Fall 2016 Update

Communication Law in America (4th Edition)

AUTHOR'S NOTE: This update includes reference to Supreme Court decisions and other relevant data through the end of 2016.

CHAPTER 1

Only Eight Justices

Perhaps the most dramatic and far-reaching effect on American law in general since our last Update was the death of Justice Scalia and the Senate's failure refusal to hold hearings on federal appellate Judge Merrick Garland's nomination by President Obama as his possible replacement. As a result, the already rather divided Court now has only eight members, already resulting in a handful of troubling 4-4 ties. The Court has thus accepted fewer cases for its 2016-2017 Term, and is postponing oral arguments on cases predicted to be especially difficult, so as to maximize the chances that a ninth member will have been appointed early in the Trump administration.[1]

More on National Security Letters

On pages 38-39 we offer a discussion of the government's approaching individuals (usually librarians) seeking information about a particular patron's onsite use of the Internet. From a First Amendment perspective, the most troubling part of NSL's was the government's insistence that the target (again, typically librarians) not report to anyone the fact that they had received the inquiry.

In 2015 Congress passed the USA Freedom Act, which can be thought of as a revision of the Patriot Act. The new law required that the government, when issuing NSL's, explicitly alert recipients that they have a right to judicial review of the order. [2]

OK to Pray in Greece, New York

Since it is in this chapter where readers are introduced to the Establishment Clause, it is worth nothing that in early May, 2014, the Supreme Court handed down a much-awaited decision generally permitting official town meetings to be opened with a prayer.[3] This was a 5-4 decision, with Justice Kennedy writing for the majority. Kennedy understood that the plaintiff was upset at how often prayers preceding the business at the town's meetings were sectarian, invoking Jesus's name, but held that the Establishment Clause does not protect against this kind of discomfort, especially since there was no pattern of overt disparagement of other religious faiths, and no one had to actually participate in prayer.

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[1] Noah Feldman, "Cautious Approach in Supreme Court's New Term, *Morning Call* (Allentown PA), Oct. 5, 2016.

[2] 18 U.S.C. § 2709

[3] *Town of Greece, New York v. Galloway*, 134 S. Ct. 1811 (2014).

OK to Prohibit Judicial Candidates from Asking for Money

Chapter 1 offers brief mention (see pp. 2-3) of state laws governing election and retention of state judges, as well as Supreme Court review of such practices. In its 2014-2014 Term, the Supreme Court again weighed into this area of the law.[4] Like most states that provide for the election of state judges, Florida has a rule of judicial conduct prohibiting candidates for judge-ships to "personally solicit" campaign funds (although they may establish committees to take care of such matters). In this case, candidate Lanell Williams–Yulee sent a letter to local voters (she was running for a position in the county that includes Tampa), in which she promised to "bring fresh ideas and positive solutions to the Judicial bench," and in which she then sought contributions of "$25, $50, $100, $250, or $500" to "launch the campaign and get our message out to the public." As it turned out, she lost the primary election.

The state supreme court accepted an official recommendation that "Yulee" be reprimanded and ordered to repay the state for the cost of the proceedings against her. She appealed, arguing that the ban on personal solicitation was in violation of the First Amendment.

The Supreme Court, Chief Justice Roberts writing for the majority[5] (portions of the opinion were only joined by three other justices) rejected the appeal, and upheld the state law. As the Chief Justice put it, "personal solicitation by a judicial candidate inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate."

CHAPTER 2

They Never Mentioned the First Amendment by Name, But . . .

Even though the much-awaited 2015 Supreme Court decision holding that same-sex marriage is constitutionally protected was based on Fourteenth Amendment, equal protection grounds, there is a lot of First Amendment "texture" in the justices' prose.[6]

Justice Kennedy's majority opinion uses the word "association," as in "intimate association," 5 times. (Recall that "freedom of association" is one of the rights protected by the First Amendment). Several times in the opinion he emphasizes that the plaintiffs pursue the marriage right as an "expression" of "identity."

Court Rejects Appeal on Transit Speech

Brief mention is made in this chapter (see pages 32–33) of a federal district court in DC having ruled that the local transit system must accept for display a controversial poster that seemed

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[4] *Williams–Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015).

