

## TEXTUALISM AND THE BILL OF RIGHTS

NADINE STROSSEN\*

This Essay concerns the Supreme Court's free speech rulings, which do not take a textualist approach. Instead, the Court draws and builds upon a large body of precedents, which contain and reflect a complex web of doctrines, exceptions, and exceptions to the exceptions. Likewise, the Court uses a varying mix of analyses. Not surprisingly, this leads to unpredictable and inconsistent rulings.

To support these conclusions, this Essay will quote two federal judges from opposite ends of the ideological spectrum. First, Ninth Circuit Judge Marsha Berzon has said of free speech cases, lower court judges "do what [they] want because that's what" the Supreme Court does.<sup>1</sup> Justice Clarence Thomas agreed in *Morse v. Frederick*,<sup>2</sup> a case where the Court carved out yet another exception to the free speech rights that it had upheld for public school students in the landmark *Tinker* case.<sup>3</sup> Justice Thomas summed up the Court's rulings on point this way: "students have a right to speak in schools except when they do not."<sup>4</sup> Alas, Justice Thomas's summary applies not only to students, but also to the rest of us.

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\* Professor of Law, New York Law School. Former President, American Civil Liberties Union (1991–2008). This Essay was adapted from remarks given at the Federalist Society's National Lawyers Convention in Washington, D.C., on November 14, 2013.

1. Judge Marsha S. Berzon, U.S. Court of Appeals for the Ninth Circuit, Remarks at the Closing Plenary Panel at the Annual National Convention of the American Constitution Society, Free Speech and the Roberts Court: The First Amendment in the First Five Years (June 18, 2011), available at <http://www.acslaw.org/news/video/free-speech-and-the-roberts-court-the-first-amendment-in-the-first-five-years>, [<http://perma.cc/D2MW-A5H8>].

2. 551 U.S. 393, 397 (2007) (holding that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use").

3. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

4. *Frederick*, 551 U.S. at 418 (Thomas, J., concurring).

In a recent article, First Amendment scholar Ron Collins documented forty-eight distinct exceptions to speech protection that the Court has either created or continued to enforce during the past several decades under the leadership of Chief Justices Rehnquist and Roberts.<sup>5</sup> In another recent article that analyzes all the free speech rulings of the Rehnquist-Roberts Court, Professor David Kairys concluded that this case law entails “an incoherent tangle of rules, doctrines, distinctions, and results that lacks cohesive principles or themes. Functionally, it provides an easy basis for either vindicating or rejecting any plausible free speech claim.”<sup>6</sup>

Despite its many inconsistencies, the Court’s free speech jurisprudence does reflect some noteworthy general patterns, and this Essay will outline those that I consider to be the most important and interesting. Overall, I want to highlight what this Essay will call the “dark side” of the Court’s free speech rulings, dark both in the sense that they are negative for free speech and in the sense that many people are unaware of them.

The conventional wisdom is that this Court has been very speech protective, and it certainly has issued some important decisions that strongly protect controversial types of expression. For example, in the last three years, the Court has held that the Free Speech Clause protects corporate and union campaign expenditures,<sup>7</sup> videos depicting cruelty to animals,<sup>8</sup> protestors spouting hate speech near military funerals,<sup>9</sup> violent video games sold to minors,<sup>10</sup> lies about having received military honors,<sup>11</sup> and the nonconsensual disclosure of doctors’ prescriptions to pharmaceutical marketers.<sup>12</sup> These rulings have understandably drawn a lot of attention, but viewed in isolation, they do not give an accurate impression of the Court’s overall free speech jurisprudence.

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5. Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 417–22 (2013).

6. David Kairys, *The Contradictory Messages of Rehnquist-Roberts Era Speech Law: Liberty and Justice for Some*, 2013 U. ILL. L. REV. 195, 215.

7. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

8. *United States v. Stevens*, 559 U.S. 460 (2010).

9. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

10. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

11. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

12. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

Several recent analyses have aimed to do precisely that, and they belie the conventional wisdom about the Court's alleged speech protectiveness. For example, Adam Liptak of the *New York Times* wrote about an analysis of the Court's free speech cases from 1953 to 2011 under Chief Justices Warren, Burger, Rehnquist, and Roberts; the study concluded that the Roberts Court hears fewer such cases and rules in favor of free speech at a lower rate than all three prior Courts.<sup>13</sup> Likewise, other studies have documented the following patterns in the Roberts Court's rulings: it rejects free speech claims much more often than it upholds them; in many cases in which it upholds free speech claims, it does so by votes of 9-0 or 8-1; and it affirms the lower court rulings when there was no circuit split, indicating that these were easy cases.<sup>14</sup> Conversely, in many cases in which the Court rejects free speech claims, it does so over strong dissents and overturns lower courts,<sup>15</sup> indicating that it is ignoring or cutting back on speech-protective precedent.

