Justice Kennedy:
A Free Speech Justice? Only Sometimes

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The conventional wisdom is that Anthony Kennedy was very much a staunch advocate of free speech on the Supreme Court. To be sure, there were many majority opinions he wrote that advanced the protection of free speech. I would point as an example to one of the last majority opinions he wrote for the Court with regard to freedom of speech and that clearly protected speech, *Packingham v. North Carolina*.[1]

Lester Packingham was convicted of taking indecent sexual liberties with a minor when he was in college. He was thus a convicted sex offender in the state of North Carolina. North Carolina had a law that said that those who were convicted of sex crimes were not allowed to use the Internet or any social media where minors might be present. Packingham got a traffic ticket, went to traffic court, and got it quashed. He then went on to Facebook and wrote the words, "God is good." Just for doing this, he was convicted of violating the North Carolina law because he was a registered sex offender impermissibly on social media.[2]

The Supreme Court declared the North Carolina law unconstitutional. Justice Kennedy wrote an opinion joined by five other Justices.[3] Justice Kennedy's opinion began in eloquent language talking about the importance of the Internet and social media as a form for speech. It is clear that any government regulation of speech over this medium has to be subjected to exacting scrutiny. I, of course, could point to many other opinions that Justice Kennedy wrote advancing free speech.

Yet I believe that the conventional wisdom is incomplete, and frankly, inaccurate. Often Justice Kennedy's opinions were not on the side of free speech. Often his votes did not advance free speech.

In my remarks this morning, I want to make two points. First, when the institutional interests of the government were at stake, Justice Kennedy was not

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[1] 137 S. Ct. 1730 (2017).

[2] *Id*. at 1735.

[3] *See generally id*.

a free speech proponent. Second, some of Justice Kennedy's opinions and votes that appeared to advance speech, in fact, will lead to less speech.

In terms of the first point, what's striking to me is that in cases where the interests of the government were involved, Justice Kennedy was not on the side of free speech. To pick an example, *Garcetti v. Ceballos* was an opinion written by Justice Kennedy in spring of 2006.[4]

Richard Ceballos was a deputy district attorney in Los Angeles County. He believed that a witness in one of his cases, a deputy sheriff, was lying. He did some investigation that confirmed his theories. He wrote a memo of the file saying this. His supervisor instructed him to soften the tone of the memo. Ceballos refused to do that.[5] He believed under *Brady v. Maryland*[6] he was required to share a copy of that memo with the defense lawyer.[7]

For doing this, he was removed from his supervisory position. He was transferred to a much less desirable location. He sued saying that this violated his First Amendment rights.[8] The Supreme Court in a five to four decision ruled against Richard Ceballos. Justice Kennedy wrote the opinion for the Court joined by the four conservative Justices who were then on the Court. Justice Kennedy's opinion held that there is no First Amendment protection for the speech of government employees on the job in the scope of their duties.[9]

I can point you to not just dozens, but likely hundreds of lower court cases where government employees have lost their speech claims in light of the Supreme Court's broad holding that there is no First Amendment protection for the speech of government employees on the job in the scope of their duties. This is particularly important when whistleblowers suffer reprisals after exposing wrongdoing to their supervisors.

In the year 2000, after the Rampart scandal in the Los Angeles Police Department came to light, I was asked to do a report on the Los Angeles Police Department. One of the things that I learned was that those who reported misconduct by other officers often would face reprisal by supervisors and by other officers. *Garcetti v. Ceballos* means that if the officer comes forward, they have no First Amendment protection whatsoever.

I can point to other cases, too, where Justice Kennedy ruled against free speech when the institutional interests of the government were at stake. Take a case decided a year after *Garcetti v. Ceballos—Morse v. Frederick*.[10] The Olympic torch was coming through Juneau, Alaska. A high school there released its students to stand on the sidewalk and watched it come by. A high school student got together with some friends and unfurled a banner that said, "Bong

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[4] 547 U.S. 410 (2006).

[5] *Id.* at 413–14.

[6] 373 U.S. 83 (1963).

[7] *Ceballos*, 547 U.S. at 425.

[8] *Id.* at 415.

[9] *Id.* at 426.

[10] 551 U.S. 393 (2007).

Hits 4 Jesus."[11] At the oral argument, Justice Souter said he had no idea what that meant.[12]

The principal thought that it was a message to encourage illegal drug use. She confiscated the banner and suspended the student from school. The student sued and said that his free speech rights had been violated. The Supreme Court, in a five to four decision, ruled in favor of the Principal of the school and against the student. Chief Justice Roberts wrote the opinion for the Court here, but Justice Kennedy was part of the majority. Chief Justice Roberts emphasized the interest of the school in discouraging illegal drug use and gave the school the authority to punish speech that was perceived as encouraging illegal drug use.[13]

As Justice Stevens pointed out in dissent, it's hard to imagine that any student of the school, the smartest or the slowest, was more likely to use illegal drugs because of this banner.[14] The banner would not have any effect with regard to drug use within the school, yet nonetheless, Justice Kennedy was part of the majority saying that speech could be punished.

