
FIRST AMENDMENT DECISIONS FROM THE OCTOBER 2006 TERM

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PROFESSOR CHEMERINSKY: There were four First Amendment cases this term.¹ Three were about speech² and one was about the Establishment Clause, more specifically, standing of taxpayers to sue under the Establishment Clause.³ This portion of the Article will briefly describe the three speech cases and Professor Marci Hamilton's portion will discuss the Establishment Clause and standing case.

I. *DAVENPORT V. WASHINGTON EDUCATION ASSOCIATION*

There were three speech cases this Term. The least contro-

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¹ *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553 (2007); *Morse v. Frederick*, 127 S. Ct. 2618 (2007); *Davenport v. Wash. Educ. Ass'n*, 127 S. Ct. 2372 (2007).

² *Fed. Election Comm'n*, 127 S. Ct. at 2659 (holding the interests justifying restrictions on "corporate campaign speech or its functional equivalent" are insufficient to warrant the restriction of issue advocacy); *Morse*, 127 S. Ct. at 2622 (finding school administrators may censor speech "that can reasonably be regarded as encouraging illegal drug use" without impinging First Amendment rights); *Davenport*, 127 S. Ct. at 2383 (holding the First Amendment permits a "State to require that its public-sector unions receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes").

³ See *Hein*, 127 S. Ct. at 2559.

versial, certainly receiving the least media attention, was *Davenport v. Washington Education Ass'n*.⁴ *Davenport* involved a Washington State law which prohibited nonmembers of public sector unions from having their dues used for political purposes unless they affirmatively approved having their dues used in that way.⁵

This goes back to *Abood v. Detroit Board of Education*,⁶ where the Supreme Court said that non-union members can be forced to pay union dues to pay for collective bargaining activities, but they cannot be forced to pay dues that go to political activities they do not believe in.⁷ The Supreme Court said that even non-union members benefit from the collective bargaining activities of the union.⁸ Furthermore, non-union members should not be able to be free riders, so it is appropriate to force them to pay dues for the collective bargaining.⁹

Nobody should be forced to subsidize political activities that he or she disagrees with. In most places, non-members can opt-out of

⁴ 127 S. Ct. at 2372.

⁵ *Id.* at 2377. See also Fair Campaign Practices Act, WASH. REV. CODE § 42.17.760 (West 2007) provides, in pertinent part:

A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

⁶ 431 U.S. 209 (1977).

⁷ *Id.* at 235-36.

⁸ *Id.* at 221. A union that engages in collective-bargaining must “ ‘fairly and equitably . . . represent all employees . . . union and nonunion.’ ” *Id.* (quoting *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 761 (1961)).

⁹ See *Abood*, 431 U.S. at 222. The Court explained that requiring nonunion members to contribute “counteracts the incentive that employees might otherwise have to become ‘free riders’ to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.” *Id.* (citing *Oil, Chem. & Atomic Workers Int’l Union v. Mobile Oil Corp.*, 426 U.S. 407, 416 (1976)).

having their dues used for things of a political nature.¹⁰ *Davenport* reverses that.¹¹ The State of Washington has a law that says for a non-union member's dues to be used for political activities, he or she must affirmatively approve that use.¹²

The question is, does that violate the First Amendment?¹³ The Supreme Court, without dissent, upheld the Washington law, six-three.¹⁴ Justice Breyer, joined by Chief Justice Roberts and Justice Alito, concurred in the judgment in part. They disagreed with the majority for reaching some issues which had not been ruled on below.¹⁵

Justice Scalia, writing for the majority, emphasized the First Amendment rights of the non-union members and reasoned that non-union members had the right to not have their dues used for political activities they did not agree with; the Washington law fulfills that by requiring the affirmative opt-in.¹⁶

The Court did not say the Constitution requires this, only that the State of Washington could require it, if it chose.¹⁷ Here, the

¹⁰ See *id.* at 238 (“[D]issent is not to be presumed’ and that only employees who have affirmatively made known to the union their opposition to political uses of their funds are entitled to relief . . .” (quoting *Street*, 367 U.S. at 774-75)).

¹¹ *Davenport*, 127 S. Ct. at 2378-79.

¹² Fair Campaign Practices Act § 42.17.760.

¹³ *Davenport*, 127 S. Ct. at 2376. The issue before the Court was whether Washington's prohibition, in the context of public-sector labor unions, was permissible under the First Amendment's Free Speech Clause. *Id.*

¹⁴ *Id.* at 2382 (“In sum, given the unique context of public-sector agency-shop arrangements, the content-based nature of [section] 760 does not violate the First Amendment.”).

¹⁵ *Id.* “However, I do not join Part II-B, which addresses numerous arguments that respondent Washington Education Association raised for the first time in its briefs before this Court. I would not address those arguments until the lower courts have been given the opportunity to address them.” *Id.* (citations omitted) (Breyer, J. concurring).