Going beyond these overall statistics—which can show only so much—if we look individually at many of the Court's rulings concerning free speech claims, they actually have significantly undermined important speech rights, and these negative rulings have consistently stifled would-be speakers who are relatively powerless and vulnerable, namely government employees, public school students, and prisoners. In contrast, a very high percentage of the Court's pro-speech rulings have struck down regulations on campaign finance and commercial speech, thus benefiting corporations and businesses. Now, don't get me wrong, I am one of the few liberal civil libertarians who support these rulings. The ACLU was actually a plaintiff as well as co-counsel in the original challenge to the McCain-Feingold law,<sup>16</sup> against which I personally testified in

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13. Adam Liptak, *Study Challenges Supreme Court's Image as Defender of Free Speech*, N.Y. TIMES, Jan. 7, 2012, [http://www.nytimes.com/2012/01/08/us/study-challenges-supreme-courts-image-as-defender-of-free-speech.html?\\_r=0](http://www.nytimes.com/2012/01/08/us/study-challenges-supreme-courts-image-as-defender-of-free-speech.html?_r=0), [<http://perma.cc/666S-FFC6>].

14. See, e.g., Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723 (2011); Monica Youn, *The Roberts Court's Free Speech Double Standard*, ACSBLOG (Nov. 29, 2011), <http://www.acslaw.org/acsblog/the-roberts-court's-free-speech-double-standard>, [<http://perma.cc/8XQB-HU5V>].

15. See, e.g., Chemerinsky, *supra* note 14; Youn, *supra* note 14.

16. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

Congress,<sup>17</sup> and the ACLU filed an amicus brief in *Citizens United*, arguing that a key provision of McCain-Feingold was unconstitutional.<sup>18</sup> As I keep telling my liberal friends, as president of the ACLU I would have faced a hefty prison term if the ACLU had just taken out broadcast ads saying that McCain-Feingold was unconstitutional, because Senators McCain and Feingold were then running for national office. Ken Starr volunteered to represent me pro bono, but I decided not to make a test case of it.

Nonetheless, as much as I support those rulings, I regret that the Court has not evenhandedly enforced the same speech-protective doctrines and analysis in too many other cases beyond the campaign finance and commercial speech contexts. The robust free speech analysis applied in *Citizens United* and other campaign finance cases has been sorely lacking in other contexts.

In *Citizens United*, the Court appropriately subjected the government's asserted justification for the challenged restrictions to strict scrutiny.<sup>19</sup> In contrast, in *Holder v. Humanitarian Law Project*,<sup>20</sup> the Court passively accepted the government's asserted national security justifications for criminalizing even peaceful advocacy of lawful aims by U.S. groups, so long as it is coordinated with any group that the government has designated a foreign terrorist organization.<sup>21</sup> When then-Solicitor General Elena Kagan argued the case in the Supreme Court, she acknowledged that the law criminalized the filing of an amicus curiae brief in a U.S. court.<sup>22</sup> Yet, far from exercising strict scrutiny, the Court upheld this draconian speech suppression without any proof that the targeted speech was likely to cause harm.

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17. *Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. 16–22 (2001) (statement of Nadine Strossen, President, American Civil Liberties Union).

18. Brief of the American Civil Liberties Union as Amicus Curiae Supporting Appellant on Supplemental Question at 2, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205).

19. *Citizens United*, 558 U.S. at 340.

20. 560 U.S. 1 (2010).

21. *See id.* at 29–30.

22. *See* Transcript of Oral Argument at 47–48, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (No. 08-1498).

Beyond the inconsistent enforcement of speech-protective precedents and principles, the Rehnquist-Roberts Court has also created some brand new exceptions to free speech protection, which threaten to swallow what the Supreme Court has called the “bedrock rule” of free speech jurisprudence, the viewpoint and content neutrality rule that the government may neither favor nor disfavor any particular idea.<sup>23</sup> Several exceptions to free speech that were either created by the Roberts Court or continued by the Roberts Court allow end-runs around this core content neutrality principle. One is the so-called “secondary effects doctrine,” which shields expressly content-based laws on the grounds that they are aimed at secondary effects such as crime control.<sup>24</sup> The second is the so-called “government speech doctrine,” which gives complete immunity to government speech.<sup>25</sup> Most troublingly, in 2009, the Roberts Court extended that immunity to nongovernment speech that it said the government had adopted.<sup>26</sup> At the same time that the Roberts Court has been fostering these new speech-restrictive doctrines, it has declined to overturn old speech-suppressive rulings that give both broadcast expression and sexual expression only limited First Amendment protection, despite powerful arguments for doing so.<sup>27</sup>

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23. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 201 (1994) (“I begin by reviewing the traditional bedrock rule of the First Amendment: The government cannot regulate speech based on its content.”).

