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TRANSCRIPT

The Roberts Court and Free Speech Symposium

BROOKLYN LAW SCHOOL
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The following is a transcription of The Roberts Court and Free Speech Symposium presented at Brooklyn Law School on Friday, April 9, 2021, and sponsored by the Brooklyn Law Review. This transcript has been lightly edited for clarity.

WELCOME REMARKS

Michael T. Cahill[†]
Joel M. Gora[††]
Geoffrey R. Stone[†††]

Dean Cahill:

Good afternoon, everyone. It is just barely afternoon here in Brooklyn. My name is Michael Cahill. It is currently my privilege to serve as dean here at Brooklyn Law School, and I am delighted to welcome you to the annual symposium of the *Brooklyn Law Review*, whose topic is timely and important: free speech and the Supreme Court. This is in fact the third major symposium that we have hosted on free speech in the last five years here at Brooklyn Law School.

Five years ago in 2016, we had a number of scholars and advocates from all over the country surveying and evaluating the pluses and minuses of the first decade of the Roberts Court and assessing its record on First Amendment rights. In 2019, we hosted a conference that marked the one hundredth anniversary of the 1919 case of *Schenck v. United States*, which started a national conversation about the permissible boundaries of the advocacy of

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violence and lawlessness to achieve political ends. This is a topic that has become surprisingly and rather disturbingly timely in its realism and contemporary importance in recent months, playing a central role in the impeachment of a president where there was a conversation about the proper meaning of incitement of violence—a matter at issue back in 1919 in *Schenck*.

Now, once again, we have gathered a number of eminent scholars and advocates to assess the Roberts Court's free speech jurisprudence. John Roberts now has been chief justice for nearly sixteen years, and among the hallmarks of his tenure, and landmarks of his tenure, have been the Court's opinions on free speech issues. In some areas, they have taken a rather aggressive and assertive approach as to both the methodology of assessing and upholding free speech claims and the substance of some of those claims in areas like campaign finance. At the same time, in other areas involving, say, national security or government employees, the Court has been more willing to recognize government restrictions. So, a complicated, mixed, and interesting record on free speech issues for the Court. This symposium is going to examine and assess that record, looking both at areas where the Court has taken an expansionist understanding of free speech and also looking at areas where the Court has left at least potential areas of free speech unprotected.

Before we embark on that interesting conversation, let me take a moment to thank people in our community who have been instrumental in organizing this symposium today. First, I want to note our topflight event staff, specifically Chris Gibbons and Liz Alper, for doing all of the behind-the-scenes work that is going to make things proceed smoothly today. Let me also thank Professor Beryl Jones-Woodin, the faculty advisor for our *Law Review*, as well as the student editors of the *Law Review*, who have handled the logistics of organizing this conference. Of course, I want to thank all of the participants in today's conference. I am not going to name all ten of them. I am sure they will be introduced in due time. But many, many thanks to them for their insights and their contributions. Let me single out specifically only our own moderators and panelists who also helped organize this event, Professors Joel Gora and Bill Araiza on the Brooklyn Law School faculty. And finally, let me thank all of you for attending. I am very pleased to have you here, showing your interest in the kind of dialogue about key public matters that is crucial not only to academic discourse, but really to the future of American democracy. I am very pleased that Brooklyn Law School can provide a forum for that conversation, and I am deeply grateful to all of you for joining and engaging in that discussion. So, without further ado, let that conversation begin. I now turn the podium over to Professor

Joel Gora to give you some further information about today's program and introduce our first speaker. Professor Gora, take it away.

Professor Gora:

Thank you very much, Dean Cahill. First, I too want to welcome all of you to our symposium. And I also want to thank the extraordinary event staff who helped us put this program together and my terrific colleague, Bill Araiza, who is such a great collaborator in planning and implementing programs like this.

We at the Law School are so fortunate to have a remarkable all-star lineup of leading First Amendment experts with us today. They are: Geoffrey Stone, professor and former dean of the University of Chicago Law School; Erwin Chemerinsky, dean of the University of California at Berkeley Law School; Floyd Abrams, perhaps the nation's most well-known First Amendment lawyer; Robert Corn-Revere, a free speech and free press advocate of similar accomplishments and stature; Ellis Cose, an acclaimed author and journalist; Nadine Strossen, New York Law School professor emerita and former president of the ACLU; and highly regarded, powerful scholars, Professor Genevieve Lakier of the University of Chicago Law School and Professor Helen Norton of the University of Colorado Law School.

We are also particularly appreciative of the participation of Ronald Collins, one of America's leading First Amendment chroniclers and analysts, whose indispensable *First Amendment News* is a weekly source of essential information about free speech. And we also want to thank Professor David Hudson of Belmont University College of Law, who has prepared so many of the reports that we are going to be considering. The impressive work of these two scholars in surveying the Roberts Court's free speech record will provide a solid foundation for today's discussion. And again, thank you all for joining us today.

Our very first presenter, Geoffrey Stone, is the Edward H. Levi Distinguished Service Professor of Law and the former dean of the University of Chicago Law School and former provost of the University. He clerked for Justice William Brennan on the Supreme Court, and he has written numerous important books on constitutional law and free speech. He has served on presidential review commissions on national security, and he has authored amicus curiae briefs in the Supreme Court in a number of landmark cases—one in particular, *Obergefell v. Hodges*, on marriage equality. And so, we at Brooklyn Law School are delighted to have him participate in this symposium today. Dean Stone, the podium is yours.

Dean Stone:

. . . .[1]

I. OVERVIEW: THE FREE SPEECH RECORD OF THE ROBERTS COURT

Speakers:
Ronald K.L. Collins[†]
David L. Hudson, Jr.[††]

Commentators:
Floyd Abrams[*]
Ellis Cose[**]

Mr. Collins:

Well, thank you, Geof. I am Ron Collins and with my colleague, Dave Hudson, we are honored to be a part of this third annual symposium on the First Amendment. And thank you to Dean Cahill for your kind and informative introductory remarks, and special thanks to our colleagues, Joel Gora and Bill Araiza, for their help in making this conference possible. Geof is someone that I got to know in my law school days. I think he had written an article in the *Supreme Court Review* in 1974 about public fora. And it was one of those articles that really opened my mind, and it was the beginning of what turned out to be a wonderful friendship with Geof Stone, whose writings on the First Amendment continue to inform me to this day. So Geof, thank you very much for those thoughtful introductory remarks and for participating in today's event.

Today, what we are going to be starting to talk about is a coauthored draft report I did with David Hudson. It is an eighty page, mainly empirical report—that is, we explored the decisional law of the Roberts Court, and in doing so, we gathered information, we took notes, we organized our data, and we classified our data. All of this by way of a prelude to future works relating to jurisprudential analysis of the kind so well done by Professor Geoffrey Stone in his introductory remarks, and also normative evaluations. Again, ours

[1] Geoffrey R. Stone's introductory remarks were omitted from this transcript, but can be found at Geoffrey R. Stone, Introductory Remarks, *The Roberts Court and the First Amendment: An Introduction*, 87 BROOK. L. REV. 133 (2021).

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is just, if you will, an exploration of the Roberts Court's decisional record. As I said, we took notes, we organized our data, and we classified it. That said, let us share some of what our exploration into this universe of law revealed.

When I first read the chief justice's statement, which came from a 2019 interview with Dean Alberto Gonzales at Belmont Law School, I was very much struck by it. Why? Well, the chief justice is a rather modest man—a rather humble man. But, when he said, "I'm probably the most aggressive defender of the First Amendment," that really caught my attention. And soon enough, I found myself working with David Hudson to explore: what exactly did that mean?

In order to do that, we looked at fifty-six First Amendment cases—speech, press, petition, and assembly cases. No religion cases. We looked at fifty-six cases the Court had decided, First Amendment cases, so that means that if they had a free speech statutory case, that was not part of the information we collected. We wanted to see what it meant when the chief justice said, "I'm probably the most aggressive defender of the First Amendment." Well, here is what it meant. And when you look at the data, when you look at the information, it is really striking. The chief justice is in the majority 95 percent of the time. Think about that. That means that he is assigning the majority opinion 95 percent of the time. It is really remarkable when you think of that. He assigned the lead opinion to himself in nearly one-third of the cases—that means almost one out of every three cases, he is assigning one to himself. He has authored twice as many majority opinions than any of his colleagues. And he has written more majority opinions than the combined total of Breyer, Ginsburg, Sotomayor, and Kagan. He has also written more majority opinions than the combined totals of Justices Scalia, Thomas, and Alito. So, when you think of it from that point of view, you get a better idea of what it means when the chief justice said that he was the most aggressive defender of the First Amendment. That is what it means—95 percent of the time.

And what of the liberal wing of the Court? Now think of this: Justice Kagan, all the years she has been on the Court, she has only been assigned one majority opinion; Justice Sotomayor, two; Justice Ginsburg, for all of the years that she was on the Court, three, and none of them significant or landmark opinions. Justice Kavanaugh, in just two years, has already been assigned two majority opinions—more than Justice Kagan and the same amount as Justice Sotomayor for all their years on the Court.

Justice Breyer finds himself in dissent nearly a quarter of the time. What does that tell you? That tells you that the liberal wing of the Court, when it comes to the First Amendment speech cases, are not major players.

So, what about originalism? You hear a lot about originalism and textualism, mainly from the jurisprudence of the late Justice Antonin Scalia. And yet, in his five free speech majority opinions, little or no notice was given to originalism, to textualism. "Congress shall make no law . . . ." Does "Congress" mean just Congress? Does it not apply to the executive branch and the judicial branch? Does "no law" mean no law? As to those sorts of questions concerning originalism and textualism, you will not find any extended discussion in the jurisprudence of the Roberts Court. In lone opinions, Justice Thomas has used his form of originalism to question the doctrine of overbreadth, to challenge the holding in *New York Times v. Sullivan*, and to challenge the application of the First Amendment in state cases involving K–12 students. Again, those are lone opinions. So, practically speaking, originalism—whatever one may make of it—is really not part of the Court's First Amendment free speech jurisprudence.

And what of Justice Clarence Thomas, the senior justice? Well, he is really not a player. He has only had four majority opinions, none of which—save one—was significant. But that one was seminal—*Reed v. Town of Gilbert*. And my colleague David Hudson will soon say more about that. But again, when it comes to free speech, apart from this opinion (which is a major opinion), Justice Thomas and the doctrine of originalism play minor roles.

So much of what is taught in law school is court centric. It treats the First Amendment and constitutional law, or all law for that matter, as if it begins and ends with the work product of appellate judges. But those who study the law, not only the law as announced by judges, but the law as made by lawyers, stand to realize the significance of lawyers. And in that respect, at least two lawyers arguing before the Roberts Court are of particular significance. Paul Clement, the former solicitor general, a major player in the area of First Amendment law, a longtime friend of the chief justice and other justices, has played a major role in campaign finance cases, in big tech cases (one of which he just won recently), and in public sector union cases. He has a petition before the Court right now on that very topic.

You may have not heard the name Kristen Waggoner. Most people have not, but if you are watching the Court and you are tracking the First Amendment cases, and you are looking at that little box that says "attorneys," you will definitely notice her

name. Why? Well, she is the general counsel for the Alliance Defending Freedom. And do you remember that baker's case that went to the Supreme Court? That was the case that she argued: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. She won that case. There is a case out of Washington State right now involving basically the same question, but this time involving a florist who does not want to sell floral arrangements to gay couples. The case is *Arlene's Flowers Inc. v. Washington*. It has been on the Court's docket for more than a year. And she is also lead counsel in *Thomas More Law Center v. Becerra*, a campaign contribution disclosures case which the Court has granted review. So, if you are watching the development of the law in the Roberts Court, these are two people who you have to keep your eyes on.

During his confirmation hearings in 2005, then-nominee John Roberts analogized appellate judging to that of an umpire who calls balls and strikes during the game. It won a lot of attention, and it seemed sort of credible that you would just analogize the work of a judge to that of an umpire. So, let us see how the Court calls its balls and strikes under the work of the chief justice. If it is a campaign finance case involving a challenge to some campaign finance law, the Court has heard eight such cases, and in every single one, *every one*, the challenge to the campaign finance law has prevailed. Every single one. And I suspect it will prevail again in the case that Kristen Waggoner has before the Court involving disclosure requirements. We will see. Public sector union cases: these cases lose almost two-thirds of the time. Government speech cases, as my colleague David Hudson will talk about shortly, receive very little speech protection, as *Garcetti v. Ceballos* and its progeny reveal. Commercial speech: the Court has continued to ratchet up protection for commercial speech from the *Central Hudson* intermediate scrutiny test. And if it applies *Reed v. Town of Gilbert*, that may ratchet it up even further. David Hudson will speak more.

So, who are the winners and losers? Well, according to Adam Liptak of the *New York Times* and the study he did, the conservatives in speech cases prevail 69 percent of the time while the liberals prevail 21 percent of the time. One of the expressions that has caught the attention of many people is the word "weaponizing," and it was one used by Justice Elena Kagan in the opinion of *Janus v. AFSCME, Council 31*. It was a 5–4 2018 public sector union fees case in which she accused the majority of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in

economic and regulatory policy." Worst still, she added, "Departures from *stare decisis* are supposed to be 'exceptional action[s]' demanding 'special justification,' but the majority offers nothing like that here." So, this whole idea of weaponizing the First Amendment, particularly when it comes to matters involving economic regulation, is one of the major concerns expressed by the liberal wing of the Court, mainly through Justice Elena Kagan.

What of the three new justices on the Court? How are they going to inform the calculus of First Amendment jurisprudence? We have no reason to believe, based on what we know of them, that their views will be significantly different than those of the chief justice. Of course, that remains to be seen. But remember, he assigns the majority opinions. And if just two justices agree with him, he still has the majority. If anything, with the advent of these three justices, we may see the Roberts Court's free speech jurisprudence invigorated even more.

