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Not a Free Speech Court

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INTRODUCTION

Two of the most high-profile decisions in the Supreme Court's October 2010 term were clear victories for freedom of speech. In *Snyder v. Phelps*, the Court considered whether the First Amendment protects the right of protestors to go to military funerals to express anti-gay messages.[1] Matthew Snyder was a Marine who died in military service in Iraq.[2] The members of the Westboro Baptist Church went to his funeral and, as is their practice, held up signs that condemned homosexuality and tolerance for it.[3] Snyder's father sued the demonstrators for intentional infliction of emotional distress and intrusion upon seclusion.[4] A jury in federal district court ruled in favor of Snyder and the judge upheld an award of both compensatory and punitive damages.[5]

The Supreme Court, in an 8–1 decision, concluded that the imposition of liability for such speech violates the First Amendment.[6] Chief Justice Roberts, writing for the Court, stressed that the speech lawfully occurred on public property, did not disrupt the funeral, and involved a matter of public concern.[7] The Court explained that there are alternatives available to state and local governments to protect privacy and sensibility at funerals, such as creating buffer zones around them,[8] similar to what the Court has permitted around reproductive health care facilities.[9] The case is important because the Court reaffirmed one of the most

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1. 131 S. Ct. 1207 (2011).
2. *Id.* at 1213.
3. *Id.*
4. *Id.* at 1214.
5. *Id.*; *see also* Snyder v. Phelps, 533 F. Supp. 2d 567, 570 (D. Md. 2008).
6. *Snyder*, 131 S. Ct. at 1219–20.
7. *Id.* at 1220.
8. *Id.* at 1218.
9. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

basic principles of the First Amendment: speech cannot be punished, or speakers held liable, just because the speech is offensive, even deeply offensive.

In *Brown v. Entertainment Merchants Ass'n*, the Court, in a 7–2 decision, struck down a California law that made it a crime to sell or rent violent video games to minors under age 18 without parental consent.[10] Justice Scalia, writing for the Court, held that the law is an impermissible content-based restriction on speech and that the government failed to prove that the law was necessary to achieve a compelling purpose.[11] In perhaps the strongest language to date, the Court spoke of the First Amendment rights of minors and once more refused to recognize violent speech as categorically less protected by the First Amendment.[12] The Court made it clear that such attempts by states to restrict the sale or rental of violent video games violate the First Amendment.[13]

Based on these cases, it is tempting to generalize that the Roberts Court is strongly protective of speech. In fact, I recently heard Baylor University President Ken Starr proclaim that this is the most free speech Court in American history.[14] As is often the case with generalizations from a small sample, this one is inaccurate and hides the reality: the Roberts Court frequently rules against free speech claims.

Part I of this Lecture looks at the Roberts Court's dismal record of protecting free speech in cases involving challenges to the institutional authority of the government when it is regulating the speech of its employees, its students, and its prisoners, and when it is claiming national security justifications. Part II examines a troubling new exception to the First Amendment that the Roberts Court has created for government speech—that the government can adopt private speech as its own and, accordingly, avoid the First Amendment. Part III analyzes the Roberts Court's aggressive decisions protecting campaign contribution speech. A careful examination of these cases reflects the conservative majority's hostility to campaign finance regulations, rather than a pro-speech commitment.

I am certainly not denying that the Roberts Court sometimes rules in favor of free speech claims, as it did in *Snyder v. Phelps* and *Brown v. Entertainment Merchants Ass'n.* Rather, my claim is that the Roberts Court's overall record suggests that it is not a free speech Court at all.

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10. 131 S. Ct. 2729 (2011).

11. *Id.* at 2738–42.

12. *Id.* at 2734–37. In the prior term, in *United States v. Stevens*, 130 S. Ct. 1577 (2010), the Court declared unconstitutional a federal law that prohibited the sale, distribution, or possession of depictions of animal cruelty. The Court rejected the government's argument for recognition of violence as a new category of unprotected speech. *Id.* at 1586.

13. *See Brown*, 131 S. Ct. at 2738–42.

