

# The Reach of Free Speech

Recent rulings make it tough to nail down the boundaries of protected speech and other thorny state-federal issues.

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s the Supreme Court begins a new term, a look at the decisions the justices handed down last term shows, as is often the case, a mixed bag for states.

Although the court upheld state laws to control immigration and help parents send their children to religious schools, it invalidated others passed to protect doctors' prescription records and restrict children from buying violent video games. Several of the decisions turn on what constitutes "free speech" protected by the First Amendment, and the justices came to some surprising conclusions.

They struck down a Vermont law, initiated by physicians, that barred the sale of doctors' prescription records to drug makers to use in their marketing activities. The court's opinion in *Sorrell v. IMS Health* described prescription data as "speech" fully protected by the First Amendment.

A legislator's vote for and advocacy of a bill, however, is not "protected speech," concluded Justice Antonin Scalia in a Nevada case involving a conflict of interests. All this might be puzzling to state lawmakers who think they know what real speech is when heard on the floor of a legislature.

"How can it be that restrictions upon legislators' voting are not restrictions upon legislators' protected speech?" Scalia asked. "The answer is a legislator's vote is the commitment of his apportioned share of the legislature's power. ... [It] is not personal to the legislator, but belongs to the people," he said in *Nevada Commission on Ethics v. Carrigan*. In that case, Michael Carrigan, an elected city councilman from Sparks, Nev., was charged with a state ethics violation for voting to approve a development project that was backed by his long-time friend and campaign manager. He appealed and won a ruling from the state Supreme Court, which said the ethics charge violated the First Amendment. However, in a unanimous decision, the U.S. Supreme Court said legislators cannot use free speech as a defense to a charge they violated a conflict-of-interest rule.

## Candidates' Free Speech

The free-speech rights of candidates came into play when the conservative bloc, led by Chief Justice John G. Roberts, struck down part of an Arizona voter initiative that offers public funding to candidates who agree to forego private fund-raising and abide by spending limits. To keep pace with a well-funded opponent relying on private money, the law allowed a candidate to obtain matching public funds once the spending limit was crossed by his opponent.

Roberts said the matching funds impose "a substantial burden" on the free-speech rights of the privately funded candidates. "It is not legitimate for the government to attempt to equalize electoral opportunities in this manner," he said for the 5-4 majority in *Arizona Free Enterprise Club v. Bennett*. "Leveling the playing field can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech."

The newest justice, Elena Kagan, spoke for the liberal bloc, saying Arizona's law would encourage more political speech, not less. "Except in a world gone topsy-turvy, additional campaign speech and electoral competition is not a First Amendment injury," she said.

Legal experts differ on whether the ruling will deal a death blow or a minor punch to public financing of campaigns. Roberts said his opinion should not be read to "call into question the wisdom of public financing." Laws that provide a fixed amount to candidates, he said, would not be threatened.



The decision striking down California’s law on violent video games on First Amendment grounds came as no surprise. Before this year, a half dozen states had tried to restrict violent video games and had lost. California’s law met the same fate in a 7-2 decision in *Brown v. Entertainment Merchants Association* handed down in June. This time, the justices did not split along the usual ideological lines. Justice Scalia called California’s law “the latest episode in a long series of failed attempts to censor violent entertainment for minors.” Justices Anthony M. Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor and Kagan agreed.

Although Roberts and Justice Samuel A. Alito spoke approvingly of California’s law as a “pioneering effort to address ... a potentially serious social problem,” in the end they said the law was vague in its definition of violence and could not stand. Justices Clarence Thomas and Stephen G. Breyer dissented separately.

These contrasting opinions on protected speech, if nothing else, should provide a warning to anyone who seeks to set out a simple, reliable rule for understanding or predicting the Supreme Court’s decisions affecting states and state laws.

### Congressional Intent

In recent years, states have won some and lost some in cases testing whether a state law is preempted by federal law. The justices say the results depend on a close examination of the purpose of the federal law. Did Congress, for example, intend federal regulation to dominate the area to the exclusion of conflicting state laws, or did it leave a role for the states as well?

That is the crucial question in the area of immigration. Frustrated by Washington’s failure to deal with the estimated 11 million illegal immigrants in this country, several states, led by Arizona, have passed their own enforcement measures. This year, the Supreme Court upheld one targeted at employers who hire illegal workers. Passed in 2007, and signed by then-Governor Janet Napolitano, the Legal Arizona Workers Act requires employers to check the immigration status of new hires through the federal E-Verify program. Napolitano predicted it would impose a “business death penalty” on employers who knowingly hire illegal workers, because if convicted, companies could lose their business licenses.

A broad coalition of groups—including civil rights and immigrant rights advocates and the U.S. Chamber of Commerce—challenged the law. When *Chamber of Commerce v. Whiting* reached the Supreme Court, the plaintiffs were joined by the Obama administration, whose chief immigration enforcement officer is now, ironically, Homeland Security Secretary Janet Napolitano.

The challengers contended the Arizona law conflicts with a confusing provision in federal immigration law that preempts “any state or local law imposing civil or criminal sanctions [other than through licensing and similar laws] upon those who employ unauthorized aliens.” Citing the ban on “sanctions,” they argued Congress intended to prevent the states from imposing their own punishments on employers who hired illegal workers.

But in a 5-3 decision, the court disagreed. Chief Justice Roberts said Arizona’s use of its licensing authority “falls well within the confines of the authority Congress chose to leave to the states.”

So, too, is the mandate for businesses to use E-Verify, he said. “That requirement is entirely consistent with the federal law,” he said. Roberts cited in a footnote that similar licensing laws exist in Colorado, Mississippi, Missouri, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia, and that four states—Mississippi, South Carolina, Utah and Virginia—also require the use of E-Verify. Scalia, Kennedy, Thomas and Alito concurred with Roberts.

