



# The Jurisprudence of Justice John Paul Stevens: Leading Opinions on the Free Speech Clause of the First Amendment

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## Summary

Justice Stevens has authored a number of significant opinions expounding upon the constitutional right to freedom of speech. Among them are significant cases related to indecency and the rights of broadcasters (“Seven Dirty Words Case”), commercial speech, symbolic speech, and the freedom of association. This report will describe these cases with a view to their impact on free speech case law, and their continuing relevance in the future. This report will not discuss Justice Stevens’s election law-related opinions.

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## Introduction

Justice Stevens has authored a number of important majority opinions and dissents expounding upon the limits of the Free Speech Clause of the First Amendment. Justice Stevens is not a free speech absolutist. His opinions have been guided by an apparent desire to allow the government to impose reasonable restrictions on speech, while scrutinizing, particularly closely, instances in which the government bans specific modes of expression entirely.

The primary areas in which Justice Stevens has authored controlling decisions are regulation of indecency over broadcast and the Internet, regulation of indecency in general, and commercial speech. Stevens has also authored important dissents in cases addressing the constitutionality of laws banning the burning of an American flag, and free association rights.

This report discusses Justice Stevens's opinions in these areas.<sup>1</sup>

## Speech over Radio and Television Broadcast

Perhaps the most famous free speech decision authored by Justice Stevens is *Federal Communications Commission v. Pacifica Foundation*.<sup>2</sup> This case has come to be known as the “Seven Dirty Words” case or the “Filthy Words” case. The case arose out of an adjudication the Federal Communications Commission (FCC) had undertaken against Pacifica Foundation for broadcasting a monologue by the comedian George Carlin at 2 o'clock in the afternoon. In the monologue, Carlin repeatedly used seven particularly inflammatory words that “you couldn't say on the public ... airwaves.”<sup>3</sup> All parties agreed that the monologue was not obscene and did not fit the definition for obscenity. The case, thus, squarely presented to the court the question of whether the FCC could regulate speech over broadcast that is indecent, but is not obscene.

Justice Stevens took a methodical approach to the opinion, breaking down the issue presented into four separate questions: (1) the scope of the Court's review; (2) whether the FCC's order was a form of illegal censorship; (3) whether the broadcast was, in fact, indecent, under the applicable law; and (4) whether the order violated the First Amendment. After finding that the Court must focus its review on the FCC's determination that Carlin's monologue was indecent, and that the FCC's action was not illegal censorship, Stevens analyzed the more difficult questions presented by the case.

The statute being enforced by the FCC in this case was 18 U.S.C. § 1464 which forbids the utterance of “any obscene, indecent or profane language by means of radio communication.” Justice Stevens observed that the statute is written in the disjunctive, implying that each word has a separate meaning. Despite the fact that 18 U.S.C. § 1461, containing similar language to ban “obscene, indecent, or profane” speech through the mail, had been construed by the Court to prohibit only obscene speech delivered through the mail, Stevens reasoned that Congress could not have intended the same standard to apply to different modes of delivering speech.

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<sup>1</sup> This report will not discuss Justice Stevens's opinions in the areas of election law or campaign finance law.

<sup>2</sup> 438 U.S. 726 (1978).

<sup>3</sup> *Id.* at 729.

Furthermore, Stevens found that the accepted definition of indecency does not require an appeal to prurient interest. Rather, the term indecent “refers to nonconformance with accepted standards of morality.” With that definition in mind, Justice Stevens had little trouble deciding that the “Filthy Words” broadcast was indecent.

The only question left for Justice Stevens to answer was whether restricting indecent speech over broadcast radio was constitutional under the First Amendment. Stevens concluded that it is. In making this determination, Justice Stevens paid particular attention to the unique nature of the broadcast medium when deciding that restricting indecent speech over broadcast stations did not violate the First Amendment.

Context for Justice Stevens, in this case and subsequent cases, was key. Even though the speech at issue was undisputedly “vulgar, “offensive,” and “shocking,” Stevens found that the monologue at issue in the case may have been protected speech in some contexts. Stevens went so far as to include a transcript of the monologue in its entirety as an appendix to the opinion. However, Justice Stevens wrote that, though the monologue may be protected in some contexts, it was not “entitled to absolute protection under all circumstances.” Stevens set forth to analyze the context in which the speech occurred to determine whether the FCC’s action was appropriate.

