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Free Speech Matters: The Roberts Court and the First Amendment

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FREE SPEECH MATTERS: THE ROBERTS COURT AND THE FIRST AMENDMENT

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This Symposium would not have happened without the support and guidance of Dean Nicholas Allard and Judge Andrew Napolitano, and without the participation of so many First Amendment experts and scholars, many of whom have been long-time professional and personal friends, and all of whom have contributed greatly to the consideration of these critical issues by presenting views across the spectrum about the proper measure of free speech.

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INTRODUCTION

At a time when we have had, in my view, the most free speech-protective Supreme Court in memory, this is, nonetheless, a perilous time for speech. For a ten-year period, the Roberts Supreme Court may well have been the most speech-protective Court in a generation, if not in our history, extending free speech protection on a number of fronts and rebuffing claims by government and its allies to limit such protections.[1] Yet these free speech rulings have drawn fire from critics, both on and off the Court, contending that the

[1] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (concluding that Alvarez lying about having military honors is protected free speech); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 805 (2011) (finding the sale and rental of violent video games to minors is protected free speech); Snyder v. Phelps, 562 U.S. 443, 460–61 (2011) (holding offensive speech targeted at the family of a deceased soldier on the day of his funeral is speech protected by the First Amendment); Sorrell v. IMS Health, Inc., 564 U.S. 552, 557 (2011) (finding the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors to be a form of protected speech); United States v. Stevens, 559 U.S. 460, 482 (2010) (holding the commercial creation, sale, or possession of depictions of animal cruelty to be protected by the First Amendment); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010) (finding independent corporate expenditures for electioneering communications to be protected by the First Amendment).

decisions are inconsistent with the democratic and egalitarian purposes of the First Amendment and that they overprotect free speech at the expense of competing and important values, such as equality, privacy, decency, or democracy.[2] And in the trenches of everyday life, censorship and suppression of speech seem more the rule than the exception, both at home and abroad. Free speech is thus at a crucial constitutional and cultural crossroad.

The Roberts Court celebrated its tenth anniversary on January 30, 2016, a decade after Associate Justice Samuel Alito joined the Court, which Chief Justice John G. Roberts had been appointed to lead a few months earlier.[3] The resulting coalition of a five Justice "conservative majority" has had a significant impact on the Court's jurisprudence in a number of areas, and this has been especially evident in its rulings on the crucial First Amendment right of freedom of speech, reaffirming and expanding powerful protection for free speech in a variety of settings. In the process, the Court has rebuffed numerous attempts by government and its allies to restrict established free speech protections or create new free speech limitations. The Court created a sort of free speech "Camelot," with powerful, perhaps unprecedented, application of free speech principles and protection of free speech values. If one were to ask,

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[2] *See, e.g.*, *Citizens United*, 310 U.S. at 393, 446, 478–80 (Stevens, J., dissenting) (proclaiming the majority's "conclusion that the societal interest in avoiding corruption and the appearance of corruption does not provide an adequate justification for regulating corporate expenditures on candidate elections relies on an incorrect description of that interest, along with a failure to acknowledge the relevance of established facts and the considered judgments of state and federal legislatures over many decades"); *Snyder*, 562 U.S. at 463–65 (Alito, J., dissenting) ("Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."); *Brown*, 564 U.S. at 847–48 (Breyer, J., dissenting) (communicating the idea that California's law restricting the sale or rental of violent video games to minors only imposes a "modest restriction on expression" while furthering a compelling state interest in the least restrictive means possible and should therefore be upheld). *See also* sources cited *infra*, note 27 (showing academic critics of the Roberts Court's First Amendment jurisprudence).

[3] An earlier version of the themes in this Introduction appeared in my blog entry: Joel Gora, *The Roberts Court & the Future of Free Speech*, CONCURRING OPINIONS (Oct. 5, 2015), http://concurringopinions.com/archives/2015/10/joel-gora-the-roberts-court-the-future-of-free-speech.html.

paraphrasing Ronald Reagan, "Is free speech better off now than it was 10 years ago," I think the clear answer would be "yes."[4]

First, in a series of cases, the most well-known of which is *Citizens United v. Federal Election Commission*,[5] the Court has insisted that protecting political speech is at the heart of the First Amendment's purposes in American democracy and that limits on political spending are limits on political speech and can rarely be justified. The Court's theory, echoing earlier rulings, has been that government restrictions on how much can be spent to speak about politics and government, and what individuals or groups can do the spending and speaking, are fundamentally anathema to the essence of political freedom of speech and association.[6]

In these campaign finance cases, the Court has also reaffirmed a theme that transcends politics: that another core purpose of the First Amendment is to guarantee that the people, not the government, get to determine what they want to say and how they want to say it.[7] This liberty-affirming concept celebrates the freedom and autonomy of each person and group and condemns censorship of thought and speech by government. It has applications well beyond the political realm and guarantees the strongest protection to free speech in a number of settings, including artistic, corporate, and commercial speech. In all of these areas the Roberts Court affirmed that the First Amendment presumption against government censorship is but another recognition and manifestation of individual and group

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[4] In one of the presidential debates in 1980 with incumbent President Jimmy Carter, Ronald Reagan asked the public, rhetorically, "Are you better off now than you were four years ago?" Bret Schulte, *Ronald Reagan v. Jimmy Carter: "Are You Better Off Now than You Were Four Years Ago?"*, U.S. NEWS (Jan. 17, 2008), https://www.usnews.com/news/articles/2008/01/17/the-actor-and-the-detail-man.

[5] *Citizens United*, 558 U.S. 310.

[6] *See* cases cited *infra* Section I.B.2.

[7] *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1442 (2014) (invalidating federal statute that imposed aggregate limits on contributions that any one person could make to candidates and parties even if the donor chose to support a wide range of candidates and groups); *Brown*, 564 U.S. at 790–92 (invalidating statute which prevented individuals from access to violent video games); *Citizens United*, 558 U.S. at 372 (striking down campaign finance restrictions that interfere with the rights of people and their groups to determine for themselves how to engage in political speech and association).

freedom and liberty.[8] Similarly, the Court has generally been extremely vigilant against laws where government seeks to regulate speech on the basis of content.[9] And the Court has also generally insisted that all speakers and methods of communicating be afforded equal status under the First Amendment, rejecting any perceived free speech caste system where government privileges some speakers over others.[10] Instead, "First Amendment rights should be unified, universal, and indivisible."[11] The Court has also generally resisted efforts to balance free speech against other values and interests, preferring instead to try to find firmer, more categorical rules which seek to place First Amendment rights beyond the discretionary pale even of judges themselves.[12] It gave more

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[8] *See Citizens United*, 558 U.S. at 371–73; Sorrell v. IMS Health, Inc., 564 U.S. 552, 576–80 (2011); *Brown*, 564 U.S. at 799–804.

[9] *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2230–31 (2015) (discussing that the town's sign Code singles out specific subject matter for differential treatment, making it a form of content-based discrimination and therefore cannot stand because it does not pass the strict scrutiny test). *But see* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015) (stating that the State's judicial conduct rule prohibiting judicial candidates from personally soliciting campaign funds served the compelling state interest of preventing the appearance of impropriety).

[10] *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1463 (Thomas, J., concurring) (discussing that the Court "has never required a speaker to explain the reasons for his position in order to obtain full First Amendment Protection. Instead, [the Court] ha[s] consistently held that speech is protected even 'when the underlying basis for a position is not given'"); *Citizens United*, 558 U.S. at 340 (stating that "restricting distinguishing among different speakers, allowing speech by some but not others" are prohibited).

[11] Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. L. REV. 935, 939 (2011) [hereinafter Gora, *United*].

[12] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."); *Brown*, 564 U.S. at 792 (referring back to *Stevens*, the Court discussed how the government in *Stevens* argued that lack of a historical warrant did not matter and that it could create new categories of unprotected speech by applying a "simple balancing test" that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test—however, the Court rejected this contention); United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (citing to *Brown*, the Court stated that "[b]efore exempting a category of speech from the normal prohibition on content-based restrictions . . . the Court

prominence to the right of listeners and audiences to receive ideas and hear what speakers had to say. Thus, the Roberts Court has usually put its thumb strongly on the First Amendment side of the scale.

Applying these principles, the Court has steadfastly refused to declare speech that many deemed socially worthless to be beyond the pale of the First Amendment's protection.[13] In rejecting government efforts to criminalize depictions of animal cruelty, regulate the sale of violent video games to young people, punish those who lie about receiving military honors and permit damages to the targets of even hateful and hurtful slurs and insults, the Court reaffirmed that it is the individual, not the government, who must judge the worth of such speech.[14] In those cases the Court emphatically refused to expand the very short list of "non-speech" exceptions from First Amendment protection, such as, obscenity and fighting words.[15] Nor was the Court willing to permit government to regulate even such prosaic items as street or yard signs on the basis of their content.[16]

To be sure, the Roberts Court has not invariably ruled in favor of free speech claims.[17] It has allowed government, in some circumstances, to censor student speech,[18] government employee

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must be presented with 'persuasive evidence that a novel restriction on content is part of a long . . . tradition of proscription[]'" but the government did not demonstrate that in this case).

[13] *See, e.g.*, *Stevens*, 559 U.S. 460 (holding Federal law criminalizing creation, sale or possession of depictions of animal cruelty to be overbroad under the First Amendment); *Brown*, 564 U.S. 786 (striking down California law imposing restrictions on the sale of violent video games); *Alvarez*, 132 S. Ct. 2537 (holding Stolen Valor Act was unconstitutional though respondent falsely claimed to have received Medal of Honor).

[14] *See* discussion *infra* Section I.B.1.

[15] *See Stevens*, 559 U.S. at 469–70; *Brown*, 564 U.S. at 792; *Alvarez*, 132 S. Ct. at 2546–47.

[16] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2230–31 (2015).

[17] *See* discussion *infra* Part II.

[18] *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 403 (2007) ("The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.").

speech,[19] certain forms of campaign funding associated with elections to judicial office,[20] and speech supporting terrorist organizations.[21] It has also given government some leeway to control speech on or utilizing government property.[22] But these few exceptions help prove the rule that, outside these few instances, the Roberts Court insisted on rigorously protecting free speech to preserve vital individual and societal First Amendment values. The same regard for the individual can also be found in a number of significant cases where the Court has protected religious freedom against the demands of government, including safeguarding the rights of a church to determine whom to hire as a teacher, a family-held company to resist providing health care insurance against its religious convictions, a Muslim prisoner to wear a beard for religious reasons despite prison security concerns, and an employee to wear a religious head scarf despite a company's dress code appearance rules.[23] In all of these cases, the Court privileged individual religious preferences over the government's claimed need to permit the intrusion on such conscientious objection. And in the process, as with the Court's free speech work, individual sovereignty was expanded and government intrusion contracted.

But that Roberts Court, that very First Amendment-friendly Roberts Court, seemed, sadly, to come suddenly to an end on February 13, 2016, with the abrupt and untimely death of Justice Antonin Scalia, a staunch supporter during his long career on the

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[19] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 424–25 (2006) ("[T]he First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities.").

[20] *See, e.g.*, Williams Yulee v. Fla. Bar, 135 S. Ct. 1656, 1661 (2015) ("Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary.").

[21] *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 6 (2010) ("[The court] simply holds that § 2339B does not violate the freedom of speech as applied to the particular types of support these plaintiffs seek to provide.").

[22] *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239 (2015) (holding that government license plate designs were government speech and thus permissible); Pleasant Grove v. Summum, 555 U.S. 460 (2009) (holding that the government could determine what monuments to place in a public park because that choice is a form of government speech).

[23] *See* discussion *infra* Section I.B.3.b.

Court of many of its strongest free speech cases.[24] As a result, grave doubt arose as to whether the Supreme Court would continue to be the surprisingly powerful voice for free speech that it has become, and the future of free speech and the First Amendment seemed to hang in the balance, on the reasonable expectation that a Democratic President would probably be elected and would appoint Justice Scalia's successor.[25]

Indeed, dissenting Justices and prominent legal scholars have taken sharp issue with various pro-free speech Roberts Court decisions, insisting that the Court has gone too far in overprotecting freedom of speech and not properly taking account of and balancing the needs of government which have been advanced to justify particular restrictions on speech.[26] Other critics write off the Court's

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[24] For example, in *Brown v. Entertainment Merchants Association*, Justice Scalia wrote the Court's opinion invalidating a California law restricting access by young people to violent video games and observed:

> Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an "actual problem" in need of solving and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. "It is rare that a regulation restricting speech because of its content will ever be permissible."

Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011) (citations omitted); *see* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Republican Party of Minn. v. White, 536 U.S. 765 (2002); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Texas v. Johnson, 491 U.S. 397 (1989).

[25] Indeed, two cases already reflect the impact of Justice Scalia's death. In one, the Court looked poised to rule that it violated the First Amendment for non-members of public sector unions to be compelled to provide financial support for the advocacy of those unions, even as it pertained to collective bargaining matters, but the lower court union victory wound up being affirmed by an equally divided Court. *See* Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016). In another case, a further effort to resist compliance with Obamacare contraceptive provision insurance mandates by a pro-life religious order was also derailed and remanded by a diminished Court. *See* Zubik v. Burwell, 136 S. Ct. 1557 (2016)

[26] For some of the more prominent academic critics of the Robert Court's First Amendment work, see BURT NEUBORNE, ON READING THE FIRST AMENDMENT: MADISON'S MUSIC (2015); RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF

free speech jurisprudence as simple right-wing favoritism of the rich and the powerful, insisting instead that the First Amendment should mainly protect just the deserving "lonely pamphleteer" or "soapbox orator" of an earlier era.[27] Ironically, liberals who usually led the fight for free speech a generation ago are more likely to be leading the charge to restrict free speech today, both on and off the Court. The Roberts Court, however, steadfastly maintained that the First Amendment must be available to *every* person or group who would seek to exercise its rights and has refused to curtail free speech protection.[28] In taking that position, the Roberts Court relied on free speech themes sounded in earlier, more "liberal" eras of the Court, building upon and strengthening the foundational pillars of free speech erected by the great Justices like Holmes, Brandeis, Black, and Douglas.

The death of Justice Scalia, the political battle over his replacement, and what seemed the likely outcome of the 2016 elections seemed to make it probable that a Democratic nominee would replace Justice Scalia, one unlikely to share his usually strong pro-free speech views. That outcome, no matter how well-meaning the successor, would have posed a serious peril to strong free speech protection and lead almost certainly to a critical shift in the

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AMERICAN ELECTIONS (2016); LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION (2014); STEVEN SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT (2016); Steven Shiffrin, *The Dark Side of the First Amendment*, 61 U.C.L.A. L. REV. 1480 (2014); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV L. REV. F. 165 (2015); Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).

