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Free Speech Still Matters

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INTRODUCTION

This article is a companion piece to the major project undertaken by Ronald Collins and David Hudson to assess the Roberts Court and free speech, which anchors this issue of the *Brooklyn Law Review*.[1] Five years ago, I did a similar study for Brooklyn Law School's *Journal of Law and Policy*, entitled "Free Speech Matters: The Roberts Court and the First Amendment."[2] The paper was presented as part of a symposium that assessed the first ten years of the Roberts Court's First Amendment jurisprudence, from 2006 to 2016. When this *Brooklyn Law Review* symposium was being planned, I thought it might be interesting, and hopefully illuminating, to focus on the five-year period since 2016 to assess whether the Roberts Court had stayed on the same strong First Amendment path that I mapped out five years earlier. As I described the Court's handiwork back then as of 2016:

> For a ten-year period, the Roberts Supreme Court may well have been the most speech-protective Court in a generation, if not in our history, extending free speech protection on a number of fronts and rebuffing claims by government and its allies to limit such protections. Yet these free speech rulings have drawn fire from critics, both on and off the Court, contending that the decisions are inconsistent with the democratic and egalitarian purposes of the First Amendment and that they overprotect free speech at the expense of competing and important values, such as equality, privacy, decency, or democracy. And in the trenches of everyday life, censorship and suppression of speech seem more the rule than the exception, both at home and abroad. Free speech is thus at a crucial constitutional and cultural crossroad.[3]

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† Professor of Law, Brooklyn Law School. The author wishes to thank Courtney Clark, Brooklyn Law School Class of 2021, for her exceptional research assistance on this article. And, as always, thanks to my wife, Ann Ray, for all of her help and support.

[1] Ronald K.L. Collins & David L. Hudson, Jr., *The Roberts Court—Its First Amendment Free Expression Jurisprudence: 2005-2021*, 87 BROOK. L. REV. 5 (2021).

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

[3] *Id.* at 64–65 (footnotes omitted).

In the intervening five years, how has the Court's support for First Amendment rights and values been impacted by: (1) the intensified criticism of the Roberts Court's First Amendment work, as reflected in many of the presentations at this symposium; (2) the attacks on the Roberts Court, including serious proposals to "pack" the Court; (3) the turbulence of the Trump presidency; (4) the arrival of three new justices; and (5) the frequently remarked cautionary inclinations of the chief justice to prefer incremental shifts in doctrine and to preserve the institutional stature of the Court by trying to avoid politically controversial rulings?[4] Here is the CliffsNotes answer: the Court has basically and remarkably stayed the course, compiled an astounding .800 batting average in affirming First Amendment free speech claims, has sometimes hedged and trimmed its willingness to recognize and protect new rights, but on many occasions has significantly strengthened and extended free speech protections.[5] Finally, and woefully, where the condition of our free speech culture is concerned, I think the situation is even more troubling than I assessed it to be five years ago. The culture of free speech has buckled and weakened under the weight of political correctness, cancel culture, the antiracism reckoning, and the widespread and pervasive censorship by social media, producing a general reign of suffocating systemic censorship.[6]

I. THE ROBERTS COURT BASELINE: THE FIRST TEN YEARS OF FREE SPEECH MATTERS, 2006–2016

So, more specifically, what were the main themes that made the Roberts Court, during its first decade, the most speech-protective, First Amendment-friendly Court, perhaps in history? Those rights reaffirmed and strengthened during the Roberts Court era stem from the magnificent provision which guarantees our religious freedom, our freedom of speech and of the press, and the right of the people to assemble and petition the

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[4] *See* David Leonhardt, *A Supreme Court, Transformed*, N.Y. TIMES (July 6, 2021), https://www.nytimes.com/2021/07/06/briefing/supreme-court-donald-trump.html [https://perma.cc/C445-PRHJ]; 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/Q87W-QJQ9].

[5] A list of the twenty cases surveyed is set forth as an appendix to this article.

[6] *See generally* Alec Greven, *Why a Culture of Free Expression Demands Tolerance*, INST. FOR FREE SPEECH BLOG (Aug. 10, 2020), https://www.ifs.org/blog/free-expression-culture-demands-tolerance/ [https://perma.cc/RP93-FHVS] (discussing the idea that "a culture of free expression goes beyond the law," requiring reinforcement for the open exchange of ideas from private actors and individuals, yet the current social environment in America appears to prevent this free expression out of fear of the social consequences resulting from this "cancel culture").

government for a redress of grievances.[7] In my view, in its first decade, the Roberts Court travelled on the fast lane of the highway of political freedom, ensuring those rights and advancing the core First Amendment values and principles.

First, in a series of cases, the most well-known of which is *Citizens United v. FEC*,[8] the Court reaffirmed that protecting political speech from government censorship and repression is at the heart of the First Amendment's purposes in American democracy, and limits on political spending are limits on political speech that can rarely be justified. The Court has also reaffirmed a theme that transcends politics, namely, that another core purpose of the First Amendment is to guarantee that the people, not the government, get to determine what they want to say and how they want to say it—a principle that applies in a number of settings including those characterized as artistic, corporate, and commercial.[9] In all of those areas, the Roberts Court emphasized that the First Amendment's powerful presumption against government censorship is a recognition of individual and group freedom, liberty, and autonomy to choose what to say and what to hear.[10] Likewise, the Court was extremely vigilant against laws where government seeks to regulate speech on the basis of content, and especially on the basis of disapproved viewpoints.[11] The Court similarly rebuffed efforts to create new nonspeech categories, even to punish reprehensible, "worthless" speech.[12] As much as possible, the Court tried to give categorical protection to almost all speech content and to resist ad hoc balancing of speech versus claims of harm from the speech.[13] As an earlier Court once said about the choice between free speech and censorship: "It is precisely this kind of choice . . . that the First Amendment makes for us."[14] In short, and with very few exceptions, government has to be studiously neutral where speech is concerned.[15]

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[7] U.S. CONST. amend. I.

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

[9] *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 805 (2011) (giving First Amendment protection to violent video games companies).

[10] *See, e.g.*, *Citizens United*, 558 U.S. at 339–40 (discussing the right of individuals and groups to determine how they want to express their views on candidates for elective office).

[11] *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 171–73 (2015) (striking down town ordinance that imposed more stringent restrictions on signage displayed in public areas depending on the content on the sign); Iancu v. Brunetti, 139 S. Ct. 2294, 2297–98 (2019) (striking down federal trademark law that barred "immoral" or "scandalous" marks as viewpoint based on its face and in its enforcement).

[12] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 482 (2010) (invalidating, as overbroad, statute which punished depictions of animal cruelty).

[13] *Id.* at 460–61.

[14] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976).

[15] *See* Gora, *supra* note 2, at 66–69.

II. THE ROBERTS COURT'S MOST RECENT FIVE YEARS: FREE SPEECH MATTERS EVEN MORE, 2016–2021

In the last five years, the Roberts Court has consistently reaffirmed almost all of the core free speech themes explained above and extended others, such as the safeguards against compelled speech.[16] The Court has given free speech rights added protection on the internet and has continued to protect the flow of information to the public in a variety of contexts, carrying forward the antipaternalism theme of earlier years and Courts.[17] In addition, the Court has both reaffirmed the core First Amendment protection for offensive speech, reducing even further the power of government to tell us what we can and cannot say, and generally continued to take a firm stand against restrictions of speech based on content.[18] And the Court has rebuffed government efforts to place speech into unprotected or less protected categories.[19]

The Court also produced some welcome extensions or expansions of free speech rights in certain areas. As indicated above, for almost a decade, from 2006 to 2015, the Court invalidated on First Amendment grounds almost every campaign finance law that it considered, the most well-known being *Citizens United*.[20] Then, for the next five years, the Roberts Court kept a low

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[16] *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (holding that public sector unions cannot compel nonmember employees to pay union fees).

[17] *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1751, 1757–65 (2017) (finding that an Asian rock group is free to choose an ethnically-negative name in order to show they are in control of their identity). This reflects the more general antipaternalism which the Roberts Court has embodied in limiting the ability of the government to determine what people can say and what information they may use to say it.

[18] *See, e.g.*, *id.* at 1763 ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" (quoting Street v. New York, 394 U.S. 576, 592 (1969))); Iancu v. Brunetti, 139 S. Ct. 2294, 2296 (2019) (striking down ban on "immoral" or "scandalous" trademarks).

[19] *See, e.g.*, *Tam*, 137 S. Ct. at 1757–65 (rejecting arguments that the trademark could be banned because it constituted "government speech" or subsidized speech or commercial speech).

[20] *See* Thomson v. Hebdon, 140 S. Ct. 348 (2019) (state limits on campaign contributions); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1442 (2014) (federal limits on aggregate campaign contributions by individuals); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 753–55 (2011) (state matching funds provision for publicly-financed candidates); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 362–66 (2010) (federal limits on corporate independent expenditures); Davis v. Fed. Election Comm'n, 554 U.S. 724, 729–30 (2008) (federal limits that burden candidate's personal campaign contributions); Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 481–82 (2007) (plurality opinion) (federal limits on corporate issue advocacy expenditures that mention candidates); Randall v. Sorrell, 548 U.S. 230, 236–37 (2006) (plurality opinion) (state limits on campaign contributions by individuals, groups, and candidates). The only case deviating from the pattern was *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015), which upheld, 5–4, a prohibition on personal campaign

profile on campaign finance law type issues—until the last day of the 2020 term when it decided an important issue on the First Amendment right of associational privacy in *Americans for Prosperity Foundation v. Bonta* (*AFP*).[21] Though the case did not involve campaign finance law directly,[22] the Court handed down a very powerful ruling protecting the core right to join and support organizations without having to tell the government.[23] In the process, the Court opened the door to challenges to disclosure regimes in the campaign finance area as well.

An equally pleasant surprise to free speech fans came when the Court, for the first time in over fifty years since its landmark *Tinker* decision on student free speech rights,[24] reaffirmed and extended the free speech rights of high school students to express their views on social media free from official approval or sanction.[25] The Court in *Mahanoy Area School District v. B.L.* held that a student's off-campus social media post including vulgar language criticizing the school after not making the varsity cheerleading team was protected student speech under the First Amendment, given a consideration of several factors.[26]

In the other vital First Amendment vineyard—the protections of freedom of religion—the Roberts Court continued its almost unbroken string of cases both protecting the free exercise of religion against government restrictions and impositions and expanding (despite establishment clause objections) the amount of religious expression that can occur on or with government property. The net effect is more protected religious expression than before.[27]

But the last five years have also witnessed considerable pushback to these positive developments in various forums. Chief among the charges, from on and off the Court, are that the Court is: (1) overprotecting free speech at the expense of other

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contribution solicitation by judicial office candidates, even in writing. One possible explanation for the deviation is that the Court is particularly sensitive to judicial ethics.

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

[22] Rather, the case involved a challenge to California's requirement that charitable organizations disclose to the state their large donors. *Id.* at 2379.

[23] *Ams. for Prosperity*, 141 S. Ct. at 2388–89.

[24] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969).

[25] *See* Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038, 2044 (2021).

[26] *Id.* at 2046–48. The factors included that it was off-campus speech on her own time, dealt with a valid issue of school policy, and the vulgarity was communicated to a limited number of friends, was not directed at any one person, and did not cause any substantial disruption at the school. But the opinion made it quite clear that it was not a broad Magna Carta for student speech on the internet, but rather a multifactor, ad hoc approach that might yield different results with different facts.

[27] *See* discussion *infra* Section II.G.

values;[28] (2) "weaponizing" the First Amendment in the impermissible service of conservative policy goals and at the expense of those individuals and institutions without wealth or power;[29] and (3) "*Lochner*izing" the law by using the First Amendment to limit the government's power to regulate the enormous range of business and commercial activity.[30]

Ironically, there has been a sea change shift in the support for free speech. Many liberals and progressives who used to embrace the values of free speech now question them, and conservatives who used to resist free speech now often support its principles.[31] When I was an American Civil Liberties Union (ACLU) lawyer, my colleagues and I tried to weaponize free speech against government controls as much as possible, on behalf of groups and individuals across the political and cultural spectrum, including Communists, Socialists, civil rights activists, women's rights protestors, anti-war protestors, commercial speakers, sexual speakers, Klansmen, and Nazis. Our fundamental view was that the protections of the First Amendment were and had to be universal and indivisible; they had to be available to all or they would be available to none. Free speech was the handmaiden of democracy, not its antagonist. More information would allow for an informed citizenry capable of self-governance and individuals capable of self-realization. I hope the Court will not yield to the criticism that it is too "absolutist" about free speech, that its rulings hinder rather than help democracy, that its decisions unduly favor business interests against progressive concerns. I hope, instead, that the Court will continue on that strong free speech path and not take the road toward greater government control of our First Amendment rights.

Finally, a pivotal figure in consistently affording such protections has been Justice Anthony Kennedy, who, in my mind, is a true First Amendment hero. Not only did he write the landmark *Citizens United* decision protecting core political speech

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[28] *See, e.g.*, *Ams. for Prosperity*, 141 S. Ct. at 2392 (Sotomayor, J., joined by Breyer & Kagan, JJ., dissenting).

[29] *See infra* text accompanying notes 80–90; Liptak, *supra* note 4.

[30] *See infra* text accompanying notes 78–80. The "*Lochner*izing" charge of course refers to the Court's 1905 decision in *Lochner v. New York*, 198 U.S. 45 (1905), where the Court used the due process clause to give robust judicial review and often to thereby invalidate new laws regulating workplace labor relations and other economic and business matters.