Justice Stevens went on to hold that restricting (but not banning) indecent speech over the broadcast airwaves is constitutional because (1) “the broadcast media have established a uniquely pervasive presence in the lives of all Americans” and (2) “broadcasting is uniquely accessible to children, even those too young to read.”<sup>4</sup> Stevens seemed concerned by the unwilling listener happening upon this “vulgar” broadcast, perhaps as he was channel surfing for a station in his car. Stevens noted that a warning prior to the broadcast would not protect that unwilling listener. The hour of the broadcast (2 p.m.) also concerned Justice Stevens, because children were more likely to be listening at that hour. Stevens stressed that these factors weighed heavily in the Court’s decision to uphold the FCC’s action, and that the Court was not endorsing a broad indecency ban. Stevens made clear that a host of variables would continue to be important to constitutionally restricting indecent speech including time of day, the medium of delivery, and the content of the program. This opinion is widely cited and remains precedent for many decisions related to speech over the broadcast airwaves.

Stevens’s conviction that the broadcast medium is special carried over into his dissent in *FCC v. League of Women Voters*.<sup>5</sup> In that case, Justice Stevens would have voted to uphold a statute that banned broadcast stations that received public funds from editorializing. Stevens expressed concern for the unseen influence of government funding upon the editorial opinions of stations that receive the funds. In his estimation, it was a legitimate concern for Congress to address. Furthermore, he noted that broadcasting was unique in that it is the only mode of mass communication that requires a license from the federal government. In his view, the proper course would have been to uphold Congress’s attempt to prevent some non-commercial broadcast stations, whose license to operate and funding depend upon the federal government, from potentially becoming propaganda purveyors should the government choose to pressure those stations to broadcast the government’s view as the station’s own in an editorial.

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<sup>4</sup> *Id.* at 748-750.

<sup>5</sup> 468 U.S. 364 (1984).

## Online Speech

Consistent with the philosophy exhibited in the broadcast cases that context and form of speech factors heavily in the government's ability to restrict speech, Justice Stevens authored the opinion for the majority of the Court in *Reno v. American Civil Liberties Union*.<sup>6</sup> The case struck down for violating the First Amendment two provisions of the Communications Decency Act (CDA) that prohibited indecent speech to minors on the Internet. Stevens wrote that the "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve," making clear that a higher standard of scrutiny would apply to restrictions of speech on the Internet than restrictions of speech over broadcast. Stevens continued: "[T]he governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not 'reduc[e] the adult population ... to ... only what is fit for children.'"<sup>7</sup>

In distinguishing between the Internet and other forms of mass communication, Stevens found that "[t]he CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet." Thus the restrictions on indecent speech over broadcast media were more narrowly tailored than the speech restriction in this case. Furthermore, Stevens took issue with the fact that the CDA imposed criminal penalties, and the Court has never decided whether indecent broadcasts "would justify a criminal prosecution." Lastly, in Steven's estimation, radio and television, unlike the Internet, have, "as a matter of history ... received the most limited First Amendment protection ... in large part because warnings could not adequately protect the listener from unexpected program content.... [On the Internet], the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material."

Justice Stevens dissented from the Court's decision in *United States v. American Library Association*, which upheld provisions of the Children's Internet Protection Act (CIPA) prohibiting the receipt of federal assistance for Internet access by public libraries that failed to install software to filter pornographic images.<sup>8</sup> Justice Stevens argued that the provision mandated, paradoxically, "underblocking" and "overblocking" of websites. Technology, at the time, could only filter text on a web page; therefore, if a website contained only indecent or pornographic images, the filtering software would not block it. This was Justice Stevens's reason for finding an "underblocking" problem. The "overblocking" issue also arose out of the software's heavy reliance on words, because words chosen for blocking could be pornographic in one context, but scientific, educational, or innocuous in another. Stevens explained, "[in] my judgment, a statutory blunderbuss that mandates this vast amount of 'overblocking' abridges the freedom of speech protected by the First Amendment." Stevens was also troubled by the fact that if even one computer with Internet access in a public library was not equipped with the filtering software, regardless of whether that computer was funded in part by federal assistance, the public library would be ineligible for federal funds.