[27] *See* NEUBORNE, *supra* note 26, at 10. *See generally* David Kairys, *The Contradictory Messages of the Rehnquist-Roberts Era Speech Law: Liberty and Justice for Some*, 2013 U. ILL. LAW REV. 195 (discussing how free speech is used to favor the wealthy in the area of campaign finance); Adam Liptak, *Sidebar: First Amendment, 'Patron Saint' of Protestors, Is Embraced by Corporations*, N.Y. TIMES (Mar. 23, 2015), http://www.nytimes.com/2015/03/24/us/first-amendment-patron-saint-of-protesters-is-embraced-by-corporations.html?_r=0 (describing how some say free speech has become a tool for the Republican Party and the wealthy to promote conservative agenda).

[28] *See* discussion *infra* Part I (detailing the expansion of free speech rights under the Roberts Court).

balance.[29] But the surprising election of Donald Trump as President and his pledge to nominate Justices in "the mold of Justice Scalia," made it much more likely that the Roberts Court as a strong protector of First Amendment rights would continue. Indeed, the nomination of Judge Neil Gorsuch, seemingly a strong supporter of such rights, increases this likelihood and will help provide a judicial bulwark against some of the disparaging views on free speech—he would penalize flag burning—and free press—he would relax the restraints on defamation suits—that President Trump seems to hold.[30]

The loss of a powerful pro-free speech Court would be troubling for one final, and ironic reason. In a time when the Supreme Court was affording more free speech protection in its legal rulings than almost any predecessor Court, in everyday life, these are trying times for free speech. Censorship seems to reign, both at home and abroad, in what sometimes seems to be a war on free speech. Whether it be the instantaneous condemnation and punishment of fraternity members for singing racially offensive lyrics at a social event, the brazen murder of journalists for producing anti-Muslim cartoons and commentary, or the cancelling of celebrity contracts for making offensive remarks or expressing unpopular views, free speech in everyday life seems often under attack and in jeopardy.[31] Enhanced by technology, and the phenomenon of "going viral," one slip of the tongue, caught on camera or recorder, can ruin an individual's career or life prospects. Technology has also facilitated unprecedented surveillance of citizens,[32] which can create a new

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[29] Within days of Justice Scalia's death, one observer commenting on key Roberts Court precedents now at risk, was already writing the epitaph for the *Citizens United* decision: "Some would go quickly like Citizens United." Adam Liptak, *Supreme Court Appointment Could Reshape American Life*, N.Y. TIMES (Feb. 18, 2016), http://www.nytimes.com/2016/02/19/us/politics/scalias-death-offers-best-chance-in-a-generation-to-reshape-supreme-court.html.

[30] *See* David Cole, *Donald Trump vs. The First Amendment*, NATION (Jan. 18, 2017), https://www.thenation.com/article/donald-trump-vs-the-first-amendment/.

[31] *See infra* text accompanying notes 268–78.

[32] *See generally* SUSAN N. HERMAN, TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY (2011) (discussing data collection by financial institutions for surveillance purposes); ANDREW P. NAPOLITANO, SUICIDE PACT: THE RADICAL EXPANSION OF PRESIDENTIAL POWERS AND THE LETHAL THREAT TO AMERICAN LIBERTY (2014) (discussing the use of drone technology for international and domestic surveillance).

form of chilling effect to suppress criticism of government. And, too often, our campuses, rather than being sanctuaries of free speech, thought, and inquiry, are venues for suppression and censorship of offensive or "hurtful" ideas and the provision of "safe spaces" from free speech.[33] The very presence of these sweeping restrictions on speech on campus and in the workplace can have the proverbial chilling effect of silencing a great range of speech which could not legally be punished, because as one Justice once said: "the value of a Sword of Damocles is that it hangs, not that it drops."[34]

In the face of these various suppressions of speech, it is imperative, in my view, that at least where the law is concerned the Supreme Court continue to make it quite clear that free speech must be the rule and government censorship the rare exception. For the reasons that follow, that would be faithful to the Roberts Court's First Amendment legacy

This article will analyze and assess that legacy and support its preservation. First, I will discuss the overall First Amendment-protective themes and principles that the Roberts Court has reaffirmed and strengthened. Then, the focus shifts to how the Roberts Court has applied those principles in a speech-protective fashion. This discussion describes the Court's powerful refusal to create new "non-speech" categories of censorship, its strong protection of speech and association in the campaign finance area, the expansion of individual choice about speech and religion and the concomitant restriction of government sovereignty over such matters, the strengthening of the important anticensorship content neutrality principles, the protection of speaker equality, and finally, the reluctance to balance First Amendment rights against competing

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[33] *See* Nadine Strossen, *Freedom of Speech and Equality: Do We Have to Choose?*, 25 J. L. & POL'Y 185, 187 (2017); Conor Friedersdorf, *The Glaring Evidence That Free Speech is Threatened on Campus*, ATLANTIC (Mar. 4, 2016), http://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825/; Robert Corn-Revere, *Hate Speech Laws: Ratifying the Assassin's Veto*, CATO INST.: POL'Y ANALYSIS, May 24, 2016, no. 791, https://object.cato.org/sites/cato.org/files/pubs/pdf/pa791.pdf.

[34] *See* Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting). *See generally* Joel M. Gora, *An Essay in Honor of Robert Sedler: Fierce Champion of Free Speech*, 58 WAYNE L. REV. 1087, 1098–1103 (2013) (discussing how censorship silences constitutionally protected speech in schools and workplaces).

values. The article also notes and assesses those areas where the Court has rejected First Amendment protection and concludes that they do not overshadow the Court's strong stance in favor of such rights. The article concludes by praising the Court for its work, but notes the concerns that in everyday life, free speech often seems to be denied the same high regard.

I. THE ROBERTS COURT'S LEGACY: FREE SPEECH MATTERS

The Roberts Court left a surprisingly First Amendment friendly legacy during its ten-year run. It embraced and extended classic free speech principles and applied them in a number of different areas. This section will identify those principles and trace the Roberts' Court's decisions protecting and reaffirming them in those various areas.

A. Summary of Principles and Themes

In its ten-year run prior to Justice Scalia's death, the Roberts Court decided approximately forty First Amendment cases, most of which involved free speech.[35] Many of those cases have continued or revived some of the strongest free speech-protective themes and doctrines from an earlier era, expanded the zone of protection of free speech in a number of contexts, and rebuffed efforts to contract that zone by refusing to recognize a variety of new "non-speech" categories of prohibition.[36] As a cause and consequence, the Roberts Court has done so by enlarging the zone of individual and group liberty where free speech is concerned, contracted the area of government sovereignty over speech, and left free speech far more

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[35] *See* Ronald K.L. Collins, *CJ Roberts: Mr. First Amendment – The Trend Continues*, CONCURRING OPINIONS: FAN 63 (June 10, 2015), https://concurringopinions.com/archives/2015/06/fan-63-first-amendment-news-cj-roberts-mr-first-amendment-the-trend-continues.html (listing all cases). *See generally* Symposium, *The First Amendment*, 76 ALBANY L. REV. 409–781 (2013) (discussing different First Amendment cases the Roberts Court heard); Ronald K.L. Collins, *Foreword: Exceptional Freedom – The Roberts Court, The First Amendment and the New Absolutism*, 76 ALBANY L. REV. 409 (2013) [hereinafter Collins, *Exceptional Freedom*] (providing an overview of Roberts Court First Amendment cases).

[36] These issues, themes and cases are discussed in Part I of this Article. Cases that have rejected First Amendment protection are analyzed in Part II.

protected than it found it ten years ago. The Court's First Amendment jurisprudence reflected strong libertarian, antipaternalistic, and anticensorship themes that are rooted in the Court's most powerful First Amendment precedents from earlier eras including: *New York Times Co. v. Sullivan*,[37] *Cohen v. California*,[38] *Buckley v. Valeo*,[39] *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*,[40] *Texas v. Johnson*,[41] and *Reno v. ACLU*.[42] The holdings of these cases have been preserved and extended by the Roberts Court.

Taken together, the Roberts Court's decisions, with a few notable exceptions, have left constitutional speech rights much stronger than they were found. To be sure, some First Amendment claims have been rejected by the Roberts Court.[43] But, when one factors in the quality and nature of the Court's pro-free speech decisions, the Court's rulings and broader First Amendment doctrinal themes hold up well against any predecessor Court.[44] Those themes include a strong libertarian distrust of government regulation of speech and presumption in favor of letting people

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[37] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (discussing the First Amendment in dealing with the issue of libel).

[38] Cohen v. California, 403 U.S. 15 (1971) (reversing Cohen's conviction of disturbing the peace, on First Amendment grounds, for wearing a jacket stating "Fuck the Draft").

[39] Buckley v. Valeo, 424 U.S. 1 (1976) (finding a First Amendment violation where a statute limited campaign expenditures for individuals, groups, and candidates using personal funds).

[40] Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (finding unconstitutional, on First Amendment grounds, a statute which prohibits pharmacists from publishing or advertising prescription drug prices).

[41] Texas v. Johnson, 491 U.S. 397 (1989) (affirming the reversal of Johnson's conviction, on First Amendment grounds, for burning an American flag in violation of a statue which prohibits desecration of venerated objects).

[42] Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997) (finding unconstitutional, on First Amendment grounds, a statute "enacted to protect minors from 'indecent' and 'patently offensive' communications on the internet").

[43] *See* discussion *infra* Part II.

[44] *See generally* Collins, *Exceptional Freedom*, *supra* note 36 (detailing the powerful protection the Roberts court extended to particular areas of speech that reach beyond the scope of previous courts).

control speech, a consistent refusal to fashion new non-speech categories, a reluctance to "balance" free speech against governmental interests, and, most notably in the campaign finance cases, a reaffirmation of the "central meaning" of the First Amendment, namely, to protect the processes of freedom of speech, press, and association that make our democracy possible.[45] More specifically, the Court's legacy has involved invocation of cases with themes extolling the individual choice over what to say, how to say it, and when and where to say it, expressing deep skepticism for permitting government to make those choices and censor the information and ideas the public may receive.[46]

The Roberts Court has also revived the concept that the First Amendment protects both the speaker's right to communicate and the listener's right to receive ideas and information.[47] It is not that these ideas and principles are new; they were powerfully articulated by the great Justices Holmes and Brandeis almost a century ago, namely, that the purposes of free speech are both to enable the individual to exercise their liberty and autonomy, and to ensure that the community will have all the information they need to live and to govern.[48] Free speech is viewed both as an end in itself to better human growth and development and as a means to a better society.

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[45] *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.

[46] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 353–56 (2010) (finding a law that bans corporations from using their general treasury funds to support or criticize election candidates an unconstitutional attempt to censor protected speech); Sorrell v. IMS Health, Inc., 564 U.S. 522, 577–80 (2011) (finding a law that regulates certain speech of the pharmaceutical industry an unconstitutional attempt to censor protected speech).

[47] *See, e.g.*, *Citizens United*, 558 U.S. at 353–56 (stating it is unlawful for the Government to control thought through targeted censorship of speakers and listeners); *Sorrell*, 564 U.S. at 577–80 (finding the Government unable to quiet speech they deem "too persuasive" by its messengers to the public); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011) (stating the Government has limited authority in restricting expression based on a content's message).

[48] *See* Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

In honoring these principles, the Roberts Court has provided greater protection than ever before in the area of campaign finance regulation, striking down a number of laws which restricted the ability of individuals and groups to fund their political ideas and campaigns.[49] The Court has broadened the protections against content-based restrictions of speech in the public arena[50] and has restricted the ability of government to use its funding powers to restrict or compel the speech of government beneficiaries.[51] In the parallel First Amendment area of religious freedom, the Court has generally honored claims of the need to value religious observance over government interests, thus liberating religious conscience and expression, and, in cases rejecting claims of improper government endorsement or support of religion, has expanded the realm of individual choice of speech and belief and contracted the realm of government supremacy.[52] Non-union members have seen their First Amendment right to refuse to support union activities expand.[53] Efforts to create new categories of non-speech protection have been decisively rebuffed, as have attempts to "balance" free speech against other interests.[54] Finally, it is difficult to identify any First Amendment areas where rights have been rolled back.

Critics say that the Roberts Court is a faux free speech Court, which has not been that hospitable to free speech, absent a few isolated opinions, such as the funeral protest case, or when corporate or moneyed interests are doing the talking, as in the campaign

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[49] *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1462 (2014); *Citizens United*, 558 U.S. at 372.

[50] *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (holding that a law prohibiting the display of outdoor signs without a permit but exempting ideological or political signs is a content-based restriction on speech that does not survive strict scrutiny).

[51] *See, e.g.*, Agency for Int'l Dev. v. Open Soc'y Int'l, Inc., 133 S. Ct. 2321 (2013) (holding that the restriction of funds meant to combat HIV/Aids, Tuberculosis, and Malaria to organizations with policies explicitly opposing prostitution and sex trafficking violates the First Amendment).

[52] *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2782 (2014); Town of Greece v. Galloway, 134 S. Ct. 1811, 1828 (2014).

[53] *See* Harris v. Quinn, 134 S. Ct. 2618, 2644 (2014).

[54] *See* cases cited *infra* notes 72–95.

finance cases or commercial speech cases.[55] The effort is to paint the Roberts Court as a right-wing Court across the board, with its free speech rulings being no exception.[56] But the truth of the matter is that the Court has handed down a number of crucial rulings that could not have pleased people on the right, but were consistent with protecting free speech principles.[57] Overall, the Roberts Court in most instances vigorously protected free speech and other First Amendment values regardless of the ideological or partisan consequences of the decisions.

Finally, two time-honored, complimentary themes have animated much of the pro-free speech Roberts Court decisions: the libertarian individual rights concept that we protect free speech so that individuals and the groups they form will have the maximum freedom to choose for themselves how and whether to speak,[58] and the bookend, anticensorship principle that the government cannot be trusted to exercise the power to censor the speech of individuals and groups.[59] Both principles were elegantly framed in a famous 1971

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[55] *See, e.g.*, Laurence Tribe, *Free Speech and the Roberts Court: Uncertain Protections*, WASH. POST: VOLOKH CONSPIRACY (June 3, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/03/free-speech-and-the-roberts-court-uncertain-protections/ (discussing different instances when the Court has allegedly stripped away First Amendment rights).

[56] *See* sources cited *supra* note 27.

[57] Such cases involved protecting the free speech rights of AIDS workers, people who lied about receiving military honors, manufacturers of violent video games and distributors of depictions of animal cruelty. *See* discussion *infra* Sections I.B.1, I.B.3.a.

[58] *See*, *e.g.*, Snyder v. Phelps*,* 562 U.S. 443, 454–58, 460–61 (2011) (holding that the First Amendment provided "special protection" to groups picketing on public streets outside military funerals); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 353–56 (2010) ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought.").