[31] *See* 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 the phenomenon of "reverse polarity" in several contexts including the First Amendment); Genevieve Lakier, *The Great Free-Speech Reversal*, ATLANTIC (Jan. 27, 2021), https://www.theatlantic.com/ideas/archive/2021/01/first-amendment-regulation/617827/ [https://perma.cc/SLZ8-PABX] (explaining how liberals and conservatives have reversed positions on speech protections for corporations); Liptak, *supra* note 4 (noting "liberals who once championed expansive First Amendment rights are now uneasy about them").

against government suppression, but he has also safeguarded the internet as a true forum for a myriad of voices and views.[32] Add to that the phenomenon of his writing for the Court majority on all four of the major decisions that comprise an unprecedented canon of gay rights law—sounding some of the same themes of personal liberty that inform his First Amendment rulings—and you have a true libertarian champion of both political freedom and personal liberty.[33] In a recent 2018 case, Justice Kennedy summed up his libertarian constitutional philosophy in the following way:

> The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of "forward thinking." But it is not forward thinking to force individuals to "be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable." It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.[34]

Now let me turn to the major cases of the past five years that embody the Roberts Court's continued powerful commitment to First Amendment values.

A. The Proudest Boast: The Roberts Court's Protection of the Freedom to Express the Thoughts that We Hate

One of the strongest pro-free speech themes of the Roberts Court is that offensive, hurtful speech is nonetheless protected by the First Amendment. The Court strongly sounded that theme in 2011 in *Snyder v. Phelps*, the funeral protest case where anti-gay demonstrators shouted and displayed anti-gay slurs and expressions and found refuge in the First Amendment.[35] In its most

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[32] *See, e.g.*, Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (holding that denial of internet and social media privileges to a former sex offender violated the First Amendment because of the crucial role of the internet in the exercise of free speech rights in the contemporary world).

[33] The four gay rights cases are *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013); and *Obergefell v. Hodges*, 576 U.S. 644 (2015).

[34] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) (alterations in original) (citations omitted).

[35] *See generally* Snyder v. Phelps, 562 U.S. 443 (2011) (holding that use of anti-gay slurs and epithets as part of a public demonstration in a public forum on issues of public concern cannot serve as the basis for an award of damages for intentional infliction of

recent five years, the Roberts Court reaffirmed that powerful anticensorship theme, ruling, in effect, that there is no categorical hate speech exception to the First Amendment.

In the 2017 case, *Matal v. Tam*, the Court unanimously struck down a section of the Lanham Act, a federal law that banned "the registration of trademarks that may 'disparage . . . or bring . . . into contemp[t] or disrepute' any 'persons, living or dead.'"[36] A rock band comprised of Asian-Americans wanted to call themselves "The Slants," a derogatory racial slur, in order to "reclaim" the term and drain its denigrating force.[37] Justice Alito's opinion held that the law "violates the Free Speech Clause . . . . It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[38] Allowing such a theory

> strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."[39]

Or as Voltaire supposedly put it: "I disapprove of what you say, but I will defend to the death your right to say it."[40] In addition, the Court also rejected various categorical bases for suppressing the speech such as the government speech doctrine and the government subsidy doctrine.[41]

Equally important is that the Court's most liberal justices joined a separate opinion, written by Justice Kennedy, which reaffirmed the "fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the

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emotional distress and the need to prevent even extremely hurtful and offensive speech must yield to free speech requirements).

[36] Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (alterations in original) (quoting 15 U.S.C. § 1052(a)).

[37] *Id.* at 1754.

[38] *Id.* at 1751.

[39] *Id.* at 1764 (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

[40] Justice Breyer referenced this in his opinion in the *Mahanoy* case:

> Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it." (Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.)

Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038, 2046 (2021) (Breyer, J., majority opinion).

[41] *See Tam*, 137 S. Ct. at 1757–61.

speech conveys."[42] Likewise, he said, there can be no heckler's veto as a way around this principle: "The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience."[43]

Finally, to underscore that point, Justice Kennedy concluded:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.[44]

This sounds another continuing Roberts Court theme, namely, that it is the people, not the government, who get to decide what speech they want to espouse.

These issues of protecting hateful speech are difficult ones. But at the core of the principles of free speech is the right of the most loathsome speakers to communicate their message in a peaceful, nonviolent way, without forceful interference and threats by private vigilante groups and with the most rigorous official protection. From Skokie to Charlottesville, the most important lesson to be learned is that if we do not protect the free speech rights of everyone, we will wind up having no free speech rights for anyone.[45] But, though sad to say, I do not know if a majority of the public believes that.[46] So, we are on a collision course between what the Court powerfully tells us free speech requires and what the public thinks the government should be able to do to suppress hateful speech. Maybe that is why some leaders find it easier to condemn the deplorables than to "defend to the death" their right to speak deplorably.[47]

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[42] *Id.* at 1765 (Kennedy, J., concurring).

[43] *Id.* at 1766.

[44] *Id.* at 1769.

[45] In the 1970s "Skokie case," the Illinois ACLU defended the right of a Nazi group to march in the predominantly Jewish Chicago suburb of Skokie, Illinois. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (invalidating city ordinances designed to prevent the Nazis from marching). In the 2017 "Charlottesville case," the Virginia ACLU defended the right of a "Unite the Right" group to march in Charlottesville, Virginia, *see* Kessler v. City of Charlottesville, 441 F. Supp. 3d 277 (W.D. Va. 2020), though later violence ensued.

[46] *See* Robert Corn-Revere, *The Anti-Free Speech Movement*, 87 BROOK. L. REV. 145, 184–89 (2021) (citing several episodes in recent years of violent and forceful suppression, ironically on college campuses, of speakers whose views the assailants condemn, with the violent censorship justified on the ground that the offending ideas must be stamped out at all costs).

[47] *See supra* note 40. During the 2016 presidential campaign, Hillary Clinton famously commented that Donald Trump's supporters could be put into a "basket of deplorables":

More recently, the Court reaffirmed these core anticensorship principles in *Iancu v. Brunetti*, a case involving yet another provision of the Lanham Act on trademark laws—one which precluded official recognition of a trademark which comprised "immoral[] or scandalous" matter.[48] But, concededly, there was some slippage in the Court's unanimous support—as seen in *Tam*—for protecting offensive or ugly speech. In this case, a clothing manufacturer had been denied the right to trademark the trade name, "FUCT."[49] Again, a majority of the Court, in an opinion written by Justice Kagan, agreed that the statute violated the strict principle against government viewpoint censorship: positive ideas are permitted, negative ones are banned.[50] And in practical application, the dangers of such viewpoint favoritism were apparent, with examples of a number of positive trademarks being allowed, while a number of negative ones on the same topics, e.g., drug use, were prohibited.[51] A clearer case of government viewpoint discrimination cannot be found.[52] Nor could the Court reinterpret the statute to only restrict "vulgar" words, i.e., those which were lewd, sexually explicit, or profane, even assuming that would cure the viewpoint discrimination.[53]

Justice Alito strongly supported the Court's decision because of his concern with the widespread censorship of offensive or hateful speech:

> Viewpoint discrimination is poison to a free society. But in many countries with constitutions or legal traditions that claim to protect freedom of speech, serious viewpoint discrimination is now tolerated, and such discrimination has become increasingly prevalent in this country. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination. We reaffirm that principle today.[54]

> "You know, to just be grossly generalistic, you could put half of Trump's supporters into what I call the basket of deplorables. Right?" she said to applause and laughter. "The racist, sexist, homophobic, xenophobic, Islamaphobic—you name it. And unfortunately there are people like that. And he has lifted them up."

Amy Chozick, *Hillary Clinton Calls Many Trump Supporters 'Deplorables,' and G.O.P. Pounces*, N.Y. TIMES (Sept. 10, 2016), https://www.nytimes.com/2016/09/11/us/politics/hillary-clinton-basket-of-deplorables.html [https://perma.cc/SXD7-738Q].

[48] *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2297 (2019) (alteration in original) (quoting 15 U.S.C. § 1052(a)).

[49] *Id.*

[50] *Id.* at 2299.

[51] *Id.* at 2300.

[52] *See id.* at 2300–01.

[53] *Id.* at 2301–02.

[54] *Id.* at 2302–03 (Alito, J., concurring).

But Chief Justice Roberts, along with Justices Breyer and Sotomayor, dissented.[55] This is somewhat surprising, since the chief justice is a self-proclaimed strong supporter of free speech and has rarely dissented from one of the Court's cases honoring First Amendment claims.[56] These dissenters agreed that the "immoral" criterion was facially unconstitutional, but they thought the word "scandalous" in the statute could be interpreted as limited to three categories of vulgarity—lewd, sexually explicit, and profane—and that such an application would not violate the First Amendment.[57] Justice Breyer, using his well-known balancing approach, agreed and reasoned that the interests protected by the First Amendment would not be disproportionately harmed by such a statute and that the government should be able to ban, for example, the use of ugly racial epithets in this circumstance.[58] And even Justice Alito, who voted to strike down the "immoral or scandalous" statute, supported a statute limited to vulgarity.[59] But it is hard to reconcile these views with the famous 1971 "Fuck the Draft" case, which found First Amendment protection for the use of such vulgar language in public.[60] The dissenters in *Brunetti* also seem to be in tension with *Mahanoy*, the recent high school social media speech case where the Court ruled a student could not be punished for a private social media message which used the word "Fuck" liberally in communications.[61] In any event, these three Roberts Court precedents—*Snyder*, *Tam*, and *Brunetti*—remain strong sentinels against laws banning hate speech or other forms of scurrilous, offensive, or hurtful communications.

B. That Fixed Star: The Government Cannot Compel a Person to Speak the Government's Message

One of the Court's most abiding landmark cases, decided at the height of wartime and patriotic fervor in 1943 and that overruled a case decided barely three years earlier, is *West*

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[55] *Id.* at 2303–04 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 2304–08 (Breyer, J., concurring in part and dissenting in part); *id.* at 2308–18 (Sotomayor, J., joined by Breyer, J., concurring in part and dissenting in part).

[56] Ronald Collins & David Hudson, *John Roberts: Mr. First Amendment*, SCOTUSBLOG, (July 21, 2020, 10:00 AM), https://www.scotusblog.com/2020/07/john-roberts-mr-first-amendment/ [https://perma.cc/D4RV-WW4K].

[57] *Brunetti*, 139 S. Ct. at 2303 (Roberts, C.J., concurring in part and dissenting in part).

[58] *Id.* at 2304–08 (Breyer, J., concurring in part and dissenting in part).

[59] *Id.* at 2302–03 (Alito, J., concurring).

[60] *See* Cohen v. California, 403 U.S. 15, 16, 25–26 (1971).

[61] *See* Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L. 141 S. Ct. 2038, 2043, 2048 (2021); *see infra* Section II.E.

Virginia State Board of Education v. Barnette.[62] The case involved compulsory student flag salutes imposed in public schools that Jehovah's Witnesses children objected to, claiming that the compulsion to utter such words was destructive to their freedom of speech and religion.[63] The Court agreed that it violated the rights of the children and their parents to force the children to participate in a ceremonial flag salute which completely conflicted with their religious beliefs.[64] The Court's reasoning was embodied in a quote familiar to most students of the First Amendment:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[65]

The decision shows that sometimes the most humble David can defeat the most powerful Goliath when the former is armed with the protections of the First Amendment.[66]

Over the years, the *Barnette* rule against compelled speech has been applied to protect individual freedom of speech,[67] freedom of the press,[68] and to protect institutions as well as individuals.[69] In its early years, the Roberts Court unanimously *rejected* a compelled speech claim by law schools that objected to being required to host military recruiters on campus at a time when the military policies were anti-gay.[70] But the Court has become more vigilant in recent years in terms of guarding against government compelled speech. Indeed, on consecutive days in June 2018, the Court handed down two powerful, though sharply contested, 5–4, conservative/liberal

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[62] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943).

[63] *Id.* at 628–30.

[64] *Id.* at 642.

[65] *Id.* (footnote omitted).

[66] *See* Hemant Mehta, *The Complicated History of the Pledge of Allegiance | Episode 3*, FRIENDLY ATHEIST (June 29, 2019), https://friendlyatheist.patheos.com/2019/07/29/the-complicated-history-of-the-pledge-of-allegiance-episode-3/ [https://perma.cc/SB8Q-WCTV].

[67] *See* Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[68] *See* Mia. Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974).

[69] *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986).

[70] *See* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 48–49 (2006).

split decisions, safeguarding the right not to be compelled to speak against one's beliefs and the right not to financially support speech against one's beliefs.[71]

The first case involved a California statute that regulated pro-life crisis pregnancy centers and required these clinics to notify women of the availability of abortions and other health care services at other clinics, or to notify women if the clinics were not allowed to provide medical services.[72] The Court, in an opinion by Justice Thomas, held that the compelled speech requirement improperly burdened the centers' First Amendment rights.[73] Though not explicitly invoking the *Barnette* case, the Court in effect applied its principles by finding that the California law could not pass muster under strict scrutiny.[74] Nor was it justifiable on the rejected theory that there is a category of "professional speech" deserving lesser protection against government regulation:

> The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices "alte[r] the content of [their] speech." Here, for example, licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing. By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly "alters the content" of petitioners' speech.[75]

And another feature of the law improperly "impose[d] a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest" and that seriously burdened the group's efforts to express their own protected message.[76]

Justice Kennedy, speaking for himself, the chief justice, and Justices Alito and Gorsuch, did squarely invoke the principles against improperly compelled speech:

> This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions. This compels individuals to contradict their most

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[71] *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2365–78 (2018) (decided on June 26, 2018); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2462 (2018) (decided on June 27, 2018).

[72] *NIFLA*, 138 S. Ct. at 2377–78.

[73] *Id.* at 2378.

[74] *Id.* at 2375.

[75] *Id.* at 2371 (citations omitted).

[76] *Id.* at 2377–78.

> deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these. And the history of the Act's passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their beliefs.[77]

The four liberal dissenters, in an opinion by Justice Breyer, rejected the specific holding of improperly coerced speech and raised the broader charge that the majority was trying to "*Lochner*ize" its review of what are no more than every day economic or business regulations.[78] In other words, the intensive scrutiny given to the clinic requirements is alleged to recall *Lochner*'s deep scrutiny of economic, business, and labor regulations, an approach long discredited and discarded by the Court.[79] The specter of *Lochner* is raised to suggest that, since so much of human activity involves speech, the Court is opening the door to applying scrutiny to that whole swath of normally unexceptional government regulation of business and commerce.

