court or it could indicate that the Court simply doesn't care.

This also raises the fundamental problem of the meaning of overturning a single "case." Will reversing the decision be limited to this case or extend to other cases of access to detainees.

Access to detainee cases has become a big issue for the press. Without knowledge of or access to this information the fundamental freedom of the press is severely limited. This case (especially if overturned on 1A grounds) explores the limits the Patriot Act and similar post 9/11 legislation puts on the 1A. The S Ct. decision to deny cert and allow the seal on the case demonstrates the real limits of the 1A. There is good debate on both sides as to which value is, and should, be preeminent.

Bibliography

<http://files.findlaw.com/news.findlaw.com/hdocs/docs/scotus/mkbwarden62703cpet.pdf>

A copy of the redacted cert petition

Ferstenfeld-Torres, "Who are We to Name? The Applicability of the "Immediate-Custodian-as-Respondent" Rule to Alien Habeas Claims under 28 U.S.C. § 2241" 17 Geo. Immigr. L.J. 431 (2003)

Arguing that the courts have the legal authority to reject the Immediate Custodian Rule which the administration uses as a loophole to evade Habeas review. The Immediate Custodian Rule, as currently interpreted, limit courts' ability to review Habeas petitions of prisoners detained outside the jurisdiction of the courts.

<http://hrw.org/english/docs/2003/09/30/usdom6409.htm>

Detailing the human rights abuses identified by HRW attributed to detentions and advocating the overturning of this decision

<http://www.law.com/jsp/article.jsp?id=1067350987786>

Advocating that the courts be required to identify that national security is at issue prior to sealing habeas petitions

Journalistic Privilege – *Branzburg v. Hayes*, 408 U.S. 665 (1972)

Background

The Supreme Court held that a newspaper staff reporter had to appear before a grand jury to answer questions put to him, as the Constitution of the United States did not exempt petitioner from performing the normal citizen's duty of appearing and furnishing information relevant to the grand jury's task. Kentucky had a reporters' privilege statute protecting journalists from revealing sources and the petitioner argued that this authorized his refusal to answer. The Court perceived no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings was insufficient to override the consequential, but uncertain, burden on news gathering that petitioner argued would result from insisting that he answer to the grand jury. Moreover, the evidence failed to demonstrate that there would be a significant constriction of the flow of news to the public if the Court reaffirmed the prior common law and constitutional rule regarding testimonial obligations of newspaper reporters.

Analysis

While this decision affects journalists covering everything from petty drug crimes to election fraud, but the most salient example is the Valerie Plame matter.

The majority of states have laws that codify some sort of journalistic privilege. However, there is a lot of pressure- especially in media circle- to establish a federal journalistic privilege. Without a journalistic privilege some fear a chilling effect on the ability of reporters to get sources and a decrease in the amount of willing whistleblowers that would come forward. There is also an interesting cultural dichotomy (that could support some case debate) between American values that place a premium on the concept of the anonymous source (a la Watergate) and the idea that this creates a release valve to corruption and a French sensibility that rejects this concept. Historically this was born out of WW2 during which anonymous “tattling” to Nazi occupiers pitted neighbors against neighbors and built an environment of distrust and secrecy. Now such anonymous sources or whistleblowers are generally illegal in France.

Despite its newsworthiness, this issue is very narrow and probably could not support a season of debates.

Bibliography

<http://www.vanityfair.com/commentary/content/printables/060403roco03?print=true>
Analysis of the Plame affair and the implications of losing journalistic privileges on the ability to report such stories as the possible corruption in the current Iraqi war.

<http://www.brechner.org/reports/2005/05jun2005.pdf>

Plame related article—only the S Ct can overturn Branzburg and establish a federal journo priv.

http://www.cfif.org/htdocs/legal_issues/legal_updates/first_amendment_cases/reporters-contempt-secrecy.htm

Much legal dissent exists over the existence of a journo priv—only uniform fed priv would check this back.

http://www.findarticles.com/p/articles/mi_qa3677/is_200304/ai_n9224970

Freedom of Religion

Free Exercise Clause – *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990)

The Supreme Court rejected free exercise challenge to Oregon's criminal prohibition (and denial of unemployment benefits) of the use of peyote, including religiously inspired use. Congress responded by passing the first RFRA in response in an attempt to carve out better (more defined/concrete) religion protections. The Supreme Court struck down that effort in *City of Boerne v. Flores*, 521 US 507 (1997) on the grounds that the RFRA rewrote rather than merely enforced the protections of free exercise as the Court had previously interpreted them, exceeding Congress' authority and infringing the prerogatives of the states.

Analysis

One of the key elements of American freedom of religion is the free exercise clause—the right to exercise religion without undue interference from the government. In this case the Court weighed the government's interest in a uniform drug policy over free exercise. This case sets up a pretty classic battle of interests and also implicates the manner in which we weigh these competing interests.

Bibliography

McConnell, "Free Exercise Revisionism And The Smith Decision," 57 U.Chi. L.Rev. 1109 (1990); Greene, "The Political Balance Of The Religion Clauses," 102 Yale L. Rev. 1611 (1993)

Articles focusing on the flawed reasoning employed by the Court, improperly interjecting political concerns into the traditional First Amendment analysis. These articles can also access the broader literature about rejecting the politicization of the judiciary

Marshall, "In Defense Of Smith And Free Exercise Revisionism," 58 U.Chi.L.Rev. 308 (1990)

Arguing that a free exercise exemption analysis may result in a troublesome interplay with the Speech Clause that threatens both speech and free exercise interests. The free exercise exemption would then primarily serve to protect activities at the periphery of religious exercise. The explicit inequality required by the free exercise exemption analysis more directly and powerfully harms equality interests than does the inadvertent de facto discrimination caused by generally applicable laws. It suggests that content-discrimination in favor of religious ideas might be permissible under the Speech Clause.

Establishment Clause

There is no good establishment clause case that we could find. The most timely are the cases surrounding the display of the Ten Commandments. But here again is the problem with the vagaries of Supreme Court holdings. In [*Van Orden v. Perry*](#), five justices concluded that the overall message of a 40-year-old commandments monument on the grounds of the Texas State Capitol is secular. So it stays. But in [*McCreary County v. ACLU*](#), five justices decided that the commandments display on the wall of the local courthouse was a thinly disguised effort by county officials to promote religion. So it goes. Thus unconstitutional establishment depends on context, history, and motive.

<http://www.firstamendmentcenter.org/commentary.aspx?id=15530>

http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Van_Orden_v_Perry

http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=McCreary_County_Ky_v_ACLU_of_Kentucky