[5] The portion of Roberts' opinion in which he concludes that the statute would have to survive "strict scrutiny" to be joined by only 3 other justices. But a majority of justices accepted the Chief's decision, and the concurrence-that-broke-the-majority (written by Justice Ginsburg) argued only that the state law could be struck down even using a more intermediate level of scrutiny.

[6] *Obergefell v. Hodges*, 135 S. Ct 2584 (2015).

equated Israel with the "civilized man" and those who embrace "jihad" as "savages." That decision was in 2012. In 2015 the same plaintiff organization was unsuccessful in its attempt to place another controversial ad on Seattle buses. CLICK HERE to see the ad.

A panel of the Ninth Circuit Court of Appeals ruled in part because the ad included a couple of crucial falsities. First, it was the State Department, not the FBI, that was offering rewards. Second, the amount being offered was $5 million, not $25 million. No doubt it hurt the plaintiff's case that it sued immediately upon receiving the rejection notice, rather than trying to work with Seattle to fix the ad.

The U.S. Supreme Court denied the plaintiff's request for review. This was just a few weeks after Justice Scalia's unexpected death. It is hard to avoid wondering if the Court determined it was best to allow contradictions among the circuits to remain at least until a ninth justice joins it.[7]

States Given Much Leeway in Rejecting Offensive Vanity Plates

Brief mention is made in Chapter 2 (see p. 65, n. 100, and accompanying text) of the case law tying the hands of states to make content-based and especially viewpoint-based distinctions among proposals for vanity automobile license plates.

Toward the end of its 2014-2015 Term, the Supreme Court, in a 5-4 vote, weighed into this area of the law, giving states much more freedom to reject license plate designs, finding that messages on license plates are government speech,[8] not speech by individual vehicle owners.[9] At issue was a design proposed by the Texas affiliate of the Sons of Confederate Veterans, a design which included a confederate battle flag. The state had rejected the design, finding it

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[7] *American Freedom Defense Initiative v. King County*, 796 F.3d 1165 (9th Cir. 2015), cert den., 136 S.Ct. 1022 (2016).

[8] The eloquent dissent, penned by Justice Alito, argues that specialty license plates are more appropriately viewed as individual speech, not government speech. His reasoning:

> *Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.*
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> *As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says "Rather Be Golfing" passed by at 8:30 am on a Monday morning, would you think: "This is the official policy of the State—better to golf than to work?" If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents? And when a car zipped by with a plate that reads "NASCAR—24 Jeff Gordon," would you think that Gordon (born in California, raised in Indiana, resides in North Carolina) is the official favorite of the State government?*

[9] *Walker v. Texas Division, Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015).

"offensive,"and that " a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups." Writing for the majority, Justice Breyer points to how the notion of states using automobile license plates to send messages dates back many decades.[10]

> *In 1917, Arizona became the first State to display a graphic on its plates. The State presented a depiction of the head of a Hereford steer. In the years since, New Hampshire plates have featured the profile of the "Old Man of the Mountain," Massachusetts plates have included a representation of the Commonwealth's famous codfish, and Wyoming plates have displayed a rider atop a bucking bronco.*
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> *In 1928, Idaho became the first State to include a slogan on its plates. The 1928 Idaho plate proclaimed "Idaho Potatoes" and featured an illustration of a brown potato, onto which the license plate number was superimposed in green. The brown potato did not catch on, but slogans on license plates did. Over the years, state plates have included the phrases "North to the Future" (Alaska), "Keep Florida Green" (Florida), "Hoosier Hospitality" (Indiana), "The Iodine Products State" (South Carolina), "Green Mountains" (Vermont), and "America's Dairyland" (Wisconsin). States have used license plate slogans to urge action, to promote tourism, and to tout local industries.*

Breyer explains that Texas too has used its license plates to send specific messages, and the state must be given leeway to engage in what would be view-point based discrimination were government speech not involved. "Texas offers plates celebrating the many educational institutions attended by its citizens. But it need not issue plates deriding schooling. Texas offers plates that pay tribute to the Texas citrus industry. But it need not issue plates praising Florida's oranges as far better. And Texas offers plates that say 'Fight Terrorism.' But it need not issue plates promoting al Qaeda."

The majority also makes clear that the Sons of Confederate Veterans are hardly without alternative outlets for dissemination of their views, including, of course, on bumper stickers.