[59] *See, e.g.*, Brown v. Merchs. Entm't Ass'n, 564 U.S. 786, 805 (2011) (holding that a California statute prohibiting the sale of "violent video games" to minors violated the First Amendment because it was both overbroad and under inclusive); United States v. Stevens, 559 U.S. 460, 474–77, 482 (2010) (holding that a statute criminalizing the portrayal of animal cruelty was "substantially overbroad, and therefore invalid under the First Amendment").

case, *Cohen v. California*, holding that the word "fuck" could not be categorically banned from public display or discourse:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[60]

A few years later, the same theme was sounded in the Court's landmark campaign finance ruling in *Buckley v. Valeo*, holding that the government could not impose limits on how much political speech that people and the groups they form could have:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.[61]

In another landmark ruling of that era, the Burger Court applied similar libertarian and anticensorship principles to efforts to control purely commercial speech about consumer goods, invoking the same themes of speaker and listener autonomy to choose what to say or hear.[62] The Court concluded that the choice between permitting "highly paternalistic" government control of speech or letting people have the information and make up their own minds, was a

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[60] Cohen v. California, 403 U.S. 15, 24 (1971).

[61] Buckley v. Valeo, 424 U.S. 1, 57 (1976).

[62] Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) ("If there is a right to advertise, there is a reciprocal right to receive the advertising . . . ").

choice already made for us in the First Amendment's rejection of government censorship.[63] Embracing these themes, in later cases, the Court would insist that even the most hateful, hurtful ideas about racial or religious equality, or expressions of contempt or hatred for America, even by publicly burning the American flag, could not be censored by government.[64] In a similar vein, broad-scale efforts to censor sexual content on the Internet, to protect children, were also rebuffed on the ground that "the vast democratic forums of the Internet," should not be subject to overly vague and sweeping controls.[65]

The Roberts Court has been more than willing to pick up these libertarian and anticensorship themes and principles and apply them in modern times to a wide range of government restrictions of political speech. In a few short years, the Roberts Court handed down several decisions that even the Warren Court, let alone the Burger Court, would be proud to claim.[66]

Buckley's embrace of these themes would become a central feature in the Roberts Court's campaign finance canon,[67] and especially its *Citizens United* decision, embodying the concept that government still could not control the range of speech that speakers choose to communicate and listeners choose to receive.[68] To allow that government control would allow "censorship . . . vast in its

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[63] *Id.* at 770.

[64] *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (holding that flag burning was conduct protected by the First Amendment); Snyder v. Phelps, 562 U.S. 443 (2011) (holding that picketing at a serviceman's funeral with signs reading, for example, "Thank God for 9/11," "Thank God for Dead Soldiers," and "God Hates Fags" was allowed under the First Amendment).

[65] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 868–69 (1997).

[66] *See* Robert A. Sedler, *The "Law of the First Amendment" Revisited*, 58 WAYNE L. REV. 1003, 1026–27 (2013); Collins, *Exceptional Freedom*, *supra* note 36, 432–35. The themes have played out in cases involving such disparate contexts as campaign finance regulation, violent content of videos and video games, hurtful hateful speech, government funding of speech, government regulation of the time place and manner of speech. *See* Collins, *Exceptional Freedom*, *supra* note 36, 428–36, 453–55.

[67] *See* discussion *infra* Sections I.A.2.b–c.

[68] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354–56 (2010).

reach."[69] The more recent ruling in *McCutcheon v. Federal Election Commission*[70] likewise sounded these themes of individual choice about how to speak about and participate in the political process and what limits must be imposed on government efforts to control such choices. These libertarian and anticensorship principles would also animate important Roberts Court rulings invalidating state restrictions on youthful access to violent video games,[71] on the use of pharmaceutical information by drug companies,[72] and, most powerfully, on monetary penalties on hurtful and hateful anti-gay speech.[73]

B. Application of These Principles and Themes

1. No New Non-Speech Categories

In four cases arising in disparate areas of the law, but posing similar questions of categorical exclusion from free speech protection, the Roberts Court decisively rejected such exclusion and made it quite clear that any proposed new non-speech category would have an extreme uphill climb to success.[74] Even though each of the laws at issue commanded wide-spread popular support, the Roberts Court did not hesitate to invoke the principles of the First Amendment to strike them down.[75]

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[69] *Id.* at 354. For further discussion of *Citizens United*, see Kathleen Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 123 (2010).

[70] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1448 (2014).

[71] *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 805 (2011).

[72] *See* Sorrell v. IMS Health, Inc., 564 U.S. 552, 557 (2011).

[73] *See* Snyder v. Phelps, 562 U.S. 443, 455–60 (2011).

[74] *See* United States v. Stevens, 559 U.S. 460, 472 (2010) (holding "depictions of animal cruelty" are not considered an unprotected class); *Snyder*, 562 U.S. at 460–61 (holding Westboro's speech could not be restricted because of its upsetting content); *Brown*, 564 U.S. at 792–93 (holding that the First amendment prohibits regulating "whatever a legislature finds shocking"); United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (holding that the Government has not demonstrated that false statements constitute a new category of unprotected speech on this basis).

[75] *See generally* John D. Moore, *The Closed and Shrinking Frontier of Unprotected Speech*, 36 WHITTIER L. REV. 1, 17–18 (2014) (discussing the Roberts Court's method in evaluating what constitutes free speech).

In the first case, *United States v. Stevens*,[76] the Court refused to permit Congress to outlaw so-called "crush videos" that depicted vicious acts of animal cruelty and were of interest to certain sexual fetishists.[77] While the acts of cruelty could be punished as illegal conduct, the Court ruled that the speech depicting those acts was protected by the First Amendment, which

> reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."[78]

Indeed, the Court strongly suggested that no new non-speech categories might ever be created if they had not already been recognized by our history and tradition, especially not by a process of ad hoc balancing which would measure the value of the speech against its harm.[79] Chief Justice Roberts rejected such a "highly manipulable balancing test" as a "startling and dangerous" threat to the First Amendment.[80] The late Justice Hugo L. Black, known for his antipathy to balancing free speech against government interests, would have been pleased.[81]

Next came the challenge to a California statute restricting the sale of "violent video games" to minors under the age of eighteen in *Brown v. Entertainment Merchants Association*, which followed the approach in *Stevens*.[82] The Court strongly condemned the content-based statute and harshly rejected the creation of a new category for violent content, even where minors were concerned.[83] The Court

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[76] United States v. Stevens, 559 U.S. 460 (2010).

[77] *Id.* at 465–66.

[78] *Id.* at 470.

[79] *Id.* at 472.

[80] *Id.* at 470–72.

[81] *See* Raymond G. Decker, *Justice Hugo L. Black, The Balancer of Absolutes*, 56 CAL. L. REV. 1335, 1338 (1971) (noting Justice Black's "insistence upon the importance of the first amendment" and describing his disapproving approach to balancing the individual and societal interest).

[82] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 789 (2011).

[83] *Id.* at 793–99.

made it clear that the stronger the popular sentiment to suppress the content of certain speech, the more the need for serious strict scrutiny to ensure that it is real harms, not loathsome ideas, in the government's sights.[84] In the process, these two cases undermined some older precedents which had long been thought to justify prohibiting "worthless" speech, or speech targeting,[85] or harming young people.[86] And they did so with strong invocation of the libertarian and anticensorship themes which have become a hallmark of Roberts Court First Amendment jurisprudence.

A third case, *United States v. Alvarez*, also challenged a politically popular Congressional statute, the Stolen Valor Act, which punished those who falsely claimed to have been awarded military medals, and was justified on the ground that a new category of materially false speech should be created as an exception to First Amendment protection. The Court once again refused to create a new non-speech category even for those who demean and dishonor military medals by falsely claiming they had earned them.[87] A six-three majority, though divided on the rationale, struck down the Act and refused to exempt from First Amendment protection all knowingly false speech, noting that:

> The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find [the defendant's] statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of expression.[88]

Once again, the Court had rebuffed the government's argument for creating new non-speech categories that would automatically withhold First Amendment protection from speech within such categories.[89]

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[84] *See id.* at 799.

[85] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[86] *See* New York v. Ferber, 458 U.S. 747 (1982); Ginsberg v. New York, 390 U.S. 629 (1968).

[87] *See* United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012).

[88] *Id.* at 2551.

[89] *Id.* at 2543.

Finally, in another case involving hateful, hurtful speech, the Court once again countered popular opinion and majority sentiment in order to vindicate First Amendment values by refusing to recognize a new "hate speech" exception to First Amendment protection, in *Snyder v. Phelps*.[90] The anticensorship theme was clearly sounded in the case involving extremely hurtful, offensive, outrageous, and abusive speech targeted at the family of a deceased soldier, on the day of his funeral.[91] It is difficult to imagine more wounding speech; a "vicious verbal assault" as the lone dissenting Justice Samuel Alito characterized it.[92] Nonetheless, Chief Justice Roberts, for a majority of the Court, held that no matter how bizarre the speech or the speaker—in this case, the Westboro Baptist Church, a fringe fundamentalist church taunting grieving families by preposterously claiming that America's soldiers were dying as punishment for America's growing tolerance of homosexuality—it was protected by the First Amendment.[93] As he had in *Stevens*, Chief Justice Roberts acknowledged the power of speech to have a harmful impact and made plain that this was not sufficient grounds to restrict it:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[94]

It would seem to me these cases alone are enough to make the Court that produced them worthy of praise as a highly speech-protective institution, safeguarding free speech regardless of popular sentiment. And these cases may have some lasting precedential force, even though two of them, *Alvarez* and *Brown,* drew some dissenting and concurring opinions. With the death of Justice Scalia, the same prediction of longevity seemed to be cast into considerable

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[90] Snyder v. Phelps, 562 U.S. 443 (2011).

[91] *Id.* at 448–50.

[92] *Id.* at 463 (Alito, J., dissenting).

[93] *Id.* at 448, 458–61.

[94] *Id.* at 460–61.

doubt with respect to the Roberts Court's campaign finance cases, which, as we will now see, were consistently sharply divided five to four decisions. With a President Trump, however, there may very well be more adherence than resistance to Roberts Court rulings, including in the campaign finance area.

2. The Campaign Finance Cases

Only someone vacationing on Mars could be unaware that the Court's campaign finance cases have garnered not praise, but condemnation, especially the most widely criticized ruling in the *Citizens United* case.[95] I think that is a constitutional shame because the Court's ruling embodied and applied classic First Amendment principles, including many of the ones identified above, especially the notion that it is the people, not the government, that must determine the nature and range of political speech, and that to permit the government to do so invites the kind of censorship anathema to the First Amendment.[96] Happily, though most academic and

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[95] In an unprecedented action, President Barack Obama attacked the Court's decision in a press conference the day it was handed down and then again a few days later before the nation in his State of the Union address. *See* Press Release, The White House, Office of the Press Sec'y, Statement from the President on Today's Supreme Court Decision (Jan. 21, 2010), https://obamawhitehouse.archives.gov/the-press-office/statement-president-todays-supreme-court-decision-0 ("With its ruling today, the Supreme Court has given a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans. This ruling gives the special interests and their lobbyists even more power in Washington—while undermining the influence of average Americans who make small contributions to support their preferred candidates."); Adam Liptak, *Supreme Court Gets a Rare Rebuke, In Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), http://www.nytimes.com/2010/01/29/us/politics/29scotus.html [hereinafter Liptak, *Supreme Court Gets Rare Rebuke*]. The Democratic Party has called for a constitutional amendment to overturn the decision. *See The 2016 Democratic Party Platform*, https://www.democrats.org/party-platform#campaign-finance (last visited Feb. 3, 2017).

[96] *See* Gora, *United*, *supra* note 12; Joel M. Gora, *In the Business of Free Speech, The Roberts Court and Citizens United*, *in* BUSINESS AND THE ROBERTS

professional opinion is unyieldingly against the decision, there are some First Amendment stalwarts who recognize it as a vital and strong bastion of free speech.[97] Indeed, the Court's campaign finance canon gave the greatest protection to the funding of political speech of any Court since the landmark decision in *Buckley v. Valeo* in 1976.[98] In doing so, the Roberts Court came closer than any predecessor Court to invalidating all limits on giving and spending funds for political speech.[99]

It is hard to imagine a group more deserving of First Amendment protection than Citizens United, a nonpartisan issue and political advocacy organization, that created a movie harshly critical of then-Senator Hillary Clinton who was beginning her first run for President in 2008.[100] Their model was the popular Michael Moore cinematic election year assault against President George W. Bush in

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COURT 227 (Jonathan H. Adler ed., 2016) [hereinafter Gora, *Business of Free Speech*].

[97] *See* Floyd Abrams, *Citizens United and Its Critics*, 120 YALE L.J. ONLINE 77 (Sept. 29, 2010), http://www.yalelawjournal.org/forum/citizens-united-and-its-critics; Michael W. McConnell, *Essay: Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 414 (2013); Sullivan, *supra* note 68, 143–44; Ira Glasser, *Understanding the Citizens United Ruling*, HUFFINGTON POST (Apr. 5, 2010), http://www.huffingtonpost.com/ira-glasser/understanding-the-emcitiz_b_447342.html; Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want*, 34 HARV. J.L. & PUB. POL'Y 639, 640 (2011); Martin H. Redish & Peter B. Siegal, *Constitutional Adjudication: Free Expression and the Fashionable Art of Corporation Bashing*, 91 TEX. L. REV. 1447, 1448 (2013); Bradley A. Smith, *Citizens United Gives Freedom of Speech Back to the People*, REUTERS: GREAT DEBATE (Jan. 16, 2015), http://blogs.reuters.com/great-debate/2015/01/16/citizens-united-gives-freedom-of-speech-back-to-the-people/.

[98] Multiple cases comprise the Roberts Court campaign finance canon. *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014); Ariz. Free Enter. Club's Freedom Political Action Comm. v. Bennett, 564 U.S. 721 (2011); Citizens United v. Fed. Election Comm'n; 558 U.S. 310 (2010); Davis v. Fed. Election Comm'n, 554 U.S. 724 (2009); Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007); Randall v. Sorrell, 548 U.S. 230 (2006).

[99] A deregulatory position espoused, at least until 2010, by the hardly conservative American Civil Liberties Union. *See* Floyd Abrams et al., *The ACLU Approves Limits on Speech*, WALL STREET J. (Apr. 30, 2010), http://www.wsj.com/articles/SB10001424052748704423504575212152820875486.

[100] *See Citizens United*, 558 U.S. at 319–20.