So, what of the future? What types of cases might we see more of? Content discrimination, *Reed v. Town of Gilbert*: how will the Court finesse the application of that doctrine? How will it take into consideration the very points that Professor Stone referenced in his discussion? Campaign finance cases: as I said, they are likely to have more of those cases. And what of disclosure cases? Heretofore, the disclosure cases have been pretty much safe from First Amendment challenges, but that may change with the *Thomas More Law Center v. Becerra* case. Furthermore, the Court may formally abandon *Buckley*'s contribution versus expenditure dichotomy. Some believe that the Roberts Court has already done that functionally, but it remains to be done formally. Additionally, I think we are going to see a lot more religious speech cases involving claims of free speech and free exercise: cases involving bakers and florists. And right now, there is a case involving a Catholic foster care provider who declined to place foster care children in gay family homes. That case is before the Court right now and it has been argued. We are likely to see more public sector union fee cases. There is a major one right now that is pending on the Court's docket that Paul Clemente has brought. So, I think we will see more of those. Student speech: it has been a while since we have heard anything, but now there is a case before the Court involving regulation of off-campus speech. So, we are going to see more in that area. The internet platform cases: *Biden v. Knight First Amendment Institute* was vacated and dismissed recently, but I think we are going to see more of those kind of

cases. Defamation cases: undoubtedly, it has been years since the Court has heard a defamation case, but what with the lawsuits against Fox News, Powell, and Trump, we are certainly likely to see more of those cases and we may see, depending on criminal indictments, some incitement cases as well. Finally, facial recognition cases: this is the *Clearview* line of cases. Clearview collects data, particularly photographs, from the internet. It compiles all of that photographic information and sells it to law enforcement authorities, which raises questions about free expression versus privacy. That is certainly a case that we are going to see more of. So, those are the cases that we think the Court will be considering as it proceeds.

As I said, again, our work at this point is primarily an empirical analysis. In other words, we went out into the universe, we took notes, we organized, and we classified. And it remains, as I said earlier, for another day for others to make sense of this in terms of jurisprudential analysis and normative evaluations. With that, I am pleased to turn it over to my coauthor of our report and my longtime friend and colleague, David Hudson, with whom I had the pleasure of working with for many years at the First Amendment Center at the Newseum. David.

Professor Hudson:

Thanks so much, Ron. It is really a great honor for me to participate in this program, particularly with so many First Amendment luminaries whom I have looked up to, admired, and read their work for years.

I want to talk about three basic tenets or areas in which you can see a discernible impact that the Roberts Court has had on the First Amendment. The first one is that the Roberts Court has resisted attempts by the government to create new unprotected categories of speech. This refers back to what Professor Stone was talking about with Justice Frank Murphy's 1942 opinion in *Chaplinsky v. New Hampshire*, where there are certain narrow, limited classes of speech, the regulation of which do not really threaten core First Amendment values. The Roberts Court has been very strong in refuting the government's arguments that there should be new unprotected categories of speech.

The second point, however, which is not so good in terms of the Roberts Court protection of the First Amendment, is that the Roberts Court has generally ruled against public employees, public school students, and prisoners in free speech cases. It is true, of course, that the government has greater power to restrict speech

when the government acts as employer, educator, or warden than it does as sovereign. The fourth category I would also include, which Professor Stone also referenced, was when the government acts as military commander or commander in chief.

And then I want to say a few words (and I believe we have the nation's leading government speech scholar on later, Professor Helen Norton) about how the Roberts Court has issued several opinions that are quite interesting in terms of the government speech doctrine. So, I thought I would mention that as well.

The first point, again, is that an important part of First Amendment jurisprudence is determining whether speech falls into an unprotected category or not. And we have heard a lot of these: obscenity, still governed by the famous *Miller* test in 1973; incitement to imminent lawless action, which is in the news a lot lately because of things that happened in early January, and we still have the *Brandenburg v. Ohio* standard from 1969; fighting words from *Chaplinsky*, words which by their very utterance inflict injury or cause an immediate breach of the peace; and true threats. The Court created the true-threat doctrine in the Court's 1969 decision, *Watts v. United States*, but there is still much uncertainty with the true-threat doctrine. And the Court created the unprotected category of child pornography in *New York v. Ferber* in 1982.

What we have seen, though, is that the Roberts Court resisted the government's argument to create new unprotected categories in four areas. Images of animal cruelty under 18 U.S.C. § 48: *United States v. Stevens* involved a man named Robert Stevens who was promoting pitbull videos. The law was a really bizarre law that was initially designed to criminalize only "crush videos," where women in high-heel stilettos would crush small animals. It morphed into this larger law, criminalizing the display of images of animal cruelty. The US Supreme Court the next year in *Brown v. Entertainment Merchants Association* rejected the idea that violent video games are a core unprotected category of speech. Justice Scalia famously wrote, look, a lot of fairy tales contain violence; the famous line about "Grimm's Fairy Tales . . . are grim indeed." Then we got the celebrated free speech decision of *Snyder v. Phelps*, which involved the really repugnant speech of the Westboro Baptist Church. But you had the great passage from Chief Justice John Roberts about:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain. . . . As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

And then in *United States v. Alvarez*, the US Supreme Court in Justice Anthony Kennedy's main opinion resisted the idea that false speech is always unprotected because sometimes we protect false speech in order to protect truthful speech. Note *New York Times Company v. Sullivan*, where Justice William Brennan famously wrote that "erro[r] . . . is inevitable." We have to sometimes protect speech that is wrong to protect truthful speech to give it "breathing space." Ultimately, what Chief Justice Roberts said in *United States v. Stevens* is that these new unprotected categories of speech must be rooted in history and tradition. And if they are not, the Court is not going to recognize them. Now, Chief Justice Roberts did not say that we would never have a new unprotected category of speech, but it must be one rooted in history and tradition. The government had argued that, under the child pornography case of *Ferber*, if the evil and the harm overwhelmingly outweighs the expressive value of the speech, then you can create a new unprotected category. Roberts said, "look, *Ferber* does not give us that type of freewheeling authority."

Now, moving on to the second category—I sometimes tell my students, context matters. And when I say context, I am referring to the status of the speaker. The essential point is that public employees, students, prisoners, and members of the military do not have the same level of free speech rights, and the Court has created a separate line of jurisprudence in each one of these areas. The Roberts Court has not been protective in these areas. Ron Collins already mentioned *Garcetti v. Ceballos*. I view this as one of the worst free speech decisions in modern memory. Essentially, the Court created a new categorical threshold bar that said, if public employees make statements pursuant to their official job duties, they have no First Amendment protection. Plaintiff attorneys refer to it as being "Garcettized."

There still is the debate—and there was a debate between Justice Kennedy in his majority opinion and Justice David Souter in his dissent—as to whether *Garcetti* applies in the context of academic freedom on college and university campuses. We now have four circuits which have directly or impliedly said that *Garcetti* does not apply in the context of academic freedom. We have the *Demers* case out of the Ninth Circuit, the *Adams* case out of the Fourth Circuit, *Buchanan* in the Fifth Circuit, and the *Meriwether* decision out of the Sixth Circuit, which was just decided. Hopefully, the US Supreme Court will take the case and say that it does not apply. In fairness, the Court did take a case, *Lane v. Franks* decided in 2014, a very narrow exception to *Garcetti*, that said the

First Amendment did protect the public employee who was fired after he gave truthful in-court testimony. Justice Sotomayor referred to a lot of Justice Marshall's decisions back in *Pickering v. Board of Education*, which is the landmark public employee free speech case.

Ron also mentioned student speech, and the Roberts Court did rule against students in *Morse v. Frederick*, which is colloquially known as the "Bong Hits 4 Jesus" case. Joseph Frederick was a very interesting senior in Juneau, Alaska, and he took it upon himself to conduct a series of free speech experiments, one of which was skipping school and going across the street from his public high school and displaying an 8 by 14 foot banner that said, "Bong Hits 4 Jesus" as the Olympic Torch Relay was coming down. Essentially, what the Court did here is it recognized another carve out to the Court's seminal landmark student speech case, *Tinker v. Des Moines Independent Community School District*. And essentially, under *Morse v. Frederick*, public school officials can restrict student speech that they reasonably regard as encouraging the illegal use of drugs. Notably, aside from the *Pico* case, which dealt with library censorship of books, every time the Court has created a carve out, it has ruled against students. So, they ruled against the students in *Bethel School District v. Fraser*, public school officials can restrict student speech that is vulgar or lewd, in 1986. Two years later, in *Hazelwood v. Kuhlmeier*, the Court created a new standard for school-sponsored student speech—educators do not offend the First Amendment by exercising editorial control over the style and content of school sponsored expressive activity. And then we have *Morse v. Frederick* as well. So, it will be very interesting, as Ron said, as to what the US Supreme Court is going to do with off-campus social media speech by students in *Mahanoy Area School District v. B.L.* Do we give school officials the ultimate power to restrict any student speech that is off-campus? Or do we have some sort of nexus test? That will be fascinating.

Prisoners have also not fared well under the Roberts Court. In the early years of the Roberts Court, they decided a case called *Beard v. Banks*. Inmate Ronald Banks was in a segregation unit. For inmates who had gotten into some sort of trouble, and essentially as a form of behavior modification, prison officials said, "You cannot read newspapers and books." Extreme deference was given to prison officials. The only two dissenters in that case are no longer on the Court—Justice Stevens and Justice Ginsburg. So, what we see here is that the Roberts Court, again, has not been very protective at all when it comes to public school students, public employees, and prisoners.

The third area I wanted to talk about is the government speech doctrine. A very interesting exception to the First Amendment in a sense, and certainly the government has a right to be a speaker and control its own message. But the important thing is, if something is classified as government speech, that essentially ends First Amendment free speech scrutiny. And the Roberts Court has been very active in this arena. In *Pleasant Grove City v. Summum*, the Court examined a claim by the religion of Summum when a city in Utah refused to display their monument of the Seven Aphorisms of Summum. And they are saying, "Well, you engaged in viewpoint discrimination because you posted the Ten Commandments for Christians, but you will not post the Seven Aphorisms of Summum." That seemed like a cognizable viewpoint-discrimination claim, but in an opinion by Justice Alito, who has been very active in the Court's government speech cases, the Court said that the monument in a public park is a form of government speech, therefore the free speech claim fails.

Several years later, the Court returned to the government speech doctrine in a case involving specialty license plates. The Sons of Confederate Veterans applied for a specialty license plate that would feature their picture of the Confederate flag. The State of Texas says, "whoa, that is going to be highly offensive to a lot of people, so we are going to reject it." Prior to this decision, the Fourth Circuit had held that rejecting the Sons of Confederate Veterans' specialty license plate constituted viewpoint discrimination and was governmental discrimination of private speech, but ultimately, the US Supreme Court disagreed and found that specialty license plates are a form of government speech. It was a 5–4 decision and the Court said, "look, they are government speech, people associate them with the state, they are a form of government ID," et cetera. Justice Alito wrote a dissenting opinion in that case in which he said, "look, when a normal person sees a car drive down the road and sees the license plate, they do not really associate that with the state. They associate it more with the driver owner of the car." Nevertheless, that is what the Court held. However, in *Matal v. Tam*, a case involving Simon Tam, a musician that wanted to get trademark registration of his band's name, "The Slants," the Trademark Board said no because this is a disparaging term. Simon Tam essentially said, "no, we want to take this term and actually empower ourselves." Ultimately, one of the arguments that the government made was that a trademark is a form of government speech. And in an opinion by Justice Alito, the Court said no, this is not a form of government speech, and to extend the government speech here would be very threatening to free speech doctrine. A couple years later in the *Brunetti* case,

Justice Alito, in a concurring opinion, also held that this would be a grave threat to the First Amendment, that you have to worry about a capacious application of the government speech doctrine because it can really threaten First Amendment free speech rights.

My last point refers to another point Ron raised—the importance of *Reed v. Town of Gilbert*. I agree with Ron that this is a very significant case. Adam Liptak referred to it as a "sleeper case" back when it came out in 2015. Professor Stone's landmark 1987 *Law Review* article explains the content-discrimination principle quite wonderfully. As Justice Thurgood Marshall referred to it, the First Amendment means the government may not "restrict [speech] because of its message, its ideas, its subject matter, or its content." Essentially, there was a divide, however, between some of the justices where you have a regulation where the purpose is not to suppress content, even if on its face it looks content based. But essentially what the Supreme Court said in *Reed v. Town of Gilbert* is that if a law makes distinctions on the basis of content, it is content based, even if there is not some large underlying purpose to suppress speech. I agree with Ron. What will be very interesting is to see how the Court grapples with some of the statements made in *Reed v. Town of Gilbert* and to see how that comports with commercial speech doctrine and the secondary effects doctrine. Under the secondary effects doctrine, if something is classified as a secondary effect, you do not do content-based review. You do content-neutral review. And then in commercial speech, even content-based restrictions on commercial speech are still subject to intermediate scrutiny under *Central Hudson*, even though the Court has been pushing that slightly. So that is a review of some elements of the Roberts Court. Thank you very much.

Mr. Collins:

Thank you, David. And a reminder, the law of the First Amendment, as with the law of the Constitution, is not just what justice is right, but what lawyers do. And in that regard, no lawyer's name in the country is more synonymous with the First Amendment and freedom of speech than that of our next speaker, Floyd Abrams. Mr. Abrams.

Mr. Abrams:

I thought I would address a somewhat different question about the Roberts Court. I have been asking myself which of our decisions, seen through international eyes, would be most disturbing. Or, what would be the opinion that is least consistent with the law in other democratic countries? To take a few, I do not think the *Alvarez* case or *United States v. Stevens* or *Citizens*

United v. FEC would have been decided that way in any other democratic country but ours. But the one that strikes me the most is one which embodies a notion of the First Amendment, which is so inconsistent with other democratic countries that it would be startling. That case is *Snyder v. Phelps*. Eight-to-one opinion. Only Justice Alito dissenting. The case that involved sickening homophobic slurs about a dead soldier near the church in which his death was being mourned, as well as defamatory condemnations of all gay soldiers.