Court Gives Public Employees a Bit More Free Speech Rights

Mention is made in Chapter 2 (see page 75) of *Garcetti v. Ceballos*,[11] in which the Supreme Court held that public employees can be subject to sanctions flowing from their speech, if that speech is in the work setting (not aimed at the larger public) and if it is, as the Court put it, "pursuant to their official duties." At the end of its 2013-2014 Term, the Court narrows that holding a bit.[12]

At issue was the firing of a community college administrator whose research into his unit's financial woes uncovered the existence of what they used to call on *The Sopranos* a "no show" employee, someone on the payroll, but not doing much of anything, and hardly ever showing up for work. The individual, a state legislator, was eventually convicted of fraud, and

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[10]For this history, Breyer relies chiefly on a 1997 illustrated reference book by James K. Fox titled *License Plates of the United States*. One wonders if media attention to this Court decision has increased sales in the book.

[11]547 U.S. 410 (2006).

[12]*Lane v. Franks*, 134 S. Ct. 2369 (2014).

the administrator was a material witness against her (brought in to the grand jury with a subpoena). When he was later fired, the administrator sued, alleging that his dismissal was in retaliation for his speech.

In upholding Lane's termination, the Eleventh Circuit Court of Appeals "read *Garcetti* far too broadly," Justice Sotomayor wrote for a unanimous Supreme Court. Yes, it is true that Lane learned about the government corruption about which he eventually testified while doing research pursuant to his job duties. But that fact does not make his actual testimony into job-related speech. His testimony was offered as a private citizen, and on a matter of clear public interest.

AZ Town Law Governing Sign Sizes Struck Down

In Chapter 2 we learn that "time, place and manner" restrictions are generally permitted, but that those which are or seem to be triggered by the content of speech are much less likely to be upheld as constitutional. Ion 2015 the Supreme Court struck down an ordinance from Gilbert, Arizona governing the size of signs. The law would allow a fairly large and permanent sign expressing an "ideology," but signs announcing events (including regularly sponsored church services), would have to be much smaller, and removed right after the "event." The Court found that the ordinance's definitions of the various categories of exceptions was evidence that the law was content-based. Moreover, the town could not provide any compelling interest for placing so many restrictions on signs announcing events. Thus the Good News Community Church, a group that did not have a permanent home and thus needed to place highway signs frequently alerting parishioners as to any given week's location, could not be sanctioned for failing to remove the signs in a timely fashion.[13]

Shocked! SHOCKED! (Political Speech Includes Lies!)

Chapter 2 makes brief mention of the fact that political speech is deemed so very important in our system of freedom of expression, even knowing falsehoods are sometimes explicitly protected (see reference to *U.S. v. Alvarez*, the "Stolen Valor Act" case, on page 29). In 2014 the Supreme Court had occasion to take a first look at a case involving false political campaign speech more generally.[14] A pro-life group calling itself the Susan B. Anthony List was having trouble placing ads accusing then-Congressman Steve Driehaus of having voted "for taxpayer-funded abortions" (when he voted for Obamacare). Driehaus filed a complaint with an Ohio state elections commission charged with enforcing a state law prohibiting knowing falsehoods in ads seeking to elect or defeat a candidate for office. The commission decided that there was enough evidence to warrant an investigation, but when Driehaus lots his re-election bid, he decided not to pursue his action any further.

So this is the posture in which the case reaches the Supreme Court: The pro-life group seeks a ruling that the state law is unconstitutional, not only as applied to its own advertising, but on its face, in general. The Court had to decide whether the challenge was mooted by the fact of Driehaus' having dropped his complaint. Writing for a unanimous Court, Justice Thomas

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[13] *Reed v. Town of Gilbert, Arizona*, 135 S.Ct. 2218 (2015).

[14] *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014).

concludes that the pro-life plaintiff has suffered a real and likely repeatable harm (the election commission in Ohio handles several dozen allegations of untrue campaign rhetoric each election cycle), and instructs a lower court to adjudicate the matter further. There is a good chance the case will be back in front of the Supreme Court in a few years.