2004 entitled, *Fahrenheit 911*.[101] The Citizens United group wanted to promote and distribute its movie on cable, on demand, and in movie theaters.[102] However, because it was a corporation, albeit a nonprofit one, the federal campaign finance laws made doing so a federal crime.[103] Those laws prohibited any corporation and, for good measure, any labor union, from spending their funds for candidate-related advocacy.[104] So, here you had a law which made it a crime for a group to put out a movie criticizing a major candidate for the Presidency of the United States, in a country with a First Amendment which says that "Congress shall . . . make no law abridging the freedom of speech, or of the press."[105] One would think a case like that would have been almost a per se violation of that sacred commandment. But under the incredibly complex, often Byzantine campaign finance rules prior to *Citizens United*, that was not the case. The Roberts Court would fix that by applying settled principles going back a generation to hold that limiting the ability of individuals and groups to spend funds to express their views on government and the politicians who run it was a violation of the core principles of the First Amendment.[106]

a. Background

A little background is in order. The Court's campaign finance law has gone through three eras since the landmark 1976 ruling in

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[101] *See* Philip Rucker, *Citizens United used 'Hillary: The Movie,' to Take on McCain-Feingold*, WASH. POST (Jan. 22, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012103582.html.

[102] *Citizens United*, 558 U.S. at 320.

[103] *See id.* at 320–21 (discussing federal statute 2 U.S.C. § 441(b) and the Bipartisan Campaign Reform Act of 2002 which "prohibit corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections").

[104] *See id.*

[105] *See id.*; U.S. CONST. amend. I.

[106] *See Citizens United*, 558 U.S. at 318–19.

Buckley v. Valeo,[107] the Court's first encounter with the clash between campaign finance law restrictions and First Amendment rights. In that case the Court addressed the massive, post-Watergate restrictions on campaign funding contained in the new Federal Election Campaign Act ("FECA").[108] Under the FECA, almost every dollar spent on politics was subject to regulation, prohibition, limitation, and disclosure.[109] The Court fashioned a constitutional compromise which struck down limits on campaign speech and expenditures by candidates, parties, and independent groups as cutting too close to the core of free speech, but upheld limits on contributions made directly to candidates and campaigns because of their presumed potential for corruption.[110] For a quarter of a century the Court applied that basic divide to strike down laws which restricted expenditures, while being more deferential to laws limiting contributions.[111] But the Court consistently insisted that all such laws operated at the heart of the Constitution's core protections of political speech and association so vital to a vibrant democracy.[112]

Then, in a handful of cases from 2000 to 2003, the Court took a different tack, one which was far more deferential to campaign finance limitations, expanded the concept of the kind of undue

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[107] *See generally* Buckley v. Valeo, 424 U.S. 1 (1976) (holding that limits on campaign contributions are constitutional but that limits on expenditures violate the First Amendment).

[108] *See id.* at 6–7.

[109] *See id.* at 7.

[110] *Id.* at 58–59.

[111] *See, e.g.*, Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) (holding that there is a distinction between contributing to a political candidate and an organization that independently supports a political candidate); Fed. Election Comm'n v. Nat'l Right to Work Comm., 459 U.S. 197 (1982) (showing the history of the Court and its stance on contributions). *But see* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (holding that campaign expenditure limits on corporations are valid under the Constitution).

[112] See, for example, *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996), *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S 258 (1986), and *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), all striking down limits on independent political expenditures. *But see Mich. Chamber of Commerce*, 494 U.S. 652 (upholding limits on corporate independent political expenditures).

access and influence facilitated by campaign funding that could justify regulation, and relied on the expertise of elected politicians to decide what kinds of political funding might undermine representative democracy.[113] For many, however, that was tantamount to letting the fox guard the henhouse: deferring to incumbents to set campaign finance limitations for future campaigns where they may be challenged.[114] During this phase, the Court upheld extremely low limits on campaign contributions—which generally hurts challengers and helps incumbents[115]—and restrictions on the abilities of political parties to spend funds to help their candidates speak to voters;[116] affirmed bans on political contributions by nonprofit organizations, even ones free to make independent expenditures;[117] and, finally, recognized the power of Congress to expand its authority over all groups seeking to mobilize voters or inform the public about politicians and candidates.[118] That last decision, *McConnell v. Federal Election Commission,*[119] involved the well-known McCain-Feingold law, the Bipartisan Campaign Reform Act, which was an unprecedented federal effort to regulate the funding of political communication and was challenged by some of the top business, labor, and nonprofit organizations across the political spectrum in America, including the United States Chamber of Commerce, the American Federation of Labor, the National Rifle Association, and the ACLU, as well as the Republican National Committee and key state Democratic party

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[113] *See generally* Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885 (2004) (describing the Court's new deference to campaign finance regulations and legislative proposals in that area).

[114] *See* James V. DeLong, *Free Money: Campaign Finance "Loopholes" Are the Best Part of the System*, COMPETITIVE ENTERPRISE INST. (Aug. 1, 2000), https://cei.org/op-eds-and-articles/free-money-campaign-finance-loopholes-are-best-part-system-delong-article-reason.

[115] Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

[116] Fed. Elec. Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001).

[117] Fed. Elec. Comm'n v. Beaumont, 539 U.S. 146 (2003).

[118] McConnell v. Fed. Elec. Comm'n, 540 U.S. 93 (2003).

[119] *Id.*

groups.[120] Nonetheless, a five-four Court upheld most of these restrictions in a decision, rarely seen in a First Amendment case, where the Court deferred to legislators who had created sweeping restraints on speech and association in an area of embedded Congressional self-interest.[121]

b. Enter the Roberts Court

The emergence of the Roberts Court, in February 2006, dramatically changed the campaign finance as political speech landscape, especially the replacement of Justice Sandra Day O'Connor with Justice Samuel Alito, who would be much more skeptical of campaign finance controls' consistency with First Amendment principles.[122] As a result, the Court's campaign finance jurisprudence became much more First Amendment protective. In a string of six consecutive cases,[123] the Court restored the First Amendment to the primacy it deserves. First came a case striking down unconstitutionally low Vermont state contribution and expenditure limits, with the new Chief Justice, during oral argument, being openly skeptical of the government's talismanic incantation of "corruption" as a justification for the repressive financial restrictions on political speech and association.[124] In the next case, Chief Justice Roberts limited *McConnell's* impact by reasoning that only issue advocacy that was the "functional equivalent of express advocacy" could be limited when engaged in by corporations or unions.[125] That took a big bite out of the law and returned to

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[120] *See* McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176 (D.D.C 2003), *aff'd in part, rev'd in part on other grounds*, 540 U.S. 93 (2003).

[121] *McConnell*, 540 U.S. at 224. In a highly unusual procedure, the Court's principal opinion upholding most of the law was jointly authored by Justices John Paul Stevens and Sandra Day O'Connor. *Id.* at 113.

[122] See discussion of *Davis v. Federal Election Commission infra* notes 126–27 and accompanying text.

[123] *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008); Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007); Randall v. Sorrell, 548 U.S. 230 (2006).

[124] *Randall*, 548 U.S. 230.

[125] *Wis. Right to Life, Inc.*, 551 U.S. at 469–70.

constitutional principles enunciated in *Buckley*. A third case, which put another crimp in the Congressional effort to restrict electoral advocacy by limiting its funding, involved a cynical effort by Congress to manipulate contribution limits—raising them threefold—for any candidate who was facing a self-funded opponent, as a way to deter such campaigns.[126] As it turned out, the people who took advantage of this law most frequently were incumbents, seeking to use it against challengers who were spending their own funds—the least corrupting form of funding imaginable. In striking down this unusual mechanism, the Court made it clear that it would no longer defer to what a Congress full of incumbents said was needed to improve our politics.[127] For the Roberts Court, campaign finance reform did not mean reform of the other candidate's campaign finances.

c. The *Citizens United* Decision

This would all set the stage for the landmark *Citizens United* decision in 2010. As I indicated at the outset, the facts of the case seemed almost per se to cry out for First Amendment protection of an organization's speech criticizing a candidate for President of the United States and urging her defeat. And the Court did not disappoint First Amendment supporters. In order to afford that protection, the Court had to restore the full force of two cases: *Buckley* and *First National Bank of Boston v. Bellotti*,[128] which, together, had ruled that the First Amendment permitted no financial limitations—of either source or amount—on independent speakers voicing their views on political candidates and electoral issues.[129] Two later cases had departed from those principles in the case of corporations and labor unions—the *McConnell* case dealing with McCain-Feingold, and a Michigan state case, *Austin v. Michigan Chamber of Commerce*.[130] Those cases had seemed to suggest that the government could limit how much speech any person or group

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[126] *Davis*, 554 U.S. at 729–37.

[127] *See id.* at 738.

[128] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

[129] Buckley v. Valeo, 424 U.S. 1, 39–51 (1976); *Bellotti*, 435 U.S. at 784–91.

[130] Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

could have,[131] a principle fundamentally inconsistent with the First Amendment and democratic values. In *Citizens United,* the Court disagreed and declared that free speech is not the enemy of democracy; it is the engine of democracy.[132] And more funding of political speech was not the problem; it was the solution.[133]

Despite the popular misconception, the Court did not rule that corporations are people or that they have the same exact rights as people.[134] What the Court said is that the First Amendment bars government from telling any person or group they have had enough to say about government and politics.[135] And such a rule not only respected the innate rights of the speaker, but the correlative rights of the audience to hear what the speaker had to say and to get as much information as possible, from as many sources as possible, to ensure that democratic decision-making is as informed as possible. As the Court put it:

> By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.[136]

These themes not only reflect the libertarian cast to the Roberts Court's First Amendment jurisprudence, but also revive a theme from earlier Court eras that the First Amendment protects the right to hear and receive ideas, as well as the right to communicate them.[137]

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[131] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 114−32 (2003); *Austin*, 494 U.S. at 658−61.

[132] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336–41 (2010).

[133] *Id.* at 354–55.

[134] *See id.* at 343.

[135] *Id.* at 350–52.

[136] *Id.* at 340–41.

[137] *See* Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965).

Once these primary First Amendment principles of not limiting political speech were reaffirmed by the *Citizens United* Court, the application was quite straightforward. Independent political spending by corporations, nonprofits, and unions was protected by the core principles of the First Amendment, just as individual speech would be.[138] The fact that such spending was independent undermined any concerns that the speech would corrupt the politicians who were the beneficiary. It might give those groups and individuals greater access to or influence with the favored politicians, but the *Citizens United* Court clearly rejected that as the kind of corruption that should restrict speech and said, to the contrary, that such responsiveness was a hallmark of democracy, not a blight on it.[139] Finally, the Court observed, if government could prohibit corporations from speaking merely because they were corporations, nothing would limit application of this power to media corporations as well.[140] So guaranteeing a free press was as much a goal of the *Citizens United* Court as protecting free speech and association. Any concern with some groups having too much speech would best be addressed by the time-honored principle of more speech, not "silence coerced by law," and disclosure of the sources of such independent spending would enable the public to judge who was having how much influence on which politicians.

Speaking of disclosure, this is the one area where the Roberts Court has been, arguably, *less* protective than predecessor Courts. In *Citizens United*, the Court upheld the requirement that those who engage in the independent spending now freed from control had to engage in extensive disclosure about who they were and where the funding came from.[141] Indeed, upholding such broad disclosure was an important part of the Court's overall approach: "A campaign finance system that pairs corporate independent expenditures with

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[138] *Citizens United*, 558 U.S. at 364–65.

[139] *Id.* at 357–60. Recently, the Court unanimously expressed a similar concern in narrowly construing a public corruption bribery statute so that it could not criminalize normal routine interactions where political officials interact with and provide constituent services and other assistance to their supporters. *See* McDonnell v. United States, 136 S. Ct. 2355, 2372–74 (2016).

[140] *Citizens United*, 558 U.S. at 351–52.

[141] *Id.* at 366–71.

effective disclosure has not existed before today."[142] The problem is that routine disclosure of political support, especially for controversial candidates and causes, can cause substantial harassment and harm and thereby deter such support. Also, *Buckley* restricted the disclosure burdens and requirements to groups or individuals who engaged in "express advocacy" of the election or defeat of candidates, a very narrow range of operation which freed all of the issue advocacy groups in America to criticize the records of politicians without automatically having to disclose their members and supporters.[143] Unfortunately, the disclosure permitted by *Citizens United* seems broader than that permitted by *Buckley*, and the current Supreme Court has shown little interest in easing those burdens.[144]

Despite these important concerns, *Citizens United* remains a landmark of political freedom for its understanding that under the First Amendment the government should not decide whether we get to see *Hillary: The Movie*. We should decide whether to see it and what we think of it:

> Those choices and assessments are not for the government to make. "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to

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[142] *Id.* at 370. And in a similar case, the Court also turned aside challenges to disclosure of political support by individuals. Doe v. Reed, 561 U.S. 186, 202 (2010). But in another case, the Court described sympathetically the concerns for political anonymity—long valued under the First Amendment—by controversial groups that do not want to indiscriminately disclose their members and contributors or supporters. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014).

[143] Buckley v. Valeo, 424 U.S. 1, 39–45 (1976).

[144] *See* Del. Strong Families v. Attorney Gen. of Del., 793 F.3d 304 (3d Cir. 2015) *cert. denied sub nom* Del. Strong Families v. Denn, 136 S. Ct. 2376 (2016). Justice Thomas wrote a strong dissent from the denial of certiorari and rehearsed the burdensome problems controversial or small groups face complying with disclosure and how that effectively chills their speech, even just for putting out a Voter Guide. *Denn*, 136 S. Ct. 2376 (Thomas, J., dissenting) (denial of certiorari).

> the people, and the Government may not prescribe the means used to conduct it."[145]

The dissenters, in an opinion by Justice John Paul Stevens, complained bitterly that corporations, and presumably unions as well, should not be given the same First Amendment protection as individuals; that entities could engage in and support political speech in other ways, thus rebutting the claim of "vast censorship," that speaker identity was often a valid basis for restricting speech and that corporate wealth would be amassed to drown out the voices of the people, undermining both free speech and democracy.[146] In my view, the dissent's critiques of the ruling downplayed the fact that corporations—and unions—have been given First Amendment protection by the Court for decades; that the so-called "PAC option"—allowing corporations and unions to assist in the formation of political action committees that can raise funds from members and employees—is often far more burdensome and restrictive than using organizational funds to sponsor a political message, especially where labor unions and small entities are concerned; and that instances where speech has been restricted because of the speaker's identity tended to involve special circumstances like military members, government employees, and school students. Finally, in light of the strict scrutiny mandated by the First Amendment,[147] the feared harms of undue access and influence flowing from spending money seemed ephemeral and exaggerated as a basis for imposing the vast censorship of corporate and union political speech commanded by the statute.

The reaction against the ruling was almost instantaneous and included an unprecedented attack on the Court by President Barack Obama during his State of the Union address a few days later.[148] The opinion has become a lightning rod for so many of the complaints about our campaign finance system, whether or not they result from

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[145] *Citizens United*, 558 U.S. at 372 (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 341 (2003)).

[146] *Id.* at 393–96 (Stevens, J., dissenting).

[147] *Id.* at 340.