¹⁶ *Id.* at 2378.

¹⁷ *Id.* (finding it permissible “for Washington to eliminate agency fees entirely” if the state

Court dealt only with a law that regulated public-sector unions, although the reasoning may not have been different if the state wanted to apply the same rule with regard to non-union members in the private-sector.

II. *MORSE V. FREDERICK*

The second speech case, one that received the most media attention this year, was *Morse v. Frederick*.¹⁸ The Olympic torch was coming through Juneau, Alaska, and a school decided to release students from class to stand on the sidewalk and watch the Olympic torch come through.¹⁹ A student got together with friends and unfurled a large banner that said “Bong Hits 4 Jesus.”²⁰

At oral argument, Justice Souter said he had no idea what that phrase means.²¹ The principal, however, thought it was a message to encourage drug use, so she confiscated the banner and suspended the student from school.²² The student sued under the First Amendment.

The principal raised qualified immunity as a defense.²³ The Ninth Circuit ruled in favor of the student, saying that this was a violation of free speech under the First Amendment, and the principal was not entitled to qualified immunity²⁴ because the principal vio-

chose to do so).

¹⁸ *Morse*, 127 S. Ct. at 2618.

¹⁹ *Id.* at 2622 (“[T]he school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip.”).

²⁰ *Id.*

²¹ Transcript of Oral Argument at 25, *Morse*, 127 S. Ct. at 2618 (No. 06-278). Justice Souter asked, “[D]oes anybody really know what the statement means?” *Id.*

²² *Morse*, 127 S. Ct. at 2622-23.

²³ *Frederick v. Morse*, 439 F.3d 1114, 1117, 1123 (9th Cir. 2006).

²⁴ *Id.* at 1124. The Ninth Circuit employed the three-part test set forth in *Saucier v. Katz* to determine qualified immunity. See *Saucier v. Katz*, 533 U.S. 194 (2001).

lated clearly established law that a reasonable officer should know.²⁵

The Supreme Court, in a five-four decision, reversed the Ninth Circuit.²⁶ Chief Justice Roberts wrote the opinion for the Court, which was ideologically divided in the same way as the other ideologically divided cases just discussed.²⁷ Chief Justice Roberts' majority opinion said that this was an official school activity, even though the display was out on a public sidewalk, with students being released from classrooms to watch the Olympic torch come through the city.²⁸ He said that the principal could interpret this as a banner to encourage drug use, and that schools have a vital interest in discouraging drug use among their students.²⁹

In 1969, the Supreme Court, in *Tinker v. Des Moines Independent Community School District*,³⁰ said students do not leave their First Amendment rights "at the schoolhouse gate."³¹ In *Tinker*, the Court said that students could be punished only for speech that was

²⁵ *Morse*, 439 F.3d at 1124 ("The law of *Tinker*, *Fraser*, *Kuhlmeier*, *Burch*, and *McMinnville* is so clear and well-settled that no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful.").

²⁶ *Morse*, 127 S. Ct. at 2624.

²⁷ *See id.* at 2622. Justices Scalia, Kennedy, Thomas, and Alito joined in the Chief Justice's opinion and agreed that the student had no First Amendment right to display the banner. Justices Stevens, Souter, and Ginsburg dissented, maintaining that although "the principal should not be held liable for pulling down" the student's banner, the "school's interest in protecting its students from exposure to speech 'reasonably regarded as promoting illegal drug use,' " does not trump the student's First Amendment protection. *Id.* at 2643 (Stevens, J., dissenting) (quoting Chief Justice Roberts' majority opinion at 2622). Justice Breyer wrote separately finding that the First Amendment issue did not need to be decided by the Court because the principal's "qualified immunity [barred] the student's claim for monetary damages . . ." *Id.* at 2638 (Breyer, J., concurring in part and dissenting in part).

²⁸ *See id.* at 2624 (majority opinion).

²⁹ *Morse*, 127 S. Ct. at 2628 (recognizing that "detering drug use by schoolchildren is an 'important-indeed, perhaps compelling' interest").

³⁰ 393 U.S. 503 (1969).

³¹ *Id.* at 506.

actually disruptive of school activities.³² In *Morse*, there was no claim by the school that the banner was disruptive of the school activity, but Chief Justice Roberts said schools are not limited to punishing speech only when it is disruptive of school activities.³³

Chief Justice Roberts invoked a Supreme Court case from over twenty years ago, *Bethel School District v. Fraser*.³⁴ There, a student gave a speech during a school assembly nominating another student for a position in the student government. The speech actually had no profanities, but it was filled with sexual innuendo.³⁵ The student was suspended from school for several days and kept from graduating when scheduled.³⁶ The Supreme Court ruled in favor of the school, saying schools are responsible for “inculcating” civilized discourse in our youth.³⁷

In *Morse*, Chief Justice Roberts said schools are not limited to only punishing students’ speech that is disruptive of school activities.³⁸ The key issue, if you litigate in this area, or for lower courts, is how narrowly or how broadly to read this. It is possible to read this decision very narrowly.