From "*Lochner*ize" to "weaponize," the *Janus v. AFSCME, Council 31* case decided the next day was the finale to a campaign waged across several years and cases to undermine the rule that members of a public sector bargaining unit, who declined to join the civil servants' union, could be compelled to pay their fair share of the costs of collective bargaining between the union representatives and state or local government officials.[80] At issue in this case was an Illinois law which required nonmembers of public employee unions to pay a so-called agency fee relating to the union's collective bargaining activities that benefited all employees, including the dissenting non-union members.[81] The practice was handily upheld as constitutional in the 1977 *Abood v. Detroit Board of Education* decision, which also held that dissenting non-union members could not be compelled to pay for the public union's political (and other similar) activities.[82] Such a requirement would have violated their right not to be compelled to support speech they oppose.

A majority in *Janus* held that the same immunity applied to compulsory payment of the agency fees.[83] As he had in the two previous pertinent cases, Justice Alito wrote the opinion for the Court, ruling that there was no compelling interest that could

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[77] *Id.* at 2379 (Kennedy, J., concurring).

[78] *Id.* at 2382–83 (Breyer, J., joined by Ginsburg, Sotomayor, & Kagan, JJ., dissenting).

[79] *See id.* at 2381–82.

[80] *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

[81] *Id.* at 2460–61.

[82] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. 2448.

[83] *Janus*, 138. S. Ct. at 2478, 2486.

sustain a law that compelled a private person to subsidize the speech of other private speakers on matters of substantial public concern.[84] Justice Alito centrally relied on the core principles of *Barnette*, especially noting the harm to personal autonomy by forcing a person to espouse views they abhor.[85] Indeed, the Court said that compelling speech was actually worse than prohibiting it:

> Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.
>
> Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.
>
> When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding "involuntary affirmation" of objected-to beliefs would require "even more immediate and urgent grounds" than a law demanding silence.
>
> Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns.[86]

The *Janus* ruling attracted powerful dissents. Justice Sotomayor objected that earlier Roberts Court precedent marked a "troubling development in First Amendment jurisprudence over the years"[87] and had wrongly encouraged and enabled the Court "to wiel[d] the First Amendment in . . . an aggressive way"[88] in most inappropriate cases like this. Justice Kagan lamented the undoing of the delicate and fair balance in public union employer relations that *Abood* had facilitated. Reaffirming a recurring Justice Breyer theme, she said that the Court's aggressive use of the First Amendment in the broad areas of normal everyday government activity and regulation is a danger to democracy and a disservice to the First Amendment:

> There is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their

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[84] *See id.* at 2464. In other words, a private person cannot be forced to pay for another's political advocacy that the private person does not share or endorse.

[85] *See id.*

[86] *Id.* (citations omitted) (emphasis in original).

[87] *Id.* at 2487 (Sotomayor, J., dissenting).

[88] *Id.* at 2487 (alterations in original) (citation omitted).

> state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy.[89]

Her sharp criticism provided the occasion for a front-page story, accumulating many similar criticisms against the Roberts Court's robust application and defense of the First Amendment's protections and guarantees.[90]

Two other high-profile cases had intimations of compelled speech concerns, but were resolved on free exercise of religion clause grounds. Those are the well-known wedding cake baker case[91] and an equally important public adoption services case decided this year.[92] Both cases involved the conflict between gay rights and same-sex marriage, on the one hand, and freedom from compelled speech or compelled religious practices on the other. In both cases, the objectors raised both compelled speech and freedom of religion claims, and the cases were decided in their favor, but arguably without a definitive resolution of the difficult constitutional clash.[93]

Finally, on the compelled speech theme, three other cases from the October 2020 term have resulted in protecting people or institutions from having to serve as a platform for speech they oppose. First, a California regulation that allowed farmworker union organizers to enter the premises of agricultural property on a regular basis year-round to try to unionize the work force was held to constitute a *per se* compensable taking under the Fifth Amendment takings clause, which requires compensation or desistence.[94] Although in the past, the Court had upheld California laws permitting leafletting—i.e., the activity of handing out or distributing pamphlets or leaflets in public places—at privately owned shopping centers, despite compelled speech arguments, in the farm workers case, the Court, 6–3, found the mandatory imposition too close to the core of the takings clause concerns to sustain the entry.[95]

Similarly, in the cable public access channel case, discussed in Section III.C, the Court refused to treat a private nonprofit cable channel operator as the equivalent of government and rejected a claimed right of First Amendment supervision of the company,

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[89] *Id.* at 2501 (Kagan, J., dissenting).
[90] *See* Liptak, *supra* note 4.
[91] *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).
[92] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).
[93] For more detail on these cases, see *infra* Section II.G.
[94] *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071–72 (2021).
[95] *Id.* at 2068, 2074–77.

effectively absolving it from being compelled to open its forum against its editorial will.[96]

Finally, in *AFP*, the charitable donor disclosure case discussed above, the Court's ruling spared the charity from being compelled to identify its major donors to the state attorney general, also a blow against government-compelled speech.[97] In less direct ways, these three cases served libertarian ends by enforcing constitutional barriers against government compulsion to speak or to permit access to unwanted speakers.

C. "Above All Else . . . ": No Restrictions on Speech Based on Content

In 1972, Justice Thurgood Marshall wrote: "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[98] In *Police Department of the City of Chicago v. Mosley*, he used that principle to strike down a Chicago law which banned any picketing or demonstrations outside a school, except for those involving a labor dispute.[99] In that powerful single sentence is embedded a core pillar of free speech: no government censorship. Of course, there are exceptions to that pillar, such as laws against obscenity, but the core principle remains: the people, not the government, get to decide what gets to be said.

Four years after *Mosley*, in 1976, the Court would embed that principle in two disparate cases—one dealing with the vital issues of political speech, the other with the no less vital issues of where to get reasonably priced prescription drugs. In *Buckley v. Valeo*, in striking down government limits on how much candidates and causes could spend to promote their political messages, the Court wrote: "In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign."[100] And a few months later, in a case dealing with the seemingly more mundane matter of advertising drug prices, the Court made a similar point in rejecting government arguments that people needed to be protected against getting such information for their own good:

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[96] *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019).
[97] *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2385 (2021).
[98] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).
[99] *Id.*
[100] Buckley v. Valeo, 424 U.S. 1, 57 (1976) (per curiam).

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.[101]

The legacy of cases like these has carried forward to modern times in the doctrine that, in general, laws that prohibit or burden speech on the basis of its content are presumptively unconstitutional and must be subject to strict scrutiny. The same is true, even more so, in the case of the biased first cousin of content-based laws: viewpoint-discriminatory laws which punish or disfavor one point of view while enabling and allowing the opposite contentions.[102]

We have seen that the Roberts Court has taken this principle most seriously. In a 2011 case involving government limits on access to and use of pharmaceutical information, the Court, speaking through Justice Kennedy, observed that the law restricted speech on the basis of its content, barred some speakers but not others, and was even viewpoint based—thus violating the First Amendment.[103] And in another significant case, the Roberts Court in 2015 invalidated a local ordinance which regulated outdoor signs, but made a variety of exceptions for those of a certain content.[104] The city claimed it had no malign purposes but was just trying to act reasonably.[105] The Court's response was clear: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[106]

So, now, how have these principles fared since 2015 in the Roberts Court? Extremely well, I submit, though there has been a little slippage and much push back. First, in the two Lanham Act trademark cases discussed above, *Tam*

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[101] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

[102] *See, e.g.*, Iancu v. Brunetti, 139 S. Ct. 2294, 2299–2331 (2019) (striking down ban on "immoral" or "scandalous" trademarks).

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

[104] *See* Reed v. Town of Gilbert, 576 U.S. 155 (2015).

[105] *Id.* at 165, 171.

[106] *Id.* at 165 (quoting Cincinnati v. Discovery Network, Inc., 507 U. S. 410, 429 (1993)). For criticism of putting such a dispositive emphasis on whether the law is facially content based, regardless of the law's purpose or justification, see William Araiza, *Invasion of the Content Neutrality Rule*, 2019 BYU L. REV. 875 (2019); and Genevieve Lakier, *Reed v. Town of Gilbert, Arizona and the Rise of the Anti-Classificatory First Amendment*, 2016 SUP. CT. REV. 223 (2016).

(unanimous)[107] and *Brunetti* (6–3),[108] the Court found that the rules against content-based censorship and viewpoint-based discrimination were violated. In *Tam*, the Court unanimously struck down a ban on "disparaging" trademarks, and the justices found both that the law was content based without compelling justification and indeed, even more vulnerably, viewpoint based, relying on the enduring principle that speech cannot be punished or restricted because it is offensive or disagreeable.[109] The dangers of letting government suppress speech based on its content or, worse, its viewpoint is anathema to the central meaning of the First Amendment, as Justice Kennedy noted in a concurring opinion in *Tam*:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.[110]

Brunetti seemed like it might be a carbon copy with its challenge to the statutory ban on "immoral or scandalous" trademarks, applied to censor a clothing company that wanted to be called "FUCT."[111] But the unanimity of *Tam* gave way. Justice Kagan's majority opinion was a powerful demonstration of why the law was defectively and fatally viewpoint based, permitting trademarks that expressed wholesome, proper, or decent concepts but not the opposite.[112] Nor could the statute be interpreted more narrowly and perhaps more in line with the Constitution to reach only "vulgar" trademarks.[113]

The statute was unanimously struck down with respect to "immoral," but there was disagreement among the justices about "scandalous." Justice Alito, despite a powerful attack on viewpoint censorship in our modern "cancel culture" world, suggested that if Congress rewrote the statute to cover only the vulgar trademarks, it might pass First Amendment scrutiny.[114] And three partial dissenters, including Chief Justice Roberts, would have interpreted "scandalous" as limited to vulgar and, so limited, would have

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[107] Matal v. Tam, 137 S. Ct. 1744, 1751 (2017). The unanimous decision in *Tam* was 8–0, as Justice Gorsuch did not participate.

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

[109] *See Tam*, 137 S. Ct. at 1751.

[110] *Id.* at 1769.

[111] *Brunetti*, 139 S. Ct. 2294, 2297–98 (2019).

[112] *Id.* at 2299–300.

[113] "Vulgar" here was defined as "lewd, sexually explicit or profane." *Id.* at 2301–02.

[114] *See id.* at 2302–03 (Alito, J., concurring).

upheld it. His opinion gave short shrift to protecting "vulgar" speech in this noncriminal setting.[115] That would seem to undercut the classic First Amendment teachings of *Cohen v. California*, where Justice Harlan's exquisitely careful opinion concluded that "one man's vulgarity is another's lyric" and gave constitutional protection against criminal punishment to wearing a jacket in public that said "Fuck the Draft."[116] Likewise, Justice Breyer characteristically emphasized a balance to determine whether the restriction on speech was "disproportionate" to the values of the speech. He was concerned that otherwise, hurtful racial, ethnic, and other epithets could be used to trademark products.[117] Such a communitarian approach to free speech is markedly different from the libertarian views toward government control of content expressed in *Buckley* and *Virginia Pharmacy*. Justice Sotomayor likewise dissented because the government was now forced to register trademarks containing the most vulgar, profane, or obscene words and images imaginable.[118]

Other cases showed a similar fault line between the more conservative, pro-free speech justices and the more liberal, pro-regulation members of the Court.[119] But the end result was that the majority prevailed in subjecting a variety of content-based speech restricting laws to invalidation. So, in the pregnancy counseling center cases discussed above, the majority ruled that the compelled speech requirements imposed on the centers were content based, failed strict or even intermediate scrutiny, and burdened the centers' ability to speak their anti-abortion message.[120] As Justice Thomas put it for the Court: "The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest" on a narrow subset of facilities in a way that stifles their own message by enforcing burdensome requirements on all advertising materials.[121] Justice Kennedy was more candid in his concurring opinion, insisting that the California statute was designed as one-sided government viewpoint discrimination against pro-life crisis

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[115] *Id.* at 2303–04 (Roberts, C.J., concurring in part and dissenting in part).

[116] *See* Cohen v. California, 403 U.S. 15, 16, 25 (1971) (Harlan, J., majority opinion).

[117] *See Brunetti*, 139 S. Ct. at 2304–08 (Roberts, C.J., concurring in part and dissenting in part).

[118] *Id.* at 2308–18 (Sotomayor, J., concurring in part and dissenting in part).

[119] *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) (holding that a state mandate for pregnancy centers to provide certain notices to clients likely violated First Amendment); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (holding that public sector unions cannot collect union fees from nonconsenting employees).

[120] *See NIFLA*, 138 S. Ct at 2371, 2375.

[121] *Id.* at 2377.

pregnancy centers.[122] Once again, the dissenters complained not only that the particular findings against the laws were unjustified, but that the rulings threatened a wide range of government regulatory programs in the economic and social welfare areas by "*Lochner*izing" the First Amendment as a weapon against such programs having little to do with appropriate free speech protections.[123] That seems a questionable accusation in an area freighted with political issues, namely, pregnancy and abortion.

Finally, in two less controversial cases, the Court continued to champion the principles against content-based, viewpoint-discriminating government censorship. In one case, restrictions on the wearing of "political" badges, buttons, or other insignia in polling places on election day were invalidated.[124] Though the ban was clearly content based, it operated within a so-called "non-public" forum, an area controlled by government and dedicated to certain functions and where speech rights can be limited somewhat to serve the interests of the location.[125] And the Court had long held that express vote solicitation on or near the entrance to polling place property could be restricted.[126] But the Court nonetheless gave the content-based ban a very close look and concluded that the state had not defined "political" in a clear enough fashion, which then gave too much discretion to the election monitors on the scene to pick and choose which "political" buttons to ban and which to allow.[127]

The other case involved something we all can agree on: the annoyance of robocalls.[128] In 1991, Congress prohibited such uninvited calls from being made to cell phones.[129] But later, Congress granted an exemption for calls made to collect a debt owed to or guaranteed by the government.[130] In effect, an exception to the speech ban was given to a favored group, much like the exemption given to labor disputes in the seminal *Mosley* case above.[131] A group of political advertisers, barred from using robocalls to promote their political clients, challenged the exemption on the ground that it constituted a content-based favoritism which was not extended to them.[132] The Court concluded

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[122] *Id.* at 2379 (Kennedy, J., concurring).

