Roberts at 10:

The Strongest Free Speech Court in History?

By David H. Gans

I. Overview

Observers on both the right and the left have called the Roberts Court the "strongest First Amendment Supreme Court in our history,"[1] and there is no doubt that John Roberts has been at the forefront of the Roberts Court's First Amendment jurisprudence. In his nearly ten years on the Court, Chief Justice Roberts has written more majority opinions in free speech cases than any other current member of the Court, including opinions in a host of the Court's most important First Amendment cases. Significantly, Roberts has not dissented in any major First Amendment case.

Many of Chief Justice Roberts's most important statements on the meaning of the First Amendment have come in cases decided by wide margins and that concern constitutional protection for offensive speech. Roberts's opinions have celebrated that "[s]peech is powerful," and that the First Amendment requires us "to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[2] Likewise, Roberts's opinions have firmly rejected the idea that the government's interest in regulating speech should be balanced against the value of the speech at issue. He has described such interest balancing in First Amendment cases as "startling and dangerous," making clear that "the First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."[3] Roberts's opinions in other free speech cases, while rejecting an absolutist interpretation of the First Amendment, have placed emphasis on the text's command that "Congress shall make no law . . . abridging the freedom of speech," arguing that "[t]he Framers' actual words" must be given their due.[4] In Roberts's view, "[t]he First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair."[5] As Chief Justice, Roberts has repeatedly celebrated "[t]he First

[1] BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 11 (2015); Erwin Chemerinsky, *Not A Free Speech* Court, 53 ARIZ. L. REV. 723, 724 (2011) (citing Ken Starr, President, Baylor Univ., Address at the Pepperdine Judicial Law Clerk Institute (Mar. 18, 2011)).
[2] Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011).
[3] United States v. Stevens, 559 U.S. 460, 470 (2010).
[4] *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 482 (2007) (quoting U.S. CONST. amend. I).
[5] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826 (2011) (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976) (quoting Roth v. United States, 354 U.S. 476, 484 (1957))).

Amendment's purpose 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'"[6]

Despite these broad and universal-sounding claims, a complete review of the Chief Justice's First Amendment jurisprudence demonstrates that Roberts has been more favorable to some free speech claims than to others. At the same time that Chief Justice Roberts has helped ratchet up First Amendment protections in some cases, he has also written a number of major, divided rulings upholding content-based regulation of speech, the kind of government regulation usually disfavored under the First Amendment. For example, Roberts has authored key rulings that rejected First Amendment claims by public school students,[7] by human rights activists seeking to train terrorist groups to use peaceful methodologies,[8] and by candidates for judicial office seeking to personally solicit campaign contributions,[9] and joined other decisions limiting the First Amendment rights of government employees[10] and prisoners.[11] In these cases, Roberts has deferred to the government in significant ways, prioritizing the government's interest in its educational or employment mission, in national security, and in prison administration, over the individual's right to speak protected by the First Amendment. These cases seem plainly informed by the kind of cost-benefit analysis that Chief Justice Roberts has ruled out of bounds in other, more speech-protective rulings. These cases featured dissents accusing the Chief Justice of doing serious violence to First Amendment protections and cutting back on landmark free speech rulings. In the Roberts Court, some have charged, "free speech often means 'speech I agree with'."[12]

Even more troubling are a series of rulings written or joined by the Chief Justice in First Amendment cases in which the Court has favored the privileged and powerful. In a line of closely divided cases, the Court's conservative majority has struck down campaign finance legislation,[13] made it significantly harder for the government to regulate commercial speech by

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[6] McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984) (internal quotation marks omitted)). For further discussion of *McCullen*, see Brianne Gorod, *Roberts at 10: Roberts's Quiet, But Critical, Votes To Limit Women's Rights*, CONSTITUTIONAL ACCOUNTABILITY CTR. (Dec. 2, 2014), http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-Roberts-Quiet-But-Critical-Votes-To-Limit-Womens-Rights.pdf.

[7] Morse v. Frederick, 551 U.S. 393 (2007).

[8] Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

[9] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015).