³² *Id.* at 513-14. The Court noted that the students’ wearing of black armbands in protest of the Vietnam War did not materially and substantially disrupt the work and discipline of the school. The Court held that absent such interference, state officials could not deny the students their right to wear the armbands. *Id.*

³³ *Morse*, 127 S. Ct. at 2626-27 (distinguishing the “substantial disruption” analysis of *Tinker* from the “approach *Fraser* employed,” which concerned a student’s suspension for graphic and lewd sexual speech during a school assembly).

³⁴ 478 U.S. 675 (1986).

³⁵ *Id.* at 678. The Court described the speech as an “elaborate, graphic, and explicit sexual metaphor[.]” Two teachers warned the student that the speech was “inappropriate and that he probably should not deliver it.” *Id.*

³⁶ *Id.* at 679. The student actually served two days of a three day suspension, and delivered a speech at the school’s commencement ceremonies. *Id.*

³⁷ *Id.* at 681.

³⁸ *See Morse*, 127 S. Ct. at 2627-28.

Justice Alito, who wrote a concurring opinion (joined by Justice Kennedy), viewed *Morse* as a case about the schools' ability to punish student speech that encourages illegal drug use.³⁹ This is a place where schools have a very special interest and it reaches no further than giving authority to schools to punish speech advocating illegal drug use.⁴⁰

Justice Stevens, writing for the dissent, sees this much more broadly. He sees this decision as giving much more discretion to school authorities to punish student speech.⁴¹ Justice Stevens read *Tinker* as saying that students can be punished only if the speech is actually disruptive of school activities, and there was no allegation of disruption in this case.⁴² Justice Stevens also said that generally, speech that encourages illegal activity could be stopped only if there is a likelihood that it will encourage or have the effect of increasing the illegal activity.⁴³ Lastly, Justice Stevens stated that it is hard to imagine any student in the school, the smartest or the slowest, being more likely to use drugs as a result of this banner.⁴⁴

³⁹ See *id.* at 2636 (Alito, J., concurring).

⁴⁰ *Id.* at 2638.

⁴¹ *Morse*, 127 S. Ct. at 2644 (Stevens, J., dissenting). "In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students." *Id.*

⁴² *Id.* at 2645. Justice Stevens quoted an opinion authored by then-Circuit Judge Alito, which interpreted *Tinker*.

[R]egulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.

Id. (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001)).

⁴³ *Id.*

⁴⁴ *Id.* at 2649. Justice Stevens, in what appears to be a mocking paraphrase of *Tinker*, stated that "students . . . do not shed their brains at the schoolhouse gate." *Id.*

Justice Breyer's opinion addresses an issue with regard to Section 1983⁴⁵ which also came up in *Scott v. Harris*.⁴⁶ Over the last several years, the Supreme Court has required lower courts to consider qualified immunity using a two-step inquiry. Under *Wilson v. Layne*⁴⁷ and *Saucier v. Katz*,⁴⁸ courts are to determine, first, whether there is a constitutional violation.⁴⁹ If so, the courts must decide if it is clearly established law that the reasonable officer should know.⁵⁰

In several cases, the Second Circuit has stated this does not make sense.⁵¹ If courts can dismiss on qualified immunity grounds, then they should not be deciding whether there is a constitutional vio-

⁴⁵ 42 U.S.C.A. § 1983 (West 2003).

⁴⁶ 127 S. Ct. 1769, 1774 n.4 (2007) ("There has been doubt expressed regarding the wisdom of *Saucier's* decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward.").

⁴⁷ 526 U.S. 603, 615-16 (1999) (holding that police officers who brought reporters into a private home while executing a warrant were entitled to qualified immunity).

⁴⁸ 533 U.S. 194, 197-98, 208-09 (2001) (holding that it was reasonable for a police officer to shove the plaintiff into a van during an animal rights demonstration to protect Vice President Al Gore, who was speaking at the event).

⁴⁹ *Saucier*, 533 U.S. at 201 ("A court required to rule upon the qualified immunity issue must consider . . . [the] threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?").

⁵⁰ *Wilson*, 526 U.S. at 609. "A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" *Id.* (quoting *Connecticut v. Gabbert*, 526 U.S. 286, 290 (1999)).

