THE FUTURE OF THE FIRST AMENDMENT

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It is such an honor and a pleasure to be here. Thank you so much for the kind introduction. The conference will focus on the future of the First Amendment. I was asked to begin by looking back just a bit to talk about the First Amendment in the first four years of the John Roberts Court. A week ago Monday, on October 5, 2009, the Supreme Court began the fifth year with John Roberts as Chief Justice. Actually, the term unofficially began on Wednesday, September 9, when the Justices came back from their summer recess early for arguments in the case of *Citizens United v. Federal Election Commission*,[1] which will likely be the most important First Amendment case so far by the Roberts Court, and one sure to be discussed a lot here today.

I think in order to discuss the First Amendment and the Roberts Court, we need to look more generally at the first few years of the Roberts Court, and we need to situate the First Amendment cases in this context. I want to make three quick overviews about the Roberts Court, where it is, and then apply these to some specific themes about the Roberts Court and the First Amendment. First, let me tell you a little about the Court by the numbers. Last year the Supreme Court decided 75 cases after briefing and oral arguments. It is a bit more from the 67 cases the year before, and a bit more than the 68 cases the year before that. To put this in a historical context, the Supreme Court for much of the 20th century was deciding over 200 cases a year. As recently as the 1980s, the Court was averaging about 160 cases a year. So in that sense, the 75, or 67 decisions of the last two years are dramatic downsizing in the docket. This is important as we look at the First Amendment.[2] There have not been that many First

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

2. *See* Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, N.Y. TIMES, Dec.

Amendment cases of the Roberts Court, and that is because there have not been that many decisions by the Roberts Court. The smaller docket has enormously important implications for the First Amendment, and all areas of law. More of the major legal issues are going a longer time before being resolved. More conflicts among the states and the circuits are going a longer time before being settled. Another less noticed implication of the smaller docket is that the number of decisions has gone down, but the length of the opinions has increased. I can show a perfect inverse correlation, as the number of cases decided per year decreases, the average length of opinion, as measured by words per page and number of pages, increases. Now I am not sure what is the cause and what is the effect. Is the court 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? It is now common, especially in the high profile cases, for there to be slip opinions that are greater than 150 pages long. One of the things I have to do every July is edit annual supplements to my Constitutional Law and Criminal Procedure casebooks. There is no way to edit a 150-page opinion down to an assignment for law students in one night without making a hash of it. So I am starting a new campaign that I would ask you to join me in. Word and page limits should be imposed on Supreme Court opinions.

There are some other statistics that might interest you. The two Justices that were most often in agreement last term were Chief Justice Roberts and Justice Samuel Alito. They voted together 92% of the time. The two Justices next most often in agreement were Chief Justice Roberts and Justice Antonin Scalia. You can guess who the two Justices were who were next most often in agreement: Justices Scalia and Alito. I think it is a clear indication of the ideology of two of the newest members of the court, and that has implications, as I will talk about in a moment, for the First Amendment.

The second general observation: When it matters most, it is the Anthony Kennedy Court. I know we refer to it as the Roberts Court out of tradition and deference to the Chief Justice, but at least in the perspectives of lawyers who stand before the Justices and write briefs to the Court, this is the Anthony Kennedy Court. Last year, the Justice who was most often in the majority was Anthony Kennedy:

7, 2006, *available at* http://www.nytimes.com/2006/12/07/washington /07scotus.html.

92% of the time. In each of the four years in which John Roberts has been Chief Justice, Justice Kennedy has been in the majority in most 5–4 decisions. Last term, of 75 cases, 23 were decided 5–4. Justice Anthony Kennedy was in the majority in 18 of 23, more than any other Justice. The year before that, when there were 67 cases, 14 were decided 5–4, and Justice Kennedy was in the majority in 9, more than any other Justice. In the year before that, when there were 68 cases, 24 were decided 5–4, and Justice Kennedy was in the majority in every one of them. It is the only term I can identify with a significant number of 5–4 decisions where one Justice was in the majority every time. This holds true with regard to the First Amendment as well, as I will show you in a moment. If for nothing else, this is relevant for the lawyers who practice before the Court. There is often a sense of arguing to an audience of one. I recently wrote a brief in a case and I will tell you in all honesty, my brief was a shameless attempt to pander to Justice Kennedy. If I could, I would have put Justice Kennedy's picture on the cover of my brief. My brief was not unique among those in this case. This case is not unique among those on the docket. It is the Anthony Kennedy Court.

The third and final observation is that, generally, this is a very conservative court. Now, there is a very easy explanation for this: Anthony Kennedy sides with the more conservative block much more often than he sides with the more liberal block. Statistics bear this out. I mentioned that last term, of 75 cases, 23 were decided 5–4. In 16 of those 23 cases, the Justices split long traditional ideological lines. Justices Roberts, Scalia, Thomas, and Alito were on one side. Justices Stevens, Ginsburg, Souter, and Breyer were on the other. In 11 of the 16, Justice Kennedy sided with the conservatives. In 5 of the 16, he sided with the more liberal Justices. That has been true all four years where John Roberts has been Chief Justice. Anthony Kennedy sides with the conservatives more than twice as often as with the more liberal Justices. In fact, in each of the major First Amendment cases that was decided 5–4, Anthony Kennedy has sided with the conservatives, not the liberals.