14. Ken Starr, President, Baylor Univ., Address at the Pepperdine Judicial Law Clerk Institute (Mar. 18, 2011).

I. THE GOVERNMENT AS AN AUTHORITARIAN INSTITUTION AND FREE SPEECH

The Roberts Court has consistently ruled against free speech claims when brought by government employees, by students, by prisoners, and by those who challenge the government's national security and military policies. The pattern is uniform and troubling: when the government is functioning as an authoritarian institution, freedom of speech always loses.

A. Government Employees

Garcetti v. Ceballos involved Richard Ceballos, a supervising district attorney in Los Angeles County, who concluded that a witness in one of his cases, a deputy sheriff, was not telling the truth.[15] He wrote a memo to this effect and felt that he was required by the Constitution to inform the defense of the problems with the witness.[16] Ceballos alleged that, as a result of this speech, his employers retaliated against him, including transferring him to a less desirable position and denying him a promotion.[17]

The issue before the Court was whether Ceballos's speech was protected by the First Amendment.[18] Although the Court has long held that there is constitutional protection for the speech of government employees,[19] it ruled against Ceballos.[20] The Court drew a distinction between speech "as a citizen" and speech "as a public employee"; only the former is protected by the First Amendment.[21] Justice Kennedy stated: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[22] The Court expressed great concern about the disruptive effects of allowing employees to bring First Amendment claims based on their on-the-job speech.[23] Justice Kennedy wrote that allowing such claims "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents."[24] The Court observed that civil service protections provide safeguards for employees against retaliation for their speech.[25]

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15. 547 U.S. 410, 413–14 (2006).
16. *Id.* at 414.
17. *Id.* at 415.
18. *Id.* at 413.
19. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (holding that a government employee's speech is protected by the First Amendment if it involves a matter of public concern and does not unduly interfere with the functioning of the workplace).
20. *Garcetti*, 547 U.S. at 417.
21. *Id.* at 418–20.
22. *Id.* at 421.
23. *See id.* at 418–23.
24. *Id.* at 423.
25. *Id.* at 425.

Garcetti was a 5–4 decision and the dissent strongly objected to the holding that there is *no* First Amendment protection for the speech of government employees on the job in the scope of their duties.[26] The dissent was expressly concerned about the whistleblower who exposes wrongdoing in the workplace, often benefiting the public, having no protection from reprisals.[27] The dissent noted that civil service protections are often nonexistent or limited.[28]

Garcetti is thus an important limit on First Amendment protections for speech by government employees; it is a categorical exception from constitutional protection for speech while on the job and in the scope of the employee's duties. The case's premise that the First Amendment protects only speech "as citizens" has no foundation in other case law. For example, in *Citizens United v. Federal Election Commission*, the Court protected the speech of corporations even though they, of course, are not citizens.[29] The explicit premise of *Citizens United* is that more speech is better whatever the source;[30] the effect of *Garcetti v. Ceballos* is that there will be significantly less speech. Moreover, government employees do not lose their citizenship when they walk into the government office building.

Interestingly, the Court was explicit that it was not changing the First Amendment law with regard to other speech by government employees.[31] The Court stated that its holding "relates only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints . . . that are made outside the duties of employment."[32] But this leads to the anomaly that Ceballos's speech would have been protected if he had written a memo to the *Los Angeles Times*, but not one to his supervisor.[33]

The reality is that the case means that whistleblowers, those who expose wrongdoing by others within their workplaces, have no First Amendment protection. Although the Court pointed to civil service protections, the dissent observed that these protections are often nonexistent or inadequate.[34] The result will be a significant loss of speech, often speech that can expose wrongdoing within the government.

Another, more recent, example of the government ruling against First Amendment claims of government employees was in *Borough of Duryea v. Guarnieri*.[35] The Court held that government employees may bring claims under the provision of the First Amendment protecting a right to petition the government for redress of grievances only if the speech involves a matter of public concern.[36]

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26. *Id.* at 428–29 (Souter, J., dissenting).
27. *Id.* at 440–41.
28. *Id.* at 440.
29. 130 S. Ct. 876 (2010) (invalidating a provision of federal law limiting independent expenditures by corporations and unions in federal election campaigns).
30. *See, e.g.*, *id.* at 904.
31. *Garcetti*, 547 U.S. at 424.
32. *Id.*
33. *See id.* at 430 n.1 (Souter, J., dissenting).
34. *Id.* at 440.
35. 131 S. Ct. 2488 (2011).
36. *Id.* at 2501.