⁵¹ *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 55 (2d Cir. 2003) ("The [*Horne*] Court's assertion that consideration of the constitutional question is [*n*]ormally the better approach implies that such consideration is *not always* the better approach." (citing *Horne v. Coughlin*, 191 F.3d 244, 248, 251 (2d Cir. 1999)) (emphasis added)); *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 359 (2d Cir. 2002) ("We may, in an appropriate case, decline to rule on the question whether an asserted right exists where, as here, we conclude that it was not clearly established at the relevant time." (citing *Horne*, 178 F.3d at 606-07)); *Koch v. Town of Brattleboro* 287 F.3d 162, 166 (2d Cir. 2002) ("Although we normally apply this two-step test, where we are convinced that the purported constitutional right violated is not clearly established, we retain the discretion to refrain from determining whether, under the first step of the test, a constitutional violation was violated at all.").

lation.⁵² Three judges in a prior case encouraged the Court to reconsider this.⁵³

In either *Scott* or *Morse*, the Court might have ruled in favor of both the school and police on qualified immunity, without getting to the constitutional violation.⁵⁴ Justice Breyer, in his opinion in *Morse*, said he would have ruled in favor of the principal on qualified immunity grounds and he would abandon the two-step approach as the original requirement.⁵⁵ I think it is interesting that the Court had the opportunity to abandon the two-step approach in *Scott* and *Morse*,

⁵² *Horne*, 191 F.3d at 249, 251.

A federal court faced with a suit alleging the deprivation of a constitutional rights under 42 U.S.C. § 1983 should ordinarily decide whether the constitutional right alleged by the plaintiff actually exists, even where the defense of qualified immunity might provide an alternative ground for decision. Although this principle need not govern in each and every case, it is undoubtedly the “[n]ormal[]” rule and the “better approach” to constitutional adjudication in § 1983 litigation.

Id.

⁵³ See *Poe v. Leonard*, 282 F.3d 123, 133 (2d Cir. 2002). Judge Chester J. Straub authored the *Poe* opinion, joined by Judge Jose Alberto Cabranes and Judge Robert D. Sack.

⁵⁴ See Erwin Chemerinsky, *A Troubling Take on Excessive-Force Claims*, 43 TRIAL 74, 76 (2007). See also Murad Hussain, Commentary, *The Bong Show: Viewing Frederick’s Publicity Stunt Through Kuhlmeier’s Lens*, 116 YALE L.J. 292 (2007).

By viewing Frederick’s publicity stunt through *Kuhlmeier’s* lens, the Court could endorse the school’s decision to discipline Frederick while narrowly defining the context in which educators may regulate drug-themed speech. Although this would be a defeat for Frederick individually, such a ruling would not be the setback for First Amendment protections that an expansion of *Fraser* might.

Id.

⁵⁵ *Morse*, 127 S. Ct. at 2640-41 (Breyer, J., concurring in part and dissenting in part). Justice Breyer explained why the Court should abandon *Saucier’s* “order-of-battle” rule:

Sometimes the rule will require lower courts unnecessarily to answer difficult constitutional questions, thereby wasting judicial resources. Sometimes it will require them to resolve constitutional issues that are poorly presented. Sometimes the rule will immunize an incorrect constitutional holding from further review. And often the rule violates the longstanding principle that courts should not . . . pass on questions of constitutionality . . . unless such adjudication is unavoidable.

Id. at 2641 (citing *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

yet it did not. I do not know if there are five votes right now on the Court to abandon that approach.⁵⁶ On a practical level, this is enormously important.

III. *FEDERAL ELECTION COMMISSION V. WISCONSIN RIGHT TO LIFE, INC.*

Federal Election Commission v. Wisconsin Right to Life, Inc. deservedly got a lot of media attention. It involved an applied challenge to a specific provision of the Bipartisan Campaign Finance Reform Act of 2002, the so-called McCain-Feingold Act.⁵⁷ This provision limits the ability of corporations and unions to engage in issue advertising with regard to a candidate for elected office thirty days before the primary or sixty days before the general election.⁵⁸

To put this in a historical context, which is necessary to understand the provision, Congress passed a law in 1907 stating that said corporations cannot donate money to candidates for a federal elective office.⁵⁹ Corporations and unions became clever in circumventing this. Rather than giving the money to the corporation, they took out the ads themselves, encouraging the election or defeat of specific candidates.⁶⁰

⁵⁶ *Harris*, 127 S. Ct. at 1779-81 (8-1 decision) (Ginsburg & Breyer, JJ., concurring) (Stevens, J., dissenting); *Morse*, 127 S. Ct. at 2629, 2636, 2638, 2643 (6-3 decision) (Thomas, Alito, & Kennedy, JJ., concurring) (Breyer, J., concurring in the judgment in part and dissenting in part) (Stevens, Souter, & Ginsburg, JJ., dissenting).

⁵⁷ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C.A. and 36 U.S.C.A.).

⁵⁸ See 2 U.S.C.A. § 434(f)(3)(A) (West 2007).

⁵⁹ Tillman Act of 1907, ch. 420, 34 Stat. 864 provides, in relevant part: “[I]t shall be unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office.”

