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Justice Kennedy and the First Amendment

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ARTICLE

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I. INTRODUCTION

He was not the first choice of President Ronald Reagan or even the second choice.[1] Instead, Justice Anthony McLeod Ken-

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1. President Reagan's first choice was Judge Robert Bork. The Senate rejected Bork by a vote of 42-58. President Reagan's second choice was Judge Douglas H. Ginsburg who

nedy was the President's third choice for the United States Supreme Court.[2] Called a "true conservative" by the President,[3] Kennedy may be most remembered for his opinions on sexual equality[4] and for often serving as the key swing vote during much of his 30-year tenure on the Court.[5] Many referred to him as the decisive vote caster.[6] Others called the Roberts Court "the Kennedy Court."[7]

But, Justice Kennedy also will be remembered for his many and varied contributions to First Amendment jurisprudence. Notre Dame law professor Richard Garnett called him a "free speech hawk."[8] Cornell law professor Michael Dorf wrote that "on free speech questions, he may well have been the most libertarian justice in the Supreme Court's history."[9] Political commentator Michael Barone called the First Amendment his "first priority."[10]

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withdrew before the Senate voted on his confirmation. Linda Greenhouse, *Reagan Nominates Anthony Kennedy to Supreme Court*, N.Y. TIMES, Nov. 12, 1987, at A1.

2. Sherry Colb, Justice Kennedy, abortion and the legacy of a third choice, SCOTUSBLOG (Jul. 6, 2018, 9:50 AM), http://www.scotusblog.com/2018/07/justice-kennedy-abortion-and-the-legacy-of-a-third-choice/.

3. Timothy J. McNulty, "President Chooses Kennedy, High-Court Selection Draws Praise," *Chicago Tribune*, Nov. 12, 1987, at p. 1-C.

4. Romer v. Evans, 517 U.S. 620 (1996)(striking down a Colorado state constitutional amendment prohibiting cities from passing laws prohibiting discrimination based on sexual orientation); Lawrence v. Texas, 539 U.S. 558 (2003)(invalidating a Texas same-sex sodomy law); United States v. Windsor, 570 U.S. 744 (2013)(invalidating a section of the Defense of Marriage Act prohibiting benefits to same-sex partners); Obergefell v. Hodges, 576 U.S. _ (2015)(invaliding state laws prohibiting same-sex marriage).

5. *See* Jess Bravin, "Kennedy is key to U.S. top court – Justice holds sway as new 'swing vote,' favors broad sweep," *Wall Street Journal*, Oct. 3, 2006 (stating that "Ever since Justice Sandra Day O'Connor retired last year, the High Court has been dubbed the Kennedy Court."); Douglas M. Parker. *Justice Kennedy: The Swing Voter and His Critics*, 11 Green Bag 2d 317 (2008). Some legal experts even predicted Justice Kennedy would be a key swing vote before he started serving on the High Court. *See* David Savage, "Experts Think Kennedy May Be New Swing Vote; Californian Seen as Deciding Each Case on Its Merits," *Los Angeles Times*, Nov. 12, 1987, at p. 1.

6. Charles D. Kelso and R. Randall Kelso. *The Constitutional Jurisprudence of Justice Kennedy on Speech*, 49 SAN DIEGO L. REV. 693, 694 (2012).

7. David Cole, "This Isn't the Roberts Court, It's the Kennedy Court," The Nation, Sept. 24, 2015, at https://www.thenation.com/article/this-isnt-the-roberts-court-its-the-kennedy-court/; Adam Liptak, "In Influence If Not Title, This Has Been the Kennedy Court," *The New York Times*, June 27, 2018, at https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-career.html; Jonathan H. Adler. "Say Goodbye to the Kennedy Court," Volokh Conspiracy, June 28, 2018, at https://reason.com/volokh/2018/06/28/say-goodbye-to-the-kennedy-court.

8. Quoted in Kevin Clarke, "A former clerk assesses the legacy of Justice Kennedy, a constitutional romantic," *America*, June 28, 2018, at https://www.americamagazine.org/politics-society/2018/06/28/former-clerk-assesses-legacy-justice-anthony-kennedy-constitutional.

9. Michael Dorf, Tribute: Justice Kennedy's genius, SCOTUSBLOG (Jun. 28, 2018, 8:32 AM), http://www.scotusblog.com/2018/06/tribute-justice-kennedys-genius/.