[10] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[11] Beard v. Banks, 548 U.S. 521 (2006).

[12] Adam Liptak, *For Justices, Free Speech Often Means 'Speech I Agree With'*, N.Y. TIMES, May, 5. 2014, http://www.nytimes.com/2014/05/06/us/politics/in-justices-votes-free-speech-often-means-speech-i-agree-with.html?_r=0.

[13] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010); McCutcheon v. FEC, 134 S. Ct. 1434 (2014). While campaign finance cases are a huge part of the story of the First Amendment in the Roberts Court, we've discussed those cases at great length in an earlier snapshot, David H. Gans, *Roberts at 10: Campaign Finance and Voting Rights: Easier to Donate, Harder to Vote*, CONSTITUTIONAL ACCOUNTABILITY CTR. (Nov. 11, 2014), http://theusconstitution.org/sites/default/files/briefs/Roberts-at-10-Easier-to-Donate-Harder-to-Vote.pdf, and so we focus here on Roberts's First Amendment record outside the campaign finance cases, addressing the campaign finance cases only briefly.

corporations and other businesses,[14] and sharply limited the power of public-sector unions to collect fees for collective-bargaining, dealing a serious blow to organized labor.[15]

This series of rulings resembles the aggressive, divisive, and now overturned rulings of the *Lochner* era, named after the infamous 1905 case *Lochner* v. *New York*,[16] one of a number of cases in which the Supreme Court of the early twentieth century struck down laws designed to prevent the exploitation of workers. During this era, the Court repeatedly expanded the constitutional rights of corporations and other businesses while dismissively treating the government's interest in economic regulation. In the Roberts Court, the nation is seeing a revival of *Lochner* in the name of protecting free speech.[17] And, in the years to come, we are sure to see a steady stream of new cases that aim to use the First Amendment as a deregulatory tool to free businesses from economic regulation.

This snapshot unfolds as follows. Part II examines Chief Justice Roberts's most significant majority opinions in free speech cases, both those in which he voted to strike down speech regulations and those in which he voted to uphold them, illustrating the contradictory impulses in Roberts's approach to the constitutional guarantee of freedom of speech. Part III then turns to Roberts's effort to remake First Amendment law to favor corporations and other powerful interests, examining the campaign finance, commercial speech, and union dues cases in which Roberts has written or joined opinions that adopted expansive, far-reaching interpretations of the First Amendment. Part IV examines a number of sequels to these major rulings that could reach the Roberts Court in the next and succeeding Terms. A short conclusion follows.

II. Chief Justice Roberts's Majority Opinions in Key Free Speech Cases

During his tenure on the Court, Chief Justice Roberts has delivered a number of majority opinions that give an expansive interpretation to the First Amendment's guarantee of freedom of speech. In a pair of high-profile cases decided by wide margins, Roberts has written sweeping opinions reaffirming constitutional protection for offensive speech.

In 2010, in *United States v. Stevens*, the Chief Justice wrote the Court's 8-1 opinion striking down a federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty as a violation of the First Amendment. Roberts firmly rejected the government's argument that depictions of animal cruelty are unprotected by the First

[14] Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).
[15] Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277 (2012); Harris v. Quinn, 134 S. Ct. 2618 (2014).
[16] 198 U.S. 45 (1905).
[17] *See, e.g.*, David H. Gans, *The Roberts Court Thinks Corporations Have More Rights Than You Do*, NEW REPUBLIC (June 30, 2014), http://www.newrepublic.com/article/118493/john-roberts-first-amendment-revolution-corporations; Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, NEW REPUBLIC (June 3, 2013), http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation.