⁶⁰ Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition*

In 1974, amendments were made to the Federal Election Campaign Act. Congress prohibited corporations and unions from running ads urging the election or defeat of specific candidates.⁶¹ Corporations and unions were clever and came up with a way to circumvent this too, while running issue ads. The ads never said “Vote for Mary Smith” or “Vote against John Jones.” Instead, they discussed a particular issue and a candidate’s views and positions on the issue.

To get around that, the Bipartisan Campaign Finance Reform Act, or McCain-Feingold, prohibited corporations and unions from running broadcast ads thirty days before the primary and sixty days before the general election, which could be the functional equivalent of an ad to vote for or against a specific candidate.⁶²

That is exactly what Wisconsin Right to Life wanted to do in the 2004 election.⁶³ They ran an ad that criticized Wisconsin’s democratic senators for filibustering President Bush’s judicial nominees.⁶⁴

Right after Congress adopted the Bipartisan Campaign Finance Reform Act, a facial challenge was brought against it and

for *Corporate Charters*, 69 U. CHI. L. REV. 1103, 1128-30 (2002). “The passage of the 1907 Tillman Act (and its state law analogues) is usually explained as a product of political entrepreneurship by opportunistic politicians who capitalized on the Progressive Era’s distrust of large corporations generally and a few salient corporate campaign finance scandals in particular.” *Id.* at 1128.

⁶¹ See *supra* notes 58-60 and accompanying text.

⁶² See 2 U.S.C.A. §§ 434(f)(3)(A), § 441b. See *Fed. Election Comm’n*, 127 S. Ct. at 2660 (citing 2 U.S.C.A. §§ 441b(b)(2), 434(f)(3)(A)).

⁶³ See *Fed. Election Comm’n*, 127 S. Ct. at 2661 (stating that Wisconsin Right to Life recognized the ads would amount to a violation under the Bipartisan Campaign Finance Reform Act, yet believed it was an infringement upon its First Amendment rights).

⁶⁴ See *id.* at 2660-61.

many other provisions.⁶⁵ The Supreme Court, in a very long opinion in *McConnell v. Federal Election Commission*, upheld the facial constitutionality of this and several of the other provisions.⁶⁶ It is important to note that *McConnell* was decided five-four, with Justices O'Connor and Stevens writing a joint opinion joined by Justices Souter, Ginsburg and Breyer.⁶⁷

Wisconsin Right to Life would have been decided differently if Justice O'Connor, rather than Justice Alito, was on the bench. The issue was whether the provision that was upheld as facially constitutional was unconstitutional as applied to Wisconsin Right to Life.⁶⁸

The Court, in a five-four decision, held the provision to be unconstitutional as applied to the facts of this case.⁶⁹ Chief Justice Roberts announced the judgment for the Court. Only Justice Alito joined his opinion in its entirety. Chief Justice Roberts said that it is very important to give clear guidance as to what is allowed and what is not allowed, and “[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.”⁷⁰

Chief Justice Roberts said the prohibition should only be applied if no reasonable person could interpret it as other than encouraging the election or defeat of a specific candidate.⁷¹ This opens the door to allowing corporations and unions to engage in much more

⁶⁵ See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 133, 189 (2003).

⁶⁶ *Id.* at 188, 194, 201-02, 233.

⁶⁷ *Id.* at 113.

⁶⁸ *Fed. Election Comm'n*, 127 S. Ct. at 2659.

⁶⁹ See *id.* at 2673 (plurality opinion); *id.* at 2674 (Alito, J., concurring); *id.* at 2687 (Scalia, Kennedy, and Thomas, JJ., concurring in part and concurring in the judgment).

⁷⁰ *Id.* at 2699 & n.7 (plurality opinion).

⁷¹ *Id.*

advertising so long as at the end they never say “Vote against Mary Smith” or “Vote for John Jones.”

Justices Scalia, Kennedy and Thomas said that this aspect of *McConnell* should be overruled.⁷² The three Justices repeatedly called for a major change with regard to campaign finance law.⁷³ They believe *Buckley v. Valeo*⁷⁴ was wrong in allowing restrictions on campaign contributions and the Court should overrule this aspect of *McConnell* even though it was only a few years old.⁷⁵

Chief Justice Roberts and Justice Alito said there is no need to overrule *McConnell*.⁷⁶ Alito wrote a short separate opinion saying that if this proves to chill speech in practice, then we can come back and reconsider it.⁷⁷ Three of the Justices would have overruled *McConnell*,⁷⁸ four would have followed it,⁷⁹ but the majority held the provision unconstitutional as applied.⁸⁰

Corporations and unions can engage in issue ads so long as no reasonable person could see it as other than calling for the election or defeat of a specific candidate.⁸¹ The largest practical impact will probably be the tremendous proliferation of ads we will see before

⁷² *Id.* at 2687 (Scalia, J., concurring in part and concurring in judgment).