I mention that case because the way I teach a First Amendment course, most often at least, is to compare it with the closest Canadian case. Canada had a case in 2017 in which a religious zealot who was appalled at the notion that a high school in Saskatchewan that was going to teach about homosexuality would even begin to do so. And he printed, in the old-fashioned way, pieces of paper and put them in mailboxes by hand around Saskatchewan, denouncing the school board, and saying the teachers are going to teach buggery and homosexual sex (phrased coarsely) to our high school students. He was tried and convicted of a hate crime in Canada. That decision was affirmed by the Canadian Supreme Court. They cited only one American case in their opinion. And that was Justice Alito's dissenting opinion in *Snyder v. Phelps*. And that sort of stuck with me all this time.

Let me read you two lines from the concurring opinion in *Matal v. Tam*, of Justices Alito, Roberts, Thomas, and Breyer, a 2017 opinion. Just two lines, "Speech that demeans on the basis of race, ethnicity, . . . religion, age, disability, or [the like] . . . is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom," quoting Holmes, "to express the thought that we hate." And I am struck by the fact of how inconsistent that is with shared international views about what sort of speech should be protected and what not. Think of it. The language in *Snyder v. Phelps* was defamatory of the dead soldier and of all gay people. The basic claim made in the material that they handed out and showed, and spoke about on television too, was directly, flatly, unambiguously anti-gay. "God is punishing you, he deserves to die, the parents are Satan-like." That sort of language. And what does the chief justice say in his majority opinion? He says this language deserves "special protection" because it is about a public issue, which is gays in the military. It was about a number of public issues. It is a plausible position, but a more persuasive reading would have been that, in essence, the totality of the language is and was intended to be understood

as an attack on all gay people. Period. If that is so, why would the chief justice have chosen to read the slurs as positions on public policy issues? It was, I suggest, because positions about public issues unequivocally receive the highest level of First Amendment protection and the chief justice was seeking the firmest basis for concluding that the speech, outrageous and deliberately wounding as it was, required just that protection.

I agree with the opinion, but my point only is how uniquely American that is. And as I said at the beginning of my brief presentation, one could make almost the same case with a number of the decisions of the Roberts Court. I am less familiar with foreign law in general, but pretty up-to-date on English law. And they would not say lying is protected or anything like what was set forth in the *Alvarez* opinion. Or that lying about a military metal, let alone the highest metal, is protected speech. I do not think that, similarly, *Citizens United* and *Buckley v. Valeo* would be conceivable in most Western democratic countries. And it is too early to say about digital speech, but I have little doubt that we will wind up with more First Amendment protection in that area than any of the nations that we believe we share democratic values with.

So, that was really the theme I wanted to offer. And to just expand it a touch more and make it fit with the totality of what we are talking about, the Roberts Court has been consistent, powerful, and unique in the world in its First Amendment jurisprudence. And it is likely to remain so.

Mr. Collins:

Thank you very much, Floyd, for those remarks. As Floyd's remarks reveal, sometimes we come to know our own law by seeing how it is perceived by other countries. So, thank you for those remarks, Floyd. Key to the First Amendment is freedom of the press. And one of the people who has long helped make that principle viable is our next speaker, Ellis Cose. Ellis.

Mr. Cose:

Thank you, Ron. Yes, and thank you for having me. Several years ago, Professor Mark Tushnet wrote an article in the *Harvard Law Review* that I found both interesting and provocative. "Scholars of the First Amendment," he said, like the First Amendment in a way that experts of other amendments do not. Where "scholars of the Second or the Fourth Amendment," as he said, are basically committed to understanding the limits of those amendments, "they do not necessarily like [them]." I am not sure that is completely true. I think that plenty of Second

Amendment scholars really love their amendment, or at least they really love their guns. But I think that Tushnet is essentially right. People do have a special affection for the First. It is seen as an unambiguously good thing. It is a fully American thing, as Mr. Abrams was explaining just a second ago. And we wrap ourselves in its' warm protection. That is certainly true of journalists. It has been at least since *New York Times Company v. Sullivan* in 1964. And the irony of that decision is that it flowed from something that was not even journalism. It was an ad criticizing police and other public officials in Alabama, and was taken out by poor Black ministers who were part of Martin Luther King's movement. At its core was a story about the Alabama white racist establishment going after King, in particular, but after protesters and after poor Black preachers who would have been permanently financially ruined because the judgments in the lower courts were for hundreds of thousands of dollars had the Alabama official won. So, even though it was not about journalism directly, it reflected a journalistic value of allowing the little guy to stand up and speak to power. And we have been grateful for that ever since.

And it is not just journalists or First Amendment scholars who have a particularly fond way of looking at the First Amendment. It tends to be informed people in general, at least since the latter part of the twentieth century. And it is not just the freedom from government interference and speech that is seen as something valuable in itself, but it was valuable because it captured something essential to America, an importance of the value to everyone, whatever their station, whatever their status, to be heard. It is an idea in short of what used to be called expressive equality. Genevieve Lakier has written eloquently about this, but it is about the idea that the First Amendment guarantees not only freedom of speech, but also what Justice Thurgood Marshall called "equality of status in the field of ideas." He made that comment in the majority opinion in the 1972 case, *Police Department of the City of Chicago v. Mosley*. Chicago had adopted an ordinance prohibiting picketing within 150 feet of a school during school hours, though it made an exception for peaceful labor picketing. Earl Mosley had been picketing Jones Commercial High School, a selective school in downtown Chicago that he thought had a quota on Black students. Earl Mosley was a postal worker. He was president of another high school's community board. He had been fighting his lonely battle for something like five years, since 1967. He was demanding that Black girls make up half the enrollment of

Jones, the school, and that more Black teachers be hired. Asked his reason by the *Chicago Defender*, which was then the largest Black newspaper in Chicago, he said, "Yeah, I'm tired of carrying mail on the North Side, and seeing all those White folks in air conditioned offices and then watching the Black girls scrub the floors." Enter Marshall: "[U]nder the equal protection clause, not to mention the First Amendment itself," argued Marshall, "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." However unacceptable their views, whatever their station in life, they have a right to be heard was his point.

In talking about equality of status in the field of ideas (he was quoting Alexander Meiklejohn, a political theorist), he argued in the text from 1948 that the reasons for this equality of status lies deep in the very foundations of the self-governing process. When people govern themselves, it is they and no one else who must pass judgment upon unwisdom and unfairness and danger. In other words, there was an assumption that the First Amendment works, not just for big shots, but for the little guy, that it was about speaking truth to power, among other things. And that is one reason this current era, this current Court, for some people, is so puzzling, and so polarizing, and why some people find it hard to understand how a Court could argue that powerful corporations enjoy the same freedom as actual breathing persons. It is one of the reasons that *Citizens United* evoked such an explosive reaction when it was decided in 2010 and still does eleven years later. As you recall, then-President Obama denounced that decision the year it was made in his State of the Union, which was attended by several justices of the Supreme Court. And what he said is that, with all due deference to separations of power, "[l]ast week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limits in our elections." Honestly, I am not precisely clear what the impact has been. We have one of the most distinguished lawyers in the country, the person who just preceded me, the legendary lawyer Floyd Abrams who has found that, of the $2.76 billion raised in the 2016 presidential election, corporations and other businesses accounted for only $67 million—roughly 2.4 percent. The Brennan Center came to a very different conclusion in the study they refer to as a tidal wave of dark money and a tilt towards super PACs because of *Citizens United*.

Putting aside the question of exactly how much dark money and corporate money is pouring into politics, a lot of people are disturbed by the idea that corporations, powerful and wealthy as they are, are receiving the same rights and protections as living human beings. One of the most beautiful dissents I have ever read was by John Paul Stevens in that case, who wrote that "the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its 'identity' as a corporation. While that glittering generality has rhetorical appeal," he wrote, "it is not a correct statement of the law." There is another fact that is just confusing to many: that in a slightly different configuration of justices, the Court saw that matter quite differently only seven years earlier. Like so many other cases, *Citizens United* was a 5–4 decision and it overturned part of *McConnell v. FEC* decided only seven years earlier, as well as overturning the *Austin v. Michigan Chamber of Commerce* decision from 1990.

There is also the question of the Roberts approach and whether it favors religion, or at least a certain perception of the American Christian religion. *Burwell v. Hobby Lobby Stores* allowed closely held corporations to be exempt from regulations that were offensive to the religious perspectives of its owners. The specific case was about birth control, and Hobby Lobby Stores was organized around principles of the Christian faith, as understood by the family that owned it. And the Green family understood that to mean that they should make contraception immoral and should not offer insurance that offered that. The decision is essentially a recognition that we must respect the religious beliefs for-profit corporations may have, which sort of raises the question: can a company, even one privately owned, be a religious entity? Apparently, in the Roberts Court opinion, it can.

And then there is the view of unions, which brings me to *Friedrichs v. California Teachers Association*. A California law allowed unions to become the exclusive marketing representative for public school employees in a particular district. And once the union entered into this agreement to become the marketing representative for the school district, it could establish this shop agency arrangement, which basically meant that it could require public school employees to either join the union or pay the equivalent of dues to the union in the form of what it called a "fair share service fee." And to avoid paying that, the nonmember had to affirmatively opt out of the union or opt out of the fee. A conservative law firm called the Center for Individual Rights thought that was wrong and they got some

California teachers to accept them as their representative and they took it to the Supreme Court. In an editorial in 2016, Dana Milbank, a *Washington Post* columnist who was anticipating what the Roberts Court would do with that, wrote that he thought it would find just another way to stack the deck in favor of the powerful. And he argued, and I quote, "the only real counterweight to Republican super PACs in this new era is union money. And the Supreme Court is about to attack that, too." Now, he wrote that in anticipation of a real decision. The death of Justice Scalia intervened. Merrick Garland was nominated, but as we all know, he was not confirmed (at least he was not confirmed at that time to that job). And so, the Court basically punted on that decision and *Abood v. Detroit Board of Education* was allowed to stand at least for a while. But just for a while, because two years later, we got *Janus v. AFSCME, Council 31*. And again, it was a 5–4 decision that reversed this idea; this forty-year-old decision that unions could collect a fair share of agency fees from non-union members. And Alito wrote the opinion and argued, essentially, that it imposed an excessive burden on those who did not belong to the union. And this has already been mentioned. Justice Kagan took strong exception to this. And she wrote in her dissent that judges, now and in the future, can intervene in economic and regulatory power. And she also described the Court as "black-robed rulers overriding citizens' choices." And she used the phrase that has been invoked before about "weaponizing the First Amendment." Judge Lynn Adelman has argued the decision is largely about the Court's animus to what he calls governmental assistance to challenging the established order.

It is obvious to me that this Court is inclined to be trusting of the powerful or the conservative or the publicly religious or what we used to call "the establishment." The biggest evidence of this may not be its approach to free speech, but its approach to the voting rights amendment, which it eviscerated in *Shelby County v. Holder*. In that decision, Roberts asserted, "Our country has changed," which boiled down to a feeling in his gut that voter suppression was not serious, or at least was not a serious enough problem for the remedy that was in place. A lot of people disagree with that assessment, including Justice Ginsburg, Justice Sotomayor, and other members of the Court. And it was another 5–4 decision. But when you break it down, that and so many decisions are not so much about principles or even about law, they are about the reading of history and of our society. A reading of where we are and what should be prohibited, and whether in the final analyses you are more comfortable erring

on the side of the powerless or erring on the side of the powerful and the connected. To me, it is clear what side the Roberts Court chooses to err on, and it is that that makes me, at the very least, uncomfortable. Thank you.

Mr. Collins:

Thank you very much, Ellis, for those remarks. And I think they lead well into the next question by Lou Adolfsen, who asks: "Do cases like *Citizens United* and *Snyder v. Phelps* suggest that the Roberts Courts wants to treat what we thought were First Amendment issues as matters for voters?" Let me address *Citizens United*. The question is, how does the First Amendment relate to information for voters? For example, does *Citizens United* and its progeny leave campaign-related information to citizens? Or rather does it prohibit, or block, or diminish the amount of information citizens receive? For example, just this term, the Court will hear *Thomas More Law Center v. Becerra*, a case involving disclosure requirements. Now, if disclosure requirements are deemed unconstitutional, then one can argue that information provided to the citizenry diminishes, rather than increases.

Mr. Abrams:

First, that is a great case coming up, with an extraordinary number of briefs and the like. I hope they stay away from your question, as I fear what they would do to disclosure as opposed to the anonymity interest on the other side as a matter of law. That is one of the reasons why there has been a striking divergence on a political level about the amicus briefs. Twenty-two states submitted briefs in support of the Thomas More Law Center, all of them saying that it would interfere with anonymity if information had to be turned over about the largest donors to the attorney general of California. Only two of those states were won by the Democrats in the last presidential election, and they were ones with Republican governors. And eighteen states were on the other side, all of them won by the Democrats. So, there is a high level of political jockeying before the Court. I do not think they are going to reach that sort of issue because if they choose, there are much easier ways to do it. But just one more thought on that. We had the extraordinary situation, and not for the first time, where the solicitor general submitted a brief basically supporting Americans for Prosperity and the Thomas More entity, and then the election occurred, and then there was a new solicitor general, and then there has been a new brief filed by the solicitor general's office seeking a remand to the Ninth Circuit on an issue which the old solicitor general's office did not even think was relevant.

Mr. Collins:

I discern some common ground here between Floyd and Ellis. Ellis, am I wrong in terms of what Floyd has just said?

Mr. Cose:

No, I would not disagree with anything he has just said.

Mr. Collins:

Okay. David.

Mr. Abrams:

May I say, Ellis, I love the beginning story. And if I may just say a two-line personal one: on the anniversary in 1989 of the ratification of the Bill of Rights two hundred years before, I was one of the people who was asked to read an Amendment. They read all of the Bill of Rights. So, I got to read the First Amendment and I was cheered by the audience, and then someone read the Second Amendment and he was booed. And I was thinking, this is only in New York City.

Mr. Cose:

Well, I think you were probably being cheered in your personal capacity, but certainly the First Amendment, as I said, I think it evokes a special set of feelings.

Mr. Collins:

David, do you care to have the last word?

