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Free Speech

Kathleen M. Sullivan

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Last year was a very big year for freedom of speech in the Roberts Court—or more precisely, it was a big year with respect to some kinds of speech cases but not others. To tell you about freedom of speech in the Roberts Court so far, let me first divide the cases by scorecard. I will begin with the cases in which speakers won their challenges, vindicating a First Amendment interest against a government regulation. Then, turning to the other side of the scorecard, I will talk about cases where the speaker lost.

The biggest win for speakers last Term was *FEC v. Wisconsin Right to Life*,[1] which involved a free speech challenge to some aspects of the McCain-Feingold Campaign Finance Reform Act.[2] Ultimately, the Court invalidated the electioneering provisions of the Act as applied to broadcast issue advertisements by nonprofit advocacy groups.

Of the three biggest losses for speakers in the Roberts Court so far, the first is the case of *Rumsfeld v. Forum for Academic and Institutional Rights ("FAIR")*.[3] This case involved a challenge by a coalition of law faculties against the Secretary of Defense with respect to the so-called Solomon Amendment,[4] which restricts federal funding for any university that excludes military recruiters from its career placement process, even if on grounds of its anti-discrimination policy.[5]

The second was a case called *Garcetti v. Ceballos*.[6] This is a case in which a public employee in the Los Angeles District Attorney's office lost a free speech challenge to a demotion he suffered, because he reported what

* Stanley Morrison Professor of Law and Former Dean, Stanford Law School

1. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007).

2. Bipartisan Campaign Reform Act of 2002 (McCain-Feingold Campaign Finance Reform Act), Pub. L. No. 107-155, 116 Stat. 81 (2002) [hereinafter McCain-Feingold Act].

3. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006).

4. Solomon Amendment, 10 U.S.C. § 983 (1996).

5. *Id.* at § 983(b) ("No funds . . . may be provided . . . to an institution of higher education . . . if the Secretary of Defense determines that the institution . . . has a policy or practice . . . that prohibits, or in effect prevents . . . military recruiting . . . .); *see also Rumsfeld*, 547 U.S. at 51.

6. Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).

he thought were certain false affidavits and police misconduct underlying a search warrant.[7]

The third case in which the speaker lost, *Morse v. Frederick*,[8] is one in which your own Dean Ken Starr successfully litigated on behalf of the school district of Juneau, Alaska, and high school principal Deborah Morse. In this case, young Mr. Frederick, a public high school student, was found to have no right to unfurl a fourteen-foot banner displaying those immortal words, "Bong Hits 4 Jesus."[9]

Why did the speaker win in *Wisconsin Right to Life*? Conversely, why did the speaker lose when universities receiving public funds tried to exclude military recruiters, when a public employee in a prosecutor's office tried to expose police false witness, and when a high school student tried to speak in his own unique and original way in a Juneau, Alaska public school?

We will begin with *Wisconsin Right to Life*. This decision signaled a stunning turnaround from the Rehnquist Court to the Roberts Court with respect to freedom of speech in the campaign finance context. Only a few years ago, a free speech challenge to the McCain-Feingold Act failed in a case called *McConnell v. FEC*.[10] Dean Starr, together with renowned First Amendment attorney Floyd Abrams and myself, advocated for the speakers' side in that case, and alas we lost our facial challenge to the Act. The so-called electioneering provisions in the McCain-Feingold Act state that, during election season, no corporate treasury funds may be used to run any broadcast ad that identifies a candidate by name.[11]

Now this strikes me as the kind of restriction on freedom of speech that the Framers would have been concerned about. This statute significantly restricts political speech in the most important political medium at the most important part of the political season—a time when people might well want to lobby their government. After all, Congress does not shut down during election season, unlike some governments of the world where the national legislature goes out of session during elections.[12] In the United State, there is a major increase in legislative activity during the months preceding our national elections, and political air time is especially valuable and salient during that time.

On behalf of the challengers to McCain-Feingold, we argued that, on its face, a blackout period for broadcast ads funded from a corporate

7. *Id.* at 1955-56.

8. Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).

9. *Id.*

10. McConnell v. FEC, 540 U.S. 93 (2003).

11. *Id.* at 323.