⁷³ *Fed. Election Comm'n*, 127 S. Ct. at 2686 (adopting the argument of Richard Gephardt, former House Minority Leader and a campaign-finance reform proponent, that enforcement of section 203 of the Bipartisan Campaign Finance Reform Act should be held unconstitutional).

⁷⁴ 424 U.S. 1 (1976).

⁷⁵ *Fed. Election Comm'n*, 127 S. Ct. at 2687 (Scalia, J., concurring in part and concurring in judgment, joined by Kennedy, Thomas, JJ.).

⁷⁶ *Id.* at 2673; *id.* at 2674 (Alito, J., concurring).

⁷⁷ *Id.* at 2674 (Alito, J., concurring).

⁷⁸ *Id.* at 2687 (Scalia, J., concurring in part and concurring in judgment, joined by Kennedy, Thomas, JJ.).

⁷⁹ *Id.* at 2704 (Souter, J., dissenting, joined by Stevens, Ginsburg, Breyer, JJ.).

⁸⁰ *Fed. Election Comm'n*, 127 S. Ct. at 2673-74, 2686-87 (plurality opinion).

⁸¹ *Id.* at 2667.

the 2008 election.⁸²

IV. *HEIN V. FREEDOM FROM RELIGION FOUNDATION, INC.*

PROFESSOR HAMILTON: I will discuss *Hein v. Freedom from Religion Foundation*.⁸³ Freedom from Religion Foundation is one of my favorite organization names. They are a very clever group who files strategic lawsuits in order to expand the separation of church and state.⁸⁴ However, they have not had a great deal of success in recent years and they did not this year either.⁸⁵

⁸² See Terry Carter, *Roberts Court Pressing on Precedent*, 6 No. 26 ABA J. E-REPORT 2, June 29, 2007. See also Editorial, *Three Bad Rulings*, N.Y. TIMES, June 26, 2007, at A20.

⁸³ 127 S. Ct. 2553 (2007). The Freedom from Religion Foundation, Inc. is a non-profit, tax-exempt organization that advocates the separation of church and state and the education of nontheism. Formed in 1978 in Wisconsin, the organization describes itself as a “national membership association of freethinkers: atheists, agnostics and skeptics of any pedigree.” One of the foundation’s major activities is to file lawsuits based on the premise that “[o]ur Constitution was very purposefully written to be a godless document, whose only references to religion are exclusionary.” Freedom from Religion Foundation, <http://www.ffrf.org/purposes/> (last visited Feb. 1, 2008).

⁸⁴ See *Freedom from Religion Found., Inc. v. Chao*, 433 F.3d 989, 996-97 (7th Cir. 2006) (holding that a taxpayer had standing to challenge the use of federal funds used by the executive branch to promote faith based and community initiatives); *Doe v. Porter*, 370 F.3d 558, 559 (6th Cir. 2004) (holding that a public school board’s authorization of Bible studies violated the Establishment Clause.); *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 608 (7th Cir. 2001) (holding Wisconsin’s subsidization of telecommunications to religious schools violated the Establishment Clause); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 496 (7th Cir. 2000) (finding the proximity of a statue of Christ to city-owned property created a perception of improper endorsement of religion by the city in violation of the Establishment Clause); *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1019 (W.D. Wis. 2004) (finding the placement of a monument of the Ten Commandments in a public park violated the Establishment Clause); *Freedom from Religion Found., Inc. v. Thompson*, 920 F. Supp. 969, 975-76 (W.D. Wis. 1996) (holding that a Wisconsin statute making Good Friday a holiday favored Christianity and thus violated the Establishment Clause).

⁸⁵ See *Hein*, 127 S. Ct. at 2559 (holding the foundation lacked standing to challenge the executive branch’s funding of faith-based initiatives). See also *Freedom from Religion Found., Inc. v. Nicholson*, 469 F. Supp. 2d 609, 623 (W.D. Wis. 2007) (finding state funding of the Veteran Administration’s National Chaplain Center had a valid secular purpose and did not amount to excessive government entanglement); *Habecker v. Town of Estes Park*, 452 F. Supp. 2d 1113, 1118 (D. Colo. 2006) (reaffirming that the Pledge of Allegiance is Constitutional and that the plaintiffs lacked standing to challenge the recitation of the Pledge of Allegiance at town board meetings).