[123] *Id.* at 2381–82 (Breyer, J., dissenting).

[124] *See* Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018).

[125] *Id.* at 1885–86, 1888.

[126] *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion).

[127] *Minn. Voters All.*, 138 S. Ct. at 1888–92.

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

[129] *Id.* at 2343 (noting that the Telephone Consumer Protection Act of 1991 (TCPA) generally prohibited such robocalls to cell and home phones).

[130] *Id.* (stating that the exemption to the TCPA for federal government-guaranteed debt collection robocalls was passed in 2015).

[131] *See supra* notes 98–99 and accompanying text for discussion of *Mosley*.

[132] *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2343.

that the law was clearly a content-based law, and the government conceded the exemption could not survive strict scrutiny.[133]

So, the political consultants won, no? No. Their First Amendment victory was of the Pyrrhic variety, because the Court went on to rule that the exemption for debt-collecting calls was severable from the rest of the statute, which was then upheld *entirely*.[134] So, the debt-collectors lost, for sure, but the political consultants only won the moral victory of having the exemption decreed to be violative of the First Amendment. Some victory. And Justice Breyer, concurring once again, complained that the robotic application of strict scrutiny to all content-based laws, even those dealing with routine economic and business regulations, threatens to undo government policy without just cause and gives the First Amendment a potent force in areas far removed from political debate or discussion of matters of public concern.[135] In the view of Justice Breyer, those former matters should be subject to the broader government power to regulate business and economic matters freed from the more rigorous restraints of First Amendment doctrine.[136] And once again, this criticism was echoed and enforced by many academic commentators.[137]

But, finally, two other dissenters objected in the opposite direction: they thought the statute was unconstitutional and would have given the political consultants the fruits of their litigative labor and granted an injunction against enforcement of the law against them.[138] The Court was faulted for ignoring a key First Amendment instinct:

> The First Amendment . . . pushes, always, in one direction: against governmental restrictions on speech. Yet, somehow, in the name of vindicating the First Amendment, our remedial course today leads to the unlikely result that not a single person will be allowed to speak more freely and, instead, more speech will be banned.[139]

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[133] *Id.* at 2346–47.

[134] *Id.* at 2349, 2352–54.

[135] *Id.* at 2358–62 (Breyer, J., concurring in judgment with respect to severability and dissenting in part).

[136] *Id.*

[137] For some articles reflecting and embodying these and similar criticism of much of the Roberts Court's free speech work, see generally Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631 (2021); and Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219 (2018).

[138] *Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2363, 2365 (Gorsuch, J., joined by Thomas, J., concurring in judgment in part and dissenting in part).

[139] *See id.* at 2364–66. Justice Gorsuch's inclinations are reminiscent of the famous opinion by Justice Brandeis with Justice Holmes indicating that the basic principle of the First Amendment is to "eschew[ ] silence coerced by law" and seek "more

Despite the unsatisfying bottom line in the robocall exception case, the majority of the Roberts Court still consistently supports the powerful, core First Amendment presumption against the validity of content-based or viewpoint-based government regulations of speech.

D. "The Vast Democratic Fora" of the Internet: How Free Will It Remain?

Though the internet is ubiquitous, it has only infrequently been the subject of Supreme Court First Amendment consideration of how its eighteenth-century protections should apply to the twenty-first century digital world. Is the internet a threat to First Amendment values and rights of speech, press, assembly, and petition or a facilitator of them? So far, the Court has opted for the latter view.

In a landmark case in 1997, the Supreme Court determined that the internet was a vital new public forum and that normal First Amendment principles should apply and limit government regulation and censorship of the "vast democratic [fora] of the Internet," an opinion by Justice John Paul Stevens that served as a powerful kind of Magna Carta for the internet.[140] Twenty years later, in 2017, the Roberts Court reaffirmed, and perhaps expanded this understanding and protection of the critical function the internet performs to facilitate First Amendment rights.[141] Writing for the Court in *Packingham v. North Carolina*, Justice Kennedy observed: "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular."[142] The result was to invalidate a North Carolina law which made it a felony for a registered sex offender to access social media sites where minors had unrestricted access, like, for example, Facebook and Twitter.[143] Though noting the power of the state to take more focused actions to protect crimes by sex offenders, the Court said that this law was a "prohibition unprecedented in the scope of First Amendment speech it burdens."[144] Foreclosing access to social media altogether and in such a sweeping manner

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speech, not enforced silence." Whitney v. California, 274 U.S. 357, 375–76, 377 (1927), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[140] *See* Reno v. Am. C.L. Union, 521 U.S. 844, 868 (1997).

[141] *See* Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[142] *Id.* at 1735 (quoting *Reno*, 521 U.S. at 868).

[143] *Packingham*, 137 S. Ct. at 1733, 1738. Three justices concurred in the judgment. *Id.* at 1733.

[144] *Id.* at 1737.

is to prevent the user from engaging in the legitimate exercise of First Amendment rights.

Despite the Court's enormous praise for the internet in its 2017 *Packingham* decision, there were storm clouds ahead. In the past year, people at various ends of the political spectrum have harshly criticized giant organizations like Google, Facebook, and Twitter for wielding too much power of censorship and stifling competition.[145] Some have argued that they should be regulated like gigantic public utilities because of the power they have.[146] The amassing of information about all of us seems a certain threat to our privacy. Those who think that the internet is an indispensable medium for the exercise of First Amendment rights are rightly concerned, especially since the giant players have come under fire from both the right and the left, and calls for greater regulation of the internet have significantly increased in Congress.[147] Among the complaints are that the internet giants should do or be required to do more to censor and restrict hate speech, sexual speech, sex trafficking, terrorist

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[145] *See, e.g.*, Peter Suciu, *Do Social Media Companies Have the Right to Silence the Masses—And Is this Censoring the Government?*, FORBES (Jan. 11, 2021, 7:25 PM), https://www.forbes.com/sites/petersuciu/2021/01/11/do-social-media-companies-have-the-right-to-silence-the-masses--and-is-this-censoring-the-government/?sh=7d7fa08948e2 [https://perma.cc/S97E-QUQS] (summarizing questions surrounding the right of social media to silence Trump and political messaging).

[146] *See, e.g.*, Niall Ferguson, *The 'Good Censors,'* BLOOMBERG (Oct. 18, 2020, 8:00 AM), https://www.bloomberg.com/opinion/articles/2020-10-18/facebook-twitter-google-can-t-be-good-censors-of-politics (last visited Dec. 29, 2021) ("[W]e need to impose the equivalent of First Amendment obligations on the network platforms, recognizing that they are too dominant a part of the public sphere to be able to regulate access to it on the basis of their own privately determined and almost certainly skewed 'community standards.'"); Ahiza Garcia-Hodges, *Big Tech has Big Power over Online Speech. Should It Be Reined In?*, NBC NEWS (Jan. 21, 2021, 12:00 PM), https://www.nbcnews.com/tech/tech-news/big-tech-has-big-power-over-online-speech-should-it-n1255164 [https://perma.cc/RGQ8-SQFB] ("All of the legal experts . . . agreed that the major tech companies have incredible influence over the content that's put out into the world. But checking that power is likely to require overhauling existing legislation or enacting new laws, neither of which will happen soon."); David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, ABA, https://rb.gy/pvh9qf [https://perma.cc/8UPD-JZBF] ("Certain powerful private entities—particularly social networking sites such as Facebook, Twitter, and others—can limit, control, and censor speech as much or more than governmental entities. A society that cares for the protection of free expression needs to recognize that the time has come to extend the reach of the First Amendment to cover these powerful, private entities . . . .").

[147] *See, e.g.*, Lindsey Jacobson, *Proposed Regulations over Internet Companies Could Change Free Speech Online*, CNBC (June 27, 2020, 7:00 AM), https://www.cnbc.com/2020/06/27/doj-call-for-internet-reform-may-change-free-speech-online.html [https://perma.cc/SH84-56P5] (noting that four Senators called for the FCC to look into Section 230, "which provides 'conduit immunity' to internet platforms"); Jessica Rich, *After 20 Years of Debate, It's Time for Congress to Finally Pass a Baseline Privacy Law*, BROOKINGS (Jan. 14, 2021), https://www.brookings.edu/blog/techtank/2021/01/14/after-20-years-of-debate-its-time-for-congress-to-finally-pass-a-baseline-privacy-law/ [https://perma.cc/VU86-6UYD] (calling for Congress to pass privacy legislation).

speech and the like, not to mention "disinformation."[148] Others would impose greater disclosure requirements on political information and advertising on the internet, citing the Russian efforts to use social media to influence our elections.[149] Some would eliminate the statutory immunity from suits for content posted by third parties, as provided in Section 230 of Communications Decency Act.[150] That has recently been done in a law, with the acronym FOSTA (Allow States and Victims to Fight Online Sex Trafficking Act of 2017),[151] which strips that immunity where the posted information promotes sex trafficking.[152] That new restriction has been challenged by a group of websites, two human rights organizations, an advocate for sex workers rights, and a small business owner.[153]

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[148] *See, e.g.*, Roger McNamee, *Big Tech Needs to Be Regulated. Here Are 4 Ways to Curb Disinformation and Protect Our Privacy*, TIME (July 29, 2020, 10:05 AM), https://time.com/5872868/big-tech-regulated-here-is-4-ways/ [https://perma.cc/6LPC-AS34] (discussing the need for regulation across four areas: safety, privacy, competition, and honesty); Jamie M. Freilich, Note, *Section 230's Liability Shield in the Age of Online Terrorist Recruitment*, 83 BROOK. L. REV. 675 (2017) (arguing that Section 230 of the Communications Decency Act should be amended to allow social media companies to be held liable for terrorist speech on their platforms); Rob Portman, Opinion, *How Federal Law Protects Online Sex Traffickers*, WIRED (Oct. 24, 2017, 10:00 AM), https://www.wired.com/story/how-federal-law-protects-online-sex-traffickers/ [https://perma.cc/MMK8-Z32K].

[149] *See, e.g.*, David Oxenford, *FCC Issues "Clarifications" of Political Broadcasting Public File Disclosure Requirements—Significantly More Disclosures to Be Required on Issue Ads*, BROAD. L. BLOG (Oct. 21, 2019), https://www.broadcastlawblog.com/2019/10/articles/fcc-issues-clarifications-of-political-broadcasting-public-file-disclosure-requirements-significantly-more-disclosures-to-be-required-on-issue-ads/ [https://perma.cc/926Q-VLCA] (discussing implications of two 2019 FCC decisions that addressed public complaints that several television stations did not disclose sufficient information about political advertisements); *see also Cambridge Analytica, GDPR - 1 Year On—A Lot Of Words And Some Action*, PRIV. INT'L (Apr. 30 2019, 11:59 AM), https://privacyinternational.org/news-analysis/2857/cambridge-analytica-gdpr-1-year-lot-words-and-some-action [https://perma.cc/AJM2-HM9T] (discussing Privacy International's efforts to address data privacy concerns in the wake of news that personal data from over 50 million Facebook users ended up in the hands of a private company seeking to increase support Donald Trump's 2016 presidential campaign); Tim Lau, *The Honest Ads Act Explained*, BRENNAN CTR. FOR JUST. (Jan. 17, 2020), https://www.brennancenter.org/our-work/research-reports/honest-ads-act-explained [https://perma.cc/UCH9-WDRJ] ("The proposed law would close a major loophole that allowed Russia to pay for online political ads that attempted to influence the 2016 U.S. elections.").

[150] *See, e.g.*, Nina I. Brown, *Regulatory Goldilocks: Finding the Just and Right Fit for Content Moderation on Social Platforms*, 8 TEX. A&M L. REV. 451 (2021) (discussing the argument to amend or repeal Section 230 and its implications); Dan Patterson, *What Is "Section 230," and Why do Many Lawmakers Want to Repeal It?*, CBS NEWS (Dec. 16, 2020, 10:59 AM), https://www.cbsnews.com/news/what-is-section-230-and-why-do-so-many-lawmakers-want-to-repeal-it/ [https://perma.cc/N932-VKZ3] (primer on Section 230 and the reasons for and risks of repealing the law); *see also* Communications Decency Act of 1996, § 230, 47 U.S.C. 230 (amended 2018).

[151] Pub. L. No. 115–164, 132 Stat. 1253 (2018) (codified at 18 U.S.C. 1591, 1595, 2421A and 47 U.S.C. § 230).

[152] FOSTA, § 4 (amending 47 U.S.C. § 230); *see also* Woodhull Freedom Found. v. United States, 948 F.3d 363, 368 (D.C. Cir. 2020).

[153] *See Woodhull*, 948 F.3d at 369–70, 374 (holding that some plaintiffs had standing to challenge the new law).

Others claim that the major internet companies have become a kind of corporate thought police, censoring and squelching ideas that offend corporate consensus on any issue.[154] That has become a sharply partisan issue with Republicans claiming that giant internet platforms have censored speech critical of Democrats, and the latter complaining that former President Trump used social media to spread lies about the election and incite insurrection.[155]

Another claim is that internet giants have become so powerful that they should be broken up under the antitrust laws, which the United States is alleging in a suit recently filed against Facebook.[156] But that suit was recently dismissed.[157] An earlier lawsuit filed by the United States and several states against Google is still pending and scheduled for trial.[158] Similarly, some claim that these entities are so powerful and intertwined with government that their actions should be subject to First Amendment scrutiny.[159] Indeed, former President Trump has recently filed a suit against Facebook,

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[154] *See, e.g.*, Bill Buchanan, *The Thought Police Have Finally Arrived?*, MEDIUM (Aug. 19, 2018), https://medium.com/asecuritysite-when-bob-met-alice/the-thought-police-have-finally-arrived-9742765af6ea [https://perma.cc/LNL2-R8H2] (discussing how targeted advertisements and data harvesting can influence political thought); Andrew Doyle, *When Will the Online Thought Police Come for You?*, UNHERD (Jan. 6, 2021), https://unherd.com/2021/01/how-big-tech-is-policing-the-pandemic/ [https://perma.cc/4CJR-XVA3] ("In recent years, there has been a growing misapprehension that censorship can only be enacted by the state. But in reality, social media platforms are the *de facto* public square, and the companies that run them are effectively the arbiters of a substantial proportion of political discourse."); Chris Hedges, *Thought Police for the 21st Century*, OCCUPY (Jan. 29, 2018), https://www.occupy.com/article/thought-police-21st-century#sthash.4WQc5Y7o.dpbs [https://perma.cc/5QB3-5WJ2] (asserting that social media and online news "censorship, justified in the name of combating terrorism by blocking the content of extremist groups, is also designed to prevent a distressed public from accessing the language and ideas needed to understand corporate oppression, imperialism and socialism").

