Brooklyn Law Review

Volume 87
Issue 1 *SYMPOSIUM: THE ROBERTS COURT AND FREE SPEECH*

Article 2

12-30-2021

The Roberts Court—Its First Amendment Free Expression Jurisprudence: 2005–2021

Ronald K.L. Collins

David L. Hudson Jr.

The Roberts Court

ITS FIRST AMENDMENT FREE EXPRESSION JURISPRUDENCE: 2005–2021*

Ronald K.L. Collins† & *David L. Hudson, Jr.*††

* Previous abbreviated and preliminary publications appeared in SCOTUSblog (July 21, 2020 & July 9, 2013) and were presented at events hosted by the Cato Institute (Oct. 12, 2020) and Brooklyn Law School (Apr. 9, 2021). The authors express their appreciation to Ilya Shapiro, Joel Gora, and William Araiza for helping to make these events happen.

† Former Harold S. Shefelman Scholar, University of Washington School of Law; editor of First Amendment News; coauthor, THE FIRST AMENDMENT IN MODERNITY: CASEBOOK ON THE FUNDAMENTALS OF FREEDOM (forthcoming 2022) with Greg Lukianoff, Will Creeley, David L. Hudson, Jr., and Jackie Farmer; and coauthor, FIRST THINGS FIRST: A MODERN COURSEBOOK ON FREE SPEECH FUNDAMENTALS (2020) with Will Creeley and David L. Hudson, Jr.

†† Assistant professor of law, Belmont University; Justice Robert H. Jackson Fellow for the Foundation for Individual Rights in Education (FIRE); First Amendment Fellow for the Freedom Forum; coauthor, THE FIRST AMENDMENT IN MODERNITY: CASEBOOK ON THE FUNDAMENTALS OF FREEDOM (forthcoming 2022) with Ronald K.L. Collins, Greg Lukianoff, Will Creeley, and Jackie Farmer.

INTRODUCTION

Let us not speak falsely: freedom of speech in a democracy is an unruly proposition. This is a lesson as old as antiquity; just witness the Athenian trial of Socrates in 399 BC and the resulting tension between truthful free speech and the norms (not to say biases) of a democratic society.[1] When the likes of George Mason and James Madison gave constitutional credence to free speech principles,[2] they embarked upon a journey fraught with danger, albeit of the clear and present variety. By that measure, the study of free speech is as much a study in political philosophy and government as it is a study in law.

In the free speech domain, ideals run hand-in-hand with hypocrisy,[3] while toleration competes with suppression for the minds and hearts of the majority. Metaphors are invoked to stoke either the will to tolerate the otherwise intolerable, or the willpower to silence the otherwise indispensable. Law gives legitimacy to this inherent conflict between free speech and democracy, siding with one view or another depending on the predictions of the judges and lawmakers, notwithstanding any claims of them being neutral brokers. As such, precedent is honored until it is set aside, but never without some claim of fidelity to the Constitution.

Apart from the conceptual parameters of these philosophical concerns, there is the decisional law of the First Amendment. It is an area of law formulated, for the most part, by the high Court of the land. It is a forest populated with many strange trees known as doctrines. And that domain is presided over by the chief justice of the United States, which brings us to John Glover Roberts Jr., the seventeenth chief justice.

As you will see in our following account of the forest and the trees of First Amendment law, no chief justice in our history has had as much influence on the law of freedom of expression as John Roberts. For some sixteen years and fifty-eight First Amendment free expression decisions rendered by the Court, he has been the prime mover of this area of law. Will that continue? Will the new makeup of the Court decrease his momentum? And

---

[1] *See* Anthony D'Amato, *Obligation to Obey the Law: A Study of the Death of Socrates*, 49 S. CAL. L. REV. 1079, 1084 (1976).

[2] *See* Jeff Broadwater, *George Mason, James Madison, and the Evolution of the Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 547, 547, 549 (2017). *See generally* T. DANIEL SHUMATE, THE FIRST AMENDMENT: THE LEGACY OF GEORGE MASON (1985) (discussing George Mason's legacy in helping to shape First Amendment guarantees).

[3] *See* RONALD K.L. COLLINS, *The Holmesian Experiment and the Democratization of Truth in the Academy*, *in* SPEECH FREEDOM ON CAMPUS: PAST, PRESENT AND FUTURE 21, 34 (Joseph Russomanno ed., 2021).

what effect might a new line of future cases have on his jurisprudential power? Before taking up such questions, we must first turn to the workings of the Court named after him in order to get some sense of those many trees located in that forest of First Amendment free expression law.

I. THE LAW AND CULTURE OF FREE SPEECH IN THE ROBERTS COURT ERA

The Supreme Court's jurisprudence is the jurisprudence of our times. Both practically and theoretically, state constitutional law has taken a back seat to the work product of the nine justices, at least when it comes to popular and scholarly attention. The fix was already in, for example, when Justice Oliver Wendell Holmes penned his great dissent in *Abrams v. United States*,[4] which had long since eclipsed interest in his seminal book, *The Common Law*.[5] And when Justice Louis Brandeis came on board, first in joining Holmes's dissents and then with his legendary concurrence in *Whitney v. California*,[6] the First Amendment drew new constitutional converts. What followed, thanks to the incorporation doctrine and an ever-evolving body of decisional law, was the modern First Amendment—the crown jewel of the liberty side of the Constitution.

Against that backdrop, a justice could secure a measure of greatness if he or she made a reputation in the law of free expression. Beyond Holmes and Brandeis, witness Justices William O. Douglas, Hugo Black, William Brennan, and more recently Anthony Kennedy[7]—they all gave the First Amendment new staying power and, in the process, brightened their own stars in the American constitutional constellation.[8] Meanwhile, the press, like the pseudo-sages of the legal academy, loved to dwell on whatever was written about the forty-five words of Madison's Amendment. Consequently, the

---

[4] Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

[5] OLIVER WENDELL HOLMES, THE COMMON LAW (1881).

[6] Whitney v. California, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring); *see also* David Skover & Ronald Collins, *Curious Concurrence: Justice Brandeis's Vote in Whitney v. California*, 2005 SUP. CT. REV. 333, 334–35 (2005).

[7] *See, e.g.*, David L. Hudson Jr., *Justice Anthony Kennedy Made His Mark on First Amendment Jurisprudence*, FREE SPEECH CTR. (July 1, 2018), https://www.mtsu.edu/first-amendment/post/157/hudson-justice-anthony-kennedy-made-his-mark-on-first-amendment-jurisprudence [https://perma.cc/9ZWD-3H7G] (discussing Justice Kennedy's contributions to free speech and religion jurisprudence).

[8] *See, e.g.*, ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 140–63 (1991) ("The central meaning of the First Amendment.").

Court was often judged by its fidelity to the First Amendment's free speech principles.[9]

At much the same time, the *culture* of the First Amendment evolved in ways that over time gave staying power to the idea of freedom of speech as a preeminent constitutional norm, "the First Freedom,"[10] as it is broadly understood. At first, this occurred in mainly a political context, as more robust forms of speech became more commonly accepted, albeit with some pushback in certain quarters, both conservative (as with opposition to flag-burning)[11] and liberal (as with feminist opposition to pornography).[12] Still, the cultural fix was in, which made for a comfortable alliance with the law of the First Amendment.

Of course, change begets change. In time, cracks became more and more visible in the edifice of First Amendment decisional law as liberals began to take exception[13] to the ever-tending libertarian tilt of free speech law in the commercial speech[14] and union fees[15] arenas. Then came the campaign finance cases, most

---

[9] *See, e.g.*, RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 29–36 (2016) (criticizing the Court's "audacious opinion" in *Citizens United*); MARTIN H. REDISH, COMMERCIAL SPEECH AS FREE EXPRESSION: THE CASE FOR FIRST AMENDMENT PROTECTION 1–20, 171 (2021) (arguing that the Court has failed to afford commercial speech a level of First Amendment protection equivalent to the level the Court affords noncommercial speech); Frederick Schauer, *Not Just About License Plates:* Walker v. Sons of Confederate Veterans*, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265 (examining the Court's decision to apply only two of four plausible "doctrinal frames" in *Walker*).

[10] NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA (1980) (recounting development of free speech through controversial court decisions and advocating for broad speech protections).

[11] *See, e.g.*, DAVID LOWENTHAL, NO LIBERTY FOR LICENSE: THE FORGOTTEN LOGIC OF THE FIRST AMENDMENT 269 (1997) (disputing that flag burning is protectable free expression under the First Amendment).

[12] *See, e.g.*, CATHARINE MACKINNON, ONLY WORDS (1993) (arguing that, as hate speech that perpetuates sexual discrimination, unequal treatment, and violence against women, pornography should not be protected under the First Amendment). *But see also* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS (1995) (arguing that eliminating First Amendment protection for pornography will be more harmful to women and not reduce violence or discrimination against them).

[13] *See, e.g.*, OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 30 (1996) ("The received tradition takes no account of the fact that to serve the ultimate purpose of the First Amendment we may sometimes find it necessary to 'restrict the speech of some elements of our society in order to enhance the relative voice of others,' and that unless the Court allows, and sometimes even requires, the state to do so, we as a people will never truly be free.").

[14] *See, e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3–4, 46 (1976) (criticizing the Court's reasoning that excluding commercial speech from First Amendment protection was not justifiable and arguing that "a complete denial of [F]irst [A]mendment protection for commercial speech is not only consistent with, but is required by, [F]irst [A]mendment theory").

[15] *See* Harris v. Quinn, 573 U.S. 616, 655–56 (2014) (holding that collecting union dues from quasi-public employees who neither support nor want to join the union violated the employees' First Amendment protections).

notably the 5–4 decision in *Citizens United v. FEC*.[16] As the First Amendment was pushed ever further down the doctrinal halls of law, there was spillover in the culture as more and more young liberals disavowed certain First Amendment principles while their conservative counterparts embraced them.[17] And, of course, the swirl of controversy became increasingly intense with the advent of the emerging and varied technologies of communication.[18]

But it was not always so. At one time (a very long time ago), the divide cut along different ideological lines, with liberals calling for expansive applications of the First Amendment and conservatives demanding restrictive interpretations.[19] As free speech law evolved from the Warren Court to the Burger Court to the Rehnquist Court and then to the Roberts Court, a gradual though important shift in thinking occurred—many of those who once staunchly defended free speech demanded that it be curbed, while many who once opposed it celebrated its near-absolutist application.[20] And there were those (the "old liberals"[21]) who held true to free speech principles even though such principles were difficult to reconcile with other tenets of their liberalism.[22] Conversely, there were those conservatives whose free speech

---

[16] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365–66 (2010) (holding that federal ban on corporate and union independent expenditures violated free speech protections). It is often forgotten that this line of cases began with *liberal* support. *See* RONALD COLLINS & DAVID SKOVER, WHEN MONEY SPEAKS: THE *MCCUTCHEON* DECISION, CAMPAIGN FINANCE LAWS AND THE FIRST AMENDMENT 49–51 (2014).

[17] *See* Genevieve Lakier, *The Great Free-Speech Reversal*, ATLANTIC (Jan. 27, 2021, 9:33 AM), https://www.theatlantic.com/ideas/archive/2021/01/first-amendment-regulation/617827/ [https://perma.cc/P8TC-UMEU].

[18] *See* RONALD COLLINS & DAVID SKOVER, ROBOTICA: SPEECH RIGHTS AND ARTIFICIAL INTELLIGENCE 3–31 (2018).

[19] *See* FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT: WHY FREEDOM OF SPEECH MATTERS 12–13 (2017); Lakier, *supra* note 17. For an example of a traditional conservative take on First Amendment jurisprudence, see WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 226 (1976), in which Bern criticizes the Court's expansion of freedom of speech to cover vulgar and sexual expression: "What the Supreme Court has done in its obscenity decisions is to make it possible for vice to take on the likeness of decency, precisely because it may no longer be labeled as vice."

[20] *See generally* Arthur D. Hellman, *The Supreme Court's Two Constitutions: A First Look at the "Reverse Polarity" Cases*, 82 U. PITT. L. REV. 273, 308–11 (2020) (discussing evolution of the meaning of "liberal" and "conservative" under the Roberts Court generally and within the context of the First Amendment).

[21] OWEN FISS, THE IRONY OF FREE SPEECH 19 (2009) ("Whereas the traditional framework rests upon the old liberal idea that the state is the natural enemy of freedom . . . .").

[22] *See, e.g.*, ABRAMS, *supra* note 19, xiv–xv, 9–12 (arguing that the "clearly established" purpose of the First Amendment is to protect citizens from government censorship); Floyd Abrams, Opinion, *Floyd Abrams: The First Amendment is the Soul of Our Democracy*, DALL. MORNING NEWS (Oct. 4, 2020), https://www.dallasnews.com/opinion/commentary/2020/10/04/the-soul-of-the-first-amendment-and-why-it-is-crucial-to-our-democracy-our-freedom-and-our-culture/ [https://perma.cc/BY98-DBRN] ("Though sometimes hard to stomach, free speech is crucial to our culture.").

fidelity largely began and ended with their political objectives.[23] That said, the move in law and society pulled free speech jurisprudence ever closer towards cultural conservativism and libertarian market values.[24]

It is well to remember the admonition of Justice Holmes, that old Civil War soldier who liked to say: "[T]ime has upset many fighting faiths."[25] So it is with the First Amendment. On the bench, conservatives like Judge Robert Bork preached the gospel of "neutral principles," which sought to cabin many of the doctrines being invoked to expand the constitutional domain of free speech protections.[26] In the academy, conservative professors like Walter Berns opposed the excesses of such newfound freedoms.[27] Nonetheless, many of their ideological descendants have come to

---

[23] *See, e.g.*, LOWENTHAL, *supra* note 11, at 273 (arguing against the incorporation of the First Amendment: "It is vital that the Court be made to withdraw its claim to incorporate the First Amendment into the Fourteenth. This would free the states to follow their own constitutions and signal a return to the federal structure set up by the post-Civil War Amendments.").

[24] *See, e.g.*, MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 61–94 (2021) (discussing the shift in judicial interpretations of First Amendment free speech and press protections); STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT 1–9 (2016) (arguing that the First Amendment overprotects speech at the expense of other values); LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2019) (demonstrating how modern First Amendment jurisprudence is the product of a "constitutional compromise" between radical labor activists and conservatives); TAMARA PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA 231 (2012) (advocating that the Court, when given the chance, "will reconsider its expansive notions of the value of commercial and corporate participation in the polity"); ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 41–42 (2014) (discussing the Court's controversial 2010 decision in *Citizens United v. FEC*: "But for more than a century the nation did not understand the First Amendment to entail judicially enforceable rights. In a decision like *Citizens United*, the Court was forced to choose whether the nation's commitment to self-governance would be better realized through institutions of representation or through the discursive democracy established by First Amendment rights. The Court selected the latter path, even though we have been committed to structures of representation for far longer than we have aspired to democratic self-government."); Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html [https://perma.cc/3A3M-PB49] ("Conservative groups, borrowing and building on arguments developed by liberals, have used the First Amendment to justify unlimited campaign spending, discrimination against gay couples and attacks on the regulation of tobacco, pharmaceuticals and guns. . . . The Roberts Court . . . . is far more likely than earlier courts to rule for conservative speech than for liberal speech."); Michael Powell, *Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis*, N.Y. TIMES (June 7, 2021), https://www.nytimes.com/2021/06/06/us/aclu-free-speech.html [https://perma.cc/RU65-FTS2] (discussing an "identity crisis" within the ACLU as the organization's advocacy for progressive causes stands in tension with its traditional defense of free speech and other First Amendment protections).

[25] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[26] *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971) (albeit neutral largely in name only).

[27] *See* BERNS, *supra* note 19, at 147–237. *See generally* WALTER BERNS, FREEDOM, VIRTUE & THE FIRST AMENDMENT (1957) (arguing that First Amendment freedoms should not be absolute but rather should be constrained to promote virtue).

take quite a different view—no doubt because it serves their own interests. On the other side of the ideological aisle, many modern liberals (excluding the old liberal guard[28]) have lost much of their devotion to "the First Freedom"[29]—here, too, because it does not sit well with the new liberalism.[30] Again, time changes the clocks of our faith in almost anything.

History may well record the era of the twenty-first century First Amendment, as interpreted by the Roberts Court, as the age of anxiety for liberals and liberalism. Torn between past free speech principles and present threats to their progressive principles, liberals may come to first question and then shun some of the devotion they once had for the free speech jurisprudence of the likes of Justices Holmes, Brandeis, Black, Douglas, and Brennan.[31] As for conservatives, this same era may be recorded as an age of promise for those wed to syncing Adam Smith's market economy[32] and Justice Alito's religious absolutism[33] with First Amendment free expression doctrine.

To repeat the point by way of an ancient axiom: Nothing endures but change.[34] And change is everywhere in the pollinated air of today's politics when it comes to the First Amendment. Far from any "neutral principles" of free speech law, the ever-present tilt has been in the opposite direction: "Free speech for me—but not for thee," as the late Nat Hentoff put it.[35] Whether the nation can endure as a fair broker when it comes to the First Amendment is almost as much a question today as it was in the founding era when the Alien and Sedition Acts of 1798 first put Madison's mandate to

---

[28] Floyd Abrams, for example, has remained a steadfast defender of First Amendment principles. *See* Profile of *Floyd Abrams*, CAHILL, https://www.cahill.com/professionals/floyd-abrams [https://perma.cc/J3S6-FAKR].

[29] *See generally* HENTOFF, *supra* note 10 (recounting development of free speech).

[30] For example, the ACLU has been criticized of "stepping away from [its] founding principle—unwavering devotion to the First Amendment." Powell, *supra* note 24; *see also* WEINRIB, *supra* note 24.

[31] *See, e.g.*, SHIFFRIN, *supra* note 24, at 166–71 (showing this has already begun to happen).

[32] *See generally* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015) (explaining that "the First Amendment has become a powerful engine of constitutional deregulation" and "conservative [j]ustices have been leading the charge to use commercial speech doctrine to strike down economic regulation").

[33] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883–1926 (2021) (Alito, J., concurring in judgment) (free exercise case); Kalvis Golde, *At Federalist Society Convention, Alito Says Religious Liberty, Gun Ownership are Under Attack*, SCOTUSBLOG (Nov. 13, 2020, 1:32 PM), https://www.scotusblog.com/2020/11/at-federalist-society-convention-alito-says-religious-liberty-gun-ownership-are-under-attack/ [https://perma.cc/M3QY-LP7G].

[34] *See* PLATO, *The Cratylus*, *in* THE COLLECTED DIALOGUES OF PLATO 421, 438–39 (Edith Hamilton & Huntington Cairns, eds., 1961).

[35] NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER (1992).

the test.[36] To get some perspective, we need to better understand where the law of free speech is and where it might be going—in other words, the time has come to examine the workings of the Roberts Court.

* * * *

Some precedents take on a larger-than-law character; they become part of the *culture of free speech*. Thus, despite the partisan divides of the moment, support for the free speech and press protections of the First Amendment continues largely unabated[37] notwithstanding what some view as the animus of the forty-fifth president towards the press[38] and despite the late Justice Antonin Scalia's originalist swipes against *New York Times Co. v. Sullivan*,[39] the holy grail of free speech precedents.[40] Justice Clarence Thomas issued a solo attack on *Sullivan* in 2019[41] and Thomas and Justice Gorsuch assailed the landmark precedent and its progeny in separate dissents in 2021.[42] Such objections aside,

---

[36] *See* TERRI DIANE HALPERIN, THE ALIEN AND SEDITION ACTS OF 1798 TESTING THE CONSTITUTION 6–8 (2016).

[37] *But see* RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study* (Univ. of Ga., Research Paper No. 2021-01, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787709 [https://perma.cc/V2TR-WURM] (finding that over the last fifty years, the Supreme Court's view and rhetoric of the press has deteriorated: "Not only is the Court talking about the press much less often than it once did, but when it does talk about the press, it is now more likely to do so in a negative manner.").

[38] *See, e.g.*, TIMOTHY ZICK, THE FIRST AMENDMENT IN THE TRUMP ERA 2–4 (2019) (discussing how Trump's "declared 'war' on the press" is unique relative to former presidents); Ronald K.L. Collins, *FAN 202.2 Robert Corn-Revere: "The Retaliator in Chief: The Case Against Donald J. Trump*," FOUND. FOR INDIVIDUAL RTS. EDUC. (Mar. 4, 2019), https://www.thefire.org/robert-corn-revere-the-retaliator-in-chief-the-case-against-donald-j-trump/ [https://perma.cc/8ENG-XYDB] (describing Trump's "illegitimate censorial motives" and retaliatory acts against the press).

[39] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[40] John Bruce Lewis & Bruce L. Ottley, New York Times v. Sullivan *at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DEPAUL L. REV. 1, 35–36 (2014); *see also Sullivan*, 376 U.S. at 279–80 (holding that public officials must prove actual malice to recover in libel actions against the press that relate to their official conduct).

[41] McKee v. Cosby, 139 S. Ct. 675, 676–78, 680 (2019) (Thomas, J., concurring in denial of certiorari) ("In short, there appears to be little historical evidence suggesting that the *New York Times* actual-malice rule flows from the original understanding of the First or Fourteenth Amendment. . . . The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. We should reconsider our jurisprudence in this area.").

[42] *See* Berisha v. Lawson, 141 S. Ct. 2424, 2424–25 (2021) (Thomas, J., dissenting from denial of certiorari) ("The lack of historical support for this Court's actual-malice requirement is reason enough to take a second look at the Court's doctrine. Our reconsideration is all the more needed because of the doctrine's real-world effects."); *see id.* at 2429–30 (Gorsuch, J., dissenting from denial of certiorari) ("Without doubt, *Sullivan* sought to promote that goal as the Court saw the world in 1964. Departures from the Constitution's original public meaning are usually the product of good intentions. But less clear is how well

free speech has long been championed as the pride of American democracy; the nation's culture has bought into this principle in a variety of robust ways.[43] Thus, to favor the First Amendment was perforce to favor democracy . . . or so it was once thought. There is also this: we live in a grievance culture, one in which many portray themselves as victims of any range of "injustices."[44] Where grievance (however justifiable) is the touchstone, free speech is the rallying cry. As this tonic is mixed into the cultural beaker, the First Amendment takes on new and different compositions.

All of which brings us back to the Roberts Court. For some, it is an exceptionally speech-protective Court, while for others it is a Court that has "weaponized the First Amendment" to serve the interests of the monied and powerful.[45] Of course, both could be true. Either way, its free speech rulings are one of the mainstays (perhaps *the* pillar) of the Roberts Court's constitutional jurisprudence. More than all the rest—even compared to Justice Kennedy and his opinion in *Citizens United*[46] or Justice Thomas and his opinion in *Reed v. Town of Gilbert*[47]—the one who has had the most influence in shaping that overall jurisprudence *thus far* has been John Roberts.

* * * *

Again: the First Amendment continues to be the focal point of public, press, scholarly, and lawyerly interest in the Court. Perhaps that explains the great number of free expression cases that come before the Court and the Court's

---

Sullivan and all its various extensions serve its intended goals in today's changed world. . . . [G]iven the momentous changes in the Nation's media landscape since 1964, I cannot help but think the Court would profit from returning its attention, whether in this case or another, to a field so vital to the 'safe deposit' of our liberties.").

[43] *See, e.g.*, RONALD COLLINS & DAVID SKOVER, THE DEATH OF DISCOURSE 69–135 (2d ed., Carolina Academic Press 2005) (1996) (discussing the ways in which public speech has been commercialized).

[44] *See, e.g.*, BRADLEY CAMPBELL & JASON MANNING, THE RISE OF VICTIMHOOD CULTURE: MICROAGGRESSIONS, SAFE SPACES, AND THE NEW CULTURE WARS (2018) (identifying a clash of cultures—between a new "victimhood culture" and a more traditional culture of dignity); Ryan Cooper, *The Conservative Victimhood Complex Has Made America Impossible to Govern*, WEEK (May 14, 2020), https://theweek.com/articles/914220/conservative-victimhood-complex-made-america-impossible-govern [https://perma.cc/HY7W-894V] (positing that the coronavirus pandemic has been fueled by a "victimhood complex").

[45] Liptak, *supra* note 24.

[46] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (Kennedy, J., majority opinion) (holding that government restrictions on corporate and union independent expenditures abridge free speech and overturning prior Court rulings that permitted such spending restrictions).

[47] Reed v. Town of Gilbert, 576 U.S. 155, 171–73 (2015) (Thomas, J., majority opinion) (invalidating town ordinance that imposed more stringent requirements on temporary directional signs than other signage categories and setting strict scrutiny as the judicial review standard for content-based speech restrictions).

willingness to review ever more of them. In the course of the 2019–2020 and 2020–2021 terms, the Roberts Court considered more than three dozen certiorari petitions then on its docket involving such matters as diverse as "off-campus student speech"[48] "campaign finance laws,"[49] floral art,[50] and even an invitation to reconsider the public figure tenet of *Sullivan*.[51]

In those two terms alone, the Court granted review in twelve cases that raised First Amendment free speech claims were raised. Even so, the Court rendered such rulings in only the first six cases listed below:

(1) *Thompson v. Hebdon*[52]
(2) *USAID v. Alliance for Open Society International, Inc. II*[53]
(3) *Barr v. American Association of Political Consultants, Inc.*[54]
(4) *Mahanoy Area School District v. B.L.*[55]
(5) *Thomas More Law Center v. Bonta*[56]
(6) *Americans for Prosperity Foundation v. Bonta*[57]
(7) *Chiafalo v. Washington* (consolidated with *Colorado Department of State v. Baca*)[58]
(8) *Carney v. Adams*[59]

---

[48] Petition for Writ of Certiorari at 17, Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038 (2021) (No. 20-255).

[49] Petition for Writ of Certiorari at 14, Thompson v. Hebdon, 140 S. Ct. 348 (2019) (No. 19-122).

[50] *See* Petition for Writ of Certiorari, Arlene's Flowers, Inc. v. Washington, 141 S. Ct. 2884 (2021) (No. 19-333).

[51] *See* Petition for Writ of Certiorari, Berisha v. Lawson, 141 S. Ct. 2424 (2021) (No. 20-1063).

[52] *Thompson*, 140 S. Ct. at 351 (per curiam) (vacating and remanding Ninth Circuit's decision to uphold state law that capped individual campaign contributions to political candidates or groups).

[53] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2089 (2020) (upholding federal law that required foreign affiliates of American organizations to adopt an anti-prostitution and sex trafficking policy to receive funding because the affiliates had no First Amendment rights).

[54] Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2356 (2020) (plurality opinion) (striking down government debt collection exception to federal ban on robocalls).

[55] Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038, 2047–48 (2021) (holding that a student's First Amendment rights were violated when she was suspended for off-campus speech).

[56] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021) (deciding together with *Thomas More Law Center v. Bonta*, No. 19-255) (invalidating state law requiring nonprofits to disclose donor information).

[57] *Id.*

[58] Chiafalo v. Washington, 140 S. Ct. 2316, 2328 (2020) (deciding on non-First Amendment grounds).

[59] Carney v. Adams, 141 S. Ct. 493, 497 (2020) (deciding on non-First Amendment grounds).

(9) *Fulton v. City of Philadelphia*[60]
(10) *Facebook, Inc. v. Duguid*[61]
(11) *Biden v. Knight First Amendment Institute*[62]
(12) *Houston Community College System v. Wilson*[63]

Notably, at the end of the 2019–2020 term and into the 2020–2021 term, there was a single case that had long lingered on the Court's docket: *Arlene's Flowers Inc. v. Washington*.[64] The issues raised in the case were

> (1) [w]hether a state violates a floral designer's First Amendment rights to free exercise and free speech by forcing her to take part in and create custom floral art celebrating same-sex weddings or by acting based on hostility toward her religious beliefs; and (2) whether the free exercise clause's prohibition on religious hostility applies to the executive branch.[65]

Had the Court granted review, it would have revisited its holding in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[66] Ultimately, the Court denied review of *Arlene's Flowers* on July 2, 2021 though three justices—Thomas, Alito, and Gorsuch—voted to hear the case.[67] To be sure, this kind of case involving the intersection between religious expression and equality will surface again in the years to come, albeit with little meaningful guidance from the Court's decision in *Masterpiece Cakeshop*.

* * * *

---

[60] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (deciding on free exercise grounds).

[61] Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1168 (2021) (deciding on non-First Amendment grounds).

[62] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1220 (2021) (vacating and remanding to the Second Circuit to dismiss as moot).

[63] Houston Cmty. Coll. Sys. v. Wilson, 141 S. Ct. 2564 (2021) (mem.) (No. 20-804), *granting cert. to* 955 F.3d 490 (5th Cir. 2020) (case to be argued in 2021-2022 Court Term).

[64] Arlene's Flowers, Inc. v. Washington, 141 S. Ct. 2884 (2021) (mem.) (No. 19-333), *denying cert. to* 441 P.3d 1203 (Wash. 2019).

[65] Coverage of *Arlene's Flowers Inc. v. Washington*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/arlenes-flowers-inc-v-washington-2/ [https://perma.cc/98XV-4HPC].

[66] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723 (2018) (holding that the Colorado Civil Rights Commission's actions in assessing a cakeshop owner's reasons for declining to make a cake for a same-sex couple's wedding celebration violated the First Amendment's free exercise clause). The lawyer who argued on behalf of the petitioner in *Masterpiece Cakeshop* (Docket No. 16-111), Kristen Waggoner, also represented the petitioner in *Arlene's Flowers* (Docket No. 19-333).

[67] *Arlene's Flowers*, 141 S. Ct. at 2884.

Two Similar but Different Chief Justices.

In October and November of 1999, John Roberts, then a partner at Hogan & Hartson (now Hogan Lovells), helped his colleague, Robert Corn-Revere,[68] prepare for oral arguments in *United States v. Playboy Entertainment Group, Inc.*,[69] a First Amendment Telecommunications Act sexual expression case. His role: to assume the character of then Chief Justice William Rehnquist (for whom he had clerked) in helping to moot the case.[70] Others on the moot court bench included Hogan partners Jay E. Ricks and E. Barrett Prettyman, Jr.[71] "Back then," Corn-Revere recalled, "I don't remember John expressing any special interest in First Amendment issues. But he was always generous in making time to help colleagues, and was an exceptionally talented appellate litigator with unparalleled insight into the workings of the Court. So I was very fortunate to have him moot me."[72] When the judgment in the matter was announced on May 22, 2000, Justice Anthony Kennedy wrote for a 5–4 majority, with Chief Justice Rehnquist joining in Justice Stephen Breyer's dissent.[73] "Though he didn't help me do the nearly impossible—secure Rehnquist's vote—John Roberts was quite effective in helping me to navigate my way to five votes," Corn-Revere added.