12. One example of this type of recess can be found in the system of British Parliament. *See* HOUSE OF COMMONS INFORMATION OFFICE, PARLIAMENTARY ELECTIONS 2 (2007), *available at* http:www.parliament.uk/documents/upload/M07.pdf.

treasury—including the corporate treasury for nonprofit organizations, from Wisconsin Right to Life to the American Civil Liberties Union, from the National Rifle Association to the National Gay and Lesbian Task Force—is unconstitutional.[13] A nonprofit organization, we argued, should be able under the First Amendment to run broadcast ads that name a candidate during an election season.[14]

In *McConnell*, the Rehnquist Court, with Justice O'Connor providing the decisive vote, held that there is no First Amendment invalidity in that law on its face.[15] There may be ads, the Court reasoned, in which what looks like a lobbying ad is really an attempt to support or defeat a candidate—so that the ad amounts to a de facto candidate contribution that the government may regulate. In Congress's and the Court's view, you may be saying, "Senator Feingold, please stop filibustering those judicial candidates," but what you are really saying—hint-hint, nudge-nudge, wink-wink—is, "Voter—defeat Senator Feingold."

In *Wisconsin Right to Life*, by contrast, the Court—now including Justice Alito in place of Justice O'Connor—sided with the speaker in a free speech challenge to the McCain-Feingold Act's electioneering provisions.[16] By a vote of five-to-four, the Court held that, as applied to certain ads that do have a reasonable purpose other than just advocating the election or defeat of a candidate, there is a First Amendment right to be free of this restriction on expenditures.[17] Yes, Wisconsin Right to Life can run that ad about Senator Feingold.

What changed? Chief Justice Roberts, writing for the Court over strenuous dissent, suggested that the Court was distinguishing *McConnell* and not overruling it.[18] Justice Scalia was incensed. In a concurrence, he contended that this was "faux judicial restraint" and suggested that the Court should just overrule *McConnell* outright.[19] While the Court did not overrule *McConnell*, it did indicate very clearly that there are now five Justices on the Supreme Court who favor strong First Amendment limits on campaign finance regulation.[20] The *WRTL* majority suggested that there is an

13. *See McConnell*, 540 U.S. at 190.
14. *Id.* at 209-10.
15. *Id.* at 95-96.
16. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2667 (2007).
17. *Id.* at 2669.
18. *Id.* at 2670 n.8.
19. *Id.* at 2683 n.7 (Scalia, J., concurring in part and concurring in the judgment).
20. Chief Justice Roberts delivered the judgment of the Court, which received the vote of Justice Alito, as well as the votes of Justices Scalia, Kennedy, and Thomas. *Id.* at 2674 (Alito, J.,

important free speech right that should limit the power of government to restrict speech expressed through funding of advocacy groups during election time. Justice Alito, unlike his predecessor Justice O'Connor, sided with Justices Kennedy, Scalia, and Thomas,[21] who have long said that campaign finance regulation strikes at the heart of the First Amendment and ought to be subject to stricter First Amendment limits.[22] This is a significant switch.

Now let us turn to the cases where the speakers lost. In *Rumsfeld v. FAIR*, the Court ruled unanimously against the claim that the Solomon Amendment infringed any free speech rights.[23] The plaintiff law school faculties argued that they had a First Amendment right to express, through their on-campus career services interviewing policy, their view that there should be no discrimination in hiring on the basis of sexual orientation or other factors that are unrelated to merit.[24] In their view, they should not lose funding for excluding military employers who discriminate in violation of their policy.

This claim raises an important and interesting question under the so-called doctrine of unconstitutional conditions, which asks whether the government may bribe you to give up the same free speech rights it could not coerce you to forego.[25] May the government say, "If we're going to give Pepperdine funding for certain scientific research, we may also tell Pepperdine how to run its placement office," or "how to run its teaching," or "how to run its research?"

Had the Court found that career services was like teaching or research—that is, that any *speech* was being limited here—it might well have faced a much more difficult question as to whether the government was impermissibly coercing university faculties into giving up their free speech rights by threatening to withhold federal funds. But the Court never reached that unconstitutional conditions question. Instead, Chief Justice Roberts cut that argument off at the pass by saying that no speech was inhibited or coerced by the Solomon Amendment in the first place.[26]

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concurring); *id.* at 2674-87 (Scalia, J., concurring in part and concurring in the judgment, joined by Kennedy & Thomas, JJ.)

21. *Id.* at 2674 (Alito, J., concurring).