Another case at about the same time that involved prisoners where Justice Kennedy voted against free speech was *Beard v. Banks*.[15] What's involved here was a Pennsylvania prison regulation that prisoners in the maximum security facility could not have any printed material. They couldn't have newspapers, magazines, books. They couldn't even have family photographs.[16] The traditional principle with regard to the constitutional rights of prisoners is that prisoners lose those rights than are necessary to effectuate incarceration. It is hard to believe that taking away all printed material is necessary to effectuate incarceration. It also is harder to think of a clearer infringement of speech than saying, "No access to printed material at all." The Supreme Court upheld that regulation, once more with Justice Kennedy in the majority.[17]

I'll point to one other example. This is a case from 2010, *Holder v. Humanitarian Law Project*.[18] American citizens wanted to help a Sri Lankan group apply for humanitarian aid and a Kurdish group use the United Nations to resolve its dispute and its desire for independence. The State Department had labeled both of these groups as terrorist organizations. The question was whether the Americans could be prosecuted for materially assisting terrorist activity for helping these groups.[19] Nothing the Americans were doing was in any way linked to terrorist activity. It was about getting humanitarian assistance and using the United Nations.

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[11] *Id*. at 397.

[12] *See* Transcript of Oral Argument at 25, *Morse*, 551 U.S. 393 (No. 06-278).

[13] *Morse*, 551 U.S. at 407–09.

[14] *Id.* at 444–45 (Stevens, J., dissenting).

[15] 548 U.S. 521 (2006).

[16] *Id.* at 524–25.

[17] *Id.*

[18] 561 U.S. 1 (2010).

[19] *Id.* at 9–11.

Nonetheless, the Supreme Court, in an opinion by Chief Justice Roberts said that such speech could be prosecuted and punished as material assisting foreign terrorist organizations.[20] Justice Kennedy was part of the majority opinion that said that the speech could be punished. Justice Breyer, in dissent, argued that under the leading Supreme Court case, *Brandenburg v. Ohio*,[21] speech should be punished only if there is a substantial likelihood of imminent illegal activity and only if the speech is directed causing imminent illegal activity.[22] There was no evidence of this whatsoever. Indeed, Chief Justice Roberts' majority opinion didn't even cite to *Brandenburg v. Ohio*.

For those who want to think of Anthony Kennedy as a free speech Justice, you need to take into account his rulings in cases like *Garcetti v. Ceballos*, *Morse v. Frederick*, *Beard v. Banks*, and *Holder v. Humanitarian Law Project*. These votes by Justice Kennedy were not speech protective at all.

The second point that I want to make this morning is that some of Justice Kennedy's opinions or votes that seem to advance free speech, actually will lead to less speech. Let me again give some examples. I'll start with a case from June 27, 2018, *Janus v. American Federation of State, County & Municipal Employees, Council 31*.[23]

In 1977, in *Abood v. Detroit Board of Education*, the Supreme Court reaffirmed that no one can be forced to join a public employees union, but the Court said that nonunion members can be required to pay the share of the union dues that go to support the collective bargaining activities of the union.[24] The Court explained that nonunion members benefit from collective bargaining in their wages, their hours, their working conditions. They should not be able to be free riders. The Court said that nonunion members cannot be required to pay the share of the union dues that go to support the political activities of the union; that would be impermissible compelled speech.

This was the law for decades until the Supreme Court overruled it in *Janus*. Justice Alito wrote the opinion for the Court. Justice Kennedy was part of the five-person majority. The Court focused on how it violates the free speech rights of nonunion members to force them to pay the so-called agency fees, the fair share that goes to support collective bargaining. Now, I certainly would question that premise. After all, the members of the union voted by majority vote to unionize and part of democracy includes sometimes having to pay taxes even if we disagree with how they are used.

But if you look at it just from the free speech perspective, I am convinced that *Janus* is going to mean much less in the way of speech. *Janus* will mean that unions are going to have far less revenue and less members, which means

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[20] *Id.* at 8.

[21] 395 U.S. 444 (1969).

[22] *Holder*, 561 U.S. at 43–44 (Breyer, J., dissenting).

[23] 138 S. Ct. 2448 (2018).

[24] 431 U.S. 209, 234–36 (1977), *overruled by Janus*, 138 S. Ct. 2448.

they're going to engage less expressive activity. If you look at *Janus* from a calculus with regard to whether it is going to mean more or less free speech, I think it is clearly going to be less.

Or take the case that Justice Kennedy might be most identified within the area of freedom of speech, *Citizens United v. Federal Election Commission*.[25] There, of course, the Supreme Court held that corporations can spend unlimited amounts of money to get the candidates a choice elected or defeated. There's many grounds which I would argue that *Citizens United* was not a desirable interpretation of the First Amendment, including I question whether it's going to lead to more speech.

To be sure, it means corporations are going to be able to engage in more speech. But what about the candidates who will never choose to run because of the corporate wealth that arrayed against them? What about all of the voices that are drowned out by the accumulation of corporate wealth?

I think when you look at cases like *Janus* and *Citizens United*, though on the surface they seem to be free speech cases, I question whether they're going to really lead to more speech. I think it often will mean less speech.

When I look at Justice Kennedy's record with regard to freedom of speech, what I see is that when there was a tension between his conservative values and free speech, often it was the conservative principles that triumphed. This was apparent in the cases involving the institutional interests of the government. But also if you *Janus* together with *Citizens United*, it is apparent that what the Court has done is increase the power of corporations in our society and significantly decrease the power of unions. That's something conservatives favor, but not something that the First Amendment should continence.

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[25] 558 U.S. 310 (2010).

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