[155] *See* Colleen McClain & Monica Anderson, *Republicans, Democrats at Odds over Social Media Companies Banning Trump*, PEW RSCH. CTR. (Jan. 27. 2021), https://www.pewresearch.org/fact-tank/2021/01/27/republicans-democrats-at-odds-over-social-media-companies-banning-trump/ [https://perma.cc/G6GN-9Q6D]; Lauren Aratani, *Trump Twitter: Republicans and Democrats Split Over Freedom of Speech*, GUARDIAN (Jan. 9, 2021), https://www.theguardian.com/us-news/2021/jan/09/trump-twitter-republicans-democrats [https://perma.cc/94FL-AYDY].

[156] *See* Fed. Trade Comm'n v. Facebook, Inc., No. 20-3590 (JEB), 2021 WL 2643627, at *1 (D.D.C. June 28, 2021).

[157] *See id.* at *23.

[158] *See* Complaint, United States v. Google, L.L.C., No. 20-cv-03010-APM (D.D.C. Oct. 20, 2020); Amended Scheduling and Case Management Order, No. 20-cv-03010-APM (D.D.C. Feb. 3, 2021).

[159] Victoria Baranetsky, *Keeping the New Governors Accountable: Expanding the First Amendment Right of Access to Silicon Valley*, KNIGHT FIRST AMEND. INST. (Aug. 21, 2019), https://knightcolumbia.org/content/keeping-the-new-governors-accountable-expanding-the-first-amendment-right-of-access-to-silicon-valley [https://perma.cc/6AW2-RP5U]; Craig Parshall, *Big Tech and The Whole First Amendment*, FEDERALIST SOC'Y (Aug. 14, 2020), https://fedsoc.org/commentary/fedsoc-blog/big-tech-and-the-whole-first-amendment [https://perma.cc/KHG8-ATUX].

Google's YouTube, and Twitter, alleging that their censorship of him and his supporters is both unconstitutional and illegal.[160] But the very recent Roberts Court ruling in the cable access case is likely to squelch that claim because of the "state action" requirement.[161] Whatever the ultimate merits of the Trump litigation, it certainly strikes a responsive chord in the 32 percent portion of the public which still seems to support and believe in former President Trump and feel that "the Establishment" or "the deep state" were always out to get him.[162]

Finally, many worry about the capacity of social media to wreak harm and havoc by swarming attacks on individuals and incitement of "flash mobs."[163] Indeed, the impact of so-called "cancel culture" is often magnified by the power, intrusiveness,

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[160] *See* Michael C. Bender & Sarah E. Needleman, *Trump Sues Facebook, Twitter, Google to Restore Social-Media Accounts*, WALL ST. J. (July 7, 2021), https://www.wsj.com/articles/trump-sues-facebook-twitter-google-to-restore-social-media-accounts-11625674561 [https://perma.cc/UG7Z-BADG] (noting that Big Tech's justification for cutting off former President Trump's access to their platforms was that he created a risk of continued violence by continuously stating that the 2020 election was a fraud, especially following the January 6 riot at the Capitol and Trump's comments at the rally on the day of the riot).

[161] *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) (ruling that an operator of a public access cable channel is a private entity that cannot be transformed into a state actor by merely opening its property for the speech of others, resulting in the corporation not being subject to the First Amendment). Most observers initially opined that the Supreme Court would follow this reasoning and hold that the Big Tech defendants were not bound by the First Amendment, thus defeating Trump's claims, see, for example, Aaron Blake, *How Trump's Own Supreme Court Justice Undercut His Facebook Lawsuit*, WASH. POST (July 8, 2021, 11:25 AM), https://www.washingtonpost.com/politics/2021/07/08/how-trumps-own-supreme-court-justice-undercut-his-facebook-lawsuit/ [https://perma.cc/4TRF-HC5S]. But, the complaint alleges collusion between the leaders of the Big Tech companies and the Democratic congressional leaders. Such an allegation, if proven, might show state action and subject the companies to First Amendment limitations. *See* Vivek Ramaswamy, Opinion, *Trump Can Win His Case Against Tech Giants*, WALL ST. J. (July 7, 2021), https://www.wsj.com/articles/trump-can-win-his-case-against-tech-giants-11626025357 [https://perma.cc/K7VY-UDU3].

[162] Regardless of the ultimate merits of the litigation former President Trump has commenced against Facebook, Google's YouTube, and Twitter, there is still clear outspoken support and endorsement of the former president. *See, e.g.*, Chuck Todd et al., *After 100 Days Out of Office, Trump's Support Softens in NBC News Poll*, NBC NEWS (Apr. 27, 2021, 9:21 AM), https://www.nbcnews.com/politics/meet-the-press/after-100-days-out-office-trump-s-support-softens-nbc-n1265457 [https://perma.cc/9B99-SBRY] (noting that while support for the former president has somewhat declined, "the perception of Trump's pull within his party couldn't be stronger"); Aaron Bycoffe et al., *How Popular is Donald Trump?*, FIVETHIRTYEIGHT (Jan. 20, 2021), https://projects.fivethirtyeight.com/trump-approval-ratings/ [https://perma.cc/YU3F-PS4Q] (depicting former President Trump's approval rating).

[163] Daniel Henninger, *'I Didn't Change. The World Changed,'* WALL ST. J. (Aug. 30, 2011), https://www.wsj.com/articles/SB10001424053111904199404576536882769562442 [https://perma.cc/C3DQ-D87Y] ("As we finish up, Mr. Cheney diverts into a consideration of the sorts of responses governments may have to make when confronted by things in the news now, such as 'flash mobs' using social media to organize riots through London. 'It's going to present us with some pretty significant challenges that we've only begun to address.'").

and speed of social media. What will the Court say about all of these varied issues and concerns, and will it change its very positive and enabling view of the First Amendment importance and protection of the internet? Grist for another symposium, I am certain about that.

E. Beyond the Schoolhouse Gate: At Last, Greater Free Speech Rights for Students

The two most recent cases where free speech prevailed, handed down at the very end of the 2020 term, were both quite pleasant surprises in that the Court supported and arguably strengthened First Amendment rights in areas that in recent years had been somewhat dormant.

In 1969, the Supreme Court handed down its landmark *Tinker* decision, ruling that the First Amendment protected the right of high school students to protest the Vietnam War by wearing black armbands to school.[164] As the Court ruled, only if the students' behavior caused material and substantial disruption of school processes or interference with the rights of others could the students be silenced, and objection to their political message would not be sufficient grounds to do so.[165] This heartening Magna Carta for free speech in schools was widely heralded as opening an age of free speech on campus.[166] The problem was that, in the next five decades after the case was decided, the Supreme Court handed down three significant cases that deflected the *Tinker* principles and allowed school punishment of various forms of student speech.[167] The last of those three cases was a disappointing 2007 Roberts Court decision which ruled that the student display of a banner that seemed to advocate drug use by declaring: "BONG HiTS 4 JESUS" while attending an off-campus school-authorized field trip (to celebrate the Olympic torch

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[164] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504–05, 514 (1969).

[165] *Id.* at 506, 514 (famously asserting that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

[166] *See Education Law—Student Speech and the First Amendment*, JRANK, https://law.jrank.org/pages/6348/Education-Law-Student-Speech-First-Amendment.html [https://perma.cc/5878-CTJX].

[167] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (sexual innuendo at school assembly); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) (student newspapers that are part of the school curriculum); Morse v. Frederick, 551 U.S. 393, 410 (2007) (speech promoting illegal drug use). During that long period, college students fared much better in vindicating their free speech rights on campus. *See* Healy v. James, 408 U.S. 169, 194 (1972) (recognition of student organization); Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 671 (1973) ("indecent speech" in student newspaper); Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 845 (1995) (withholding of university funds from student religious publication).

being carried through town), justified punishment of the high school student involved.[168]

So, supporters of free speech rights for high school students were a bit concerned when the Court granted review in 2021 of the *Mahanoy* case, a school board's appeal seeking the right to penalize a high school student for vulgar but off-campus social media speech.[169] Having not gotten a coveted spot on the cheerleading team, the student expressed her disappointment by sending out an angry Snapchat message to friends with a photo in which she had her middle finger raised, with the caption: "Fuck school fuck softball fuck cheer fuck everything."[170] The case raised the very broad issues of student free speech and the internet under the *Tinker* regime. To what extent may schools penalize students on the basis of things said and done on social media or the internet outside the physical confines of the school, or perhaps even on school premises but on the internet?

The lower court had taken a very broad and speech-protective position that, categorically under *Tinker*, students could not be punished by the school for otherwise legal speech that takes place off-campus, even if it had an impact on the school in some fashion.[171] The Supreme Court ruled for the student, but took a somewhat less capacious and more narrow approach, which is not surprising since the opinion was written by Justice Breyer who generally eschews categorical approaches in favor of multifactor balancing.[172] Accordingly, the opinion observed, in considered dictum, that schools might be able to punish off-campus or internet speech in some circumstances:

> Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances. . . . These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online

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168 *See Frederick*, 551 U.S. at 397, 410.

169 *See* Mahanoy Area Sch. Dist. v. Levy *ex rel.* B.L., 141 S. Ct. 2038, 2042–43 (2021).

170 *Id.* at 2043.

171 Levy *ex rel.* B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d Cir. 2020).

172 *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 536 (2001) (Breyer, J., concurring) ("I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits? What this Court has called 'strict scrutiny' . . . is normally out of place where, as here, important competing constitutional interests are implicated.").

> school activities; and breaches of school security devices, including material maintained within school computers.[173]

Instead of applying a categorical rule, Breyer noted that three considerations should make courts wary of allowing schools to supervise what students say off campus: (1) parents rather than administrators are better suited to disciplining children away from school, (2) the specter of round-the-clock surveillance is at odds with free speech values, and (3) schools should teach students that unpopular speech is worthy of protection.[174] The conclusion: because none of the factors in the case directly involved individuals at the school, were she an adult there would be no penalty for what she sent out, it was done off school grounds and on a weekend, and it did not seem to cause any substantial disruption at school, the First Amendment prevailed.[175] Importantly, Justice Breyer emphasized that what schools must teach students is the value of free speech:

> America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." . . . Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it."[176]

Though the ACLU, which represented the student in the *Mahanoy* case, said that this was a huge victory for the free speech rights of students in America,[177] my concern is that the ruling is specifically contingent on the facts being so divorced from any school concerns that there are no clear guidelines as to how future, more borderline cases will be resolved, and the chilling effect of such uncertainty is disturbing. For example, if the student's online profanity had been directed at the school principal by name or the volleyball coach, would it still have been protected? Indeed, Justice Breyer's majority opinion itself stated:

> Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the

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[173] *Mahanoy*, 141 S. Ct. at 2045.

[174] *Id.* at 2046.

[175] *Id.* at 2046–48.

[176] *Id.* at 2046. Justice Thomas was the sole dissenter, taking his usual view that in light of history and tradition, children are properly supervised by their parents and their school officials and do not have an extensive array of First Amendment rights to invoke. *Id.* at 2059–63.

[177] *Supreme Court Decision Rules to Protect Students' Full Free Speech Rights*, ACLU PA. (June 23, 2021), https://www.aclupa.org/en/press-releases/supreme-court-decision-rules-protect-students-full-free-speech-rights [https://perma.cc/8AN5-M6UV].

> differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. *We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference.* This case can, however, provide one example.[178]

A categorical approach against punishment for all or almost all social media speech by students would have been more secure protection. But one of the noted hallmarks of Chief Justice Roberts's regime is often incrementalism and minimalism and trying to get as much common ground among the justices as possible. An 8–1 victory for the student on less than broader grounds is a classic example of that strategy. But the case remains an important victory for free speech and joins the Roberts Court's pro-speech canon.

F. NAACP Rules: A Strong Revival for the Right of Associational Privacy

Fortunately, the other free speech case of the October 2020 term, which was a pleasant surprise, had more free speech wind in the sails of the opinion written by Chief Justice Roberts. In a landmark 1958 decision, the Supreme Court observed the precious rights of free speech and peaceable assembly are importantly interrelated:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.
>
> . . . .
>
> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.[179]

Thus was born the right of associational privacy recognized as essential to the implementation of political rights under the

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[178] *Id.* at 2046 (emphasis added).

[179] *See* Nat'l Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449, 460, 462 (1958).

First Amendment. This protected right of association furthers a wide variety of political, social, economic, educational, religious, and cultural ends, and is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Accordingly, the government must have strong reasons, such as evidence of corporate wrongdoing or organizational irregularities, to try to justify such compelled, destructive disclosure against civil rights groups like the NAACP.

Two decades later, the Court applied similar principles in the context of campaign finance laws requiring disclosure of contributors to candidates and political organizations and reaffirmed that such disclosure would be judged by "exacting scrutiny" requiring a substantial relation between the disclosure requirement and a sufficiently important governmental interest.[180]

In 2021, the Court in the *AFP* case applied that same standard to determine whether charitable organizations, in order to solicit funds in California for their countless causes, had to provide the attorney general a list of their donors of more than $5,000.[181] About ten years ago, Democratic attorneys general in both New York and California began actively imposing such disclosure requirements on charities seeking to raise funds in their states, even though previously enforcement had been lax.[182] Though the lists of donors were supposedly strictly confidential and not for public disclosure, there had been many breaches of this confidentiality over the years in California. The Court also determined that the disclosure regime burdened the associational rights of donors, that the Americans for Prosperity Foundation, a conservative organization, had suffered from threats and harassment in the past, and that donors were likely to face similar retaliation in the future if their affiliations and financial support became publicly known.[183]

The parties disputed whether the exacting scrutiny test required a least restrictive means inquiry similar to the one imposed by strict scrutiny. The Court, in an opinion by Chief Justice Roberts, concluded that exacting scrutiny requires that a government-mandated disclosure regime be narrowly tailored to the government's asserted interest, even if it is not the least restrictive

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[180] *See* Buckley v. Valeo, 424 U.S. 1, 60–64 (1976) (per curiam).