### More to Come on Immigration

The chief justice’s opinion offered clues on how the court may view the next and even bigger upcoming immigration question: Can states authorize their police to question and arrest illegal immigrants? A federal judge in Phoenix and the U.S. 9<sup>th</sup> Circuit Court of Appeals have blocked enforcement of Arizona’s SB 1070, which calls on the police to check the immigration status of people they “reasonably” suspect of being in the country illegally. The judges said immigration enforcement is the exclusive duty of the federal government, which, by implication, means Arizona’s law is preempted.

But Roberts, in the earlier *Whiting* case, appeared to suggest a state law is not preempted unless Congress says so expressly or a clear conflict between the two is apparent. “Implied preemption analysis does not justify a ‘free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives,’” he wrote. “Our precedents establish a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal act.”

In August, Arizona Governor Jan Brewer filed a petition urging the court to review the 9<sup>th</sup> Circuit’s ruling and to revive the state’s law. If justices grant Brewer’s appeal, it figures to be one of the premier cases this term, which began Oct. 3.

### Key School Decision

Another Arizona case also could be far-reaching. Since the 1970s, the court often has reviewed and struck down state laws that sent taxpayers’ money to religious schools. But this year, a 5-4 decision in *Arizona Christian School Tuition Organization v. Winn* upheld the state’s use of tax credits to fund religious schools.

Arizona’s law offers a dollar-for-dollar tax credit—up to \$500 for individuals and \$1,000 for a married couple—for donations to special school tuition organizations that then pay for students’ costs to attend private schools, even when these organizations limit their scholarships to particular religious denominations. The ACLU sued, claiming the law was only a ruse to divert taxpayers’ money into church school coffers.

Justice Kennedy, speaking for the court, said no objecting taxpayer could prove his taxes were being diverted. “When Arizona taxpayers choose to contribute to STOs, they spend their own money, not money the state has collected from ... other taxpayers,” he said. The majority in the case was the same as in the immigration case: Roberts, Scalia, Kennedy, Thomas and Alito.

Kagan, who sat out in the immigration case, wrote her first dis-

sent in this case, calling the decision a break with precedent that will open the door to unconstitutional government funding of religion. “Appropriations and tax subsidies are readily interchangeable; what is a cash grant today can be a tax break tomorrow,” she wrote. “The court’s opinion thus offers a roadmap—more truly, just a one-step instruction—to any government that wishes to insulate its financing of religious activity from legal challenge.” Justices Ginsburg, Breyer and Sotomayor agreed with her.

### Prisons and Consumers

Another decision sounded a note of warning for states with prisons teeming with inmates.

Since 1991, California has fought a class-action lawsuit contending it was not providing decent health care for inmates. A three-judge panel concluded overcrowding was the root of problem, and ordered the state to reduce its inmate population by as many as 40,000. To the surprise of many, the Supreme Court affirmed that order with a 5-4 decision in *Brown v. Plata*.

“For years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements,” said Kennedy, a native of Sacramento, who joined the court’s liberal bloc in this case. California officials responded they plan to transfer inmates to county jails, hoping to avoid setting prisoners free.

In areas of tort suits and liability claims, state laws suffered two setbacks. The court shielded the makers of generic drugs from being sued for failing to warn patients of new dangers. The 5-4 ruling held that, because federal law requires generics to mimic brand-name drugs, their makers cannot be sued under state liability laws for failing to warn patients of any newly revealed problems. The dissenters said the ruling in *PLIVA v. Mensing* will leave millions of Americans with no legal remedy if they suffer an injury from a generic drug.



Consumer class-action claims were also dealt a blow in *AT&T Mobility v. Concepcion*. Several states have prohibited consumer contracts that forbid class-actions claims. In another 5-4 decision, the court ruled the Federal Arbitration Act preempts these state laws. Under the decision, companies can avoid class-action claims by including an arbitration clause in their purchase agreements.

In product liability claims involving motor vehicles, the court made it easier for consumers to sue. In *Williamson v. Mazda*, the court said a man whose wife died in a car crash can sue the automaker for failing to install lap-belts in the rear seats, even though federal safety regulations don't require them. Breyer said the federal rules set only "minimum standards," and lawsuits can play a "continued meaningful role" in identifying safety problems.

The states, however, were shut out of suing the major power producers in federal court for contributing to global warming. Four years ago, the court said carbon pollution could be regulated under the Clean Air Act in a suit brought by a dozen states. Based on that conclusion, the court this June unanimously threw out *American Electric Power v. Connecticut* (and seven other states) that urged a judge to set new restrictions on carbon pollution. Ginsburg said that because the Environmental Protection Agency has the authority to restrict these emissions, "we see no room for a parallel track" in the courts.

## Health Care Looms

This term could be a momentous one for health care. Justices on the first day of the new session heard a California case on whether states can be sued for reducing Medicaid reimbursement rates. The California Legislature approved a series of cutbacks, but hospitals, doctors and pharmacies went to court and won rulings blocking the reductions.

In *Douglas v. Independent Living Center*, the state argues these private plaintiffs have no legal right to sue under the Medicaid Act. The Obama administration and the attorneys general for 30 states, the National Conference of State Legislatures and the National Governors Association have filed briefs supporting California's position.

The court also has before it appeals challenging the constitutionality of the health insurance mandate in the Affordable Care Act. Lawyers for 27 states have joined suits arguing Congress exceeded its authority by imposing this controversial mandate. The Supreme Court will have the final word.