Professor Hudson:

I really appreciate Ellis mentioning *Police Department of the City of Chicago v. Mosley*. That is one of my favorite First Amendment cases, primarily because oftentimes we consider the liberty interest of the First Amendment in conflict with the equality interest of equal protection clause in the Fourteenth Amendment. And what we see in *Police Department of the City of Chicago v. Mosley* is there is synergy between the two. And so, oftentimes something can violate the First Amendment and also the equal protection clause.

Mr. Collins:

On that note, thank you, David. Thank you, Ellis. Thank you, Floyd. Thank you, ladies and gentlemen.

II. FIRST AMENDMENT EXPANSIONISM AND THE ROBERTS COURT

Moderator:
Joel Gora

Speakers:
Robert Corn-Revere[†]
Genevieve Lakier[††]

Professor Gora:

This is our second session: First Amendment Expansionism and the Roberts Court. As you can tell from our earlier sessions, the Roberts Court has been a very strong protector of free speech rights. In a piece that I wrote for our *Journal of Law and Policy*, I claim that the Roberts Court may well be the most speech-protective court in our history. It has extended First Amendment protection on a number of fronts and has rejected efforts by government and its allies to create new limits on free speech. As you are also probably aware, this record has not gone without pushback and challenge from both on and off the Court. There have been many dissents, some of which were referenced just a while ago, and much literature taking serious issue with the Court's expansive view of the First Amendment.

And we are so fortunate today to have in our panel two of the most prominent advocates on the different sides of those various questions. First, Robert Corn-Revere, a partner at Davis Wright Tremaine, specializes in freedom of expression and communication, and has been designated "Lawyer of the Year" for his vital First Amendment cases. He has argued and won a number of precedent-setting Supreme Court decisions, represented major broadcast networks, and also found time to secure the first posthumous pardon in New York history for the late comedian and free speech hero, Lenny Bruce. He has written widely and his forthcoming book, *The Mind of the Censor and the Eye of the Beholder: The First Amendment and the Censor's Dilemma*, will be published by Cambridge University Press in October. One of my contributions to the First Amendment was to write a book on the rights of reporters that inspired Bob when he was a college student to go to law school

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to become a First Amendment lawyer. So, I have done my part. And he is a great one. Professor Genevieve Lakier teaches at the University of Chicago Law School, where her research explores the connection between culture and law, especially pertaining to the First Amendment. She has written a number of powerful articles in top journals on free speech issues with perceptive analyses of the pluses and minuses of the Roberts Court handiwork. Holding both a JD from NYU Law School and a PhD in Anthropology from the University of Chicago, she has also clerked for judges in the Southern District of New York and on the Sixth Circuit. Professor Lakier was recently appointed a fellow at the Knight First Amendment Institute at Columbia University, and we are so pleased to welcome her back to Brooklyn Law School. So, Bob, the floor is yours.

Mr. Corn-Revere:

Thank you, Joel. It is always a pleasure for me to be on any panel that you are on, and it is an honor to be invited to be on this one in particular. I was going to note the fact that you had been a major inspiration for me when I was an undergraduate student. I was a reporter at the time, and trying to figure out if there might be something I could do after undergraduate school to work in this area. I decided to go to law school and to try to find a way to work on cases involving freedom of expression. Since then, I have been fortunate in my career to work on a wide range of First Amendment cases. But that being said, it is a special privilege to be invited to participate in an academic discussion like this one. Floyd is of course an exception because he is the premier First Amendment advocate of our age. But for the rest of us working media lawyers, participating in an academic conference like this one is like going to an auto show and being a mechanic among car designers. As a practicing lawyer, I do not have the luxury of developing new theories or dispensing great thoughts on the First Amendment. I just use the legal tools that are available to me in my job. And so, anytime I get to be part of a high-level discussion like this, it is a special privilege. Thank you for inviting me.

This morning's presentation really could not be more timely. I read in this morning's *New York Times* that President Biden has announced a Study Commission to look at the Supreme Court appointment process and the composition of the Court. We will see if that will make any difference in what the Court is going to look like going forward, although, as I understand it, the Commission is not designed to come up with recommendations per se. And whether or not any recommendations could be adopted is

an entirely different matter. So that leaves for us to debate the pros and cons of the Court as it is.

I think Ron Collins and David Hudson have done a great service by providing a very full analysis of the Roberts Court's First Amendment decisions. It concludes that the First Amendment is the pillar of the Roberts Court's constitutional jurisprudence, and that it has been an exceptionally protective Court. Joel, you also have written on how protective you believe the Roberts Court is when it comes to the First Amendment.

But of course, as the preceding discussion indicates, not everybody agrees with that assessment; there are various ways in which people look at the Roberts Court to either criticize or laud its First Amendment jurisprudence. One perspective is to point to First Amendment cases where the Court did not uphold First Amendment rights where people think that it should have, and I think there is some well-founded criticism here. For example, in the area of student speech, *Morse v. Frederick* is an example of a case where I think the opinion stretched to fit the speech at issue into a category of "school-sponsored" speech that made it regulable. Not a great start for the Court in terms of student speech cases. As David Hudson indicated, *Garcetti v. Ceballos* is devastating when it comes to protecting the First Amendment rights of public employees. You can say the same thing about the national security area. In *Holder v. Humanitarian Law Project*, the Court applied strict scrutiny, but nevertheless upheld restrictions on making "material contributions" to organizations the government deems to be terrorist organizations. These are not high points for the Roberts Court. And interestingly enough, they are all decisions that came out in the early years of the Roberts Court in terms of its First Amendment jurisprudence.

There are other cases, and these are the ones that we have been hearing about in the presentations this morning, where the Court upheld First Amendment claims where certain people think it should not have done so. The main cases on this list are the campaign finance reform cases, with *Citizens United v. FEC* being the headliner and most prominent among them. The union speech cases are frequently listed as well, including *Janus v. AFSCME, Council 31.* Of course, you can argue that there were First Amendment issues on both sides—the interest of the union versus the interest of the union members who did not want to make contributions—but either way, those cases have become fairly hot button items. And then there are other compelled speech cases, like *NIFLA v. Becerra*, which involved disclosure requirements at

family life clinics. That case also has been criticized by people for the Court's finding in favor of First Amendment right.

My view is that these disputes function as something of a Rorschach test. Where people come out on these cases is determined more by their political philosophy than by their theory of the First Amendment. One way of looking at them is to compare cases like *Citizens United* and *Humanitarian Law Project*. Some people will criticize *Citizens United* by characterizing it (incorrectly) as holding that money is speech; yet they will also say the Court erred in *Humanitarian Law Project* for *not* finding that the First Amendment protects "material contributions." As I said, it is sort of a Rorschach Test.

I think that the Court's real strength and its most important contribution has been in those cases that David Hudson talked about—the cases where the Court declined to create new categories of unprotected speech. As Floyd Abrams just told us, those cases distinguish American free speech jurisprudence from that of the rest of the world.

In a quartet of cases, beginning in 2010 and through 2012, the Court explicitly declined the government's invitation to expand the categories of unprotected speech: *United States v. Stevens*, *Snyder v. Phelps*, *Brown v. Entertainment Merchants Association*, and *United States v. Alvarez*. In *Stevens*, the government, with then solicitor general Elena Kagan, contemplated a theory of what she called "low-value speech," suggesting that new unprotected categories could be created under what the solicitor general called "the *Chaplinsky* framework." The proposed test would simply balance the relative value of the speech to be regulated against its perceived social harms. Under the categorical balancing approach proposed there, Congress could not just regulate depictions of animal cruelty (which was the issue in *Stevens*), but these depictions were to be deemed *entirely outside* the reach of the First Amendment. The Court rejected that proposed test, describing it as startling and dangerous, and saying that the First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of its relative social costs and benefits. Essentially the same approach to First Amendment analysis was proposed in various forms in the cases that followed: *Snyder v. Phelps*, *Brown v. Entertainment Merchants Association*, and *United States v. Alvarez*. And in each case, the Court declined to create new categories of unprotected expression.

Two things are notable about this. One is, when in *Stevens*, the Court declined to apply the so-called *Chaplinsky* framework, it clarified that it was not talking about any actual test that was

articulated in the *Chaplinsky* case. The Court clarified that when *Chaplinsky* referred to low-value speech, it was being descriptive. It was essentially summarizing, in dictum, what had been the areas of the greatest controversies in cases leading up to that point, both at the Supreme Court and in the lower courts. And the main areas had been defamation, obscenity (or, profanity in that case), and various forms of incitement. And the Court summarized prior holdings as cases that had held the speech at issue was outside the protection of the First Amendment. But I do not think the Court was suggesting, even then, that the courts were supposed to evaluate the relative value of speech and only protect that speech which was "valuable." So, the Court looked at that history in *Stevens* and rejected a balancing approach. It then reaffirmed that holding in the cases that followed. This has been the Roberts Court's most important contribution to preserving a strong First Amendment.

And to pick up on the point that Floyd made about the difference between protections in US law versus those around the world, I think you only need to compare the relative limited number of unprotected categories of speech the Supreme Court has recognized to the exceptions that are written into the European Convention of Human Rights. Article 10, for example, guarantees freedom of speech, but then also excludes broad categories of speech from that protection. For example, it allows national laws to restrict speech when they are necessary, in a democratic society, in the interest of national security, territorial integrity, or public safety, for the prevention of disorder in crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, for maintaining the authority and impartiality of the judiciary. When you go through that laundry list, it is like listening to a pharmaceutical ad on television where they say, "Do not take if you have the following conditions," followed by a long list that they read at the speed of a disc jockey. I think those are the basic distinctions between the law in the United States that the Roberts Court has reaffirmed compared to that in other countries, even those that protect free expression. Overall, because of its narrow view of First Amendment exceptions, I would say it has been a very speech-protective Court, despite its flaws.

Professor Gora:

Thank you, Bob. Genevieve.

Professor Lakier:

Well, thank you so much for having me. I am going to do my job of disagreeing with my copanelist to make a nice and lively panel. Because I do not think that we should think about the Roberts Court on the whole as a very speech-protective Court, and I do not think we should think that we have a very strong First Amendment right now. In some ways, we have a strong First Amendment, in some ways we have a very weak First Amendment. So, to tie it to the theme of this panel, I think we should understand what the Roberts Court has done is be expansionist with respect to certain kinds of speech rights and be very restrictive when it comes to other speech rights. There is a wide panoply of speech rights and association rights that one could imagine coming within the framework of the First Amendment. And it is worthwhile thinking about what rights the Court has shown solicitude to and what rights it has not. And again, doing my job disagreeing with Bob, I do not think it is just a Rorschach Test, I do not think our criticism of the Court necessarily is and certainly should not simply be: do we like the outcome in the decisions?

I think you can discern, out of the mix of cases that the Court has handed down, a certain view of freedom of speech and ideological construction of the free speech right that we may like or dislike, but that I am not a huge fan of. But I thought I would just spend a few minutes outlining what I think the Court is doing descriptively and then describing some objections to it to understand what the Court has done so far, with the caveat that it is a somewhat new Court now. There has been a personnel change, and so there is a "question mark" about whether this is going to remain the Court's approach going forward. But for now, I will just describe what has been the hallmark of the Roberts Court First Amendment jurisprudence so far.

The Court has been very aggressive at protecting the expressive freedom of property owners. The ability of property owners to use their property for whatever expressive purposes they want, the Court has protected very assiduously, and in that way, I think it is a very expansionist First Amendment Court. And we can see this in a ton of different cases. So, *Citizens United* is in some ways a very expansionist First Amendment decision. And *NIFLA v. Becerra*, which Bob mentioned. The *Janus* case, the labor case, where it is the right of workers to choose where and how their money gets spent on expressive purposes. *Brown v. Entertainment Merchants Association*, which is the right of video game manufacturers to decide the content of

a video game. Maybe to some degree trademark cases, *Matal v. Tam*, *Expressions Hair Design v. Schneiderman*, a whole range of cases dealing with the rights of sellers of expressive materials to freely dictate the terms and contents of those sales, and then the right of people to use money for expressive purposes. The Court has very assiduously protected these rights.

So, we might think after that long list of cases, wow, what a First Amendment protective court. But let us think about the rights that the Court has not protected. And I think in almost all of these cases, we can conceptualize them as the right of people who are not property owners, who do not control the property, or cases in which there is a conflict between, say, national security and police interests and the First Amendment (because when it comes to this conflict, the Court is not speech protective really at all). And I think the one through-line here is that the Court protects the speech rights of the powerful and it does not protect the speech rights of the powerless, but that is getting to my normative account. So, *Nieves v. Bartlett* (2019) is a case that often gets forgotten, but I think is a very powerful indication of the very strong limits on how free speech protective this Court is. The Court says, even if there is a lot of prima facie evidence that someone was arrested because of their speech by police officer, so long as the police had formal probable cause for that arrest (meaning they can come up with a justification for the arrest that sounds in the Fourth Amendment), there is no retaliation claim. *Garcetti v. Ceballos*, where the rights of the government employee, so long as they are pursuing their job, it is completely outside the scope of the First Amendment. And the argument that the Court makes in *Garcetti* to explain why is the argument about the property rights—that someone purchases a certain amount of labor and they get their rights to dictate the terms under which that occurs. *Manhattan Community Access Corporation v. Halleck* case, Justice Kavanaugh's first Amendment decision in which he says, even though there is this nominally private organization that has been set up under state law to regulate public access cable channels, it has no editorial discretion and is essentially created to perform this public function, it is going to be considered a private act for First Amendment purposes and no First Amendment rights. In *Clapper v. Amnesty International*, speakers who feel that their speech is being chilled because they are worried about the possibility of government surveillance do not have standing to bring a First Amendment challenge, the Court said, so long as they have no definitive proof that they are actually being

surveilled. Which of course we can imagine is going to be very hard to come by. *Holder v. Humanitarian Law Project*, which Bob talked about. The *USAID* decision handed down last year, which said foreign people had no First Amendment rights whatsoever. *Morse v. Frederick*. And then, of course, *Citizens United*, one might imagine that the First Amendment rights of the people who do not have the money to be providing a corporation big campaign donations are using money to facilitate express purposes and are worried that they are therefore being shut out of the political process—their speech rights are nowhere in *Citizens United*.