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<sup>6</sup> 521 U.S. 844 (1997).

<sup>7</sup> *Id.* at 874-75.

<sup>8</sup> 593 U.S. 194, 220 (2003) (Stevens, J. dissenting).

## Secondary Effects and Adult Establishments

Justice Stevens exhibited his belief that government attempts to ban particular types of content require more exacting scrutiny in the opinions that he wrote related to regulation of adult establishments. In *Young v. American Mini-Theaters, Inc.*, Stevens authored the opinion for the Court upholding a local ordinance requiring movie theaters that predominantly exhibit adult movies to be a certain distance away from one another.<sup>9</sup> Stevens noted that even when speech is protected, differences in content may permit different government responses. In this case, with recognition that adult establishments are associated with urban blight, lower property values, and other unsavory effects on neighborhoods, Stevens found that the government “may legitimately use the content of these materials as the basis for placing them in a different classification than other movie theaters,” under the Equal Protection Clause of the Fourteenth Amendment. However, Stevens emphasized that this was not a complete ban on these establishments, nor was it a restriction on what types of content these establishments could display. Rather, the restriction was “nothing more than a limitation on the place where adult films may be exhibited,” and was therefore constitutional.

Justice Stevens dissented, however, from the Court’s decision to uphold a city ordinance that required women in adult dance clubs to wear pasties and a G-string, thereby preventing them from dancing completely naked.<sup>10</sup> The case was *City of Erie v. Pap’s A.M., TDBA “Kandyland.”* Stevens distinguished this case from his holding in *Young*.<sup>11</sup> First, the ordinance in *Young* did not burden the content of the speech at issue; here, a particular type of content (dancing naked) would be banned entirely. Furthermore, in *Young* the ordinance attempted to manage the secondary effects of these establishments by spreading them out. In this case, in Stevens’s opinion, there seemed to be no reason to believe that requiring dancers to wear pasties and a G-string would reduce the tendency of the establishments to attract crime and prostitution. Stevens argued that this ordinance did not seek to reduce secondary effect of adult establishments, and, instead, did nothing more than entirely ban a mode of protected expression.

## Commercial Speech

Justice Stevens has written a number of opinions furthering the Court’s jurisprudence regarding First Amendment protections for commercial speech. Repeatedly, Stevens has made clear that commercial speech restrictions that ban particular types of truthful content deserve more exacting scrutiny and are constitutionally suspicious. In *44 Liquormart, Inc. v. Rhode Island*, Justice Stevens, writing for the majority, invalidated a statute that prohibited alcohol price advertisements.<sup>12</sup> In doing so, Justice Stevens made clear that a total prohibition on “the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process” will be subject to a stricter review by the courts than a regulation designed “to protect consumers from misleading, deceptive, or aggressive sales practices.” Stevens added, “[the] First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own

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<sup>9</sup> 427 U.S. 50 (1976).

<sup>10</sup> 529 U.S. 277 (2000).

<sup>11</sup> *Id.* at 317.

<sup>12</sup> 517 U.S. 484 (1996).

good.” Many viewed this decision as increasing the constitutional protection for truthful and nonmisleading commercial speech.

Stevens also authored the opinion in *City of Cincinnati v. Discovery Network*.<sup>13</sup> That case made clear that commercial speech restrictions are, in fact, content based restrictions on speech, and that restrictions on commercial speech should relate to the interests the government seeks to advance.<sup>14</sup> In this case, the city had enacted a ban on news racks that contained commercial publications. Its reasons for enacting the ban were primarily aesthetic; however, the ban did not apply to newspapers or other publications that were not “primarily commercial” in nature. This fact led Justice Stevens to observe that “[not] only does Cincinnati’s categorical ban on commercial news racks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted.”<sup>15</sup> Stevens conceded that there may be instances wherein a government could assert permissible reasons for distinguishing between commercial and noncommercial news racks, but that the city had failed to do so in this case.