So, having painted this general picture of the Roberts Court, let me specifically get to the task to which I was assigned, and talk about what the Roberts Court has done with regard to the First Amendment. Here, I identify three themes. First, the Roberts Court has given great deference to the government as government in First Amendment

cases.[3] It has been very statist. Let me give you a couple examples to support this. The first, which I regard as one of the most important Roberts Court's decisions regarding the First Amendment, is *Garcetti v. Ceballos*.[4] Richard Ceballos was an Assistant District Attorney in Los Angeles County. He believed that a witness in one of his cases, a deputy sheriff, was not telling the truth. He wrote a memo to that affect. His supervisor told him to soften the memo, take out some of the language, and some of the accusations. He refused, believing that his doubts were accurate.[5] In fact, he turned over a copy of his memo to the defense, as he believed he was required to do under *Brady v. Maryland*[6] and its progeny. As a result, he alleged that he was removed from his supervisory position and transferred to a less desirable location. He said this was in retaliation for his speech, and he sued for violation of the First Amendment. A motion to dismiss was made for failure to state a claim. The Ninth Circuit ruled that there was a cause of action under the First Amendment.[7] The Supreme Court reversed in a 5–4 decision. Justice Kennedy wrote for the majority.[8] I want to pause here. Many had noted previously that Justice Kennedy had been one of the more speech protective Justices under the Rehnquist Court. This has not continued to be true under the Roberts Court. This case, I think, is typical of many that I will discuss where Kennedy votes against the free speech position. Justice Kennedy said, and this is the holding of *Garcetti*, that there is no First Amendment protection for the speech of government employees, while on the job, in the scope of their duties.[9] Justice Kennedy explained that a distinction must be drawn between a person as a citizen as opposed to a person as a government employee.[10] The First Amendment provides protection for speech in the former capacity, but not as to the latter.[11] Justice Kennedy expressed great concern that the federal judiciary might be turned into a super employment agency.[12] The worry was that anyone who was fired or suffered

3. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006); Rust v. Sullivan, 500 U.S. 173 (1991).
4. 547 U.S. 410 (2006).
5. *Id.* at 413–14.
6. 373 U.S. 83, 87 (1963).
7. Ceballos v. Garcetti, 361 F.3d 1168 (2004).
8. *Garcetti*, 547 U.S. at 413.
9. *Id.* at 421.
10. *Id.* at 418–19.
11. *Id.* at 419–20.
12. *Id.* at 424.

adverse employment consequences might allege that it was because of speech and then bring a lawsuit in federal court. The holding, as Justice Souter pointed out in the dissent, was broad.[13] There is no First Amendment protection for the speech of government employees, on the job, in the scope of their duties. I have read dozens of lower court cases that have applied *Garcetti* and they have generally applied it expansively against government employees.[14] There is some litigation about what it means to be in the scope of one's duties, but generally courts have come down on the side of the government.[15] I find this decision very troubling. I find the premise that there is a difference between speech as a citizen and speech as employee a tough one to justify. A government employee does not give up his or her citizenship when walking into the government office building. I am troubled that the Court here decided to adopt such a bright line rule covering all government employees in all contexts. I am most worried here for what it will mean in terms of exposing wrongdoing with the government.

About a decade ago, in the year 2000, I was asked to do a study of the Los Angeles Police Department ("LAPD") after the Rampart scandal was exposed. As part of this, I interviewed 75–100 police officers and learned that the greatest problem at the LAPD was a culture that created a code of silence. There was tremendous pressure against officers revealing the wrongdoing of other officers. I learned a new phrase as I was doing my report: "freeway therapy." Officers said that those officers who reported misconduct of other officers to supervisors would be transferred to the precinct furthest from where they live. Hence the phrase, "freeway therapy." In Los Angeles, that can be a distance of two to three hours, in terms of the commute. When the Christopher Commission did its report on LAPD after the Rodney King beating, it said that the single largest obstacle to an effective disciplinary system was the code of silence.[16] How can we encourage police officers to come forward and report wrongdoing to their supervisors if there is no First Amendment protection for that?

13. *Id.* at 427 (Souter, J., dissenting).

14. *See, e.g.*, Foley v. Town of Randolph, 598 F.3d 1, 10 (1st Cir. 2010); Weintraub v. Bd. of Educ., 593 F.3d 196, 200–01 (2nd Cir. 2010).

15. *See, e.g.*, Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 693–94 (5th Cir. 2007); Phillips v. City of Dawsonville, 499 F.3d 1239, 1242–43 (11th Cir. 2007).

16. Report of the Independent Commission On the Los Angeles Police Department 168 (1991).

Justice Kennedy, for the majority in *Garcetti*, said that there is civil service protection; whistle-blower protection.[17] As the dissent pointed out, often that is non-existent or inadequate.[18] To this day, there is no whistle-blower protection at the LAPD for officers to come forward and report wrongdoing by other officers.

There is also an anomaly that this decision creates that I think will create a long-term, even larger threat to free speech. Had Ceballos gone to the *Los Angeles Times* or CBS radio, his speech would have been protected by the First Amendment. However, since he went in the department, it was not protected. The holding of *Garcetti v. Ceballos* is that speech on the job in the scope of employment is not protected.[19] It does not change the law about speech by government employees to external media. I do not think that the Supreme Court wanted to encourage Ceballos to go to the *Los Angeles Times* or CBS radio rather than his supervisors, and I worry that this will create pressure to reduce the protection of speech of government employees when they are talking to others.

Let me give you another example of this theme of the Court being deferential to the government as government, and that is the rise of the so-called "government speech doctrine."[20] The government speech doctrine is a relatively recent invention. We can argue about when it started. One of the first major cases was *Rust v. Sullivan*[21] in 1991. *Rust v. Sullivan* involved a federal law that said recipients of federal funds could not advise, or give information, with regard to abortion, in terms of counseling or referrals.[22] The Supreme Court, in a 5–4 decision, upheld this as constitutional.[23] Chief Justice Rehnquist wrote for the Court and said that this is the government as speaker.[24] The government was saying that if a Planned Parenthood organization got federal money, they could not offer abortion services or abortion counseling. But the Supreme Court said that since these are government funds, we should think of this as the government

17. *Garcetti*, 547 U.S. at 425.

18. *Id*. at 439–41 (Souter, J., dissenting).

19. *Id*. at 421–22.