So, we see on the one hand aggressive protection of certain kinds of speech rights and on the other hand, a shrinking of the domain of the First Amendment so that it only applies in certain arenas and to certain kinds of speech rights. Maybe we could say the right of the pregnant woman who goes to the abortion crisis center and wants to have full and accurate information about the services available to her, the right of the person who wants their representative to listen to their voice even if they don't give them a hefty campaign donation, the right of the government worker, the right of the dissident who is maybe worried about government surveillance—these speech rights have gotten left out of the story. And so I think to assess the Court's record on free speech, it is important and necessary to go beyond a frame of just: is it strong, is it a good protector of the First Amendment, or is it not a good protector of the First Amendment? In some ways, this is an echo of the sort of arguments that happened when there was a transition from the Warren Court to the Burger Court. And in many ways, I think the Roberts Court is continuing and intensifying the turn in First Amendment law that the Burger Court initiated. There was this concern when the Burger Court started to come into being that it would not be very civil liberties protective because, of course, Nixon ran against the Warren Court and against this threat of counter-majoritarian judicial power. And the view was, well, the new Court is just going to forget about the Bill of Rights. And then what we saw, of course, with the Burger Court was pretty aggressive protection of speech rights, but only certain kinds of speech rights. And in the celebration of the fact that the Burger Court did not fully forget about the First Amendment, there was a certain lack of attention to the fact that the tenor and the focus of First Amendment law had changed. And I think we are still living within that changed jurisprudence that the Burger Court initiated, where there are very strong

constraints on government regulation when it comes to the regulation of commercial actors and property owners in general.

And I have to say two things in response to Bob's discussion of the *Stevens* case, *Brown v. Entertainment Merchants Association*, and low-value speech cases. First, when Kagan was articulating her theory about low-value speech, she was just cribbing from *Ferber*. She was relying on the kind of "loosey goosey" balancing test that the Court had used in *Ferber*. It was not her invention. And second, I think it is true that the *Stevens* case and the *Brown* case do reflect a good suspicion of the bases for when the government tries to carve out special limited categories of speech as possessing a disfavored status. And actually, I was a little disturbed in the recent case, *Iancu v. Brunetti*, the trademark case, in which four members of the Court suggested that they would be open to having a kind of profanity limitation on the scope of trademark laws. I think that kind of viewpoint-based, content-based effort to discriminate among categories of speech is troubling and problematic, and so to the extent that the Court is resisting that, I think that is good.

So, just thinking about the expansionist half of this equation, what the Court has tended to do is apply a very rigid formulist framework when it comes to speech regulations in the domain that it cares about. So, when we are talking about the regulation of property owners control their property or commercial actors. I do think that there are a lot of questions that can be raised about the threat that it poses to the ability of the government to regulate in the interest of other important interests. So, we might think that the government is doing a kind of moral policing, a moral regulation that is anathema to the goals and concerns of the First Amendment, which are really about the people (not the government) to decide what is morally appropriate speech, good speech, or decent speech. But many of the cases in which the Court is being expansionist, *NIFLA v. Becerra*, *Janus v. AFSCME, Council 31*, are cases in which there are very significant interests on the other side: privacy interests, interests in full information, which we might conceptualize as a First Amendment interest in its own sake. And so, even when it comes to the expansionist First Amendment, we might have some concerns about exactly what the implications of this very rigid and formulist approach to the First Amendment are.

But my main objective in these comments is to raise some questions about exactly how expansionist the Court is and about the very, very, very many ways in which we should recognize that we are having a very narrow and weak First Amendment.

The most important is that (and I think we are experiencing this now) because the Court has interpreted the state action doctrine as rigidly as it has, as narrowly as it has, the First Amendment simply does not protect speakers and users of mass public forums against private censorship. And so, in some ways, we have a very strong First Amendment and in some ways both a weak and a narrow one.

Professor Gora:

Thank you, Genevieve. Bob, how about a moment to respond?

Mr. Corn-Revere:

Thank you. Some very good points there. And maybe this makes me a bad panelist, but let me start with the things on which Genevieve and I agree. I think there are a number of cases, and I mentioned a few of them earlier, where I think the Roberts Court was insufficiently protective of First Amendment interests: *Humanitarian Law Project*, *Garcetti*, *Morse v. Frederick*. And I would agree with her comment about the troubling dictum in *Iancu v. Brunetti*, where there are suggestions that the Court would allow a profanity limitation on trademark law. I do not understand where that comes from, particularly given what the Court actually held in both *Tam* and *Iancu*. So, it is not a decision where the Court got it wrong, but it is an area that I think bears some watching.

I would disagree with the premise, though, that where the Court is most speech protective is where property is involved. And I understand there is sort of a meme going around about "*Lochner*ization" of the First Amendment, which is I think more of a bumper sticker than an argument. But I do not agree that the primary cases, and particularly not the ones that declined to expand the exceptions to the First Amendment, are based on property. Certainly, it is not protecting business interests or property to find First Amendment protections for, say, crush videos, as in *Stevens*, or offensive speech, as in *Snyder v. Phelps*. In *Brown v. Entertainment Merchants Association*, you have video game makers that were behind the case, but certainly it spoke to the First Amendment rights, not just of the producers of games, but also of the consumers, in finding that minors have significant First Amendment rights. And certainly, the defendant in *Alvarez* was not a monied or propertied person. So, the Court's finding of First Amendment protection for lying, absent some other factors, was not in any way protecting business interests. Certainly, the Court has found First

Amendment protection in cases where either commercial speech or other interests are involved, but that is an extension of cases going back to the 1970s, like *Virginia Board of Pharmacy*.

One other point that Genevieve made that I completely agree with is that in cases like *Nieves v. Bartlett*, the Court was too willing to defer to the interests of law enforcement and to find that probable cause is enough to cut off a First Amendment claim for retaliation. That is an area that I think requires special attention in the First Amendment context and an area where the Roberts Court has not lived up to its otherwise good reputation.

Professor Gora:

Thank you, Bob. Genevieve?

Professor Lakier:

No, I will open it up to questions.

Professor Gora:

We have gotten some good questions from the audience, which I am going to share with you. Well, the first is a question that came up to the previous panel, they did not have a chance to answer it, but it is quite pertinent to you, and that is *New York Times v. Sullivan*. As you know, Justice Thomas has expressed misgivings. Circuit Judge Silberman recently had a huge condemnation of that case. I guess, my question is, do you think there is a chance that the Roberts Court, even with its new membership, would want to review *Times v. Sullivan*, and, if so, what is your prediction about what they might do, and how do you feel about that?

Professor Lakier:

I will take a stab at that. So, Justice Thomas is so idiosyncratic. No one joined that opinion in which he called into question *New York Times v. Sullivan*. I will bring up a concurring opinion he wrote this week suggesting that he thinks potentially common carrier regulation or public accommodations regulation of social media companies would be constitutional because this kind of regulation was used at the founding (although it was not, and certainly not with respect to common carrier regulations). There are a lot of questions about Justice Thomas's history, but there too he was going alone. So, I am not terribly worried about the future of *New York Times v. Sullivan*, although I think it is interesting that his critique of *Sullivan* was echoed by Silberman, in maybe even stronger terms. I do wonder

if it points to a shifting of opinion or understanding about the First Amendment, because the First Amendment and the Roberts Court approach, as I was describing it, is as a kind of laissez faire First Amendment, where we are going to allow the marketplace—the literal marketplace, in this case the speech marketplace—to decide truth or falsity and we are not going to allow the government to intervene. I think that political winds are changing, and so it was embraced wholeheartedly, I think, by both those on the right and those on the left for a long time. And I do think that there is beginning to be serious challenges to it and a loss of public faith in it. And so I think Thomas's idiosyncratic views on, among other things, *Sullivan* is one indication of this. I still think it is a very important and valuable decision.

Professor Gora:

Bob?

Mr. Corn-Revere:

I agree with Genevieve that Justice Thomas really is pretty much on his own; I do not see the Supreme Court revisiting or threatening to overturn *New York Times v. Sullivan*. I think there is, as Genevieve mentioned, sort of something in the air, sort of in the winds of change, although it is hard to tell exactly which way that cuts. Perhaps its fulfilling candidate Trump's pledge to open up the libel laws. These defamation cases we have been seeing against Trump spokesman and attorneys in the *Dominion Voting Machine* cases, where actually you have media lawyers in some cases cheering on the defamation claims based on the nefariousness of the speech that they see being targeted. But I think there is going to be, and has been, increasing activity in this area as we have become more polarized. There has been a lot more unguarded speech disseminated widely where the speakers have not exhibited a degree of care for the veracity of their claims. In Justice Thomas's other separate statement, his concurrence with a GVR order in the *Knight First Amendment Institute* case, he writes about how we should expand regulation or government control over internet platforms. This strikes me as contrary to the Court's recent decision in *Halleck*, where the Court held a public access cable channel manager is not a state actor. Again, I see the Court staying on that side of the line rather than where Justice Thomas is suggesting we go.

Professor Gora:

This relates to another question that someone has asked, and that is, the whole thing about the censorship power of these gigantic platforms. If you believe in an expanded view of what a public forum is, if you think that cable case was decided incorrectly, so how do you feel about trying to apply First Amendment safeguards to decisions by Facebook and the other giant platforms to censor people or cancel them or deny them privileges because of things they have said and done? I mean, those institutions have enormous power over speech, as we all know, and they seem to be engaging in a lot of censorship. The normal instinct would be to try to figure out some way to bring them within some First Amendment control would it not? I am not sure I would favor that, but it seems to me that is something that we want to consider. So, what are your views on those issues?

Professor Lakier:

So, I do not think that is necessarily the normal case. What we have done historically with powerful, potentially censorial media companies is subject them to common carrier regulation or quasi-common carrier regulation as it is with radio and TV broadcasters. And I think that would be the most appropriate way to go. It seems like these kinds of first-order decisions would be better handled by the legislature with some kind of judicial oversight as we have done with common carrier regulations, rather than subjecting it all to the power of the federal courts, which could be problematic in all kinds of ways. I do think what is so interesting, though, about this conversation about social media and Justice Thomas's concurring opinion is, up until recently and maybe still today, my view was that there should be some kind of nondiscrimination obligations imposed on the social media companies like we have done with every single other major private media company, save for the newspapers, and even some newspapers have limited and nondiscrimination obligations.

And my understanding was that the First Amendment was going to be a big problem for that because, in the *Halleck* case and in a whole range of cases, the Court has suggested that private companies are immunized by the First Amendment when it comes to editorial decision making. The most famous case, of course, being the *Miami Herald Publishing Company v. Tornillo* case. Now, *Miami Herald* is about newspapers, which have historically played a pretty unique role in our media ecosystems, so not necessarily applicable broadly, but I would have predicted that the Roberts

Court would have taken that view that, even if Congress applied some kind of common carrier or quasi-common carrier obligation on the social media companies, that is a violation of the First Amendment. Thomas here is coming out strongly to provide a story, an originalist argument, I do not think a very convincing one, but an originalist argument for why we should not hold that view. And I think at least some of the fight about the regulation of the internet in the next few years is going to be about whether this kind of regulation violates the First Amendment or not. And here, I think this framing of an expansionist First Amendment is a really tricky and potentially dangerous one, because we might think that those common carrier laws are actually advancing free speech values in a very significant way by protecting the rights of users against a kind of arbitrary and capricious decision making, or motivated discrimination by the private companies. And so, is it really an expansion of free speech if we are going to prevent the government from protecting those users in the name of the First Amendment? What we have here is a fight, really, between different speech rights and different kinds of speech rights, which is why I began my presentation by suggesting we want to be thoughtful about what is an expansion and a contraction.

Professor Gora:

Thank you. Bob?

Mr. Corn-Revere:

I think we need to take some care in describing what we mean when we are talking about "competing First Amendment rights." I have to tell you that, as a former FCC official, the notion of the government being able to decide what is fair or what is nondiscriminatory on internet platforms just gives me the hives. And having seen the Commission and worked with the Commission for a number of years trying to make those kinds of decisions, it never turns out well and will always be manipulated in one way or another, as has been the history of the FCC. A nondiscrimination, common carriage requirement would be Donald Trump's or Josh Hawley's greatest dream. They would love to see that kind of thing imposed. And I talk about this not just from whether or not it will be good policy, but I think, as Genevieve even anticipated, that it would present some rather significant First Amendment problems as well. The importation of common carrier law to media law is really quite a stretch, and to say that platforms cannot have terms of service or editorial rules unless the government approves them, or they are "neutral" from the government standpoint, would create endless problems.

Professor Gora:

We have time for one more question, and it is from my friend and colleague, Professor Murumba. He asks, "Should freedom of speech apply to speech by political leaders: presidents, prime ministers, and the like the same way it should apply to speech by regular people?" Of course, we have a former president who engaged in a lot of political speech. So, what is your response to that?

Mr. Corn-Revere:

I would respond on a couple of levels. One is, we have talked about the government speech doctrine, when the government speaks as an official entity. When the government speaks, it is not exercising a "right;" it is exercising its *power*. It is an aspect of sovereignty. And so, that is one of the reasons why the First Amendment does not apply to government speech. When government employees or government officials speak as citizens, they do have certain First Amendment rights. I will illustrate the difference between the two. As the Supreme Court held in *White v. Republican Party of Minnesota*, judicial candidates have First Amendment rights to speak as candidates, but once they are on the bench, their ability to use that speech or to impose their values from the bench, is limited. So, you cannot have a Supreme Court justice of Alabama, just to pick a random state, put a Ten Commandments monument in the courthouse. Same thing is true of lesser officials—let us say a county clerk is very religious and does not believe in gay marriage. That is fine. It is her right as a citizen to hold that belief. But she does not have the right as a state official when exercising government functions to refuse to give out marriage licenses to gay couples. So, there is a rights versus powers distinction when you are talking about government speech. It is the reason why you cannot have government officials using speech in their official roles to retaliate against people and threaten adverse governmental action, because that is a key aspect of the First Amendment retaliation doctrine.