While William Rehnquist and John Roberts were two chief justices who shared many of the same jurisprudential views, they parted paths when it came to free speech and the First Amendment. Whereas the former is illiberal in his protection of aberrant speech, the latter was generous when it came to such speech, along with other forms of expression as well. "When it comes to free speech," Corn-Revere observed, "the two jurists were profoundly different, one tilted towards reading the press and speech clauses out of the Constitution while the other buttressed the constitutional firewall erected to bar government censorship."[74]

---

[68] A noted First Amendment lawyer and partner at the Washington, D.C. office of Davis Wright Tremaine. *See* ROBERT CORN-REVERE, THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER: THE FIRST AMENDMENT AND THE CENSOR'S DILEMMA (2021); *Robert Corn-Revere*, DAVIS WRIGHT TREMAINE LLP, https://www.dwt.com/people/c/corn revere-robert [https://perma.cc/54BD-V78P].

[69] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803 (2000).

[70] Telephone Interview with Robert Corn-Revere, Partner, Davis Wright Tremaine LLP (Feb. 10, 2021).

[71] *Id.*

[72] *Id.*

[73] *Playboy Ent. Grp.*, 529 U.S. at 805.

[74] *Id.*

Whatever else is said of the current chief justice, one thing is certain: his overall view of and voting record in First Amendment free expression cases is root-and-branch different from that of former Chief Justice Rehnquist, for whom Roberts clerked in the 1980–1981 Court term—the term when *Chandler v. Florida*,[75] *Heffron v. International Society for Krishna Consciousness, Inc.*,[76] and *Metromedia, Inc. v. City of San Diego*[77] were argued. As for the free speech jurisprudence of former Chief Justice Rehnquist, Professor Geoffrey Stone has observed:

> After 33 years on the Supreme Court, what can we say about Justice Rehnquist's record on the freedom of speech, and of the press? . . . [H]is voting [record reveals] not only that he was by far the justice least likely to support such claims, but also that his approach to these issues was largely unprincipled, result-oriented, and incompatible with any plausible theory of the First Amendment.[78]

The free speech record of John Roberts and his Court is one profoundly different from that of his predecessor. As the record reveals, the Roberts apple fell far (quite far) from the Rehnquist tree. When the history books are written about the jurisprudential tenets of the Rehnquist and Roberts Courts, a new chapter will have to be added concerning the latter; and that will be due largely to one man—John Roberts, a chief justice so different from his predecessor and former boss.

* * * *

The Roberts Court has made First Amendment free speech jurisprudence the centerpiece of its constitutional agenda more than any previous Supreme Court. In the 2018–2019 term, the Court hit the fifty-case mark with Justice Kennedy writing the last of his seven majority opinions for the Roberts Court.[79] This past term, the Court released its fifty-eighth First Amendment ruling in a free expression case.[80] As important as Justice Kennedy was in the development of that Court's jurisprudence in this area, he stood second to another: Chief Justice John Roberts.

---

[75] Chandler v. Florida, 449 U.S. 560 (1981) (state broadcasting of criminal trials).

[76] Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (state rule confining the sale or distribution of religious materials at a state fair).

[77] Metromedia, Inc., v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion) (municipal regulation of billboards).

[78] Geoffrey R. Stone, Abstract of *Justice Rehnquist and "The Freedom of Speech or of the Press*," SSRN (Apr. 12, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=698443 [https://perma.cc/5DT2-EZW3].

[79] Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018) (Kennedy, J., majority opinion) (probable cause in retaliatory-arrest suits).

[80] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

As one pages through the Roberts Court's fifty-eight free expression First Amendment opinions, a number of questions arise:

- How has the Roberts Court wielded its constitutional power in this arena?
- Who are the main players?
- Who are the non-players; the ones who have little real say in shaping the contours of the fifty-eight free speech cases?
- Which line of cases best defines the Court's judicial philosophy in terms of those cases in which the justices voted to sustain a free expression claim?
- Which line of cases is the Court most hostile to when it comes to affirming such claims?
- Do liberal-conservative labels have any real meaning when it comes to affirming or denying a free expression claim? If so, in what line of cases is that true, or not true?
- Who are the lawyers most involved in helping to shape the law of free speech in the era of the Roberts Court?
- And how will the new makeup of the Court (with the addition of Justices Kavanaugh, Gorsuch, and Barrett) affect the future of free speech law?

In what follows, we set out to answer such questions based on extensive original research concerning the Roberts Court and its free speech, press, assembly, and petition jurisprudence. The data in this article reveal just how important free expression claims have been in the development of the overall constitutional jurisprudence of the Roberts Court.

* * * *

I would never underestimate his ability to influence people. – Joan Biskupic[81]

John Roberts assumed office on September 29, 2005. Not too along after that, the new chief justice sat down for an interview with Jeffrey Rosen of the National Constitutional Center. In the

[81] Ronald Collins, *Ask the Author: "Mr. Everything"—Joan Biskupic on Chief Justice John Roberts*, SCOTUSBLOG (Apr. 11, 2019, 10:05 AM), https://www.scotusblog.com/2019/04/ask-the-author-mr-everything-joan-biskupic-on-chief-justice-john-roberts/ [https://perma.cc/5WRG-D9BG].

course of that exchange, Chief Justice Roberts spoke a lot about former Chief Justice Marshall:

> [I]t was just in [Marshall's] nature to get along with people. I think that had to play an important role in his ability to bring the Court together, to change the whole way judicial decisions were arrived at, to really create the notion that we are a Court—not simply an assemblage of individual justices . . . It was the force of his personality. That lack of pretense, that openness and general trustworthiness, were very important personality traits in Marshall's success . . . . [82]

That very much appears to be the John Roberts persona, though, of course, the matter is more complicated if only because former Chief Justice Marshall, like Roberts, was a masterful tactician.[83] Here, too, the seventeenth chief justice is very much like the fourth.

The 2019–2020 term reveals, for example, how Roberts channeled those "very important personality traits" he so admires in Marshall.[84] Part of that vision was, in Roberts's words, "getting seven votes rather than five,"[85] a goal achieved in *Trump v. Vance*,[86] as well as *Trump v. Mazars USA LLC*.[87] But, as Roberts's majority opinion in *Espinoza v. Montana Department of Revenue*[88] (a 5–4 First Amendment religion clauses case) also revealed, sometimes unanimity or near unanimity must take a back seat to how the law is shaped.[89]

These two sides of the chief justice and his Court are exemplified in a line of cases central to the mission of the Roberts Court. Thus, in the Roberts Court's fifty-eight First Amendment free speech cases (2006–2021), the Court was unanimous nearly one-third of the time,[90] while a 5–4 division occurred a quarter of the time.[91]

In the Rosen interview, Roberts also took exception to the prevalent practice of writing separate opinions: "I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution."[92] That creed is one that the seventeenth chief justice has honored in

---

[82] Jeffrey Rosen, *Roberts's Rules*, ATLANTIC (Jan./Feb. 2007) (first alteration in original) (quoting Chief Justice John Roberts), https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/ [https://perma.cc/RR3N-Y5H8].

[83] *See* RONALD COLLINS & DAVID SKOVER, THE JUDGE: 26 MACHIAVELLIAN LESSONS 12, 87–91 (2017).

[84] Rosen, *supra* note 82.

[85] *Id.*

[86] Trump v. Vance, 140 S. Ct. 2412 (2020).

[87] Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

[88] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

[89] *See id.* at 2273.

[90] Eighteen decisions of the Roberts Court's free expression cases have been unanimous for a total of 31 percent. *See infra* Appendix E: Unanimous Judgments.

[91] Fourteen decisions of the Roberts Court's free expression cases have resulted in 5–4 splits for a total of 24.1 percent. *See infra* Appendix G: Authors of 5–4 Lead Opinions.

[92] Rosen, *supra* note 82.

the First Amendment free expression context. Thus, he rarely dissents (two full dissents in fifty-eight cases) and likewise, he seldom writes a separate opinion (only once).

When one looks at the chief justice's sixteen First Amendment expression majority opinions for the Court, the figures point to something that gives his jurisprudence staying power: John Roberts is the man at the control center. Roberts has authored more than twice as many lead opinions as each of his colleagues. Compare that number with the *total* of such opinions written by Justices Breyer, Ginsburg, Sotomayor, and Kagan (10), or the *total* for Justices Scalia, Thomas, and Alito (15), or even the *total* for Justices Kennedy and Alito (13).[93]

There is a certain resolve, at once philosophical and tactical, that is at work here. Approximately 29 percent of the time, Roberts has assigned the lead opinion to himself. Equally revealing, he assigned the lead opinion in 95 percent of the First Amendment free expression cases handed down by his Court. In other words, there is something *special* about this genre of cases, something that speaks to a grander vision of who John Roberts is and what he hopes the Court bearing his name might be remembered for decades after his Court is reconstituted.

Such resolve is apparent in the *tenor* of his free speech opinions: "Speech is powerful. It can . . . move [people] to tears of both joy and sorrow, and . . . inflict great pain," as he cast it in his majority opinion in *Snyder v. Phelps*,[94] the funeral protest decision. It is also manifest in the *substance* and tenor of his opinion, as evidenced by what he wrote in *United States v. Stevens*,[95] albeit with a nod to former Chief Justice Marshall. In resisting the impulse to accept new unprotected categories of speech, Roberts declared:

> As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. 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. The First Amendment itself 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." [96]

---

[93] *See infra* Appendix C: Majority Opinions by Justice.

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

[95] *See* United States v. Stevens, 559 U.S. 460 (2010) (animal cruelty depictions).

[96] *Id.* at 470 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)).

In other words, Chief Justice Roberts is quite at home in the house of the First Amendment—it is perhaps his favorite jurisprudential dwelling.

* * * *

I'm probably the most aggressive defender of the First Amendment. Most people might think that doesn't quite fit with my jurisprudence in other areas. . . . People need to know that we're not doing politics. We're doing something different. We're applying the law. – Chief Justice Roberts[97]

That is how Chief Justice Roberts described his First Amendment voting record when he engaged Belmont Law School Dean and former Attorney General Alberto Gonzales in a conversation about his jurisprudence in February of 2019.[98] In the course of that conversation with the former attorney general, the chief justice stressed the importance of unanimity or near unanimity combined with the desirability of narrowly drafted opinions designed to better ensure judicial accord.[99] Roberts also bemoaned the divisive state of affairs in the Supreme Court confirmation process and took exception to the practice of asking nominees their views on cases or controversies.[100] With his trademark diplomacy, Roberts downplayed the importance or even the accuracy of "liberal" or "conservative" labels.[101] "It's a shorthand, a lot of people use it," he emphasized, "the press in particular, they use it a lot . . . because . . . they think it helps get a message across. But I think it's very misleading."[102] To illustrate the point, he noted: "I don't know . . . where you put conservative or liberal in the First Amendment area."[103]

In some First Amendment free expression cases, the chief justice's words about unanimity certainly ring true. Take, for example, the unanimous judgment of the Court in *McCullen v.*

---

[97] April Hefner, *Honorable John G. Roberts, Jr., Chief Justice of the United States, Speaks at Belmont University*, BELMONT UNIV. (Feb. 7, 2019), https://news.belmont.edu/honorable-john-g-roberts-jr-chief-justice-of-the-united-states-speaks-at-belmont-university/ [https://perma.cc/52HB-NJRR].

[98] *Id.*

[99] Belmont University, *A Conversation with Chief Justice John Roberts*, YOUTUBE (Feb. 7, 2019), https://www.youtube.com/watch?v=x-2vV84d6RY (last visited Dec. 29, 2021).

[100] *Id.*

[101] Hefner, *supra* note 97.

[102] Belmont University, *supra* note 99.

[103] *Id.*

Coakley,[104] a controversial abortion clinic protest case—few in the press or public foresaw that 9–0 judgment.[105] True to his Belmont Law School statements, Roberts's majority opinion was drafted narrowly, careful not to cross a certain doctrinal line. By the measure of the judgment reached in the *McCullen* case, there was no liberal-conservative divide.

When one looks beyond the judgment in that case, however, the liberal-conservative divide is quite apparent. In a separate opinion concurring in the judgment, Justice Scalia (joined by Justices Kennedy and Thomas) took sharp exception:

> Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion.[106]

Justice Scalia thus urged that *Hill v. Colorado*[107] be overruled and that a strict scrutiny standard be applied in abortion clinic protest cases.[108] And Justice Alito also voiced his special concerns.[109]

The *McCullen* case was unusual for two reasons: (1) its judgment was unanimous; and (2) the primary divide was not the traditional liberal-conservative split seen in the campaign finance decisions, but rather between the chief justice and some of his more conservative brethren who felt the chief did not go far enough in striking down the law. Hence, unanimity has its doctrinal price. In a case before the Court in the 2019–2020 term, *Price v. City of Chicago*,[110] the Court had to decide whether it should reconsider *Hill* in light of its intervening decisions in *Reed v. Town of Gilbert*[111] and *McCullen*. The justices declined the invitation; certiorari was denied.

---

[104] McCullen v. Coakley, 573 U.S. 464, 467 (2014) (invalidating on First Amendment grounds a state statute that prohibited nonexempt persons from entering a public walkway within thirty-five feet of an entrance to an abortion clinic).

[105] *See, e.g.*, Garrett Epps, *In Abortion Case, Supreme Court Asks: How Far is 35 Feet?*," ATLANTIC (Jan. 15, 2014), https://www.theatlantic.com/national/archive/2014/01/in-abortion-case-supreme-court-asks-how-far-is-35-feet/283105/ [https://perma.cc/2JY2-XW9W] (noting ahead of the *McCullen* decision that the Court would "likely strike down [the state]'s 'buffer zone' law").

[106] *McCullen*, 573 U.S. at 497 (Scalia, J., concurring in judgment) (first citing Hill v. Colorado, 530 U.S. 703 (2000); then citing Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994)).

[107] Hill v. Colorado, 530 U.S. 703, 734–35 (2000) (upholding state statute that prohibited protesting, counseling, or education within one hundred feet of a health care facility entrance).

[108] *McCullen*, 573 U.S. at 505 (Scalia, J., concurring in judgment).

[109] *Id.* at 511 (Alito, J., concurring in judgment) (disputing majority's conclusion that the challenged statute was viewpoint neutral).

[110] Price v. City of Chicago, 141 S. Ct. 185 (2020) (mem.) (No. 18-1516), *denying cert. to* 915 F.3d 1107 (7th Cir. 2019).

[111] Reed v. Town of Gilbert, 576 U.S. 155, 171–73 (2015) (invalidating town ordinance that imposed more stringent requirements on temporary directional signs than other signage categories and setting strict scrutiny as standard of review for content-based speech restrictions).

Another indicator of a conservative-liberal divide is this fact: the lead authors in the lion's share of the Court's fifty-eight free speech opinions were "conservatives"—the chief justice followed by Justices Alito and Kennedy.[112] Not until the 2018–2019 Court term had the "liberal" Justice Elena Kagan ever been assigned a majority opinion[113] in such cases (that is one majority opinion out of the thirty-two cases she participated in).

Moving forward, it may be something of a Sisyphean task for the chief justice to secure unanimity or near unanimity in a free speech case, or even reach the 7–2 margin he desires. This is especially so given some of the cases that have come to be known as hallmarks of the Roberts Court. Then again, when it comes to the First Amendment, unanimity sometimes frustrates the realization of those objectives that John Roberts views as central to his free speech jurisprudence.

II. OVERVIEW

A. Divisive Divides

It doesn't bother me in the least that our opinions are criticized. They should be if people think they are wrong.
– Chief Justice Roberts[114]

Chief Justice Roberts spoke those words in his characteristic calm manner during the course of his discussion with Dean Gonzales. But that calm exists in the face of strikingly divergent notions about the role of the First Amendment in our constitutional democracy.

One of the chief justice's colleagues found his understanding of the First Amendment and those of his conservative colleagues troublingly "wrong."[115] In a robust dissent in *Janus v. AFSCME, Council 31*, a 5–4 ruling in a public sector union fees case, Justice Kagan (joined by her liberal colleagues) declared that the majority was guilty of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."[116] Worse still, she argued, "[d]epartures from *stare decisis* are supposed to be 'exceptional action[s]' demanding 'special justification,'—but the majority offers nothing like that here."[117]

---

[112] *See infra* Appendix C: Majority Opinions by Justice.

[113] Iancu v. Brunetti, 139 S. Ct. 2294, 2297 (2019).

[114] Belmont University, *supra* note 99.

[115] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2494 (2018) (Kagan, J., dissenting) ("The majority goes wrong at every turn.").

[116] *Id.* at 2501.

[117] *Id.* (second alteration in original) (citation omitted).

As the Court's liberal wing viewed it, such "weaponizing" was particularly apparent in campaign finance cases. Of the eight such cases decided by the Roberts Court, five were rendered by a 5–4 vote, one by a 6–3 vote, and two by a unanimous vote.[118] The divided cases cut along "liberal-conservative" lines. In his dissent in one of those badly divided cases, *McCutcheon v. FEC*,[119] Justice Breyer was unusually frank:

> Today a majority of the Court overrules [the] holding [in *Buckley v. Valeo*]. It is wrong to do so. Its conclusion rests upon its own, not a record-based, view of the facts. Its legal analysis is faulty: It misconstrues the nature of the competing constitutional interests at stake. It understates the importance of protecting the political integrity of our governmental institutions. It creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate's campaign. Taken together with *Citizens United v. Federal Election [Commission]*, today's decision eviscerates our Nation's campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.[120]

As for *Citizens United*, the Court was so badly divided that Justice Stevens felt compelled to draft a 30,104-word dissent.[121] In an opinion joined by Justices Ginsburg, Breyer, and Sotomayor, Stevens wrote: "The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution."[122]

Among others, Professor Erwin Chemerinsky has echoed this view: "When it comes to freedom of speech, the Roberts Court has been very much a conservative court. I think you can understand what the Roberts Court has done with regard to free speech by just focusing on traditional, contemporary, conservative ideology."[123]

As a class of free speech cases, few if any have proven more divisive than the campaign finance ones. Then again, the votes in a variety of other important First Amendment cases reveal a sharply divided Court, usually split along liberal-conservative lines. For example:

---

[118] *See infra* Appendix K: Cases Organized by Topic, Campaign Finance.

[119] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014) (plurality opinion).

[120] *Id.* at 233 (Breyer, J., dissenting) (citation omitted).

[121] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 396–479 (2010) (Stevens, J., dissenting).

[122] *Id.* at 396.

[123] Erwin Chemerinsky, *The Roberts Court and Freedom of Speech*, 63 FED. COMMC'NS L.J. 579, 581 (2011).

- Government employee speech: *Garcetti v. Ceballos* (5–4);[124]
- Student speech: *Morse v. Frederick* (5–4);[125]
- Union fees: *Harris v. Quinn* (5–4);[126]
- "Pro-life" centers & compelled speech: *NIFLA v. Becerra* (5–4); and [127]
- State action & free expression: *Manhattan Community Access Corporation v. Halleck* (5–4)[128]

Roberts was in the conservative majority in all of those cases.

B. Exceptional Freedom?

Professor Joel Gora has correctly observed that the Roberts Court has declined to create new exceptions to the First Amendment's free expression clauses.[129] The Roberts Court has decisively rejected such exceptions and made it quite clear that any proposed new nonspeech category would have a steep uphill climb to conquer. Categorical cases on point include:

(1) *United States v. Stevens*;[130]
(2) *Snyder v. Phelps*;[131]
(3) *Brown v. Entertainment Merchants Association*;[132] and
(4) *United States v. Alvarez*.[133]

In this spirit, Chief Justice Roberts's majority opinion in *Stevens* declined to "carve out from the First Amendment any novel exception."[134] To bring the point home, he added: "No categorical exception to the First Amendment applies here.

---

[124] Garcetti v. Ceballos, 547 U.S. 410 (2006) (Kennedy, J., joined by Roberts, C.J., Scalia, Thomas, & Alito, JJ., majority opinion).

[125] Morse v. Frederick, 551 U.S. 393 (2007) (Roberts, C.J., joined by Scalia, Kennedy, Thomas, & Alito, JJ., majority opinion).

[126] Harris v. Quinn, 573 U.S. 616 (2014) (Alito, J., joined by Robert, C.J., Scalia, Kennedy, & Thomas, JJ., majority opinion).

[127] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) (Thomas, J., joined by Roberts, C.J., Kennedy, Alito, & Gorsuch, JJ., majority opinion).

[128] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019) (Kavanaugh, J., joined by Roberts, C.J., Thomas, Alito, & Gorsuch, JJ., majority opinion).

[129] Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 64 (2016).

[130] United States v. Stevens, 559 U.S. 460 (2010) (images of animal cruelty).

[131] Snyder v. Phelps, 562 U.S. 443 (2011) (funeral protests).

[132] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011) (violent video games).

[133] United States v. Alvarez, 567 U.S. 709 (2012) (false speech).

[134] *Stevens*, 559 U.S. at 472.

Those exceptions are limited to [1] fighting words, [2] obscenity, and [3] child pornography, and they should not be extended."[135]

Likewise, Roberts buttressed that point in his majority opinion in *Snyder* (the military funeral protest case) despite Justice Alito's lone dissent that began with the following language: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."[136] Justice Kennedy was on board with the Roberts proposition when, in *Alvarez* (the stolen valor case), he declared: "Content-based restrictions on speech have been permitted only for a *few* historic categories of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent."[137] He then added: "Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements."[138] Here again, Justice Alito took exception: "the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."[139] Finally, Justice Scalia endorsed the no-new-exceptions doctrine when in *Entertainment Merchants* (the violent video games case) he wrote there are a few exceptions that "represent 'well-defined and narrowly limited classes of speech.'"[140]

So there the law stands, or seems to stand, insofar as exceptions to the First Amendment go—no new exceptions. Moreover, there are only a "few" exceptions that apply when deciding First Amendment free expression cases. Insofar as this doctrine is concerned, however, the Roberts Court's constitutional handiwork must be seen more as aspirational than factual. The truth is that there are no fewer than forty-eight exceptions to the First Amendment's free speech jurisprudence, everything ranging from blackmail, bribery, and insider trading to perjured and plagiarized expression to "certain kinds of telemarketing."[141]

---

[135] Annotation to *United States v. Stevens*, JUSTIA, https://supreme.justia.com/cases/federal/us/559/460/ [https://perma.cc/M6EC-PECR].

[136] *Snyder*, 562 U.S. at 463 (Alito, J., dissenting).

[137] *Alvarez*, 567 U.S. at 709.

[138] *Id.* at 718.

[139] *Id.* at 739 (Alito, J., dissenting).

[140] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791 (2011) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[141] Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 417–21 (2012/2013).

There is a strange twist in all of this, namely, how the Court divides. Here, the Court does not divide along liberal-conservative lines. On the liberal side of the divide, there are various qualifying statements by Justice Breyer (the quintessential balancer)[142] as expressed in his separate concurrence in *Alvarez* and his dissent in *Entertainment Merchants*.[143] On the conservative side of the divide, Justice Alito has proven to be equally uncomfortable with the categorical imperative announced in *Stevens* and endorsed elsewhere—there are his dissents in *Stevens* and *Alvarez* and his concurring opinion in *Entertainment Merchants*.[144]

Stranger still is the fact that the chief justice joined Justice Alito's opinion in *Entertainment Merchants*. In that concurrence in the judgment, Justice Alito declared:

> In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology. The opinion of the Court exhibits none of this caution.[145]

As if this were not enough, consider the lineup in *Entertainment Merchants*: Justice Scalia wrote the majority opinion,

---

[142] *See generally* Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817 (1998) (explaining Justice Breyer's balancing approach in First Amendment cases and contrasting the approach against the Court's traditional methodology).

[143] *Alvarez*, 567 U.S. at 730–39, 732–33 (Breyer, J., concurring in judgment) ("I must concede . . . that this Court has frequently said or implied that false factual statements enjoy little First Amendment protection. But these judicial statements cannot be read to mean 'no protection at all.' False factual statements can serve useful human objectives . . . ." (citations omitted)); *Ent. Merchs.*, 564 U.S. at 857 (Breyer, J., dissenting) ("But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? . . . This anomaly is not compelled by the First Amendment. It disappears once one recognizes that extreme violence, where interactive, and *without literary, artistic, or similar justification*, can prove at least as, if not more, harmful to children as photographs of nudity.").

[144] *Stevens*, 559 U.S. at 472, 482–99, 493 (Alito, J., dissenting) ("The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes."); *Alvarez*, 567 U.S. at 739–55, 751 (Alito, J., concurring) ("All of these proof requirements inevitably have the effect of bringing some false factual statements within the protection of the First Amendment, but this is justified in order to prevent the chilling of other, valuable speech."); *Ent. Merchs.*, 564 U.S. at 805–21 (Alito, J., concurring in judgment).

[145] *Ent. Merchs.*, 564 U.S. at 806 (Alito, J., joined by Roberts, C.J., concurring in judgment).

joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan (Justices Thomas and Breyer filed dissenting opinions).[146] That means the no-new-exceptions doctrine still had five votes while Justice Scalia was on the Court even *without* the vote of the chief justice.

All of this calls to mind something Justice Holmes wrote in a 1918 *Harvard Law Review* article: "Certitude is not the test of certainty. We have been cock-sure of many things that were not so."[147] This maxim by the pater of our modern free speech jurisprudence may well find some applicability to the no-new-exceptions tenet of the Roberts Court's First Amendment jurisprudence. Whether the doctrine will survive depends on:

(1) whether the Roberts Court ever recognizes the numerous exceptions to the First Amendment line of free speech cases;
(2) the votes of Justices Gorsuch, Kavanaugh, and Barrett; and
(3) the willingness of the chief justice and four of his colleagues to recognize some exception in the emerging technologies line of cases.

C. Standardized (and Other) Tests

When it comes to First Amendment free speech freedoms, the Roberts Court has been loath to employ balancing tests. Such "free-floating" balancing tests, the chief justice declared, are "highly manipulable" and therefore "dangerous."[148] That admonition also found expression by Justice Kennedy in *United States* v. *Alvarez*[149] and by Justice Scalia in *Brown v. Entertainment Merchants Association*,[150] among other cases.

The Roberts Court has also employed the overbreadth and content-neutrality doctrines to police numerous kinds of restrictions on free expression. In cases involving content-based restrictions, the Roberts Court has been particularly demanding, scrutinizing such laws even when it comes to municipalities regulating signs as the holding in *Reed v. Town of Gilbert*[151] (with Justices Breyer, Kagan, and Ginsburg questioning rigid adherence to strict scrutiny) illustrates.

---

146 *Id.* at 787.
147 Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).
148 *Stevens*, 559 U.S. at 470, 472.
149 *Alvarez*, 567 U.S. at 717 (Kennedy, J., plurality opinion).
150 *Ent. Merchs.*, 564 U.S. at 792.
151 Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015).

The Roberts Court also relied on or formulated the following tests in various contexts:

- Commercial Speech: *Sorrell v. IMS Health Inc.*[152] ("stricter form of judicial scrutiny" than *Central Hudson's* intermediate scrutiny test, though the Court did not explicitly reject that test)
- Material Support: *Holder v. Humanitarian Law Project*:[153] "rigorous" review instead of *Brandenburg* test
- Government Employee Speech: *Garcetti v. Ceballos*[154] and *Lane v. Franks*[155] (multiprong test)
- Government as Participant Speech: *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[156] (three-factor test)
- Government as Regulator Speech: *Matal v. Tam*[157] (viewpoint discrimination: rigorous constitutional scrutiny)
- Content Discrimination: *Barr v. American Association of Political Consultants, Inc.*[158] (strict scrutiny)
- *Student* Speech (in school): *Morse v. Frederick*[159] (no clear standard beyond speech that "is reasonably viewed as promoting illegal drug use"; the "illegal drugs" or drugs-related exception to *Tinker*)
- Student Speech (off campus): *Mahanoy Area School District v. B.L.*[160] (three "features" test)
- Campaign Finance*: McCutcheon v. FEC*[161] (strict scrutiny or the "closely drawn" test/state's interest limited to "preventing *quid pro quo* corruption or its appearance")
- Compelled Disclosure (charitable donations): *Americans for Prosperity Foundation v. Bonta*[162] ("exacting scrutiny")

---

[152] Sorrell v. IMS Health Inc., 564 U.S. 552, 571 (2011).

[153] Holder v. Humanitarian L. Project, 561 U.S. 1, 28 (2010); *id.* at 43–46 (Breyer, J., dissenting).

[154] Garcetti v. Ceballos, 547 U.S. 410, 418–19 (2006).

[155] Lane v. Franks, 573 U.S. 228, 240-41 (2014).

[156] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 209–13 (2015).

[157] Matal v. Tam, 137 S. Ct. 1744, 1763–64 (2017).

[158] Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2347 (2020).

[159] Morse v. Frederick, 551 U.S. 393, 403–05 (2007).

[160] Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038, 2046 (2021).

[161] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 192, 197 (2014) (plurality opinion).

[162] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021).

D. Traces of Originalism and Textualism

1. Justice Hugo Black

When it came to the text and history of the Constitution, Justice Hugo Black was the point man on the Supreme Court. As Professor Noah Feldman put it in *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*: "Hugo Black was the first Justice to frame originalism as a definitive constitutional theory and to explain why and how he was using it. In this sense, Black was the inventor of originalism."[163] This was especially true in Black's First Amendment jurisprudence. He expressed his originalist-absolutist creed time and again in cases (e.g., *Communist Party of the United States v. Subversive Activities Control Board*[164] and *Mishkin v. New York*[165]), in public lectures (e.g., his 1960 James Madison Lecture at New York University[166]), in public interviews (e.g., Justice Black and the First Amendment "Absolutes": A Public Interview[167]), and in books (e.g., *A Constitutional Faith*[168]). To be sure, Black's originalist-textualist approach was met with considerable blowback, both on and off the Court. For example, as expressed in his book, *The Least Dangerous Branch*, Professor Alexander Bickel maintained that such a jurisprudence would obligate jurists to render judgments from "a text incapable of yielding them."[169]

---

[163] NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 145 (2010).