CHAPTER 3

Fewer Criminal Libel Laws

In this chapter (see page 83), brief mention is made of the fact that a number of states still have criminal libel laws on their books. The last time the Supreme Court has opined on the constitutionality generally of such laws was back in 1952, when a 5-4 ruling upheld states' authority to outlaw "group libels" aimed at targets' ethnic or racial backgrounds.[15]

Still, the trend nationwide toward states removing criminal libel statutes has continued in recent years. The 4th edition of the text makes reference to the continued existence of criminal libel laws in over a dozen states. More recently, courts have struck down laws in Montana and Minnesota, and Georgia's legislature has repealed its law.

CHAPTER 5

A Right to be Forgotten?

It has often been suggested that one way courts should balance competing interests in Public Disclosure privacy cases is to consider that a revelation that was once newsworthy might not be so forever. This "passage of time" test had been embraced in some early 20th Century decisions, but as was pointed out in chapter 5, the "newsworthiness" defense has made it very difficult for Public Disclosure plaintiffs to prevail.

In Europe, a very different philosophy seems to be embraced. The European Court of Justice held in 2014 that there is a right to "practical obscurity," what the French call "le droit à l-oubli" (a right to be forgotten, a "right to oblivion.").[16] Using this reasoning, the court held that Google and other search engines can be forced to remove damaging but true information about folks on request; as a result Google has had to hire many new employees to begin the process of deleting access to some web sites from its search engine, at least when accessed in Europe.[17]

"Hurt Locker" Case Upheld on Appeal

Brief mention is made on page 172 of Sergeant Jeffrey Sarver's misappropriation suit, dismissed, against the distributors of *The Hurt Locker*. More recently a federal appellate court has upheld that dismissal. The court held that the film, even if it did appropriate parts of Sarver's biography to tell the story of our soldiers in Iraq assigned to disarming "Improvised Explosive Devices (IED's), was focusing on matters of high public interest. Also, Sarver had

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[15] *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

[16] *Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD)*. Case C-131/12 (European Grand Chamber, 2014).

[17] Maureen Dowd, "Remember to Forget," *New York Times*, May 21, 2014, A23

never demonstrated an interest in or awareness of his own "marketabiblity."

Sarver had also made a defamation claim, and the court's narrative is worth sharing. The film, he argued had made it difficult for him to find employment outside the military, in that it "portrayed him as a bad father, bereft of compassion, fascinated with war and death, and disobedient." The court disagreed. Most viewers of the film would see the Sarver-based character as "a heroic figure, albeit one struggling with certain internal conflicts." The character "exhibits compassion for various Iraqi citizens, including a young boy and a man trapped in a suicide vest; appears to care for and miss his son; and occasionally departs from military protocol in an effort to save human lives."[18]

NY Med Forces Widow to Re-Live Husband's Death

Brief mention is made in this chapter (see pages 182-183) of a case involving automobile accident victim Ruth Shulman's successful suit against a TV program that aired video of her conversations with an attending nurse while she was being placed on a helicopter journey to a hospital. A similar dispute emerged in New York City when an ABC program called "NY Med" showed footage of Mark Chanko's treatment at New York-Presbyterian Hospital. Chanko had been run over by a sanitation truck, and was declared dead at the hospital a few hours later. Surviving family members sued several entities involved in the incident, including the TV network. In late 2014, a state appellate court dismissed the suit,[19] finding that the pixilated images of Mr. Chanko were not identifiable, and that not breach of confidentiality thus occurred. The case was being appealed as of early 2015.[20]

An Oldie But Goodie– the Joe Montana case

Here we have a reference to a case from the 90s that had been discussed in previous editions, but that had been deleted from the text to make room for newer examples. The reason for re-inserting mention here, and likely in the next edition of the text, is that I finally tracked down the relevant visual artifact.

Former San Francisco 49ers' quarterback Joe Montana sued the *San Jose Mercury News* for having reprinted a page from the newspaper which had celebrated the teams' phenomenal performance in the Super Bowl, and then selling that reprint, which boasted a drawing of Montana, as a stand-alone poster for five dollars. An appellate court in California held that Montana' claims had no merit, in part because, as we know from the textbook's discussion of the Booth rule (see pages 174-176), a media outlet is free to reprint without permission anything from its prior issues to publicize the magazine or newspaper. The Montana court also made much of the fact that the original photo and story accompanying it were on a highly newsworthy topic.[21]

CLICK HERE to see the poster at issue in the case.