In *Greater New Orleans Broadcasting Ass’n v. United States*, Justice Stevens invalidated a ban on casino advertising over broadcast stations located in states where gambling was legal.<sup>16</sup> Stevens rejected the “greater includes the lesser” argument previously adopted by the Court in *Posadas de Puerto Rico Associations v. Tourism Co. of P.R.*, 478 U.S. 328 (1986). Justice Stevens made clear that simply because government could ban the underlying activity all together (gambling), that did not mean government could ban advertising or other forms of speech about that activity. Furthermore, Stevens found that, even in a commercial speech context, there is presumption that “the speaker and the audience, not the government, should be left to assess the value of accurate and nonmisleading information about lawful conduct.”<sup>17</sup> Consistent with this opinion, Justice Stevens dissented from the earlier case, *United States v. Edge Broadcasting*, which upheld the statute at issue in *Greater New Orleans Broadcasting*, when it was applied to broadcast stations located in states that forbid gambling that were seeking to broadcast advertisements for gambling establishments in states where gambling was legal.<sup>18</sup> Stevens wrote “the United States has selected the most intrusive, and dangerous form of regulation possible—a ban on truthful information regarding a lawful activity imposed for the purpose of manipulating, through ignorance, the consumer choices of some of its citizens. Unless justified by a truly substantial governmental interest, this extreme, and extremely paternalistic, measure surely cannot withstand scrutiny under the First Amendment.”<sup>19</sup>

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<sup>13</sup> 507 U.S. 410 (1993).

<sup>14</sup> This was the primary reason for refusing to uphold the statute at issue as a time, place, and manner restriction. *Id.* at 428-430.

<sup>15</sup> *Id.* at 424 (emphasis in original).

<sup>16</sup> 527 U.S. 173 (1999).

<sup>17</sup> *Id.* at 195.

<sup>18</sup> 509 U.S. 418 (1993).

<sup>19</sup> *Id.* at 439 (Stevens, J. dissenting).



## Symbolic Speech

Justice Stevens authored a brief dissent from the Court's decision in *Texas v. Johnson*. In that case, the Court overturned a criminal conviction for desecration of the American flag. Stevens emphasized the importance of the American flag as a unique symbol of "the courage, the determination, and the gifts of nature that transformed" the United States into a world power. Stevens argued that a law that prohibited desecration of that symbol would not suppress the message that was attempting to be conveyed by the act of desecration. Rather, Stevens argued the law prohibited "disagreeable conduct." Stevens would have upheld the conviction and the statute at issue. Stevens reasoned that no one would question a law prohibiting the desecration of the Lincoln Memorial. According to this logic, the "prohibition [on desecration of the Lincoln Memorial] would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag."<sup>20</sup>

## Buffer Zones

Again exhibiting his willingness to uphold laws that reasonably restrict the time, place, or manner of speech, and a concomitant tendency to strike down laws that ban a particular form of expression in its entirety, Stevens wrote the opinion for the Court in a case that upheld certain restrictions on protesting near hospitals and medical facilities and authored the primary dissent from a case that upheld a ban on protesting specific residences. In *Hill v. Colorado*, the Court upheld the constitutionality of a statute that required protesters outside health care facilities to remain eight feet away from persons entering or exiting those facilities, unless they consented to the approach of the protesters.<sup>21</sup> Stevens began his opinion by noting that, contrary to the arguments of those opposed to the law, the law was content neutral. The question of content neutrality, particularly in cases that involve time, place, and manner restrictions, "is whether the government has adopted a regulation of speech because of disagreement with the message conveyed."<sup>22</sup> Stevens made clear that the restriction at issue here was not a "regulation of speech." Rather it was "a regulation of the places where some speech may occur." Furthermore, the law restricted all protesters outside of health care facilities regardless of viewpoint, lending further support to the finding that it was content neutral. Stevens, therefore, applied the relevant constitutional test for content neutral time, place, and matter restrictions on speech. Stevens found that the law was a valid and narrowly tailored government effort to balance the interests of protesters against the privacy interests of those entering and exiting health care facilities, who may find themselves in a particularly vulnerable position. He noted that the eight foot restriction is close enough that the protesters' message can be conveyed through speech, signs, etc., but preserves the personal space of those entering the facility. Also factoring in to Stevens's finding that the law was narrowly tailored was that the protesters could approach with the consent of the person they were attempting to counsel and that the eight foot restriction was only in effect within 100 feet of health care facilities. In Stevens's reasoning, this left open many alternative channels of communication and banned no one from engaging in constitutionally protected speech.