[164] Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 137–69 (1961) (Black, J., dissenting) (disagreeing that a law requiring the Communist Party to register with the government was constitutional); *id.* at 148, 163 ("If there is one thing certain about the First Amendment it is that this Amendment was designed to guarantee the freest interchange of ideas about all public matters and that, of course, means the interchange of *all* ideas . . . .The Founders . . . demanded . . . unequivocal limitations upon the powers of Government and obtained the Bill of Rights, the central provisions of which were the First Amendment guarantees of complete religious and political freedom.").

[165] Mishkin v. New York, 383 U.S. 502, 515–18 (1966) (Black, J., dissenting) (rejecting state conviction of man charged with publishing, hiring others to prepare, and possessing with intent to sell "obscene" books); *id.* at 517–18 ("[N]either Congress nor the States shall pass laws which in any manner abridge freedom of speech and press—whatever the subjects discussed. I think the Founders of our Nation in adopting the First Amendment meant precisely that the Federal Government should pass 'no law' regulating speech and press but should confine its legislation to the regulation of conduct.").

[166] Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960) ("It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'").

[167] *See generally Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962) (Justice Black discussing his absolutist view of the First Amendment and the Bill of Rights).

[168] *See generally* HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH (1968) (compiling Justice Black's principles for freedom of speech and freedom of assembly principles).

[169] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 96–97 (1962).

Of course, that was then. And in time, Justice Black's absolutes proved to be qualified absolutes as evidenced by opinions such as his majority opinion in *Adderley v. Florida*[170] and his dissent in *Tinker v. Des Moines Independent Community School District*.[171] But then came the return of originalism and its new day in the Rehnquist and Roberts Courts. Yet this brand of originalism paid little or no attention to that of the liberal Hugo Black—it forged its own course, though it left some paths largely unexplored.

2. Justice Antonin Scalia

For all his many writings and opinions on originalism and textualism, and unlike his Second Amendment right-to-bear-arms jurisprudence,[172] Justice Scalia never dug deeply in any extended way into the topic when it came to his First Amendment free expression jurisprudence, though he did offer a few general comments in his March 2012 Hugo Black lecture at Wesleyan University.[173]

This absence of any extended discussion of originalism is true of all of his five free speech majority opinions for the Roberts Court: *Davenport v. Washington Education Association*,[174] *United States v. Williams*,[175] *New York State Board of Elections v. Lopez Torres*,[176] *Brown v. Entertainment Merchants Association*,[177] and

---

[170] *See* Adderley v. Florida, 385 U.S. 39, 40, 47–48 (1966) (Black J., majority opinion) (holding that trespassing convictions of protesters did not violate the protestors' First Amendment rights because the state retained power to control use of its property).

[171] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 515, 517 (1969) (Black, J., dissenting) (rejecting majority opinion that students have the right to wear black peace armbands as a form of silent, political protest in school: "While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleased and when he pleases.").

[172] *See* District of Columbia v. Heller, 554 U.S. 570, 576–636, 635 (2008) (Scalia, J., majority opinion) (striking down government handgun ban and shotgun and rifle restrictions in the Court's "first in-depth examination of the Second Amendment").

[173] *See* Lauren Rubenstein, *Justice Scalia Delivers Defense of Originalism at Hugo Black Lecture*, WESLEYAN UNIV. (Mar. 26, 2012), http://newsletter.blogs.wesleyan.edu/2012/03/26/scaliahugoblack/ [https://perma.cc/3JX9-S6AP].

[174] *See* Davenport v. Wash. Educ. Ass'n, 551 U.S. 177 (2007) (Scalia, J., majority opinion) (state requirement for unions to seek authorization from nonmembers to use their union fees for elections did not violate First Amendment).

[175] *See* United States v. Williams, 553 U.S. 285 (2008) (Scalia, J., majority opinion) (offers to obtain or requests to provide child pornography are excluded from First Amendment protections).

[176] *See* N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196 (2008) (Scalia, J., majority opinion) (state's electoral system for nominating justices to its highest court did not violate First Amendment rights of party candidates).

[177] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011) (Scalia, J., majority opinion) (state restriction on sale or rental of violent video games to minors violated First Amendment protections).

Nevada Commission on Ethics v. Carrigan.[178] Justice Scalia did, however, offer some preliminary originalist analysis in his discussion of the petition clause in his separate opinion in *Borough of Duryea v. Guarnieri*.[179] And he did have some off-the-bench[180] controversial originalist views of the Court's opinion in *New York Times Co. v. Sullivan*.[181]

3. Scalia v. Thomas/Alito v. Scalia

While Justice Clarence Thomas has done some originalist spadework as reflected in his concurrence in *Morse v. Frederick*,[182] Justice Scalia did not sign onto that opinion. Moreover, in *Brown v. Entertainment Merchants Association*, Justice Scalia's majority opinion was attacked on historical grounds by Justice Thomas in his lone dissent in that case.[183] That said, there was a brief but colorful exchange between Justices Alito and Scalia during oral arguments in *Entertainment Merchants*:

> JUSTICE ALITO: Well, I think what Justice Scalia wants to know is what James Madison thought about video games.
>
> (Laughter.)
>
> JUSTICE ALITO: Did he enjoy them?
>
> JUSTICE SCALIA: No, I want to know what James Madison thought about violence. Was there any indication that anybody thought, when the First Amendment was adopted, that there . . . was an exception to it for . . . speech regarding violence? Anybody?[184]

---

[178] *See* Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117 (2011) (Scalia, J., majority opinion) (state recusal provision did not violate legislator's First Amendment right to free speech).

[179] *See* Borough of Duryea v. Guarnieri, 564 U.S. 379, 403, 406–08 (2011) (Scalia, J., concurring in judgment in part and dissenting in part).

[180] *See* Geoffrey R. Stone, *Justice Scalia, Originalism and the First Amendment*, HUFFINGTON POST (Dec. 13, 2011), https://www.huffpost.com/entry/justice-scalia-originalis_b_1009944 [https://perma.cc/9XMG-6EC8].

[181] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (holding that states cannot award damages to public officials in libel actions relating to their official conduct unless the public official proves actual malice).

[182] *See* Morse v. Frederick, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring).

[183] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 821–38 (2011) (Thomas J., dissenting).

[184] Transcript of Oral Argument at 17, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011) (No. 08-1448), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/08-1448.pdf [https://perma.cc/DEB3-UE6D] (The case name on the oral argument transcript differs from the final opinion because a new governor took office between oral argument and the issuance of the case opinion, changing the first named party, the Governor of California, from Schwarzenegger to Brown.).

4. Justice John Paul Stevens

Ironically, the most extended originalist/textualist analysis has not come from the opinions of originalists justices, but rather from Justice Stevens and his dissent in *Citizens United,* this in his exchange with Justices Kennedy and Scalia. To buttress his arguments, Justice Stevens referenced one of the early defenders of originalism: "[T]he Framers and their contemporaries conceived of speech more narrowly than we now think of it, *see* [Robert] Bork, Neutral Principles and Some First Amendment Problems, but also because they held very different views about the nature of the First Amendment right."[185]

5. Justice Clarence Thomas

Not surprisingly, the most originalist work done in connection with the First Amendment and free expression has come from the hands of Justice Thomas. Much of this is owed to the number of separate opinions (sixteen in fifty-eight cases: 27.5 percent) he has authored. There was, for example, what he slipped into his concurring opinion in *Ramos v. Louisiana*, a Sixth Amendment case.[186] Therein, he quoted from an earlier ruling referring to William Blackstone as "the preeminent authority on English law for the founding generation."[187] Maybe, but more likely maybe not as evidenced by a contrary conclusion reached in Wendell Bird's impressively documented book, *The Revolution in Freedoms of Press and Speech: From Blackstone to the First Amendment and Fox's Libel Act*.[188]

There was also his concurrence in *Morse* wherein he called for the overruling of *Tinker v. Des Moines Independent Community School District*:[189] "As originally understood, the Constitution does not afford students a right to free speech in public schools. In light of the history of American public education, it cannot seriously be suggested that the First Amendment 'freedom of speech' encompasses a student's right to speak in public schools."[190]

---

[185] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 426 (2010) (Stevens, J., dissenting) (citation omitted). See *supra* note 26 for full citation of Bork's book.

[186] Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

[187] *Id.* at 1422 (Thomas, J., concurring in judgment).

[188] *See* WENDELL BIRD, THE REVOLUTION IN FREEDOMS OF PRESS AND SPEECH: FROM BLACKSTONE TO THE FIRST AMENDMENT AND FOX'S LIBEL ACT 14–15, 19–73 (2020).

[189] Morse v. Frederick, 551 U.S. 393, 410 (2007) (Thomas, J., concurring); *see also* DAVID L. HUDSON JR., LET THE STUDENTS SPEAK: A HISTORY OF THE FIGHT FOR FREEDOM OF EXPRESSION IN AMERICAN SCHOOLS 116–17 (2011).

[190] *Morse*, 551 U.S. at 418–19 (Thomas, J., concurring).

And then there was Thomas's dissent from the Court's denial of review in *Kansas v. Boettger*[191] wherein he argued that the First Amendment is protected by the privileges or immunities clause of the Fourteenth Amendment:

> The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." As I have previously explained, "[t]he evidence overwhelmingly demonstrates that the privileges and immunities of such citizens included individual rights enumerated in the Constitution." One of those rights is "the freedom of speech" in the First Amendment."[192]

Justice Thomas, like Justice Scalia before him, had serious originalist reservations about the Court's holding in *New York Times Co. v. Sullivan.* He said as much in *McKee v. Cosby*[193]:

> *New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law. Instead of simply applying the First Amendment as it was understood by the people who ratified it, the Court fashioned its own "'federal rule[s]'" by balancing the "competing values at stake in defamation suits."
>
> We should not continue to reflexively apply this policy-driven approach to the Constitution. Instead, we should carefully examine the original meaning of the First and Fourteenth Amendments. If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we.
>
> . . . .
>
> . . . We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified. The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. We should reconsider our jurisprudence in this area.[194]

Thomas reiterated his call for a re-examination of *Sullivan* and its progeny in *Berisha v. Lawson*.[195] Justice Gorsuch issued a similar call.[196] Thomas wrote of the "lack of historical support" for the actual malice standard.[197]

---

[191] Kansas v. Boettger, 140 S. Ct. 1956 (2020) (mem.), *denying cert. to* 450 P.3d 805 (Kan. 2019).

[192] *Id.* at 1956–57 (Thomas, J., dissenting) (alterations in original) (citations omitted).

[193] McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 334, 338 (1974)).

[194] *Id.* at 676, 682 (alterations in original) (citations omitted in denial of certiorari); *see also* Elonis v. United States, 575 U.S. 723, 760–63 (2015) (Thomas, J., dissenting) (discussing intentional threats from an originalist First Amendment perspective).

[195] Berisha v. Lawson, 141 S. Ct. 2424 (2021) (mem.), *denying cert. to* 973 F.3d 1304 (11th Cir. 2020); *id.* at 2424–25 (Thomas, J., dissenting from denial of certiorari).

[196] *Id.* at 2426–30 (Gorsuch, J., dissenting from denial of certiorari).

[197] *Id.* at 2425 (Thomas, J., dissenting from denial of certiorari).

6. Justice Neil Gorsuch

For his part in joining in dissent from the denial of certiorari in *Berisha*, Justice Gorsuch also called for a reexamination of *Sullivan* and its progeny.[198] He did so for the following five reasons, among others:

(1) *Revolution of the Modern Age:* Seldom is there much, if any, discussion of corresponding duties.[199] In that regard, the following statement is noteworthy: "Like most rights, this one comes with corresponding duties."[200] To which he added: "Not only has the doctrine evolved into a subsidy for published falsehoods on a scale no one could have foreseen, it has come to leave far more people without redress than anyone could have predicted."[201]

(2) *Focus on Historical Sources*: Consistent with is originalist perspective, Justice Gorsuch relied on Blackstone and Justice Joseph Story,[202] among others, to buttress his arguments.[203] But that raises the question of there being other historical sources and the interpretations given to them.[204]

---

[198] *Id.* at 2426–30 (Gorsuch, J., dissenting from denial of certiorari). For two commentaries, see Eugene Volokh, *Justices Thomas and Gorsuch Criticize* New York Times v. Sullivan, VOLOKH CONSPIRACY (July 2, 2021, 10:58 AM), https://reason.com/volokh/2021/07/02/justices-thomas-and-gorsuch-criticize-new-york-times-v-sullivan/ [https://perma.cc/6EKA-2MSD]; and Jonathan H. Alder, *Is* NYT v. Sullivan *the Real Problem with Libel Law? (Updated)*, VOLOKH CONSPIRACY (July 2, 2021 3:14 PM), https://reason.com/volokh/2021/07/02/is-nyt-v-sullivan-the-real-problem-with-libel-law/ [https://perma.cc/8853-D9XG].

[199] This point about corresponding duties (or obligations) was raised more than a half-century ago by a French philosopher and political activist. *See* SIMONE WEIL, *Draft for a Statement of Human Obligations*, *in* SELECTED ESSAYS: 1934-1943, at 219, 219–27 (Richard Rees, trans., 1962) (1943 essay).

[200] *Berisha*, 141 S. Ct. at 2426 (Gorsuch, J., dissenting from denial of certiorari).

[201] *Id.* at 2429.

[202] *Joseph Story: United States Jurist*, BRITANNICA, https://www.britannica.com/biography/Joseph-Story [https://perma.cc/2Q8X-99GZ].

[203] *Id.* at 2426.

[204] *See* Ronald K.L. Collins, *First Amendment News 277: Contra-Justice Thomas, the Originalist Debate Continues—A Review of Wendell Bird's "Criminal Dissent"*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Nov. 11, 2020), https://www.thefire.org/first-amendment-news-277-contra-justice-thomas-the-originalist-debate-continues-a-review-of-wendell-birds-criminal-dissent/ [https://perma.cc/GAG3-ZB5J]; Ronald K.L. Collins, *First Amendment News 247: Living Originalism and Its Evolution—Books by Wendell Bird Paint New Picture of the History of Press, Speech Freedoms in America*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Mar. 25, 2020), https://www.thefire.org/fan-247-living-originalism-and-its-evolution-books-by-wendell-bird-paint-new-picture-of-the-history-of-press-speech-freedoms-in-america/ [https://perma.cc/9Y27-EV9U].

(3) *Focus on "Momentous" Changes in Media*: To what extent is the rule of Sullivan and its progeny affected by changes in the media landscape? Here again, Gorsuch raises an important point: "Since 1964, however, our Nation's media landscape has shifted in ways few could have foreseen."[205] And then this:

> It's hard not to wonder what these changes mean for the law. In 1964, the Court may have seen the actual malice standard as necessary "to ensure that dissenting or critical voices are not crowded out of public debate." But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands.[206]

At the end of his dissent, Gorsuch added this:

> I do not profess any sure answers. I am not even certain of all the questions we should be asking. But given the momentous changes in the Nation's media landscape since 1964, I cannot help but think the Court would profit from returning its attention, whether in this case or another, to a field so vital to the "safe deposit" of our liberties.[207]

(4) *Focus on Increases in False Statements:* We live in a world in which truth is ever more democratized, which means truth becomes relative.[208] According to Justice Gorsuch: "It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy."[209] That problem is compounded, so the argument goes, if such falsehoods are beyond legal reach. "When the Court originally adopted the actual malice standard," Gorsuch argued,

> [I]t took the view that tolerating the publication of *some* false information was a necessary and acceptable cost to pay to ensure truthful statements vital to democratic self-government were not inadvertently suppressed. But over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability.[210]

---

[205] *Berisha*, 141 S. Ct. at 2427 (Gorsuch, J., dissenting from denial of certiorari).

[206] *Id.* (citation omitted).

[207] *Id.* at 2430.

[208] *See* Collins, *The Holmesian Experiment*, *supra* note 3, at 23–25.

[209] *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from denial of certiorari).

[210] *Id.* (citation omitted). Justice Gorsuch goes on to state that "[s]tatistics show . . . the number of trials involving defamation, privacy, and related claims based on media publications has declined dramatically over the past few decades: In the 1980s there were on average [twenty-seven] per year; in 2017 there were [three]." *Id.* The Justice's reliance on these statistics compiled by the Media Law Resource Center has been contested by the organization. *See* George Freeman, Times v. Sullivan*, Rosenbloom, and Justice Gorsuch: Where is SCOTUS Heading?*, MLRC MEDIALAWLETTER (Media Law Resource Center), Aug. 2021, at 3, 4, 7, https://medialaw.org/issue/medialawletter-august-2021/ [https://perma.cc/G2J9-6WKF].

(5) *Focus on the Public Figure Doctrine*:

> [T]oday's world casts a new light on [certain assumptions made in *Sullivan* and its progeny]. Now, private citizens can become "public figures" on social media overnight. Individuals can be deemed "famous" because of their notoriety in certain channels of our now-highly segmented media even as they remain unknown in most.[211]

Prediction: We surmise that the Gorsuch dissent will garner considerable attention in the profession and the legal academy in the months ahead. If so, the Roberts Court may, in time, render an opinion in press cases, something it has yet to do.

* * * *

Perhaps in the coming years more serious attention will be devoted to the originalist approach given Justice Neil Gorsuch's ascendance to the Court and what he wrote in his book *A Republic if You Can Keep It*.[212] If so, the Court would need to explore the meaning of the text and history[213] of words and phrases such as "Congress," "make," "no law," "abridging," "freedom of," and "the press," among others, at some length . . . and perhaps in ways different from those championed decades ago by Justice Black or thereafter by Justices Scalia and Thomas.

E. The Players and Non-Players

When it comes to majority opinions in First Amendment free expression cases, the chief justice leads the way. Between 2006 and the end of the 2020–2021 term, he authored 16 majority opinions (9 First Amendment (FA) claims sustained, 7 denied). The tallies for the other justices divide into six tiers:

<u>First Tier: The Affirmers {10 out of 13 FA claims sustained}</u>

- Kennedy (7) (2006–2018) [5 FA claims sustained, 2 denied]
- Alito (6) (2006–2021) [5 FA claims sustained, 1 denied]

<u>Second Tier: The Frequent Deniers {6 out of 9 claims denied}</u>

- Scalia (5) (2006–2016) [1 FA claim sustained, 4 denied]
- Thomas (4) (2006–2021) [2 FA claims sustained, 2 denied]

---

[211] *Id.* at 2429.

[212] NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP It 108–44 (2019) (regarding originalism and textualism).

[213] *See* Ronald K.L. Collins, *The Speech & Press Clauses of the First Amendment*, DEL. LAW., Winter 2011/2012, at 8, 8.

Third Tier: The Rare Affirmers {3 out of 9 FA claims sustained}

- Breyer (4) (2006–2021) [2 FA claim sustained, 2 denied]
- Ginsburg (3) (2006–2020) [0 FA claims sustained, 3 denied]
- Sotomayor (2) (2009–2021) [1 FA claim sustained, 1 denied]

Fourth Tier: The Rare Players {1 out of 2 claims sustained}

- Stevens (1) (2006–2010) [0 FA claims sustained, 1denied]
- Kagan (1) (2010–2021) [1 FA claim sustained, 0 denied]

Fifth Tier: Too Early to Tell Tier

- Gorsuch (0) (2018–2021) [0 FA claim sustained, 0 denied]
- Kavanaugh (2) (2018–2021) [1 FA claim sustained, 1 denied]
- Barrett (0) (2020–2021) [0 FA claim sustained, 0 denied]

Sixth Tier: Other

- Per Curiam (2) [2 claim sustained, 0 denied]
- O'Connor (0) (2006–2006) [0 FA claim sustained, 0 denied]
- Souter (0) (2006–2009) [0 FA claim sustained, 0 denied]

F. The Senior Justice: A Notable Majority Opinion and a Noteworthy Concurrence

October 23, 1991. That was the date that Clarence Thomas, the senior justice, joined the Supreme Court. Of the fifty-eight Roberts Court First Amendment free expression cases in which he participated, Justice Thomas was only assigned four majority opinions, two of which affirmed a free speech claim and two of which denied a free speech claim:

(1) *Washington State Grange v. Washington State Republican Party*[214] [vote: 7–2 ×]
(2) *Reichle v. Howards*[215] [vote: 8–0 ×]
(3) *Reed v. Town of Gilbert*[216] [vote: 9–0 ✓]
(4) *NIFLA v. Becerra*[217] [vote: 5–4 ✓]

---

[214] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) (denied First Amendment claim).

[215] Reichle v. Howards, 566 U.S. 658 (2012) (denied First Amendment claim).

[216] Reed v. Town of Gilbert, 576 U.S. 155 (2015) (affirmed First Amendment claim).

[217] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) (affirmed First Amendment claim).

1. Content Discrimination

By far, the most important of those opinions—and an important one on its own right—was Thomas's majority opinion in *Reed*, the outdoor signs case.[218] "We hold," said Thomas writing for the Court, "that these provisions are content-based regulations of speech that cannot survive strict scrutiny."[219] He thereafter added:

> Our precedents have . . . recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "'justified without reference to the content of the regulated speech,'" or that were adopted by the government "because of disagreement with the message [the speech] conveys." Those laws, like those that are content based on their face, must also satisfy strict scrutiny.
>
> . . . .
>
> . . . 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 . . . .
>
> . . . .
>
> Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an "'absolutist'" content-neutrality rule would render "virtually all distinctions in sign laws . . . subject to strict scrutiny," but that is not the case. Not "all distinctions" are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny.[220]

Shortly after the *Reed* opinion came down, Adam Liptak of the *New York Times* observed, "there is little question that the decision, *Reed v. Town of Gilbert*, marks an important shift toward treating countless laws that regulate speech with exceptional skepticism."[221] Professor Genevieve Lakier, writing in the *Supreme Court Review*, agreed:

---

[218] *See* David L. Hudson, Jr., *The Content Discrimination Principle and the Impact of Reed v. Town of Gilbert*, 70 CASE W. RSRV. L. REV. 259, 259 (2019).

[219] *Reed*, 576 U.S. at 159.

[220] *Id.* at 164, 167, 172 (citations omitted).

[221] Adam Liptak, *Court's Free Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html [https://perma.cc/Q6YM-33VJ] (emphasis added).

> *Reed* . . . represents an important change in First Amendment doctrine, and one that will in all likelihood have a significant impact in many areas of law. . . . By insisting that strict scrutiny applies to all laws that treat speakers differently because of the content of their speech, *Reed* potentially imperils the hundreds, even perhaps thousands, of local, state, and federal laws that make subject matter or viewpoint distinctions.[222]

Though Justice Breyer concurred in the judgment, he felt compelled to emphasize that "content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny."[223] Thereafter, he pointed out "[t]hat is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity."[224] His proposed test is as follows:

> The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives.[225]

During the course of the oral arguments in *Barr v. American Association of Political Consultants, Inc.*, Justice Breyer again took aim at Justice Thomas's *Reed* opinion:

> All human life is carried on through speech. All government regulation is carried on through speech. Every single statutes book is filled with all kinds of content discrimination.
>
> The SEC and every agency deals with nothing but what do their rules apply to, where are the exceptions, et cetera. And so I'd always thought that that was in Justice Brandeis's third category, economic regulation, as far as the First Amendment is concerned, or at least most of it was.[226]

---

[222] Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 235 (2016).

[223] *Reed*, 576 U.S. at 176 (Breyer, J., concurring in judgment).

[224] *Id.* at 177.

[225] *Id.* at 178–79.

[226] Transcript of Oral Argument at 15, Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335 (2020) (No. 19-631), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-631_omjp.pdf [https://perma.cc/A9AP-BERF].

In his separate opinion in *American Association of Political Consultants*, Justice Breyer (joined by Justices Ginsburg and Kagan) again took exception to the use of a strict scrutiny standard of review in content discrimination cases:

> A proper inquiry should examine the seriousness of the speech-related harm, the importance of countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less restrictive ways of doing so. Narrow tailoring in this context, however, does not necessarily require the use of the least-restrictive means of furthering those objectives.[227]

And in her separate opinion in *American Association of Political Consultants*, Justice Sotomayor urged the use of an "intermediate scrutiny" standard of review. Here, and as we discuss in further detail below,[228] the *Reed* opinion may prove to be the most momentous one of the Roberts Court First Amendment freedom of expression opinions.

2. Money and Silence . . . and Anonymity

At least two tenets of Justice Thomas's campaign finance opinions merit special attention. The first concerns the legitimacy of the Court's landmark campaign finance holding in *Buckley v. Valeo*[229] the second concerns the status of anonymity in the campaign contributions and expenditures context.

In his opinion, concurring in the judgment, in *McCutcheon v. FEC*, Justice Thomas reiterated his view that *Buckley* should be overruled: "I adhere to the view that this Court's decision in *Buckley* denigrates core First Amendment speech and should be overruled."[230] Later, he added:

> [W]hat remains of *Buckley* is a rule without a rationale. Contributions and expenditures are simply "two sides of the same First Amendment coin," and our efforts to distinguish the two have produced mere "word games" rather than any cognizable principle of constitutional law. [*Buckley*,] 424 U.S., at 241, 244 (Burger, C. J., concurring in part and dissenting in part). For that reason, I would overrule *Buckley* and subject the aggregate limits in [the Bipartisan Campaign Reform Act of 2002] to strict scrutiny, which they would surely fail.[231]

---

[227] *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2362.

[228] *See infra* Part V.

[229] *See* Buckley v. Valeo, 424 U.S. 1, 58–59 (1976) (per curiam) (holding federal statutory limits on campaign contributions did not violate First Amendment but federal statutory limits on campaign expenditures infringed on First Amendment rights of free expression).

[230] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 228 (2014) (Thomas, J., concurring in judgment).

[231] *Id.* at 231–32.

As to anonymity in the campaign contributions and expenditures context, in his concurring in part and dissenting in part opinion in *Citizens United,* he declared:

> Congress may not abridge the "right to anonymous speech" based on the "'simple interest in providing voters with additional relevant information,'" . . . (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995)). In continuing to hold otherwise, the Court misapprehends the import of "recent events" that some *amici* describe "in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation." The Court properly recognizes these events as "cause for concern," but fails to acknowledge their constitutional significance. In my view, *amici*'s submissions show why the Court's insistence on upholding §§ 201 and 311 [of the Bipartisan Campaign Reform Act of 2002] will ultimately prove as misguided (and ill fated) as was its prior approval of § 203.
>
> . . . .
>
> I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in "core political speech, the 'primary object of First Amendment protection.'"[232]

While Thomas was alone in that view, it is an argument that may gain traction in future Roberts Court opinions. Perhaps some evidence of that came this past term when the Court handed down its ruling in *Americans for Prosperity Foundation v. Bonta*,[233] a case in which the justices struck down a compelled disclosure requirement in the context of charitable donations. Notably, in his majority opinion, the chief justice emphasized the "'*possible* deterrent effect' of disclosure."[234] Perhaps the specter of such statements being applied in the campaign finance context prompted Justice Breyer to ask the following questions in the course of oral arguments in that case:

> If you win in this case, I think the Court will have in some form held that the interest of the donors in maintaining privacy of their giving to a charity, interests of the charity in receiving those money, here at least outweighs the interest of the State in having a law on the books that, even if it never is actually enforced, frightens people into behaving properly. Okay? Something like that.
>
> Well, if we hold that, can we distinguish campaign finance laws, where the interest is even stronger in people being able to give

---

[232] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 480, 485 (2010) (Thomas, J., concurring in part and dissenting in part) (citations omitted).

[233] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

[234] *Id.* at 2388 (quoting NAACP v. Alabama, 357 U.S. 449, 460–61 (1958)).

> anonymously? Can we distinguish laws that require them to disclose their givers? How would you distinguish that, if you would?[235]

The logic of Breyer's question may well prompt the Court to revisit the anonymity question in the campaign finance context.

G. The Court Chambers and the New Technologies of Communication

The ever-emerging technology of cameras has had a profound impact on law, from everything to how it is executed by police on the street[236] to how it affects the very development of the law, both statutorily and constitutionally, both at the federal[237] and state[238] levels. But when it comes to the law of the First Amendment and how it is applied when cameras focus on the Supreme Court and its nine justices, nothing has changed. The Roberts Court, like its predecessors, has not embraced the idea of photography of any kind being used in its revered sanctum.

Appearing before a House Appropriations subcommittee in March of 1996, "Justice David H. Souter minced no words[:] 'I think the case is so strong,' . . . 'that I can tell you the day you see a camera come into our courtroom, it's going to roll over my dead body.'"[239]

Thirteen years later, then Solicitor General Elena Kagan dodged the matter of cameras in the Supreme Court when the question was presented to her by a C-SPAN reporter.[240] Still, she did concede: "If cameras were in the courtroom, the American public would see an amazing and extraordinary event."[241]

Then, in 2019, when Justices Alito and Kagan appeared before a House Appropriations Committee in a televised hearing[242]

---

[235] Transcript of Oral Argument at 12, *Ams. for Prosperity*, 141 S. Ct. 2373 (No. 19-251), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-251_h3ci.pdf [https://perma.cc/M2N6-549Z].

[236] *See* Matthew Feeney, *Watching the Watchmen: Best Practices for Police Body Cameras*, CATO INSTITUTE 782 (Oct. 27, 2015), https://www.cato.org/policy-analysis/watching-watchmen-best-practices-police-body-cameras [https://perma.cc/EBM2-PENX].

[237] *See generally* SARAH J. ECKMAN, CONG. RSCH. SERV., R44514, VIDEO BROADCASTING FROM THE FEDERAL COURTS: ISSUES FOR CONGRESS (2019), https://www.everycrsreport.com/files/20191028_R44514_467e0ce75c3873fbda5849081ef39ee2f43f1b2d.pdf [https://perma.cc/WH2M-DAWR] (discussing judicial and congressional policies, actions, and considerations for use of cameras in courtrooms).

[238] *Id.* at 1 & n.2.

[239] *On Cameras in Supreme Court, Souter Says, 'Over My Dead Body,'* N.Y. TIMES, Mar. 30, 1996 (§1), at 24.

