

The Roberts Court and Freedom of Speech

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I was asked to talk about the Roberts Court and freedom of speech. I thought what I would do is try to situate the First Amendment discussion in some larger themes about the Roberts Court—where it is now and where it is likely to go in the foreseeable future.

I want to begin with some numbers concerning the Supreme Court. I think they are very revealing. Last year the Supreme Court decided seventy-three cases after briefing and oral argument. This is a bit less than the seventy-five cases decided in the year before, but more than the sixty-seven cases the year before that or the sixty-eight cases the year before that. But to put that in some historical context, through much of the twentieth century the Supreme Court was deciding over 200 cases a year. As recently as the 1980s, the Court was deciding about 160 cases a year. To go from 160 cases to seventy-three cases in two decades is truly remarkable. It has enormous implications for all lawyers no matter what their field of practice. More major legal issues go a longer time before being resolved. More conflicts among the circuits in the states go a longer time before being settled.

There is another, less noted implication of the smaller docket. As the number of cases has gone down, the length of the opinions has gone up. I can show you a perfect inverse relationship. As the number of decisions

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decreases, the length of the opinions, as measured by words per opinion and pages per opinion increases. Now I am not sure what is cause and what is effect. Are the Justices taking fewer cases because they want to write longer opinions, or, as I would guess, are they writing longer opinions because they have fewer cases?

Last term, the most important case—certainly the most important First Amendment case—was *Citizens United vs. Federal Election Commission*.¹ The slip opinion totaled 157 pages long.² But that was nothing compared to the Second Amendment case that came down on June 28, *McDonald vs. City of Chicago*.³ It was 220 pages long. One of the things I have to do every July is prepare the annual supplements to my Constitutional Law and Criminal Procedure casebooks. There is no way to edit a 157 page opinion, let alone a 220 page opinion, into an assignment manageable by law students in one night without making a hash of it. So I have decided to start a new campaign and I want to recruit you to join me in it: word and page limits should be imposed on the United States Supreme Court.

Another statistic that I found disquieting last term was that there were fourteen cases decided in per curiam opinions without briefs and oral arguments. These are cases that were decided entirely on the petition for certiorari and the opposition to the petition for certiorari. I am enough of a lawyer that I want the chance to at least brief and argue my case. Here, the Supreme Court was deciding without briefs and oral arguments. There is a tremendous difference between what goes into a petition for certiorari or an opposition to petition, compared to a brief on the merits. I hope this is not the beginning of a trend.

One more statistic about last term, the two Justices who were most often in agreement were Justices Scalia and Thomas. They voted together ninety-two percent of the time. Next most often in agreement were Justices Ginsburg, Breyer, and Sotomayor. They voted together ninety percent of the time, although not always in the same cases.

The second theme I would identify is familiar. When it matters most, it is the Anthony Kennedy Court. That is true with regard to freedom of speech and the First Amendment as with all other areas of law. Last term, Justice Kennedy and Chief Justice Roberts were both in the majority ninety-three percent of the time, the most of any Justices. The year before, Justice Kennedy was alone being most often in the majority, ninety-three

1. 130 S. Ct. 876 (2010).

2. *Citizens United v. Fed. Elections Comm'n*, No. 08-205, slip op. (U.S. 2010), <http://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.

3. 130 S. Ct. 3020 (2010); *see also McDonald v. City of Chicago*, No. 08-1521, slip op. (U.S. 2010), <http://www.supremecourt.gov/opinions/09pdf/08-1521.pdf>.

percent of the time.

Of course, it is most apparent that this is the Kennedy Court by focusing on the five-to-four decisions. These are usually the most important decisions, and by definition they are the most controversial. In each of the five years in which John Roberts has been Chief Justice, Anthony Kennedy has been in the majority in more five-to-four decisions than any other Justice. Last year there were seventy-three cases and sixteen of them were decided five to four. Justice Kennedy was in the majority in thirteen. The year before that, there were seventy-five cases and twenty-three were five to four. Justice Kennedy was in the majority in eighteen, the most of any Justice. A couple years before that there were twenty-four five-to-four decisions and Justice Kennedy was in the majority in literally every one of them.