20. *See* Blake R. Bertagna, *The Government's Ten Commandments:* Pleasant Grove City v. Summum *and the Government Speech Doctrine*, 58 DRAKE L. REV. 1, 6 (2009); Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring).

21. 500 U.S. 173 (1991).

22. 42 U.S.C. §§ 300–300(a)(6).

23. *Rust*, 500 U.S. at 178.

24. *Id.* at 193–94.

speaking.[25] Although it was not literally the government as the speaker, the Court saw it as similar enough to coin the phrase of "government speech." There were other Rehnquist Court decisions that adopted and used this "government speech" notion.[26] There is a case called *National Endowment of the Arts v. Finley*,[27] which said that recipients of Federal National Endowment of the Arts money could not engage in indecent art. The Supreme Court upheld this as constitutional, saying that since it is the government's money, in essence, the government is the speaker, so the restrictions cannot violate the First Amendment.[28] Even though the term "indecent art" is vague, the Court said the government was not acting as a regulator, where vagueness is of concern; it is the government as a subsidizer of the speaker.[29]

In the last year of the Rehnquist Court, the Court decided a case called *Johanns v. Livestock Marketing Association*.[30] A tax is imposed on cattle producers, per head of cattle, that then goes into a fund to pay for generic advertising to encourage people to consume beef.[31] Some cattle producers did not want to have to contribute to the fund. They would rather use those funds for advertisements for their specialized products, like organic beef. The producers said the tax violated their First Amendment rights. The Supreme Court, in an opinion by Justice Scalia, upheld the tax as constitutional.[32] Justice Scalia expressly called this "government speech."[33] He said the government wants to express a message to encourage people to eat more beef.[34] The government is allowed to express that message, and the government can certainly use tax dollars to do this.[35] It does not have to be a tax on the general population, it can be a tax on cattle

25. *Id.* at 195.

26. *E.g.*, Nat'l Endowment of the Arts v. Finley, 524 U.S. 569 (1998); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

27. 524 U.S. 569.

28. *Id*. at 587–88.

29. *Id.* at 586–87.

30. 544 U.S. 550.

31. *Id.* at 553–55; *see also* The Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901–2911 (2010).

32. *Johanns*, 544 U.S. at 566–67.

33. *Id.* at 562.

34. *Id.* at 560–61.

35. *Id.* at 561–62.

producers.[36]

But, I think the most important, and the most insidious government speech case, was a decision from last year in a case called *Pleasant Grove City v. Summum*.[37] Pleasant Grove is a city in Utah and it has a public park. In the public park, there is a Ten Commandments monument. A group called "Friends of the Eagles" donated the Ten Commandments monument to the city. The monument was almost certainly paid for by Cecil B. De Mille. Cecil B. De Mille made a movie in the 1950s called *The Ten Commandments*,[38] and he paid for the Friends of the Eagles to put up hundreds, maybe thousands of these monuments, all over the country. I got to argue a case in the Supreme Court in 2005 involving one of these monuments; a case called *Van Orden v. Perry*.[39] It involves a six-foot high, three-foot wide, Ten Commandments monument that sits directly at the corner of the Texas state capital and the Texas Supreme Court. The question at oral argument that took me most by surprise came from Justice Sandra Day O'Connor. She said, "Wasn't this monument paid for by Cecil B. De Mille?" And I answered honestly, of course, and I said, "We don't know who paid for this particular monument, but we do know that he paid for monuments all over the country."[40]

The Summums are a small faith. They went to the city officials of Pleasant Grove and said that since there was a monument of the Ten Commandments in the park, they wanted to put up a monument of their religion, specifically a monument of the seven aphorisms of their faith.[41] The city refused and the Summums sued. The United States Court of Appeals for the Tenth Circuit ruled in favor of the Summum religious organization.[42] The Tenth Circuit said that this was impermissible content-based discrimination with regard to speech.[43] The Supreme Court unanimously reversed in an opinion by Justice Samuel Alito.[44] Justice Alito said this is government speech.[45]

36. *Id*. at 562–63.

37. 129 S. Ct. 1125 (2009).

38. THE TEN COMMANDMENTS (Paramount Pictures 1956).

39. 545 U.S. 677 (2005).

40. Transcript of Oral Argument at 11, Van Orden v. Perry, 545 U.S. 677 (2005).

41. *Summum*, 129 S. Ct. at 1127.

42. Summum v. Pleasant Grove City, 483 F.3d 1044 (10th Cir. 2007), *rev'd*, 129 S. Ct. 1125 (2009).

43. *Id.* at 1047.

44. *Summum*, 129 S. Ct. at 1129.

Justice Alito went on to say that frequently government chooses to speak, with things like monuments and that when the government engages in speech, it can make content-based choices, even viewpoint based discriminations.[46] The government can choose to express one message, and not another.[47] Put that way, it does not sound so troubling. But now think of the following hypothetical. Imagine there is a city with a public park and the city officials decide to allow a pro-war demonstration in the park. Some anti-war demonstrators come and say "we want to use the same park, in the same way, for our anti-war demonstration," and the city refuses to allow it. The answer should be easy: that violates the First Amendment. That is the kind of viewpoint discrimination that goes against the very core of what free speech is about. But imagine that the city officials say, "we adopt the private, pro-war demonstration, as our government speech, just like Pleasant Grove adopted the privately donated Ten Commandments monument as its government speech." Pleasant Grove never made an official adoption as government speech; the Court implied that. Here, maybe the city makes an official adoption. I cannot easily distinguish my hypothetical from the Court's holding in *Pleasant Grove*. Justice Alito drew a distinction in his opinion between the monument being permanent speech, and my hypothetical being transitory speech.[48] But I do not understand why that matters in terms of the First Amendment, and then you get into line drawing. If it is there for a couple of days, does that then make it more permanent speech, and so on?