In other words, claims by government employees under the petition clause face the same restrictions as those under the free speech clause of the First Amendment.

B. Students

In *Morse v. Frederick*, the Court held that the First Amendment was not violated when a student was punished for displaying a banner with the inscription, "Bong Hits 4 Jesus."[37] When the Olympic torch came through Juneau, Alaska, a high school released its students from class to watch, and the student unfurled his banner.[38] The principal, believing that the banner encouraged drug use, confiscated it and suspended the student who displayed it.[39]

In an opinion by Chief Justice Roberts, the Court, in a 5–4 decision, said that the principal could reasonably interpret the banner as encouraging illegal drug use and that schools have an important interest in stopping such speech.[40] Chief Justice Roberts wrote: "The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may."[41]

Justice Alito wrote a concurring opinion, joined by Justice Kennedy, which stressed the narrowness of the Court's holding.[42] Justice Alito explained that the Court was holding only that schools may punish speech that encourages illegal drug use. He wrote:

> I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."[43]

Justice Stevens wrote a forceful dissent in which he questioned whether the majority's holding could be cabined so narrowly.[44] He expressed concern that the Court did not require any showing that the speech would actually increase the likelihood of illegal drug use; he observed that it is highly unlikely that any student, the smartest or the slowest, would be more likely to use drugs because of Frederick's banner.[45] He particularly lamented the abandonment of the prohibition

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37. 551 U.S. 393, 401 (2007).
38. *Id.* at 396.
39. *Id.*
40. *Id.* at 407–10.
41. *Id.* at 403. Justice Thomas wrote a concurring opinion in which he argued that the First Amendment does not apply at all in public schools. *Id.* at 410–11 (Thomas, J., concurring).
42. *Id.* at 422 (Alito, J., concurring).
43. *Id.*
44. *See id.* at 441–42 (Stevens, J., dissenting).
45. *Id.*

on viewpoint discrimination in schools and the requirement of a showing of actual disruption to justify punishing student speech.[46]

It is difficult to read *Morse* and see the Roberts Court as protective of free speech. The banner at issue in this case was silly and incoherent. There was not the slightest evidence that it caused any harm; there was no claim that it was disruptive and certainly no evidence that it increased the likelihood of drug use.[47] But, the conservative majority still ruled against speech and in favor of the government.

C. Prisoners

In *Beard v. Banks*, the Court upheld a Pennsylvania prison regulation that prevented some prison inmates from having *any* access to newspapers, magazines, or photographs.[48] Justice Breyer, writing for the Court in a 6–3 decision, said:

> The Secretary in his motion set forth several justifications for the prison's policy, including the need to motivate better behavior on the part of particularly difficult prisoners, the need to minimize the amount of property they control in their cells, and the need to ensure prison safety, by, for example, diminishing the amount of material a prisoner might use to start a cell fire. We need go no further than the first justification, that of providing increased incentives for better prison behavior. Applying the well-established substantive and procedural standards . . . we find, on the basis of the record before us, that the Secretary's justification is adequate.[49]

The Court's deference to the government was stunning. This is a regulation that denies prisoners access to all newspapers, magazines, and even family photographs.[50] It is hard to imagine a more extensive restriction of First Amendment rights. There was no evidence that this actually improves prisoner behavior, and in fact, the Court said that none was needed.[51] The government's assertion of a benefit was sufficient to justify the restriction on speech.[52]

D. National Security

Perhaps the most troubling First Amendment decision by the Roberts Court was in 2010 in *Holder v. Humanitarian Law Project*.[53] Federal law prohibits providing "material support" to a "foreign terrorist organization."[54] Material support is defined to include such activities as "training," providing "personnel," and giving "expert advice or assistance."[55] Two groups of Americans brought a lawsuit seeking to establish First Amendment protection for their assistance to