The question in *Hein v. Freedom from Religion Foundation* was: who has standing to challenge government spending that benefits religious organizations or missions?⁸⁶ We had in place a 1968 case from Chief Justice Warren, *Flast v. Cohen*,⁸⁷ which held that taxpayers could have standing in Establishment Clause cases to challenge funds being used by the government in support of religious organizations.⁸⁸

Hein addressed whether that reasoning extends to executive expenditures?⁸⁹ The plaintiffs challenged President George W. Bush's Office of Faith-Based and Community Initiatives.⁹⁰ "Initiatives" is the neutral part of this White House created office.⁹¹ However, a significant amount of executive funding is being used to support the Office of Faith-Based and Community Initiatives.⁹² According to the record, most of this money went to faith-based organizations that engage in activities like missions.⁹³

⁸⁶ *Hein*, 127 S. Ct. at 2559. The plurality noted that there was a narrow exception to the general rule that the payment of taxes is generally not sufficient to establish standing. *Id.* The broadness of this exception was at issue in *Hein*. *Id.*

⁸⁷ 392 U.S. 83 (1968).

⁸⁸ *Flast*, 392 U.S. at 88, 102-03.

⁸⁹ *See Hein*, 127 S. Ct. at 2559 ("Congress did not specifically authorize the use of federal funds to pay for the conferences or speeches that the plaintiffs challenged. Instead, the conferences and speeches were paid for out of general Executive Branch appropriations.").

⁹⁰ *Id.* at 2559 (citing Exec. Order No. 13199, 3 C.F.R. 752 (2001)).

⁹¹ *See id.*

The purpose of this new office was to ensure that "private and charitable community groups, including religious ones . . . have the fullest opportunity permitted by law to compete on a level playing field, so long as they achieve valid public purposes" and adhere to "the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality."

Id.

⁹² *See* Brief for Respondents at 6, *Hein*, 127 S. Ct. 2553, No. 06-157 (stating that the White House Office of Faith-Based and Community Initiatives has spent more than twenty-four million dollars on its programs).

⁹³ *See id.* at 5 (noting that the White House has not provided any financial statements per-

Is that not a violation of the Establishment Clause? As taxpayers, are we not challenging this funding because it is not an appropriate use of our money? In all other circumstances, taxpayers simply do not have standing.⁹⁴ Under *Flast*, in Establishment Clause cases, they do.⁹⁵

This Term, the United States Supreme Court said that when the executive branch is expending funds from general funds, not from funds designated by Congress for a particular reason, taxpayer would not have standing.⁹⁶ For example, had Congress passed a law in which money was designated specifically for funding religious organizations engaged in community service, and a taxpayer wanted to challenge the way the executive was carrying that out, they might have the ability to go to court.⁹⁷ Since, however, the money came from the Executive Branch's general funds, there was not enough to prove standing.⁹⁸

The competing issues, or policy arenas, are: Establishment Clause principles and docket control.⁹⁹ That is how to understand

taining to community-based programs, but has provided substantial reports for faith-based organizations seemingly indicating funding is predominately spent on faith-based programs).

⁹⁴ See, e.g., *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 469-70 (1982) (denying standing based on taxpayer status where plaintiffs challenged congressional action under the Federal Property and Administrative Services Act as a violation of the Establishment Clause). *Valley Forge* exemplifies the very limited circumstance in which a taxpayer would have standing—the injury being congressional action pursuant to the Taxing and Spending clause and in violation of the Establishment Clause. See *id.*

⁹⁵ See *Flast*, 392 U.S. at 105-06 (“[A] taxpayer will have standing . . . to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions [such as the Establishment Clause] which operate to restrict the exercise of the taxing and spending power.”).

⁹⁶ *Hein*, 127 S. Ct. at 2568.

⁹⁷ See *id.*

⁹⁸ *Id.*

⁹⁹ See generally Neal Devins & Alan Meese, Symposium, *Judicial Decisionmaking: Ju-*

what is going on at the Court. It is most helpful to read a short section of each of the opinions, about a sentence each, from *Flast* in 1968 and then *Hein* in 2007, which are roughly forty years apart.

Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that ‘the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.’¹⁰⁰

The constitutional concern that justified taxpayer standing, which would normally not be justified, was that citizens might be forced to fund religious organizations whose beliefs they did not support.¹⁰¹

The heart of Justice Alito’s plurality, in which Roberts and

dicial Review and Nongeneralizable Cases, 32 FLA. ST. U. L. REV. 323, 354 (2005) (positing the Supreme Court should deal with nongeneralizable standing cases on its docket by seeking to “balance inherent limits in judicial fact finding with its needs to speak forcefully on constitutional questions”); Mark Gabel, Note, *Generalized Grievances and Judicial Discretion*, 58 HASTINGS L.J. 1331, 1341 (2007) (“A prudential generalized grievance doctrine would . . . never bar suits under . . . broadly worded citizen suit provisions. But if the doctrine is constitutionally mandated, then no generalized grievance can ever be justiciable, even if a statute authorizes standing for this claim.”).

¹⁰⁰ *Flast*, 392 U.S. at 103 (internal citation omitted).

¹⁰¹ See *Hein*, 127 S. Ct. at 2585 (Souter, J., dissenting) (“The advocates of a constitutional ban on establishment were concerned about paying taxes to support religious purposes that their consciences told them not to support.” (quoting NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 48 (2005))).