Certainly from the perspective of lawyers who write briefs to the Justices and stand before them, there is often a sense of arguing to an audience of one. I filed a brief last term and I will tell you in all honesty, my brief was a shameless attempt to pander to Justice Kennedy. If I could have, I would have put Anthony Kennedy's picture on the front of my brief. My brief was not unique among those in this case; this case was not unique among those on the docket. Everyone knows, even the Justices know, it is the Anthony Kennedy court.

Thus, you can get the best sense of the overall ideology of the Roberts Court by focusing on the five-to-four decisions that are split along traditional ideological lines. Last term there were twelve such cases, with Roberts, Scalia, Thomas, and Alito on one side, and on the other, Stevens, Ginsburg, Breyer, and Sotomayor. Justice Kennedy sided with the conservatives in nine and with the liberals in three. The year before that there were sixteen five-to-four cases split among ideological lines. Justice Kennedy sided with the conservatives with eleven and with the liberals in five. If you look at the five years in which John Roberts has been Chief Justice, in the ideologically divided five-to-four cases, Anthony Kennedy has sided with the conservatives significantly more than twice as often as with the liberals.

Well this then brings me to my third theme. When it comes to freedom of speech, the Roberts Court has been very much a conservative court. I think you can understand what the Roberts Court has done with regard to free speech by just focusing on traditional, contemporary, conservative ideology. I have often said I think you can understand the Roberts Court better by reading the 2008 Republican platform than by reading the *Federalist* Papers, and I think that is certainly true with regard to freedom of speech. Now the key example on the other side, where it has been a "pro-speech" court has been with regard to campaign finance. The

one place where the Roberts Court has been protective of speech is with regard to the ability of corporations by implications union to spend money. *Citizens United v. Federal Elections Commission* is the most important speech case of the Roberts era and one of its most important cases overall. It held that corporations and unions have the right to engage in unlimited independent expenditures in election campaigns.⁴ This is actually the fourth campaign finance case decided by the Roberts Court. The earlier decisions were *Wisconsin Right to Life v. Federal Election Commission*,⁵ *Randall v. Sorrell*,⁶ and *Davis v. Federal Election Commission*.⁷ Three of the four were five-to-four decisions,⁸ with the conservative majority being Roberts, Scalia, Kennedy, Thomas, and Alito.

I have engaged in many debates about *Citizens United* since January 2010 when it was decided. And my opponent always says that this shows that the Roberts Court is really a free speech court. I would like you to keep *Citizens United* in mind while I mention four other speech cases.

Another of the most important speech cases in the Roberts era was *Garcetti v. Ceballos*⁹ in 2006. Richard Ceballos is an assistant district attorney from Los Angeles County. He believed that a deputy sheriff in one of his cases was lying. He did an investigation and that reinforced conclusion. He wrote a memo to the file to that effect. His supervisor, told him to soften the tone of the memo. He refused. He believed that he was constitutionally required to turn the memo over to defense counsel and he did that. He was then, he alleged, removed from his supervisory position and transferred to a much less desirable location. He sued claiming that it violated his First Amendment rights.¹⁰ The case was originally argued in October of 2005 and many believed that if the Supreme Court was able to get the decision out by January of 2006, it would have come out five to four in Ceballos's favor. But Justice O'Connor left the bench and was replaced by Justice Alito. The case was reargued and when it was decided in June of 2006, the Supreme Court held that there is no First Amendment protection for the speech of government employees on the job in the scope of their duties.¹¹ Now, the Court could have ruled against Ceballos without going nearly so far in restricting the speech rights of government employees.

4. *Citizens United*, 130 S. Ct. at 886.

5. 551 U.S. 449 (2007).

6. 548 U.S. 230 (2006).

7. 554 U.S. 724 (2008).