Amendment based on a balancing of costs and benefits, denying the government the power "to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor."[18] Roberts declined the invitation to adopt a "highly manipulable balancing test" that would give courts "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[19] Concluding that the statute was written with "alarming breadth,"[20] and could criminalize hunting magazines or videos, the Court held that the statute was unconstitutionally overbroad. In dissent, Justice Alito accused the majority of invalidating a "valuable statute . . . that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty," and argued that the statute "may reasonably be construed not to reach almost all, if not all, of the depictions that the Court finds constitutionally protected."[21]

In 2011, in *Snyder v. Phelps*, Chief Justice Roberts once again authored an 8-1 majority opinion, this time holding that the First Amendment protected members of a fundamentalist church who picketed and carried offensive and harmful anti-gay signs outside the funeral of a gay soldier. Roberts's majority opinion held that the members of the infamous Westboro Baptist church could not be subject to tort liability for intentional infliction of emotional distress because their speech was on a subject of public concern, explaining the importance of according "broad protection to speech to ensure that courts themselves do not become inadvertent censors."[22] Roberts's opinion held that the church's anti-gay messages qualified for full First Amendment protection, observing that "[w]hile these messages may fall short of refined social or political commentary, the issues they highlight . . . are matters of public import."[23] Such speech, Roberts wrote, "cannot be restricted simply because it is upsetting or arouses contempt."[24] In another strongly worded dissent, Justice Alito claimed that the majority had perverted the First Amendment, arguing that "[o]ur profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."[25]

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[18] United States v. Stevens, 559 U.S. 460, 471 (2010).

[19] *Id.* at 472. Similar reasoning underlies the Court's ruling in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), in which Roberts joined Justice Kennedy's plurality opinion striking down the Stolen Valor Act, which criminalized a person's lying about having received military medals or honors, as a violation of the First Amendment.

[20] *Stevens*, 559 U.S. at 474.

[21] *Id.* at 482, 490 (Alito, J., dissenting).

[22] Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011).

[23] *Id.* at 1217.

[24] *Id.* at 1219.

[25] *Id.* at 1222 (Alito, J., dissenting). Roberts and Alito disagreed sharply in *Snyder*, but later that Term, in *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011), Roberts joined Alito's concurring opinion, which voted to strike down a California law limiting minors' access to violent video games on fair notice grounds and disagreed with the majority's more sweeping First Amendment analysis. Arguing that the Court should not rule on the free speech question when the relevant technologies were rapidly changing, Justice Alito would have left for another day the question "whether a properly drawn statute would or would not survive First Amendment scrutiny." *Entm't Merchants Ass'n*, 131 S. Ct. at 2746 (Alito, J., concurring).

Chief Justice Roberts has also authored important opinions limiting the power of the government to use its spending power in a manner that trenches on freedom of speech and belief. In *Agency for International Development v. Alliance for Open Society International*, Roberts wrote a 6-2 majority opinion, with Justice Kagan not participating, holding unconstitutional the requirement that public health organizations that receive federal funding under the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act adopt a policy expressly opposing prostitution. The Chief Justice's majority opinion reaffirmed the "basic First Amendment principle" that "'freedom of speech prohibits the government from telling people what they must say,'"[26] holding that the First Amendment prevented the government from "compelling a grant recipient to adopt a particular belief as a condition of funding."[27] Roberts rejected the government's argument that the anti-prostitution pledge was simply an appropriate condition of the federal government's use of its own funds. The pledge requirement, Roberts reasoned, "goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government's policy of eradicating prostitution."[28] In a dissenting opinion, Justice Scalia, joined by Justice Thomas, argued that the "First Amendment does not mandate a viewpoint-neutral government" and that the challenged pledge was "nothing more than a means of selecting suitable agents to implement the Government's chosen strategy to eradicate HIV/AIDS."[29]

Yet these decisions by Roberts upholding First Amendment claims do not tell the whole story. During his tenure as Chief Justice, Roberts has also written a number of opinions expanding the authority of the government to regulate speech and upholding a number of content-based restrictions on speech. In each of these cases, Roberts concluded that the government's institutional interests overcame the liberty secured by the First Amendment, deferring in significant measure to the government.

In 2007, in *Morse v. Frederick*, Roberts wrote a five-Justice majority opinion holding that public school officials could, consistent with the First Amendment, suspend a student for waving a banner stating "BONG HiTS 4 JESUS" at an off-campus, school-supervised event. Roberts, joined by his conservative colleagues, held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[30] In Roberts's view, "[t]he 'special characteristics of the school environment,' and the governmental interest in stopping student drug use . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[31] While not all offensive speech by students could be proscribed, Roberts found that speech about drugs was different.