The question should be, "Is this really the government as speaker, or is the government creating a forum for expression?" To be sure, the government can be the speaker. It can create government playhouses, concert halls, and museums, where they can make content-based choices. And if that is really what this is about, then I think you can see where Justice Alito's opinion makes sense. On the other hand, if this is the government creating a forum for speech, then the government cannot engage in content discrimination. Parks are the quintessential public forum. I think what the Court needed to explain is, "why should this be regarded as the government as the speaker, rather than the government, by creating a park, creating a

45. *Id.* at 1134.
46. *Id.* at 1131.
47. *Id.*
48. *Id.* at 1132.

forum?" That is the issue that is not discussed. Justice Stevens, in an opinion concurring in the judgment, expressed great concern about the "recently minted government speech doctrine."[49] I share that concern.

The second major theme that I would identify with regard to the Roberts Court and the First Amendment is the triumph of conservative values in First Amendment cases. Here I want to give three examples where I think you will see that traditional conservative values have won, and won because Justice Kennedy has sided with the conservatives. The first of these examples is a case from a couple years ago: *Morse v. Frederick*.[50] The Olympic torch was coming through Juneau, Alaska. A school decided to release its students to stand on the sidewalk and watch the torch come through. A student got together with some classmates, and some friends who were not at the school, and unfurled a banner that said, and I'm quoting, "Bong Hits 4 Jesus."[51] Here, I agree with something that Justice Souter said at oral argument: "I have no idea what that means."[52]

But the school principal thought that it was a message to encourage illegal drug use. The banner was confiscated, and the student was suspended from school. The student sued under the First Amendment. The Ninth Circuit ruled in favor of the student, and against the school officials, who had claimed qualified immunity.[53] The Supreme Court, in a 5–4 decision, reversed.[54] Fitting with the themes I identified at the beginning, Chief Justice Roberts wrote the opinion for the Court, joined by Justices Scalia, Kennedy, Thomas, and Alito.[55] The Chief Justice said the principal could reasonably interpret the speech as encouraging illegal drug use.[56] Chief Justice Roberts said schools have an important interest in stopping illegal drug use, so they can punish the speech.[57] Justices Kennedy and Alito wrote a concurring opinion in which they said this is a narrow case, really about the important interest of the school in stopping illegal

49. *Id.* at 1139 (Stevens, J., concurring).
50. 551 U.S. 393 (2007).
51. *Id*. at 397.
52. *See* Transcript of Oral Argument at 49–50, Morse v. Frederick, 551 U.S. 393 (2007).
53. Frederick v. Morse, 439 F.3d 1114, 1125 (2006).
54. *Morse*, 551 U.S. at 410.
55. *Id.* at 395.
56. *Id.* at 401–02.
57. *Id.* at 408–09.

drugs.[58] But I do not see it as a case that can be so easily cabined. I think it is a major restriction in terms of student speech, a significant expansion in the ability of schools to punish student speech. As you know, the leading Supreme Court case about student speech was *Tinker v. Des Moines Independent Community School District*,[59] now forty years ago. Justice Fortas, writing for the majority, spoke eloquently, that students do not leave their First Amendment rights at the schoolhouse gate.[60] The Supreme Court said schools can punish students only if their speech is actually disruptive of school activities.[61] There was no claim by the school in *Tinker* that the armband was even slightly disruptive of school activities, that anybody paid any attention to it other than the principal. Moreover, it seems that what the Court was concerned about was that this might encourage illegal activity. But there are tests under the First Amendment for incitement.[62] I think Justice Stevens made an important point in his dissent in *Morse* when he said there is not a shred of evidence that any student at the school was more likely to use illegal drugs because of the banner that was held up.[63] Hard to believe that any student, the smartest or the slowest, would be more likely to go out and use drugs because they saw the banner that was there. To me, it is about the deference to the government in the area where conservatives always wanted great deference to the government: wanting schools to fight drugs.

Let me give a second example with regard to the triumph of conservative values. Now admittedly, it was not a case that was decided on First Amendment grounds, but the First Amendment was clearly in the background. It is a case from this year: *Federal Communications Commission v. Fox Television Stations*.[64] You might remember in 1978, in *Federal Communications Commission v. Pacifica*,[65] the Supreme Court said that a radio station could be punished for broadcasting the George Carlin monologue on the seven

58. *Id.* at 422 (Alito, J., and Kennedy, J., concurring).

59. 393 U.S. 503 (1969).

60. *Id.* at 506.

61. *Id.* at 508–09.

62. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 431 U.S. 494 (1951).

63. *Morse*, 551 U.S. at 444 (Stevens, J., dissenting).

64. 129 S. Ct. 1800 (2009).

65. 438 U.S. 726 (1978).

dirty words.[66] For the students in the audience, whenever I teach this, I always tell them they do not have to memorize the list of the seven dirty words for the exam, but I warn them when they see my exam questions that they may be the first words that come to mind anyway. In a footnote, the Court said that they were not dealing with the single fleeting use of an expletive,[67] and from 1978 until 2004, the FCC took the position that the single, fleeting use of profanity, would not be punishable. Then, in 2004, the conservative Bush FCC changed its policy. There were a few incidents that they pointed to as the basis for this. One involved Bono, at a music awards show, accepting his award and saying it was brilliant, and using the "F" word as an adjective before it.[68] Another involved Cher, speaking to her critics, and saying "go F them."[69] Another involved Nicole Richie, who managed to use the "F" word and the "S" word in a single sentence.[70] One other incident involved an episode of NYPD Blue, where the word "bullshit" was used. The FCC said all of this could be punished. The FCC said, "Any use of the 'F' word is deemed to be inherently sexual." I have to admit, I do not think that when Cher said to her critics, "go fuck them" she was proposing sexual relations with them. The United States Court of Appeals for the Second Circuit said that the new FCC policy violated the Administrative Procedures Act, that it was "arbitrary and capricious," that the FCC failed to justify the basis for revising the policy.[71] The Second Circuit said the First Amendment issue was not posed, but it believed that the policy would violate the First Amendment.[72] The Supreme Court, in a 5–4 decision, reversed the Second Circuit.[73] Justice Scalia wrote for the Court, joined by Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Justice Alito.[74] Justice Scalia's decision focused entirely on the Administrative Procedures Act, saying that the decision of the FCC was not "arbitrary and capricious."[75] The Court

66. *Id.* at 751.