8. *Citizens United*, 130 S. Ct. 876; *Randall*, 554 U.S. 724; *Wis. Right to Life, Inc.*, 551 U.S. 449.

9. 547 U.S. 410 (2006).

10. *Id.* at 413–15.

11. *Id.* at 421.

Interestingly, the composition of the majority was identical to that in *Citizens United*.¹² As in *Citizens United*, Justice Kennedy wrote the opinion of the Court, joined by Roberts, Scalia, Thomas, and Alito.¹³

A second example, a year later, is *Morse v. Frederick*.¹⁴ The Olympic torch was coming through Juneau, Alaska. A school released its students to stand on the sidewalk and watch. A student got together with some others and held a banner that said, “Bong Hits 4 Jesus.”¹⁵ Here I agree with something that Justice Souter said at oral arguments: I have no idea what that means.¹⁶ The Supreme Court, five to four, ruled in favor of the principal that she did not violate the First Amendment by confiscating the banner and suspending the student.¹⁷ Chief Justice Roberts wrote the opinions of the Court, joined by Scalia, Kennedy, Thomas, and Alito.¹⁸ The Court stressed the importance of schools being able to prevent illegal drug use, including stopping messages that they perceive as encouraging illegal drug use.¹⁹ Justice Stevens in dissent objected that there was no showing of any likelihood that this speech would have any impact whatsoever.²⁰ It is hard to believe that any student, the smartest to the slowest, was more likely to use illegal drugs because of this speech.

A third example is *Fox Broadcasting v. Federal Communication Commission*²¹ in 2009. The Supreme Court did not decide it on First Amendment grounds, but some of the things in Justice Scalia’s majority opinion touch on the underlying First Amendment issue. This, of course, involves the FCC policy that it would punish so called, “fleeting expletives” and involved instances of Bono and Cher and Paris Hilton and Nicole Richie using isolated profanities at music awards shows.²²

Prior to the time of the new policy, the FCC said it would not punish the so-called “fleeting expletives.” The Second Circuit found that the FCC’s policy was arbitrary and capricious, in violation of the Administrative Procedure Act, but suggested in the alternative that it would find that it violated the First Amendment.²³ The Supreme Court reversed

12. *Citizens United*, 130 S. Ct. at 886.

13. *Garcetti*, 547 U.S. at 413.

14. 551 U.S. 393 (2007).

15. *Id.* at 397.

16. Transcript of Oral Argument, *Morse*, 551 U.S. 393 (2007) (No. 06-278), available at http://www.oyez.org/cases/2000-2009/2006/2006_06_278/argument.

17. *Morse*, 551 U.S. at 397.

18. *Id.* at 396.

19. *Id.* at 408.

20. *Id.* at 434–35 (Stevens, J., dissenting).

21. *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800 (2009).

22. *Id.* at 1807–08.

23. *Fox TV Stations, Inc. v. FCC*, 489 F.3d 444, 447, 466 (2d Cir. 2007).

the Second Circuit, with the same five Justices in the majority as in *Citizens United* and *Garcetti and Morse v. Frederick*. Justice Scalia wrote for the Court and focused only on the APA issue.²⁴ The Court said that the Federal Communications Commission could reasonably believe that exposure to fleeting expletives is harmful to children.²⁵ I am the parent of four children; they range in age now between twelve and twenty-seven. I have never understood how exposure to fleeting expletives does any psychic harm to the kids. The reality is the kids hear the words from an early age, and they are bound to say them at a time that is going to be most embarrassing to their parents. Hearing Bono or Cher or Nicole Richie say it on a music awards show does not seem to me to do any harm to them in any meaningful way. But the Court was willing to simply accept that judgment.