[26] Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, 133 S. Ct. 2321, 2327 (2013) (quoting Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 61 (2006)).
[27] *Id.* at 2330.
[28] *Id.* at 2332.
[29] *Id.* at 2332 (Scalia, J., dissenting).
[30] Morse v. Frederick, 551 U.S. 393, 397 (2007).
[31] *Id.* at 408 (citation omitted) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

"Student speech celebrating illegal drug use at a school event . . . poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse."[32] In a strongly worded dissent, Justice Stevens, joined by Justice Ginsburg and Justice Souter,[33]argued that the majority had "invent[ed] out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message."[34] The majority's ruling, Stevens wrote, "does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed."[35]

In 2010, in *Holder v. Humanitarian Law Project*, Chief Justice Roberts authored a 6-3 majority opinion rejecting a First Amendment challenge to the constitutionality of the federal prohibition on providing material support to terrorist organizations. Human rights activists claimed that the First Amendment protected their right (1) to train members of terrorist groups on how to use humanitarian and international law to peacefully resolve disputes, (2) to engage in political advocacy, and (3) to teach members of terrorist organizations how to petition the United Nations and other bodies for relief.

Applying strict scrutiny, Roberts concluded that all these forms of speech could be banned by the government since any kind of material support "frees up other resources within the organization that may be put to violent ends. It also importantly helps to lend legitimacy to foreign terrorist groups . . . all of which facilitate more terrorist attacks."[36] In reaching this conclusion, Roberts deferred in very substantial measure to the judgment of the political branches, observing that in the context of national security and foreign relations, "'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate."[37] "Demanding hard proof," Roberts wrote, "would be a dangerous requirement. In this context, conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government."[38] In dissent, Justice Breyer argued that "the Government has not made the strong showing necessary to justify under the First Amendment the criminal prosecution of those who engage in . . . the communication and advocacy of political ideas and lawful means of achieving political ends,"[39] taking the majority to task for "fail[ing] to insist upon specific evidence, rather than general assertion" and "fail[ing] to require tailoring of means to fit

[32] *Id.*
[33] Justice Breyer, alone on the Court, would have decided the case on the basis of qualified immunity, and would not have reached the merits of the First Amendment question. *Id.* at 425 (Breyer, concurring in part and dissenting in part).
[34] *Id.* at 446 (Stevens, J., dissenting).
[35] *Id.* at 435.
[36] Holder v. Humanitarian Law Project, 561 U.S. 1, 30 (2010).
[37] *Id.* at 34 (citation omitted) (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)).
[38] *Id.* at 34-35.
[39] *Id.* at 42 (Breyer, J., dissenting).

compelling ends."[40] Roberts, the dissent charged, had ignored the lessons of the McCarthy era in which the Court repeatedly protected Communist Party speakers even in cases in which individuals advocated overthrow of the government. "Here the plaintiffs seek to advocate peaceful, *lawful* action to secure *political* ends; and they seek to teach others to do the same."[41]

Most recently, in *Williams-Yulee v. Florida Bar*, Chief Justice Roberts authored a 5-4 majority opinion upholding the constitutionality of a Florida Bar Canon of Judicial Conduct prohibiting candidates for elective judicial office from personally soliciting campaign contributions. Emphasizing that "[j]udges are not politicians, even when they come to the bench by way of the ballot" and that "[a] State may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money," Roberts concluded that "[t]his is . . . one of the rare cases in which a speech restriction withstands strict scrutiny."[42] In finding strict scrutiny satisfied, Roberts reasoned that "[j]udges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity," emphasizing that "States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians."[43] Perfect tailoring, Roberts wrote, was not required when dealing with a compelling state interest "as intangible as public confidence in the integrity of the judiciary."[44] It was sufficient that the "solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates."[45]