67. *Id.* at 729 n.1.

68. *Fox Television Stations*, 129 S. Ct. at 1807–08.

69. *Id.* at 1809.

70. *Id.*

71. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 455 (2nd Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009).

72. *Id.* at 462.

73. *Fox Television Stations*, 129 S. Ct. 1800, 1819 (2009).

74. *Id.* at 1805.

75. *Id.* at 1814.

said that it was not dealing with the First Amendment issue. However, Justice Scalia said that the FCC could assume that any exposure to profanities is inherently harmful to children.[76] That goes right to the First Amendment question, even though the Court did not decide the First Amendment issue. I am the parent of four children, and my sense is kids hear those words from early on, and I am not persuaded that hearing those words really causes any damage to children. I certainly do not use those words in everyday conversation. I encourage my children not to, but I do not see what the real harm is of hearing Bono, Cher, or Nicole Richie use those kinds of words. I think the Second Circuit's point here was that the FCC failed to justify this. I think that Justice Scalia's opinion is an indication that at least some, if not a majority of the court, would side with the FCC and its views, and will likely vote that way when the First Amendment issue comes up. I think its telling here that Justice Kennedy, who for so long had been thought of as a speech protective Justice, sides with the more conservative Justices in upholding the FCC policy. I would point you to a concurring opinion by Justice Thomas that might have long-term significance that might be discussed later today. Justice Thomas said that the "medium by medium" approach that the Supreme Court had used for the First Amendment makes no sense.[77] He said over time, the Supreme Court has developed certain rules for newspapers, which are different from over-the-air television and radio, which is different from cable television, which is then different from the telephone, which is different from the Internet. He said now, many people receive all of this media from one service provider. The "case by case" approach, the "medium by medium" approach, does not make sense any longer.[78] I think he is clearly right here, and I hope that is a direction for the future.

One more example that I would point to as the triumph of conservative values on the Supreme Court is campaign finance. The conservatives of the Supreme Court have consistently taken the position that spending money in election campaigns is core political speech and that any restriction has to meet strict scrutiny. Justices Scalia, Kennedy, and Thomas have repeatedly taken the position that

76. *Id.* at 18.

77. *Id.* at 1821 (Thomas, J., concurring).

78. *Id.*

any limit on campaign contributions, other than disclosure requirements, violates the First Amendment. They have taken the position that corporations have Free Speech rights, just like individuals, and limits on corporate contributions to candidates violate the First Amendment. We have already had a couple of campaign contribution cases before the Roberts Court. In *Randall v. Sorrell*, [79] the Supreme Court struck down a Vermont campaign contribution limit. That was a 6–3 decision, with Justice Breyer joining the five more conservative Justices, saying that if the contribution limit is too low, it violates Freedom of Speech.[80] There was *Federal Election Commission v. Wisconsin Right to Life*, [81] which involved a provision of the McCain-Feingold Bipartisan Campaign Finance Reform Act. It is a provision that says that corporations and unions cannot take out broadcast advertisements for or against an identifiable candidate, thirty days before a primary election or sixty days before a general election.[82] The Supreme Court upheld that as facially constitutional in *McConnell v. Federal Election Commission*[83] in 2003. To understand this area of law, it is important to note that *McConnell* was a 5–4 decision. Justices Stevens and O'Connor wrote a joint opinion for the majority, joined by Justices Souter, Ginsberg, and Breyer.[84] In *Federal Election Commission v. Wisconsin Right to Life*,[85] the Supreme Court declared this provision unconstitutional as applied to a political action corporation. It was a 5–4 decision with the five conservatives in the majority.[86]

But the most important campaign finance case is the one that is before the Court right now—the one I mentioned in my introduction—*Citizens United v. Federal Election Commission*.[87] In 1907, Congress passed a law prohibiting corporations from contributing money to candidates for federal elective office.[88] This

79. 548 U.S. 230 (2006).

80. *Id*. at 232.

81. 551 U.S. 449 (2007).

82. *Id.* at 455–56; Bipartisan Campaign Reform Act of 2002 § 203, Pub. L. No. 107-155, 116 Stat. 91 (codified as amended at 2 U.S.C. § 441b(b)(2) (2006)).

83. 540 U.S. 93 (2003).

84. *Id.* at 113.

85. *Wisconsin Right to Life*, 551 U.S. at 457.

86. *Id.* at 454.

87. 130 S. Ct. 876 (2010).

88. Tillman Act of 1907, ch. 420, 34 Stat. 864 (1907).

was expanded to unions in the 1940s.[89] Corporations have clever lawyers, and they found a way around this. The corporations simply took out the advertisements themselves, endorsing or opposing candidates; they did not need to give the money to the candidate. In 1974, Congress amended the Federal Election Act to prohibit corporations and unions from doing this.[90] But, corporations and unions, with clever lawyers, came up with a way to circumvent this. The corporations and unions would simply take out so-called "issue ads." The advertisements would never say "vote for or against" a specific candidate, but they would criticize a candidate's position on a particular issue, or praise a candidate's view on a particular issue, and it was in the midst of the election campaign. It was not hard for the listener to connect the dots. That was actually the underlying facts of *Wisconsin Right to Life v. Federal Election Commission*.[91] An anti-abortion political action corporation took out ads criticizing Wisconsin Senator Russell Feingold for filibustering President Bush's judicial nominations. This ad was run at the time that Russell Feingold was standing for re-election. Congress tried to prevent this through this provision of the McCain-Feingold law. The Supreme Court upheld this provision just seven years ago in *McConnell v. Federal Elections Commission*.[92]