[240] C-SPAN, *Elena Kagan on Cameras in Court*, YOUTUBE (July 23, 2009), https://www.youtube.com/watch?app=desktop&v=L2Ng1GNICLk (last visited Dec. 29, 2021) (from C-SPAN coverage of the July 2009 Ninth Circuit Judicial Conference).

[241] *Id.* at 01:12.

[242] C-SPAN, *Justices Alito and Kagan on Cameras in the Supreme Court*, YOUTUBE (Mar. 7, 2019), https://www.youtube.com/watch?app=desktop&v=GosJsE5KGrU (last visited Dec. 29, 2021).

on the Supreme Court's budget, the two jurists, in their own ways, discussed the various pros and cons of cameras in their Court. Even so, they never openly endorsed the idea of changing the status quo.

Chief Justice Roberts addressed the question at some length in October of 2018 in an event hosted by the University of Minnesota Law School. The event was a televised C-SPAN exchange with Professor Robert Stein to discuss various issues concerning the Supreme Court.[243] On the one hand, he began, "I think it would be very helpful in getting more people familiar with how the Court operates."[244] On the other hand, he quickly added, "that's not our job, to educate people. Our job is to carry out our role under the Constitution, to interpret the Constitution and laws according to the rule of law. And, I think, that having cameras in the courtroom would impede that process."[245] Whatever advantages might be had by televising the Court's proceedings, they were outweighed by the disadvantages:

> We think the process works pretty well. I think if there were cameras, that the lawyers would act differently. I think, frankly, some of my colleagues would act differently. And that would affect what we think is a very important and well-functioning part of the decision process. I don't think there are a lot of public institutions, frankly, that have been improved in how they do business by cameras. . . . People have an absolute right to know what we're doing, and that's true in courts around the country. We have an open courtroom. I think it is, to a certain extent, unfortunate that we're not televised, because I think most people would be pleased with what they saw in terms of how seriously we take our work and the high level at which the exchange is conducted. But I do think it would have an adverse effect on our job under the Constitution, and that has to come first.[246]

For all its First Amendment commitments to truth and transparency, the Roberts Court is unlikely to break from tradition in this area, notwithstanding anything some of the justices said, suggested, or evaded during their confirmation hearings.[247] For example, Justice Sotomayor changed her mind on this issue and ultimately came out against Court coverage.[248]

---

[243] *Chief Justice Roberts Remarks at University of Minnesota Law School*, C-SPAN, at 19:10 (Oct. 16, 2018), https://www.c-span.org/video/?451977-1/chief-justice-roberts-stresses-supreme-courts-independence-contentious-kavanaugh-hearings (last visited Dec. 29, 2021).

[244] *Id.*

[245] *Id.*

[246] *Id.* at 19:31.

[247] *See* C-SPAN, *Justices on Camera in the Court from Confirmation Hearings*, YOUTUBE (Mar. 17, 2017), https://www.youtube.com/watch?app=desktop&v=gAKQM8rkZ5o (last visited Dec. 29, 2021).

[248] Sam Baker, *Justice Sotomayor No Longer Backs Television Cameras in Supreme Court*, HILL (Feb. 7, 2013, 7:25 PM), https://thehill.com/homenews/news/281765-sotomayor-no-longer-backs-cameras-in-supreme-court [https://perma.cc/6YGW-P3XV].

That left two justices: Neil Gorsuch and Brett Kavanaugh. During his confirmation hearings, then Judge Gorsuch said: "I come to it with an open mind . . . I would want to hear the arguments."[249] That was pretty much the same mantra previously followed by most of the justices when similarly situated, though nothing ever came of it.

If there is to be any movement in this area, albeit cautious and incremental, it may come by way of something then-Judge Kavanaugh hinted at in this confirmation hearings.[250] On the one hand, he kept many of his comments pretty much in lockstep with what his soon-to-be colleagues had said previously:

> On the Supreme Court, I think the best approach for me is to listen to the [various] views . . . and [those] of others I know who are interested in that . . . to listen to the Justices currently on the Supreme Court . . . and to learn from [them] what they think about [it] . . . .[251]

On the other hand, he then braved into new and unexplored territory:

> I'd want to think about . . . oral arguments and the actual *announcements of the decisions. I think those are two distinct things.* There hasn't been much focus on the possibility of live audio, for example, of the decision announcements, or video of the decision announcements. And I think that's a distinct issue from oral arguments, and I[woul]d be interested in thinking about that and talking to my colleagues. . . . I will have an open mind on it.[252]

Aside: It took centuries to happen, but in 2019, the Roberts Court announced a new rule, whereby lawyers were given a two-minute grace period uninterrupted by questions from or comments by the justices.[253] Admittedly, a small step. But like the onetime no writing ban on Court audience members, which was halted,[254] such modest changes reveal how difficult it is to break with tradition.

Tradition, however, did change much in the 2019–2020 and 2020–2021 terms. What was new was the advent of a live

---

[249] *Gorsuch Confirmation Hearing, Day 2, Part 1*, C-SPAN, at 00:55 (Mar. 21, 2017), https://www.youtube.com/watch?app=desktop&v=9XNGxBIlT0g (last visited Dec. 29, 2021).

[250] *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 3, Part 1*, C-SPAN (Sept. 6, 2018), https://www.c-span.org/video/?449706-1/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-3-part-1 (last visited Dec. 29, 2021).

[251] *Id.* at 19:10.

[252] *Id.* at 1:10:03 (emphasis added); *see* Floyd Abrams & Ronald K.L. Collins, *A Novel Idea: Televising the Announcement of Supreme Court Opinions*, U. CHI. L. REV. ONLINE (Jan. 13, 2020), https://lawreviewblog.uchicago.edu/2020/01/13/a-novel-idea-televising-the-announcement-of-supreme-court-opinions-by-floyd-abrams-ronald-k-l-collins/ [https://perma.cc/A3WH-AXN9].

[253] U.S. SUP. CT., GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 7 (2019).

[254] Ronald K.L. Collins & David M. O'Brien, *At the Whim of the Court*, WASH. POST (Aug. 18, 1997), https://www.washingtonpost.com/archive/opinions/1997/08/18/at-the-whim-of-the-court/4db51502-fb32-47c9-92fc-e21feee27095/ [https://perma.cc/Y84D-HVD7].

audio feed of the oral arguments,[255] owing to the COVID-19 pandemic. As reported by Adam Feldman for SCOTUSblog:

> [T]hough potentially ephemeral, the new structure implemented in May included unprecedented changes to the argument format. The three main alterations were [1] that the arguments occurred remotely, so for the first time during arguments the justices were not in the same room with the advocates and one another; [2] that the court used an ordering mechanism whereby the justices asked questions individually and in order of seniority; and, critically, [3] that the justices were limited in the time they could question.[256]

The advent of this new form of oral arguments had at least two notable consequences: (1) the demise of the oral summary of opinions, and (2) Justice Thomas became far more vocal than he had been since he came to the Court in October of 1991.[257]

III. THE LAWYERS

Constitutional and First Amendment law are taught in court-centric ways as if the lawyers who argued the cases were of little or no moment.

> We live in court-centric times. That is, the law is equated with the work-product of judges, and this with sustained frequency. Judicial review is the altar at which many worship[, especially in the legal academy].
>
> . . . .
>
> Practically *and* theoretically speaking, much is lost by this myopic approach to law. By considering law from the vantage point of the lawyer, the study of the law stands to be more holistic; it also stands to be enriched in legal realist ways [especially when it comes to constitutional and First Amendment law].[258]

And then there is this point: law professors place a lot of stock into *how* cases are decided and how opinions are structured without fully appreciating the ways in which the issues were presented *to* the Justices beforehand by the lawyers in the case. That is, even accepting a court-centric model, it might not always be clear

---

[255] Adam Feldman, *Empirical SCOTUS: Results from the Court's Experiment with a New Oral Argument Format*, SCOTUSBLOG (May 22, 2020, 4:51 PM), https://www.scotusblog.com/2020/05/empirical-scotus-results-from-the-courts-experiment-with-a-new-oral-argument-format/ [https://perma.cc/7HX8-3R6T].

[256] *Id.*

[257] *See also* SCOTUStalk, *SCOTUSblog Co-Founders Discuss Use of Live Audio in May Oral Arguments*, PODCAST ADDICT (May 21, 2020), https://www.scotusblog.com/2020/05/live-audio-for-oral-arguments/ [https://perma.cc/ET6V-XECL].

[258] Ronald K.L. Collins, *Thoughts on Hayden C. Covington and the Paucity of Litigation Scholarship*, 13 FIU L. REV. 599, 600, 603 (2019) (footnotes omitted).

why judges decided cases the way they do without the context of the ways in which the issues were first presented to them. Even after the fact of judicial review, it is lawyers who must first apply that judge-announced law to the facts of future cases. As Professor David Vladeck has rightfully noted:

> [L]aw schools fail students by focusing only on opinions and not briefs. . . . [All too often, law professors fail to ask] students to read briefs; indeed, I know of no professor who ever has asked students to read briefs, except, perhaps, professors who teach appellate advocacy courses. But that use of briefs is for skills training, not to see how doctrine evolves. The only mention of briefs in law school is the mention of Brandeis brief, and that is simply a way of describing a brilliant advance by a brilliant lawyer.[259]

In all of this, our concern is to broaden the lens through which law professors and law students study and understand law. Those in the legal academy could do much to enhance the educational experience by paying more attention to how the law is actually applied, construed, and developed by lawyers. Mindful of such concerns, we turn next to say a few words about the lawyers who have played key roles in the development of free expression law during the era of the Roberts Court.

A. Leading Lawyers: Those Who Argued Three or More Cases in the Supreme Court

The appellate lawyers who ventured to curb or expand the free speech jurisprudence of the Roberts Court make for both a predictable and surprising bunch. There are, for example, Elena Kagan's arguments on behalf of the government in

(1) *Holder v. Humanitarian Law Project*;[260]

and her arguments on behalf of the government in

(2) *Citizens United v. FEC*.[261]

---

[259] *Id.* at 603 (alterations in original) (quoting Email from David Vladeck to Ronald K.L. Collins (Aug. 5, 2013) (on file with Ronald K.L. Collins)).

[260] Transcript of Oral Argument at 30–58, Holder v. Humanitarian L. Project, 561 U.S. 1 (2010) (No. 08-1498), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2009/08-1498.pdf [https://perma.cc/5LNK-6PQ2] (advocating for federal statute that prohibited provision of "material support" to designated foreign terrorist organizations to further government interest in combatting terrorism).

[261] Transcript of Oral Argument (Reargument) at 35–68, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205[Reargued].pdf [https://perma.cc/QVL7-K977] (arguing to uphold federal ban on corporate and union independent expenditures for "electioneering communication" or express candidate advocacy to further government's anticorruption interest).

In the latter case, Kagan's views as the government's lawyer (solicitor general) proved largely consistent with her views as a justice, as evidenced by her dissents in such campaign finance cases as *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*[262] and her vote to join in dissent in *McCutcheon*.[263]

Paul D. Clement was similarly situated; he too argued First Amendment cases acting on behalf of the government.[264] In his capacity as solicitor general from 2005 to 2008, he argued:

(1) *Wisconsin Right to Life, Inc. v. FEC*;[265]
(2) *Rumsfeld v. FAIR*;[266]
(3) *Davenport v. Washington Education Association*;[267]
(4) *FEC v. Wisconsin Right to Life, Inc.*;[268]
(5) *United States v. Williams*;[269] and
(6) *Davis v. FEC*.[270]

Prior to the Roberts Court era, Mr. Clement also argued on behalf of the government in:

(1) *Ashcroft v. Free Speech Coalition* (for petitioner);[271] and
(2) *McConnell v. FEC* (for respondent).[272]

In the 2019–2020 and 2020–2021 terms, Mr. Clement was counsel of record in no fewer than four cases in which First Amendment free expression issues were raised:

---

[262] *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 755–85 (2011) (Kagan, J., dissenting) (disagreeing that state law granting additional monies to publicly funded candidates outspent by privately financed candidates burdened speech and that combatting corruption was not a compelling interest).

[263] *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 232–72 (2014) (Breyer, J., joined by Ginsburg, Sotomayor, & Kagan, JJ., dissenting) (disagreeing that federal aggregate limits on campaign contributions were "poorly tailored" to the government's stated interest of combatting corruption).

[264] Information about *Paul D. Clement*, KIRKLAND & ELLIS, https://www.kirkland.com/lawyers/c/clement-paul-d [https://perma.cc/XE7Y-EAHY].

[265] Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 454 (2007) (campaign finance).

[266] Rumsfeld v. F. for Acad. & Institutional Rts., 547 U.S. 47, 50 (2006) (compelled speech; association).

[267] Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 179 (2007) (government employee unions).

[268] *Wis. Right to Life*, 551 U.S. at 454.

[269] United States v. Williams, 553 U.S. 285, 287 (2008) (child pornography).

[270] Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008) (campaign finance).

[271] Ashcroft v. Free Speech Coal., 535 U.S. 234, 238 (2002).

[272] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 111 (2003).

(1) *Charter Communications Inc. v. National Association of African American-Owned Media*[273] (cable operator and First Amendment right to include racial considerations in making editorial determinations);
(2) *Archdiocese of Washington v. WMATA*[274] (religious advertisements) (cert. denied);
(3) *Thompson v. Hebdon*[275] (political campaign contributions) (judgment vacated, and the case was remanded to circuit court); and
(4) *Facebook, Inc. v. Duguid*[276] (Telephone Consumer Protection Act robotext case).

Mr. Clement also filed an important amicus brief on behalf of Facebook in *Barr v. American Association of Political Consultants, Inc.*[277] In light of that amicus brief, it is noteworthy that Mr. Clement again represented the same social media client in *Facebook, Inc. v. Duguid*.

Another important player in arguing cases before the Roberts Court is James Bopp, Jr.[278] He argued:

(1) *Wisconsin Right to Life, Inc. v. FEC*;[279]
(2) *Randall v. Sorrell*;[280]
(3) *FEC v. Wisconsin Right to Life, Inc.*;[281] and
(4) *Doe v. Reed*.[282]

Mr. Bopp was also the lawyer who argued *McCutcheon*[283] in the District Court for the DC Circuit.[284] He then filed the

---

[273] Charter Commc'ns, Inc. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 2561 (2020) (mem.) (No. 18-1185), *vacating* 915 F.3d 617 (9th Cir. 2019).

[274] Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 140 S. Ct. 1198 (2020) (mem.) (No. 18-1455), *denying cert. to* 897 F.3d 314 (D.C. Cir. 2018).

[275] Thompson v. Hebdon, 140 S. Ct. 348 (2019) (No. 19-122) (per curiam).

[276] Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021) (No. 19-511).

[277] *See* Brief of *Amici Curiae* Elec. Priv. Info. Ctr. (EPIC) and Twenty-Nine Tech. Experts and Legal Scholars in Support of Petitioners, Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335 (2020) (No. 19-631); *see also* Ronald K.L. Collins, *First Amendment News 268: The Clement Cure for the Cure*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Aug. 26, 2020), https://www.thefire.org/first-amendment-news-268-the-clement-cure-for-the-cure/ [https://perma.cc/2GQ2-7H3K].

[278] *James Bopp*, WIKIPEDIA (Aug. 15, 2021, 8:05 PM), https://en.wikipedia.org/wiki/James_Bopp [https://perma.cc/DQB2-Y9MB].

[279] Fed. Election Comm'n v. Wis. Right to Life, Inc., 546 U.S. 410 (2006) (campaign finance).

[280] Randall v. Sorrell, 548 U.S. 230 (2006) (campaign finance).

[281] Wis. Right to Life, Inc. v. Fed. Election Comm'n, 551 U.S. 449 (2007) (campaign finance).

[282] Doe v. Reed, 561 U.S. 186 (2010) (election law).

[283] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014) (campaign finance).

[284] McCutcheon v. Fed. Election Comm'n, 893 F. Supp. 2d 133, 134 (D.D.C. 2012).

jurisdictional statement in that case when it went to the high Court,[285] and thereafter filed a brief on behalf of the Republican National Committee in the Supreme Court.[286] Earlier, he represented Citizens United, drafting the complaint, handling the early stages of the litigation, and arguing the case before a three-judge federal district court. As reported in *When Money Speaks*, Senator Mitch McConnell has said: "'I have been privileged to be associated with Jim Bopp over the past decade on the important issue of the First Amendment.' . . . Bopp, McConnell continued, 'has probably won and argued more First Amendment campaign finance cases than any lawyer in the country.'"[287] Stephanie Mencimer noted: "The [Republican National Committee] has been a major funder of Bopp's work—paying him at least $1.5 million in fees in cases involving GOP candidates . . . ."[288]

Despite the James Bopps of the litigation world, the lineup in campaign finance cases does not cut easily along liberal-conservative ideological lines. Thus, the ACLU's Stephen Shapiro filed an amicus brief in *Citizens United* in support of the appellant[289] while Norman Dorsen (also an ACLU liberal) filed an amicus brief in opposition on behalf of former officials of the ACLU.[290] Moreover, one of the lawyers challenging the law (on behalf of Senator McConnell) and arguing before the Court was Floyd Abrams, the legendary First Amendment lawyer.[291]

Donald B. Verrilli, Jr., who was solicitor general from 2011 to 2016,[292] argued the following cases:

(1) *Golan v. Holder*;[293]
(2) *United States v. Alvarez*;[294]

---

[285] Jurisdictional Statement, McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014) (No. 12-536), https://www.scotusblog.com/wp-content/uploads/2012/12/12-536-Jurisdictional-Statement-final.pdf [https://perma.cc/VU2M-Z2JA].

[286] Brief on the Merits for Appellant Republican Nat'l Comm., McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014) (No. 12-536).

[287] COLLINS & SKOVER, *supra* note 16, at 32–33.

[288] *Id.* at 33 (quoting Stephanie Mencimer, *The Man Behind Citizens United is Just Getting Started*, MOTHER JONES (May/June 2011), https://www.motherjones.com/politics/2011/05/james-bopp-citizens-united/ (last visited Dec. 29, 2021).

[289] *Amicus Curiae* Brief of the American Civil Liberties Union in Support of Appellant on Supplemental Question, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205).

[290] Supplemental Brief of Former Officials of the American Civil Liberties Union as *Amici Curiae* on Behalf of Neither Party, *Citizens United*, 558 U.S. 310 (No. 08-205).

[291] Profile of *Floyd Abrams*, *supra* note 28.

[292] Profile of *Donald B. Verrilli, Jr.*, MUNGER, TOLLES & OLSON LLP, https://www.mto.com/lawyers/donald-b-verrilli-jr (last visited Dec. 29, 2021) (biography of Donald B. Verrilli, Jr.).

[293] Golan v. Holder, 565 U.S. 302, 305, 335–36 (2012) (copyright).

[294] United States v. Alvarez, 567 U.S. 709, 712, 730 (2012) (false speech).

(3) *McCutcheon v. FEC*;[295] and
(4) *Harris v. Quinn*.[296]

Edwin S. Kneedler has served as deputy US solicitor general since 1993.[297] "As of June 2020, he has argued more cases before the Court than any other active advocate."[298] His First Amendment cases argued during the Roberts Court era include:

(1) *Garcetti v. Ceballos*;[299]
(2) *Morse v. Frederick*;[300] and
(3) *Sorrell v. IMS Health Inc.*[301]

Prior to the tenure of Chief Justice Roberts, Mr. Kneedler also argued:

(1) *Legal Services Corporation v. Velazquez*;[302] and
(2) *Thompson v. Western States Medical Center*.[303]

Malcolm L. Stewart, a former deputy US solicitor general,[304] has argued five First Amendment free speech cases during the Roberts Court era:

(1) *Citizens United v. FEC*;[305]
(2) *Matal v. Tam*;[306]
(3) *Iancu v. Brunetti*;[307]
(4) *Barr v. American Association of Political Consultants, Inc.*;[308] and
(5) *Mahanoy Area School District v. B.L.*[309]

---

[295] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 190, 227 (2014) (campaign finance).

[296] Harris v. Quinn, 573 U.S. 616, 619 (2014) (government employee unions).

[297] *See Edwin S. Kneedler*, OYEZ, https://www.oyez.org/advocates/edwin_s_kneedler (last visited Dec. 29, 2021).

[298] *Edwin Kneedler*, Wikipedia (Apr. 25, 2021, 5:13 AM), https://en.wikipedia.org/wiki/Edwin_Kneedler [https://perma.cc/L5YU-M2XY].

[299] Garcetti v. Ceballos, 547 U.S. 410 (2006) (government employee speech).

[300] Morse v. Frederick, 551 U.S. 393 (2007) (student speech).

[301] Sorrell v. IMS Health Inc., 564 U.S. 552, 555 (2011) (commercial speech; content discrimination).

[302] Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

[303] Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002).

[304] *Malcolm L. Stewart*, C-SPAN, https://www.c-span.org/person/?1018654/MalcolmLStewart [https://perma.cc/J8MN-PUME]; *see also Malcolm L. Stewart*, OYEZ, https://www.oyez.org/advocates/malcolm_l_stewart (last visited Dec. 29, 2021).

[305] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (campaign finance).

[306] Matal v. Tam, 137 S. Ct. 1744, 1750 (2017) (trademark; viewpoint discrimination).

[307] Iancu v. Brunetti, 139 S. Ct. 2294, 2297 (2019) (trademark; viewpoint discrimination).

[308] Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2342 (2020) (robocalls; content discrimination).

[309] Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L. 141 S. Ct. 2038 (2021) (No. 20-255) (student speech).

There is also Jeremiah A. Collins,[310] who argued:

(1) *Locke v. Karass*;[311]
(2) *Ysursa v. Pocatello Education Association*;[312] and
(3) *Knox v. SEIU, Local 1000*.[313]

* * *

The 2019–2020 term also saw University of California, Berkeley Dean Erwin Chemerinsky filing a brief in a government employee speech case, *Waronker v. Hempstead Union Free School District*,[314] in an attempt to scale back the censorial reach of *Garcetti v. Ceballos*.[315] The petition was denied.[316]

B. Women Lawyers Who Argued First Amendment Free Expression Cases in the Supreme Court

When it comes to First Amendment freedom of expression cases argued in the Supreme Court, the male lawyers typically steal the spotlight, as do the male justices in such cases. For that reason, among others, it is important to know much more about the women lawyers who help to shape the law in this area. The following data provides a sketch of just that.

Garcetti v. Ceballos:[317]

- Bonnie I. Robin-Vergeer[318] (for respondent)
- Cindy S. Lee[319] (for petitioner)

---

[310] Profile of *Jeremiah A. Collins*, BREDHOFF & KAISER PLLC, http://www.bredhoff.com/attorneys/senior%20counsel/jeremiah-a-collins/ [https://perma.cc/W8KA-L35D].

[311] Locke v. Karass, 555 U.S. 207, 209 (2009) (government employee unions; compelled speech).

[312] Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 353 (2009) (government employee unions; compelled speech).

[313] Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 301 (2012) (government employee unions).

[314] Petition for Writ of Certiorari, Waronker v. Hempstead Union Free Sch. Dist., 140 S. Ct. 2669 (2020) (No. 19-893); *see Waronker v. Hempstead Union Free School District*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/waronker-v-hempstead-union-free-school-district/ [https://perma.cc/B9XE-7BM8].

[315] Garcetti v. Ceballos, 547 U.S. 410 (2006) (government employee speech).

[316] *Waronker*, 140 S. Ct. 2669 (2021) (mem.), *denying cert. to* 788 F. App'x 788, 792 (2d Cir. 2019).

[317] *Id.*

[318] *Judicial Nomination Commission*, Bonnie I. Robin-Vergeer Biography, *DC.GOV*, https://jnc.dc.gov/biography/bonnie-i-robin-vergeer (last visited Dec. 29, 2021).

[319] *See* David G. Savage, *Whistle-blower Case Goes to High Court*, BALT. TIMES (Oct. 13, 2005), https://www.baltimoresun.com/news/bs-xpm-2005-10-13-0510130250-story.html [https://perma.cc/SET8-6QTU].

Randall v. Sorrell:[320]

- Brenda Wright[321] (for respondent)

Tennessee Secondary School Athletic Association v. Brentwood Academy:[322]

- Maureen E. Mahoney[323] (for petitioner)

Pleasant Grove City v. Summum:[324]

- Pamela Harris[325] (for respondent)

Citizens United v. FEC:[326]

- Elena Kagan (for respondent)

United States v. Stevens:[327]

- Patricia A. Millett[328] (for respondent)

Holder v. Humanitarian Law Project:[329]

- Elena Kagan[330] (for petitioner)

Snyder v. Phelps:[331]

- Margie J. Phelps[332] (for respondent)

---

[320] Randall v. Sorrell, 548 U.S. 230 (2006) (campaign finance).

[321] Profile of *Brenda Wright*, DEMOS, https://www.demos.org/brenda-wright [https://perma.cc/5K6M-LE3Y].

[322] Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291, 293 (2007) (upholding a state sports association's antirecruiting rule, concluding that solicitation by schools can be banned).

[323] *See* Maureen Mahoney, LATHAM & WATKINS LLP, https://www.lw.com/people/maureen-mahoney [https://perma.cc/SS8P-2ALE].

[324] Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (government speech).

[325] *See Pamela Harris (Judge)*, WIKIPEDIA (Sept. 11, 2021, 4:34 PM), https://en.wikipedia.org/wiki/Pamela_Harris_(judge) [https://perma.cc/B89Q-UPRR].

[326] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (campaign finance).

[327] United States v. Stevens, 559 U.S. 460 (2009) (images of animal cruelty).

[328] *See Patricia Millet*, WIKIPEDIA (Sept. 19, 2021, 4:42 PM), https://en.wikipedia.org/wiki/Patricia_Millett [https://perma.cc/XBX8-BN7E].

[329] Holder v. Humanitarian L. Project, 561 U.S. 1, 6 (2010) (material support).

[330] *See Elena Kagan*, WIKIPEDIA (Sept. 27, 2021, 6:53 PM), https://en.wikipedia.org/wiki/Elena_Kagan [https://perma.cc/UN5K-KWGH].

[331] Snyder v. Phelps, 562 U.S. 443, 446 (2011) (funeral protests).

[332] *See Margie J. Phelps*, OYEZ (Sept. 9, 2021), https://www.oyez.org/advocates/margie_j_phelps (last visited Dec. 29, 2021).

Sorrell v. IMS Health Inc.:[333]

- Bridget C. Asay[334] (for petitioner)

McCutcheon v. FEC:[335]

- Erin E. Murphy[336] (for petitioner)

McCullen v. Coakley:[337]

- Jennifer Grace Miller[338] (for respondent)

Heffernan v. City of Paterson:[339]

- Ginger D. Anders[340] (amicus curiae for US government)

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission:[341]

- Kristen K. Waggoner[342] (for petitioner)

---

[333] Sorrell v. IMS Health Inc., 564 U.S. 552, 556 (2011).

[334] Press Release, Office of the Attorney General of Vermont, Bridget Asay Appointed Solicitor General of Vermont (Apr. 19, 2015), https://vtdigger.org/2015/04/19/bridget-asay-appointed-solicitor-general-of-vermont/ [https://perma.cc/556P-TLXG].

[335] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014) (campaign finance).

[336] *See* Profile of *Erin Murphy*, KIRKLAND & ELLIS, https://www.kirkland.com/lawyers/m/murphy-erin-e [https://perma.cc/4A5L-FQAD].

[337] McCullen v. Coakley, 573 U.S. 464 (2014) (leafletting).

[338] *See Jennifer Grace Miller ('93) Named Chief of Staff to Boston District Attorney Rachael Rollins*, BOS. UNIV. SCH. of L. (Jan. 14, 2019), https://www.bu.edu/law/2019/01/14/jennifer-grace-miller-93-named-chief-of-staff-to-boston-district-attorney-rachael-rollins/ [https://perma.cc/8DBW-LYBW].

[339] Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016) (government employee speech).

[340] Profile of *Ginger D. Anders*, MUNGER TOLLES & OLSON, https://www.mto.com/lawyers/ginger-d-anders [https://perma.cc/W9ZS-TK6V].

[341] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (religious neutrality).

[342] *Kristen Waggoner*, Wikipedia (July 26, 2021, 5:41 PM), https://en.wikipedia.org/wiki/Kristen_Waggoner [https://perma.cc/Y5C8-JNQB]; *see also* Ronald K.L. Collins, *First Amendment News 263: Kristen Waggoner is the One to Watch in First Amendment Cases*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (July 15, 2020), https://www.thefire.org/first-amendment-news-263-kristen-waggoner-one-watch-first-amendment-cases/ [https://perma.cc/AT9Z-6RG8]. She was also counsel in *Thomas More Law Center v. Bonta*. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2020) (No. 19-255) (decided with Thomas More L. Ctr. v. Bonta), *rev'g and remanding* 903 F.3d 1000 (9th Cir. 2018) (charitable contributions disclosure case).

Lozman v. City of Riviera Beach:[343]

- Pamela Karlan[344] (for petitioner)

Mahanoy Area School District v. B.L.:[345]

- Lisa S. Blatt[346] (for petitioner)

Americans for Prosperity Foundation v. Bonta:[347]

- Aimee A. Feinberg[348] (for respondent)
- Elizabeth B. Prelogar[349] (amicus curiae for US government)

IV. THE JUSTICES

Every Supreme Court has its giants; those who move the doctrinal earth in new directions. From Chief Justice John Marshall to Chief Justice Earl Warren and beyond, certain jurists bring their knowledge and tactical skills[350] to bear in ways that reshape the law. The same holds true for specific areas of the law—for example, modern Second Amendment jurisprudence is largely credited as being the brainchild of Justice Scalia[351] (duly mindful of the assistance he received from the many briefs filed in the *Heller* case). Then again, other justices (such as Pierce Butler) either never develop a revered reputation or never lay claim to any exceptional expertise in a particular area of law. The same holds true for the chief justice of the Roberts Court when it comes to the First Amendment and free expression jurisprudence.

---

[343] Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018) (retaliatory arrest case).

[344] Biography of *Pamela S. Karlan*, STAN. L. SCH., https://law.stanford.edu/directory/pamela-s-karlan/ [https://perma.cc/XY93-GSKP].

[345] Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038 (2021) (student speech).