[148] *See* Barack Obama, President of the United States, Remarks at State of the Union Address (Jan. 27, 2010) (transcript available at http://www.npr.org/2011/01/26/133224933/transcript-obamas-state-of-union-address); Liptak, *Supreme Court Gets Rare Rebuke*, *supra* note 95.

the Court's decision.[149] Indeed, there has been a widespread call for a constitutional amendment to overturn the ruling, a call endorsed by one of our two major parties, even though we have never in our history amended the constitution to repeal First Amendment rights.[150] One thing is clear: the predicted tsunami of corporate political spending overwhelming our democracy never materialized. As the *New York Times*, one of the rulings' harshest and most persistent critics, was forced to admit three years after the decision: "virtually no public corporations have spent their own money directly in political campaigns, a practice now permitted under the Supreme Court's Citizens United decision."[151] Nor has corporate spending on political campaigns increased significantly since then.[152]

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[149] *See generally* HASEN, *supra* note 26 (observing that the decision is only a reflection of the larger concerns of political inequality which flow from our largely unregulated campaign finance system); Abrams, *supra* note 97 (showing that the ruling was squarely in the First Amendment mainstream of the strongest protection for political speech and wrongly criticized as some kind of radical, plutocratic departure); Gora, *United*, *supra* note 11 (defending the decision against the various myths that had been swirling around its reasoning and its impact).

[150] The Democratic Party presidential nominee, Hillary Clinton, pledged that within thirty days of being elected President, she would make a proposal for a constitutional amendment to overturn *Citizens United*: "'Today, I'm announcing that in my first 30 days as President, I will propose a constitutional amendment to overturn *Citizens United* and give the American people—all of us—the chance to reclaim our democracy,' Mrs. Clinton said in a taped speech to the Netroots Nation conference of progressives." Editorial, *Clinton to Madison: Get Me Rewrite*, WALL STREET J. (July 19, 2016), http://www.wsj.com/articles/clinton-to-madison-get-me-rewrite-1468969367. The Democratic Party Platform was in accord. *See The 2016 Democratic Party Platform*, *supra* note 95. Needless to say, Secretary Clinton did not have that opportunity.

[151] Nicholas Confessore, *S.E.C. is Asked to Require Disclosure of Donations*, N.Y. TIMES (Apr. 24, 2013), http://www.nytimes.com/2013/04/24/us/politics/sec-is-asked-to-make-companies-disclose-donations.html.

[152] *See* BRADLEY SMITH, CHAIRMAN, FED. ELECTION COMM'N, & DAVID KEATING, PRESIDENT, CTR. FOR COMPETITIVE POLITICS, STATEMENT ON THE "CORPORATE POLITICAL SPENDING AND FOREIGN INFLUENCE" FORUM (transcript available at http://www.campaignfreedom.org/wp-content/uploads/2016/06/2016-06-23_Smith-Keating-Statement_FEC_-Weintraub-Corporate-Political-Spending-And-Foreign-Influence-Forum.pdf). For a detailed analysis of the *Citizens United* decision, see Gora, *Business of Free Speech*, *supra* note 96.

d. The Final Chapter

But *Citizens United*, as important and notorious a decision as it is, has not been the end of the Roberts Court campaign finance story. Though the ruling might seem a hard act to follow, the Roberts Court decided two other very significant cases finding that campaign finance controls were in violation of First Amendment principles.

One case was the Court's first consideration of public financing of campaigns since the *Buckley* court upheld the concept.[153] In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[154] the Court dealt with a new wrinkle whereby whenever a privately funded candidate spent more than a publicly supported one, the latter would be given additional money by the government to fight back.[155] Though justified as simply providing "more speech," the Roberts Court rejected the analogy and said, on the contrary, the purpose and effect of the scheme was to burden and deter people and independent groups from using their own funds to speak about politics and elections, especially since using your own funds for your campaign, or using funds for independent speech were the least likely funding methods to involve corruption.[156] Since corruption was not being prevented, the only rationale left for the scheme was an illicit effort to "level the playing field" by reducing the amount of money spent on politics, in violation of the clear *Buckley* principle that:

> the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic courses,' and '"to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[157]

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[153] *See* Buckley v. Valeo, 424 U.S. 1, 85–108 (1976).

[154] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011).

[155] *Id.* at 727–32.

[156] *Id.* at 751–52.

[157] *Buckley*, 424 U.S. at 48–49.

One alarming feature of the case was Justice Elena Kagan's opinion for the four liberal dissenters which seemed to suggest that private financing of politics was itself inherently corrupting and that public funding served the compelling interest of discouraging private financing.[158] Had a Democratic nominee been appointed to the Scalia vacancy, that theme might have soon commanded majority adherence, in my view a chilling prospect for the First Amendment.

The other significant campaign finance decision which expanded the scope of individual First Amendment freedom to financially support political candidates is *McCutcheon v. Federal Election Commission.*[159] The case revisited an issue which *Buckley* had decided, though in a quite perfunctory manner, namely, whether it was proper for the government to set an *aggregate contribution* limit on the overall amount that one person could contribute to multiple candidates and committees.[160] The overall limit was claimed both to prevent corruption and, in effect, as a backdoor effort to level the playing field and keep any one person from having too much political influence through multiple contributions, even though each one would be within proper limits.[161]

The Court, in an opinion by Chief Justice Roberts, methodically dismantled that rationale. First, he went out of his way to say that giving financial support to a candidate or cause that you believe in was as valid and valued a method of exercising your First Amendment free speech rights as handing out leaflets on a street corner or speaking on a soapbox.[162] Next, he showed how the law already had a number of filters and barriers to prevent the funds,

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[158] *See Bennett*, 564 U.S. at 775–77 (Kagan, J., dissenting). *See generally* Joel M. Gora, *Don't Feed the Alligators: Government Funding of Political Speech and the Unyielding Vigilance of the First Amendment*, 2011 CATO SUP. CT. REV. 81 (elaborating on Justice Kagan's characterization of private financing in her dissent).

[159] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014).

[160] *See id.* at 1442–45; *Buckley*, 424 U.S. at 37–42.

[161] *McCutcheon*, 134 S. Ct. at 1441–42. In *Buckley*, the statutory base contribution limit was $1,000 per person/per candidate. *Buckley*, 424 U.S. at 26–29. By the time of the *McCutcheon* case, it had been indexed for inflation and was $2,600. *McCutcheon*, 134 S. Ct. at 1442.

[162] *McCutcheon*, 134 S. Ct. at 1448.

which would be contributed to myriad different sources, from being used for the benefit of any one candidate, and thus circumvent individual contribution limits.[163] As a result, the restriction interfered with freedom for no valid purpose—since limits on contributions to particular candidates were still in place—and was struck down. The case did, however, provide for a jurisprudential debate with dissenting Justice Stephen Breyer who insisted that there were First Amendment values on both sides to be balanced, including the idea that government action should reflect popular opinion to ensure that "collective speech *matters"* and is not overridden by lopsided campaign funding representing only special interest or minority points of view.[164]

The final Roberts Court campaign finance case to date was the first one to *reject* a First Amendment challenge to a campaign finance restriction.[165] In a five-four decision, with Chief Justice Roberts again writing the opinion, the Court ruled that candidates for election to *judicial* offices could be prohibited from directly soliciting campaign contributions either in person or through mail appeals.[166] Rejecting the free speech arguments of groups like the ACLU, the majority concluded that the integrity of the judiciary and, particularly the appearance thereof, would be inherently compromised if judicial candidates could solicit campaign funds from lawyers appearing before them or litigants having cases in their courts.[167] Despite the obvious response from the dissenters that such concerns could be addressed in far more focused ways,[168] less restrictive of speech and associational rights than a total ban on solicitation, the majority felt the rule served a compelling interest in an appropriately direct way. Perhaps the case was special because it involved judicial elections, as the Court had suggested before, though with the Chief Justice in dissent.[169] Or perhaps a certain battle fatigue had set in after the years of constant onslaught over the *Citizens United* ruling.

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[163] *Id.* at 1452–56.

[164] *Id.* at 1466–67 (Breyer, J., dissenting).

[165] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1665–66 (2015).

[166] *Id.* at 1660–61, 1670–71.

[167] *Id.* at 1666–69.

[168] *Id.* at 1678–81 (Scalia, J., dissenting).

[169] *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 887 (2009).

So, the most recent case in the Roberts Court campaign finance canon produced a surprising outcome. But the Court's overall insistence that it is the people and not the government who have the right to decide how much political speech they want or need has been a critical chapter in the protection of First Amendment rights and one, hopefully, that will be further enhanced with time.

3. More Space for Speech/Less Room for Regulation

Many of the cases and themes analyzed above, and certainly the campaign finance cases, and the cases refusing to recognize new non-speech categories involve efforts to increase the area of individual and group choice about speech and decrease the area of permissible government regulation. More space for speech, so to speak.

That theme can be seen in a number of other seemingly disparate areas and doctrines which are united by the common concern with maximizing private speech and religious choices and minimizing government intervention in those choices.

a. Free speech

In 1976, the Burger Court handed down the *Virginia Pharmacy Board* case[170] giving very strong protection to commercial speech to serve the interests of both the speaker and the audience.[171] Perhaps stung by a criticism that the Court was using the First Amendment to overprotect business, and risking a return to the much-criticized, so-called *Lochner* era,[172] the Court thereafter retreated to a

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[170] Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

[171] *Id.* at 765.

[172] Lochner v. New York, 198 U.S. 45, 57–58 (1905). The "*Lochner* era" refers to the time when the Court employed the doctrine that government interference with contractual and business relationships are deprivations of "liberty" which need strong justification. *See* Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 U.N.C.L. 1 (1991). The Court abandoned this approach by the 1930's, and substituted broad judicial deference to legislative choices on such matters. *See, e.g.*, W. Coast Hotel v. Parrish, 300 U.S. 379, 393 (1937). For a defense of *Lochner*, see DAVID E.

balancing formula which gave frequent but less certain protection to such commercial speech.[173] As part of its efforts to deregulate speech, the Roberts Court seemed to return to the more rigorous scrutiny of commercial speech restrictions in a 2011 case involving limits on the ability of pharmaceutical companies to gather and use publicly available information in order to target doctors for prescription drug sales.[174] The Court found the law triply violative of the First Amendment:[175] it was defectively content-based in only applying to information used for marketing, but not other purposes; it was prohibitedly speaker-based in that it only applied to speakers using the information for the prohibited purpose; and, as if that were not enough, it was viewpoint-based in banning the use of the information only to advocate the point of view that branded drugs were better than generic drugs. Though formally applying the less rigorous *Central Hudson* test,[176] the Court's evaluation of the restriction was decidedly more hostile to censorship by government:

> The State seeks to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers – that is, by diminishing detailer's ability to influence prescription decisions. Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the "fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech. The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left

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BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 125–27 (2011).

[173] *See* Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

[174] Sorrell v. IMS Health, Inc., 564 U.S. 552, 565 (2011).

[175] *Id.* at 563–66.

[176] *Cent. Hudson Gas*, 447 U.S. at 566. The so-called "Central Hudson four-part test" was framed as follows: "For commercial speech to [get First Amendment protection] it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*

> unburdened those speakers whose messages are in accord with its own views. This the State cannot do.[177]

The result? More free speech and less regulated speech.

Putting barriers around government efforts to control speech was also evident in *Agency for International Development v. Open Society International*,[178] a case involving the federal government's efforts to compel speech of groups receiving federal funds for international AIDS-prevention work.[179] The groups could not use public funds to advocate prostitution—a limitation on the use of the money that all concede was a valid condition on and limitation of the scope of the funded program—but the statute also compelled the group, in order to obtain the funding, to adopt a policy specifically opposing prostitution.[180] The Court ruled that the compelled affirmation exceeded the scope of the program, violated the First Amendment, and could not be sustained.[181] The government could tell the group what to say or do with the government's funds, but could not with their own private funds, and could not compel them to pledge allegiance to the government's ideological message.[182] The Court's reasoning was very instructive and reflective of the pervasive theme of more space for speech:

> It is, however, a basic First Amendment principle that "freedom of speech prohibits the government from telling people what they must say." At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas

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[177] *Sorrell*, 564 U.S. at 577–80 (quoting Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002)).

[178] Agency for Int'l Dev. v. Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2328 (2013).

[179] *Id.* at 2324–25.

[180] The restriction was contained in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. §§ 7601–7682 (2016).

[181] *Open Soc'y Int'l, Inc.*, 133 S. Ct. at 2732.

[182] *Id.* at 2327–28.

> and beliefs deserving of expression, consideration, and adherence."[183]
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> [T]he Policy . . . requires [the group] to pledge allegiance to the Government's policy of eradicating prostitution. As to that, we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[184]

Agency for International Development was an important victory to limit the First Amendment strings that can be attached to the grant of federal funds or subsidies, a victory that liberals had long sought and conservatives might disapprove but neutrally applying principles beneficial to speakers across the political spectrum.

Another area where the Roberts Court applied strong First Amendment protections to guard against government-compelled speech involved whether non-members of public employee unions who benefit from collective bargaining of salaries, benefits, and working conditions can be compelled to financially support those union's activities, even though the non-members disagree and disapprove.[185] Going back to the 1977 case, *Abood v. Detroit Board of Education*, the accommodation had been that the dissenters could be made to subsidize the job-related work of the unions, but not the political advocacy.[186] But the Roberts Court had gradually removed many of the requirements of unwilling support, thereby enlarging the sphere of First Amendment freedom from being compelled to subsidize speech with which one disagrees. In one case, the Court held that a state could require public sector unions to get the affirmative consent of non-members before using their fees for

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[183] *Id.* at 2327 (citations omitted) (quoting Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 61 (2006); Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 641 (1994)).

[184] *Id.* at 2331 (citations omitted) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

[185] *See* discussion *supra* Section I.B.2.

[186] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234, 237 (1977).

election-related purposes.[187] Then a year later, the Court held that the First Amendment requires an opt-in rule whereby the non-members' affirmative consent must be obtained to spend their money on political purposes.[188] Two years after that, the Court refused to extend *Abood* to cover home health care workers, invoking "the bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."[189]

The final logical step—holding that the First Amendment bars using non-members fees even for collective bargaining activities—would probably have been taken this year if Justice Scalia had not died. In *Friedrichs v. California Teachers Association*,[190] non-union members claimed that they were philosophically opposed to collective bargaining by public sector unions because of the endemic political conflicts of interest inherent in the situation and that the First Amendment prevented them from having to support such activity. Based on the oral argument in January 2016, the Court seemed poised to agree with them and overturn *Abood* which permitted such use of non-members fees.[191] But, with Justice Scalia gone, the Court split, and the lower court ruling against the First Amendment claimants was affirmed by an equally divided Court.[192] That effectively suspended the Roberts Court's First Amendment efforts in this area to enlarge the area of individual employees' control over being compelled to speak or not speak, reduce the government's sovereignty, and thus give more breathing space for speech and less room for regulation.

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[187] Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 191 (2007).

[188] Knox v. Serv. Emps. Int'l Union, 132 S. Ct. 2277, 2295–96 (2012).

[189] Harris v. Quinn, 134 S. Ct. 2618, 2644 (2014).