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[18] *Sarver v. Chartier,* 813 F. 3d 891, 906 (9th Cir. 2016).

[19] *Chanko v. ABC*, 122 A.D. 3d 487 (Appel. Div. 1st Dept. 2014).

[20] Charles Ornsetin, "Dying in the E.R., and on TV," *New York Times*, January 4, 2015, A22.

[21] *Montana v. San Jose Mercury News,* 34 Cal. App. 4th 790 (Court of Appeals, 6th Dist., 1995).

CHAPTER 6

Google Doesn't Need Permission to Copy My Textbook

Perhaps you are familiar with "Google Books" searches, which allow you to identify books where specific words or phrases of interest to you have appeared. Did you know that Google produces this resource by collecting real paper versions of books from academic libraries, then creating scanned digital versions of the books? Some individual authors and author associations, who had not given permission for books to which they own copyrights to be scanned, or to thus become readily accessible in online searches, sued Google. In 2015 a federal appellate court held that Google's procedures amounted to protected Fair Use of the otherwise protected works.

The court held that Google's use of the books was "transformative," that it provided extremely accessible information about the scanned works, without usurping the market for those works. After all, the search engine does not provide anything approaching the full text of the book to researchers. Rather, it provides only up to three short "snippets" that include the search terms selected by end users. Indeed, Google will, upon written request by the rights holder, shut down the "snippet" utility altogether for a specific work. Google prevailed even though it copies works in their entirety (usually a factor that counts against a finding of Fair Use), in that the search utility would be meaningless unless the work's full text was available behind the scenes.[22]

Innocence of Muslims Actress's Copyright Claim Denied

Brief mention is made in the textbook (in Chapter 2, actually)of the controversy surrounding online release of a trailer for the film, *Innocence of Muslims*. The title was intended ironically, in that the film depicts Muhammad in the most unflattering ways. Budding actress Cindy Lee Garcia had a bit part in the film, which she had been led to believe was a desert war/action film. Her relatively innocuous lines had been later dubbed over so as to have her accusing Muhammad of being a child molester. Garcia had received death threats, and sued the film's producer, as well as Google, because it had not removed the trailer from its YouTube site.

An en banc Ninth Circuit ruled against Garcia's copyright claims. She had not been responsible for setting the film down in a finished form, and thus had no copyright interests in the film. The court expressed much sympathy for her plight, and even while pointing out that other claims of hers might succeed (such as suing the producer for lying to her about the film, a violation of contract claim), but none of these would likely result in governmental action to stop distribution of the trailer, or of the full film.[23] **CLICK HERE** to see the very short segment of the trailer that include's Garcia's part.

A New Slant on Trademark Law

Awaiting Supreme Court disposition (with oral arguments scheduled for mid-January, 2017) is

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[22] *The Authors Guild v. Google*, 804 F.3d 202 (2nd Cir. 2015).

[23] *Garcia v. Google*, 786 F.3d 733 (9th Cir. 2015).

Lee v. Tam, in which the appellate court for the Federal Circuit ruled en banc that provisions of the Lanham Act prohibiting the granting of a trademark for "disparaging" messages is in violation of the First Amendment.[24] At issue was "The Slants," a name sought to be trademarked by an Asian-American singing group of the same name.

CHAPTER 7

Reveal Guidelines on How/When to Use Drones to Kill Americans?

In April, 2014, the Second Circuit Court of Appeals ruled on an FOIA request from the New York Times and the ACLU for documents concerning how the administration went about deciding when it was legitimate to use unmanned drones to kill two American citizens operating in Yemen.[25] Writing for the 3-0 judge panel, Judge Jon Newman generally upholds a lower court opinion that the various government agencies involved appropriately withheld the requested documents. He does allow that some of the relevant FOIA exemptions claimed by the CIA and the Office of Legal Counsel might have been waived by formal testimony and public speeches on the topic of drone-conducted warfare by a handful of administration officials. And with respect to some of the documents, Judge Newman requires either disclosure of at least redacted versions to the plaintiffs, or disclosure in camera to the district court a detailed "Vaughn index" of available documents. Interestingly, "redacted" is one of the most frequently appearing words in the Newman text, because the official court's opinion itself manifests dozens of redactions.