[181] *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2379, 2380–81, 2388 (2021).

[182] *See id.* at 2380; Citizens United v. Schneiderman, 882 F.3d 374, 379 (2d Cir. 2018).

[183] *See Ams. for Prosperity*, 141 S. Ct. at 2381, 2389.

means of achieving that end.[184] Applying this standard, the Court concluded that the narrow tailoring requirement was not satisfied by California's disclosure regime. The Court noted that "[t]here is a dramatic mismatch, however, between the interest the Attorney General seeks to promote and the disclosure regime that he has implemented in the service of that end."[185] There was almost no real need for the wholesale disclosure, and the potential of real harm to donors and the organizations they support across the political spectrum was palpable. Hence the gross mismatch. The Court's conclusion: the attorney general's disclosure requirement "imposes a widespread burden on donors' associational rights[,] [a]nd this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing, or that the State's interest in administrative convenience is sufficiently important."[186]

In reaching that result, Chief Justice Roberts went out of his way to point out dramatically that strong protection for First Amendment rights benefits people and groups across the political spectrum:

> The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as amici curiae in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California.[187]

Conversely, Justice Sotomayor for three dissenters maintained that "[t]oday's decision discards decades of First Amendment jurisprudence recognizing that reporting and disclosure requirements do not directly burden associational rights."[188]

This is a very important case for several reasons. First, at a jurisprudential level, the quote in the paragraph above is a paradigmatic demonstration of the importance of protecting the First Amendment rights of groups and speech across the political spectrum and who are often at odds with each other and shows a continued strong embrace on behalf of the Roberts Court of the theme of allowing as much speech as possible across the ideological spectrum. It evokes connections to the most speech-

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184 *Id.* at 2384–85.
185 *Id.* at 2386.
186 *Id.* at 2389.
187 *Id.* at 2388.
188 *Id.* at 2404 (Sotomayor, J., joined by Breyer & Kagan, JJ., dissenting).

protective justices of the twentieth century: Holmes and Brandeis and Black and Douglas, and, of course, Kennedy.[189] Second, this is the first time in more than twenty years, since 1999, that the Court has invalidated a disclosure requirement on First Amendment grounds.[190] Since then, the Court has upheld disclosure requirements in campaign finance and related settings in an almost perfunctory way.[191] And, indeed, in *Citizens United*, Justice Kennedy relied on the benefits of disclosure as a justification for invalidating limits on political spending by corporations, unions, and nonprofits: "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."[192] Third, the Court has clarified the exacting scrutiny standard and applied it in a quite rigorous and muscular way to invalidate the charity disclosure requirement on its face. Fourth, the net effect is another case where compelled speech, i.e., disclosure, is rebuffed by the Court.

Finally, despite the different settings, the strong review of disclosure requirements in the Court's *AFP* opinion may very well have some spillover effect on campaign finance law. The "exacting scrutiny" standard and its narrow tailoring requirement may become the measure in the campaign finance disclosure area and other aspects of campaign finance law like, for example, the validity of various kinds of contribution limits. As a leading election law advocate, who favors strong limits on spending and significant disclosure of giving, put it:

> The [C]ourt's ruling calls into question a number of campaign finance disclosure laws. Perhaps even more significant, it also threatens the constitutionality of campaign contribution laws, which are judged under the "exacting scrutiny" standard, too. Lower courts can now find that such laws are not narrowly tailored to prevent corruption or its appearance or

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[189] *See* Gora, *supra* note 2, at 71, 76.

[190] *See* Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 201–04 (1999) (invalidating state disclosure requirement for names and addresses of petition circulators and their total pay); *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347, 357 (1995) (invalidating state prohibition on distribution of anonymous ballot question campaign literature); Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 101–02 (1982) (invalidating state requirement that minor political party disclose membership, contributors, or associates).

[191] *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 194–202 (2003) ("electioneering communications"), *overruled on other grounds by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); *Citizens United*, 558 U.S. at 365–66 (corporate independent expenditures); Doe v. Reed, 561 U.S. 186, 201–02 (2010) (referendum signatures).

[192] *See Citizens United*, 558 U.S. at 371.

> do not provide voters with valuable information—two interests the [C]ourt recognized in the past to justify campaign laws.[193]

As one who has long argued that restrictive and burdensome campaign finance laws are harmful, not helpful, to democracy, I hope he is right.

G. Freedom of Religion: Still Robustly Protected

In my 2016 First Amendment survey of the first decade of the Roberts Court, I noted that one of the prevalent themes was to increase the area of individual choice about speech and decrease the area of government regulation of those choices.[194] Under that rubric, I noted the effect of some of the Court's important freedom of religion cases during that period: "[I]n both honoring Free Exercise Clause claims that government should accommodate religious conscience, and rejecting Establishment Clause objections that the government should not be supporting religious activity, the Court expanded the range of personal choice over religious expression and reduced the area of [permissible] government mandate."[195] But I also noted that, where there was a tension between religious freedom and gay rights, especially the right to same-sex marriage, the First Amendment was not guaranteed to prevail.[196]

The most recent five-year period of the Roberts Court has witnessed a similar pattern. First, freedom of religion claims have prevailed in all six major cases during that period, in both free exercise rulings requiring government to support or accommodate religious freedom and activity and establishment clause cases holding that government could include or recognize religious speech or activities without running afoul of that provision.

In 2012, the Roberts Court had ruled unanimously that the free exercise clause required the judicial creation of a "ministerial exception" immunizing from scrutiny a church's decision to fire a religious instruction teacher even against her claim that the firing violated the Americans with Disabilities Act of 1990 (ADA).[197] Such government intrusion into the selection or retention of a minister contravened both the free exercise clause

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[193] Richard L. Hasen, Opinion, *The Supreme Court is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html [https://perma.cc/XD2B-DVX4].

[194] *See* Gora, *supra* note 2, at 100.

[195] *Id.* at 105.

[196] *Id.* at 106–08.

[197] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171, 196 (2012).

and the establishment clause, both protecting religious freedom from government mandate.[198] In 2020, the Court reaffirmed those powerful principles and the corresponding right of religious communities to select their own teachers and teachings, applying the ministerial exception to defeat suits under both the ADA and the Age Discrimination in Employment Act of 1967.[199] Thus, religious freedom afforded by the "ministerial exception" trumps claims of employment discrimination.

A similar pattern is found in other recent Roberts Court cases. In 2002, the Rehnquist Court, 5–4, had held that government could provide financial assistance for supplies or tuition to parents of children attending public or private schools and in the latter case secular or religious ones, without violating the establishment clause.[200] In 2017, the Roberts Court applied these same principles to strike down a state law which provided school funding for improving playground surfaces, but excluded religious school playgrounds from eligibility for the benefit.[201] The Court, 7–2, found this a wholly unjustified violation of the free exercise clause to punish and deny an educational benefit because the school was religious.[202] Likewise, in 2020, the Court ruled that denial of a tax credit for contributions to schools, if made to religious schools, was likewise a wholly impermissible discrimination against religion in clear contravention of the free exercise clause.[203]

Finally, in 2019, the Roberts Court, 7–2, rejected an establishment clause challenge to a very large and long-standing World War I memorial cross located on public property and maintained by government.[204] In a very impassioned prevailing opinion, Justice Alito, even quoting the famous poem "In Flanders Fields,"

> In Flanders fields the poppies blow
> Between the crosses, row on row,

ruled the cross in the context of a war memorial to be constitutional.[205] Rather than ask what a hypothetical "reasonable observer" would think about the display and whether the government was endorsing religion, the Court looked instead to the

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198 *See id.* at 188–89.

199 *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020).

200 *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002).

201 *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024–25 (2017).

202 *See id.* at 2024.

203 *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2262–63 (2020).

204 *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2072, 2089–90 (2019).

205 *Id.* at 2075, 2090.

perspective of respecting history and tradition in trying to determine whether such a display violates the establishment clause.[206] And the Court majority indicated that such noncoercive and long-standing displays and practices should not be uprooted on the complaint of offended observers seeking to cancel those displays.[207] Justice Ginsburg was no less passionate in her dissent, pointedly observing that the Latin cross is foremost a symbol of Christianity not placed over the graves of people of other religions, and government's display of it in the fashion here elevates that religion, Christianity, over all others.[208]

In light of this powerful protection of religious freedom and autonomy, as safeguarded by both the free exercise and establishment clauses, against various forms of significant countervailing government interests, it is noteworthy that the Court has had such difficulties when the cases have involved gay rights versus religious autonomy. Two recent Roberts Court cases have witnessed the Court struggling with how to strike the delicate balance of reconciling two competing yet powerful and worthwhile sets of values. The Court resolved both of those cases in favor of the religious claimant, but on seemingly narrow grounds, specific to the particular cases, which seemed to many not to resolve the broader issues going forward. But other knowledgeable observers suggest that the Court was effectively putting its thumb on the scale in favor of religion, in these contexts.[209]

The first case is quite well known—the cake baker case. A same-sex couple went into a bakery owned and operated by a religious cake baker in Colorado and asked him to bake a cake to celebrate their wedding.[210] He explained to them that, because of his religious beliefs, he was opposed to same-sex marriage and he could not create that same-sex couple wedding cake, but he claimed he would have provided any other cake product for any other occasion.[211] The couple subsequently filed a complaint with

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[206] *Id.* at 2089–90.

[207] *Id.*

[208] *Id.* at 2104 (Ginsburg, J., dissenting).

[209] *See* Thomas Berg & Douglas Laycock, *Symposium:* Masterpiece Cakeshop—*Not as Narrow as May First Appear*, SCOTUSBLOG (June 5, 2018, 3:48 PM), https://www.scotusblog.com/2018/06/symposium-masterpiece-cakeshop-not-as-narrow-as-may-first-appear [https://perma.cc/8FYT-AJQ2]; Thomas Berg & Douglas Laycock, *Protecting Free Exercise Under Smith and After Smith*, SCOTUSBLOG (June 19, 2021, 6:37 PM), https://www.scotusblog.com/2021/06/protecting-free-exercise-under-smith-and-after-smith/ [https://perma.cc/UUD8-XT6T]; Andrea Picciotti-Bayer, *From the Court, a Vindication of Faith-based Service. From Alito, a Blueprint for the Future*, SCOTUSBLOG (June 19, 2021, 4:37 PM), https://www.scotusblog.com/2021/06/from-the-court-a-vindication-of-faith-based-service-from-alito-a-blueprint-for-the-future/ [https://perma.cc/N93W-6VNG].

[210] *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).

[211] *Id.* at 1723–24.

the Colorado Civil Rights Commission, complaining that the refusal of service was because of their sexual orientation and constituted improper discrimination by a public accommodation in violation of Colorado's pertinent antidiscrimination statute.[212] The baker claimed that his religious beliefs gave him no choice and that, in effect, the free exercise clause required recognition and accommodation of a constitutional exemption from that law in his case.[213] The Colorado courts ruled against the baker and in favor of the gay couple, and the Supreme Court agreed to hear his appeal.[214] Also pertinent is that by that point, the Roberts Court had ruled that the Constitution protects and guarantees the right of same-sex marriage against government discrimination and denial.[215]

The Court seemed on the verge of trying to resolve a classic dispute between clashing sets of individual rights, and dozens of briefs were filed on either side of the issues. The end result was not a clear win for either side. Instead, a 7–2 Court ruled for the baker on the case-specific ground that the Civil Rights Commission's decision against him was tainted by expression of hostility and animus against his religious beliefs by one of the commissioners.[216] That violated the free exercise clause's requirement of religious neutrality and vitiated the administrative ruling against the baker. The Court's opinion, written by Justice Kennedy, both the Court's strongest First Amendment champion[217] and also the author of the landmark same-sex marriage opinion,[218] acknowledged the importance of the constitutional right to same-sex marriage and the importance of First Amendment rights of free speech and religious freedom.[219] But the Court refrained from resolving the

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[212] *Id.* at 1725.

[213] *Id.* at 1726.

[214] *Id.* at 1727.

[215] *See* Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015).

[216] *See Masterpiece Cakeshop*, 138 S. Ct. at 1722, 1729–32. The baker raised both free exercise and free speech claims, but the Court only ruled on the free exercise issues. *Id.* at 1723–24. The Court quoted the following anti-religious sentiments expressed by one commissioner:

> Freedom of religion and religion ha[ve] been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.

Id. at 1729. Those remarks were viewed as having tainted the commission's decision on the baker's religious freedom claims. *Id.*

[217] *See supra* text accompanying notes 32–34.

[218] *Obergefell*, 576 U.S. 644 (Kennedy, J., majority opinion).