[190] Friedrichs v. Cal. Teachers Ass'n, No. SACV 13-676-JLS (CWx), 2013 WL 9825479, at *1–2 (C.D.Cal. Dec. 5, 2013), *aff'd*, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *aff'd*, 136 S. Ct. 1083 (2016).

[191] *See* Adam Liptak, *Supreme Court Seems Poised to Deal Unions a Major Setback*, N.Y. TIMES (Jan. 11, 2016), http://www.nytimes.com/2016/01/12/us/politics/at-supreme-court-public-unions-face-possible-major-setback.html?_r=0.

[192] *See* Adam Liptak, *Victory for Unions as Supreme Court, Scalia Gone, Ties 4-4*, N.Y. TIMES (Mar. 29, 2016), http://www.nytimes.com/2016/03/30/us/politics/friedrichs-v-california-teachers-association-union-fees-supreme-court-ruling.html.

b. Religious Freedom

Perhaps not surprisingly, the Roberts Court manifested a similar pattern in First Amendment freedom of religion cases; in both honoring Free Exercise Clause claims that government should accommodate religious conscience, and rejecting Establishment Clause objections that the government should not be supporting religious activity, the Court expanded the range of personal choice over religious expression and reduced the area of government mandate.

The Roberts Court has been generous in protecting religious conscience in Free Exercise cases, as it has protected personal expression in its free speech cases, whether applying the First Amendment's Free Exercise clause or the statutory protections of the Religious Freedom Restoration Act or Religious Land Use and Institutionalized Persons Act. For example, in *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission*,[193] the Court recognized a "ministerial exception" grounded in the religion clauses of the First Amendment and unanimously ruled that it would violate *both* the Establishment Clause and the Free Exercise Clause for the government to apply federal antidiscrimination laws to intrude on a church's decision to fire a minister.[194] The effect is more freedom for religious choices from government interference. The Court has also applied statutory protections to allow a prison inmate to wear a beard required for religious observance despite claimed security concerns[195] and a clothing store employee to wear a religious headscarf.[196] Finally, in the well-known "Hobby Lobby" case, the Roberts Court upheld the statutory rights of a closely held corporation, run strictly along religious doctrinal lines, to resist providing contraceptive coverage

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[193] Hosanna-Tabor Evangelical Lutheran Church v. Equal Emp't Opportunity Comm'n, 565 U.S. 171 (2012).

[194] *Id.* at 188.

[195] Holt v. Hobbs, 135 S. Ct. 853, 859, 866–67 (2015).

[196] Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032–34 (2015).

for its employees under Obamacare because of its owners' religious scruples.[197]

Interestingly, in two sharply divided Establishment Clause cases, in rejecting or deflecting the objections to religious actions by government, the Roberts Court majority emphasized that a contrary result would have invited intrusive government censorship and judicial review of speech occurring under government auspices.[198] For example, a claimed violation of the Establishment Clause caused by the White House having an Office of Faith-Based and Community Initiatives was turned aside partly on the ground that there should not be censorship of religious themes in Presidential speeches or actions.[199] Likewise, one of the reasons cited for allowing prayers to start meetings of local government bodies, despite Establishment Clause objections, was to avoid censorship of the precise language that would be used at such meetings.[200]

Despite the fact that the Roberts Court has given religious speech, beliefs, and conduct wide latitude and immunity from governmental controls, there are storm clouds on that particular First Amendment horizon as well. The Court's decision in *Christian Legal Society v. Martinez,*[201] denying a Christian student law school group official status because it required its members to commit to pre-marital abstinence, was claimed, by the dissenters, to have improperly discriminated against students because of their fundamental Christian beliefs.[202] Likewise, in *Obergefell v. Hodges*, the Court's recent landmark same sex marriage case, the majority noted that some would have religious objections to recognizing such marriages, but then said that such objectors were free to voice their contrary opinions, without also suggesting that they might have any constitutional immunity from having to participate in celebration of same sex marriages, an additional concern noted by the

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[197] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760, 2766, 2782 (2014).

[198] *See* Hein v. Freedom from Religion Found., 551 U.S. 587, 611–12 (2007); Town of Greece v. Galloway, 134 S. Ct. 1811, 1822 (2014).

[199] *See Hein*, 551 U.S. at 611–12.

[200] *Galloway*, 134 S. Ct. 1822.

[201] Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010).

[202] *Id.* at 708–10 (Alito, J., dissenting).

dissenters.[203] Indeed, in a recent "Hobby Lobby"-type case, where a religious order claimed religious objection to providing health care contraceptive services, the Court was unable to reach a decision on the merits and remanded the case urging the parties to negotiate a compromise if possible.[204] Clearly, Justice Scalia's replacement will play a pivotal role in the disposition of these cases which pit religious conscience against anti-discrimination laws.

This all raises the question of whether there is no longer a majority for strong protection of conscientious objection by fundamentalist Christians from civic obligations. Ironically, in an earlier era, when the conscientious objection came from Quakers, Jehovah's Witnesses, Seventh Day Adventists and others, or resulted from opposition to the War in Vietnam, it met a more favorable response in the liberal Warren Court.[205] The strongest decision in that era protecting conscientious objectors against complying with otherwise valid and neutral civic requirements—a case involving a Seventh Day Adventist who was denied

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[203] Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08, 2625 (2015) (Roberts, C.J., dissenting). Indeed, the Court has turned aside appeals from those claiming that their fundamentalist religious beliefs should immunize them from being compelled by public access anti-discrimination laws to provide personal services to help celebrate same sex ceremonies. *See* Elane Photography v. Willock, 309 P.3d 54 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). More recently, in dissenting from the denial of review in a case where pharmacists unsuccessfully raised religious conscience claims against having to fill prescriptions for contraceptives or abortion medication, Justice Alito raised similar concerns: "This case is an ominous sign . . . . If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern." Stormans, Inc. v. Wiesman, 136 S. Ct. 2433 (2016) (Alito, J., dissenting) (denial of cert.).

[204] Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016).

[205] *See* Clay v. United States, 403 U.S. 698 (1971); United States v. Seeger, 380 U.S. 163 (1965) (reversing draft board's rejection of applications for conscientious objector classification on religious grounds); *see also* Sherbert v. Verner, 374 U.S. 398 (1963) (finding denial of unemployment benefits to employee on grounds of her refusal to accept employment forcing her to work on the Sabbath was unconstitutional); *Left, Right*, RELIGIOUS LIBERTY LS.: ECONOMIST (July 9, 2016), http://www.economist.com/news/united-states/21701802-thirty-years-ago-progressives-embraced-religious-exemptions-no-longer-left-right (explaining how "religious accommodation was a liberal tenet" in the Warren court).

unemployment benefits because her religion prevented her from working on the Sabbath—was written by liberal Justice William Brennen in *Sherbert v. Verner*.[206] Now, liberal groups who championed religious freedom in the past suggest it must be balanced against competing interests like gay rights, and the Court seems inclined to agree. The result, it seems, may be less, not more, protection for religious free exercise.

4. Content Neutrality

Another speech-protective theme strongly sounded by the Roberts Court is the presumptive invalidity of content-based regulations of speech. Fueled by anticensorship instincts, the content neutrality doctrine seeks to prevent the government from exercising control or favoring speech based on its content, unless the content brings it within one of the very few "non-speech" categories, or, failing that, if the government can satisfy the demands of strict scrutiny for the content-based rule.

The rule against content discrimination has long been a staple of First Amendment jurisprudence. A generation ago, in a case where Chicago forbid picketing near a school except when related to labor disputes, the Court unanimously ruled, in an opinion by Justice Thurgood Marshall, that such a content-based distinction was anathema to the First Amendment:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the

[206] *Sherbert*, 374 U.S. at 399.

> principle that debate on public issues should be uninhibited, robust, and wide-open."[207]

A generation later, the Roberts Court would employ this principle in numerous different free speech settings to minimize government censorship and maximize individual choice.[208] Most recently it did so to invalidate a local Arizona town ordinance that restricted the public display of various signs, but contained numerous content-based exemptions and exceptions which discriminated against a small church group whose temporary meeting signs did not qualify for one of the exceptions.[209] The Court, in an opinion by Justice Clarence Thomas, ruled that the ordinance, which on its face made the differential treatment turn on the signs' content, was a clear violation of the rule against content-based controls of speech unless they can be justified under strict scrutiny, which this one could not.[210] The important speech-protective aspect of the ruling was the Court's insistence that, even if the government did not have a censorial or malicious motive for the restriction, so long as it was content-based on its face, it would be treated as such:

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated

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[207] Police Dep't of Chi. v. Mosely, 408 U.S. 92, 95–96 (1972) (citations omitted) (citing Cohen v. California, 403 U.S. 15, 24 (1971); Street v. New York, 394 U.S. 576 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964) and cases cited; NAACP v. Button, 371 U.S. 415, 445 (1963); Wood v. Georgia, 370 U.S. 375, 388–89 (1962); Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353 (1937)).

[208] *See, e.g.*, United States v. Stevens, 559 U.S. 460 (2010) (holding that a federal statute which criminalized the commercial creation, sale, or possession of depictions of animal cruelty was a content-based regulation of expression and thus implicated the First Amendment); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that a federal statute which barred independent corporate expenditures for electioneering communications violated First Amendment principles of free speech); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011) (holding that video games qualify for First Amendment protection as content-based expression).

[209] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2232 (2015).

[210] *Id.* at 2231–32.

> speech. We have thus made clear that "'[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.[211]
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> The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the "abridg[ement] of speech"—rather than merely the motives of those who enacted them. "The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes."[212]

In another case, though the Court divided sharply over whether restrictions on sidewalk counseling near abortion clinics should be judged as content-based, the Court unanimously struck the law down as not being narrowly tailored to serve a significant

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[211] *Id.* at 2228 (citations omitted) (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991); Turner Broadcasting System, Inc. v. Fed. Commn'cs Comm'n, 512 U.S. 622, 642 (1994)). And once again a very speech protective Roberts Court ruling was criticized by legal scholars as giving too much protection to speech. *See* Adam Liptak, *Side Bar: Court's Free Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html?_r=0 (quoting the Yale Law School Dean, a prominent free speech scholar, as troubled by the Court's overprotection of speech at the expense of government interests).

[212] *Id.* at 2229 (quoting Hill v. Colorado, 530 U.S. 703, 743 (Scalia, J., dissenting)).

governmental interest.[213] The abortion protestors fared better than anti-war dissenters of an earlier generation convicted for burning their draft cards, under a law which on its face was content-neutral, and which the Court concluded was unrelated to the suppression of free expression, even though it was widely known that Congress adopted the law to suppress anti-war protests.[214] In that case, not a single Justice on the liberal Warren Court found a First Amendment violation.[215] The Roberts Court did somewhat better than that.

Content-based rules are not automatically invalid; on unusual occasions, they have been sustained even though the Court purported to apply strict scrutiny.[216] The Roberts Court has twice upheld such laws, even though it applied strict scrutiny.[217] But for the most part, in the Roberts Court, strict scrutiny was usually fatal scrutiny.

5. Speaker Equality

One other critical hallmark of the Roberts Court's First Amendment jurisprudence is that the protections should be equally available to all speakers; no privileged speakers, pariah speakers, second class speakers, and no First Amendment caste system. This theme has been especially evident in the campaign finance cases, most notably in *Citizens United* where the Court swept aside and dismantled the previous distinctions in the law as to which groups could use their funds to speak on electoral politics and which could not. It replaced a patchwork system where the ability to speak was contingent on several variables having to do with the speech—the speaker, the medium, and the timing—with a universal rule: free speech for all individuals and groups where campaign finance

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[213] McCullen v. Coakley, 134 S. Ct. 2518, 2539 (2014).

[214] *See* United States v. O'Brien, 391 U.S. 367, 381–83 (1968); FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS 138–39 (Richard A. Parker ed., 2003).

[215] No Justice found a First Amendment violation, and the lone dissenter, Justice Douglas, only focused on whether the war was unconstitutional for not having been declared by Congress, not on any free speech defect in the statute. *O'Brien*, 391 U.S. at 389–90 (Douglas, J., dissenting).

[216] *See, e.g.*, Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1672 (2015) (exemplifying the Court holding that a law survives the strict scrutiny test).

[217] *See* cases cited *infra* notes 243–44, 258–60 and accompanying text.

restrictions were involved.[218] The Court envisioned a rule with no content- or speaker-based restrictions, at least certainly without the most persuasive justifications:

> the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.[219]

Chief Justice Roberts went out of his way to sound the same theme—that *all* speakers are equal under the First Amendment and entitled to equal respect for their different ways of speaking—in *McCutcheon*, striking down aggregate limits on contributions to federal candidates and committees.[220] As he stated:

> There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign. This case is about the last of those options . . . . Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral

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[218] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336–42, 370–71 (2010).

[219] *Id.* at 340–41. The libertarian individual themes in the case seem very similar to those sounded in Justice Anthony Kennedy's decision in the gay rights case of *Lawrence v. Texas*, 539 U.S. 558 (2003), upholding the right of consenting adults to choose to engage in same sex relationships, as a matter of personal, individual right and choice.

[220] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1448 (2014).

> protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.[221]

He also sounded a similar theme that the individual, not the government, gets to decide the medium for his or her political speech and association:

> Those First Amendment rights are important regardless whether the individual is, on the one hand, a "lone pamphleteer[] or street corner orator[] in the Tom Paine mold," or is, on the other, someone who spends "substantial amounts of money in order to communicate [his] political ideas through sophisticated" means. Either way, he is participating in an electoral debate that we have recognized is "integral to the operation of the system of government established by our Constitution."[222]

The Roberts Court showed a similar solicitude for the modern-day version of the lone pamphleteer in *McCullen v. Coakley*, a case concerning pro-life protestors. Chief Justice Robert's opinion extolled the speakers' methodology in the most respectful terms, contrasting the "sidewalk counselors" to more strident anti-abortion protestors:

> McCullen and the other petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges. Such interactions, petitioners believe, are a much more effective means of dissuading women from having abortions than confrontational methods such as shouting or brandishing signs, which in petitioners' view tend only to antagonize their intended audience. In unrefuted testimony,

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[221] *Id.* at 1440–41.

[222] *Id.* at 1448 (alteration in original) (quoting Cohen v. California, 403, U.S. 15, 24 (1971); Buckley v. Valeo, 424 U.S. 1, 14, 21–22 (1976); Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 493 (1985)).

> petitioners say they have collectively persuaded hundreds of women to forgo abortions.[223]

With this sensitive and laudatory description of the kind of speech in which the challengers engage, there is little wonder the Court concluded that the government creation of zones around abortion clinics in which such conversations cannot be had "compromise[d] petitioner's ability to initiate the close, personal conversations that they view as essential to "sidewalk counseling," and did so without proper justification.[224]

So, to the Roberts Court, the lonely pamphleteer, the soap-box orator, the itinerant church group, the Citizens United supporter, the well-heeled campaign contributor and the sidewalk counselor have equal status and are entitled to equal respect under the First Amendment. All are accorded the maximum First Amendment protection and respect because protecting their speech serves the multiple purposes of the First Amendment: maximizing the right of the individual and group to speak; minimizing the government's ability to censor and control that speech; and guaranteeing the public as much information as possible for self-governance and self-fulfillment.