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46. *Id.* at 437.
47. *See id.* at 433–41.
48. 548 U.S. 521, 530–31 (2006).
49. *Id.* at 531.
50. *See id.* at 524–26.
51. *Id.* at 534.
52. *Id.*
53. 130 S. Ct. 2705 (2010).
54. 18 U.S.C. § 2339B (2006).
55. *Id.* § 2339A(b).

groups that had been designated by the Department of State as foreign terrorist organizations.[56] One group of Americans sought to help a Kurdish group, which sought to form an independent state, use international law and the United Nations to peacefully resolve disputes.[57] The other group of Americans sought to help a group in Sri Lanka, which similarly aimed to form a separate nation, apply for humanitarian assistance.[58]

The Court, in a 6–3 decision, ruled that this speech could constitutionally be punished.[59] Initially, the Court rejected the vagueness challenge to the law, concluding that most of the activities of the plaintiffs were clearly within the statute's prohibition of expert advice, assistance, and training.[60] The Court then concluded that the speech could be punished so long as it was done in coordination with a foreign terrorist organization.[61] Chief Justice Roberts, writing for the Court, stressed that the plaintiffs could speak out on any topic they wished, but if the speech was done in concert with a foreign terrorist organization it was not protected by the First Amendment.[62] He wrote:

> Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations. . . . Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.[63]

Justice Breyer's dissenting opinion, joined by Justices Ginsburg and Sotomayor, criticized the majority for allowing the punishment of speech without any proof that it was likely to cause harm.[64] Justice Breyer reviewed the Court's decisions concerning incitement, especially *Brandenburg v. Ohio*,[65] and said that they do not justify allowing punishment of the sort of speech in which the plaintiffs sought to engage.[66] He explained that prior cases have permitted "pure advocacy of even the most unlawful activity—as long as that advocacy is not 'directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.'"[67]

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56. *Humanitarian Law Project*, 130 S. Ct. at 2713.
57. *Id.*
58. *Id.*
59. *Id.* at 2720–21.
60. *Id.* at 2719–21.
61. *Id.* at 2722.
62. *Id.* at 2722–23.
63. *Id.*
64. *Id.* at 2731–32 (Breyer, J., dissenting).
65. 395 U.S. 444 (1969).
66. *Humanitarian Law Project*, 130 S. Ct. at 2732 (Breyer, J., dissenting).
67. *Id.* at 2737 (quoting *Brandenburg*, 395 U.S. at 447).

In other words, the Court allowed the government to prohibit speech that in no way advocated terrorism or taught how to engage in terrorism solely because the government felt that the speech assisted terrorist organizations. The restriction on speech was allowed even without any evidence that the speech would have the slightest effect on increasing the likelihood of terrorist activity. The deference that the Court gave to the government was tremendous and the restrictions it placed on speech were great.[68]

II. THE GOVERNMENT AS SPEAKER

The Supreme Court has held that when the government is the speaker, the First Amendment does not apply at all or provide a basis for challenging the government's action.[69] The Roberts Court affirmed and extended this principle in *Pleasant Grove City, Utah v. Summum*, one of the Roberts Court's most troubling, although unanimous, decisions concerning the First Amendment.[70]

Pioneer Park in Pleasant Grove, Utah, has 15 monuments, 11 of which were privately donated.[71] One of these is a large Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.[72] Summum, on the other hand, is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah.[73] On two separate occasions in 2003, Summum's president wrote a letter to the Pleasant Grove's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of Summum" and be similar in size and nature to the Ten Commandments monument.[74] The city refused the request and Summum sued.[75] Summum claimed that for the city to allow a monument from some religions but not others violated the First Amendment.[76]

The federal district court ruled against Summum, but the Tenth Circuit reversed and found that the government engaged in impermissible content-based discrimination by denying access to the Summum monument, but permitting the Ten Commandments display.[77] The Supreme Court unanimously reversed and ruled in favor of the City of Pleasant Grove, with Justice Alito writing for the

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68. Also in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), the Court expressly professed the need for deference to the government and upheld a federal law requiring universities to allow military recruiters equal access to campus interviewing as a condition for receipt of federal funds. The Court rejected the claim that this violated the First Amendment rights of universities by compelling speech and association. *Id.* at 62.

69. Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1132 (2009); *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) (holding that the government's speech is exempt from First Amendment analysis).

70. 129 S. Ct. 1125.