Professor Gora:

Genevieve, are all speakers equal, including presidents and kings?

Professor Lakier:

I will say two things: one is, I find the question itself interesting because it suggests how much our conversation about free speech is being driven right now by debates about internet, because I presume that this question comes from the Trump deplatforming and this question about whether on the platforms,

presidents should be treated equally. But I will say, as a descriptive matter, they are not treated the same generally. I do not think we should think that this would be such a change from current law. I mean, in *New York Times v. Sullivan* and the current defamation law, public officials are treated differently when they are speaking in their government capacity for sure, but even when not. We might think Trump is going to be an all-purpose public figure. At this point, I feel pretty certain in that conclusion. Or the decision that was just handed down about Katie Hill and the nonconsensual pornography claim that was thrown out of the court on statutory grounds. But the argument was that these pictures are newsworthy because they depict a congresswoman engaging in sexual behavior that some of her constituents would like to know about and might influence their voting, which seems descriptively true, but also suggests that public officials are going to have less protection against nonconsensual porn, for example, than other people. And so, the way in which we use this idea of newsworthiness both in our First Amendment law, and it turns out on the platforms they use it as well, it is going to have differential effects on government officials and other people. And we can understand why. I do think we should recognize the harms that this can impose on those particular people. In general, though, I agree with Bob that, in their personal capacity, presidents have free speech rights, too.

Professor Gora:

Well, that is a great point for us to conclude. I want to thank you both for wonderful and engaging presentations. It has really been a privilege to be a small part of it. And that concludes this session. And I want to thank you both again so much.

III. SPEECH LEFT UNPROTECTED BY THE ROBERTS COURT

Moderator:
William D. Araiza[†]

Speakers:
Helen Norton[*]
Nadine Strossen[**]

Professor Araiza:

My name is Bill Araiza, and I am a professor here at Brooklyn Law School. Along with my colleague Joel Gora and the *Brooklyn Law Review*, we are really delighted that you are spending part of your Friday with us to talk about free speech issues. Our next panel, the one we are beginning right now, contains two really extraordinary scholars and lawyers. And so, in the order of speaking, let me introduce them, then I will talk a little bit about our topic, and then I will lead off with a question that I hope will trigger a discussion among our panelists.

So, first up to bat, so to speak, will be Helen Norton, Professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law at the University of Colorado Law School. Professor Norton's scholarly and teaching interests include constitutional law and civil rights law. Before she entered academia, Professor Norton served as deputy assistant attorney general for civil rights at the Department of Justice and as director of legal and public policy at the National Partnership for Women and Families. She has been honored with the Excellence in Teaching Award on multiple occasions, and in 2014 was appointed as the University of Colorado Presidential Teaching Scholar. Professor Norton is widely published. Her book, *The Government's Speech and the Constitution*, was published by Cambridge University Press, and is an important analysis of this emerging First Amendment issue. I am delighted and honored to note that this time next week, I will be on a panel discussing that book, and I am looking forward to that and to Professor Norton's insights about government speech and other topics today.

Next up is Nadine Strossen, the John Marshall Harlan II Professor Emerita at New York Law School and past national president of the ACLU. Professor Strossen is a leading expert

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and frequent guest media speaker on constitutional and civil liberties issues. She serves on the advisory boards of a number of prominent organizations, including, of course, the ACLU, the Foundation for Individual Rights in Education, and the National Coalition Against Censorship. The *National Law Journal* has named Professor Strossen one of America's "100 Most Influential Lawyers" and several other national publications have named her one of the country's most influential women. Her 2018 book, *HATE: Why We Should Resist It with Free Speech Not Censorship*, was selected by Washington University as its 2019 common read, and her earlier book, *Defending Pornography: Free Speech, Sex and the Fight for Women's Rights*, was named by the *New York Times* as a "notable book" in 1995. We are so honored to have both of these accomplished scholars, teachers, and lawyers here today.

Our topic is an important one—cases where the Roberts Court has ruled against a free speech claim. Indeed, I was joking during the break that this is really the best topic of all the topics we are going to be talking about today because our prior panelists could not resist but start to broach the topic of situations where the Roberts Court has declined to rule in favor of the would-be speaker. Given that the Roberts Court is generally thought to be a pro-free speech court, although obviously people disagree about that, that general characterization suggests that the opposite set of cases, where they ruled against speakers, might give us some helpful insight into the Court's free speech jurisprudence more generally.

I will begin this discussion by asking Professor Norton the leadoff question. Professor Norton, can you briefly tell us about some of the First Amendment decisions where the Roberts Court rejected the would-be speaker's free speech claim, and talk about the particular decisions of that sort that you think are especially important or significant. Professor Norton, take it away.

Professor Norton:

Thank you, Bill, and thanks for that very gracious introduction. I also want to thank Ron Collins and David Hudson and Brooklyn Law School for making this really terrific event possible.

So, to respond to Bill's question, in my opinion, the most consequential and the most damaging of the Roberts Court's decisions rejecting a challenge to a free speech claim is its decision in *Garcetti v. Ceballos*. I share the views that David

Hudson expressed earlier that this is among the Roberts Court's worst First Amendment decisions. Recall that in *Garcetti*, a 5–4 Court created this bright-line rule that treats public employees' speech delivered pursuant to their official duties as speech that is entirely unprotected by the First Amendment. And this is based on the theory, Genevieve mentioned this too, that the government as employer has bought its employees' speech with a salary and thus retains the power to control that speech. In *Garcetti*, the majority then applied this new rule to reject a First Amendment challenge by a prosecutor, who had been punished by his employer after he had written an internal memo that criticized police affidavits for including serious factual misrepresentations. However truthful the prosecutor's speech might be, according to the majority, it was not protected because he was doing his job.

So, lower courts have since applied *Garcetti*'s bright-line rules in hundreds of cases to reject the First Amendment claims of a wide variety of government workers who are punished for accurately reporting government misconduct when it was their job to do exactly that. And examples include police officers fired after reporting government officials' illegal or unethical conduct, financial managers fired after reporting public agencies' fiscal improprieties, health and safety inspectors terminated after reporting health and safety violations, healthcare workers punished after expressing concerns about patient care, and public school teachers punished for expressing concern about student welfare. So, in other words, *Garcetti* slammed the door shut on the prospect of First Amendment protection for public employees' speech pursuant to their official duties. And in so doing, the *Garcetti* rule too often denies the public, denies us, information that we need to hold the government accountable for its performance.

So, next I will talk just a bit about *Morse v. Frederick*. This was the 2007 decision where the Court held that a public school principal did not violate the First Amendment when she disciplined a student for displaying a banner that displayed the message "BONG HiTS 4 JESUS." And there, the majority held that the First Amendment permits public school officials to discipline student speech that can be reasonably regarded as encouraging illegal drug use and thus threatening students' health and safety. The majority then held that the principal there was reasonable to conclude that the message, "BONG HiTS 4 JESUS," promoted illegal drug use. The dissent objected to the majority's deference to the principal's assessment of the

message's meaning. More specifically, the dissent found that a reasonable observer would simply have viewed the student's message as silly and it worried that the majority's approach insulated, and thus encouraged, schools' viewpoint-based discrimination against student speech. So, in both *Garcetti* and *Morse*, the Roberts Court expanded the universe of speech left entirely unprotected by the First Amendment in the context of public employees and public school students.

Next, I want to turn to *Holder v. Humanitarian Law Project*, in which the majority again deferred to the government's assessment of speech as dangerous. But here, it did so in the context of the government's regulation of fully protected speech. On one hand, *Humanitarian Law Project* did not claim to carve out an additional category of less-protected speech, unlike *Garcetti* and *Morse*. Instead, it purported to apply strict scrutiny to what it described as fully-protected speech. But on the other hand, *Humanitarian Law Project* is a very rare case in which the majority concluded that the government's content-based restriction of fully-protected speech survives strict scrutiny. Just a reminder about the background: The Kurdistan Workers' Party is a Kurdish organization in Turkey that the US secretary of state had designated as a foreign terrorist organization. And a nonprofit group called the Humanitarian Law Project wanted to persuade the Kurdistan Workers' Party to use peaceful means rather than violence to pursue its goals in advancing Kurdish human rights. And more specifically, the Humanitarian Law Project wanted to train the Kurdistan Workers' Party on how to use international law to resolve disputes peaceably, how to file human rights complaints with the United Nations, things like that. But federal law makes it a crime for anyone knowingly to provide material support or resources to organizations that have been designated as terrorist organizations. And the statutory term "material support" includes not only money and tangible goods, but also speech in the form of expert advice and training. So, on one hand, all of the justices agreed with the challengers that this was a content-based regulation of protected speech, and so it was subject to strict scrutiny. And all of the justices agreed that the government has a compelling interest in preventing terrorism. But the majority and the dissent disagreed about whether the government's restriction here should survive the narrow tailoring step of strict scrutiny. And the majority concluded that any assistance to a foreign terrorist organization, even for legal and peaceful purposes, furthers terrorist efforts because the majority felt that that support could free up other

organizational resources for violent activities. The majority felt that working in coordination with such groups might legitimize them in the public eye. So, the majority upheld the criminalization of speech to foreign terrorist organizations that advocate nonviolent and lawful objectives on the ground that such speech might unintentionally assist those organizations in criminal wrongdoing. On the other hand, the dissent argued that, since the Court's *Brandenburg* rule protects even speech that advocates illegal activity so long as it is not likely to incite imminent illegal activity, then the First Amendment must protect speech like the Humanitarian Law Project's that does not advocate illegal activity. So, the dissent would have interpreted the law to criminalize speech only when the defendant intended to assist unlawful terrorist activities.

Now, *Humanitarian Law Project*'s implications for the future are unclear. On the one hand, there is the possibility of a broad reading of the decision, which would suggest a return to the "bad tendency" test in certain settings involving terrorism and national security, where courts simply defer to the government's assessment of speech as dangerous, which is what the majority did here. And this is the crisis effect that Geof Stone explained in his opening remarks. On the other hand, David Cole, who represented the Humanitarian Law Project, suggests the possibility of a narrow reading in which courts treat *Humanitarian Law Project* as limited to a specific combination of three facts, where the regulation of speech that is coordinated with (rather than independent of) foreign (rather than domestic) groups for national security (as opposed to other) purposes. He argues that we could read *Humanitarian Law Project* narrowly to apply just in that narrow universe of cases. We will see.

Finally, and very briefly, I want to mention *United States v. Alvarez*. And it may be a bit of a surprise that I mention *Alvarez* on this panel, because in *Alvarez*, the majority of the Court, in three different opinions, agree that the First Amendment protects harmless lies. But in *Alvarez*, we also see that all nine justices agree that the First Amendment does not protect certain harmful lies. And I agree with that. And I just want to flag a few puzzles. Recall that the Stolen Valor Act criminalized lies about receiving certain military honors. And in *Alvarez*, a divided Court held that that Act violated the First Amendment even though the liar's lawyer conceded that the Act neither punished nor chilled any valuable speech. Instead, the plurality and concurring opinions voted to strike down the Act based on concerns about the government's overreaching. In

other words, concerns that focus less on whether and when speech is valuable, but instead on how the government is too often scary and dangerous, especially in contexts where the government may be self-interested, or biased, or simply clumsy. But all nine justices agreed that the government can ameliorate these concerns by punishing lies that inflict sufficient harm.

What the justices did not do, however, is offer any clear or majority guidance on what constitutes sufficient harm. And here, the Court acknowledged the need for limiting principles to address concerns about government overreach, while also recognizing a broader understanding of harm. For example, all the justices endorsed the constitutionality of certain laws that prohibit lies that threaten harm to the integrity of government processes, harms that can be intangible and collective, as well as tangible and individualized. For example, all of the opinions endorsed the constitutionality of laws that prohibit lies to the government generally. And all endorsed the constitutionality of the many laws that prohibit a speaker from falsely representing herself to be a government official.

Wrapping up, in *Alvarez*, a majority of justices agreed that the First Amendment protects harmless lies and that the First Amendment does not protect certain harmful lies, while leaving us uncertain and unguided about how to determine when lies are sufficiently harmful to permit their regulation consistent with the First Amendment. So when we couple this uncertainty with the Court's recent dictum in *Minnesota v. Mansky*, that the First Amendment permits the government to prohibit messages intended to mislead voters about voting requirements and procedures, I think that these mysteries deserve to get and will get a fair amount of attention in the ongoing public discussion about what, if any, role the government should play in addressing harmful lies like those we have seen so recently involving election fraud, election results, and COVID-19. So, I will turn things over to Nadine. I very much look forward to her thoughts.

Professor Araiza:

Yes, Nadine. Please, same questions.

Professor Strossen:

Thank you so much. Well, I join everybody in thanking everybody who has organized and contributed to this really fascinating afternoon. And I am really delighted to share the podium with Helen. I think we have been invited to the same

programs in the past, but this is the first time it has actually worked out, at least virtually.

There are three major points that I would like to add to complement Helen's insightful observations. And I should add, Genevieve, who also spoke quite compellingly about some of the shortcomings of some of these rulings from a free speech perspective.

First, I would like to note a couple major cases in which the Court rejected First Amendment claims. One has been noted by David—*Beard v. Banks* in 2006—which upheld a sweeping prison ban on possessing periodicals and photographs for prisoners in solitary confinement, essentially by rubber stamping prison officials' assertions that the ban had security and rehabilitative purposes, but without any meaningful scrutiny. The other case I would like to mention, which I think has not been mentioned so far, is *Williams-Yulee v. Florida Bar*, decided in 2015, which upheld a sweeping ban on judicial candidates soliciting campaign funds. Again, without rigorous analysis, which the dissent attributed to a thinly veiled antipathy to judicial elections.

The second point I will make concerns the Court's dangerous expansion of the government speech doctrine in *Walker v. Texas Division, Sons of Confederate Veterans* in 2015. David, again, talked about this. This let the government engage in viewpoint discrimination concerning what the four dissenters considered to be not actual government speech, but rather private speech in a limited public forum.