22. *See* McConnell v. FEC, 540 U.S. 93, 287 (2003) (Kennedy, J., concurring in judgment, dissenting in part, joined by Rehnquist, C.J., and joined in part by Scalia, J., and Thomas, J.) (noting that the majority opinion regarding campaign finance "replaces discrete and respected First Amendment principles with new, amorphous, and unsound rules, rules which dismantle basic protections for speech").

23. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 47 (2006). The Court ruled unanimously, voting eight-zero, with Justice Alito taking no part in the consideration or decision of the case. *Id.*

24. *Id.* at 55.

25. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

26. *Rumsfeld*, 547 U.S. at 62.

Writing for the Court, Chief Justice Roberts held that the Solomon Amendment did not inhibit freedom of speech because universities remained free to say anything they wished even if military recruiters used their placement services.[27] They could noisily protest JAG recruiters. They could vocally urge recruitment of gay students. These rights were not being abridged. The Chief Justice also suggested that faculties were not forced into any expressive association with the JAG Corps recruiters who are on campus only for a brief, limited time. With no First Amendment right implicated at the threshold, FAIR lost its case.[28]

In the second case, Mr. Ceballos, a public prosecutor, also lost his free speech claim against his boss, the District Attorney of Los Angeles. He claimed a free speech right to report misconduct on the job—specifically, a falsified police affidavit that he thought should have been an object of his boss's attention.[29] In an opinion by Justice Kennedy—normally a friend of First Amendment claims, including some in the public employment area—the Court held that Mr. Ceballos enjoyed no heightened protection for his free speech rights when speaking as a public employee within the scope of his official duties.[30] Here, Ceballos was the calendar deputy in the prosecutor's office, and his access to the evidence was part of his official duties.[31]

In the Court's view, therefore, Mr. Ceballos's speech was more like an unprotected internal rebellion against the boss, and less like protected speech in his capacity as a public citizen.[32] In prior cases like *Pickering*,[33] the Court had held that public employees are protected when speaking as public citizens on matters of public affairs.[34] Other decisions, by contrast, had denied such protection to public employee speech that amounted to a rebellion against the boss.[35] *Ceballos* further extended the "no rebellion against the boss" line of public employee speech cases to a situation more closely resembling classic whistle-blowing.

The third speaker to lose a free speech claim last Term came in the decision of *Morse v. Frederick*. In this case, a school district and its

27. *Id.* at 69-70.
28. *Id.*
29. *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 1951 (2006).
30. *See id.*
31. *Id.*
32. *Id.*
33. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
34. *Id.* at 574.
35. *See* Connick v. Myers, 461 U.S. 138 (1983).

principal were sued by a student who was disciplined for putting up a banner saying, "Bong Hits 4 Jesus."[36] The Court had not had a student speech case for over twenty years, but it had previously developed two lines of free speech cases. The brilliance of Dean Starr's presentation for the school district was to thread the needle between these two lines of cases.

In one line of cases, the Court had previously said that student speech rights are protected. For example, in *Tinker v. Des Moines*, some students wore black arm bands to class to protest the Vietnam War.[37] The Court said they had a right to do that as long as they caused no material disruption.[38] The famous line was, "[S]tudents [do not] shed their right to freedom of speech or expression at the schoolhouse gate."[39] Under the *Tinker* line of cases, Mr. Frederick argued he was entitled to unfurl a banner saying, "Bong Hits 4 Jesus," expressing whatever message he had in mind.[40]

On the other hand, school districts had previously prevailed on free speech claims by students when they could say that the student was interfering with the school's own curriculum or sense of educational appropriateness. For example, in *Bethel School District v. Fraser*, the Court had denied First Amendment protection to a student who made sexual remarks in a mandatory school assembly, holding that such speech may be restricted as pedagogically inappropriate and contrary to the school's educational mission.[41] Further, in *Hazelwood School District v. Kuhlmeier*, the Court upheld a school district's authority to limit stories about teenage abortion and divorced parents in the school newspaper—a publication prepared by the school's journalism class.[42] In that case, the Court ruled that a school is allowed to define its educational mission and to restrict students' speech that interferes with that educational mission.[43]

In arguing on behalf of the Juneau school district, Dean Starr avoided emphasis on the "educational mission" line of argument, presumably because one of the new Justices on the Court, Justice Alito, had already indicated during his days on the Third Circuit that he did not like the idea of school districts necessarily having the chance to say, "Our educational mission means you can't wear that T-shirt against gay

36. Morse v. Frederick, 127 S. Ct. 2618, 2622-23 (2007).

37. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504, 511 (1969).