Justice Scalia, Justice Kennedy, and Justice Alito each filed dissenting opinions. The principal dissent, authored by Justice Scalia and joined by Justice Thomas, argued that "the state has no power to ban speech on the basis of its content" and that the Court had perverted strict scrutiny in upholding this "wildly disproportionate restriction upon speech."[46] In a separate dissent, Justice Kennedy argued that "[t]he individual speech here is political speech. The process is a fair election. These realms ought to be the last place . . . for the Court to allow unprecedented content-based restrictions on speech," accusing the majority of "lock[ing] the First Amendment out."[47] Observing that the Florida Bar rule applied to all personal solicitations, even when "the person asked for a financial contribution has no chance of ever appearing in the candidate's court,"[48] each of the dissenting opinions ridiculed the notion that strict scrutiny was satisfied. Justice Scalia observed that "[t]his tailoring is as narrow as the

[40] *Id.* at 62.
[41] *Id.* at 44.
[42] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662, 1666 (2015).
[43] *Id.* at 1666, 1667.
[44] *Id.* at 1671.
[45] *Id.* at 1668.
[46] *Id.* at 1676 (Scalia, J., dissenting).
[47] *Id.* at 1682-83, 1684 (Kennedy, J., dissenting).
[48] *Id.* at 1677 (Scalia, J., dissenting).

Court's scrutiny is strict,"[49] Justice Alito argued that "this rule is about as narrowly tailored as a burlap bag,"[50] and Justice Kennedy accused the majority of writing "what is literally a casebook guide to eviscerating strict scrutiny any time the Court encounters speech it dislikes."[51]

In sum, as this review demonstrates, in his first decade as Chief Justice, Roberts has written a number of majority opinions in important First Amendment disputes over the Constitution's guarantee of freedom of speech. The story is genuinely a complicated one. While Roberts has written opinions that give an expansive interpretation to the First Amendment and reject the notion that the guarantee of freedom of speech should be balanced against the social costs of speech, he has also written opinions that expand the power of government to regulate speech on the basis of its content.

III. The Corporate Takeover of the First Amendment

If the story of John Roberts's votes in First Amendment cases is a complicated one, there is little doubt that among the biggest winners are corporations and other powerful interests. Chief Justice Roberts has presided over what's been called the "corporate takeover of the First Amendment."[52] As Harvard Law Professor John Coates has observed, "corporations have begun to displace individuals as direct beneficiaries of the First Amendment. . . . Nearly half of First Amendment challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals." [53] Given certain key rulings by the Roberts Court, this trend, as Coates observes, is "recent but accelerating."[54]

This story, of course, begins in 2010 with the Court's 5-4 ruling in *Citizens United v. FEC*, a defining moment for John Roberts and the Roberts Court. In *Citizens United*, Chief Justice Roberts joined in full Justice Kennedy's majority opinion that held that corporations have the same First Amendment rights as individuals to spend unlimited amounts of money on political campaigns, overturning prior precedent that gave the government more latitude to regulate corporate political activity. In a concurring opinion, Roberts wrote separately to explain that full protection of corporate speech was necessary to ensure "the vibrant public discourse that is at the foundation of our democracy. . . . The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer."[55] In Roberts's view, "[t]he text and purpose of the First Amendment point in the same direction: Congress may not prohibit

[49] *Id.* at 1679.
[50] *Id.* at 1685 (Alito, J., dissenting).
[51] *Id.* at 1685 (Kennedy, J., dissenting).
[52] *See* John C. Coates, *Corporate Speech and the First Amendment: History, Data, and Implications*, HARV. L. SCH. (Feb. 27, 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566785. *See also* Adam Liptak, *First Amendment, 'Patron Saint' of Protestors, Is Embraced by Corporations*, N.Y. TIMES, Mar. 23, 2015, http://www.nytimes.com/2015/03/24/us/first-amendment-patron-saint-of-protesters-is-embraced-by-corporations.html?_r=0.
[53] Coates, *supra* note 52, at 1.
[54] *Id.*
[55] Citizens United v. FEC, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring).

political speech, even if the speaker is a corporation . . . ."[56] In a lengthy discussion of the doctrine of *stare decisis*, Roberts wrote that overruling past precedent permitting regulation of political spending by corporations was necessary to ensure "the 'principled and intelligible' development of our First Amendment jurisprudence."[57]