[346] Profile of *Lisa S. Blatt*, WILLIAMS & CONNOLLY LLC, https://www.wc.com/Attorneys/Lisa-S-Blatt [https://perma.cc/F86G-6RKQ].

[347] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2020) (disclosure law).

[348] *Aimee Feinberg*, C-SPAN, https://www.c-span.org/person/?130194/Aimee Feinberg [https://perma.cc/WW4F-WAEU]; Molly Selvin, *SLS Alumni at the California Office of the Solicitor General*, STAN. LAW. MAG. (May 31, 2017), https://law.stanford.edu/stanford-lawyer/articles/sls-alumni-at-the-california-office-of-the-solicitor-general/ [https://perma.cc/PYR4-TYKZ].

[349] *Elizabeth Prelogar*, WIKIPEDIA (Nov. 9, 2021, 4:30 PM), https://en.wikipedia.org/wiki/Elizabeth_Prelogar [https://perma.cc/KH5W-XFB7].

[350] *See* COLLINS & SKOVER, *supra* note 83, at 12, 30–31, 87–91.

[351] *See* District of Columbia v. Heller, 554 U.S. 570, 573–636 (2008) (Scalia, J., majority opinion) (discussing the meaning and limits of the Second Amendment and holding government ban on handgun possession and firearm operability in the home unconstitutional).

A. Roberts's Rules

In terms of mere numbers of majority opinions alone, Chief Justice Roberts is the most important player, *plus* he is the one who assigns the lion's share of opinions, frequently to himself. As noted earlier, Roberts has assigned the lead opinion to himself approximately 29 percent of the time. Equally revealing, he assigned the lead opinion in 95 percent of the First Amendment free expression cases handed down by his Court. And he voted to affirm First Amendment expression claims in thirty-three out of fifty-eight cases (57 percent).

B. Critical Votes

Though next in numerical line in terms of numbers of lead opinions, the *combined* totals of the Kennedy-Alito duo were fewer than that of the chief justice.[352] Still, when it comes to majority opinions that affirm a free expression claim, their votes were critical . . . as will be those of Justices Gorsuch, Kavanaugh, and Barrett in the future.

C. The Liberal Wing

The liberal justices (first four, now three in number) were assigned the fewest majority opinions and then, more often than not, were assigned majority opinions in cases where the free expression claim was *denied*. Justice Breyer had the most dissents, thirteen out of fifty-eight (22.4 percent).[353] Given the change in the makeup of the Court, the liberal wing will now need two conservative justices to join them in forming any majority—an unlikely scenario.

D. The Women Justices

Of the fifty-eight First Amendment free expression cases decided by the Roberts Court, only six of those opinions (10.34 percent) were authored by Justices Ginsburg (3), Sotomayor (2), and Kagan (1) combined. Of the thirty-two free expression cases she participated in, Justice Kagan was assigned a majority opinion in only one case—*Iancu v. Brunetti*.[354]

---

[352] *See infra* Appendix C: Majority Opinions by Justice.
[353] *See infra* Appendix H: Authors of Dissenting Opinions.
[354] Iancu v. Brunetti, 139 S. Ct. 2294, 2297 (2019).

E. Left Out: Justice Souter

Though he participated in sixteen First Amendment free expression cases, Justice Souter was never assigned a majority opinion during his time with the Roberts Court. He did, however, issue five dissents along with an opinion dissenting in part.

F. Libertarian (Not Liberal) Free Speech Jurisprudence

In 2018, Cato Institute First Amendment lawyer Ilya Shapiro observed that "[t]he libertarian position has become dominant on the right on First Amendment issues."[355] Shapiro continued, "[i]t simply means that we should be skeptical of government attempts to regulate speech."[356] That skepticism has taken on a new and bold meaning as the Court's jurisprudence in this area continues to expand and as ever more issues are brought under the jurisdiction of the First Amendment. That expansion, however, has been characterized as largely one-directional. As *New York Times* reporter Adam Liptak pointed out, the "win rate for conservative speech" (69 percent) far exceeds the "win rate for liberal speech" (21 percent).[357]

G. Thomas's Originalism

Speaking for himself alone, Justice Thomas has employed his originalist understanding of the First and Fourteenth Amendments to question the overbreadth doctrine, to challenge the holding in *New York Times v. Sullivan* and its progeny (joined by Justice Gorsuch), and to contest the application of the First Amendment in state cases involving K–12 students.[358]

H. Most Numerous and Most Winning Category of Cases: Campaign Finance Controversies

The Roberts Court has rendered rulings in eight such cases and the First Amendment claim was sustained in all of them.[359]

---

[355] Liptak, *supra* note 24.

[356] *Id.*

[357] *Id.* (citing Lee Epstein, Washington University in St. Louis and Andrew D. Martin & Kevin Quinn, University of Michigan, 6+ Decades of Freedom of Expression in the U.S. Supreme Court).

[358] *See supra* notes 186–197 and accompanying text.

[359] For a list of the cases, see Appendix K: Cases Organized by Topic, Campaign Finance.

I. No Freedom of Press Cases

In its some fifteen years of existence, the Roberts Court has yet to review, and rule on, a First Amendment freedom of the press case. Though the Court did hear *FCC v. Fox Television Stations, Inc.*[360] and later *FCC v. Fox Television Stations, Inc. II*,[361] it decided neither case on First Amendment grounds. And while the justices did have a press defamation case before them the 2019 term (*National Review, Inc. v. Mann*),[362] they declined review.[363] As previously mentioned, however, Justice Gorsuch's dissent from the denial of certiorari in *Berisha v. Lawson* may well shape future thinking in this area.[364]

V. THE DOCTRINES

Emboldening certain tenets of doctrinal law combined with an infrequent nod to originalism have been the hallmarks of the Roberts Court's free speech jurisprudence. Once so emboldened, doctrine has typically been applied with near religious fidelity, save in cases such as *Holder v. Humanitarian Law Project*,[365] for example.

A. Categorical Versus Balancing Approaches

As evidenced by cases such as *Citizens United v. FEC*, *United States v. Stevens*, and *Reed v. Town of Gilbert,* the conservative wing of the Court is generally more disposed to use rigorous categorical approaches whereas the Court's liberal wing tends more towards a contextual balancing approach as evidenced by Justice Breyer's dissent in *McCutcheon v. FEC*, which was joined by Justices Ginsburg, Sotomayor, and Kagan.[366]

---

[360] Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

[361] Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 567 U.S. 239 (2012).

[362] Nat'l Rev. Inc. v. Mann, 140 S. Ct. 344 (2019) (mem.), *denying cert. to* 150 A.3d 1213 (D.C. 2016), as amended (Dec. 13, 2018) (No. 14-CV-126).

[363] *See* Jones & West, *supra* note 37, at 10.

[364] *See supra* notes 198–212 and accompanying text.

[365] Holder v. Humanitarian L. Project, 561 U.S. 1, 40 (2010) (upholding the law after a strict scrutiny test). For critical assessments of the case, see generally David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147 (2012), wherein Cole argued the case for the respondent, and James Weinstein & Ashutosh Bhagwat, *Bad Law: How the United States Supreme Court Mishandled the Free Speech Issue in* Holder v. Humanitarian Law Project, *in* EXTREMISM, FREE SPEECH AND COUNTER-TERRORISM LAW AND POLICY 8 (Ian Cram, ed., 2019).

[366] *See supra* Sections II.B–II.C. Justice Breyer's rather open-ended majority opinion in *Mahanoy Area School District v. B.L.* is certainly far less categorical and more akin to a form of balancing. *See* Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038, 2046–48 (2021).

B. Content-Discrimination Standard of Review

With the advent of *Barr v. American Association of Political Consultants, Inc.*, it is now clear that five members of the Roberts Court (Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh) hold that strict scrutiny is the applicable standard of review, whereas three members (Justices Breyer, Kagan, and Sotomayor) would use some kind of intermediate or balancing test.[367] Justice Barrett has yet to rule on the matter.

C. Content-Discrimination Standard of Review in Commercial Speech and Secondary Effects Cases

The Court's decision in *Reed* and its expansion of the content-discrimination principle creates tension with two long-standing doctrines in First Amendment law that allow for content discrimination: (1) the commercial speech doctrine, and (2) the secondary effects doctrine.[368]

D. Reed and Commercial Speech: Strict Scrutiny?

In First Amendment jurisprudence, purely commercial speech or advertising receives less protection than political speech. The Supreme Court has defined commercial speech as "speech that does no more than propose a commercial transaction"[369] or "expression related solely to the economic interests of the speaker and its audience."[370] Oftentimes it is difficult to determine the dividing line between commercial and noncommercial speech.

But, if a court classifies speech as purely commercial speech, then regulations on that speech—even if purely content-based—are evaluated under a form of intermediate scrutiny known as the "*Central Hudson* test."[371] Meanwhile, content-based restrictions on non-commercial speech normally are evaluated under strict scrutiny. As First Amendment scholar Rodney A. Smolla has explained, commercial speech is a "step-child[]"[372] in the First Amendment family.

Commercial speech receives less protection generally because it allegedly is hardier and more objectively verifiable

---

[367] *See supra* text accompanying notes 226–228.

[368] Hudson, *supra* note 218, at 259.

[369] United States v. United Foods, 533 U.S. 405, 409 (2001).

[370] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980)).

[371] *See Cent. Hudson*, 447 U.S. at 564–66.

[372] Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 4 (2002).

than non-commercial speech. Scholars have questioned these rationales and the doctrine itself for decades. Perhaps most notably, Alex Kozinski and Stuart Banner declared that the commercial speech doctrine "makes no sense."[373]

"Commercial speech, however, remains a second-class citizen in the First Amendment family."[374] This of course leads to direct conflict with the Court's admonition in *Reed* that content-based restrictions on speech are subject to strict scrutiny.[375] However, many lower courts continue to apply the *Central Hudson* test—rather than strict scrutiny—when dealing with what they regard as purely commercial speech.[376]

Ironically, it was Justice Thomas—the author of the majority opinion in *Reed*—who argued for greater protection for commercial speech in his concurring opinion in *44 Liquormart v. Rhode Island*.[377] He wrote: "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech. Indeed, some historical materials suggest to the contrary."[378]

It remains undecided whether strict scrutiny applies in commercial *speech* cases as distinguished from commercial *regulation* cases such as *Barr v. American Association of Political Consultants, Inc.* During much of the Roberts Court era, four justices (Breyer, Ginsburg, Kagan, and Sotomayor) would *not* apply strict scrutiny in commercial speech cases.[379]

At the end of the 2020–2021 term, the Court granted review in *City of Austin v. Reagan National Advertising of Texas, Inc.*[380]

---

[373] Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*?, 76 VA. L. REV. 627, 628 (1990).

[374] Hudson, *supra* note 218, at 274. *But see* REDISH, *supra* note 9, at 20 ("Fortunately, the trend in the Court has been to extend commercial speech protection to the point that it is rapidly approaching a level of constitutional insulation similar, if not yet identical, to that given more traditionally protected categories. . . . It is time for the Court to expressly acknowledge that commercial speech properly stands on an equal footing with all other kinds of expression given full protection by the First Amendment.").

[375] *See, e.g.*, Lone Star Sec. & Video v. City of Los Angeles, 827 F.3d 1192, 1198–1201, 1198 n.3 (9th Cir. 2016) (upholding city ordinance that prohibited moving billboards for advertisements under intermediate scrutiny and noting that "although laws that restrict only commercial speech are content based, [citing *Reed*], such restrictions need only withstand intermediate scrutiny [citing *Central Hudson*]").

[376] Hudson, *supra* note 218, at 274.

[377] 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996).

[378] *Id.* at 522 (Thomas, J., concurring in part and concurring in judgment); *see also* David L. Hudson, Jr. *Justice Clarence Thomas: The Emergency of a Commercial Speech Protector*, 35 CREIGHTON L. REV. 485 (2002).

[379] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 565–66 (2011) (applying "heightened judicial scrutiny" or "rigorous scrutiny" test). Justice Sotomayor joined the majority and Justice Breyer, joined by Justices Ginsburg and Kagan, dissented. *Id.* at 555.

[380] City of Austin v. Reagan Nat'l Advert. of Tex., Inc., 141 S. Ct. 2849 (2021) (mem.) (No. 20-1029), *granting cert. to* Reagan Nat'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 700 (5th Cir. 2020).

The issue raised in that case was whether the Austin city code's distinction between on-premise signs, which may be digitized, and off-premise signs, which may not, is a facially unconstitutional content-based regulation under *Reed*. "Billboard companies sought permits to digitize 84 billboards—off-premise signs—and sued the city when the permits were denied."[381] In the lower court opinion, the Fifth Circuit held, "[T]he on-premises/off-premises distinction is content based and fails under strict scrutiny. It thus runs afoul of the First Amendment."[382] The petitioner (City of Austin) argued that:

> *Reed* says that a local sign regulation is content-based if the regulation "applies to particular speech *because of the topic discussed or the idea or message expressed*." 576 U.S. at 163 (emphasis added). This, the Court said, gives a "commonsense meaning" to what is meant by "content-based" by requiring a court to determine whether a regulation draws distinctions "based on the message the speaker conveys." *Id.*
>
> Nothing in Austin's on-premise/off-premise distinction implicates or is concerned with the topic discussed on a billboard or the message being conveyed. The only thing that matters in what the sign says is whether it is being said in reference to a different location than the sign's location. The sign's "communicative content"—urging support for a worthy cause, plumping for one air conditioning service over another, touting the health benefits of an herbal supplement—is irrelevant to the regulatory distinction drawn in Austin's code. Reading the sign's text may allow a determination of its status as an on- or off-premise sign. But the applicable regulation is indifferent to the communicative content of the advertisement. The location of the thing advertised is all that matters, and it only matters to the extent it concerns something at a different site than where the communication is made.[383]

---

[381] Petition for Writ of Certiorari at i, *Reagan Nat'l Advert.*, 141 S. Ct. 2849 (No. 20-1029) [hereinafter *Reagan Nat'l Advert.* Cert. Petition].

[382] *Reagan Nat'l Advert.*, 972 F.3d at 710.

[383] *Reagan Nat'l Advert.* Cert. Petition, *supra* note 381, at 18–19 (footnote omitted). The petitioner also added:

> Understood this way, Austin's on-premise/off-premise distinction is like the buffer zone regulation upheld in *McCullen v. Coakley*, 573 U.S. 464 (2014). There, the Court broadly noted that it affords wider leeway to regulation of features of speech "unrelated to its content." *Id.* at 477. Challengers to the statutory buffer zone argued that it should be treated as a content-based regulation of speech because its applicability was based on a "place . . . where abortions are offered." *Id.* at 479. The Court rejected the argument. The regulation did not depend on what was said, "but simply on *where* they say it." *Id.* (emphasis added).
>
> Austin's regulation is much like the one that *McCullen* determined was not content-based. *Where* the speech—the advertisement—is made, not what it says, is what the regulation is concerned with.

Id. at 19.

Should the Court discount that argument and apply *Reed* in a commercial speech context,[384] then the logic of *Reed*, as applied, could achieve what Justice Thomas hoped for in *44 Liquormart*, though by a different doctrinal route.

E. Reed and Metromedia: Strict Scrutiny?

City of Austin v. Reagan National Advertising of Texas, Inc. also points to the lingering tension between *Reed* and *Metromedia, Inc. v. City of San Diego*.[385] That is, did *Reed sub silentio* overrule *Metromedia*? In its amicus brief submitted on behalf of the petitioner in the case, the International Municipal Lawyers Association pointed to the tension between *Reed* and *Metromedia* and how it has produced confusion in the lower courts:

> [L]ocal governments in the Fifth and Sixth Circuits have been hamstrung by decisions holding that code distinctions between on/off premises signs are content based and subject to strict scrutiny. Meanwhile, local governments in the Third, Ninth, and D.C. Circuits can move forward as they have for 40 years making distinctions between on/off-premises signs in their codes without fear of triggering strict scrutiny. The confusion in the circuits arises not only from the narrow issue of on/off-premises distinctions in sign codes, but more broadly on the question of whether the simple "need to read" a sign to determine its import renders it impermissibly content based. The issues are intertwined and have spawned divergent opinions among the circuits resulting in significant uncertainty for local governments.[386]

Later in its brief, the Association added:

> This split in the circuits has real world consequences for local governments, impeding one of their core regulatory functions and extending well beyond the question of on/off-premises signs. Whether this kind of cursory examination is compatible with *Reed*'s framework is a matter only the Court can reconcile. *Amici* seek review of these issues because their members have a strong interest in clear, uniform, and predictable standards for assessing whether a regulation which requires a government official to read a sign's message is inherently subject to strict scrutiny, and if so, whether such an examination subjects on/off-premises distinctions to *Reed*'s strict scrutiny standard as well.[387]

---

[384] Consider Lee Mason, *Content Neutrality and Commercial Speech Doctrine after* Reed v. Town of Gilbert, 84 U. CHI. L. REV. 955 (2017), which, following a discussion of the development of the content-neutrality and commercial speech doctrines, evaluates how courts might move forward post-*Reed*.

[385] *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion) (invalidating municipal ban on billboards with noncommercial advertisements).

[386] Brief of *Amici Curiae* International Municipal Lawyers Association et al. in Support of Petitioners at 7–8, *Reagan Nat'l Advert.*, 141 S. Ct. 2849 (No. 20-1029) (citations omitted).

[387] *Id.* at 11. By contrast, in their brief in opposition to the petition for a writ of certiorari, the lawyers for the respondents argued: "Following the decision in *Reed*, courts

Here again, the reach of *Reed* could prove to be one of the most important developments in modern free speech law.

F. The Secondary Effects Doctrine

The Court's decision in *Reed* also calls into question the validity of the Court's infamous legal fiction—the secondary effects doctrine, which allows for patently content-based restrictions on adult entertainment to be classified as content neutral.[388] The doctrine arose in adult-business zoning cases with the idea that city officials were not targeting speech because of its offensiveness, but because of its adverse secondary effects, such as increased crime or decreased property values.[389]

It began with a footnote in 1976[390] and ten years later became the dominant mode of analysis[391] for upholding patently content-based restrictions on adult entertainment. Later, the Court extended the secondary effects doctrine by applying it not just to zoning cases, but also to restrictions on the content of nude performance dancing.[392] While the Supreme Court limited the spread of the doctrine in a political speech case,[393] lower courts have applied the secondary effects doctrine outside of its adult entertainment home to a variety of other areas, including discriminatory speech, commercial speech, indecent speech, and other forms of speech.[394]

In light of *Reed*, the obvious question is whether the secondary effects doctrine maintains any semblance of legitimacy. The US Court of Appeals for the Eleventh Circuit starkly wrote: "There is no question that *Reed* has called into question the reasoning undergirding the secondary-effects doctrine."[395] Other courts have noted the tension, though they have been reluctant to inter the doctrine.[396]

---

have consistently held that *Reed's* analysis applies only to sign regulations affecting noncommercial speech. Regulation of commercial speech continues to be governed by *Metromedia*." Brief in Opposition to Petition for a Writ of Certiorari at 9, *Reagan Nat'l Advert.*, 141 S. Ct. 2849 (No. 20-1029).

388 *See* Mason, *supra* note 384, at 963–64.

389 David L. Hudson, Jr. *The Secondary Effects Doctrine: The Evisceration of First Amendment Freedoms*, 37 WASHBURN L.J. 55, 61–63 (1997).

390 Young v. Am. Mini-Theatres, Inc., 427 U.S. 50, 71 n.34 (1976); *see also* David L. Hudson, Jr. *The Secondary Effects Doctrine: Stripping Away First Amendment Freedom*s, 23 STAN. L. & POL'Y REV. 19, 21 (2012).

391 Renton v. Playtime Theatres, 475 U.S. 41, 47–52 (1986).

392 City of Erie v. Pap's A.M., 529 U.S. 277, 278–79 (2000).

393 Boos v. Berry, 485 U.S. 312, 337–38 (1988).

394 Hudson, *supra* note 389, at 77–93.

395 Flanigan's Enters. v. City of Sandy Springs, 703 F. App'x 929, 935 (11th Cir. 2017).

396 *See* BBL, Inc. v. City of Angola, 809 F.3d 317, 326 n.1 (7th Cir. 2015).

It bears repeating that both the commercial speech doctrine and the secondary effects doctrine are "aberrations from pure First Amendment principles."[397] It remains to be seen whether the Roberts Court will address the tension between these doctrines and its commitment to the content discrimination principle.

G. Government as Participant Speech Doctrine

Though it was a rare alliance, Justice Breyer secured five votes in *Walker* solely because Justice Thomas broke ranks with his conservative colleagues.[398] Should the Thomas alliance shift back to its more regular grouping, that could well affect the future direction of the government as participant speech doctrine.

H. Student Speech

The major opinion the Roberts Court rendered in this area was in *Morse v. Frederick*[399] (5–4 denying the First Amendment claim). In that case, the free speech reach of the Court's holding in *Tinker v. Des Moines Independent Community School District*[400] was notably curbed. Despite the abundance of litigation in the lower courts, the Roberts Court has yet to review a *college* student free speech case. This may be due to the paucity of certiorari petitions in this area or to a general willingness of the justices to defer to the lower courts in this area.

The ruling this term in *Mahanoy Area School District v. B.L.*[401] featured the Court setting some limitations on the authority of public high school officials when regulating student social media expression that takes place off-campus. Writing for the Court, Justice Breyer identified "three features" of social media speech that tend to make it less a regulatory concern of the state:[402]

> "First, a school, in relation to off-campus speech, will rarely stand in loco parentis. . . . Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."

---

[397] Hudson, *supra* note 218, at 281.

[398] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 202 (2015) (Breyer, J., joined by Thomas, Ginsburg, Sotomayor, & Kagan, JJ., majority opinion).

[399] Morse v. Frederick, 551 U.S. 393, 394 (2007) (holding that school officials may suppress student speech that promotes illegal drug use).

[400] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969) (holding that school officials may only restrict student speech that substantially disrupts school activities or invades the rights of others).

[401] Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038 (2021).

[402] *Mahanoy*, 141 S. Ct. at 2046.

> Second, monitoring student social media speech off-campus would turn school officials into 24/7 monitors.
>
> Third, schools have a strong interest in protecting unpopular student expression and such "protection must include the protection of unpopular ideas, for popular ideas have less need for protection."[403]

However, Breyer reasoned that school officials still had a regulatory interest in such speech as cyberbullying or threats.[404] For this reason, student speech scholar Professor Catherine Ross terms the ruling "a victory but one riddled with fissures."[405] More specifically, she added:

> The Supreme Court's failure to define off-campus speech and to provide guidance to school administrators and lower courts about whether, when, and on what grounds schools may regulate and punish students for what they say on their own time from their own equipment, is likely to lead to much additional litigation—and to even more incidents in which schools punish off-campus expression that never reach a court. The ACLU, which so ably represented Levy, and similar public interest groups can expect to send a lot of lawyers' letters to school districts and localities as the latter test exactly how wide a door *Mahanoy* opened.[406]

The Supreme Court also failed to explain when student speech might invade or infringe on the rights of other students. This remains an unsettled area of student speech in the K–12 setting.[407]

I. Future Directions

Judging from the federal government's briefs that he coauthored (in his role as the principal deputy solicitor general) in *United States v. Edge Broadcasting Co.*[408] (arguing against

---

[403] David L. Hudson, Jr., *Supreme Court Breathes New Life into Tinker and Rules in Favor of Student Speech*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (June 29, 2021) (quoting *Mahanoy*, 141 S. Ct. at 2038), https://www.thefire.org/fan-302-2-supreme-court-breathes-new-life-into-tinker-and-rules-in-favor-of-student-speech/ [https://perma.cc/QLV4-JN3F].

[404] *Id.*; *Mahanoy*, 141 S. Ct. at 2045.

[405] Catherine J. Ross, *One "Vulgar" Cheerleader Vindicated—But Other Students May Still Face Discipline for Off-Campus Speech*, FIRST AMEND. WATCH (July 6, 2021), https://firstamendmentwatch.org/one-vulgar-cheerleader-vindicated-but-other-students-may-still-face-discipline-for-off-campus-speech/ [https://perma.cc/3Y9K-M7X6].

[406] *Id.*; *see also* Ronald K.L. Collins, *First Amendment News 303: The Supreme Court's New Student Speech Case that Overlooked What Every Student Knows*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (June 30, 2021), https://www.thefire.org/first-amendment-news-303-the-supreme-courts-new-student-speech-case-that-overlooked-what-every-student-knows/ [https://perma.cc/Z8HN-WDEP] ("[W]hen it comes to off-campus social media student speech, should expression by way of modern communication technologies prompt greater or lesser governmental intrusion into young people's lives? And why?").

[407] David L. Hudson, Jr., *Unsettled Questions in Student Speech Law*, 22 U. PA. J. CONST. L. 1113, 1132 (2020).

[408] United States v. Edge Broad. Co., 509 U.S. 418 (1993).

commercial speech claim) and *Rust v. Sullivan*[409] (defending free speech restrictions placed on government-funded programs), one might have thought that John Roberts would have a cramped view of the First Amendment. That, however, has not proven to be the case, as the chief justice has often provided (by his authorship of a majority opinion or by his vote) a generous dollop of protection in First Amendment cases.[410] Even so, he wrote the majority opinions in *Morse v. Frederick*[411] and *Holder v. Humanitarian Law Project*,[412] two important First Amendment cases in which the free speech claims were denied. Then again, he also wrote the majority opinions in *United States v. Stevens*[413] and *Snyder v. Phelps*[414] in which the Court boldly sustained the free speech rights at stake in those cases.

Near the end of the 2019–2020 term, Dahlia Lithwick observed: "John Roberts is not a 'swing justice' in the manner of a Sandra Day O'Connor or an Anthony Kennedy. Roberts has strategy, while Kennedy had feelings. Roberts is a capable tactician who understands history, public opinion, and how much pressure any one institution can withstand without breaking."[415] This is readily apparent in opinions such as his majority opinion in *McCullen v. Coakley*,[416] on the one hand, and his majority opinion in *McCutcheon v. FEC*,[417] on the other hand.

Furthermore, "[t]he chief justice has already surpassed the number of [First Amendment freedom of expression] opinions authored by his predecessors Chief Justices Earl Warren (six opinions) and Fred Vinson (five opinions)."[418] Nearly sixteen years into his term, the sixty-six-year-old jurist[419] may well "equal or better the record of Chief Justice Warren Burger (eighteen opinions in seventeen years). But the record of his former boss, Chief Justice William Rehnquist (thirty opinions in

---

409 Rust v. Sullivan, 500 U.S. 173 (1991).

410 *See supra* text accompanying note 97 and Part IV.A Roberts's Rules.

411 Morse v. Frederick, 551 U.S. 393, 395 (2007) (student speech).

412 Holder v. Humanitarian L. Project, 561 U.S. 1, 6 (2010) (material support).

413 United States v. Stevens, 559 U.S. 460, 463 (2010) (images of animal cruelty).

414 Snyder v. Phelps, 562 U.S. 443, 446 (2011) (funeral protests).

415 Dahlia Lithwick, *Roberts Isn't a Liberal. He's a Perfectionist Who Wants to Win.*, SLATE (June 29, 2020, 2:10 PM), https://slate.com/news-and-politics/2020/06/roberts-june-medical-strategy.html (last visited Dec. 29, 2021).

416 McCullen v. Coakley, 573 U.S. 464 (2014).

417 McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014).

418 Ronald Collins, *The Roberts Court and the First Amendment*, SCOTUSBLOG (July 9, 2013, 11:34 AM), https://www.scotusblog.com/2013/07/the-roberts-court-and-the-first-amendment/ [https://perma.cc/B9BD-FV9X].

419 *Current Members: John G. Roberts, Jr., Chief Justice of the United States*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/F95J-6ULH].

nineteen years) will be a difficult one to top."[420] That said, there is a big difference in how the two jurists have viewed free speech cases: whereas Rehnquist affirmed such claims in 20 percent of all such cases he participated in during his entire tenure on the Court,[421] Roberts, by stark contrast, has affirmed First Amendment expression claims in 55 percent of the cases he has participated in during his term on the Court.

To be sure, there is more to the First Amendment record of the Roberts Court than tallies and the like—there is normative, doctrinal, and historical analysis. And in some cases, such as *Golan v. Holder*[422] (regarding copyright and the First Amendment), the issue at hand is conceptually complicated and not readily explained by an "up or down" vote on the First Amendment. Similarly, in other cases, such as *Reichle v. Howards*[423] (denying the First Amendment right by a vote of 8–0), the underlying facts make it difficult to sustain a free speech claim. That said, we nonetheless now have a well-defined sketch for a future portrait of the Court's record based upon the fifty-eight cases it has decided thus far. Of course, that portrait may have to be adjusted in light of what Justices Gorsuch, Kavanaugh, and Barrett add to the picture.

* * * *

As suggested by the Court's per curiam in *Thompson v. Hebdon*,[424] we may not have seen the end of the Roberts Court's willingness to revisit *Buckley's* contribution/expenditure dichotomy.[425] Given the Court's activity in the campaign-finance line of cases, it seems likely that, when given the chance, a majority will chip away at the contribution side of the *Buckley* equation, perhaps until the point that the dichotomy ceases to have any doctrinal staying power. In the near future, the Court likely will return to the *Buckley* question.

---

[420] Collins, *supra* note 418; *see* THE REHNQUIST LEGACY 11–78 (Craig Bradley ed., 2005) (examining Rehnquist's contributions to First Amendment jurisprudence).

[421] Geoffrey R. Stone, *Stone Says Rehnquist's Legacy Doesn't Measure Up*, UNIV. OF CHI. L. SCH. (Sept. 6, 2005), https://www.law.uchicago.edu/news/stone-says-rehnquists-legacy-doesnt-measure [https://perma.cc/L7NA-MDE4].

[422] Golan v. Holder, 565 U.S. 302 (2012).

[423] Reichle v. Howards, 566 U.S. 658 (2012).

[424] *See generally* Thompson v. Hebdon, 140 S. Ct. 348 (2019) (per curiam) (vacating and remanding Ninth Circuit's decision to uphold state-imposed limits on campaign contributions).

[425] Buckley v. Valeo, 424 U.S. 1, 58–59 (1976) (per curiam) (holding federal statutory limits on campaign contributions did not violate First Amendment but federal statutory limits on campaign expenditures infringed on First Amendment rights of free expression).