A couple of months later, the government released much of the memoranda justifying use of drones to kill targeted Americans overseas, having decided not to appeal the Second Circuit's decision.[26]

CHAPTER 8

Ferguson Grand Juror Wants to Talk

In early 2015, a member of the grand jury from Ferguson, Missouri– the one that refused to indict police officer Darren Wilson in the shooting death of 18-year-old Michael Brown, filed a suit against the county prosecutor, seeking the lifting of a lifetime gag order imposed on the jurors. According to press accounts, the thus far anonymous juror seeks to speak out for "legislative change" governing grand juries, and more specifically to raise questions about the conduct of this particular grand jury, which seemed to the plaintiff to have "a stronger focus on the victim" than one might expect.[27]

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[24]*In Re Tam*, 808 F. 3d 1321 (Fed. Cir. 2015) (en banc).

[25]*New York Times v. US Dept of Justice*, 756 F.3d 100 (2nd Cir. 2014).

[26]Charlie Savage, "Court Releases Large Parts of Memo Approving Killing of American in Yemen," *New York Times*, June 24, 2014, A17.

[27]Mitch Smith, "Grand Juror in Ferguson Sues to End Silence Rule," *New York Times*, January 6, 2015, A12.

CHAPTER 9

Risen Off the Hook; Not Necessarily Future Reporters

On page 336, we learned that New York Times reporter James Risen had lost a federal appellate decision, and thus had no privilege against being forced to testify at the trial of former CIA agent Jeffrey Sterling. (The Supreme Court had since refused to hear the case). Sterling himself stands accused of revealing classified government information about US attempts to disrupt Iran's nuclear program. But in January, 2015, the Justice Department decided not to seek Risen's testimony at all, perhaps in part because Risen made clear he would rather go to jail than to answer any questions that might lead to revelation of his confidential sources.[28]

Reporters May Have a Fifth Amendment Shield

Most of this chapter deals with under what circumstances reporters enjoy a statutory or a (very limited) First Amendment right to keep their sources confidential. In 2015, the Sixth Circuit Court of Appeals held that there are in some circumstances also a Fifth Amendment right not to reveal a source's identity. The Department of Justice had for years been investigating possible prosecutorial misconduct on the part of Richard Convertino. Convertino, in furthering his claim that the DOJ's action was unconstitutional retaliation for his controversial Congressional testimony, sought the name of sources used by a *Detroit Free Press* reporter who first reported the existence of that DOJ investigation. Reporter David Ashenfelter refused to reveal his sources, arguing on Fifth Amendment grounds, claiming that his forced testimony could open him up to any of a number of prosecutions based on federal law, including the Espionage Act.

As had the federal district court below, a panel of the Sixth Circuit upheld Ashenfelter's Fifth Amendment claims. It did so despite the fact that Attorney General Eric Holder had publicly stated that the DOJ did not plan to prosecute members of the working press for simply doing their jobs. "It is not the *likelihood* but rather the *possibility* of prosecution that matters," Judge Clay wrote.[29]

CHAPTER 10

Supreme Court Strikes Down Billboard Law

In this chapter (see especially p. 361), a short explanation is offered as to how the First Amendment applies to local statutes regulating or prohibiting all or some categories of signage, especially on the highways. Key to the litigation is the Court's having insisted that regulations be content-neutral.

Failure to meet this requirement led the Court to strike down unanimously a Gilbert, Arizona law that provided different rules for various categories of signs.[30] "Political" signs (those concerned with candidates for upcoming elections) were governed by one set of rules

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[28]Matt Apuzzo, "Times Reporter Won't Be Called in Trial on Leak," *New York Times*, January 13, 2015, A1.

[29]*Convertino v. DOJ*, 795 F.3d 587, 597 (6th Cir. 2015).

[30]*Reed v. Town of Gilbert, AZ*, 135 S. Ct. 2218 (2015).

concerning size and number of signs, and duration of placement, while "Ideological" signs (dealing with broader political issues, but not specific elections), and "Temporary Directional Signs Relating to a Qualifying Event" (bear with me on this one for a moment) are subject to the most strict regulations. Concerning this last category, it was originally (until the court challenge) labeled "Religious Assembly Temporary Direction Signs." Thus is it no surprise that the group challenging the law were folks associated with an impoverished local church which, lacking a building, felt it needed to post lots of signs around town to publicize where they would be meeting on any given week.