38. *Id.* at 504.

39. *Id.* at 506.

40. *See Morse*, 127 S. Ct. at 2623.

41. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986) (holding that school prohibition of vulgar terms is proper considering the school's role in inculcating values and protecting minors).

42. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 261 (1988) (holding school paper that was part of curriculum not subject to indiscriminate student use).

43. *Id.* at 266 (citing *Bethel*, 478 U.S. at 683, 685).

marriage," or "You can't wear that T-shirt that has Bible verses on it."[44] In other words, Justice Alito did not like the idea that a school district gets to define its mission broadly and that no student speech is allowed if it interferes with that mission.[45] If Dean Starr had argued too broad a proposition about students' lack of freedom in the school arena, he might have lost Justice Alito's vote.

So he emphasized instead the unique nature of drug-related speech, arguing that, when schools have a no-drug policy, an anti-drug policy, or a zero-tolerance policy, and when drug abuse is a major problem that schools have to grapple with, student speech reasonably thought to advocate illegal drug use may be barred. If you interpret "Bong Hits 4 Jesus" as being pro-marijuana use, then Mr. Frederick interfered with the narrow and specific educational mission of suppression of drug use. Indeed, Dean Starr's litigation strategy was so effective that it became the basis for Chief Justice Roberts' opinion for the Court.

Reviewing this scorecard for the speech cases, some observers might say, "I get it. The conservative speakers win, and the liberal speakers lose. If you're criticizing policemen's conduct, advocating marijuana use, or fighting JAG Corps discrimination against gay and lesbian service members, you will lose your speech claim. But if you're Wisconsin Right to Life, you will win it." In my view, that observation, while tempting, would be wrong.

A different and more helpful way of describing what distinguishes the winning case from the losing case would be this: speakers prevail when they are speaking with their own funds or other private resources, but speakers lose when they seek to retain the benefit of government funding, despite their disfavored speech. A speaker loses when he says, "I'd like to keep my job even though I'm saying something the government doesn't like," or "I'd like to get my scheduled funding even though I'm saying something the government doesn't like," or "I'd like to get my free universal public education even though I'm saying something the government doesn't like." In other words, the Roberts Court has revealed that it is not so friendly to free speech claims by those who are dependent on government largesse or who benefit from a government privilege such as public funds, public jobs, or public education.

In this respect, Chief Justice Roberts may be following the lead of Chief Justice Rehnquist, his former mentor and boss, who took the view that one who takes a government handout has no free speech right to complain about

44. *See generally* Saxe v. State College Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001).
45. *Id.* at 216-217

the strings attached. For example, in a decision holding that the FCC could not limit editorializing by publicly funded broadcasting stations,[46] Chief Justice Rehnquist dissented, suggesting that this was like saying that the "Big Bad Wolf" had taken food away from "Little Red Riding Hood" without acknowledging that the big bad wolf put all of the food in Little Red Riding Hood's picnic basket.[47] The late Chief Justice's position here recalled that of Justice Oliver Wendell Holmes, who once said, "[You] may have a . . . right to talk politics, but . . . [you don't have a] right to be a policeman."[48]

In sum, the key to understanding the pattern of free speech cases in the Roberts Court lies not in a distinction between speakers espousing conservative or liberal causes, but rather in a distinction between speakers who speak with private resources and speakers who depend upon government largesse. The speech scorecard in the Roberts Court so far suggests alignment with the Rehnquist and Holmes position. Recipients of public funds, public employment, or public education receive less protection in the Roberts Court than they would have received from prior Courts. While prior Courts suggested that acceptance of a government privilege does not negate the recipient's free speech rights, the Roberts Court has given government broad latitude to sanction speakers who try to bite the hand that feeds them. By contrast, the Roberts Court has given robust free speech protection to speakers who, like Wisconsin Right to Life, amass and expend their own private resources. Thus, while the Roberts Court has in some striking ways championed free speech rights, it has also retrenched from some protections for speech that had been upheld since the Warren Court.

46. FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984)

47. *Id.* at 402-03 (Rehnquist, J., dissenting).

48. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (holding that a policeman who was fired for spending too much time talking about political candidates had no First Amendment right to complain).