[219] *Id.* at 1727.

broader issues of the clash between the two. There were concurring opinions coming down on either side of the debate, and a two-justice dissent by Justices Ginsburg and Sotomayor, maintaining that it was a clear case of sexual orientation discrimination, not excused by the free exercise clause and justifying penalties against the baker under the antidiscrimination law.[220]

In 2021, we witnessed a redux of the cake baker case, this time involving Catholic Social Services in Philadelphia. And this time, the Court was unanimous but, once again, seemed to fail to resolve the broader clash of values and rights, though some observers suggest the ruling was not that limited and would give strong protection to religious freedom going forward.[221]

For decades, the Catholic foster care agency had been hired by the City of Philadelphia to review applications by couples to take in foster children under the city's care. Because of its religious beliefs, the Catholic agency would not certify same-sex couples as foster parents.[222] When this came to light in a newspaper article, city officials began reviewing their relationship with the agency and ultimately refused to renew the contract because the agency's policy against same-sex couples violated the city's rules against sexual orientation discrimination, although no same-sex couple had ever sought certification from the agency.[223] The Catholic agency sued and lower courts upheld the penalty, reasoning that the city's requirement of no discrimination was a neutral rule of general application which supported the valid antidiscrimination

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[220] *Id.* at 1722; *id.* at 1748–52 (Ginsburg, J., joined by Sotomayor, J., dissenting). For arguments on either side of the controversy, see Sherrilyn Ifill, *Symposium: The First Amendment Protects Speech and Religion, Not Discrimination in Public Spaces*, SCOTUSBLOG (June 5, 2018, 1:13 PM), https://www.scotusblog.com/2018/06/symposium-the-first-amendment-protects-speech-and-religion-not-discrimination-in-public-spaces/ [https://perma.cc/Z4QB-8D84]; and Richard Epstein, *Symposium: The Worst Form of Judicial Minimalism—Masterpiece Cakeshop Deserved a Full Vindication for its Claims of Religious Liberty and Free Speech*, SCOTUSBLOG (June 4, 2018, 8:29 PM), https://www.scotusblog.com/2018/06/symposium-the-worst-form-of-judicial-minimalism-masterpiece-cakeshop-deserved-a-full-vindication-for-its-claims-of-religious-liberty-and-free-speech/ [https://perma.cc/Q58E-RH53].

[221] *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021). For suggestions that the Court was more favorable to the religious claim than the antidiscrimination claim, see Berg & Laycock, *supra* note 209; and Picciotti-Bayer, *supra* note 209. *See also* Walter Olson, *Fulton v. City of Philadelphia: Yes, It Was a Big Deal*, CATO INST. (June 22, 2021, 1:32 PM), https://www.cato.org/blog/fulton-v-city-philadelphia-yes-it-was-big-deal [https://perma.cc/3WRW-5H3A] (noting the *Fulton* decision indicated that a majority of the Court is willing to overrule the *Smith* standard and the Court finding that foster services were not a public accommodation appeared to narrow the reach of the "public accommodation" definition; quoting an observation on Twitter that *Fulton* showed that "the modern Court clearly perceives a First Amendment right to discriminate to be non-frivolous in nature").

[222] *See Fulton*, 141 S. Ct. at 1874.

[223] *See id.* at 1875.

policies.[224] The agency appealed to the Supreme Court, claiming the city's requirement violated both the free speech and free exercise clauses, but the Court unanimously ruled in the agency's favor on free exercise grounds.[225]

Here was the reasoning in an opinion by Chief Justice Roberts. First, since the Philadelphia local law permitted officials to grant exemptions from the antidiscrimination requirement, that law could not seek the safe harbor afforded to a law of general and neutral application challenged under the free exercise clause. Under established precedent, a law which is completely neutral, but incidentally burdens religion, must pass only deferential judicial review, not strict scrutiny.[226] When it is not so neutral, then the refusal to grant a religious accommodation requires strict scrutiny to find a compelling justification for that refusal.[227] And that invokes another rule that restricting religious conduct "while permitting secular conduct that undermines the government's asserted interest in a similar way" is evidence of lack of general and neutral application.[228] Put the two together, and the refusal to renew the contract violates the free exercise clause.

If that all seems a bit convoluted, it is. And its consequence is subject to interpretation. To the conservative Justice Alito, the Court's decision

> might as well be written on the dissolving paper sold in magic shops . . . [I]f the City wants to get around today's decision, it can simply eliminate the never-used exemption power. If it does that, then, voilà, today's decision will vanish—and the parties will be back where they started.[229]

His opinion concluded:

> After receiving more than 2,500 pages of briefing and after more than a half-year of post-argument cogitation, the Court has emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state. Those who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I.[230]

Likewise, the *Wall Street Journal* editorially described the decision as "[a] narrow ruling [that] helps Catholic foster

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[224] *See id.* at 1876.

[225] *See id.* at 1871.

[226] *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878–82 (1990).

[227] *See Fulton*, 141 S. Ct. at 1876–77.

[228] *See id.* at 1877. This rule is articulated in the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533–34 (1993).

[229] *Fulton*, 141 S. Ct. at 1887 (Alito, J., concurring in judgment) (footnote omitted).

[230] *Id.* at 1926. As a reflection of his intensity on these religious freedom issues, Justice Alito's concurring opinion was *five times longer* than Chief Justice Roberts's opinion for the Court!

parents, but the faithful deserve more protection under the First Amendment. . . . Unlike the liberals of 30 or even 10 years ago, today's secular progressives are openly hostile to religious liberty, which needs a Supreme Court willing to defend it."[231]

On the contrary, the *New York Times*'s long-time Supreme Court reporter, Adam Liptak, called the decision "a setback for gay rights and further evidence that religious groups almost always prevail in the current [C]ourt."[232] Veteran Supreme Court observer Linda Greenhouse amplified that analysis. She saw the decision as one of the many Roberts Court's pro-religion rulings and felt that it opened the door to religious challenges to neutral government laws whenever some exception was potentially available or some momentary hostility to religion was expressed.[233] Rashomon!

Finally, to those who feel that the decision was more equivocal than either Justice Alito or Ms. Greenhouse and Mr. Liptak suggest, the conventional wisdom is that the Court in both the cake baker case and the Catholic charity case was kicking the can down the road to avoid a wrenching and divisive opinion. And that such an approach is congenial to Chief Justice Roberts who often opts for temporizing, narrow resolutions in politically sensitive and difficult cases, in part, the speculation goes, to help preserve the institutional integrity of the Court and its reality or appearance of being genuinely nonpolitical or partisan. But as the conservative concurring justices pointed out, the Catholic charity won the battle, but still has an ongoing war to face with a city that will continue to resist using the agency's services because of the church's stand on marriage equality, and the cake baker is also subject to continuing pressures to choose between his religion and his livelihood.[234] In this view, a clear decision in favor of strong protection for religious accommodation claims would be a better solution.

But despite Chief Justice Roberts's supposed temptation to temporize, overall, he has presided over arguably the longest and strongest period of protecting First Amendment values in Supreme Court history. He has earned the nickname, "Mr. First Amendment."[235]

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[231] *See* The Editorial Board, Opinion, *One Cheer for the Supreme Court on Religious Liberty*, WALL ST. J. (June 17, 2021, 6:50 PM), https://www.wsj.com/articles/one-cheer-for-the-supreme-court-on-religious-liberty-11623970233 [https://perma.cc/J2EV-PUL6].

[232] *See* Adam Liptak, *Supreme Court Backs Catholic Agency in Case on Gay Rights and Foster Care*, N.Y. TIMES (June 17, 2021), http://www.nytimes.com/2021/06/17/us/supreme-court-gay-rights-foster-care.html [https://perma.cc/XTY3-CQC2].

[233] *See* Linda Greenhouse, Opinion, *What the Supreme Court Did for Religion*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-religion.html [https://perma.cc/N2HY-8Q8L].

[234] *See Fulton*, 141 S. Ct. at 1926–32 (Gorsuch, J., concurring in judgment).

[235] *See* Collins & Hudson, *supra* note 56.

III. IN THE LOSS COLUMN: FIRST AMENDMENT CLAIMS DEFLECTED OR REJECTED

As I have noted, the Roberts Court free speech record in the last five years continues to reflect a strong commitment to rigorous protection of those rights. An .800 batting average with the First Amendment claim prevailing 80 percent of the time is quite impressive, indeed. But of the approximately twenty cases surveyed here, there were four that in one way or another rejected or deflected the First Amendment claim. What were they, was there any common ground, and do they significantly undermine the Court's positive pro-free speech record?

A. Retaliatory Arrests

There is a small corner of remedial First Amendment law which involves suits against the police or similar government agencies contending that arrests or prosecutions are motivated by a desire to retaliate against the target because of their protected political speech, for example criticism of the police department or the local government. The problem is if the arrest or prosecution is otherwise valid and based on probable cause, can the speech retaliation claim go forward? Was T. S. Eliot right when he said: "The last temptation is the greatest treason: To do the right deed for the wrong reason"?[236] The Court's answer in two cases was: although it depends on what the "but-for" cause of the arrest was, the normal rule is that the existence of probable cause for the arrest will defeat the retaliation claim.[237] If the arrest was because of the apparent commission of the crime, there is no remedy. But if there was a policy of retaliatory arrests of government critics or clear proof of animus against a particular defendant, the First Amendment claim may go forward. Accordingly, in a 2018 case, the Court found the retaliation claim could proceed, despite the presence of probable cause, because of an alleged official policy of intimidation against the plaintiff.[238] But a year later, a similar claim was defeated by probable cause for the arrest and no other factor possibly indicating retaliation.[239] So, one loss for a First Amendment claimant.

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[236] *See* T.S. ELIOT, MURDER IN THE CATHEDRAL 44 (1935).

[237] Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019); Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1953–54 (2018).

[238] *See Lozman*, 138 S. Ct. at 1954–55.

[239] *See Nieves*, 139 S. Ct. at 1727–28. In *Lozman*, the Court allowed the retaliatory arrest claim to proceed because Lozman alleged "more governmental action

B. Political Gerrymandering of Electoral Districts

The process of "gerrymandering" is as old as the Republic.[240] It is the method whereby legislative districts are drawn and arranged in such a way as to make it more likely that the party in power will more easily elect more of its members to office.[241] For example, in a hypothetical state where Republicans (or Democrats) have only 45 percent of the registered voters, the goal is to figure out an electoral districting plan which allows them to win 55 percent of the legislative districts.[242] The result can often be districts with weird shapes, including those that look like a lizard or salamander. The term "gerrymander" was coined because Boston political leader Elbridge Gerry, who helped write the Constitution and the Bill of Rights, was so good at it.[243]

For two centuries, the Supreme Court stayed out of the situation. But in modern times, suits have been filed claiming that such practices were unconstitutional on two grounds. One claimed an equal protection violation in that such schemes allegedly deprived voters of an equal opportunity to influence political outcomes.[244] The second claim is that such practices punish voters and diminish their political power because of their political views and affiliations, in violation of the First Amendment.[245] For decades, a majority of the Supreme Court refused to resolve such arguments on the ground that there were no "judicially manageable standards" to determine whether the electoral outcomes were the result of gerrymandering or of better candidates

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[occurred] than simply an arrest." *Lozman*, 138 S. Ct. at 1954. Lozman claimed the City of Riviera Beach itself acted pursuant to an official policy of intimidation in which the city officials were retaliating based on Lozman's prior criticisms of those city officials and prior lawsuits against the city. *Id.* Indeed, Lozman was arrested while speaking at a city council meeting open for public comment. *Id.* at 1949–50.

[240] The concept of "gerrymandering" was depicted in a political cartoon in the *Boston Gazette* in March 1812, with the practice also being traced back to eighteenth century England and carried over as the United States was founded. Becky Little, *How Gerrymandering Began in the US*, HISTORY (Apr. 20, 2021), https://www.history.com/news/gerrymandering-origins-voting [https://perma.cc/83NF-L8R6].

[241] *See id.*

[242] *See* Erick Trickey, *Where Did the Term "Gerrymander" Come From?*, SMITHSONIAN MAG. (July 20, 2017), https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/ [https://perma.cc/C5V6-JTEG]. For a number of real-world examples of how this works, see Alex Tausanovitch and Danielle Root, *How Partisan Gerrymandering Limits Voting Rights*, CTR. FOR AM. PROGRESS, (July 8, 2020, 9:03 AM), https://www.americanprogress.org/issues/democracy/reports/2020/07/08/487426/partisan-gerrymandering-limits-voting-rights [https://perma.cc/V5TY-L2GQ].

[243] *See* Little, *supra* note 240.

[244] *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1923–24 (2018) (plaintiffs argued that a new districting plan resulted in wasted votes that violated the plaintiffs' Fourteenth Amendment right to equal protection and their First Amendment right of association).

[245] *Id.* at 1930–31 (discussing plaintiff's argument that new redistricting plan causes dilution of votes).

or campaigns on one side versus the other.[246] In 2018, the Court again declined to resolve the issues.[247] This time, without even reaching the merits, the Court said that the challengers had no standing to complain about the statewide disparities in district outcomes because the plaintiffs had not shown that their voting power in their own districts had been diluted.[248] For instance, the lead plaintiff lived in a heavily Democratic district and was not directly harmed by the statewide disparities.[249] So, once again the Court kicked this particular can down the road. But the net effect was the deferral and, for now, the denial of First Amendment claims of electoral redistricting political punishment and discrimination for party affiliation and allegiance. That's the second "loss" for the First Amendment.

C. Censorship by Cable Television Channels

The third First Amendment loss involved whether a private, nonprofit company, hired by New York City to operate the government-mandated public access channels of a privately-owned cable television system, was subject to the limitations of the First Amendment.[250] Two film producers made a documentary critical of the way the nonprofit company running the public access channels covered a minority community.[251] The nonprofit channel permitted the critical documentary to be shown but received many complaints about it and also got into disputes about future programming with the two producers.[252] As a result, the nonprofit suspended one producer and barred the other indefinitely.[253] Both producers sued the nonprofit, claiming its actions were the functional equivalent of government censorship and violated their rights under the free speech clause of the First Amendment.[254]

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[246] *Redistricting and the Supreme Court: The Most Significant Cases*, NAT'L CONF. ST. OF STATE LEGISLATURES (Sept. 14, 2021), https://www.ncsl.org/research/redistricting/redistricting-and-the-supreme-court-the-most-significant-cases.aspx [https://perma.cc/54YU-7M2V]; *see also* Adam Liptak, *Supreme Court Avoids An Answer on Partisan Gerrymandering*, N.Y. TIMES (June 18, 2018), https://www.nytimes.com/2018/06/18/us/politics/supreme-court-wisconsin-maryland-gerrymander-vote.html [https://perma.cc/2VVG-ARHH].

[247] *See Whitford*, 138 S. Ct. at 1929.

[248] *Id.* at 1928–32.

[249] *Id.* at 1931–34.

[250] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

[251] *Id.* at 1927.