In striking down the law, Justice Thomas demonstrated first that the town's ordinance was content-related:

> *If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government***.**

Later finding that the town failed to offer any compelling state's interest to justify such content-based restriction, the Court struck down the law.

No More to Each, But More to All

Toward the end of chapter 10**,** the text offers a brief explanation of how the First Amendment has been applied to campaign finance regulations. The book's preface mentions that a Supreme Court decision was expected soon that would address whether federal limits on how much money we may contribute to individual campaigns and how much we can contribute overall during a campaign season are constitutional. The case was handed down shortly after the text went to press.[31]

The to-an-individual-campaign-limit amounts, referred to as "base limits," were most recently set by Congress at $2,600 per election per candidate. (We could thus actually contribute up to $5,200 to a candidate, one-half for the primary election, and one-half for the general election). The "aggregate limits," the total we may give in an election cycle, had been set at $123,000. Within that total, the relevant statutes provided how much could be given directly to candidates and how much to local and national party committees and political action committees (PACs).

In a 5-4 ruling, the Court upheld the base limits but struck down the aggregate limits. The main plaintiff in the case indicated she had given the maximum contributions allowable to each of 16 candidates, and was prevented from giving to an additional dozen or so candidates of her liking by the aggregate limits. Offering the decision of the Court (there was no majority opinion), Chief Justice Roberts said of the aggregate limits that "the Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse."

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[31] *McCutcheon v. Federal Election Commission*, 134 S.Ct. 1434 (2014).

Would Knowing that my Opponent is a Terrorist . . . ?

"Push polling" is a dirty campaign trick that has become so commonplace to almost not be thought of as dirty anymore. Typically the procedure is that the phone bank for one candidate calls voters in the district, assuming a tone as if one were conducting a scientific poll. The purpose of the call, however, is to spread some negative information, sometimes misinformation, about an opponent. "If you knew that Candidate X had been charged with tax fraud, would that fact make you less likely to vote for him, more likely to vote for him, or would it make no difference?" The state of New Hampshire passed a law prohibiting push polling, but the state's supreme court in 2014 held that the law could not be applied to elections for federal offices, that the Federal Election Campaign Act pre-empted any actions by the individual states.[32]

CHAPTER 11

Limits on Damages for Viewing Child Pornography

Child pornography harms its victims not only because its production is part and parcel of sexual abuse of children. Rather, the harm is perpetuated by the continued existence of the offensive images even after a child "actor" becomes an adult. The relevant federal statutes not only provide for fine and lengthy imprisonment, but also permit victims to sue persons who produced, distributed, or who own images of their abuse as children. At issue in *Paroline v. U.S.*[33] was if and how damages should be assessed to any single viewer of digital images of a child's sexual abuse when those same images have been and will be viewed by thousands of others online. The child victim argued that each possessor of the relevant images should be fully liable for the totality of her damages. In this case, the victim sought over $3 million from one such individual.

Writing for the Court's majority, Justice Kennedy provides an illuminating discourse on the notion of causality in the law, and emerges with a decision sending the case back to a lower court to determine what lessor, but not "token" or "nominal" damages, should be assessed to this individual viewer of the disturbing images.

Wrap it First

A federal appellate court has refused to grant a preliminary injunction against Los Angeles' County's ordinance requiring the "talent" in sexually-explicit films wear condoms whenever engaged in vaginal or anal intercourse. The law imposes only minimal restrictions on freedom of expression, while offering the chance to greatly reduce the spread of venereal disease. (Statistics cited by the court showed that persons working in the X-rated movie industry were over ten times more likely top be infected than was the county's general population). The court adds that if a full trial is held on the First Amendment claims, it is possible that a trial court would discover that it is possible for "special effects" to make it appear as if the protected actors were not actually wearing condoms, thus preserving whatever extra measure of "eroticism" the law seemed to be infringing.[34]

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[32] *New Hampshire Attorney General v. Bass Victory Committee*, 104 A.3d 181 (N.H. 2014).

[33] 134 Sup. Ct. 1710 (2014).