One more example here, a case from this year, a case called *Humanitarian Law Project v. Holder*.²⁶ I think it is one of the most important speech cases of the Roberts era, but it got relatively little media attention. It involved a provision of federal law—18 U.S.C. §2339B—which makes it a federal crime to materially assist a foreign terrorist organization. The case involved two groups of Americans that wanted to engage in speech activities on behalf of foreign groups that had been designated foreign terrorist groups. One was a group of Americans, including a retired administrative law judge, who wanted to advise a Kurdish group which sought to form a separate country on how to use international law and the United Nations for peaceful resolution of its disputes. The other was a group of Americans that wanted to help a group in Sri Lanka apply for humanitarian assistance. The question was whether that speech be punished as material assistance to a foreign terrorist organization.²⁷ This was not about Americans trying to raise money to help terrorists; it was not about people in the United States trying to train or engage in terrorist activities; it was entirely speech. But here the Supreme Court ruled 6-3 that the speech could be punished without violating the First Amendment.²⁸ Chief Justice Roberts wrote for the Court, and only Justices Ginsburg, Breyer and Sotomayor dissented. Justice Stevens joined the majority without opinion. The Supreme Court said that such speech, if it is coordinated with a foreign terrorist organization, could be punished as material assistance.²⁹

24. *Fox TV Stations, Inc.*, 129 S. Ct. at 1819.

25. *Id.* at 1811–12.

26. 130 S. Ct. 2705 (2010).

27. *Id.* at 2716.

28. *Id.* at 2730.

29. *Id.* at 2729–30.

Justice Breyer wrote a strong dissent. He objected that the Court allowed speakers to be punished without any showing of likely harm.³⁰

So take *Citizens United* and the campaign finance cases on one side, and then line up against it the four I have mentioned: *Garcetti vs. Ceballos*, *Morse v. Frederick*, *Fox v. FCC*, and most recently the *Humanitarian Law Project v. Holder*. Now what explains what the Supreme Court has done? I think it can only be understood through an ideological lens, as the Court is following a conservative ideological agenda.

The fourth theme that I want to address—and one that is disturbing about the Supreme Court and the First Amendment during the Roberts era—is its creating categorical exemptions from the First Amendment. Let me give two examples of what I mean here. The first is a case from 2009, *Pleasant Grove v. Summum*.³¹ I actually think this is one of the most disturbing decisions of the Supreme Court with regards to free speech in a number of years. It was unanimous in terms of results. It involves a park in a city in Utah. There's a Ten Commandments monument in that park. The Ten Commandments monument has been donated to the city by a group called The Friends of the Eagles. It had been paid for by Cecil B. DeMille in connection with promoting his movie, *The Ten Commandments*. In the late '50s and early '60s, Cecil B. DeMille paid for many of these monuments to go all over the country; hundreds, maybe thousands.³²

The Pleasant Grove monument long sat in the park and then a small religion, the Summum faith, came and said, "You can have a Ten Commandments monument in the park. You should also put up a monument with the Seven Aphorisms of our faith." The city refused and the Summum faith then sued. The Tenth Circuit ruled in favor of the Summum faith. The Tenth Circuit said this is impermissible content-based discrimination. The city should not be able to have a monument of one religion and then deny the presence of a monument of another.³³

The Supreme Court unanimously reversed.³⁴ Justice Alito wrote the opinion of the Court. Justice Alito said that the monument should be regarded as government speech. Justice Alito said one way in which the government expresses itself is through things like monuments. And the Supreme Court then said when it is government speech, the First Amendment does not apply at all.³⁵ The case got so little in the way of

30. *Id.* at 2732 (Breyer, J., dissenting).

31. 129 S. Ct. 1125 (2009).

32. *See* *Van Orden v. Perry*, 545 U.S. 677, 713–14 (2005) (Stevens, J., dissenting).

33. *Pleasant Grove*, 129 S. Ct. at 1130.

34. *Id.* at 1129.

35. *Id.* at 1132–33.

media attention, but there are potentially enormous implications.

Imagine that there is a city with a park and the city officials allow a prowar demonstration there. And then an antiwar group comes and it wants to use the same park for its speech and the city refuses. Under the most basic First Amendment principles, that would be clearly unconstitutional. Such viewpoint discrimination is inimical to the core of the First Amendment. But now imagine that the city's lawyer says, "The city adopts the prowar demonstration as its government speech," just like the city in *Pleasant Grove* adopted the privately donated monument as its government speech.