[252] *Id.*

[253] *Id.*

[254] *See id.* at 1926–27.

The case was decided 5–4 along traditional conservative/liberal fault lines against the First Amendment claims.[255] Justice Kavanaugh wrote for the Court:

> The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors. To draw the line between governmental and private, this Court applies what is known as the state-action doctrine. Under that doctrine, as relevant here, a private entity may be considered a state actor when it exercises a function "traditionally exclusively reserved to the State."
>
> . . . .
>
> Under the state-action doctrine as it has been articulated and applied by our precedents, we conclude that operation of public access channels on a cable system is not a traditional, exclusive public function. Moreover, a private entity such as MNN [Manhattan Neighborhood Network, the private, non-profit cable television operator,] who opens its property for speech by others is not transformed by that fact alone into a state actor. In operating the public access channels, MNN is a private actor, not a state actor, and MNN therefore is not subject to First Amendment constraints on its editorial discretion.[256]

Thus, the private, nonprofit public access channel operator was not the government and therefore was not subject to the limitations of the First Amendment.

Justice Sonia Sotomayor dissented, in an opinion joined by Justices Ginsburg, Breyer, and Kagan.[257] In her view, because the city has a property interest in the cable channels, and the state's regulations require that the public be given access to the channels, the public-access channels are indeed a government-like public forum.[258] Accordingly, the First Amendment was applicable, and the nonprofit company that runs the public access channel is subject to the commands of the First Amendment as though it were the government.[259] "Just as the City would have been subject to the First Amendment had it chosen to run the forum itself, MNN assumed the same responsibility when it accepted the delegation" to run the channels.[260]

Two things are worth noting about the decision. First, be careful what you wish for. Do we really want private speakers and publishers to be subject to equal access and other demands that are properly imposed upon government by the First Amendment?

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[255] *See id.* at 1925, 1932.
[256] *Id.* at 1926.
[257] *Id.* at 1934 (Sotomayor, J., dissenting).
[258] *Id.*
[259] *Id.* at 1944.
[260] *Id.* at 1936.

Many Supreme Court cases suggest otherwise.[261] Indeed, Justice Kavanaugh warned about just such a consequence at the end of his majority opinion:

> It is sometimes said that the bigger the government, the smaller the individual. Consistent with the text of the Constitution, the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere of individual liberty. Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise. We decline to do so in this case.[262]

Second, there is an irresistible irony on the horizon, as noted previously. At this writing, former President Donald Trump has filed suit against the Big Three Tech Giants—Facebook, Google's YouTube, and Twitter—essentially claiming that they have subjected him and his supporters to unconstitutional systematic censorship in violation of the First Amendment.[263] Of course, those three entities, despite their enormous size and power over our lives, are private companies. In the first round of commentary about the lawsuits, many First Amendment supporters insisted that the suit was frivolous because the First Amendment only limited government.[264] Ironic that the support for this point of view comes from the Kavanaugh opinion for the conservatives on the Court, and the support for former President Trump's claims against those powerful private censors probably will be drawn from the liberal justices' dissenting opinion.[265]

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[261] *See, e.g.*, Columbia Broad. Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114–21 (1983) (government may not compel broadcasters to accept paid editorial advertisements); Mia. Herald Publ'g. Co. v. Tornillo, 418 U.S. 241, 243, 258 (1974) (states may not require newspapers to grant political candidates free space to reply to character attacks by the newspapers); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572–81 (1995) (states may not require private citizens organizing a public march to include groups conveying messages that organizers do not want to convey).

[262] *Manhattan Cmty. Access*, 139 S. Ct. at 1934.

[263] *See* Complaint, Trump v. Facebook, No. 1-21-cv-22440 (S.D. Fla. July 7, 2021). The complaint for the class action suit filed in the Southern District of Florida was styled: Donald J. Trump et al. v. Facebook, Inc., and Mark Zuckerberg, Case 1-21-cv-22440-XXXX (S.D. Fla. 2021). Similar class action complaints were filed separately against Google, Donald J. Trump et al. v. YouTube, LLC, and Sundar Pichai, Case 1-21-cv-61384-XXXX (S.D. Fla. 2021); and Twitter, Donald J. Trump et al. v. Twitter, Inc., and Jack Dorsey, Case 1-21-cv-22441-XXXX (S.D. Fla. 2021).

[264] *See* Bender & Needleman, *supra* note 160 (quoting legendary First Amendment lawyer Floyd Abrams who "called Mr. Trump's suits against the three platforms 'irredeemably frivolous' and said that Section 230 of the Communications Act provides social-media outlets with more protection than the First Amendment requires").

[265] *See* Ramaswamy, *supra* note 161; Adam Liptak, *Trump Suits Against Tech Giants Face Steep First Amendment Hurdles*, N.Y. TIMES (July 14, 2021), https://www.nytimes.com/2021/07/12/us/politics/trump-tech-lawsuits.html [https://perma.cc/6WHC-TBUL].

D. First Amendment Rights Abroad

The final case in the loss column is similar to the cable access case in that it involves the Court's refusal to reach and apply the First Amendment to the challenged censorship in this case not because it was not the product of "state action," but because it was directed at a foreigner abroad.[266] But the First Amendment claim was again turned away, and, once again, in an opinion for the five conservative justices written by Justice Kavanaugh.[267]

The case involved congressional funding conditions and requirements imposed on organizations receiving funds to fight HIV/AIDS.[268] To get the funding, they were required to adopt a policy explicitly opposing prostitution and sex trafficking.[269] Several years earlier, the Roberts Court held that condition to be an unconstitutional violation of the First Amendment as applied to American organizations.[270]

The American organizations then challenged the application of the requirement to their legally distinct foreign affiliates. This time, the Court held that, since foreigners abroad traditionally are not afforded First Amendment rights, the policy as applied to them cannot violate the First Amendment.[271] The Court's opinion, in a rather dogmatic fashion, reasoned that since foreign citizens or entities outside the United States generally do not possess US constitutional rights, including those protected by the First Amendment, and since these foreign affiliates were separately incorporated distinct legal entities, they could not piggyback on the clear rights of their American counterparts.[272] There was unanimous agreement that foreign agencies and entities had no First Amendment rights, but the question and much of the disagreement concerned the exact relationship between the domestic and foreign entities in this case and whether they were separate enough to impose the no First Amendment rights rule on the latter.[273] But, again, like in the cable case, the Court did not apply the First Amendment in

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[266] *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2089 (2020).

[267] *Id.* at 2084.

[268] *Id.* at 2085–86.

[269] *Id.*

[270] *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 217–21 (2013).

[271] *See Agency for Int'l Dev.*, 140 S. Ct. at 2089.

[272] *Id.* at 2086–88.

[273] *Id.* at 2088–89; *id.* at 2090–91, 2095 (Breyer, J., dissenting).

a weak or watered down way; it did not apply it at all.[274] One possible explanation is the deference to the conduct of foreign affairs, similar to the analysis in the case holding that the First Amendment did not protect giving peaceful, nonviolent "material support" to terrorist organizations.[275]

CONCLUSION

Five years ago, when I assayed the free speech work of the Roberts Court in its first decade, I strongly supported and applauded its generally strong protection for free speech and related rights. But there were two causes for concern. First, the increasingly hostile audience that was criticizing and attacking the Court for what I thought were noble accomplishments.[276] These critics, on and off the Court, essentially said that the Court's overprotection of free speech was not only not praiseworthy but was harming our public policy and our democracy. If anything, that criticism, indeed hostility, has intensified in the five intervening years. Robert Corn-Revere's article in this symposium issue does an excellent job of surveying and refuting the key attacks on the Roberts Court's free speech work and showing that at bottom many such attacks are essentially no different from old fashion censorship of ideas and topics we do not like.[277] For the reasons in this paper, I share Mr. Corn-Revere's support for vigorous protection of free speech. And I think we have seen some measured pushback from some of the justices gently extolling the overriding values of protecting free speech against government censorship.

The other concern I expressed five years ago was for the deep disconnect between the Court's strong affirmation of the indispensable values of free speech and the amount of censorship in everyday life.[278] Sad to say, I think that situation has become much worse. We have experienced an epidemic of censorship from public but more dangerously from private sources. People on the left complain of laws that would censor the doctrines of Critical Race Theory or outlaw protest tactics often used by groups like Black Lives Matter.[279] People on the

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[274] *Id.* at 2089 (majority opinion).

[275] Holder v. Humanitarian L. Project, 561 U.S. 1, 4, 39–40 (2010).

[276] Gora, *supra* note 2, at 69–72.

[277] *See* Corn-Revere, *supra* note 46, at 145–47, 155, 171–72.

[278] *See* Gora, *supra* note 2, at 123–29.

[279] *See, e.g.*, Jonathan Friedman & James Tager, Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach, PEN AMERICA, https://pen.org/report/educational-gag-orders/ [https://perma.cc/Z4MA-S7R9] (making the case that legislative efforts to restrict teaching of Critical Race Theory and other "divisive" concepts threaten free speech);

right point to the censorship by Big Tech of former President Trump and other right wing voices who take issue with the mainstream narratives on climate, COVID-19, and other current issues.[280] From pre-K to 401(K), there are rules that dramatically govern our speech. They are driven in considerable part by antidiscrimination laws which, though designed to prevent discriminatory conduct, often interdict offensive, albeit arguably protected, speech. As the scope of such rules broadens, the scope of protected speech diminishes. And while many of these restraints on speech emanate from governmental statutory or regulatory mandates, many are self-inflicted by institutions without explicit government compulsion. The systemic censorship monitored and enforced by the social media giants is exhibit A these days. And while courts, like the Roberts Court, can impose considerable constitutional restraints on censorship implemented or imposed by the government, that which originates in private sources is not as readily subject to constitutional constraints though it might be violative of statutory or case law. Five years ago, I suggested, to paraphrase the famous Judge Learned Hand passage, that the ultimate salvation for free speech would not come from constitutions or courts, but could only be generated in the hearts of people.[281]

What we need is to establish, or perhaps reestablish, a "culture of free speech."[282] People of a certain age learned the core principle for such a culture on the playground decades ago, where the smart response to a mean remark or epithet was: "Sticks and stones may break my bones, but words can never harm me." Today, people who say forbidden taboo words or express disfavored ideas are sometimes met with physical sticks

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Kia Rahnama, *How the Supreme Court Dropped the Ball on the Right to Protest*, N.Y. TIMES (Aug. 17, 2020, 5:28 PM), https://www.politico.com/news/magazine/2020/08/17/portland-crackdown-freedom-of-assembly-supreme-court-397191 [https://perma.cc/8NYQ-WL6Y] (discussing the "failure" of the Supreme Court to protect First Amendment rights of protestors).

[280] *See, e.g.*, Hudson, *supra* note 146 (citing examples of censorship including Facebook's ability to control speech on its site and even the NFL's reaction to players "taking a knee" during the national anthem at football games); Corynne McSherry et al., *Private Censorship Is Not the Best Way to Fight Hate or Defend Democracy: Here Are Some Better Ideas*, ELECTRONIC FRONTIER FOUND. (Jan. 30, 2018), https://www.eff.org/deeplinks/2018/01/private-censorship-not-best-way-fight-hate-or-defend-democracy-here-are-some [https://perma.cc/S2UE-LRUK] (discussing growth in "'voluntary' platform censorship"); Tom Spiggle, *Why Social Media Companies Can Censor Trump, and Why Your Boss Can Censor You*, FORBES (Jan. 12, 2021, 11:43 AM), https://www.forbes.com/sites/tomspiggle/2021/01/12/why-social-media-companies-can-censor-trump-and-why-your-boss-can-censor-you/?sh=389cf8267b79 [https://perma.cc/W9GP-CHG3] (explaining how private employers and social media companies can censor individuals).

[281] Gora, *supra* note 2, at 125–28.

[282] *See* Robert Tracinski, *We Need More than the First Amendment, We Need a 'Culture of Free Speech'*, DISCOURSE MAG., (June 14, 2021), https://rb.gy/mrjd0g [https://perma.cc/B2JE-YCCS].

in response. But such speakers today are more often met with Twitter storms of condemnation, social media calumniation, and the omnipresent threat of cancellation. What a culture of free speech would privilege is the opposite: namely, rebuttal and response, discussion and debate, diversity of thought, ideas and ideology, and facts and information. It was best put by one of our most famous presidents:

> Americans have fought and died around the globe to protect the right of all people to express their views, even views that we profoundly disagree with. We do not do so because we support hateful speech, but because our founders understood that without such protections, the capacity of each individual to express their own views and practice their own faith may be threatened. We do so because in a diverse society, efforts to restrict speech can quickly become a tool to silence critics and oppress minorities.
>
> We do so because given the power of faith in our lives, and the passion that religious differences can inflame, the strongest weapon against hateful speech is not repression; it is more speech—the voices of tolerance that rally against bigotry and blasphemy, and lift up the values of understanding and mutual respect.[283]

That is from a speech by then-President Barack Obama given to the United Nations.[284]

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[283] Barack Obama, President of the U.S., Remarks by the President to the UN General Assembly (Sept. 25, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/09/25/remarks-president-un-general-assembly [https://perma.cc/9N7M-LJF9].

[284] *Id.*

APPENDIX

ROBERTS COURT FREE SPEECH CASES 2016–2021

(1) *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016).

(2) *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).

(3) *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

(4) *Matal v. Tam*, 137 S. Ct. 1744 (2017).

(5) *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (decided on free exercise clause grounds).

(6) *Gill v. Whitford*, 138 U.S. 1916 (2018).

(7) *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

(8) *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

(9) *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

(10) *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018).

(11) *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).

(12) *Manhattan Community Access Corporation v. Halleck*, 139 S. Ct. 1921 (2019).

(13) *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

(14) *Thompson v. Hebdon*, 140 S. Ct. 348 (2019).

(15) *USAID v. Alliance for Open Society International, Inc. II*, 140 S. Ct. 2082 (2020).

(16) *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020).

(17) *McKesson v. Doe*, 141 S. Ct. 48 (2020).

(18) *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (decided on free exercise clause grounds).

(19) *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021).

(20) *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).