Citizens United vs. Federal Election Commission involves a conservative Political Action Corporation that made a movie very critical of Hillary Clinton.[93] The question is whether the provision in McCain-Feingold that I described applies to this movie. That issue was briefed and argued to the Supreme Court last term.[94] To everyone's surprise, on June 29, rather than deciding it, the Supreme Court asked for new briefing and argument on the issue of whether prior Supreme Court decisions allowing restrictions of corporate expenditures violate the First Amendment.[95]

In *Austin v. Michigan Chamber of Commerce*,[96] in 1990, and in

89. *See* Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, 61 Stat. 136; War Labor Disputes (Smith-Connally) Act of 1943, ch. 144, 57 Stat. 163.

90. Amendments to the Federal Election Campaign Act of 1971, Pub. L. No. 93-433, 88 Stat. 1272 (1974).

91. *Wisconsin Right to Life*, 551 U.S. at 459.

92. 540 U.S. 93, 224 (2003).

93. *Citizens United*, 130 S. Ct. at 887.

94. *Citizens United v. FEC*, 129 S. Ct. 2893 (2009).

95. *Id.*

96. 494 U.S. 652 (1990).

McConnell, the Supreme Court said the government can restrict corporate spending with regard to elections campaigns.[97] I have now had the chance to read the transcript of the oral argument in *Citizens United* and I think it is pretty clear, and the conventional wisdom seems to be that it is going to be a 5–4 decision holding that corporations have the right to spend unlimited amounts of money with regard to election campaigns. I do not think it will be in this case, but I think soon there will be a 5–4 decision to hold that corporations have the right to contribute money to candidates for elective office, and I think it will only be a short time before it will be 5–4 to hold that all contribution limits, other than disclosure requirements, violate the First Amendment. And again, it will be the five most conservative Justices. Now, there is an irony here. You will notice that the only place where the conservatives on the Court have taken a pro-speech position is with regard to corporate political spending. There are many other ironies. Conservatives often embrace originalism, following the original meaning of the Constitution. I challenge any originalist to show how corporations have Free Speech rights under the First Amendment. The framers, if anything, believed in natural rights as a basis for individual liberties. Corporations do not have such natural rights. Also, conservatives long railed against judicial activism. Notice the activism. Laws adopted by Congress and signed by the President are struck down, and long-standing precedents are being overruled. But most of all, I am very troubled by this in terms of what it is going to mean in terms of election campaigns—local, state, and federal—as corporations can spend unlimited amounts of money to get their candidates of choice elected, and candidates they oppose defeated.

The third and final overall theme that I identify with regard to the First Amendment is the triumph of "majoritarianism" with regard to the Religion Clauses of the First Amendment. This wonderful conference is focusing on both speech and religion, and I think that what we have seen, and will see from the Roberts Court is what I would call "the triumph of majoritarianism," leaving the protection of religious freedom, leaving the enforceable walls separating church and state, entirely to what the government does. It is the complete absence of any protection of minority religions or minority viewpoints with regard to religion. I think we already saw this

97. *Austin*, 494 U.S. at 659–61; *McConnell*, 540 U.S. at 223–24.

happen with regard to the Free Exercise Clause almost twenty years ago when the Supreme Court decided *Employment Division v. Smith*.[98] In *Employment Division v. Smith*, the Supreme Court said that the Free Exercise Clause cannot be used to challenge "neutral laws of general applicability."[99] Put into English, so long as the law was not motivated by a desire to interfere with religion, so long as it applies to everyone, there cannot be an exemption for religion, no matter how much the law burdens religion. You may remember it as the "Native American Peyote case." Oregon law prohibited consumption of peyote, a hallucinogenic substance.[100] Native Americans brought a challenge saying that religious rituals required the use of peyote. The Supreme Court, in an opinion by Justice Scalia, ruled against the Native Americans.[101] The Court said that Oregon law was not motivated by a desire to interfere with religion; it applied to everyone, so there is no exemption.[102] In other words, if religions want exemptions from law, they must turn to the legislative process, not the courts, no matter how much the law burdens religion. Minority religions must rely entirely on the majority for their protections. Congress has responded with a couple of statutes.[103] The only Roberts Court decisions about Free Exercise of Religion have been about these statutes, and in both instances the Supreme Court has followed the majoritarianism paradigm, upholding and allowing these statutes to be used.

One of these statutes is the Religious Freedom and Restoration Act ("RFRA") adopted in 1993.[104] It was meant to overrule *Employment Division v. Smith*, trying to restore religious freedom by statute, to what it had previously been under the Constitution. The RFRA says that if the government significantly burdens religion, the government must meet strict scrutiny, showing that its action is necessary to achieve a compelling governmental interest.[105] The Supreme Court declared this unconstitutional as applied to state and

98. 494 U.S. 872 (1990).

99. *Id.* at 879.

100. OR. REV. STAT. § 475.992(4) (1997).

101. *Employment Division*, 494 U.S. at 890.

102. *Id.*

103. *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2006).

104. 42 U.S.C. § 2000bb.

105. *Id.*

local governments in *City of Boerne v. Flores*[106] in 1997. The Court said that the law exceeded the scope of congressional power under Section 5 of the 14th Amendment.[107] The Supreme Court has never expressly ruled as to whether or not the statute remains constitutional as applied to the federal government, but the Supreme Court did use this statute in one of the first Roberts Court decisions about religion. The case was *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*.[108] It involves a small religion that uses an herb from Central America in a tea that is hallucinogenic. The federal government wanted to stop them from using this substance as banned under federal law. The Supreme Court unanimously ruled in favor of the religion and against the federal government.[109] Chief Justice Roberts wrote for the Court. It is key to note that the decision was not based in any way on free exercise of religion under the First Amendment; it was based on using the Religious Freedom Restoration Act to show that the government failed to show a compelling need to keep a small religion from using this herb—this tea—that comes from Central America.