Kennedy joined, is how they characterize the problem: “[I]f every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.”¹⁰² So, we moved from the Establishment Clause to docket control, and docket control won.¹⁰³

Before the case was decided, there was general concern that *Flast* would be overturned completely and there would no longer be taxpayer standing in any circumstance.¹⁰⁴ However, there were enough votes for *Flast* to stand.¹⁰⁵ In a much narrower, circumscribed arena, in which Justice Alito and the plurality would agree, there may be taxpayer standing in a circumstance where the issue is Congress’ taxing and spending power.¹⁰⁶

If you can identify a specific exercise of congressional taxing and spending, the taxpayer would have standing to come in and challenge the way in which that money was used to benefit religion.¹⁰⁷ It is not easy to assume, nor should anyone assume, that *Flast* will remain even as vigorous as this Article described it in the more circum-

¹⁰² *Hein*, 127 S. Ct. at 2572, 2584, 2599 (5-4 decision) (Kennedy, J., concurring) (Scalia, Thomas, JJ., concurring in the judgment) (Souter, Stevens, Ginsburg, & Breyer, JJ., dissenting).

¹⁰³ See Devins & Meese, *supra* note 99, at 354; Gabel, *supra* note 99, at 1341.

¹⁰⁴ See Linda Greenhouse, *Justices Reject Suit on Federal Money for Faith-Based Office*, N.Y. TIMES, June 26, 2007, at A18 (quoting Annie Laurie Gaylor, Co-President of the Freedom from Religion Foundation, expressing concern that if the Supreme Court overturned *Flast*, then many of the foundation’s other cases would be affected because they “were either challenges to state programs in state court, or challenges to federal programs established by Congressional action.”).

¹⁰⁵ See *Hein*, 127 S. Ct. at 2553 (5-4 decision).

¹⁰⁶ *Id.* at 2559.

¹⁰⁷ *Flast*, 392 U.S. at 105-06.

scribed arena.¹⁰⁸ The plurality made it clear that they were not terribly in favor, as a general matter, of this kind of standing and would wait for the next case to see how far they would go with respect to a particular taxing and spending case.¹⁰⁹

The bottom line is that the Executive Branch now knows that it cannot be challenged by taxpayers for expenditures from their general funds. So, where funds are not designated for a particular activity, such as funding religion, the President knows the money may flow without being directly accountable to taxpayers.¹¹⁰

Barry Lynn, Executive Director of Americans United for Separation of Church and State,¹¹¹ and I were on a panel together on this same case. His view was that *Hein* would not have much of an impact because in most of these cases someone actually has a concrete injury and you do not need to rely on taxpayer standing.¹¹²

¹⁰⁸ See, e.g., *Valley Forge*, 454 U.S. at 479-80; *Hein*, 127 S. Ct. at 2569 (noting that if the *Flast* exception was broadened by allowing challenges to the spending of the Executive Branch of the federal government it would “effectively subject every federal action—be it a conference, proclamation or speech—to Establishment Clause challenge by every taxpayer”).

¹⁰⁹ *Flast*, 392 U.S. at 106 (noting the Court’s reluctance to allow individuals to use taxpayer standing as a means of challenging the conduct of the federal government).

¹¹⁰ *Id.* at 2569-70.

¹¹¹ Reverend Barry W. Lynn has been the Executive Director of Americans United for Separation of Church and State since 1992. Lynn earned a degree in theology from Boston University School of Theology in 1973, and received a law degree from Georgetown University Law Center in 1978. Americans United for Separation of Church and State is an organization founded in 1947 that is dedicated to keeping the government apart from religious issues. The group believes that “all Americans have the constitutional right to practice the religion of their choice (or refrain from taking part in religion) as individual conscience dictates” and that the government should remain neutral with regard to religious issues. AU.org, Americans United for Separation of Church and State, *The Americans United Story*, http://www.au.org/site/PageServer?pagename=about_auhstory.

¹¹² Press Release, Americans United for Separation of Church and State, Supreme Court Ruling Blocks Courthouse Door for Some ‘Faith-Based’ Lawsuits, Says Americans United (June 25, 2007) http://www.au.org/site/News2?abbr=pr&page=NewsArticle&id=9203&security=1002&news_iv_ctrl=2287.

The Court is quite clear that it is not interested in increasing opportunities for Establishment Clause taxpayer challenges to come before the Court.¹¹³

¹¹³ See *Hein*, 127 S. Ct. at 2569. “In effect, we have adopted the position set forth by Justice Powell in his concurrence in *Richardson* and have ‘limit[ed] the expansion of federal taxpayer and citizen standing in the absence of specific statutory authorization to an outer boundary drawn by the results in *Flast*’” *Id.*