71. *Id.* at 1129.

72. *Id.*

73. *Id.*

74. *Id.* at 1129–30.

75. *Id.* at 1130.

76. *Id.*

77. *Id.*; Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir. 2007); Summum v. Pleasant Grove City, No. 2:05CV00638, 2006 WL 3421838 (D. Utah Nov. 22, 2006).

Court.[78] The Court held that by allowing placement of donated permanent monuments in a public park, the city was exercising a form of government speech not subject to scrutiny under the Free Speech Clause.[79]

Justice Alito began by declaring that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[80] The Court quoted its prior decision in *Johanns v. Livestock Marketing Ass'n*,[81] declaring that "[t]he Government's own speech . . . is exempt from First Amendment scrutiny."[82] Justice Alito also explained that "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."[83] In other words, the fact that the Ten Commandments monument had been donated by a private group did not prevent the government from adopting it and making it government speech. Justice Alito declared: "[I]t is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech."[84]

This is not the first case to invoke the notion that the First Amendment does not apply when the government is the speaker; *Rust v. Sullivan*[85] and *Livestock Marketing*,[86] discussed above, also use this rationale. But *Pleasant Grove* is the first time that the Court has said that the government can adopt private speech as its own and thereby avoid the First Amendment.

This conception of government speech has potentially broad implications. Imagine if a city were to allow a pro-war demonstration in a city park while denying access to an anti-war demonstration. This obviously would be unconstitutional viewpoint discrimination. But, what if the City Council were to say that it was adopting the pro-war speech as its own message? In *Pleasant Grove*, there was not even a formal adoption of the private speech as government expression.[87] This hypothetical seems indistinguishable from the facts of *Pleasant Grove.* The Supreme Court's decision thus opens the door for the government to engage in viewpoint discrimination, which otherwise would be clearly unconstitutional, simply by adopting one side's speech as its own.

Justice Alito recognized the "legitimate concern" that the "government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint."[88] But, it is not clear how this can be done under the principle that the government can adopt private speech as government speech so that the First Amendment then does not apply. A distinction can be drawn between the permanent monument in *Pleasant Grove* and a transitory

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78. *Pleasant Grove*, 129 S. Ct. at 1130.
79. *Id.* at 1134.
80. *Id.* at 1131.
81. 544 U.S. 550, 553 (2005).
82. *Pleasant Grove*, 129 S. Ct. at 1131.
83. *Id.* at 1132.
84. *Id.* at 1134.
85. 500 U.S. 173, 192–93 (1991).
86. 544 U.S. at 553.
87. *See* 129 S. Ct. at 1134.
88. *Id.*

demonstration, but it is not clear why that should matter under the First Amendment. This problem led Justice Stevens in a concurring opinion to express concern about the "recently minted government speech doctrine."[89]

Certainly the government and government officials can engage in speech. The Court's key failure in *Pleasant Grove* was in not distinguishing between the government as the speaker as opposed to the government providing a forum for speech. It seems clear that the government was doing the latter by allowing monuments to be placed in the city's park. The Court should narrow the circumstances when the government is viewed as the speaker because doing so takes matters entirely outside the realm of the First Amendment. But the Supreme Court in *Pleasant Grove* did just the opposite.

III. WHAT ABOUT CAMPAIGN FINANCE?

One area where the Roberts Court has uniformly ruled in favor of free speech claims is in challenges to campaign finance laws. There have been several such cases in the first six terms of the Roberts Court, and all have struck down the challenged laws. In *Randall v. Sorrell*, the Court found Vermont's limits on contributions to be so restrictive as to violate the First Amendment.[90] In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, the Court held that the restrictions on independent expenditures by corporations and unions were limited to the functional equivalent of express advocacy and to speech that would be understood by a reasonable person as an appeal to vote for or against a specific candidate.[91] Most famously and most importantly, the Court in *Citizens United v. Federal Election Commission* held that corporations, and by implication unions, have the First Amendment right to engage in unlimited independent expenditures to have candidates for public office elected or defeated.[92]