6. On Balance, No Balancing

One final hallmark of the Roberts Court First Amendment work is the resistance to engage in a balancing of free speech rights against governmental interests in an *ad hoc*, case by case fashion.[225]

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[223] McCullen v. Coakley, 134 S. Ct. 2518, 2527 (2014).

[224] *Id.* at 2535; *see also* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014) (holding, unanimously, that an anti-abortion group had standing to challenge a law potentially regulating their speech about elected officials and expressing a sympathetic description of the burdens the existence of such a law and its possible administrative enforcement could have on the speech of local organizations like that).

[225] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (striking down federal statute which made it a crime to falsely claim military honors and refusing to balance the value of the speech against the government's concerns); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 (2011) (invalidating restrictions on sale of violent video games to minors and declining to create new non-speech category for low value speech); United States v. Stevens, 559 U.S. 460, 470 (2010) (same for statute prohibiting depictions of animal cruelty).

This theme appeared most strongly in the cases where the Court refused to engage in a balancing process that would result in creating new non-speech categories on the basis that some speech was so worthless that it could be banned in a plenary fashion.[226] The well-known case of *Chaplinsky v. New Hampshire*[227] had suggested that this was precisely why some forms of speech "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[228] But when pressed to make that evaluation in the context of animal cruelty depictions, or violent video games, or lying about military honors, the majority reacted sharply against such ad hoc balancing as being "startling and dangerous."[229] The same preference for relative certainty of rules was evident in the insistence that any content-based laws should be treated as presumptively invalid, regardless of censorial intent or perhaps even some common sense content-based justification in certain circumstances. Indeed, as one scholar has observed in a related context:

> Judged in any number of ways, *Citizens United* appears to be the most countermajoritarian act of the Court in many decades. Indeed, Citizens United is perhaps the most visible such act on an issue of high public salience since the Court's brief encounter with the symbolic issue of flag-burning in the late 1980s, or the Court's more substantive engagement with the death-penalty in its decisions of the 1970s.[230]

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[226] *See, e.g.*, *Stevens*, 559 U.S. at 470 (ruling that the "First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits"); *Brown*, 564 U.S. at 792–93 (affirming that a legislature may not revise the judgment of the American people, that the benefits of the First Amendment restrictions on the Government outweighs the costs and ruling that *Stevens* controls the case in question and new categorical balancing tests will not be created); *Alvarez*, 132 S. Ct. at 2544 (refusing to conduct a free floating balancing test based on an ad hoc balancing of relative social costs-and-benefits).

[227] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[228] *Id.* at 572.

[229] *Stevens*, 559 U.S. at 470.

[230] Richard H. Pildes, *Is the Supreme Court a "Majoritarian Institution?"*, 2010 SUP. CT. REV. 103, 105–06 (2010).

The assertion, in effect, that the Roberts Court has been too rigid and categorical in its protection of free speech has been part of the appeal to take a more evenly balanced approach to free speech issues. A leading voice on the Court for this approach has been Justice Stephen Breyer, the author of *Active Liberty*, a book defending the concept that the Court's job is to balance competing government and speaker interests and weigh all of the variables on a case-by-case basis, rather than through broader categorical doctrinal imperatives.[231] In some instances, the balance will require a careful, sometimes unpredictable, weighing and measuring of the government's interests against the speakers.[232] In others, it will require recognizing that there are often other constitutional and social values of equal importance poised on the scales against free speech. That was his theory in *McCutcheon* where his dissent maintained that excessive campaign spending could mean that the true opinions of a majority of the community were not being enacted and were being thwarted because of the influence of money on the political process: "the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*."[233] The political process corruption that results, Breyer argues, undermines the First Amendment by thwarting the majority will.[234] But, as Chief Justice Roberts responded, the "collective speech" referred to is basically the will of the majority, and the whole point of the First Amendment is to restrain and protect against majority laws which stifle individual and minority speech.[235]

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[231] *See* STEPHEN BREYER, ACTIVE LIBERTY 24 (2005).

[232] *See Brown*, 564 U.S. 786, 847-57 (2011) (Breyer, J., dissenting); *see also* Randall v. Sorrell, 548 U.S. 238, 278–79 (2006) (showing how the plurality compares governmental interests against interests of the speakers).

[233] McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) (emphasis in original).

[234] *Id.* at 1467–68 (Breyer, J., dissenting).

[235] Chief Justice Roberts responded as follows:

> But there are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good. First, the dissent's 'collective speech' reflected in laws is of course the will of the majority, and plainly can include laws that restrict free speech. The whole point of the First Amendment is to afford individuals protection

Moreover, the "collective" interest of the majority is always taken account of when the Court seeks to determine if the law serves any compelling interest sufficient to override free speech.[236] As has always been the case, however, the more one relies on balancing, the more one relies on the balancer and his or her five factors —to resolve the case. And while the "absolutism" associated with Justice Hugo L. Black or many of the Roberts Court's decisions cannot give certainty of outcome, it can provide relatively more so, in my view, than the ad hoc balancing that Justice Breyer has championed.

II. NOT SO FIRST AMENDMENT FRIENDLY

Of course, the Roberts Court has decided some significant cases which did not protect the asserted First Amendment rights. To many, these are the true face of the Roberts Court, with most of the pro-speech cases described above written off either as cases motivated by the desire to protect wealth and business, or easy cases whose results were predetermined. I have suggested elsewhere that the first category of those cases were first and foremost First Amendment cases with constant themes that transcended the particular interests

> against such infringements. The First Amendment does not protect the government, even when the government purports to act through legislation reflecting "collective speech."

Id. at 1449.

[236] For a further discussion of these issues, see Ronald K.L. Collins, *Three Harvard Law Review Essays Discuss Justice Breyer's Free Speech Jurisprudence*, CONCURRING OPINIONS: FAN 41 (FIRST AMENDMENT NEWS) (Nov. 11, 2014), http://concurringopinions.com/archives/2014/11/fan-41-first-amendment-news-three-harvard-law-review-essays-discuss-justice-breyers-free-speech-jurisprudence.html; Ronald K.L. Collins, *Madison Unplugged: A Candid Q&A With Burt Neuborne About Law, Life and His Latest Book*, CONCURRING OPINIONS: FAC 5 (FIRST AMENDMENT CONVERSATIONS) (May 27, 2015), http://concurringopinions.com/archives/2015/05/fac-5-first-amendment-conversations-madison-unplugged-a-candid-qa-with-burt-neuborne-about-law-life-his-latest-book.html.

at stake.[237] As to whether some of the cases were easy, many were sharply divided cases, hardly the hallmark of an easy outcome.[238]

Nonetheless, in several significant cases the Court did, indeed, reject First Amendment claims and sustain restrictions on free speech. In one much-criticized decision, *Garcetti v. Ceballos*, the Court, five to four, held that government employees—in that case a whistle-blower in a district attorney's office who wrote a memo detailing alleged perjury by a prosecution witness—had no First Amendment protection if the speech at issue was communicated "pursuant to their official duties."[239] That categorical exclusion of a large amount of public employee speech from constitutional protection is troubling, to be sure. But *Garcetti* relied on a case from an earlier era, *Connick v. Myers*, where an assistant district attorney was likewise denied protection for speech dealing with internal workplace grievances and having no significant public interest, a decision where the Court expressed a concern with becoming, in effect, the nation's civil service appeals board.[240] Both cases reflected the same theme of not wanting to second-guess the actions of government supervisors in controlling the workplace-related speech of their tens of millions of employees.[241] Indeed, in a very recent case, the Court granted First Amendment protection to an employee who had revealed official wrongdoing in the course of testifying in court pursuant to a subpoena, a context which the Court characterized as clearly a matter of public concern, thus blunting the force of *Garcetti* somewhat.[242] These problems of applying the First Amendment in the context of public officials' behavior may have also motived a five-four Court in *Williams-Yulee v. The Florida Bar* to uphold a ban on candidates running for election to judicial office

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[237] *See* Gora, *Business of Free Speech*, *supra* note 96, at 255–63.

[238] Among the 5-4 decisions were *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Morse v. Fredericks*, 551 U.S. 393 (2007); *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010); and *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).

[239] *Garcetti*, 547 U.S. at 421. *See generally* Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463 (2007) (discussing the Court's decision in *Garcetti* and proposing an alternate solution).

[240] Connick v. Myers, 461 U.S. 138, 149 (1983).

[241] *See Garcetti*, 547 U.S. at 423; *Connick*, 461 U.S. at 146.

[242] Lane v. Franks, 134 S. Ct. 2369, 2380–81 (2014).

personally soliciting campaign contributions.[243] Over the arguments of the ACLU, and despite subjecting the ban to strict scrutiny because it was a content-based restraint on speech, Chief Justice Roberts reasoned that the restriction was necessary to protect the integrity of the judiciary and the appearance thereof.[244] That was surprising and disappointing in light of the uneven way in which the restriction applied and the fact that the Chief Justice had dissented from an earlier case which involved limitations on campaign funding in judicial elections.[245]

Students have not fared well in the Roberts Court either, and in two significant cases, *Morse v. Frederick,*[246] and *Christian Legal Society v. Martinez,*[247] the Court rejected their First Amendment claims challenging the actions of school officials. In *Morse*, often cited as proof of the Court's lack of fealty to free speech, a five-four Court, divided along liberal and conservative lines, upheld punishment of a high school student for holding up a pro-drugs sign at a school-sanctioned event.[248] Further, the few Supreme Court cases since the landmark decision which first recognized free speech rights for school students, the famous *Tinker v. Des Moines Independent Community School District*,[249] have usually ruled against the student.[250] *Morse*, though highly questionable, was

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[243] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1670 (2015).

[244] *Id.* at 1665–68.

[245] *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 890 (2009) (Roberts, C.J., dissenting).

[246] Morse v. Frederick, 551 U.S. 393, 410 (2007) (upholding discipline of high school student for displaying pro-drug use sign at school event).

[247] Christian Legal Soc'y v. Martinez, 561 U.S. 661, 696 (2010) (denying full student group status to Christian law student group which conditioned membership on sexual abstinence pre-marriage).

[248] Morse v. Frederick, 551 U.S. at 408–10.

[249] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (protecting student's right to wear anti-war black armband to school without suffering penalties).

[250] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) (upholding punishment of student for making lewd remarks in a speech at official school event); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that a school could properly control subjects covered by official school-sponsored student paper which was within pedagogical discretion of school officials).

consistent with that pattern. It is also disappointing that the Court has been unwilling to grant review in any recent cases where school officials punished students for "offensive" speech or for speech on the internet, away from the physical venue of the schools.[251]

Conservative Christian students also suffered a significant First Amendment defeat when a five-four Court upheld a public law school's refusal to give full campus recognition to a student group because it required a pledge of pre-marital celibacy—same sex or opposite sex—in order to become members.[252] Finding that this was a proper, non-censorial denial of use of a limited public forum to a group which improperly excluded some students who did not share its value system, Justice Ruth Bader Ginsburg rejected the students' First Amendment claims.[253] The Court reached this outcome despite the fact that in an earlier case, involving exclusion of a left-wing group from campus recognition during the heyday of the Vietnam War protests, the Court had found a violation of First Amendment rights of speech and association.[254] This disparity caused the dissenters to complain bitterly that the law school had engaged in prohibited viewpoint discrimination against the Christian group.[255]

The public forum doctrine also played a role in a recent case where, again five-four, the Court rejected the First Amendment

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[251] *See* Bell v. Itawamba Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016); Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3rd Cir. 2010), *cert*. *denied*, 132 S. Ct. 1097 (2012).

[252] *Martinez*, 561 U.S. at 667–72.

[253] *See id.*

[254] Healy v. James, 408 U.S. 169, 170–74, 192–94 (1972). The First Amendment claimant also lost in another case involving a background of gay rights issues on campus. *See* Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 51–52 (2006). A unanimous Court rejected the claim that the federal requirement, imposed as a condition of receiving education funding, that schools not deny recruiting services to military employers—which many schools had done to protest the military's former anti-gay rights discriminatory policy of "Don't Ask. Don't Tell,"—did not deprive the schools or the pro-gay rights professors of First Amendment rights. *Id.* at 69–70. The Court concluded that by requiring schools to accommodate the military recruiters, along with all employer representatives, the government was not silencing the school's views on the gay rights issue or compelling the school to endorse or associate itself with the military or its policy. *Id.*

[255] *Martinez*, 561 U.S. at 706–18 (Alito, J., dissenting).

claims of the Sons of the Confederacy who were denied the right to use their name and logo on license plates issued by Texas.[256] The reason for the refusal was that some people felt the group represented a message of an offensive history or philosophy of racial discrimination—a reason which normally would be a totally impermissible basis for government action. But the majority ruled, again over the protests of the ACLU, that the license plates were not at all a forum for private speech, even though the State permitted that, but rather an example of government speech over which the State had complete editorial control.[257]

Two final cases demonstrate additional, unfortunate departures from the Roberts Court's normally strong protection of First Amendment rights. First, is the decision in *Holder v. Humanitarian Law Project*,[258] where a six-three majority decided that the First Amendment did *not* afford a right to give "material support" even to the peaceful, lawful activities of a certified terrorist organization.[259] Though applying strict scrutiny, the Court nonetheless ruled that Congress could properly determine whether funding or other support could be improperly fungible and therefore effectively available to support the violent activities of the terrorist group.[260] It is ironic that the decision came the same term as *Citizens United,* resulting in a two-case combination where every Justice ruled against the First Amendment: the liberals gave Congress the benefit of the doubt in allowing regulation of campaign speech and the conservatives did the same thing in the regulation of terrorism case. Only Justice Stevens was consistent, rejecting First Amendment protection in both cases. As I have said elsewhere, I think this is one situation where the Warren Court, or at least some of the most pro-free speech Justices on that Court, would have ruled for the First Amendment and against the government in both cases.[261]

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[256] Walker v. Tex. Div., Sons of Confederate Veterans, 135 S. Ct. 2239, 2243–44 (2015).

[257] *Id.* at 2245–46.

[258] Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

[259] *Id.* at 7–8.

[260] *Id.* at 16–18, 28–32.

[261] *See* Gora, *United*, *supra* note 11, at 985–87; *see also* William D. Araiza, *Citizens United, Stevens and Humanitarian Law Project: First Amendment Rules and Standards in Three Acts*, 40 STETSON L. REV. 821, 827 (2011).