24. See, e.g., *Virginia v. Black*, 538 U.S. 343, 387 n.2 (2003) (opinion of Souter, J.) (“Our ‘secondary effects’ jurisprudence presupposes that the regulation at issue is ‘unrelated to the suppression of free expression.’” (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986))).

25. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“[T]he government’s own speech . . . is exempt from First Amendment scrutiny.”).

26. *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (“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 . . . (where the government controls the message, ‘it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources’).” (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995))).

27. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (invalidating FCC fines as issued under an unconstitutionally vague rule while upholding the power

*Tinker's* statement that "students [do not] shed their constitutional rights to freedom of speech or expression at the school-house gate"<sup>28</sup> accurately reflects the lack of age restriction for the exercise of First Amendment rights. If we look at the text itself, what leaps out to me on the age question is the absence of an age limitation for First Amendment rights when there are express age limitations for being elected to high office.<sup>29</sup>

Justice Stevens's statement in an abortion case involving rights of minors is particularly apropos: "Constitutional rights do not mature and magically spring into being only when someone has attained the state-defined age of majority."<sup>30</sup> This suggests a background assumption that if a person has sufficient maturity and competence, she can exercise First Amendment rights, although there certainly are countervailing justifications for regulation, and it may be easier for the government to satisfy strict scrutiny the younger a person is.

Unfortunately, when confronted with questions of students' free speech rights, the Roberts Court has not based its decisions on a textual argument. For example in *Morse v. Frederick*, the majority opinion was based on a theory of the school as a regulatory institution,<sup>31</sup> and Justice Thomas's separate opinion wanted to carve out a bright-line exclusion of student speech from the First Amendment.<sup>32</sup> But the Court came out the way it did because a couple of the key Justices said in essence: We're making a drug exception to the *Tinker* rule. So when we think that the expression can be reasonably interpreted as advocating

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of the FCC to regulate the use of expletives on broadcast television); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (upholding FCC's rule expanding its authority to punish any broadcast of objectionable language, without regard to the context or repetition of such language, under the Administrative Procedure Act).

28. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

29. See U.S. CONST. art. I, § 2 (representatives must be 25 years old), § 3 (senators must be 30 years old); art. II, § 1, cl. 5 (President must be 35 years old).

30. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

31. *Morse v. Frederick*, 551 U.S. 393, 406 (2007) ("[S]chools may regulate some speech 'even though the government could not censor similar speech outside the school.'" (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988))).

32. *Id.* at 418–19 (Thomas, J., concurring) ("In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools.").

drugs, we will allow the school to regulate, but we are not going beyond that.<sup>33</sup>

What we are now seeing is that the Supreme Court has declined opportunities to review the question of whether the school may enforce an extremely broad, fluid concept of material and substantial disruption of the educational process, which was *Tinker's* sensible limit on student speech, so that the school could conduct its educational business.<sup>34</sup> More recently, however, this has been interpreted as allowing the school to regulate anything the student says on any social medium, on any website, on any blog, that is either about the school, including a school official, or could be read by anybody who attends the school.<sup>35</sup> This represents a reversion to an *in loco parentis* concept of the school, which Justice Thomas has expressly sought to implement.<sup>36</sup>

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33. *Morse*, 551 U.S. at 422 (Alito, J., concurring) ("I join the opinion of the Court on the understanding that...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.").

34. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012); *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011).

35. *Doninger*, 642 F.3d at 340–42, 351 (upholding school's decision to ban a student from running in the class elections because of her off campus blog post calling members of the administration "douchebags" and encouraging students to contact the administration to protest the cancellation of a school sponsored event); *D.J.M. ex rel. D.M. v. Hannibal Public Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011) (upholding school's suspension of a student who sent an instant message from his home computer to another student about getting a gun and shooting students); *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007) (upholding school's regulation of a student's buddy icon, which depicted and called for the killing of his teacher); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010) (upholding school's regulation of student's You-Tube video recorded off campus and posted on her home computer, which disparaged a fellow student and encouraged other students to gossip about that student).

36. *Morse*, 551 U.S. at 413 (Thomas, J., concurring).