In 2014, in a 5-4 ruling in *McCutcheon v. FEC*, an important sequel to *Citizens United*, Roberts wrote that "[m]oney in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition."[58] Roberts's majority opinion rejected the notion that campaign finance limits help further democratic self-governance – itself a core First Amendment value – observing that "the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such 'ad hoc balancing of relative social costs and benefits.'"[59] In Roberts's view, such "intrusion by the government into the debate over who should govern goes to the heart of First Amendment values."[60]

The Roberts Court has also expanded the rights of corporations to challenge government regulation of commercial speech. In 2011, Chief Justice Roberts joined Justice Kennedy's 6-3 majority opinion in *Sorrell v. IMS Health*, which struck down a Vermont law limiting the sale, disclosure and use of pharmacy records for marketing purposes and made it harder for governments to regulate commercial speech by corporations. *Sorrell* had two important holdings. First, the majority held that data mining by corporations in aid of marketing is fully protected by the First Amendment, since "the creation and dissemination of information are speech within the meaning of the First Amendment."[61] This is a significant expansion of the scope of the First Amendment, protecting not speech, but access to information, "mov[ing] toward[s] constitutionalizing an open market in information, at least where the data informs marketing decisions . . . ."[62] Second, the majority invoked a stricter standard of review than usually applied in commercial speech cases, reasoning that the Vermont law "enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information" and thus "heightened judicial scrutiny is warranted."[63] While the majority held that the statute failed to pass muster either under "a special

[56] *Id.* at 376.
[57] *Id.* at 385 (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).
[58] McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014).
[59] *Id.* at 1449 (quoting United States v. Stevens, 559 U.S. 460, 470 (2010)).
[60] Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2826 (2011).
[61] Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011).
[62] Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 201 (2015).
[63] *Sorrell*, 131 S. Ct. at 2663, 2664.

commercial speech inquiry or a stricter form of judicial scrutiny,"[64] its reasoning laid the groundwork for a new, more searching, inquiry in commercial speech cases.

The reasoning in *Sorrell* echoes the Court's ruling in *Citizens United*, holding that government cannot single out corporations, in this case pharmaceutical marketers, for special regulation of speech. While *Citizens United* emphasized that protection of political speech is at the core of the First Amendment, *Sorrell* suggested that commercial speech may be deserving of no less protection. "A 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.'"[65] In explaining why the Vermont statute was unconstitutional, the majority likened the statute to one that suppressed political speech, criticizing Vermont for "tilt[ing] public debate in a preferred direction."[66] *Sorrell* moved the law sharply to the right, muddling the distinction between commercial and political speech and inviting a host of new challenges to regulation of commercial speech.

Justice Breyer, joined by Justice Ginsburg and Justice Kagan, filed a strongly-worded dissenting opinon, arguing that the Court had perverted basic First Amendment principles by striking down state regulation "inextricably related to a lawful governmental effort to regulate a commercial enterprise," and had "reawaken[ed] *Lochner*'s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue."[67] In the dissent's view, applying heightened scrutiny "opens a Pandora's Box of First Amendment challenges to many ordinary regulatory practices" since much commercial speech regulation "necessarily draw[s] distinctions on the basis of content."[68] "[T]o require 'heightened' scrutiny on this basis," Justice Breyer argued, "is to require its application early and often when the State seeks to regulate industry."[69] The majority's response to the charge that it was reviving *Lochner* in the name of the First Amendment was pointed. "The Constitution 'does not enact Mr. Herbert Spencer's Social Statics.' It does enact the First Amendment."[70]

At the same time that Chief Justice Roberts and his conservative colleagues have substantially expanded First Amendment protections for corporations, the Court's conservative majority has also reinterpreted the First Amendment to gut long-recognized protections for unions, striking a serious blow against organized labor. In *Knox v. Service Employees International Union* and *Harris v. Quinn*, Roberts joined majority opinions authored by Justice Alito questioning longstanding Supreme Court precedent dating back to the 1970s upholding state laws that require government employees to pay to a union the fair share of the costs of collective bargaining. As a result, the Court's 1977 precedent in *Abood v. Detroit Board of*

[64] *Id.* at 2667.
[65] *Id.* at 2664 (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977)).
[66] *Id.* at 2671.
[67] *Id.* at 2673, 2685 (Breyer, J., dissenting).
[68] *Id.* at 2685, 2677.
[69] *Id.* at 2678.
[70] *Id.* at 2665 (majority opinion) (citation omitted) (quoting Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

Education,[71] which sustained the constitutionality of such arrangements, survives today by a thread.