The final case where the First Amendment claim was not denied, but was diverted, posed an old problem which has plagued the Court for almost forty years: the regulation of "indecency" on broadcast media.[262] In 1978, the Court divided sharply on whether the FCC could penalize a radio station for broadcasting the late comedian George Carlin's brilliant, satirical monologue, the "Seven Dirty Words You Can't Say on the Radio."[263] The Court narrowly upheld the restriction, but the liberals of that day vehemently dissented. In contemporary times, the issue came back to the Court in the celebrity of Bono, Cher, and others who used "fleeting expletives" on television broadcasts, in violation of the FCC rules on "indecency" on the airwaves.[264] This time the broadcasters won, but only on the Due Process/First Amendment vagueness grounds that the FCC rules did not provide adequate guidance as to which speech would come within the guidelines; not, unfortunately, on the broader ground that government could not ban indecency from the airwaves as a substantive free speech matter.[265]

From a strong free speech perspective, these various Roberts Court decisions are troubling in their rejection of First Amendment claims. But there does not seem to be an identifiable pattern to them, beyond the determination in each particularly idiosyncratic case that the government justifications were persuasive. No broad First Amendment theory of balancing or deference seems to predominate in these cases. As a result, despite these cases, the Roberts Court's First Amendment legacy remains a surprisingly strong one.

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[262] Fed. Commc'ns Comm'n v. Fox Television Stations, 132 S. Ct. 2307, 2320 (2012).

[263] *See* Fed. Commc'ns Comm'n v. Pacifica Found., 438 U.S. 726 (1978).

[264] *Fox Television Stations*, 132 S. Ct. at 2314.

[265] *Id.* at 2317–20. As the opinion of Justice Ruth Bader Ginsberg would have done. *Id.* at 2321. In another case the Court upheld, against a First Amendment overbreadth challenge, a federal statute that made it a crime to pander or offer to sell child pornography, even though the actual material to be sold did not come within the definition. The decision is a reflection of the fact that child pornography has long been viewed as a "non-speech" category—see *New York v. Ferber*, 454 U.S. 747, 773 (1982) as has obscenity, see *Miller v. California*, 413 U.S. 15, 36 (1973) and *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 57 (1973), despite powerful First Amendment arguments at least against obscenity in the absence of exploitation of children.

CONCLUSION: WHAT IS THE FUTURE FOR FREE SPEECH?

So, what can one conclude about the Roberts Court and the First Amendment after the various ebbs and flows in its First Amendment jurisprudence? To be sure, the cases just discussed were significant rejections of First Amendment claims. But many of them involved government controlled enclaves, auspices, or premises where the First Amendment has not traditionally had the same penetrating power. And the Roberts Court certainly did not seem to expand government control in those circumstances, with the possible exception of disclosure.

More broadly, it is the rare Roberts Court First Amendment decision which has cut back on established rights and expanded government authority over what had previously been accorded. Indeed, a major consequence of the Roberts Court's First Amendment rulings has been to expand the scope of individual choice about speech and reduce the area of government control and censorship. The Court has done so by emphasizing the libertarian themes of individual choice, the anticensorship themes of distrusting government to make First Amendment choices, and the disinclination to subject free speech protections to an ad hoc balancing process weighing government and speakers' interests, a process that leaves those rights uncertain and at greater risk. In the words of one scholar and Supreme Court advocate, the libertarian nature of the *Citizens United* decision reflects the Roberts Court's "emerging coherent vision of free speech that may characterize future Roberts Court decisions. In this vision, the more speech the better, with its distribution and assessment nearly always best left to the citizenry rather than the government."[266]

What does the future hold for free speech? As indicated at the outset, the strongly speech-protective Roberts Court lost one of its key voices with the untimely death of Justice Scalia in February, 2016. As a result, the ten-year legacy described above was thrown into jeopardy, especially with the expectation that the successor Justice would be more congenial to what, ironically, has become the "liberal" view of free speech—more willingness to balance government interests against free speech and less willing to engage

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[266] *See* Sullivan, *supra* note 69, at 177.

in First Amendment "absolutism." Certainly, there is very prominent academic support for this swing of the pendulum.[267] But in my view, replacing the insistence of First Amendment "absolutism" with the "it depends" of *ad hoc* balancing will in the long run augur ill for free speech and the values it serves. Unfortunately, so it seemed, a future Court might very well not give the First Amendment the same strong protection it received at the hands of the Roberts Court. But the results of the 2016 federal elections have significantly eased such concerns.

Even if, for some reason, the Roberts Court's strong free speech stance were to prevail for the near future, that will not guarantee that free speech will be the rule and not the exception in everyday life. Indeed, for the decade that the Court was giving that stronger protection, in everyday life, free speech seemed to be under fire and in jeopardy. As I noted in a 2013 article:

> There is a deep and distressing divide between our free speech rights on paper and in the real world. Speech that, according to the courts, is protected from punishment or suppression under the First Amendment is nonetheless subject to a barrage of public or private sanctions and deprivations that create the proverbial chilling effect. This causes speakers to "steer far wider of the unlawful zone." The gap is most yawning with respect to speech labeled racist, sexist, or homophobic, followed in close second by speech viewed as hostile to the Islamic religion. These restraints are enforced by public agencies and officials—and by private entities—in the context of education, employment, business and commerce, as well as within the political sphere. The jurisprudential mantra is that the proper antidote to bad or offensive or ugly speech is "more speech." In real life, however, the antidote to speech that offends or disturbs others is to visit punishments and restraints, formal and informal, on

[267] *See* sources cited *supra* note 26.

> those whose speech confounds the conventional wisdom or mainstream mandates.[268]

Nor has the situation improved since then. As Professor Nadine Strossen's article so powerfully demonstrates, in the academic setting the situation seems ever more repressive.[269] Just one example she cites makes the point, namely, the travails of a Northwestern University Professor, a feminist, who criticized some of the sexual harassment rules being enforced under Title IX and who was then the target of a charge that her criticism of those rules themselves constituted a violation of Title IX.[270] This may be the tip of the iceberg, and chilling effect in the academic community can be real.[271]

Free speech in the private workplace can also be subject to wholesale deterrence. In a recent New York Times article about ways to reduce racial discrimination by police officers, the author pointed out that in one case police allegedly used a racial epithet in

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[268] Joel Gora, *An Essay in Honor of Robert Sedler: Fierce Champion of Free Speech*, 58 WAYNE L. REV. 1087, 1098–99 (2013).

[269] *See* Nadine Strossen, *Freedom of Speech and Equality: Do We Have to Choose?*, 25 J. L. & POL'Y 185, 202–04 (2017); Geoffrey Stone, Free Speech On Campus: A Challenge of Our Times, Address at the University of Chicago (Sept. 22, 2016), *in* CONCURRING OPINIONS, Oct. 2016 (transcript available at https://concurringopinions.com/archives/2016/10/fan-126-first-amendment-news-geoffrey-stone-free-speech-on-campus-a-challenge-of-our-times.html); Lionel Shriver, *Will the Left Survive the Millennials?*, N.Y. TIMES (Sept. 23, 2016), http://www.nytimes.com/2016/09/23/opinion/will-the-left-survive-the-millennials.html?_r=0.

[270] Erik Wemple, *Northwestern University Professor Laura Kipnis Details Title IX Investigation Over Essay*, WASH. POST: ERIK WEMPLE BLOG (May 29, 2015), https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/05/29/northwestern-university-professor-laura-kipnis-details-title-ix-investigation-over-essay/.

[271] Even in grammar school, it seems. It is hard to believe, but the police recently came to a New Jersey elementary school to investigate one student's complaint that another student's comments about brownies being served at an end-of-the-semester party was "racist." Emma Platoff, *Why Police Were Called to a South Jersey Third-Grade Party*, PHILLY.COM, http://www.philly.com/philly/education/20160629_Why_police_were_called_to_a_South_Jersey_third_grade_class_party.html (last updated June 29, 2016). A school official called the police who arrived and interrogated the young, eight-year old offender. *See id.* One could say it was a case of a third grader getting the third degree over an innocent comment in school. *Id.* But the pervasive chilling effect of even a few incidents like that, widely reported, can be enormously silencing on speech.

arresting a suspect, and yet none of the arresting officers was punished, a situation which would not be tolerated in the private sector: "It is hard, if not impossible at this particular moment, to imagine a single private-sector context in which an employee's offensive racial or ethnic remarks would meet with no meaningful consequence."[272] The author argued the same zero tolerance should be applied to statements by police officials as well.[273] To my mind, the ease with which we seem willing to silence and punish even one offensive remark by an employee is the problem, not the solution, and generates a powerful chilling effect on speech, without the careful justifications normally required of such censorship. Finally, recent allegations of censorship by enormously powerful social media organizations like Facebook and Twitter raise concerns about suppression of free speech coming from such communication gatekeepers.[274]

The instinct to try to punish or silence those whose views we find offensive or wrong can be a powerful weapon in the hands of government officials who have wide discretionary power over so many decisions. For example, here was the free speech lesson given by the mayors of two of our most cosmopolitan cities, Boston and Chicago: they each appeared to threaten to deny new business franchise licenses to the Chick-fil-a company because of the views of the head of the company in favor of traditional marriage.[275]

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[272] Ginia Bellafante, *Policing Bias in the Ranks*, N.Y. TIMES (July 15, 2016), https://nyti.ms/2kc0i90.

[273] *See id.* ("It is a zero-tolerance world, in effect, except, arguably where repercussions would matter most."). A second-string major league catcher for the Seattle Mariners was suspended for the rest of the season, without pay, for sending a tweet which was harshly critical of Black Lives Matters and President Obama on racial issues. *See* Adam Lewis, *Seattle Mariners Suspend Steve Clevenger for the Season After Racially Insensitive Tweets*, SEATTLE P/I (Sept. 23, 2016), http://www.seattlepi.com/sports/baseball/article/Seattle-Mariners-condemn-Steve-Clevenger-s-tweets-9240833.php.

[274] *See* Jim Rutenberg, *On Twitter, Hate Speech Bound Only By a Character Limit*, N.Y. TIMES (Oct. 3, 2016), http://www.nytimes.com/2016/10/03/business/media/on-twitter-hate-speech-bounded-only-by-a-character-limit.html (discussing the difficulty Twitter has recently encountered in applying a uniform standard to "ban patently offensive speech").

[275] Alyssa Newcomb, *Chicago Politician Will Ban Chick-fil-A From Opening Restaurant After Anti-Gay Comments*, ABC NEWS (July 25, 2012),

Furthermore, the mayor of our largest city threatened to terminate, or at least review, contracts the city had with Donald Trump after he expressed some of his anti-immigrant views.[276]

All of this derogation of free speech in everyday life highlights the wisdom of the famous Judge Learned Hand, (who happened to have written one of the first protective free speech decisions) imparted in a speech administering the oath of citizenship to a group of newly naturalized Americans:

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.[277]

And in trying to internalize the liberty of free speech, perhaps we should be guided by the following aspirations:

> Americans have fought and died around the globe to protect the right of all people to express their views, even views that we profoundly disagree with. We do so not because we support hateful speech, but because our founders understood that without such protections, the capacity of each individual to express their views and practice their own faith may be threatened. We do so because in a diverse society,

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http://abcnews.go.com/Business/chick-fil-blocked-opening-chicago-store/story?id=16853890.

[276] Ed Silverstein, *First Amendment likely to protect Donald Trump on NYC Contracts*, INSIDE COUNSEL (July 8, 2015), http://www.insidecounsel.com/2015/07/08/first-amendment-likely-to-protect-donald-trump-on. We may soon have the benefit of the Supreme Court's views on the extent of continued First Amendment protection for racially or similarly offensive speech. The Court has granted review in a case called *Lee v. Tan*, O.T. 2015, No. 15-1293, involving disparaging trademarks and whether the government could prohibit them. Robert Sancrainte, *Scotus To Hear Lee v. Tam, Other Civil Rights Cases*, LEX PREDICT.COM, https://lexpredict.com/2016/10/02/scotus-hear-lee-tam-civil-rights/ (last visited Feb. 3, 2017). A divided lower court said no. *See id.* The issue will impact, for example, the challenge to such team names as the Washington Redskins. *Id.*

[277] Judge Learned Hand, The Spirit of Liberty Speech at "I AM an American Day" (1944) (transcript available at http://www.providenceforum.org/spiritoflibertyspeech). The case was *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

> efforts to restrict speech can quickly become a tool to silence critics and oppress minorities.
>
> We do so because given the power of faith in our lives, and the passion that religious differences can inflame, the strongest weapon against hateful speech is not repression; it is more speech – the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect.[278]

President Obama's stirring remarks well capture the theme of this article. The Roberts Court has been a strong defender of First Amendment rights and values of the kind identified by President Obama. The Court's effort to expand the scope of individual and group choice over how to exercise First Amendment rights and concomitantly reduce the power of government to preempt those choices has been in keeping with the most speech protective themes of earlier eras on the Court, and, in some instances, has surpassed those protections. While this approach has played out in various areas and through different doctrinal mechanisms, it often seems to have been inspired by the same first principles of free speech that President Obama identified. The future will tell us whether the doctrinal and jurisprudential legacy of the Roberts Court will prevail and whether it will become a more enduring part of our national fabric.

What does the Roberts Court's First Amendment legacy augur for the future? Its jurisprudential baseline was the constitutional imperative of special protection for First Amendment rights implemented by a general and strong presumption against restrictions or burdens on those rights. If the doctrinal paths following those principles were to continue unabated, the consequences would be significant. More decisions deregulating aspects of campaign finance controls could be expected. Greater protection of sexual content speech might be in the works. Governmental censorship and discrimination based on the content of the regulated speech might be more difficult to accomplish and

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[278] President Barack Obama, Remarks by the President to the UN General Assembly, (Sept. 25, 2012) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly).

implement. And a serious requirement that government regulations of speech be narrowly tailored to closely fit their objectives might be imposed across the board. Finally, greater protection for religious freedom and of religious speech in the public square might ensue.

The consequences of the 2016 elections, however, make it far less likely that Justice Scalia's replacement and other possible Court membership changes in the next few years will lead to a retrenchment and retreat on the protection of First Amendment rights. As a result, happily from my perspective, we are much less likely to see a Court that would approve greater regulation of the use of money in politics, more leeway for government to regulate business and commercial speech, and more willingness to allow government to regulate on the basis of the psychological harms that speech may cause. Nor will there likely be a movement away from a categorical approach favoring firm speech protection toward a balancing of the benefits of speech against the burdens or risks that speech may impose. Finally, and quite ironically, a stronger First Amendment-protective Court would also serve as a constitutional barricade against the kind of watering down of First Amendment rights that President Trump has seemed to support, at least with respect to such hot button issues as flag burning as protest and press protection against defamation lawsuits.

I am hopeful that the Court will continue to reject that watering down of First Amendment rights and continue to remember the wisdom of Justice Brandeis that the strongest protections of free speech are imperative for the well-being of both the individual and the society.