And my third point is, again, something that has not yet been mentioned. And that is that the Court disappointingly passed up two opportunities in two cases involving Fox TV to rule on First Amendment challenges to the FCC's expanded concept of broadcast indecency as extending to even fleeting expletives. In both decisions, in 2009 and 2012, the Court ruled on alternative narrower grounds, thus vacating a unanimous Second Circuit panel decision that had sustained the First Amendment claim, and leaving in place much earlier rulings that have become increasingly anomalous, relegating broadcast speech to second-class status under the First Amendment. And since I see my longtime friend and colleague Bob Corn-Revere here, I will say he was part of that story as well, representing CBS in a case involving a fleeting image, which I am sure we will all remember, the infamous wardrobe malfunction, and in that case, also in 2012, the Supreme Court ducked the issue by denying certiorari.

Now, I have chosen, of those three points, to amplify on the *Walker* case because Helen indicated that we have different views,

and I am following in the spirit of Genevieve that I think we should amplify different perspectives here rather than common ground. *Walker*, of course, upheld government power to reject specialty license plates that it deemed offensive. Again, it expanded what a couple of justices called the "recently minted" concept of government speech, which is totally exempt from the free speech clause. In a nutshell, *Walker* permits government to selectively endorse certain messages by private-sector speakers while selectively disfavoring other such messages, thus doing an end run around the content and viewpoint-neutrality principles that the Court has so strictly enforced in so many other contexts. Now, shortly after the Court issued the *Walker* decision, I got an email from Bob Corn-Revere, which he gave me permission to quote. He said, "The *Walker* opinion began with the eight scariest words in First Amendment law: 'Justice Breyer delivered the opinion of the Court.'"

Now in fairness, Justice Breyer wrote a great dissent in a case that Helen spent a fair amount of time on, *Holder v. Humanitarian Law Project*, and he is justifiably very proud of that dissent. He and I spoke on a panel about the Supreme Court in general a few years ago, and he chose to spend most of his time basically laying out that dissent. But indeed, Justice Breyer in general is (or often tends to be) less speech protective than other justices because he eschews bright-line categorical tests or rules, which tend to be speech protective. For example, he has repeatedly stated that content-based regulations of protected speech should not automatically trigger strict scrutiny. But in *Walker*, ironically Justice Breyer's majority opinion did rigidly enforce a categorical rule about speech—that once speech is deemed governmental, it should be completely exempt from any free speech clause constraints. And to heighten the irony, in the Court's prior major government speech precedent—the *Summum* case, which David talked about this morning—Justice Breyer had disavowed precisely this categorical approach. He concurred in that decision on the understanding that, and I am quoting him, "[T]he 'government speech' doctrine is a rule of thumb, not a rigid category." Even more pointedly, he said that if the government discriminated in its selection of private messages on political grounds, the action might well violate the First Amendment. But in *Walker*, the Texas Department of Motor Vehicles Board did in fact discriminate in its selection of private messages on political grounds. Yet, Justice Breyer's *Walker* opinion still rejected the First Amendment challenge, precisely because he was now treating government speech as a rigid category.

In terms of the political discrimination, I am surprised that the media coverage of the case did not focus on the viewpoint discrimination by the Texas DMV Board. Of course, every account of the case describes the specialty license plate that the board rejected, which featured a Confederate battle flag. The Board rejected this plate because, "[M]any members of the general public find the design offensive. . . ." Yet on the very same day that the Board rejected this plate, it approved another one that many members of the public also found offensive and for very similar reasons, which got almost no national media attention. Specifically, the Board approved a plate celebrating the so-called "Buffalo Soldiers," an all-Black cavalry that fought in the so-called "Indian Wars" in 1867 to 1888. Native Americans testified against this plate, saying they felt the same way about the Buffalo Soldiers as African Americans felt about the Confederate flag. As one Native American leader testified, "When we see the US Cavalry uniform, we are forced to relive an American Holocaust." Well, thanks to the *Walker* ruling, the government now has carte blanche to pick and choose not only between battle flags and uniforms and between different minority groups that find these offensive, but also between any other messages, including between pro-life and pro-choice messages, as has happened in some states.

To be sure, when the government itself is in fact speaking, it may choose its messages. But the problem with a *Walker*-type situation is that the government is selectively endorsing some private messages—worse yet, based on whether or not members of the public consider the message offensive, which has always been considered a violation of the bedrock principle of viewpoint neutrality. In *Summum* itself, the Court warned that the government speech doctrine must not be used as a subterfuge for favoring certain private speakers over others based on viewpoint. Notably, Justice Alito wrote both the majority opinion in *Summum* and the dissenting opinion in *Walker*. So, there is a special force to his statement in *Walker* that the majority there badly misunderstands *Summum*, which was the purported basis for its ruling.

Fortunately, and this is a point that David touched on, since *Walker*, the Supreme Court has rejected litigants' efforts to apply and expand its holding. And I will echo David's recitation of *Matal v. Tam*, to refer to one of the arguments that the government made in an attempt to evade a First Amendment free speech challenge to the so-called disparagement clause, which it was citing to deny trademark protection to "The Slants" for an Asian-American dance band. Notably, one of the government's major arguments was the

government speech doctrine, relying primarily on the *Walker* case. Notably, Justice Alito wrote the majority opinion, and even more notably, it was joined by Justice Breyer. The majority opinion sharply reined in the government speech doctrine with a cautionary note that aligns with Alito's dissent in *Walker*. Noting that this doctrine is susceptible to dangerous misuse, the Court explained that if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government speech precedents. And in distinguishing the *Walker* case, the majority not only recited several factual distinctions, but it then also added this observation: *Walker* likely marks the outer bounds of the government speech doctrine. Nonetheless, given the Court's past seesawing on this issue, it is too soon to know whether this asserted likelihood will actually come to pass. That is a topic for the next conference.

Professor Araiza:

Thank you, Nadine, and of course, thank you, Helen, as well. Helen, I am absolutely delighted to give you the floor if you want to respond.

Professor Norton:

Well, thank you. I would like to engage Nadine on the government speech question where I think we have some areas of agreement and some areas of disagreement. On the areas of agreement, I fully agree with Nadine that we need to be wary of government actors and courts that misunderstand the government speech doctrine to be a sword with which the government can pierce others' free speech rights. And I think the government tried that in *Matal v. Tam*, and the Court appropriately rejected that, as Nadine just described. Here is another example of that that was tried by then-President Trump, and the lower courts appropriately rejected. He was using his Twitter account to do the government's business to announce nominations, to announce policy. He was engaged in government speech on Twitter. And the government speech doctrine means that I do not have a First Amendment right to silence him even if I do not like his speech. But he went further than that and he claimed that once he was speaking in the government's capacity, that meant he also had the right to silence his critics on Twitter, and that is where I disagree. When he chose to engage in government speech on Twitter, and of course, he did not have to, he enabled and controlled a public

forum, because he chose to speak on a platform that enabled public comment. So, once he did that, the public forum doctrine means that, at a minimum, he cannot regulate public commenters based on viewpoints, singling out his critics.

I also think, and maybe Nadine will agree with me on this, that the government speech doctrine remains incomplete in that it remains yet to fully grapple with the ways in which the government speech itself can sometimes violate other constitutional provisions. When can the government's religious speech violate the establishment clause? When can the government's hateful speech violate the equal protection clause? These are the sorts of issues we are going to be discussing at the symposium next week that Bill mentioned that the *Illinois Law Review* is hosting, and I hope that you will join us if your time and schedule permit. Having said that, I do think, in general, the Court's government speech doctrine is sound in that it recognizes that the government must speak in order to govern. And it recognizes that often the government's speech has great value to the public—even when it makes us crazy, it is important for us to know our government's policies and priorities. And in general, I am fine with the outcome in both *Summum* and *Walker*. I think *Walker* was a hard case, even if, as I believe, it was correctly decided, because it illustrates how entanglements and interactions between governmental and private parties complicate the government speech problems. And the way that I would think about it is that we understand specialty license plates as reflecting the government's message that private parties are free to buy and endorse or not, similar to the way that the US Postal Commission invites every year the public to identify possibilities for celebration on postage stamps, and the Postage Commission decides which ones it is going to print and which ones it is not, and the public can buy them if they so choose or not. I think this is actually consistent both with *West Virginia State Board of Education v. Barnette*, where the Court did not question the state's expressive choice to start the school day with the pledge while holding that the First Amendment forbids the government to force students to endorse its expression. And in *Wooley v. Maynard*, the Court raised no quarrel with New Hampshire's choice of "live free or die" as its motto, but it denied the state the power to force an objecting private speaker to display or endorse that motto. That strikes me as the right balance.

Professor Araiza:

Nadine?

Professor Strossen:

Thank you so much, Helen. I look forward to reading your book and I will look forward to attending that conference as well. I certainly agree with the Second Circuit holding in the *Knight First Amendment Institute v. Trump* case. So, I agree completely with your assessment of that decision, and as I understand it, the way all similar decisions have come out around the country, with one possible exception.

I also agree with your point that there are these really interesting, difficult, unanswered questions about other constitutional constraints on government speech. While I agree with what the Court held in *Summum*, I am really troubled about the failure to deal with the establishment clause problem that was thereby presented in a way that David underscored by pointing out this discrepancy by having a monument embodying one religion's founding principles, while rejecting another one's. And I know there was a complicated procedural history in the lower courts that explains why the establishment clause issue was not before the Supreme Court, but I think it was a frustrating outcome that Summum had lost both its establishment claim, and then to add insult to injury, its free speech claim.

On the equal protection clause issue, I have not delved into that very thoroughly, but I remember that many years ago, before the Supreme Court formulated the government speech doctrine, my colleagues in the ACLU of South Carolina, which was then still flying the Confederate flag on the state Capitol, actually brought a lawsuit challenging that as violating the equal protection clause. I do not know what happened to the lawsuit. It was not conclusively resolved, to the best of my recollection, but I think that is a really important issue.

In terms of our disagreement about *Walker*, I think it is, to a large extent, a disagreement about facts or a mixed question of fact in law. Should it be characterized as government speech for the reasons the majority recited? Or should it be viewed as individual speech that was taking advantage of a government-provided forum? I think reasonable people can disagree, and certainly we have no agreed-upon standard for making this distinction. I recall that Justice Souter in *Summum* had proposed something analogous to what we use in the establishment clause context to decide a very similar question: to what extent speech, even a monument in a public park where a private group put it up, should

be seen as government endorsement of religion, and to what extent should it just be seen as government providing a forum for private speech? Souter suggested (I think it was tentative because he recognized this was a newly minted doctrine and we should move quite slowly) something analogous to the reasonable observer test. And that is clearly what Alito was using in his dissent when he mocked observers looking at these various license plates flashing by and thinking, well, they are not going to think the State of Texas was saying, "I would rather be golfing on Monday morning," for example.

Professor Araiza:

I would like to jump off from this discussion that Helen and Nadine have had and sort of take it up a level in terms of a more meta question. So, what I think I heard Nadine and Helen saying was that questions, for example, government speech questions, very often come down to details. They come down to questions of fact: what was the situation with the Texas license plate program, et cetera. So, we have that. And then Helen, in her introductory remarks, was talking about *Humanitarian Law Project*, and she recognized that all the justices on the Court applied a heightened, maybe even an explicitly strict level of scrutiny, but simply disagreed on the application. And so, the question that I want to ask, and I ask my students this all the time, and I am sure all the First Amendment professors in this room do the same: what works better to resolve these sorts of questions, a rigid, clear-cut rule, or a more contextual, sort of all-things-considered balancing test? Because it seems to me that both of these issues—what one does with strict scrutiny, and the sort of manipulation of strict scrutiny that might have happened in *Humanitarian Law Project*, that Nadine mentioned might have happened in *Williams-Yulee*—that sort of manipulation happens if one goes down the kind of rigid rules path. On the other hand, the alternative is not necessarily as attractive either because it ties us up into fact questions, where every case is a law unto itself. So, Helen I will start with you.

Professor Norton:

Thank you for that question, Bill. Two things: one of my concerns about *Humanitarian Law Project* is that I do not believe that the Court was transparent about what it was really doing. The majority said that it was applying strict scrutiny, but it is really hard to see how that was a rigorous and skeptical view of the government. But it seemed very, very deferential. So, I think that is dangerous if the Court says it is being suspicious and is actually being deferential. And if there is a good reason to be deferential, we

should be transparent about it. Going to categorical rules as opposed to context-specific balancing, I generally prefer the latter to the former. I smiled and laughed to hear Nadine's story about Bob and the eight scariest words in the First Amendment, and I will scare you even further. I think Breyer's on to something when he says that we should not pretend that hard First Amendment questions are easy by forcing them into two very rigid and mutually exclusive boxes. And that there is a role for being sensitive to the fact that some First Amendment problems are hard because speech is complicated and people are complicated and government is complicated, and that complication deserves the sensitivity of flexible standards.

Professor Strossen:

So, I tend to disagree with Justice Breyer and Helen, recognizing the complexity, but having a real distrust of government discretion in this area, including when the government official is wearing a black robe. Because throughout history to the present day, the more latitude an enforcer of a speech restriction or a principle that governs speech has, the more consistently we see patterns of arbitrary and capricious enforcement at best, discriminatory enforcement at worst. So, it is impossible to eliminate discretion, nor would we want to. That would be going too far. And therefore, I do have to acknowledge that even the so-called categorical rules, and I do not mean just strict scrutiny, but even more specific categorical rules, such as the definition of what is government speech, or the definition of what is a true threat, or the definition of what is punishable intentional incitement, even these do not completely eliminate discretion and leave, in fact, enough wiggle room that a determined court could wiggle its way through. I certainly agree with the transparency, Helen, when the Court has pretended to apply a fairly strict scrutiny, but in fact has not done so. Here is a good example—the cases involving nude dancing and other secondary effects cases, I would just much rather have had the Court straightforwardly, honestly say we really think this is lower-value speech, it should not be subject to the same protection. I would strongly disagree with that holding, but it would have done less damage than creating a doctrine, and I think the same has happened with government speech doctrine. But every zealous advocate is going to have a responsibility to raise it in defense of every restriction on speech until or unless the Court would overturn those doctrines.