There is a possible distinction suggested by Justice Alito: the monument is permanent, whereas the demonstration is transitory. But why does that distinction matter in terms of First Amendment? Can't the government get around the First Amendment by adopting any private message and declaring it to be government speech? Justice Stevens, in an opinion concurring in the judgment, expressed concern over the recently minted government speech doctrine.³⁶

It is a decision with enormously important implications. Think of another possible implication. Several years ago, in *NEA v. Finley*, the Court considered whether the National Endowment of the Arts could give money under the conditions that it not be used for indecent art.³⁷ And the Supreme Court upheld it saying as long as there is no viewpoint discrimination, the government could decide who it is going to give money to.³⁸ But after *Pleasant Grove v. Summum*, why would the Court have the need to say that? Why couldn't the Court say, "When the government is choosing to give money, that is government speech, and then it can even engage in viewpoint discrimination?" In fact the first case to really start the government speech doctrine, *Rust v. Sullivan*, in 1991, said that the government could choose to give money to Planned Parenthood groups on the condition they not do abortion counseling because it was "government speech."³⁹ This is an exception that has the potential to swallow much of the First Amendment's protections.

My other illustration of the Supreme Court creating a categorical exception is a case I already mentioned, *Garcetti v. Ceballos*. The Supreme Court so easily could have said that there will be great deference to the government when it punishes employees for their speech. Instead the Supreme Court said there is no First Amendment protection for the speech

36. *Id.* at 1139 (Stevens, J., concurring).

37. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

38. *Id.* at 587.

39. *Rust v. Sullivan*, 500 U.S. 173, 194, 196 (1991).

of government employees on the job in the scope of duties,⁴⁰ again creating a categorical exception to the First Amendment.

Finally, concluding by looking at the Court more generally, what is Elena Kagan likely to mean for the future of the Supreme Court? More generally, what is the Obama presidency likely to mean?

Certainly there are subtle effects of replacing John Paul Stevens with Elena Kagan. When the Chief Justice is in the majority, the Chief Justice assigns who writes the majority opinion. But if the Chief Justice is not in the majority, then the most senior Associate Justice assigns the majority opinion. Last year, if Justice Kennedy joined with Stevens, Ginsburg, Breyer, and Sotomayor, Justice Stevens assigned who wrote the majority opinion. Now, if Justice Kennedy joins with Ginsburg, Breyer, Sotomayor, and Kagan, Justice Kennedy is the most senior Associate Justice in the majority and he will assign who writes the majority opinion. I think we will be seeing more majority opinions from Justice Kennedy when he joins the liberal block and it might even affect how he votes in some cases.

The conventional wisdom is that Elena Kagan will vote the same way as John Paul Stevens in most cases. I am skeptical of that conventional wisdom. I do not think we know enough about Elena Kagan's judicial ideology to predict how she will vote in most cases. I think we know less about Elena Kagan's judicial philosophy than any nominees to the Supreme Court, at least since Sandra Day O'Connor in 1981. Every nominee since O'Connor in 1981 has spent at least some time as a federal court of appeals judge and most of the nominees had spent a long time as a federal judge before going to the Supreme Court. Elena Kagan had never served as a judge in any court before the Supreme Court. That by no means is disqualifying. So many Justices through history had never been on any bench before going to the Supreme Court. Think of Brandeis, Black, Douglas, Frankfurter, Jackson, Warren, Goldberg, Fortas, and more recently Rehnquist and Powell. None of them were judges before going to the Supreme Court. But the fact that Kagan has never been a judge means we do not have the prior judicial opinions to read to get a sense of her judicial ideology. As a law professor she wrote only five law review articles and none said anything particularly controversial. Unlike some law professors, she never wrote op-ed pieces or gave controversial quotes to the press. That probably explains why she is where she is at and those other law professors are not.