The other statute that Congress adopted was the Religious Land Use and Institutionalized Persons Act[110] This was adopted after RFRA was declared unconstitutional as applied to state and local governments.[111] Religious Land Use and Institutionalized Persons Act, as you may know, is often referred to with the acronym RLUIPA. RLUIPA says that if the government significantly burdens religious freedom in its land use decisions, with regard to institutionalized persons, it must meet strict scrutiny.[112] A challenge was brought, arguing the RLUIPA violated the Establishment Clause because the government was acting with the purpose of advancing religion. The Supreme Court in *Cutter v. Wilkinson* [113]—the opinion written by Justice Ginsburg—said the RLUIPA does not violate the Establishment Clause. This is consistent with the majoritarianism paradigm. The Court is not going to protect Free Exercise under the

106. 521 U.S. 507, 535 (1997).
107. *Id.*
108. 546 U.S. 418 (2006).
109. *Id.* at 439.
110. 42 U.S.C. § 2000cc (2000).
111. *City of Boerne*, 521 U.S. at 535.
112. 42 U.S.C. § 2000cc.
113. 544 U.S. 709, 725–26 (2005).

First Amendment; it is going to leave that to the majority. And if the majority wants to protect religious freedom through legislation, it can do so.

I think we will soon see the triumph of majoritarianism when it comes to the Establishment Clause. There is a case before the Court that was argued on October 7, that may be the vehicle for this. The case is *Salazar v. Buono*,[114] and it involves a large cross that sits on what was previously federal land in the Mojave Desert. A challenge was brought arguing that the cross sitting by itself violates the Establishment Clause. The district court found it violated the Establishment Clause;[115] the Ninth Circuit Court of Appeals agreed.[116] The Ninth Circuit held that a cross is uniquely a religious symbol of Christian faith.[117] The Court said that a reasonable observer would see a cross by itself on federal land as endorsing religion, thus violating the Establishment Clause.[118] The federal government then transferred ownership of the land where the cross is—a very small parcel—to a Veterans of Foreign Wars group, to try to circumvent the holding of the district court and the Ninth Circuit. The district court and the Ninth Circuit said that this was a sham transfer.[119] The transfer of ownership was done entirely by the government to try to circumvent the Establishment Clause. The National Parks service still manages this land. The reasonable observer would see this in the context of a federal park as symbolic endorsement of religion. Besides, there would be no stopping point if the government could avoid the Establishment Clause this way. A city could put a large Latin cross atop city hall, and then say, "Well, we will transfer ownership of part of the rooftop to a private group, and therefore we do not need to worry about the Establishment Clause." There is an issue in this case presented as to who has standing to challenge religious symbols.

During the years when William Rehnquist was Chief Justice, there were four Justices who urged a major change with regard to the

114. 129 S. Ct. 1313 (2009).

115. Buono v. Norton (*Buono I*), 212 F. Supp. 2d 1202, 1217 (C.D. Cal. 2002).

116. Buono v. Norton (*Buono II*), 371 F.3d 543, 550 (9th Cir. 2004).

117. *Id.* at 549–50

118. *Id.*

119. Buono v. Norton (*Buono III*), 364 F. Supp. 2d 1175, 1182 (C.D. Cal 2005), *aff'd sub nom*, Buono v. Kempthorne (*Buono IV*), 502 F.3d 1069, 1086 (2007), *amended by* 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom*, Salazar v. Buono, 129 S. Ct. 1313 (2009).

Establishment Clause. When the Supreme Court first applied the Establishment Clause to the states in 1947, in *Everson v. Board of Education*,[120] all nine Justices said that the Establishment Clause can be understood by a phrase coined by Thomas Jefferson, as creating a wall separating church and state "high and impregnable."[121] But, Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, vehemently reject the idea that there should be a wall that separates church and state. They take a philosophy that is sometimes called "accommodationism." They believe that we should be able to accommodate religion and government, and government and religion. Their view is that the government only violates the Establishment Clause if it literally establishes a church or coerces religious participation or when its aid favors one religion over another. In their view, religious symbols on government property never violate the Establishment Clause. When I argued *Van Orden v. Perry*[122] in the Supreme Court, Justice Kennedy said to me at oral argument, with some anger in his voice, "If your client doesn't like the Ten Commandments monument, why doesn't he just look the other way?"[123] Of course, there is no stopping point to that. Then a city could put the Latin cross on top of city hall and simply say, "If you don't like it, just look the other way." Besides that, it equates the Establishment Clause as being no more than about protecting people from being offended by religious symbols. The Fourth Amendment is not just about protecting people from their privacy being invaded; Free Speech is not just about protecting people from having their expression limited. The Establishment Clauses creates a personal right for individuals, that the government not endorse religion, that the government not establish religion.

But I think there are now five Justices on the Court to take the accommodamist position: Justices Roberts, Scalia, Kennedy, Thomas, and Alito. This is an approach that is highly majoritarian. It says the government can do what it wants with regards to endorsing and furthering religion. Justice Scalia has often taken this position, joined by the other conservative Justices. You might remember the important Establishment Clause case: *Lee v. Weisman*[124] from 1992.

120. 330 U.S. 1 (1947).

121. *Everson*, 330 U.S.. at 18.

122. 545 U.S. 677 (2005).

123. *See* Transcript of Oral Argument at 9, *Van Orden*, 545 U.S. 677 (2005).

124. 505 U.S. 577 (1992).