Professor Araiza:

Great. Helen, I am going to give you the last question. This comes back to a discussion of *Garcetti*, and there was a great question in the Q&A box about whistleblower statutes and whether whistleblower protections for employees maybe obviate some of the trouble or problem that *Garcetti* has caused, especially for government employees. And to make your burden even tougher, if there is anything that you want to add about, as a general matter, statutory protections reinforcing First Amendment protections. Go ahead.

Professor Norton:

So, the majority in *Garcetti* basically said just that: just do not worry that we are stripping public employees' speech of First Amendment protection, legislators can protect public employees by passing statutory protections for whistleblowers. Well, that requires political will, that requires legislators to do just that. And often, legislators have no interest in enacting those statutes, and when they do, those statutes are notoriously limited and patchwork. So that has been limited. It is possible, of course, to pass rigorous statutes that do support First Amendment protections. That has been too rare in the whistleblower context.

Professor Araiza:

Thank you. Any last words Nadine?

Professor Strossen:

I agree.

Professor Araiza:

Okay. What a fabulous conversation. Please join me in giving a round of virtual applause both to Nadine and to Helen for just a fabulous discussion. Thank you so much.

IV. CLOSING OBSERVATIONS

Moderator:
William D. Araiza

Speaker:
Erwin Chemerinsky[†]

Professor Araiza:

Now we are going to move directly to our last speaker. Our final speaker is Erwin Chemerinsky, dean and Jesse H. Chopper distinguished professor of law at UC Berkeley School of Law. If I did Erwin's bio any justice at all, I would take the next twenty minutes, and he would not have a chance to talk. So let me just say that Erwin is really one of the giants of American law and American legal education; as a scholar, as an administrator, as a teacher, as an advocate, he has really been nothing short of extraordinary. And I will say one thing to boast about him. In 2017, the *National Jurist Magazine* named him the most influential person in legal education in the United States. And that is not a bad choice at all. I am delighted to introduce Dean Chemerinsky. Erwin, you are on. Welcome. Thank you for coming.

Dean Chemerinsky:

Thank you so much for the incredibly kind introduction. It is truly a great honor and pleasure to offer some thoughts at the end of this terrific conference. I thought I would just offer a few observations with regard to the Roberts Court and free speech. Hopefully, I will not repeat too much of what was said before, but can also try to sum up some of what was said.

I would make three comments. First, I think that ideology often trumps doctrine in precedents on the Roberts Court when it comes to free speech. Let me start by comparing two cases, one of which has not been discussed this morning, and one which has been discussed a great deal. The one that has not been talked about is *Milavetz, Gallop & Milavetz, P.A. v. United States* from 2009. Federal bankruptcy law required that attorneys, in their advertisements, label themselves as "debt relief agencies" even when they were not doing that at all. This seemed to me clearly unconstitutional compelled speech. But the Supreme Court, 9–0, rejected that argument and upheld the federal law.

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Compare that with *NIFLA v. Becerra*, which has been much discussed this morning. This, of course, involves the California law that required that pregnancy counseling centers post a notice that the state would provide free and low-cost contraception and abortion for women who could not afford it, and also, that unlicensed facilities would have to disclose that they were not licensed to provide medical care. The Supreme Court declared that unconstitutional, 5–4.

I cannot reconcile those cases. To me, it is simply that the Court in the former thought that they were dealing with lawyers who are sleazy, with little factual basis to support that, and the latter is all about the Court's hostility to abortion rights. In both instances, it was about requiring factual information disclosed. In the former case, it was actually inaccurate factual information, and the latter was completely accurate. But the former law was deemed constitutional and the latter was unconstitutional.

Or compare two other cases from the Roberts Court that have been much discussed this morning. The first, of course, is *Garcetti v. Ceballos*, which was just talked about, where the Supreme Court said there is no First Amendment protection for the speech of government employees on the job in the scope of their duties. But compare that to *Janus v. AFSCME, Council 31*, where the Supreme Court overruled a forty-year-old precedent and said it violates the First Amendment to force non-union members to pay the share of their union dues that go to support the collective bargaining activities of the union. When you look at these two cases together, you realize that the only free speech right for government employees that the Roberts Court has protected is the right of non-union members to not have to pay the share of the union dues that they benefit from.

The only explanation is that it is all about ideology. To make the more general point, and here I am echoing I think what both Nadine Strossen and Helen Norton said, is that the Roberts Court is generally a free speech Court, but not when the institutional interests of the government are at stake. So, whether it is prisoners in the case like *Beard v. Banks*, or students in *Morse v. Frederick*, or the military in the *United States v. Apel* (that I argued and lost unanimously in the Court), or the employee context like *Garcetti v. Ceballos*, or the national security context like the case that was just talked about, *Holder v. Humanitarian Law Project*—this is not a free speech Court at all. And so, to me, what all of this adds up to is that the justices' conservative political ideology is much more important in many of the cases than First Amendment doctrine or prior precedent.

A second observation that I would make with regard to the Roberts Court is the tremendous inconsistency in the legal test that it uses in free speech cases. The last questions in the prior session were touching on this. There does seem to be a choice between two approaches to free speech: one of which stresses the levels of scrutiny, and the other which is about interest balancing. The majority of decisions tend to use the levels of scrutiny, but if you look at Justice Breyer's opinion in *United States v. Alvarez*, or for that matter, Justice Kagan's opinion in *Reed v. Town of Gilbert*, they are endorsing much more in the way of interest balancing. I want to suggest that what the majority is often doing is interest balancing, but under the guise of the levels of scrutiny. And you see this especially in the inconsistency and the phrasing of the levels of scrutiny and free speech cases from the Roberts Court.

Or consider the *Janus v. AFSCME, Council 31* case. And it said it was using "exacting scrutiny." And to quote the language in the decision, the Court said this "is a less demanding test than the 'strict' scrutiny" and therefore is a discrete, newly recognized level of review. What is the difference between exacting scrutiny and strict scrutiny? It drives my students crazy, because I cannot articulate what a meaningful difference is, even though the words differ. Or, go back to *Williams-Yulee* that was discussed earlier. There, the Court seems to use exacting and strict scrutiny synonymously. In *United States v. Alvarez*, Justice Kennedy says, it is "the most exacting scrutiny." Is that something between exacting and strict scrutiny? In June 2021, in *Americans for Prosperity Foundation v. Bonta*, Chief Justice Roberts's plurality opinion said it was using "exacting scrutiny," which he defined as "substantially related to a sufficiently important [government] interest." How is that any different from intermediate scrutiny? Or, sometimes the Court phrases strict scrutiny as necessary to achieve a compelling purpose. Sometimes it just has to be narrowly tailored. To me, those connote different things, but it does not always seem to have a different meaning with regard to the Roberts Court.

Why does this matter so much? I think it lets the Court do whatever it wants just by how it phrases the level of scrutiny. There is so much flexibility in the test, it leads to what I started with—the ability of ideology to trump doctrine and precedent. I think it also means that what the Court is often doing is balancing, even when it purports to be using the levels of scrutiny. And I think that is inconsistent with the transparency those talked about earlier. I can certainly see a defense, as

Nadine Strossen was arguing for, in having much clearer tiers of review. But then they need to be consistently defined and consistently applied. I think I come out more like Helen Norton and say, let us just be honest and have the courts balance explicitly all of the factors. But if that is what the Court is doing, that too should be transparent and I do not think it is with regard to the Roberts Court.

Third and finally, I want to look to the future. And I want to take what has been said this morning and try to project: what are we likely to see in the next years and decades to come? I think we are going to see great changes with regard to the law of free speech from the Roberts Court in its remaining years. Let me give three reasons why I think we are going to see these changes. One is: technological changes are going to challenge traditional free speech doctrine. It is interesting how few cases there have been from the Roberts Court dealing with the internet and social media. *Packingham v. North Carolina* is one where Justice Kennedy wrote his ode to the internet. Before the Roberts Court, there was *Reno v. ACLU* that struck down provisions of the Communications Decency Act. But at least when it comes to free speech, the Court has not dealt much with this crucial technology.

I believe that the internet and social media that surround it are the most important changes with regard to free speech and free press since the development of the printing press. It has tremendously democratized the ability to reach a mass audience. It gives immediate access to everyone to huge amounts of information. But it also means that false information or harmful information can be spread so quickly.

I think the problem of deep fakes has posed First Amendment issues that are far more difficult than the Court has yet had to grapple with concerning the internet and social media. I think it is inevitable that Congress, in some way, is going to rewrite Section 230 of the Communications Decency Act. I have no idea how they are going to do it, but whatever they do in that regard is going to lead to new free speech challenges. The more general point, though, is that technology has changed so much. First Amendment doctrine has not kept up with it, but it is going to have to in the years ahead.

Second, there has been a significant change in ideology on the Roberts Court over the last several years. I say the obvious when I point out that it has become a much more conservative Court in recent years. But think about how this is likely to play out with regard to free speech. Justice Kennedy

was often very much a free speech justice, but not always. He wrote *Garcetti v. Ceballos*. He was in the majority in *NIFLA v. Becerra*. He was in the majority in *Janus v. AFSCME, Council 31*. But overall, Kennedy certainly saw himself as a free speech justice. Will the justice who replaced him, Justice Kavanaugh, be as much a free speech justice? Justice Ginsburg was so often on the side of free speech. Will Justice Barrett who replaced her be as much a free speech justice? And there are certainly times where Justice Scalia was a free speech justice. Before the Roberts Court, we could point to his joining the majority in *Texas v. Johnson* in 1989. During the Roberts Court, he wrote the majority opinion in *Brown v. Entertainment Merchants Association*, striking down the California law that kept those under eighteen from buying or renting violent video games. Will Justice Gorsuch be as much of a free speech justice?

Overall, I think the Court being more conservative is going to manifest itself as the Court using free speech doctrine to strike down social regulations, what Justice Kagan referred to in her dissent in *Janus* as "weaponizing the First Amendment." Or what other commentators have called the "*Lochner*izing" of the First Amendment. I think the *Sorrell v. IMS Health Inc.* case is an example of that. I think a more conservative Court will be even more inclined to defer to the government as government. And so, the areas that I and others pointed to, where the Roberts Court has been deferring to the government, I think we will see even more of that. And there might even be larger doctrinal changes on the horizon. I was very concerned a couple of years ago in *McKee v. Cosby* when Justice Thomas read an opinion calling for the reconsideration of *New York Times v. Sullivan*. We know, more recently, that Judge Silberman on the DC Circuit has done so. I have always regarded *New York Times v. Sullivan* as one of the pillars of free speech law. It is why the late Harry Kalven said it was "an occasion for dancing in the streets" when it came down. But perhaps there is now a conservative majority to reconsider even that pillar.

And finally, in terms of change, I think there is a change in social attitudes with regard to speech. I am not sure how that is going to influence the Roberts Court. But free speech is not looked at today in society or in academia the same way that it was when the Roberts Court began in 2005, and certainly not when many of us were in college or law school. I see this among my students all of the time. A few years ago, there was a whole week of events being held on the Berkeley campus, with

controversial conservative speakers. The chancellor convened a forum in the largest auditorium about free speech on campus. One of the other panelists said that he thinks that the largest problem in society is white supremacy, and the chancellor should exclude any white supremacist speakers from the Berkeley campus. There was a loud applause. In the question and answer period, a student very eloquently said, "I feel threatened when there are speakers like Milo Yiannopoulos and Ann Coulter on campus. I want the chancellor to exclude them even if it means that the First Amendment is not being complied with." There was enormous applause from the audience. I was a member of the panel and I and said, "be clear, if the chancellor were to exclude the speakers, it would violate the First Amendment. They would sue, and they would win. When Auburn University excluded Richard Spencer, the white supremacist, his supporters sued and they won." I said, "the campus will have to pay the attorney's fees, and maybe because the law is so clear here, the chancellor will be liable for any damages. We will just make martyrs over those excluded. Nothing will be gained, they can speak anyway." No one applauded when I said that.

Last year, I defended the right of Ann Coulter to speak on the Berkeley campus. And if you look on the Berkeley Law website now, you will find a statement from affinity group leaders accusing me of, and I am quoting verbatim, "defending the intellectual acceptability of white supremacist views." I have never defended the intellectual acceptability of white supremacist views. I think there is a huge difference between defending somebody's right to speak and defending the intellectual acceptability of what they say. But many of our students do not see it that way, and many in society do not see it that way. And what will this shift in social attitudes mean in terms of free speech doctrine in the years and decades ahead?

Professor Araiza:

Erwin, a massively large question in a ridiculously small response window: Is there any hope for neutral principles in First Amendment law when, as you started with and as you reiterated, ideology drives so much of what the Court is doing? Is there any hope at all that we could actually have First Amendment law?

Dean Chemerinsky:

I do not believe there is such a thing as neutral principles. I think if you go back and reread the Herbert Wechsler article "Towards Neutral Principles," it is a very disturbing article because

it is really just a criticism of the end of *Brown v. Board of Education* as not following neutral principles. I believe that all constitutional law is about value choices. In terms of the levels of scrutiny, what is a compelling interest, or an important interest, or a legitimate interest? Is that not inevitably a value choice?

But what we can ask for, and this goes back to what was said at the end of the last panel, is for transparency. We can ask for the Court to be explicit and clear about the test that it is applying and how it is applying it. If the Court is going to follow the levels of scrutiny, then state them consistently, and do their best to apply them consistently. If the Court is going to do the interest balancing that Justices Breyer and Kagan called for, articulate explicitly what is being balanced and how it is being balanced. None of it is neutral, but I do not think constitutional law can ever be neutral in an ideological sense.

Professor Araiza:

Thank you. Thanks to all of our panelists for participating in what I think was just a fabulous event. Thanks to everyone in the audience who stuck it out. And on behalf of Brooklyn Law School, my colleague Joel Gora, and the *Brooklyn Law Review*, thank you all for attending. I will not say travel home safely because you are probably already home, but thank you for coming, and we hope you enjoyed it.