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<sup>20</sup> *Id.*

<sup>21</sup> 530 U.S. 703 (2000).

<sup>22</sup> *Id.* at 719 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Consistent with his aversion to complete bans on speech, Justice Stevens dissented from the Court's decision to uphold a ban on protesting in front of single family homes in an earlier case, *Frisby v. Schultz*.<sup>23</sup> Stevens argued that it was "perfectly clear that the town could prohibit pedestrians from loitering in front of a residence. On the other hand, it [seemed] equally clear that a sign carrier [had] a right to march past a resident—and presumably pause long enough to give the occupants an opportunity to read [it]."<sup>24</sup> Stevens left open the possibility that he would support restrictions on picketing in front of residences if the ordinance was limited to conduct particularly intrusive to the privacy of the home.

## Freedom of Association

Justice Stevens authored the dissent for himself and three other Justices in *Boy Scouts of America v. Dale*.<sup>25</sup> The majority upheld the right of Boy Scouts of America (BSA) to exclude gay men from the organization, despite a New Jersey statute that prohibited discrimination on the basis of sexual orientation (among other characteristics, such as race and gender). The majority found that the statute violated BSA's First Amendment rights to freedom of speech and association.

Justice Stevens disagreed. First, Stevens noted that nothing in the BSA's bylaws or code of conduct prohibited homosexuality, and, to the extent that sex or sexual orientation was a topic in those documents, they expressly directed scouts and scout masters to seek counseling on those matters from parents or clergy, because it was not the primary mission of BSA. Then, citing cases in which the Court upheld a state's requirement that private, previously all-male clubs admit women, Stevens argued that the right to freely associate is not absolute. "The relevant question is whether the mere inclusion of the person at issue would 'impose any serious burden,' 'affect in any significant way,' or be a substantial restraint upon' the organization's 'shared goals, basic goals, or 'collective effort to foster beliefs.'"<sup>26</sup> Stevens could find no evidence that forbidding BSA from excluding homosexuals in its group would alter or burden any message expressed by BSA. Stevens returned to the inconsistency and lack of clarity in BSA's speech about homosexuals, and noted that if the organization is unclear in its expression, it is difficult then to conclude that an anti-discrimination law is a "serious burden."

Furthermore, Stevens argued that the inclusion of openly gay men in BSA likely would not force BSA to adopt or include a message with which it does not agree. Stevens distinguished the case from *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, in which the Court refused to require a group holding a privately operated parade to include an openly gay group.<sup>27</sup> Stevens focused on the fact that the openly gay group would have been conveying a message by marching in the parade and that it was likely that their message would also be perceived as the message of the parade organizers. In contrast, the plaintiff in this case did not appear to be seeking to convey any message, and it seemed unlikely to Stevens that BSA would be seen by others as approving of every idea or expression held by each and every one of its members.

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<sup>23</sup> 487 U.S. 474, 496 (1988) (Stevens, J. dissenting).

<sup>24</sup> *Id.* at 497.

<sup>25</sup> 530 U.S. 640, 663 (2000) (Stevens, J. dissenting).

<sup>26</sup> *Id.* at 683.

<sup>27</sup> *Id.* at 590 (citing *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 568-570 (1995)).

Therefore, Stevens, and the other dissenters, would have upheld New Jersey's anti-discrimination law and required BSA to include homosexuals as members.

## **Conclusion**

In general, Justice Stevens appears to have consistently demonstrated a resistance to government speech restrictions that would effectively ban a particular type of speech or a particular avenue of conveying a message. However, Stevens upheld reasonable governmental restrictions on speech that did not have the effect of banning speech entirely. Stevens appeared to favor laws that channeled speech to more appropriate times, or more appropriate places, so long as the restrictions were reasonable. This approach is pragmatic. It appears to recognize the government interests in protecting its citizens from speech that could be offensive to some (indecent) or could have a particular tendency to mislead (commercial speech) while protecting the rights of people to communicate constitutionally protected speech.

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