Knox involved a challenge to the procedures followed by a public-sector union in imposing a special fee on state employees to fund the union's political activities. In the process of concluding that the procedures followed by the union were constitutionally deficient, Justice Alito, joined by Chief Justice Roberts and their other conservative colleagues, held that the First Amendment broadly forbids "compelled funding of the speech of other private speakers or groups," and raised a number of far-reaching First Amendment objections to fair share agreements that had not been raised by the parties.[72] *Abood*, the majority stated, "represents something of an anomaly," upholding a requirement that nonunion employees pay their fair share of collective bargaining based on free-rider arguments that "are generally insufficient to overcome First Amendment objections."[73] Justice Alito's opinion suggested that the balance struck in *Abood* "appears to have come about more as a historical accident than through the careful application of First Amendment principles."[74] Refusing to extend what *Abood* had permitted in the context of a special assessment, the majority concluded that "[t]he general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail."[75]

The majority's decision to break from established procedure and rule on grounds that the parties had not briefed nor litigated did not escape notice. In a concurring opinion, Justice Sotomayor, joined by Justice Ginsburg, agreed that the union's procedures did not comport with the First Amendment but disagreed with the majority's broader analysis. "To cast serious doubt on longstanding precedent is a step we historically take only with the greatest caution and reticence. To do so, as the majority does, on our own invitation and without adversarial presentation is both unfair and unwise."[76] In dissent, Justice Breyer, joined by Justice Kagan, argued that the union's actions were consistent with *Abood* and the cases following it, and that "the Court cannot be right when it departs from those principles without benefit of argument in a matter of such importance."[77]

In *Harris*, the assault on *Abood* continued. Chief Justice Roberts joined Justice Alito's 5-4 majority opinion holding unconstitutional a state law that required certain home healthcare workers (whose salaries were paid by the state through Medicaid) to pay a union their fair share of the costs of collective bargaining. Much of the majority opinion in *Harris* was devoted to making the case that *Abood* could not be squared with the "bedrock principle that . . . no person in this country may be compelled to subsidize speech by a third party that he or she

[71] 431 U.S. 209 (1977).
[72] Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2288 (2012).
[73] *Id.* at 2290, 2289.
[74] *Id.* at 2290.
[75] *Id.* at 2295.
[76] *Id.* at 2299 (Sotomayor, J., concurring).
[77] *Id.* at 2307 (Breyer, J., dissenting).

does not wish to support."[78] In the majority's view, collective bargaining by public-sector unions is essentially political in nature, since "core issues such as wages, pensions, and benefits are important political issues," and employees who disagree with the union cannot be compelled to support the union, even when they receive the benefits of the union's efforts.[79] But rather than overrule *Abood*, the *Harris* majority found that precedent inapplicable, "confin[ing] *Abood*'s reach to full-fledged state employees."[80] In a blistering dissent, Justice Kagan argued that the Court's conservative majority had turned its back on basic First Amendment principles applicable in the public employment context, ignoring that "the government, acting as employer, should have the same prerogative as a private business in deciding how best to negotiate with its employees over such matters as wages and benefits."[81] Reflecting the fact that "the government has wider constitutional latitude when it is acting as employer," "internal workplace speech about public employees' wages, benefits and such—that is, the prosaic stuff of collective bargaining—does not become speech of 'public concern' just because those employment terms may have broader consequence."[82] In Kagan's view, as *Abood* properly held, the First Amendment permits the government "to advance its interests in operating effectively—by bargaining . . . with a single employee representative and preventing free riding on that union's efforts."[83]

IV. Looking Ahead

Citizens United, *McCutcheon*, *Sorrell*, *Knox*, and *Quinn*, loom large for Chief Justice Roberts's First Amendment legacy, as the Court in the next and succeeding Terms is sure to see more and more instances in which corporations and other powerful interests invoke the First Amendment as a tool to squelch business regulation.