Quite predictably, the confirmation hearing gave us no sense of her judicial ideology. My favorite moment of the confirmation hearing occurred on the Tuesday when Senator Lindsey Graham said to her,

40. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

“Where were you at on Christmas Day?” And she responded, “You know, like all Jews, I was probably at a Chinese restaurant.”⁴¹ That is so quick and witty, and yet it did not give us any sense of her views say, on separation of church and state. Perhaps over time she will vote the same way as Justice Stevens would have voted. Some who know her well think she is going to be a good deal more moderate; possibly she will be more liberal.

This appointment, of course, is President Obama’s second pick for the Supreme Court. The year before, David Souter retired at the relatively young age for a Justice of sixty-nine years old. He was replaced by Sonia Sotomayor. I think that last term Justice Sotomayor was the most consistently liberal Justice on the Court. I can find instances where Ginsburg, Breyer, Stevens did not vote in a liberal direction last year.⁴² I cannot point to any such examples where the Court was divided where Sotomayor did not take the liberal position.

Ruth Bader Ginsburg will be seventy-eight in February 2011. There is always this speculation that she might step down, perhaps because she is so frail in appearance. I know many of you here have met her. I met her in 1985 and she was frail in appearance then. Some think that she might step down at the end of this term to let President Obama pick a successor in a nonelection year. Others think she will stay on the court as long as she is physically able.

Take a moment and think of the other side of the ideological aisle. John Roberts will be fifty-six next month in January 2011. If he remains on the Supreme Court until he is ninety years old, the age at which Justice Stevens retired, he will be Chief Justice until the year 2046. Samuel Alito turned sixty in April. Clarence Thomas has been on the Supreme Court nineteen years and is only sixty-two years old. Both Antonin Scalia and Anthony Kennedy turned seventy-four in 2010. I think that the best predictor of a long life span is being confirmed for a seat on the United States Supreme Court. So it is not likely that any of these five Justices—Roberts, Scalia, Kennedy, Thomas, Alito—will be leaving between now and January 20, 2013, or, even if there is a second Obama term, January 20, 2017. The vacancies for President Obama to fill are Justices Souter and

41. *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, WASH. POST (June 29, 2010), <http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY2.pdf>.

42. *See, e.g., Skilling v. United States*, 130 S.Ct. 2896 (2010) (Justice Ginsburg joining with five conservative justices to conclude that pretrial publicity did not violate due process); *Humanitarian Law Project v. Holder*, 130 S.Ct. 2705 (2010) (Justice Stevens joining with the five conservatives to hold that otherwise lawful speech can be material assistance for a foreign terrorist organization); *Michigan v. Fisher*, 130 S.Ct. 546 (2010) (Justice Breyer joining the majority to find that a search did not violate the Fourth Amendment over the dissents of Justices Stevens and Sotomayor).

Stevens and perhaps Justice Ginsburg.

President Obama replacing these Justices will not change the overall ideology of the Court.

When Byron White was on the Supreme Court he was fond of saying, "Every time there is a new Justice, it is a different Court." Common sense would indicate why that is true. Change one member of a small group and its dynamics are altered. The current Court is a different Court than there has ever been in American history. For the first time in American history there are three women Justices: Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. For the first time in American history there are no Protestant Justices on the Court. There are six Catholic Justices and three Jewish Justices.

I think for the first time in American history there are four Justices on the court who spent most of their career filling the bench as law professors. Antonin Scalia, Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan were academics for the most part before becoming Judges. That might explain why the opinions keep getting longer and with more footnotes. The bottom line, though, if you think about the First Amendment or generally other areas of law, is that if you are politically conservative, this is generally a Court you should rejoice over. Remember the statistics: Justice Kennedy sides with conservatives in ideologically divided five-to-four cases more than twice as often as with the liberals. And if you are politically liberal, perhaps you should be glad the Court is deciding only about seventy-three or sixty-seven cases a year.