The Court may also wish to revisit the problem created by severability clauses such as the one in *Barr v. American Association of Political Consultants, Inc.*[426] The irony of that case is that, by ruling as it did on content discrimination grounds in striking down the statutory exemption,[427] the result was to create a *broader* swath of unprotected expression. Strange: in applying the First Amendment in a more invigorated way, the Court diminished free speech protections. While the approach taken in *American Association of Political Consultants* may serve antidiscrimination values, it does so at the expense of devaluing First Amendment anticensorial values.[428]

* * * *

There is also the question of the state action doctrine and how it plays out on social media platforms. Thanks to mootness, the Court was able to duck this question when the case of *Biden v. Knight First Amendment Institute*[429] came before them. There, the issue was whether the First Amendment deprives a government official of his right to control his personal Twitter account by blocking third-party accounts if he uses that personal account in part to announce official actions and policies. Before its ruling had been vacated, the Second Circuit first found state action and then a violation of the First Amendment when the president blocked dissident third-party accounts.[430] Given the frequent use of social media platforms by public officials, this issue is likely to come before the Court, raising not only state action issues but also competing First Amendment issues.[431]

---

[426] *See* 140 S. Ct. 2335, 2352 (2020).

[427] *Id.* at 2346–47.

[428] *See* Ronald K.L. Collins, *First Amendment News 268: The Clement Cure for the Cure*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Aug. 26, 2020), https://www.thefire.org/first-amendment-news-268-the-clement-cure-for-the-cure/ [https://perma.cc/5M6C-NHBV].

[429] Biden v. Knight First Amend. Inst., 141 S. Ct. 1220, 1220 (2021) (ordering the judgment vacated, and the case remanded to the Second Circuit to dismiss as moot).

[430] *See* Knight First Amend. Inst. v. Trump, 928 F.3d 226, 236 (2nd Cir. 2019), *vacated*, 141 S. Ct. 1220.

[431] *See* Foundation for Individual Rights in Education, *First Amendment Salon: Trump, Twitter, & the First Amendment*, YOUTUBE (Feb. 12, 2020), https://www.youtube.com/watch?v=o73Qdnf-u54&feature=youtu.be (last visited Dec. 29, 2021). There is also the issue of the former president's civil law liability for statements he made on January 6, 2020. *See* Spencer S. Hsu, *Constitutional Lawyers Call Trump's First Amendment Defense Against Jan. 6 Lawsuits 'Spurious,'* WASH. POST (July 9, 2021, 11:37 AM), https://www.washingtonpost.com/local/legal-issues/first-amendment-defense-trump-lawsuit/2021/07/09/caadc64c-e038-11eb-9f54-7eee10b5fcd2_story.html [https://perma.cc/9EWY-38GX].

* * * *

Finally, there is the matter of the collection of facial recognition data gathered from the internet[432] and sold for commercial purposes and how such practices square with privacy concerns.[433]

How Chief Justice Roberts will approach such cases and what his influence will be given the addition of Justices Kavanaugh, Gorsuch, and Barrett are questions that may take a few terms to reveal. For now, when it comes to the First Amendment's free expression jurisprudence, the Court is his.

---

[432] *See* Ronald K. L. Collins, *First Amendment News 281: Clearview Face-recognition Controversy Continues—Privacy v. Free Speech*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Dec. 16, 2020), https://www.thefire.org/first-amendment-news-281-clearview-face-recognition-controversy-continues-privacy-v-free-speech/ [https://perma.cc/E5HQ-YDBS].

[433] *See* Complaint at 2–4, ACLU v. Clearview AI, Inc., No. 2020CH04353 (Ill. Cir. Ct. May 28, 2020).

APPENDIX A

THE FIFTEEN JUSTICES OF THE ROBERTS COURT

Justice	**Tenure**	**No. of Cases**
John Paul Stevens	Dec. 17, 1975–June 29, 2010	22
Sandra Day O'Connor	Sept. 25, 1981–Jan. 31, 2006	1
Antonin Scalia	Sept. 26, 1986–Feb. 13, 2016	41
Anthony M. Kennedy	Feb. 18, 1988–July 31, 2018	50
David H. Souter	Oct. 9, 1990–June 29, 2009	16
Clarence Thomas	Oct. 23, 1991–Present	58
Ruth Bader Ginsburg	Aug. 10, 1993–Sept. 18, 2020	56
Stephen G. Breyer	Aug. 3, 1994–Present	58
John G. Roberts, Jr.	Sept. 29, 2005–Present	58
Samuel A. Alito, Jr.	Jan. 31, 2006–Present	55
Sonia Sotomayor	Aug. 8, 2009–Present	42
Elena Kagan	Aug. 7, 2010–Present	32
Neil M. Gorsuch	Apr. 10, 2017–Present	13
Brett M. Kavanaugh	Oct. 6, 2018–Present	8
Amy Coney Barrett	Oct. 27, 2020–Present	2

APPENDIX B

THE FIFTY-EIGHT DECIDED CASES

(1) *Wisconsin Right to Life, Inc. v. FEC* (2006)[434]

First Amendment claim affirmed (or allowed to proceed).	
Vote:	9–0
Opinion:	Per Curiam
Oral argument:[435]	January 17, 2006
Decided:	January 23, 2006
P-Lawyer:	Paul D. Clement
R-Lawyer:	James Bopp, Jr.
Category:	Campaign Finance

SANDRA DAY O'CONNOR (steps down: January 31, 2006)

SAMUEL ALITO (joins: January 31, 2006)

(2) *Rumsfeld v. FAIR* (2006)[436]

First Amendment claim denied.	
Vote:	8–0 (Alito did not participate)
Majority:	Roberts
Oral Argument:[437]	December 6, 2005
Decided:	March 6, 2006
P-Lawyer:	Paul D. Clement
R-Lawyer:	E. Joshua Rosenkranz
Category:	Compelled Speech;[438] Association

[434] Wis. Right to Life, Inc. v. Fed. Election Comm'n, 546 U.S. 410 (2006).

[435] Transcript of Oral Argument, *Wis. Right to Life*, 546 U.S. 410 (No. 04-1581), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2005/04-1581.pdf [https://perma.cc/L8KA-RPRR].

[436] Rumsfeld v. F. for Acad. & Inst. Rts., Inc., 547 U.S. 47 (2006).

[437] Transcript of Oral Argument, *F. for Acad. & Inst. Rts.*, 547 U.S. 47 (No. 04-1152), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2005/04-1152.pdf [https://perma.cc/3TYK-CDU2].

[438] The Court upheld the Solomon Amendment, which gave military recruiters equal access to law students as other prospective employers, and rejected the challenging law schools' claim that the amendment did not compel the law schools' speech.

(3) *Garcetti v. Ceballos* (2006)[439]

First Amendment claim denied.	
Vote:	5–4
Majority:	Kennedy (joined by Roberts, Scalia, Thomas, & Alito)
Dissenting:	Stevens; Souter (joined by Stevens & Ginsburg); Breyer
Oral argument:[440]	October 12, 2005
P-Lawyers:	Cindy Lee
R-Lawyer:	Bonnie I. Robin-Vergeer
US Lawyer:	Dan Himmelfarb (amicus curiae, supporting the Petitioners)
Oral Reargument:[441]	March 21, 2006
Decided:	May 30, 2006
P-Lawyers:	Cindy Lee
R-Lawyer:	Bonnie I. Robin-Vergeer
US Lawyer:	Edwin S. Kneedler (amicus curiae, supporting Petitioners)
Category:	Government Employee Speech

[439] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[440] Transcript of Oral Argument, *Garcetti*, 547 U.S. 410 (No. 04-473), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2005/04-473.pdf [https://perma.cc/WR55-8ZVE].

[441] Transcript of Oral Argument (Reargument), *Garcetti*, 547 U.S. 410 (No. 04-473), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2005/04-473b.pdf [https://perma.cc/W3JB-TCGL].

(4) *Randall v. Sorrell* (2006)[442]

First Amendment claim affirmed.	
Vote:	6–3
Plurality:	Breyer (joined by Roberts & Alito)
Concurring in Part:	Alito
Concurring in Judgment:	Kennedy; Thomas (joined by Scalia)
Dissenting:	Stevens; Souter (joined by Ginsburg & Stevens)
Oral Argument:[443]	February 28, 2006
Decided:	June 26, 2006
P-Lawyer:	James Bopp Jr.
R-Lawyers:	William H. Sorrell & Brenda Wright
Category:	Campaign Finance

(5) *Beard v. Banks* (2006)[444]

First Amendment claim denied.	
Vote:	6–2 (Alito did not participate)
Plurality:	Breyer (joined by Roberts, Kennedy, & Souter)
Concurring in Judgment:	Thomas (joined by Scalia)
Dissenting:	Stevens (joined by Ginsburg); Ginsburg
Oral Argument:[445]	March 27, 2006
Decided:	June 28, 2006
P-Lawyer:	Louis J. Rovelli
R-Lawyer:	Jere Krakoff
US Lawyer:	Jonathan L. Marcus (amicus curiae, supporting Petitioner)
Category:	Prisoner Speech

[442] Randall v. Sorrell, 548 U.S. 230 (2006).

[443] Transcript of Oral Argument, *Randall*, 548 U.S. 230 (No. 04-528), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2005/04-1528.pdf [https://perma.cc/27XB-5J27].

[444] Beard v. Banks, 548 U.S. 521 (2006).

[445] Transcript of Oral Argument, *Beard*, 548 U.S. 521 (No. 04-1739), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2005/04-1739.pdf [https://perma.cc/8CM3-LLYL].

(6) *Davenport v. Washington Education Association* (2007)[446]

First Amendment claim denied.	
Vote:	9–0
Majority:	Scalia
Concurring in Part/ Concurring in Judgment:	Breyer (joined by Roberts & Alito)
Oral Argument:[447]	January 10, 2007
Decided:	June 14, 2007
P-Lawyer:	Robert M. McKenna
R-Lawyer:	John M. West
US Lawyer:	Paul D. Clement (amicus curiae, supporting Petitioners)
Category:	Government Employee Unions

(7) *Tennessee Secondary School Athletic Association v. Brentwood Academy* (2007)[448]

First Amendment claim denied.	
Vote:	9–0
Majority:	Stevens
Concurring in Part/ Concurring in Judgment:	Kennedy (joined by Roberts, Scalia, & Alito)
Concurring in Judgment:	Thomas
Oral Argument:[449]	April 18, 2007
Decided:	June 21, 2007
P-Lawyer:	Maureen E. Mahoney
R-Lawyer:	James F. Blumstein
US Lawyer:	Dan Himmelfarb (amicus curiae, supporting the Petitioner)
Category:	Other[450]

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

[447] Transcript of Oral Argument, *Davenport*, 551 U.S. 177 (No. 05-1589), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/05-1589.pdf [https://perma.cc/HKT3-2EFW].

[448] Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291 (2007).

[449] Transcript of Oral Argument, *Tenn. Secondary Sch. Athletic Ass'n*, 551 U.S. 291 (No. 06-427), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/06-427.pdf [https://perma.cc/ABV6-QMLZ].

[450] In *Tennessee Secondary School Athletic Association*, the Court upheld a state sports association's antirecruiting rule, concluding that solicitation by schools can be banned. The Court analogized to both commercial speech (attorney advertising) and public employee cases.

(8) *Morse v. Frederick* (2007)[451]

First Amendment claim denied.	
Vote:	5–4
Majority:	Roberts
Concurring:	Thomas; Alito (joined by Kennedy)
Concurring in Judgment/ Dissenting in Part:	Breyer
Dissenting:	Stevens (joined by Souter & Ginsburg)
Oral Argument:[452]	March 19, 2007
Decided:	June 25, 2007
P-Lawyer:	Kenneth W. Starr
R-Lawyers:	Douglas K. Mertz
US Lawyer:	Edwin S. Kneedler (amicus curiae, supporting Petitioners)
Category:	Student Speech[453]

[451] Morse v. Frederick, 551 U.S. 393 (2007).

[452] Transcript of Oral Argument, *Morse*, 551 U.S. 393 (No. 06-969), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/06-278.pdf [https://perma.cc/J8G8-QNES].

[453] Here, the Court created a new carve-out to *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) for student speech that administrators reasonably believe advocates the illegal use of drugs.

(9) *FEC v. Wisconsin Right to Life, Inc.* (2007)[454]

First Amendment claim affirmed.	
Vote:	5–4
Majority:	Roberts (joined by Scalia, Kennedy, Thomas & Alito)
Concurring:	Roberts (joined by Alito); Alito
Concurring in Part/ Concurring in Judgment	Scalia (joined by Kennedy & Thomas)
Dissenting:	Souter (joined by Stevens, Ginsburg, & Breyer)
Oral Argument:[455]	April 25, 2007
Decided:	June 25, 2007
P-Lawyers:	Paul D. Clement & Seth P. Waxman
R-Lawyer:	James Bopp, Jr.
Category:	Campaign Finance

(10) *New York State Board of Elections v. Lopez Torres* (2008)[456]

First Amendment claim denied.	
Vote:	9–0
Majority:	Scalia
Concurring:	Stevens (joined by Souter)
Concurring in Judgment:	Kennedy (joined by Breyer)
Oral Argument:[457]	October 3, 2007
Decided:	January 16, 2008
P-Lawyers:	Theodore B. Olson & Andrew J. Rossman
R-Lawyer:	Frederick A.O. Schwarz, Jr.
Category:	Election Law

[454] Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).

[455] Transcript of Oral Argument, *Wis. Right to Life*, 551 U.S. 449 (No. 06-969), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/06-969.pdf [https://perma.cc/5JUD-AB3W].

[456] N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196 (2008).

[457] Transcript of Oral Argument, *Lopez Torres*, 552 U.S. 196 (No. 06-766), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2007/06-766.pdf [https://perma.cc/2YBG-3ERP].

(11) *Washington State Grange v. Washington State Republican Party* (2008)[458]

First Amendment claim denied.	
Vote:	7–2
Majority:	Thomas (joined by Roberts, Stevens, Souter, Ginsburg, Breyer, & Alito)
Concurring:	Roberts (joined by Alito)
Dissenting:	Scalia (joined by Kennedy)
Oral Argument:[459]	October 1, 2007
Decided:	March 18, 2008
P-Lawyer:	Robert M. McKenna
R-Lawyer:	John J. White, Jr.
Category:	Election Law

(12) *United States v. Williams* (2008)[460]

First Amendment claim denied.	
Vote:	7–2
Majority:	Scalia
Concurring:	Stevens (joined by Breyer)
Dissenting:	Souter (joined by Ginsburg)
Oral Argument:[461]	October 30, 2007
Decided:	May 19, 2008
P-Lawyer:	Paul D. Clement
R-Lawyer:	Richard J. Diaz
Category:	Child Pornography

[458] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008).

[459] Transcript of Oral Argument, *Wash. State Grange*, 552 U.S. 442 (No. 06-713), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2007/06-713.pdf [https://perma.cc/U9X8-5FEA].

[460] United States v. Williams, 553 U.S. 285 (2008).

[461] Transcript of Oral Argument, *Williams*, 553 U.S. 285 (No. 06-694), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2007/06-694.pdf [https://perma.cc/35N6-FXUL].

(13) *Davis v. FEC* (2008)[462]

First Amendment claim affirmed.	
Vote:	5–4
Majority:	Alito
Concurring in Part/ Dissenting in Part:	Stevens (joined in part by Souter, Ginsburg, & Breyer); Ginsburg (joined by Breyer)
Oral Argument:[463]	April 22, 2008
Decided:	June 26, 2008
P-Lawyer:	Andrew D. Herman
R-Lawyer:	Paul D. Clement
Category:	Campaign Finance

(14) *Locke v. Karass* (2009)[464]

First Amendment claim denied.	
Vote:	9–0
Majority:	Breyer
Concurring:	Alito (joined by Roberts & Scalia)
Oral Argument:[465]	October 6, 2008
Decided:	January 21, 2009
P-Lawyer:	W. James Young
R-Lawyer:	Jeremiah A. Collins
Category:	Compelled Speech; Government Employee Unions

[462] Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008).

[463] Transcript of Oral Argument, *Davis*, 554 U.S. 724 (No. 06-694), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2007/07-320.pdf [https://perma.cc/8F4D-8KSE].

[464] Locke v. Karass, 555 U.S. 207 (2009).

[465] Transcript of Oral Argument, *Locke*, 555 U.S. 207 (No. 07-610), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/07-610.pdf [https://perma.cc/E4VK-4BKU].

(15) *Ysursa v. Pocatello Education Association* (2009)[466]

First Amendment claim denied.	
Vote:	6–3
Majority:	Roberts
Concurring in Part/ Concurring in Judgment:	Ginsburg
Concurring in Part/ Dissenting in Part:	Breyer
Dissenting:	Stevens; Souter
Oral Argument:[467]	November 3, 2008
Decided:	February 24, 2009
P-Lawyer:	Clay R. Smith
R-Lawyer:	Jeremiah A. Collins
Category:	Government Employee Unions

(16) *Pleasant Grove City v. Summum* (2009)[468]

First Amendment claim denied.	
Vote:	9–0
Majority:	Alito
Concurring:	Stevens (joined by Ginsburg); Scalia (joined by Thomas); Breyer
Concurring in Judgment:	Souter
Oral Argument:[469]	November 12, 2008
Decided:	February 25, 2009
P-Lawyer:	Jay Alan Sekulow &
R-Lawyer:	Pamela Harris
US Lawyer:	Daryl Joseffer (amicus curiae, supporting petitioners)
Category:	Government Speech

[466] Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009).

[467] Oral Argument, *Pocatello Educ. Ass'n*, 555 U.S. 353 (No. 07-869), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/07-869.pdf [https://perma.cc/D527-BK8Y].

[468] Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

[469] Transcript of Oral Argument, *Pleasant Grove City*, 555 U.S. 460 (No. 07-665), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/07-665.pdf [https://perma.cc/AWZ3-ULCL].

DAVID SOUTER (steps down: June 29, 2009)

SONIA SOTOMAYOR (joins: August 8, 2009)

(17) *Citizens United v. FEC* (2010)[470]

First Amendment claim affirmed.	
Vote:	5–4 on electioneering ban 8–1 on disclosure requirement
Majority:	Kennedy
Concurring:	Roberts (joined by Alito); Scalia (joined by Alito & Thomas (in part))
Concurring in Part/ Dissenting in Part (as to disclosure requirement):	Thomas
Dissenting in Part/ Concurring in Part (as to disclosure requirement):	Stevens (joined by Ginsburg, Breyer, and Sotomayor)
Oral Argument:[471]	March 24, 2009
P-Lawyer:	Theodore B. Olson
R-Lawyer:	Malcolm L. Stewart
Oral Reargument:[472]	September 9, 2009
Decided:	January 21, 2010
P-Lawyer:	Theodore B. Olson
R-Lawyer:	Elena Kagan
Category:	Campaign Finance

[470] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[471] Transcript of Oral Argument, *Citizens United*, 558 U.S. 310 (No. 08-205), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205.pdf [https://perma.cc/6NG6-7FZS].

[472] Transcript of Oral Argument (Reargument), *Citizens United*, 558 U.S. 310 (No. 08-205), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205%5BReargued%5D.pdf [https://perma.cc/38H3-HMB4].

(18) *Milavetz, Gallop, & Milavetz, P.A. v. United States* (2010)[473]

First Amendment claim denied.	
Vote:	9–0
Majority:	Sotomayor
Oral Argument:[474]	December 1, 2009
Decided:	March 8, 2010
P-Lawyer:	G. Eric Brunstad, Jr.
R-Lawyer:	William M. Jay
Category:	Commercial Speech; Compelled Speech

(19) *United States v. Stevens* (2010)[475]

First Amendment claim affirmed.	
Vote:	8–1
Majority:	Roberts
Dissenting:	Alito
Oral Argument:[476]	October 6, 2009
Decided:	April 20, 2010
P-Lawyer:	Neal K. Katyal
R-Lawyer:	Patricia A. Millett
Category:	Animal Cruelty Videos;[477] No New Unprotected Categories; Overbreadth

[473] Milavetz, Gallop, & Milavetz, P.A. v. United States, 559 U.S. 229 (2010).

[474] Transcript of Oral Argument, *Milavetz*, *Gallop, & Milavetz*, 559 U.S. 229 (No. 08-1119), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2009/08-1119.pdf [https://perma.cc/H4MZ-K97H].

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

[476] Transcript of Oral Argument, *Stevens*, 559 U.S. 460 (No. 08-769), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2009/08-769.pdf [https://perma.cc/7WQM-BRYN].

[477] Case invalidated law prohibiting images of animal cruelty.

(20) *Holder v. Humanitarian Law Project* (2010)[478]

First Amendment claim denied.	
Vote:	6–3
Majority:	Roberts
Dissenting:	Breyer (joined by Ginsburg & Sotomayor)
Oral Argument:[479]	February 23, 2010
Decided:	June 21, 2010
P-Lawyer:	David D. Cole
R-Lawyer:	Elena Kagan
Category:	Material Support; Association

(21) *Doe v. Reed* (2010)[480]

First Amendment claim denied.	
Vote:	8–1
Majority:	Roberts
Concurring:	Breyer; Alito; Sotomayor (joined by Stevens & Ginsburg)
Concurring in Part/ Concurring in Judgment	Stevens (joined by Breyer)
Concurring in Judgment:	Scalia
Dissenting:	Thomas
Oral Argument:[481]	April 28, 2010
Decided:	June 24, 2010
P-Lawyer:	James Bopp, Jr.
R-Lawyer:	Robert M. McKenna
Category:	Disclosure Law

[478] Holder v. Humanitarian L. Project, 561 U.S. 1 (2010).

[479] Transcript of Oral Argument, *Humanitarian L.*, 561 U.S. 1 (No. 08-1498), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2009/08-1498.pdf [https://perma.cc/G2B7-GNBG].

[480] Doe v. Reed, 561 U.S. 186 (2010).

[481] Transcript of Oral Argument, *Doe*, 561 U.S. 186 (2010) (No. 09-559), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2009/09-559.pdf [https://perma.cc/U3J9-NG7M].

(22) *Christian Legal Society Chapter of the University of California v. Martinez* (2010)[482]

First Amendment claim denied.	
Vote:	5–4
Majority:	Ginsburg
Concurring:	Stevens; Kennedy
Dissenting	Alito (joined by Roberts, Scalia, & Thomas)
Oral Argument:[483]	April 19, 2010
Decided:	June 28, 2010
P-Lawyer:	Michael W. McConnell
R-Lawyer:	Gregory G. Garre
Category:	Association

JOHN PAUL STEVENS (steps down: June 29, 2010)

ELENA KAGAN (joins: August 7, 2010)

(23) *Snyder v. Phelps* (2011)[484]

First Amendment claim affirmed.	
Vote:	8–1
Majority:	Roberts
Concurring:	Breyer
Dissenting:	Alito
Oral Argument:[485]	October 6, 2010
Decided:	March 2, 2011
P-Lawyer:	Sean E. Summers
R-Lawyer:	Margie J. Phelps
Category:	Emotional Distress; Funeral Protests; No New Unprotected Categories

[482] Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of L. v. Martinez, 561 U.S. 661 (2010).

[483] Transcript of Oral Argument, *Christian Legal Soc'y*, 561 U.S. 661 (No. 08-1371), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2009/08-1371.pdf [https://perma.cc/YU9Q-R89U].

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

[485] Transcript of Oral Argument, *Snyder*, 562 U.S. 443 (No. 09-751), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/09-751.pdf [https://perma.cc/K3YD-86BG].

(24) *Nevada Commission on Ethics v. Carrigan* (2011)[486]

First Amendment claim denied.	
Vote:	9–0
Majority:	Scalia
Concurring in Part:	Kennedy
Concurring in Judgment in Part:	Alito
Oral Argument:[487]	April 27, 2011
Decided:	June 13, 2011
P-Lawyer:	John P. Elwood
R-Lawyer:	E. Joshua Rosenkranz
Category:	Election Law Court rules not speech.

(25) *Borough of Duryea v. Guarnieri* (2011)[488]

First Amendment claim denied.	
Vote:	8–1
Majority:	Kennedy
Concurring in Judgment:	Thomas
Concurring in Judgment in Part/Dissenting in Part:	Scalia
Oral Argument:[489]	March 22, 2011
Decided:	June 20, 2011
P-Lawyer:	Daniel R. Ortiz
R-Lawyer	Eric Schnapper
US Lawyer:	Joseph R. Palmore (amicus curiae, supporting Petitioners)
Category:	Petition; Government Employee Speech

[486] Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117 (2011).

[487] Transcript of Oral Argument, *Nev. Comm'n on Ethics*, 564 U.S. 117 (No. 10-568), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/10-568.pdf [https://perma.cc/5YUA-VZSC].

[488] Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011).

[489] Transcript of Oral Argument, *Guarnieri*, 564 U.S. 379 (No. 09-1476), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/09-1476.pdf [https://perma.cc/U76G-7PSF].

(26) *Sorrell v. IMS Health Inc.* (2011)[490]

First Amendment claim affirmed.	
Vote:	6–3
Majority:	Kennedy
Dissenting:	Breyer (joined by Ginsburg & Kagan)
Oral Argument:[491]	April 26, 2011
Decided:	June 23, 2011
P-Lawyer:	Bridget C. Asay
R-Lawyer:	Thomas C. Goldstein
US Lawyer:	Edwin S. Kneedler (amicus curiae, supporting Petitioners)
Category:	Commercial Speech; Content Discrimination

(27) *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011)[492]

First Amendment claim affirmed.	
Vote:	5–4
Majority:	Roberts
Dissenting:	Kagan (joined by Ginsburg, Breyer, & Sotomayor)
Oral Argument:[493]	March 28, 2011
Decided:	June 27, 2011
P-Lawyer:	William R. Maurer
R-Lawyer:	Bradley S. Phillips
US Lawyer:	William M. Jay (amicus curiae, supporting Petitioner)
Category:	Campaign Finance

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

[491] Transcript of Oral Argument, *IMS Health*, 564 U.S. 552 (No. 10-779), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/10-779.pdf [https://perma.cc/SF9X-FTXF].

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

[493] Transcript of Oral Argument, *Ariz. Free Enter. Club*, 564 U.S. 721 (2011) (No. 10-238), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/10-238.pdf [https://perma.cc/ZS4U-7FTA].

(28) *Brown v. Entertainment Merchants Association* (2011)[494]

First Amendment claim affirmed.	
Vote:	7–2
Majority:	Scalia
Concurring in Judgment:	Alito (joined by Roberts)
Dissenting:	Thomas; Breyer
Oral Argument:[495]	November 2, 2010
Decided:	June 27, 2011
P-Lawyer:	Zackery P. Morazzini
R-Lawyer:	Paul M. Smith
Category:	Violent Video Games; No New Unprotected Categories

(29) *Golan v. Holder* (2012)[496]

First Amendment claim denied.	
Vote:	6–2 (Kagan did not participate)
Majority:	Ginsburg
Dissenting:	Breyer (joined by Alito)
Oral Argument:[497]	October 5, 2011
Decided:	January 18, 2012
P-Lawyer:	Anthony T. Falzone
R-Lawyer:	Donald B. Verrilli, Jr.
Category:	Copyright; Free Expression

494 Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011).

495 Transcript of Oral Argument *Ent. Merchs.*, 559 U.S. 1092 (No. 08-1448), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/08-1448.pdf [https://perma.cc/QV5H-JLVP].

496 Golan v. Holder, 565 U.S. 302 (2012).

497 Transcript of Oral Argument, *Golan*, 565 U.S. 302 (2011) (No. 10-545), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-545.pdf [https://perma.cc/BX6V-RJKY].

(30) *Reichle v. Howards* (2012)[498]

First Amendment claim denied.	
Vote:	8–0 (Kagan did not participate)
Majority:	Thomas
Concurring in Judgment:	Ginsburg (joined by Breyer)
Oral Argument:[499]	March 21, 2012
Decided:	June 4, 2012
P-Lawyer:	Sean R. Gallagher
R-Lawyer:	David A. Lane
US Lawyer:	Sri Srinivasan (amicus curiae, supporting the Petitioner)
Category:	Retaliatory Arrest

(31) Knox v. SEIU, Local 1000 (2012)[500]

First Amendment claim affirmed.	
Vote:	7–2
Majority:	Alito
Concurring in Judgment:	Sotomayor (joined by Ginsburg)
Dissenting:	Breyer (joined by Kagan)
Oral Argument:[501]	January 10, 2012
Decided:	June 21, 2012
P-Lawyer:	W. James Young
R-Lawyer:	Jeremiah Collins
Category:	Compelled Speech; Government Employee Unions

[498] Reichle v. Howards, 566 U.S. 658 (2012).

[499] Transcript of Oral Argument, *Howards*, 566 U.S. 658 (No. 11-262), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/11-262.pdf [https://perma.cc/6PDB-L9J7].

[500] Knox v. Serv. Emps. Int'l Union, Loc. 1000 567 U.S. 298 (2012).

[501] Transcript of Oral Argument, *Knox*, 567 U.S. 298 (No. 10-1121), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-1121.pdf [https://perma.cc/52SE-9B2T].

(32) *United States v. Alvarez* (2012)[502]

First Amendment claim affirmed.	
Vote:	6–3
Plurality:	Kennedy (joined by Roberts, Ginsburg, & Sotomayor)
Concurring in Judgment:	Breyer (joined by Kagan)
Dissenting:	Alito (joined by Scalia & Thomas)
Oral Argument:[503]	February 22, 2012
Decided:	June 28, 2012
P-Lawyer:	Donald B. Verrilli, Jr.
R-Lawyer:	Jonathan D. Libby
Category:	No New Unprotected Categories (False Speech)

(33) *USAID v. Alliance for Open Society International, Inc.* (2013)[504]

First Amendment claim affirmed.	
Vote:	6–2 (Kagan did not participate)
Majority:	Roberts
Dissenting:	Scalia (joined by Thomas)
Oral Argument:[505]	April 22, 2013
Decided:	June 20, 2013
P-Lawyer:	Sri Srinivasan
R-Lawyer:	David W. Bowker
Category:	Compelled Speech

[502] United States v. Alvarez, 567 U.S. 709 (2012).

[503] Transcript of Oral Argument, *Alvarez*, 567 U.S. 709 (No. 11-210), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/11-210.pdf [https://perma.cc/RN6V-XHLF].