It involved whether a clergy-delivered prayer at a public school graduation violates the Establishment Clause.[125] The Supreme Court declared this unconstitutional, 5–4.[126] Justice Scalia wrote a vehement dissent.[127] He concluded by saying "We hear a lot about the minority that does not want prayer at graduation. What about the majority that wants the prayer there?"[128] Or, in the recent Ten Commandment case, *McCreary County v. ACLU*,[129] Justice Scalia talked about how 97% of people are from Judeo-Christian religions,[130] very likely not an accurate statistic, and that the government should be able to advance their religious views.[131] But what about the rights of the minority? If you believe that the Constitution, the First Amendment, the religious clauses are protecting the minority, then that is going to be absent. I think that majoritarianism will mean that the Supreme Court will hold that the government can put any symbols it wants on government property. I think the Supreme Court will say the government can give any aid it wants to parochial schools, even if religious indoctrination, so long as the government does not discriminate amongst religions. I think it will really be the triumph of majoritarianism. And if you think about it, in the context of both the Free Exercise and Establishment Clauses, they will largely be read out of the First Amendment. Rare will be the case when the government will be found to violate the Free Exercise Clause or the Establishment Clause.

So let me conclude then, by focusing on what the Obama presidency and the confirmation of Justice Sonia Sotomayor is likely to mean for the future of the Supreme Court and the future of the First Amendment. My conclusion is that the Obama presidency and the Sotomayor Justiceship, are unlikely to change the overall ideological composition of the Supreme Court, at least in the short term, and they

125. *Id.* at 580.

126. *Id.* at 631.

127. *Id.* at 631–46 (Scalia, J., dissenting).

128. *Id.* at 645–46.

129. 545 U.S. 844, 894 (2005).

130. *McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting) ("The three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic.").

131. *See Van Orden*, 545 U.S. at 692 (Scalia, J., dissenting) ("[T]here is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.").

are unlikely to make much difference with regard to the First Amendment areas that I have discussed here this morning. Now why do I say that? Well, think about where the vacancies are likely to come on the Supreme Court from January 20, 2009, to January 20, 2013, and if you imagine a second Obama term, January 20, 2017. David Souter retired last spring at the relatively young age for a Justice of 69 years.[132] Justice John Paul Stevens turned 89 years old on April 20, 2009.[133] He is still in great health, as vibrant as ever, but it does not seem that likely that he will still be on the Supreme Court at age 93 in 2013, let alone age 97 in 2017. In fact, the media has reported that he has hired only one law clerk for next year, fueling speculation that he is preparing to step down.[134] Justice Ruth Bader Ginsburg turned 76 years old in February of 2009, the same month that she was diagnosed with pancreatic cancer.[135] The media, thankfully, reported that it was caught in the earliest state. But maybe, because she is so frail in appearance, there is always speculation that she might step down. Now think of the other side of the ideological aisle.

Chief Justice John Roberts turned 54 in January of 2009.[136] If he remains on the Supreme Court until he is 89 years old, he will be Chief Justice until 2044. Justice Samuel Alito turned 59 on April 1 of 2009.[137] Even though Clarence Thomas has been on the Supreme Court almost 18 years, he just turned 61 years old.[138] Both Justice Scalia and Kennedy turned 73 recently,[139] and I think the best predicator of a long life span has been being confirmed for a seat on the U.S. Supreme Court. So, absent unforeseen circumstances, it does not seem likely that any of these Justices will be going anywhere the next four years, the next eight years or the next decade. The

132. *See* Biographies of Current Justices of the Supreme Court, http://www.supremecourt.gov/about/biographies.aspx (last visited June 12, 2010).

133. *Id.*

134. Robert Barnes, *Justice Stevens Hires Just One Clerk for 2010 Term*, http://www.washingtonpost.com/wp-dyn/content/article/2009/09/02/AR2009090203857.html.

135. Carrie Johnson and Rob Stein, *Ginsburg Undergoes Surgery for Cancer*, http://www.washingtonpost.com/wp-dyn/content/article/2009/02/05/AR2009020501695.html?sid=ST2009020501946.

136. *See* Biographies of Current Justices of the Supreme Court, http://www.supremecourt.gov/about/biographies.aspx (last visited June 12, 2010).

137. *Id.*

138. *Id.*

139. *Id.*

vacancies for President Obama to fill are Justice Souter, and perhaps Justice Stevens and/or Justice Ginsburg. My sense is President Obama is likely to fill these vacancies with individuals of about the same ideology. I would characterize Justices Stevens, Souter, and Ginsburg, as moderate liberals. All, to be sure, are left of center. None, I think, are as liberal, as Justice William Douglas, Justice William Brennan, or Justice Thurgood Marshall.

This summer I read dozens, maybe hundreds, of Justice Sotomayor's opinions for the United States Court of Appeals for the Second Circuit. I would characterize her this way. I think on most controversial issues, most issues defined by ideology, she will vote the same way as Justice David Souter. I think that is probably true with regard to the First Amendment, civil rights, and civil liberties generally. I think with regard to criminal justice issues, she is more likely to be conservative, more pro-law enforcement than Justice Souter, as evident in her Second Circuit opinions, and probably a reflection of her time as a state court prosecutor. Now, I do not lessen the possibility that Justice Sotomayor may have real impact behind closed doors. The Supreme Court is a small group, and there is the opportunity for the Justices to persuade one another. Perhaps Sonia Sotomayor, by virtue of her life experiences, her persuasiveness, her considerable charm, might be able to persuade Justice Kennedy in instances when Justice Souter could not.

But my bottom line, as I look at the Supreme Court in the term ahead and for years to come, in the First Amendment and other areas, is that if you are politically conservative, this is generally a Court you should rejoice over. As the statistics I presented at the beginning indicated, Justice Kennedy sides with the conservatives twice as often as he sides with the liberals. And if you are politically liberal, maybe you should be glad the Court is only deciding 75 cases a year.