The premise of these cases is that spending money in election campaigns is speech. The Court held this in *Buckley v. Valeo*, and it is the foundation for the Roberts Court decisions.[93] But the Court's treatment of spending money as speech, rather than as conduct that communicates, is questionable.[94] Spending money may facilitate speech, and it is a way of expressing support for a candidate, but it is not itself speech. Justice Stevens expressed this well:

> Money is property; it is not speech.
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> > Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the

89. *Id.* at 1139 (Stevens, J., concurring).
90. 548 U.S. 230 (2006).
91. 551 U.S. 449 (2007).
92. 130 S. Ct. 876 (2010).
93. 424 U.S. 1 (1976).
94. *See, e.g.*, J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

> use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.[95]

However, even if one accepts the premise that spending money in campaigns is speech, two decisions of the Roberts Court suggest that what really animates its decisions is a hostility to campaign finance laws much more than a commitment to expanding speech. In *Davis v. Federal Election Commission*, the Court, in a 5–4 decision, declared unconstitutional a provision of federal law that allowed *more* spending in election campaigns.[96] The case involved the so-called "millionaires' provision" to the Bipartisan Campaign Finance Reform Act.[97] It provided that if a candidate spent more than $350,000 of his or her own funds in a federal election campaign, then opponents would be able to take advantage of higher contribution and expenditure limits.[98] If spending money in elections is speech, this law permitted more speech.

However, Justice Alito, writing for the Court, stressed that the provision increased contribution limits for only one side in the election—a candidate's opponents who spent more than $350,000 in personal funds.[99] The Court said that it would have been constitutional if Congress had done this for both sides, but increasing the contribution limit for one side and not the other violated the First Amendment.[100] Justice Alito explained:

> [The law] does not raise the contribution limits across the board. Rather, it raises the limits only for the non-self-financing candidate and does so only when the self-financing candidate's expenditure of personal funds causes the OPFA [opposition personal funds amount] threshold to be exceeded. We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other, and we agree with Davis that this scheme impermissibly burdens his First Amendment right to spend his own money for campaign speech.[101]

More recently, in *Arizona Free Enterprise Club's Freedom Fund PAC v. Bennett*, the Court struck down Arizona's public funding scheme for elections.[102] Under the Arizona law, candidates opting to receive public funding receive additional money, up to a capped amount, based on the amount spent by or on behalf of opponents.[103] In a 5–4 decision, with Chief Justice Roberts writing for the majority, the Court held that this violated the First Amendment by chilling the spending of money and thus speech.[104] In the Court's view, a candidate for office

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95. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

96. 554 U.S. 724 (2008).

97. Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 109, 2 U.S.C. § 441a-1(a) (2006), *invalidated by Davis*, 554 U.S. 724.

98. *Id.*

99. *Davis*, 554 U.S. at 739.

100. *Id.*

101. *Id.* at 738.

102. 131 S. Ct. 2806 (2011).

103. *Id.* at 2808–09.

104. *Id.* at 2828–29.

would be likely to spend less if he or she knew that would trigger more government funds for an opponent.[105] Justice Kagan wrote an impassioned dissent in which she contended that the effect of the Arizona law was more speech, not less.[106] Assuming that spending money in election campaigns is speech, the effect of the Arizona law is more spending and thus more expression.

In both of these cases, a majority of the Court was concerned that candidates and their supporters would be discouraged from spending money if they knew that it would trigger public funding for opponents. This would be a loss of speech. However, the additional public funding would mean more speech by the opponents, which could then very well lead to additional expenditures by the candidate not receiving public funds. The overall effect would thus be a significant increase in speech. At the very least, the Court had no evidence before it that such public funding laws actually decrease speech rather than increase it. Nonetheless, the Court declared the laws unconstitutional. The conclusion is that these cases reflect a Court that is hostile to campaign finance laws—especially those restricting spending by corporations and the rich—much more than it is committed to freedom of speech.

CONCLUSION

Some Roberts Court decisions have been protective of speech, such as the rulings in *Snyder v. Phelps* and *Brown v. Entertainment Merchants Ass'n*. But a look at the overall pattern of Roberts Court rulings on speech yields a clear and disturbing conclusion: it is not a free speech Court.

105. *Id.* at 2823–24.
106. *Id.* at 2844–46 (Kagan, J., dissenting).