[504] Agency for Int'l Dev. v. All. for Open Society Int'l, Inc., 570 U.S. 205 (2013).

[505] Transcript of Oral Argument, *Agency for Int'l Dev.*, 570 U.S. 205 (No. 12-10), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/12-10_h3ci.pdf [https://perma.cc/336D-8VUP].

(34) *McCutcheon v. FEC* (2014)[506]

First Amendment claim affirmed.	
Vote:	5–4
Plurality:	Roberts (joined by Scalia, Kennedy, & Alito)
Concurring in Judgment:	Thomas
Dissenting:	Breyer (joined by Ginsburg, Sotomayor, & Kagan)
Oral Argument:[507]	October 8, 2013
Decided:	April 2, 2014
P-Lawyer:	Erin E. Murphy
R-Lawyer:	Donald B. Verrilli, Jr
US Lawyer:	Bobby R. Burchfield (amicus curiae, supporting Petitioners)
Category:	Campaign Finance

(35) *Wood v. Moss* (2014)[508]

First Amendment claim denied.	
Vote:	9–0
Majority:	Ginsburg
Oral Argument:[509]	March 26, 2014
Decided:	May 27, 2014
P-Lawyer:	Ian Heath Gershengorn
R-Lawyer:	Steven M. Wilker
Category:	Qualified Immunity

[506] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014).

[507] Transcript of Oral Argument, *McCutcheon*, 572 U.S. 185 (No. 12-536). https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/12-536_2k81.pdf [https://perma.cc/4XRF-NCTF].

[508] Wood v. Moss, 572 U.S. 744 (2014).

[509] Transcript of Oral Argument, *Moss*, 572 U.S. 744 (No. 13-115), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/13-115_3246.pdf [https://perma.cc/V82H-VNAJ].

(36) *Lane v. Franks* (2014)[510]

First Amendment claim affirmed.	
Vote:	9–0
Majority:	Sotomayor
Concurring:	Thomas (joined by Scalia & Alito)
Oral Argument:[511]	April 28, 2014
Decided:	June 19, 2014
P-Lawyer:	Tejinder Singh
R-Lawyer:	Luther J. Strange III & Mark T. Waggoner
US Lawyer:	Ian H. Gershengorn (amicus curiae, supporting affirmance in part and reversal in part)
Category:	Government Employee Speech

(37) *McCullen v. Coakley* (2014)[512]

First Amendment claim affirmed.	
Vote:	9–0
Majority:	Roberts
Concurring in Judgment:	Scalia (joined by Kennedy & Thomas); Alito
Oral Argument:[513]	January 15, 2014
Decided:	June 26, 2014
P-Lawyer:	Mark L. Rienzi
R-Lawyer:	Jennifer Grace Miller
US Lawyer:	Ian Heath Gershengorn (amicus curiae, supporting Respondents)
Category:	Buffer Zones; Leafletting; Content-Based Discrimination

[510] Lane v. Franks, 573 U.S. 228 (2014).

[511] Transcript of Oral Argument, *Lane*, 573 U.S. 228 (No. 13-483), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/13-483_21o2.pdf [https://perma.cc/C689-YJ2F].

[512] McCullen v. Coakley, 573 U.S. 464 (2014).

[513] Transcript of Oral Argument, *McCullen*, 573 U.S. 464 (No. 12-1168), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/12-1168_m2hl.pdf [https://perma.cc/LKW2-68KK].

(38) *Harris v. Quinn* (2014)[514]

First Amendment claim affirmed.	
Vote:	5–4
Majority:	Alito
Dissenting:	Kagan (joined by Ginsburg, Breyer, & Sotomayor)
Oral Argument:[515]	January 21, 2014
Decided:	June 30, 2014
P-Lawyer:	William L. Messenger
R-Lawyer:	Paul M. Smith
US Lawyer:	Donald B. Verrilli, Jr. (amicus curiae, supporting Respondents)
Category:	Compelled Speech; Government Employee Unions

(39) *Williams-Yulee v. Florida Bar* (2015)[516]

First Amendment claim denied.	
Vote:	5–4
Majority:	Roberts
Concurring:	Breyer
Concurring in Part/ Concurring in Judgment:	Ginsburg (joined by Breyer)
Dissenting:	Scalia (joined by Thomas); Kennedy; Alito
Oral Argument:[517]	January 20, 2015
Decided:	April 29, 2015
P-Lawyer:	Andrew J. Pincus
R-Lawyer:	Barry Richard
Category:	Judicial Speech[518]

[514] Harris v. Quinn, 573 U.S. 616 (2014).

[515] Transcript of Oral Argument, *Harris*, 573 U.S. 616 (2014) (No. 11-681), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/11-681_4f14.pdf [https://perma.cc/NFY6-4XKF].

[516] Williams-Yulee v. Fla. Bar, 575 U.S. 433 (2015).

[517] Transcript of Oral Argument, *Williams-Yulee*, 575 U.S. 433 (No. 13-1499), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/13-1499_h75k.pdf [https://perma.cc/MKH5-TNE4].

[518] Here, the Court applied strict scrutiny and upheld the regulation.

(40) *Reed v. Town of Gilbert* (2015)[519]

First Amendment claim affirmed.	
Vote:	9–0
Majority:	Thomas
Concurring:	Alito (joined by Kennedy & Sotomayor)
Concurring in Judgment:	Breyer; Kagan (joined by Ginsburg & Breyer)
Oral Argument:[520]	January 12, 2015
Decided:	June 18, 2015
P-Lawyer:	David A. Cortman
R-Lawyer:	Philip W. Savrin
Neither Party:	Eric J. Feigin (amicus curiae)
Category:	Zoning; Content Discrimination

(41) *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (2015)[521]

First Amendment claim denied.	
Vote:	5–4
Majority:	Breyer
Dissenting:	Alito (joined by Roberts, Scalia, & Anthony)
Oral Argument:[522]	March 23, 2015
Decided:	June 18, 2015
P-Lawyer:	Scott A. Keller
R-Lawyer:	R. James George
Category:	Government Speech

ANTONIN SCALIA (dies in office: February 13, 2016)

---

[519] Reed v. Town of Gilbert, 576 U.S. 155 (2015).

[520] Transcript of Oral Argument, *Reed*, 576 U.S. 155 (2015) (No. 13-502), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/13-502_2034.pdf [https://perma.cc/HUS2-ZMWX].

[521] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015).

[522] Transcript of Oral Argument, *Walker*, 576 U.S. 200 (No. 14-144), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-144_2034.pdf [https://perma.cc/7JSZ-26QE].

(42) *Heffernan v. City of Paterson* (2016)[523]

First Amendment claim affirmed.	
Vote:	6–2 (Scalia vacancy not yet filled)
Majority:	Breyer
Dissenting:	Thomas (joined by Alito)
Oral Argument:[524]	January 19, 2016
Decided:	April 26, 2016
P-Lawyer:	Mark Frost
R-Lawyer:	Thomas C. Goldstein
US Lawyer:	Ginger D. Anders (amicus curiae, supporting Petitioner)
Category:	Government Employee Speech

(43) *Expressions Hair Design v. Schneiderman* (2017)[525]

First Amendment claim affirmed.	
Vote:	8–0 (Scalia retired, vacancy not yet filled)
Majority:	Roberts
Concurring in Judgment:	Breyer; Sotomayor (joined by Alito)
Oral argument:[526]	January 10, 2017
Decided:	March 29, 2017
P-Lawyer:	Deepak Gupta
R-Lawyer:	Steven C. Wu
Neither Party:	Eric J. Feigin
Category:	Speech-Conduct Dichotomy

NEIL GORSUCH (joins: April 10, 2017)

[523] Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016).

[524] Transcript of Oral Argument, *Heffernan*, 136 S. Ct. 1412 (No. 14-1280), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-1280_e1p3.pdf [https://perma.cc/DQ4S-RTBD].

[525] Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017).

[526] Transcript of Oral Argument, *Expressions Hair Design*, 137 S. Ct. 1144 (No. 15-1391), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1391_5315.pdf [https://perma.cc/XQ5R-MCKV].

(44) *Packingham v. North Carolina* (2017)[527]

First Amendment claim affirmed.	
Vote:	8–0 (Gorsuch did not participate)
Majority:	Kennedy
Concurring in Judgment:	Alito (joined by Roberts & Thomas)
Oral Argument:[528]	February 27, 2017
Decided:	June 19, 2017
P-Lawyer:	David T. Goldberg
R-Lawyer:	Robert C. Montgomery
Category:	Overbreadth

(45) *Matal v. Tam* (2017)[529]

First Amendment claim affirmed.	
Vote:	8–0 (Gorsuch did not participate)
Majority:	Alito
Concurring in Part/ Concurring in Judgment:	Kennedy (joined by Ginsburg, Sotomayor, & Kagan); Thomas
Oral Argument:[530]	January 18, 2017
Decided:	June 19, 2017
P-Lawyer:	Malcolm L. Stewart
R-Lawyer:	John C. Connell
Category:	Government Speech; Trademark Law; Viewpoint Discrimination

[527] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[528] Transcript of Oral Argument, *Packingham*, 137 S. Ct. 1730 (No. 15-1194), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1194_0861.pdf [https://perma.cc/A7PR-VKT8].

[529] Matal v. Tam, 137 S. Ct. 1744 (2017).

[530] Transcript of Oral Argument, *Tam*, 137 S. Ct. 1744 (No. 15-1293), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1293_o7jp.pdf [https://perma.cc/2H5Q-Y7XR].

(46) *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018)[531]

First Amendment claim affirmed.	
Vote:	7–2
Majority:	Kennedy
Concurring:	Kagan (joined by Breyer); Gorsuch (joined by Alito)
Concurring in Part/ Concurring in Judgment:	Thomas (joined by Gorsuch)
Dissenting:	Ginsburg (joined by Sotomayor)
Oral Argument:[532]	December 5, 2017
Decided:	June 4, 2018
P-Lawyer:	Kristen K. Waggoner
R-Lawyer:	Frederick R. Yarger & David D. Cole
US Lawyer:	Noel J. Francisco (amicus curiae, supporting Petitioners)
Category:	Viewpoint Discrimination

(47) *Minnesota Voters Alliance v. Mansky* (2018)[533]

First Amendment claim affirmed.	
Vote:	7–2
Majority:	Roberts
Dissenting:	Sotomayor (joined by Breyer)
Oral Argument:[534]	February 28, 2018
Decided:	June 14, 2018
P-Lawyer:	J. David Bremmer
R-Lawyer:	Daniel P. Rogan
Category:	Overbreadth

[531] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

[532] Transcript of Oral Argument, *Masterpiece Cakeshop*, 138 S. Ct 1719 (No. 16-111), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf [https://perma.cc/WY8B-4UME].

[533] Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018).

[534] Transcript of Oral Argument, *Minn. Voters All.*, 138 S. Ct. 1876 (No. 16-1435), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1435_2co3.pdf [https://perma.cc/MW95-CLPF].

(48) *Lozman v. City of Riviera Beach* (2018)[535]

First Amendment claim affirmed.	
Vote:	8–1
Majority:	Kennedy
Dissenting:	Thomas
Oral argument:[536]	February 27, 2018
Decided:	June 18, 2018
P-Lawyer:	Pamala S. Karlan
R-Lawyer:	Shay Dvoretzky
US Lawyer:	Jeffrey B. Wall (amicus curiae, supporting Respondent)
Category:	Retaliatory Arrest

(49) *NIFLA v. Becerra* (2018)[537]

First Amendment claim affirmed.	
Vote:	5–4
Majority:	Thomas
Concurring:	Kennedy (joined by Roberts, Alito, & Gorsuch)
Dissenting:	Breyer (joined by Ginsburg, Sotomayor, & Kagan)
Oral Argument:[538]	March 20, 2018
Decided:	June 26, 2018
P-Lawyer:	Michael P. Farris
R-Lawyer:	Joshua A. Klein
Neither Party:	Jeffrey B. Wall
Category:	Professional Speech Doctrine; Compelled Speech; Content Discrimination

[535] Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018).

[536] Transcript of Oral Argument, *Lozman*, 138 S. Ct. 1945 (2018) (No. 17-21), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-21_ljgm.pdf [https://perma.cc/RU2G-T7HZ].

[537] Nat'l Inst. of Fam. & Life Advocs. (*NIFLA*) v. Becerra, 138 S. Ct. 2361 (2018).

[538] Transcript of Oral Argument, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1140_o759.pdf [https://perma.cc/7DUR-CGDD].

(50) *Janus v. AFSCME, Council 31* (2018)[539]

First Amendment claim affirmed.	
Vote:	5–4
Majority:	Alito
Dissenting:	Sotomayor; Kagan (joined by Ginsburg, Breyer, & Sotomayor)
Oral Argument:[540]	February 26, 2018
Decided:	June 27, 2018
P-Lawyer:	William L. Messenger
R-Lawyer:	David L. Franklin & David C. Frederick
US Lawyer:	Noel J. Francisco (amicus curiae, supporting Petitioner)
Category:	Compelled Speech; Government Employee Unions

ANTHONY KENNEDY (steps down: July 31, 2018)

BRETT KAVANAUGH (joins: October 6, 2018)

[539] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

[540] Transcript of Oral Argument, *Janus*, 138 S. Ct. 2448 (No. 16-1466), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1466_bocf.pdf [https://perma.cc/6RGU-VN4S].

(51) *Nieves v. Bartlett* (2019)[541]

First Amendment claim denied.	
Vote:	6–3
Majority:	Roberts
Concurring in Part/ Concurring in Judgment:	Thomas
Concurring in Part/ Dissenting in Part:	Gorsuch
Concurring in Judgment in Part/ Dissenting in Part	Ginsburg
Dissenting	Sotomayor
Oral Argument:[542]	November 26, 2018
Decided:	May 28, 2019
P-Lawyer:	Dario Borghesan
R-Lawyer:	Zane D. Wilson
US Lawyer:	Jeffrey B. Wall (amicus curiae, supporting Petitioners)
Category:	Retaliatory Arrest

(52) *Manhattan Community Access Corporation v. Halleck* (2019)[543]

First Amendment claim denied.	
Vote:	5–4
Majority:	Kavanaugh
Dissenting:	Sotomayor (joined by Ginsburg, Breyer, & Kagan)
Oral Argument:[544]	February 25, 2019
Decided:	June 17, 2019
P-Lawyer:	Michael B. De Leeuw
R-Lawyer:	Paul W. Hughes
Category:	State Action Doctrine

[541] Nieves v. Bartlett, 139 S. Ct. 1715 (2019).

[542] Transcript of Oral Argument, *Nieves*, 139 S. Ct. 1715 (2019) (No. 17-1174), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1174_53k8.pdf [https://perma.cc/U47J-KDZM].

[543] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

[544] Transcript of Oral Argument, *Manhattan Cmty. Access Corp.*, 139 S. Ct. 1921 (No. 17-1702), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1702_3d93.pdf [https://perma.cc/BH5D-MCT7].

(53) *Iancu v. Brunetti* (2019)[545]

First Amendment claim affirmed.	
Vote:	9–0 (on "immoral" issue) 6–3 (on "scandalous" issue)
Majority:	Kagan
Concurring:	Alito
Concurring in Part/ Dissenting in Part:	Breyer; Roberts; Sotomayor (joined by Breyer)
Oral Argument:[546]	April 15, 2019
Decided:	June 24, 2019
P-Lawyer:	Malcolm L. Stewart
R-Lawyer:	John R. Sommer
Category:	Trademark Law; Viewpoint Discrimination

(54) Thompson v. Hebdon (2019)[547]

First Amendment claim affirmed.	
Vote:	9–0
Opinion:	Per Curiam
Separate Statement:	Ginsburg
Oral Argument:	Not Argued
Decided:	November 25, 2019
P-Lawyer:	Paul D. Clement
R-Lawyer:	Laura Fox
Category:	Campaign Finance

[545] Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

[546] Transcript of Oral Argument, *Brunetti*, 139 S. Ct. 2294 (No. 18-302), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-302_7k47.pdf [https://perma.cc/RY96-9PVK].

[547] Thompson v. Hebdon, 140 S. Ct. 348 (2019).

(55) *USAID v. Alliance for Open Society International, Inc. II* (2020)[548]

First Amendment claim denied.	
Judgment:	5–3 (Kagan did not participate)
Majority:	Kavanaugh
Concurring:	Thomas
Dissenting:	Breyer (joined by Ginsburg & Sotomayor)
Oral Argument:[549]	May 5, 2020
Decided:	June 29, 2020
P-Lawyer:	Christopher G. Michel
R-Lawyer:	David W. Bowker
Category:	Coverage

(56) *Barr v. American Association of Political Consultants, Inc.* (2020)[550]

First Amendment claim affirmed.	
Vote:	6–3; 7–2 on severability
Plurality:	Kavanaugh (joined by Roberts, Alito, & Thomas (on severability))
Concurring in Judgment:	Sotomayor
Concurring in Judgment in Part (on FA question)/ Dissenting in Part (on severability):	Gorsuch (joined by Thomas)
Dissenting in Part (on FA question)/ Concurring in Part (on severability):	Breyer (joined by Ginsburg and Kagan)
Oral Argument:[551]	May 6, 2020
Decided:	July 6, 2020
P-Lawyer:	Malcolm L. Stewart
R-Lawyer:	Roman Martinez
Category:	Content Discrimination; Robocalls

[548] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082 (2020) (No. 19-177).

[549] Transcript of Oral Argument, *Agency for Int'l Dev.*, 140 S. Ct. 2082 (No. 19-177), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-177_p8k0.pdf [https://perma.cc/DV6U-HRQ9].

[550] Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335 (2020).

[551] Transcript of Oral Argument, *Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335 (No. 19-631), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-631_omjp.pdf [https://perma.cc/YCD8-J9UR].

RUTH BADER GINSBURG (dies in office: September 18, 2020)

AMY CONEY BARRETT (joins: October 27, 2020)

(57) *Mahanoy Area School District v. B.L.* (2021)[552]

First Amendment Claim affirmed.	
Vote:	8–1
Majority:	Breyer
Concurring:	Alito (joined by Gorsuch)
Dissenting:	Thomas
Oral Argument:[553]	April 28, 2021
Decided:	June 23, 2021
P-Lawyer:	Lisa S. Blatt
R-Lawyer:	David D. Cole
US Lawyer:	Malcolm L. Stewart (amicus curiae, supporting Petitioner)
Category:	Student Speech

(58) *Americans for Prosperity Foundation v. Bonta* (2021)[554]

First Amendment claim affirmed.	
Vote:	6–3
Majority:	Roberts
Concurring in Part/ Concurring in Judgment:	Thomas; Alito (joined by Gorsuch)
Dissenting:	Sotomayor (joined by Breyer and Kagan)
Oral Argument:[555]	April 26, 2021
Decided:	July 1, 2021
P-Lawyer:	Derek L. Shaffer
R-Lawyer	Aimee A. Feinberg
US Lawyer:	Elizabeth B. Prelogar (amicus curiae)
Category:	Disclosure Law

[552] Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038 (2021).

[553] Transcript of Oral Argument, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/20-255_869d.pdf [https://perma.cc/2754-54TZ].

[554] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2020) (consolidated with *Thomas More Law Center v. Bonta*, Docket No. 19-255).

[555] Transcript of Oral Argument, *Ams. for Prosperity*, 141 S. Ct. 2373 (No. 19-251), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-251_h3ci.pdf [https://perma.cc/C4K9-LKNH].

APPENDIX C

MAJORITY OPINIONS BY JUSTICE

Total Opinions: 53

Justice	**No. of Opinions**	**Vote**
Roberts	16	6–3 (4) ▪ 5–4 (4) ▪ 8–1 (3) 8–0 (2) ▪ 9–0 ▪ 7–2 ▪ 6–2
Kennedy	07	8–1 (2) ▪ 5–4 (2) ▪ 8–0 ▪ 7–2 ▪ 6–3
Alito	06	5–4 (3) ▪ 9–0 ▪ 8–0 ▪ 7–2
Scalia	05	9–0 (3) ▪ 7–2 (2)
Thomas	04	9–0 ▪ 8–0 ▪ 7–2 ▪ 5–4
Breyer	04	9–0 ▪ 8–1 ▪ 6–2 ▪ 5–4
Ginsburg	03	9–0 ▪ 6–2 ▪ 5–4
Sotomayor	02	9–0 (2)
Per Curiam	02	9–0
Kavanaugh	02	5–4 ▪ 5–3
Stevens	01	9–0
Kagan	01	9–0 (judgment, divided 6–3 on one issue)
O'Connor	00	
Souter	00	
Gorsuch	00	
Barrett	00	

APPENDIX D

PLURALITY OPINIONS BY JUSTICE

Total Opinions: 05

Justice	**No. of Opinions**	**Vote**
Breyer	02	6–2 ▪ 6–3
Kennedy	01	6–3
Roberts	01	5–4
Kavanaugh	01	6–3

APPENDIX E

UNANIMOUS JUDGMENTS

Total Opinions: 18[556]

No. of Unanimous Opinions	Vote
13	9–0
05	8–0

[556] *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), was decided 9–0 on certain points and 6–3 on others. The table does *not* list it as a unanimous judgment. But if it did, the total number of cases would be nineteen, with fourteen 9–0 judgments.

APPENDIX F

5–4 JUDGMENTS

Total Opinions: 14

Decision	**No. of Opinions**	**Vote**
Affirming FA	08	5–4
Denying FA	06	5–4

APPENDIX G

AUTHORS OF 5–4 LEAD OPINIONS

Total Opinions: 14

Justice	**No. of Opinions**
Roberts	05 (*plus* 1 plurality)
Alito	03
Kennedy	02
Thomas	01
Ginsburg	01
Breyer	01
Kavanaugh	01
Stevens	00
O'Connor	00
Scalia	00
Souter	00
Sotomayor	00
Kagan	00
Gorsuch	00
Barrett	00

APPENDIX H

AUTHORS OF DISSENTING OPINIONS

Total Opinions: 57

Justice	**No. of Opinions**
Breyer	13 (includes 4 dissenting in part)
Stevens	07 (includes 2 dissenting in part)
Thomas	06 (includes 1 dissenting in part)
Alito	06
Sotomayor	06 (includes 1 dissenting in part)
Souter	05
Scalia	04 (includes 1 dissenting in part)
Ginsburg	04 (includes 2 dissenting in part)
Kagan	03
Roberts	01 (dissenting in part)
Gorsuch	01 (dissenting in part)
Kennedy	01
O'Connor	00
Kavanaugh	00
Barrett	00

APPENDIX I

AUTHORS OF CONCURRING OPINIONS

Total Opinions: 79

Justice	**No. of Opinions**
Thomas	14 (includes 7 concurring in judgment)
Alito	13 (includes 4 concurring in judgment)
Breyer	12 (includes 3 concurring & dissenting in part and 3 concurring in judgment)
Stevens	07 (includes 3 concurring in part)
Kennedy	07 (includes 3 concurring in judgment)
Scalia	06 (including 2 concurring in judgment and 1 concurring in part)
Ginsburg	05 (includes 1 concurring in judgment & 3 concurring in part)
Sotomayor	05 (includes 3 concurring in judgment & 1 concurring in part)
Roberts	04 (includes 1 concurring in part)
Gorsuch	03 (includes 1 concurring in judgment in part)
Kagan	02 (includes 1 concurring in judgment)
Souter	01 (concurring in judgment)
O'Connor	00
Kavanaugh	00
Barrett	00

APPENDIX J

AUTHORS OF LONE DISSENTS FROM JUDGMENT

Total Opinions: 06

Justice	**No. of Opinions**
Thomas	03 (includes partial dissent in *Citizens United v. FEC*)
Alito	02
Scalia	01 (includes partial dissent in *Borough of Duryea v. Guarnieri)*

APPENDIX K

CASES ORGANIZED BY CATEGORY

Animal Cruelty Videos (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*United States v. Stevens* (2010)	8–1

Association (FA claim affirmed: 00: 0%):

	Case Name	**Vote**
(1)	*Rumsfeld v. FAIR* (2006)	8–0
(2)	*Holder v. Humanitarian Law Project* (2010)	6–3
(3)	*Christian Legal Society Chapter of the University of California v. Martinez* (2010)	5–4

Buffer Zones (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*McCullen v. Coakley* (2014)	5–4

Campaign Finance (FA claim affirmed: 08: 100%):

	Case Name	**Vote**
(1)	*Wisconsin Right to Life v. FEC* (2006)	9–0
(2)	*Randall v. Sorrell* (2006)	6–3
(3)	*FEC v. Wisconsin Right to Life* (2007)	5–4
(4)	*Davis v. FEC* (2008)	5–4
(5)	*Citizens United v. FEC* (2010)[557]	5–4
(6)	*Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011)	5–4
(7)	*McCutcheon v. FEC* (2014)	5–4
(8)	*Thompson v. Hebdon (*2019)	9–0

Child Pornography (FA claim denied: 01: 100%):

	Case Name	**Vote**
(1)	*United States v. Williams* (2008)	7–2

[557] The disclosure requirement in *Citizens United* was sustained.

Commercial Speech (FA claim affirmed: 01: 50%):

	Case Name	**Vote**
(1)	*Milavetz, Gallop, & Milavetz v. United States* (2010)	9–0
(2)	*Sorrell v. IMS Health* (2011)	6–3

Compelled Speech (FA claim affirmed: 04: 50%):

	Case Name	**Vote**
(1)	*Rumsfeld v. FAIR* (2006)	8–0
(2)	*Locke v. Karass* (2009)	9–0
(3)	*Ysursa v. Pocatello Education Association* (2009)	5–4
(4)	*Milavetz, Gallop, & Milavetz v. United States* (2010)	9–0
(5)	*USAID v. Alliance for Open Society International* (2013)	6–3
(6)	*Harris v. Quinn* (2014)	5–4
(7)	*Janus v. AFSCME, Council 31* (2018)	5–4
(8)	*NIFLA v. Becerra* (2018)	5–4

Content Discrimination (FA claim affirmed: 04: 100%):

	Case Name	**Vote**
(1)	*Sorrell v. IMS Health* (2011)	6–3
(2)	*McCullen v. Coakley* (2014) (content neutral but not narrowly applied)	9–0
(3)	*Reed v. Town of Gilbert* (2015)	9–0
(4)	*Barr v. American Association of Political Consultants* (2020)	6–3

Copyright (FA claim affirmed: 00: 0%):

	Case Name	**Vote**
(1)	*Golan v. Holder* (2012)	6–2

Coverage (FA claim affirmed: 00: 0%):

	Case Name	**Vote**
(1)	*USAID v. Alliance for Open Society International II* (2020)	5–3

Disclosure Law (FA claim affirmed: 01: 50%):

	Case Name	**Vote**
(1)	*Doe v. Reed* (2010)	8–1
(2)	*Americans for Prosperity Foundation v. Bonta* (2021)	6–3

Election Law (FA claim affirmed: 00: 0%):

	Case Name	**Vote**
(1)	*New York State Board of Elections v. Lopez Torres* (2008)	9–0
(2)	*Washington State Grange v. Washington State Republican Party* (2008)	7–2
(3)	*Nevada Commission on Ethics v. Carrigan* (2011)	9–0

Emotional Distress (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*Snyder v. Phelps* (2011)	8–1

Funeral Protests (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*Snyder v. Phelps* (2011)	8–1

Government Employee Speech (FA claim affirmed: 02: 50%):

	Case Name	**Vote**
(1)	*Garcetti v. Ceballos* (2006)	5–4
(2)	*Borough of Duryea v. Guarnieri* (2011)	8–1
(3)	*Lane v. Franks* (2014)	6–2
(4)	*Heffernan v. City of Paterson* (2016)	9–0

Government Employee Unions (FA claim affirmed: 03: 50%):

	Case Name	**Vote**
(1)	*Davenport v. Washington Education Association* (2007)	5–4
(2)	*Locke v. Karass* (2009)	9–0
(3)	*Ysursa v. Pocatello Education Association* (2009)	5–4
(4)	*Knox v. SEIU, Local 1000* (2012)	7–2
(5)	*Harris v. Quinn* (2014)	6–3
(6)	*Janus v. AFSCME, Council 31* (2018)	9–0

Government Speech (FA claim affirmed: 01: 33.3%):

	Case Name	**Vote**
(1)	*Pleasant Grove v. Summum* (2009)	9–0
(2)	*Walker v. Texas Division, Sons of Confederate Veterans* (2015)	5–4
(3)	*Matal v. Tam* (2017)	8–0

Judicial Speech (FA claim affirmed: 00: 0%):

	Case Name	**Vote**
(1)	*Williams-Yulee v. Florida Bar* (2015)	5–4

Leafletting (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*McCullen v. Coakley* (2014)	9–0

Material Support (FA claim affirmed: 00: 0%):

	Case Name	**Vote**
(1)	*Holder v. Humanitarian Law Project* (2010)	6–3

No New Unprotected Categories (FA claim affirmed: 04: 100%):

	Case Name	**Vote**
(1)	*United States v. Stevens* (2010) (images of animal cruelty)	9–0
(2)	*Snyder v. Phelps* (2011) (funeral protests)	8–1
(3)	*Brown v. Entertainment Merchants Association* (2011) (violent video games)	7–2
(4)	*United States v. Alvarez (*2012) (false speech)	6–3

Other (FA claim affirmed: 00: 0%):

	Case Name	**Vote**
(1)	*Tennessee Secondary School Athletic Association v. Brentwood Academy* (2007)	9–0

Overbreadth (FA claim affirmed: 03: 100%):

	Case Name	**Vote**
(1)	*United States v. Stevens* (2010)	8–1
(2)	*Packingham v. North Carolina* (2017)	8–0
(3)	*Minnesota Voters Alliance v. Mansky* (2018)	7–2

Professional Speech Doctrine (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*NIFLA v. Becerra* (2018)	5–4

Prisoner Speech (FA claim affirmed: 00: 0%):

	Case Name	**Vote**
(1)	*Beard v. Banks* (2006)	6–2

Qualified Immunity (FA claim affirmed: 00: 0%):

	Case Name	**Vote**
(1)	*Wood v. Moss* (2014)	9–0

Religious Neutrality (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)	7–2

Retaliatory Arrest Cases (FA claim affirmed: 01: 50%):