Next month, the Justices are expected to decide whether to hear *Friedrichs v. California Teachers Association*,[84] a First Amendment challenge to a California law that requires the state's public school teachers to pay to the teachers' union their fair share of the costs of collective bargaining. In his petition for a writ of certiorari on behalf of those challenging this law, Michael Carvin, one of the leading lights of the conservative legal movement, has urged the Justices to take the case in order to overrule *Abood*, jettisoning decades of precedent in the process. In *Harris*, Justice Kagan's dissent argued that the "*Abood* rule is deeply entrenched" and "[o]ur precedent about precedent . . . makes it impossible for this Court to reverse that decision."[85] In his petition, Carvin dismisses the force of precedent, claiming that "[t]his Court has never before sustained a decision that wrongly permitted the ongoing deprivation of a core

[78] Harris v. Quinn, 134 S. Ct. 2618, 2644 (2014).
[79] *Id.* at 2362.
[80] *Id.* at 2638.
[81] *Id.* at 2654 (Kagan, J., dissenting).
[82] *Id.* at 2653, 2655.
[83] *Id.* at 2645.
[84] No. 14-915 (U.S. petition for cert. filed Jan. 26, 2015).
[85] *Harris*, 134 S. Ct. at 2645 (Kagan, J., dissenting).

constitutional right solely out of fidelity to the prudential principle of stare decisis."[86] If the Court agrees to hear *Friedrichs*, it will be certainly be a blockbuster.

Waiting in the wings are a host of hugely consequential commercial speech cases. For example, a three-judge panel of the D.C. Circuit is currently rehearing a case in which it struck down a part of the Dodd-Frank Wall Street Reform and Consumer Protection Act that requires the Securities and Exchange Commission to promulgate rules requiring companies to disclose whether they have used "conflict minerals" from the Democratic Republic of the Congo.[87] Also now before the D.C. Circuit is a huge test of whether the First Amendment stands in the way of network neutrality. [88] Foes of net neutrality argue that the Federal Communications Commission trampled on First Amendment rights in classifying internet service providers as common carriers and requiring them to provide the same speed to other web traffic as their own. These cases are just the tip of the iceberg. Across huge sectors of industry, we are seeing First Amendment challenges to commercial regulation.[89] It is only a matter of time before these issues are back before the Roberts Court.

V. Conclusion

During his tenure as Chief Justice, John Roberts has been at the forefront of the Court's First Amendment jurisprudence, writing more of the Court's rulings in First Amendment cases than has any other current Justice. While Roberts has been celebrated for leading a significant expansion of the First Amendment's guarantee of freedom of speech, the reality is more complicated. As his majority opinions reflect, Roberts has been partial to some free speech claims and hostile to others. Roberts has also led the charge for insisting that corporations and other powerful interests receive the full protection of the constitutional guarantee of freedom of speech. Under Chief Justice Roberts's leadership, the Supreme Court has made the First Amendment a powerful weapon for corporations and the wealthy seeking to annul government regulation.

[86] Petition for a Writ of Certiorari at 10, Friedrichs v. Cal. Teachers Ass'n, No. 14-915 (U.S. Jan. 26, 2015).
[87] *See* Nat'l Assoc. of Mfs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014), *reh'g granted*, No. 13-5252 (D.C. Cir. Nov. 18, 2014).
[88] *See* U.S. Telecom Ass'n v. FCC, No. 15-1063 (D.C. Cir. petition for review filed Mar. 23, 2015).
[89] *See, e.g.*, Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 166-167, 167 n.13 (2015) (collecting cases showing that "[a]cross the country, plaintiffs are using the First Amendment to challenge commercial regulations, in matters ranging from public health to data privacy").