[34] *Vivid Entertainment v. Fielding*, 774 F.3d 556 (9th Cir. 2014).

CHAPTER 12

Supreme Court Puts an End to Aereo

Brief mention is made of *WNET v. Aereo* in both chapter 6 (p 235, n. 45) and chapter 12 (p. 457, n. 59). Aereo is (perhaps we should now say "was") an start-up company whose service was available in only a few cities, including New York. Aimed at the market of folks who have already cut their ties with their cable or satellite TV provider, Aereo offered convenient access to over-the-air broadcasts ("as would any old-fashioned antenna!" you say?), also making it easy for subscribers to arrange for the recording and later playback of programs on their computers or mobile devices. The Second Circuit Court of Appeals had held that Aereo was no more guilty of copyright infringement than would be individual users giving themselves access to free, over-the-air broadcasts with their own individual antennas, because the defendant's business model actually had each individual subscriber assigned a tiny antenna of his or her own at the company's headquarters. But the Supreme Court held that, collectively, the use of all those tiny antennae constituted unauthorized [35]"public performance" of the protected TV programming, in violation of copyright law.

Yelp Contributors' Anonymity Attacked

Have you ever uploaded comments on local businesses to websites like Angie's List or TripAdvisor? You likely know that Yelp is a site that invites customers to comment on all sorts of businesses. A carpet cleaning company in Virginia, rather upset with a few negative comments on Yelp, sued the company to unmask the anonymous contributors, and a state appellate court held in 2014 that Yelp should comply. The case turned in part on the plaintiff's allegation that some of the contributors' narratives suggested they had not actually ever availed themselves of the company's services. That alone would be, if nothing else, a violation of Yelp's "Terms of Service" with its contributors.[36]

Ongoing Saga of Net Neutrality

The very last paragraph in Chapter 12 is about the issue of "net neutrality," the notion that Internet Service Providers should not be permitted to relegate some customers to slower online connections. In 2014 the D.C. Circuit Court of Appeals struck down the FCC's latest decisions in furtherance of that goal. But the decision was also seen as an invitation by the court for the commission to re-define ISP's as "common carriers," akin to old fashioned land-line phone companies and indeed the Post Office. Such entities have long been required to treat all clients equally. And the court was suggesting that if the FCC first re-defined the Internet in this way, the "net neutrality" rules or something like them may very well survive judicial scrutiny.

In early 2015 the FCC published new rules defining ISPs as common-carriers, thus subject to rules prohibiting them from giving some clients higher transmission speeds than others. The rules were promptly challenged in court by industry trade group USTelecom and by Alamo Broadband. The D.C. Circuit Court of Appeals ruled for the FCC, upholding the

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[35] *ABC v. Aereo*, 134 Sup. Ct. 2498 (2014).

[36] *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc*., 752 S.E. 2d 554 (Va. App. 2014).

agency's authority in re-classifying Internet Service Providers.[37]

ERRATA

●P. 336, n. 16. The citation to *U.S. v. Sterling* is incomplete; it should have been cited as 724 F.3d 482 (4th Cir. 2013), with a later *en banc* request denied at 732 F.3d 292 (4th Cir. 2013), and the Supreme Court having denied review, 134 S.Ct. 2696 (2014).

● p. 365, n. 14– reference to *Housing Opportunities Made Equal v. Cincinnati Enquirer* is wrong reference. The case described is ***Pittsburgh Press Company v. Pennsylvania Human Rights Commission***, 376 A. 2d 263 (Pa.. 1977). The Housing Opportunities case deals also with advertising, but for housing, not employment. Specifically, it considered if a newspaper can be liable for accepting illustrated housing ads where photos are of only or almost only white individuals.

●P. 383, in the "And I can Prove it!" graf, line 11. I hope the Fleis**c**hmann's margarine folks will forgive my misspelling on their brand name. Also, since going to press, I was able to make an Ebay purchase of one of the magazine ads the FTC criticized. It is now up on my website, both under "Additional Images" for chapter 10, and in the Power Point slide show for the chapter.

●p. 403, very first line– Colin McEnroe's radio program is aired Monday through Friday, not "weekly."

[37] *United States Telecom Association* v. FCC, 825 F. 3d 674 (D.C. Cir. 2016).