	Case Name	**Vote**
(1)	*Lozman v. City of Riviera Beach* (2018)	8–1
(2)	*Nieves v. Bartlett* (2019)	6–3

Robocalls (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*Barr v. American Association of Political Consultants* (2020)	6–3

Signage (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*Reed v. Town of Gilbert* (2015)	9–0

Speech-Conduct Dichotomy (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*Expressions Hair Design v. Schneiderman* (2017)	8–0

State Action Doctrine (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*Manhattan Community Access Corporation v. Halleck* (2019)	5–4

Student Speech (FA claim affirmed: 01: 50%):

	Case Name	**Vote**
(1)	*Morse v. Frederick* (2007)	5–4
(2)	*Mahanoy Area School District v. B.L.* (2021)	8–1

Trademark (FA claim affirmed: 02: 100%):

	Case Name	**Vote**
(1)	*Matal v. Tam* (2017)	8–0
(2)	*Iancu v. Brunetti* (2019)	5–4 (in part); 9–0 (in part)

Unconstitutional Conditions (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*USAID v. Alliance for Open Society International* (2013)	6–2

Viewpoint Discrimination (FA claim affirmed: 02: 100%):

	Case Name	**Vote**
(1)	*Matal v. Tam* (2017)	8–0
(2)	*Iancu v. Brunetti* (2019)	6–3

Violent Video Games (FA claim affirmed: 01: 100%):

	Case Name	**Vote**
(1)	*Brown v. Entertainment Merchants Association* (2011)	7–2

APPENDIX L

AUTHORS OF AND VOTES IN MAJORITY OPINIONS

Roberts (16) (2006–2021) [9 claims sustained (✓), 7 denied (×)]:

	Case Name	**Vote**
(1)	*Rumsfeld v. FAIR* (2006) ×	8–0
(2)	*FEC v. Wisconsin Right to Life* (2007) ✓	5–4
(3)	*Morse v. Frederick* (2007) ×	5–4
(4)	*Ysursa v. Pocatello Education Association* (2009) ×	6–3
(5)	*United States v. Stevens* (2010) ✓	8–1
(6)	*Holder v. Humanitarian Law Project* (2010) ×	6–3
(7)	*Doe v. Reed* (2010) ×	8–1
(8)	*Snyder v. Phelps* (2011) ✓	8–1
(9)	*Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011) ✓	5–4
(10)	*USAID v. Alliance for Open Society International* (2013) ✓	6–2
(11)	*McCullen v. Coakley* (2014) ✓	9–0
(12)	*Williams-Yulee v. The Florida Bar* (2015) ×	5–4
(13)	*Expressions Hair Design v. Schneiderman* (2017) ✓	8–0
(14)	*Minnesota Voters Alliance v. Mansky* (2018) ✓	7–2
(15)	*Nieves v. Bartlett* (2019) ×	6–3
(16)	*Americans for Prosperity Foundation v. Bonta* (2021) ✓	6–3

Kennedy (7) (2006-2018) [5 claims sustained (✓), 2 denied (×)]:

	Case Name	**Vote**
(1)	*Garcetti v. Ceballos* (2006) ×	5–4
(2)	*Citizens United v. FEC* (2010) ✓	5–4
(3)	*Sorrell v. IMS Health* (2011) ✓	6–3
(4)	*Borough of Duryea v. Guarnieri* (2011) ×	8–1
(5)	*Packingham v. North Carolina* (2017) ✓	8–0
(6)	*Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018) ✓	7–2
(7)	*Lozman v. City of Riviera Beach* (2018) ✓	8–1

Alito (6) (2006-2021) [5 claims sustained (✓), 1 denied (×)]:

	Case Name	**Vote**
(1)	*Davis v. FEC* (2008) ✓	5–4
(2)	*Pleasant Grove City v. Summum* (2009) ×	9–0
(3)	*Knox v. SEIU, Local 1000* (2012) ✓	7–2
(4)	*Harris v. Quinn* (2014) ✓	5–4
(5)	*Matal v. Tam* (2017) ✓	8–0
(6)	*Janus v. AFSCME, Council 31* (2018) ✓	5–4

Scalia (5) (2006-2016) [1 claim sustained (✓), 4 denied (×)]:

	Case Name	**Vote**
(1)	*Davenport v. Washington Education Association* (2007) ×	9–0
(2)	*United States v. Williams* (2008) ×	7–2
(3)	*New York State Board of Elections v. Lopez Torres* (2008) ×	9–0
(4)	*Brown v. Entertainment Merchants Association* (2011) ✓	7–2
(5)	*Nevada Commission on Ethics v. Carrigan* (2011) ×	9–0

Thomas (4) (2006-2021) [2 claims sustained (✓), 2 denied (×)]:

	Case Name	**Vote**
(1)	*Washington State Grange v. Washington State Republican Party* (2008) ×	7–2
(2)	*Reichle v. Howards* (2012) ×	8–0
(3)	*Reed v. Town of Gilbert* (2015) ✓	9–0
(4)	*NIFLA v. Becerra* (2018) ✓	5–4

Breyer (4) (2006-2021) [2 claims sustained (✓), 2 denied (×)]:

	Case Name	**Vote**
(1)	*Locke v. Karass* (2009) ×	9–0
(2)	*Walker v. Texas Division, Sons of Confederate Veterans* (2015) ×	5–4
(3)	*Heffernan v. City of Paterson* (2016) ✓	6–2
(4)	*Mahanoy Area School District v. B.L.* (2021) ✓	8–1

Ginsburg (3) (2006-2020) [0 claims sustained (✓), 3 denied (×)]:

	Case Name	Vote
(1)	*Christian Legal Society Chapter of the University of California v. Martinez* (2010) ×	5–4
(2)	*Golan v. Holder* (2012) ×	6–2
(3)	*Wood v. Moss* (2014) ×	9–0

Sotomayor (2) (2009-2021) [1 claim sustained (✓), 1 denied (×)]:

	Case Name	Vote
(1)	*Milavetz, Gallop, & Milavetz v. United States* (2010) ×	9–0
(2)	*Lane v. Franks* (2014) ✓	9–0

Kavanaugh (2) (2018-2021) [0 claims sustained (✓), 1 denied (×)]:

	Case Name	Vote
(1)	*Manhattan Community Access Corporation v. Halleck* (2019) ×	5–4
(2)	*USAID v. Alliance for Open Society International II* (2020) ×	5–3

Stevens (1) (2006-2010) [0 claims sustained (✓), 1 denied (×)]:

	Case Name	Vote
(1)	*Tennessee Secondary School Athletic Association v. Brentwood Academy* (2007) ×	9–0

Kagan (1) (2010-2021) [1 claim sustained (✓), 0 denied (×)]:

	Case Name	Vote
(1)	*Iancu v. Brunetti* (2019) ✓	9–0

Per Curiam (2) (2006-2021) [2 claims sustained (✓), 0 denied (×)]:

	Case Name	Vote
(1)	*Thompson v. Hebdon* (2019) ✓	9–0
(2)	*Wisconsin Right to Life v. FEC* (2006) ✓	9–0

APPENDIX M

THE CHIEF JUSTICE'S VOTES WITH OTHER JUSTICES

SUMMARY

Justices	Agreement
Roberts with Kavanaugh	08 of 08 FA cases = 100%
Roberts with Barrett	02 of 02 FA cases = 100%
Roberts with O'Connor	01 of 01 FA case = 100%
Roberts with Kennedy	47 of 50 FA cases = 94%
Roberts with Gorsuch	12 of 13 FA cases = 92.3%
Roberts with Scalia	36 of 41 FA cases = 87.8%
Roberts with Alito	48 of 55 FA cases = 87.3%
Roberts with Thomas	48 of 58 FA cases = 82.8%
Roberts with Stevens	15 of 22 FA cases = 68.2%
Roberts with Sotomayor	27 of 42 FA cases = 64.3%
Roberts with Kagan	20 of 32 FA cases = 62.5%
Roberts with Ginsburg	34 of 56 FA cases = 60.7%
Roberts with Breyer	33 of 58 FA cases = 56.9%
Roberts with Souter	08 of 16 FA cases = 50%

CASE TALLIES

Roberts with Kavanaugh (8 cases) 8/8 = 100%:
(1) *Nieves v. Bartlett* (2019)
(2) *Manhattan Community Access Corporation v. Halleck* (2019)
(3) *Thompson v. Hebdon* (2019)
(4) *Iancu v. Brunetti* (2019)
(5) *USAID v. Alliance for Open Society International II* (2020)
(6) *Barr v. American Association of Political Consultants* (2020)
(7) *Mahanoy Area School District v. B.L.* (2021)
(8) *Americans for Prosperity Foundation v. Bonta* (2021)

Roberts with Barrett (2 cases) 2/2 = 100%:
(1) *Mahanoy Area School District v. B.L.* (2021)
(2) *Americans for Prosperity Foundation v. Bonta* (2021)

Roberts with O'Connor (1 case) 1/1 = 100%:
(1) *Wisconsin Right to Life v. FEC* (2006)

Roberts with Kennedy (47 cases) 47/50 = 94%:

(1) *Wisconsin Right to Life v. FEC* (2006)
(2) *Rumsfeld v. FAIR* (2006)
(3) *Garcetti v. Ceballos* (2006)
(4) *Randall v. Sorrell* (2006)
(5) *Beard v. Banks* (2006)
(6) *Davenport v. Washington Education Association* (2007)
(7) *Tennessee Secondary School Athletic Association v. Brentwood Academy* (2007)
(8) *Morse v. Frederick* (2007)
(9) *FEC v. Wisconsin Right to Life* (2007)
(10) *New York State Board of Elections v. Lopez Torres* (2008)
(11) *United States v. Williams* (2008)
(12) *Davis v. FEC* (2008)
(13) *Locke v. Karass* (2009)
(14) *Ysursa v. Pocatello Education Association* (2009)
(15) *Pleasant Grove v. Summum* (2009)
(16) *Citizens United v. FEC* (2010)
(17) *Milavetz, Gallop, & Milavetz v. United States* (2010)
(18) *United States v. Stevens* (2010)
(19) *Holder v. Humanitarian Law Project* (2010)
(20) *Doe v. Reed* (2010)
(21) *Snyder v. Phelps* (2011)
(22) *Sorrell v. IMS Health* (2011)
(23) *Borough of Duryea v. Guarnieri* (2011)
(24) *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011)
(25) *Brown v. Entertainment Merchants Association* (2011)
(26) *Golan v. Holder* (2012)
(27) *Reichle v. Howards* (2012)
(28) *Knox v. SEIU, Local 1000* (2012)
(29) *United States v. Alvarez* (2012)
(30) *Nevada Commission on Ethics v. Carrigan* (2013)
(31) *USAID v. Alliance for Open Society International* (2013)
(32) *McCutcheon v. FEC* (2014)
(33) *Wood v. Moss* (2014)
(34) *Lane v. Franks* (2014)
(35) *McCullen v. Coakley* (2014)
(36) *Harris v. Quinn* (2014)
(37) *Reed v. Town of Gilbert* (2015)
(38) *Walker v. Texas Division, Sons of Confederate Veterans* (2015)
(39) *Heffernan v. City of Paterson* (2016)
(40) *Expressions Hair Design v. Schneiderman* (2017)
(41) *Packingham v. North Carolina* (2017)

(42) *Matal v. Tam* (2017)
(43) *Minnesota Voters Alliance v. Mansky* (2018)
(44) *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)
(45) *Lozman v. City of Riviera Beach* (2018)
(46) *Janus v. AFSCME, Council 31* (2018)
(47) *NIFLA v. Becerra* (2018)

Roberts with Gorsuch (12 cases) 12/13 = 92.3%:
(1) *Minnesota Voters Alliance v. Mansky* (2018)
(2) *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)
(3) *Lozman v. City of Riviera Beach* (2018)
(4) *Janus v. AFSCME, Council 31* (2018)
(5) *NIFLA v. Becerra* (2018)
(6) *Manhattan Community Access Corporation v. Halleck* (2019)
(7) *Thompson v. Hebdon* (2019)
(8) *Iancu v. Brunetti* (2019)
(9) *USAID v. Alliance for Open Society International II* (2020)
(10) *Barr v. American Association of Political Consultants* (2020)
(11) *Mahanoy Area School District v. B.L.* (2021)
(12) *Americans for Prosperity Foundation v. Bonta* (2021)

Roberts with Scalia (36 cases) 36/41 = 87.8%:
(1) *Wisconsin Right to Life v. FEC* (2006)
(2) *Rumsfeld v. FAIR* (2006)
(3) *Garcetti v. Ceballos* (2006)
(4) *Randall v. Sorrell* (2006)
(5) *Beard v. Banks* (2006)
(6) *Davenport v. Washington Education Association* (2007)
(7) *Tennessee Secondary School Athletic Association v. Brentwood Academy* (2007)
(8) *Morse v. Frederick* (2007)
(9) *FEC v. Wisconsin Right to Life (*2007)
(10) *New York State Board of Elections v. Lopez Torres* (2008)
(11) *United States v. Williams* (2008)
(12) *Davis v. FEC* (2008)
(13) *Locke v. Karass* (2009)
(14) *Ysursa v. Pocatello Education Association* (2009)
(15) *Pleasant Grove City v. Summum* (2009)
(16) *Citizens United v. FEC* (2010)
(17) *Milavetz, Gallop, & Milavetz v. United States* (2010)
(18) *United States v. Stevens* (2010)
(19) *Holder v. Humanitarian Law Project* (2010)

(20) *Doe v. Reed* (2010)
(21) *Christian Legal Society Chapter of the University of California v. Martinez* (2010)
(22) *Snyder v. Phelps* (2011)
(23) *Nevada Commission on Ethics v. Carrigan* (2013)
(24) *Sorrell v. IMS Health* (2011)
(25) *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011)
(26) *Brown v. Entertainment Merchants Association* (2011)
(27) *Golan v. Holder* (2012)
(28) *Reichle v. Howards* (2012)
(29) *Knox v. SEIU, Local 1000* (2012)
(30) *McCutcheon v. FEC* (2014)
(31) *Wood v. Moss* (2014)
(32) *Lane v. Franks* (2014)
(33) *McCullen v. Coakley* (2014)
(34) *Harris v. Quinn* (2014)
(35) *Reed v. Town of Gilbert* (2015)
(36) *Walker v. Texas Division, Sons of Confederate Veterans* (2015)

Roberts with Alito (48 cases) 48/55 = 87.3%:
(1) *Garcetti v. Ceballos* (2006)
(2) *Randall v. Sorrell* (2006)
(3) *Tennessee Secondary School Athletic Association v. Brentwood Academy* (2007)
(4) *Davenport v. Washington Education Association* (2007)
(5) *FEC v. Wisconsin Right to Life* (2007)
(6) *Morse v. Frederick* (2007)
(7) *Davenport v. Washington Education Association* (2007)
(8) *United States v. Williams* (2008)
(9) *Washington State Grange v. Washington Republican Party* (2008)
(10) *Davis v. FEC* (2008)
(11) *New York State Board of Elections v. Lopez Torres* (2008)
(12) *Locke v. Karass* (2009)
(13) *Ysursa v. Pocatello Education Association* (2009)
(14) *Citizens United v. FEC* (2010)
(15) *Holder v. Humanitarian Law Project* (2010)
(16) *Milavetz, Gallop, & Milavetz v. United States* (2010)
(17) *Doe v. Reed* (2010)
(18) *Christian Legal Society Chapter of the University of California v. Martinez* (2010)
(19) *Borough of Duryea v. Guarnieri* (2011)
(20) *Nevada Commission on Ethics v. Carrigan* (2011)
(21) *Sorrell v. IMS Health* (2011)

(22) *Brown v. Entertainment Merchants Association* (2011)
(23) *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011)
(24) *Knox v. SEIU, Local 1000* (2012)
(25) *Reichle v. Howards* (2012)
(26) *USAID v. Alliance for Open Society International* (2013)
(27) *McCutcheon v. FEC* (2014)
(28) *Wood v. Moss* (2014)
(29) *McCullen v. Coakley* (2014)
(30) *Harris v. Quinn* (2014)
(31) *Lane v. Franks* (2014)
(32) *Reed v. Town of Gilbert* (2015)
(33) *Walker v. Texas Division, Sons of Confederate Veterans* (2015)
(34) *Expressions Hair Design v. Schneiderman* (2017)
(35) *Packingham v. North Carolina* (2017)
(36) *Matal v. Tam* (2017)
(37) *Minnesota Voters Alliance v. Mansky* (2018)
(38) *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)
(39) *Lozman v. City of Riviera Beach* (2018)
(40) *Janus v. AFSCME, Council 31* (2018)
(41) *NIFLA v. Becerra* (2018)
(42) *Nieves v. Bartlett* (2019)
(43) *Manhattan Access Community Corporation v. Halleck* (2019)
(44) *Thompson v. Hebdon* (2019)
(45) *USAID v. Alliance for Open Society International II* (2020)
(46) *Barr v. American Association of Political Consultants* (2020)
(47) *Mahanoy Area School District v. B.L.* (2021)
(48) *Americans for Prosperity Foundation v. Bonta* (2021)

Roberts with Thomas (48 cases) 48/58 = 82.8%:
(1) *Wisconsin Right to Life v. FEC* (2006)
(2) *Rumsfeld v. FAIR* (2006)
(3) *Garcetti v. Ceballos* (2006)
(4) *Beard v. Banks* (2006)
(5) *Randall v. Sorrell* (2006)
(6) *Tennessee Secondary School Athletic Association v. Brentwood Academy* (2007)
(7) *FEC v. Wisconsin Right to Life* (2007)
(8) *Morse v. Frederick* (2007)
(9) *Davenport v. Washington Education Association* (2007)
(10) *United States v. Williams* (2008)
(11) *Washington State Grange v. Washington State Republican Party* (2008)

(12) *Davis v. FEC* (2008)
(13) *New York State Board of Elections v. Lopez Torres* (2008)
(14) *Locke v. Karass* (2009)
(15) *Ysursa v. Pocatello Education Association* (2009)
(16) *Pleasant Grove v. Summum* (2009)
(17) *Milavetz, Gallop, & Milavetz v. United States* (2010)
(18) *Citizens United v. FEC* (2010)
(19) *United States v. Stevens* (2010)
(20) *Holder v. Humanitarian Law Project* (2010)
(21) *Christian Legal Society Chapter of the University of California v. Martinez* (2010)
(22) *Borough of Duryea v. Guarnieri* (2011)
(23) *Sorrell v. IMS Health* (2011)
(24) *Snyder v. Phelps* (2011)
(25) *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011)
(26) *Golan v. Holder* (2012)
(27) *Knox v. SEIU, Local 1000* (2012)
(28) *Reichle v. Howards* (2012)
(29) *Nevada Commission on Ethics v. Carrigan* (2011)
(30) *McCutcheon v. FEC* (2014)
(31) *Lane v. Franks* (2014)
(32) *Wood v. Moss* (2014)
(33) *McCullen v. Coakley* (2014)
(34) *Harris v. Quinn* (2014)
(35) *Reed v. Town of Gilbert* (2015)
(36) *Expressions Hair Design v. Schneiderman* (2017)
(37) *Packingham v. North Carolina* (2017)
(38) *Matal v. Tam* (2017)
(39) *Minnesota Voters Alliance v. Mansky* (2018)
(40) *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)
(41) *Janus v. AFSCME, Council 31* (2018)
(42) *NIFLA v. Becerra* (2018)
(43) *Nieves v. Bartlett* (2019)
(44) *Manhattan Access Community Corporation v. Halleck* (2019)
(45) *Thompson v. Hebdon* (2019)
(46) *USAID v. Alliance for Open Society International II* (2020)
(47) *Barr v. American Association of Political Consultants* (2020)
(48) *Americans for Prosperity Foundation v. Bonta* (2021)

Roberts with Stevens (15 cases) 15/22 = 68.2%:

(1) *Wisconsin Right to Life, Inc. v. FEC* (2006)
(2) *Rumsfeld v. FAIR, Inc.* (2006)
(3) *Davenport v. Washington Education Association* (2007)
(4) *Tennessee Secondary School Athletic Association v. Brentwood Academy* (2007)
(5) *New York State Board of Elections v. Lopez Torres* (2008)
(6) *United States v. Williams* (2008)
(7) *Locke v. Karass* (2009)
(8) *Washington State Grange v. Washington State Republican Party* (2008)
(9) *Pleasant Grove City v. Summum* (2009)
(10) *Milavetz, Gallop, & Milavetz. v. United States* (2010)
(11) *United States v. Stevens* (2010)
(12) *Holder v. Humanitarian Law Project* (2010)
(13) *Doe v. Reed* (2010)
(14) *Snyder v. Phelps* (2011)
(15) *Brown v. Entertainment Merchants Association* (2011)

Roberts with Sotomayor (27 cases) 27/42 = 64.3%:

(1) *United States v. Stevens* (2010)
(2) *Doe v. Reed* (2010)
(3) *Milavetz, Gallop, & Milavetz v. United States* (2010)
(4) *Brown v. Entertainment Merchants Association* (2011)
(5) *Sorrell v. IMS Health* (2011)
(6) *Snyder v. Phelps* (2011)
(7) *Borough of Duryea v. Guarnieri* (2011)
(8) *Knox v. SEIU, Local 1000* (2012)
(9) *United States v. Alvarez* (2012)
(10) *Golan v. Holder* (2012)
(11) *Reichle v. Howards* (2012)
(12) *USAID v. Alliance for Open Society International* (2013)
(13) *Nevada Commission on Ethics v. Carrigan* (2011)
(14) *Lane v. Franks* (2014)
(15) *McCullen v. Coakley* (2014)
(16) *Wood v. Moss* (2014)
(17) *Williams-Yulee v. Florida Bar* (2015)
(18) *Reed v. Town of Gilbert* (2015)
(19) *Heffernan v. City of Paterson* (2016)
(20) *Expressions Hair Design v. Schneiderman* (2017)
(21) *Packingham v. North Carolina* (2017)
(22) *Matal v. Tam* (2017)
(23) *Lozman v. City of Riviera Beach* (2018)
(24) *Iancu v. Brunetti* (2019)
(25) *Thompson v. Hebdon* (2019)

(26) *Barr v. American Association of Political Consultants* (2020)
(27) *Mahanoy Area School District v. B.L.* (2021)

Roberts with Kagan (20 cases) 20/32 = 62.5%:
(1) *Snyder v. Phelps* (2011)
(2) *Brown v. Entertainment Merchants Association* (2011)
(3) *Borough of Duryea v. Guarnieri* (2011)
(4) *United States v. Alvarez (*2012)
(5) *Nevada Commission on Ethics v. Carrigan* (2011)
(6) *McCullen v. Coakley (2*014)
(7) *Wood v. Moss* (2014)
(8) *Lane v. Franks* (2014)
(9) *Williams-Yulee v. Florida Bar* (2015)
(10) *Reed v. Town of Gilbert* (2015)
(11) *Heffernan v. City of Paterson* (2016)
(12) *Expressions Hair Design v. Schneiderman* (2017)
(13) *Packingham v. North Carolina* (2017)
(14) *Matal v. Tam* (2017)
(15) *Minnesota Voters Alliance v. Mansky* (2018)
(16) *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)
(17) *Lozman v. City of Riviera Beach* (2018)
(18) *Nieves v. Bartlett* (2019)
(19) *Thompson v. Hebdon* (2019)
(20) *Mahanoy Area School District v. B.L.* (2021)

Roberts with Ginsburg (34 cases) 34/56 = 60.7%:
(1) *Wisconsin Right to Life v. FEC* (2006)
(2) *Rumsfeld v. FAIR* (2006)
(3) *Tennessee Secondary School Athletic Association v. Brentwood Academy* (2007)
(4) *Davenport v. Washington Education Association* (2007)
(5) *New York State Board of Elections v. Lopez Torres* (2008)
(6) *Washington State Grange v. Washington Republican Party* (2008)
(7) *Locke v. Karass* (2009)
(8) *Ysursa v. Pocatello Education Association* (2009)
(9) *Pleasant Grove City v. Summum* (2009)
(10) *Milavetz, Gallop, & Milavetz v. United States* (2010)
(11) *United States v. Stevens* (2010)
(12) *Doe v. Reed* (2010)
(13) *Borough of Duryea v. Guarnieri* (2011)
(14) *Snyder v. Phelps* (2011)
(15) *Brown v. Entertainment Merchants Association* (2011)
(16) *Golan v. Holder* (2012)

(17) *United States v. Alvarez* (2012)
(18) *Knox v. SEIU, Local 1000 (*2012)
(19) *Reichle v. Howards* (2012)
(20) *USAID v. Alliance for Open Society International* (2013)
(21) *Nevada Commission on Ethics v. Carrigan* (2013)
(22) *McCullen v. Coakley* (2014)
(23) *Wood v. Moss* (2014)
(24) *Lane v. Franks* (2014)
(25) *Williams-Yulee v. Florida Bar* (2015)
(26) *Reed v. Town of Gilbert* (2015)
(27) *Heffernan v. City of Paterson* (2016)
(28) *Expressions Hair Design v. Schneiderman* (2017)
(29) *Packingham v. North Carolina* (2017)
(30) *Matal v. Tam* (2017)
(31) *Minnesota Voters Alliance v. Mansky* (2018)
(32) *Lozman v. City of Riviera Beach* (2018)
(33) *Nieves v. Bartlett* (2019)
(34) *Thompson v. Hebdon* (2019)

Roberts with Breyer (33 cases) 33/58 = 56.9%:
(1) *Wisconsin Right to Life v. FEC* (2006)
(2) *Rumsfeld v. FAIR* (2006)
(3) *Beard v. Banks* (2006)
(4) *Tennessee Secondary School Athletic Association v. Brentwood Academy* (2007)
(5) *Davenport v. Washington Education Association* (2007)
(6) *United States v. Williams* (2008)
(7) *Washington State Grange v. Washington Republican Party* (2008)
(8) *New York State Board of Elections v. Lopez Torres* (2008)
(9) *Pleasant Grove v. Summum* (2009)
(10) *Locke v. Karass* (2009)
(11) *Milavetz, Gallop, & Milavetz v. United States* (2010)
(12) *United States v. Stevens* (2010)
(13) *Doe v. Reed* (2010)
(14) *Borough of Duryea v. Guarnieri* (2011)
(15) *Snyder v. Phelps* (2011)
(16) *Nevada Commission on Ethics v. Carrigan* (2011)
(17) *United States v. Alvarez* (2012)
(18) *Reichle v. Howards* (2012)
(19) *USAID v. Alliance for Open Society International* (2013)
(20) *Lane v. Franks* (2014)
(21) *Wood v. Moss* (2014)
(22) *McCullen v. Coakley* (2014)
(23) *Williams-Yulee v. Florida Bar* (2015)

(24) *Reed v. Town of Gilbert* (2015)
(25) *Heffernan v. City of Paterson* (2016)
(26) *Expressions Hair Design v. Schneiderman* (2017)
(27) *Packingham v. North Carolina* (2017)
(28) *Matal v. Tam* (2017)
(29) *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)
(30) *Lozman v. City of Riviera Beach* (2018)
(31) *Iancu v. Brunetti* (2019)
(32) *Thompson v. Hebdon* (2019)
(33) *Mahanoy Area School District v. B.L.* (2021)

Roberts with Souter (8 cases) 8/16 = 50%:
(1) *Wisconsin Right to Life v. FEC* (2006)
(2) *Rumsfeld v. FAIR* (2006)
(3) *Davenport v. Washington Education Association* (2007)
(4) *Tennessee Secondary School Athletic Association v. Brentwood Academy* (2007)
(5) *New York State Board of Elections v. Lopez Torres* (2008)
(6) *Washington State Grange v. Washington State Republican Party* (2008)
(7) *Pleasant Grove City v. Summum* (2009)
(8) *Locke v. Karass* (2009)

APPENDIX N

SELECT OPINIONS IN DENIAL OF CERTIORARI CASES

(1) *Berisha v. Lawson* (2021)[558]

(2) *Bruni v. City of Pittsburgh* (2021)[559]

(3) *Kansas v. Boettger* (2020)[560]

(4) *Jarchow v. State Bar of Wisconsin* (2020)[561]

(5) *National Review, Inc. v. Mann* (2019)[562]

(6) *Dahne v. Richey* (2019)[563]

(7) *Perez v. Florida* (2017)[564]

(8) *Delaware Strong Families v. Denn* (2016)[565]

(9) *American Freedom Defense Initiative v. King County* (2016)[566]

---

[558] Berisha v. Lawson, 141 S. Ct. 2424 (2021) (mem.).

[559] Bruni v. City of Pittsburgh, 141 S. Ct. 578 (2021) (mem.) (Justice Thomas issued a "[s]tatement . . . respecting the denial of certiorari").

[560] Kansas v. Boettger, 140 S. Ct. 1956 (2020) (mem.).

[561] Jarchow v. State Bar of Wis., 140 S. Ct. 1720 (2020) (mem.).

[562] Nat'l Rev., Inc v. Mann, 140 S. Ct. 344 (2019) (mem.).

[563] Dahne v. Richey, 139 S. Ct. 1531 (2019) (mem.).

[564] Perez v. Florida, 137 S. Ct. 853 (2017) (mem.). Justice Sotomayor wrote a concurrence to the denial of certiorari. However, she warned that the Court needed to reevaluate its true threat jurisprudence. *See* David L. Hudson, Jr., *Justice Sotomayor Expresses Concern over Court's True Threat Jurisprudence*, FREEDOM F. (March 7, 2017), https://www.freedomforuminstitute.org/2017/03/07/justice-sotomayor-expresses-concern-over-courts-true-threat-jurisprudence/ [https://perma.cc/FNL9-YA3J].

[565] Del. Strong Families v. Denn, 136 S. Ct. 2376 (2016) (mem.).

[566] Am. Freedom Def. Initiative v. King Cnty., 136 S. Ct. 1022 (2016) (mem.).

APPENDIX O

FIRST AMENDMENT EXPRESSION CASES OVERRULED

(1) *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), overruled in *Citizens United v. FEC* (2010) (majority opinion: Kennedy).

(2) *McConnell v. FEC*, 540 U.S. 93 (2003), overruled in part in *Citizens United*.

(3) *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), overruled in *Janus v. AFSCME, Council 31* (2018) (majority opinion: Alito).