10. Michael Barone. "Justice Kennedy's First Priority: The First Amendment," RealClearPolitics, June 29, 2018, at https://www.realclearpolitics.com/articles/2018/06/29/

Cato Institute scholar Ilya Shapiro called him "the strongest defender of the First Amendment the Supreme Court has ever seen."[11] Prolific scholar Eugene Volokh found Justice Kennedy to be the most speech-protective justice on the Court.[12]

Many believe that Justice Kennedy had special reverence for the first forty-five words of the Bill of Rights. A former law clerk describes how Justice Kennedy asked her during the clerkship interview what she thought about *New York Times Co. v. Sullivan*, the Court's landmark libel decision.[13] Solicitor General Noel Francisco said that "his commitment to our cherished First Amendment freedom of speech will be a legacy for generations to come."[14]

This essay reviews some of Kennedy's most significant contributions to First Amendment jurisprudence. These include his calls for absolute protection for pure political speech, his strong protection for commercial speech, his distaste for campaign finance reform laws that censored speech, his general concern for the silencing of sexual expression, his coercion test in Establishment Clause cases, and his significant failure in the public-employee free-speech decision *Garcetti v. Ceballos*.[15]

II. ABSOLUTE PROTECTION FOR PURE POLITICAL SPEECH

Justice Kennedy's reputation as a free-speech protector emerged from concurring opinions in which he advocated that content-based restrictions on pure political speech are per se unconstitutional. Traditionally, under the content discrimination principle, content-based laws are subject to strict scrutiny and content-neutral laws are subject to intermediate scrutiny.

Kennedy wrote that there was no need to even engage in any balancing when a law imposed content discrimination on political speech. He advanced this view in his concurring opinion in *Simon & Schuster v. Crime Victims Bd.*[16] The case involved New York's "Son of Sam" law – a law named after serial killer David Berkowitz

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justice_kennedys_first_priority_the_first_amendment_137387.html.

11. Quoted in "Did Anthony Kennedy Just Destroy His Own Legacy?" Politico.com, June 29, 2018.

12. Eugene Volokh, *How the Justices Voted in Free-Speech Cases 1994-2000*, 48 UCLA L. REV. 1191 (2001).

13. Nancy L. Combs, "Justice Kennedy's controversial judicial philosophy, described by former law clerk," Vox, July 2, 2018, at https://www.vox.com/first-person/2018/6/30/17520572/kennedy-retirement-supreme-court-clerk-remembers-reflections.

14. Quoted in Katie Benner, "Anthony Kennedy Retires from Supreme Court, and McConnell Says Senate Will Move Quickly on Replacement," *The New York Times*, June 27, 2018, at https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-supreme-court-live-briefing.html.

15. Garcetti v. Ceballos, 547 U.S. 410 (2006).

16. Simon & Schuster v. Crime Victims Bd., 502 U.S. 105 (1991).

– that allowed the state to seize monetary proceeds from expressive works by those who published works about their crimes. The state passed the law to protect crime victims.[17] The Court invalidated the law primarily because it was overbroad and could apply to works in which authors mentioned their crimes only in passing. For example, the Court explained the law, if enacted earlier, could apply to classics such as St. Augustine's *Confessions of St. Augustine*, Henry David Thoreau's *Civil Disobedience*, and Malcolm X's *The Autobiography of Malcolm X*.[18]

Justice Kennedy wrote separately to explain why there was no need to apply strict scrutiny. He first explained that the law did not fit into a narrow unprotected category of speech, such as defamation, obscenity, or incitement to imminent lawless action.[19] He then explained why the application of strict scrutiny was unnecessary: "Borrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so. Our precedents and traditions allow no such inference."[20]

Kennedy referenced Justice Thurgood Marshall's famous declaration that "[a]bove all else, the First Amendment means that the government may not restrict speech because of its message, its ideas, its subject matter, or its content."[21]

Justice Kennedy again urged for the full protection of pure political speech again in a case involving a Minnesota speech restriction on judicial candidates.[22] A provision in the Minnesota Code of Judicial Conduct prohibited judicial candidates from announcing their views on "disputed legal or political issues."[23] The Supreme Court narrowly (5-4) invalidated the law on First Amendment grounds. The majority applied strict scrutiny and questioned whether the state had a compelling interest for its

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17. *Id.* at 108.

18. *Id.* at 121.

19. *Id.* at 124 (J. Kennedy, concurring).

20. *Id.* at 124-25 (J. Kennedy, concurring).

21. *Id.* at 126 (J. Kennedy, concurring), quoting Chicago Police Dept. v. Mosley, 408 U.S. 92, 95 (1972). Justice Marshall's statement in *Mosley* is one of the most powerful in First Amendment jurisprudence. See David L. Hudson, Jr. "Justice Marshall: Eloquent First Amendment Defender," Newseum Institute, Feb. 4, 2013, at http://www.newseuminstitute.org/2013/02/04/justice-marshall-eloquent-first-amendment-defender/. Justice Marshall was one of the Court's most consistent free-speech defenders. David L. Hudson, Jr. *Justice Thurgood Marshall, Great Defender of First Amendment Free-Speech Rights for the Powerless*, 2 HOWARD HUMAN & CIVIL RIGHTS L. REV. 167 (2017).

22. Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

23. *Id.* at 768.

speech restriction.[24]

Once again, Justice Kennedy was even stronger than his colleagues in denouncing the law as flagrant violation of the First Amendment: "I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without inquiry into narrow tailoring or compelling government interests."[25]

III. COMMERCIAL SPEECH

Justice Kennedy was a strong advocate for commercial speech during his tenure on the Court. He wrote for a unanimous Court in striking down a ban on accountant solicitation in *Edenfield v. Fane*.[26] Kennedy wrote that solicitation "may have considerable value."[27] Kennedy also strengthened the penultimate prong of the Central Hudson test – the test used for evaluating restrictions on commercial speech.[28] That prong requires that the regulation directly and materially advance the government's interests.[29] In *Edenfield*, Kennedy wrote: "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[30]

Kennedy also showed his distaste for commercial speech restrictions that deny information to the public in *Florida Bar v. Went-For-It, Inc.*, a case involving a Florida rule that prohibits lawyers from sending direct-mail solicitation letters to accident victims until 30 days after the event.[31] The majority upheld the rule, relying on a 106-page, two-year study of the impact of advertising upon the profession. In his dissenting opinion, Kennedy blasted the study as "noteworthy for its incompetence."[32] He criticized the rule for depriving those persons most need in legal assistance of needed information: "The accident victims who are prejudiced to vindicate the State's purported desire for more dignity in the legal profession will be the very persons who most need legal advice, for they are the victims who, because they lack education,

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24. *Id.* at 778-80.

25. *Id.* at 793 (J. Kennedy, concurring).

26. Edenfield v. Fane, 507 U.S. 761 (1993).

27. *Id.* at 766.

28. The Court developed the Central Hudson test in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

29. *See Central Hudson Gas & Elec. Corp.*, 447 U.S. at 557.

30. *Edenfield*, 507 U.S. at 770-71.

31. Florida Bar v. Went-For-It, Inc., 515 U.S. 618 (1995).

32. *Id.* at 640 (J. Kennedy, dissenting).

linguistic ability, or familiarity with the legal system, are unable to seek out legal services."[33]

Kennedy wrote the Court's opinion invalidating a Vermont law that restricted the sale of information related to doctors' drug prescribing practices in *Sorrell v. IMS Health, Inc*.[34] The law generally prohibited the sale of the information to pharmaceutical manufacturers but allowed educational institutes to purchase such information.[35] Justice Kennedy found the law to violate the First Amendment because it imposed impermissible content and speaker distinctions. Even in the realm of commercial speech, which receives less protection, "[t]he State may not burden the speech of others in order to tilt public debate in a preferred direction," he wrote.[36]

IV. CORPORATE SPEAKERS

Justice Kennedy's most famous, or infamous, First Amendment decision for many may be his majority opinion in *Citizens United v. FEC*.[37] The Court in *Citizens United* invalidated a part of the Bipartisan Campaign Reform Act that prohibited all corporations – even nonprofit advocacy corporations – from broadcasting electioneering communications advocating the support or defeat of political candidates within 30 days of a primary election and 60 days of a general election.[38]

Kennedy explained that the government violates the First Amendment when it favors or disfavors certain speakers.[39] He further explained that the corporations are entitled to contribute to public discourse just as much as individuals.[40] The government advanced a series of arguments as to why corporate spending posed a threat to the political process, but Kennedy was unmoved. To him, the federal law amounted to a flat ban on political speech and rank discrimination against corporate speakers.[41] To Kennedy, this amounted to a flagrant violation of the First Amendment: "The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech."[42]

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33. *Id.* at 643 (J. Kennedy, dissenting).
34. Sorrell v. IMS Health, Inc., 564 U.S. 562 (2011).
35. *Id.* at 563-64.
36. *Id.* at 578-79.
37. Citizens United v. FEC, 558 U.S. 310 (2010).
38. *Id.* at 337.
39. *Id.* at 340.
40. *Id.* at 342.
41. *Id.* at 362-64.
42. *Id.* at 364.

While *Citizens United* was Kennedy's only majority opinion, he wrote quite frequently in the area of campaign finance and freedom of speech.[43] Kennedy authored a strong dissenting opinion in *Austin v. Michigan Chamber of Commerce*,[44] the decision he overruled in *Citizens United*.[45] In his dissent, Kennedy criticized the disparate treatment received by corporate speakers: "The protection afforded core political speech is not diminished because the speaker is a nonprofit corporation."[46]

V. SEXUAL EXPRESSION

Kennedy generally invalidated laws that restricted sexual expression, viewing them as impermissibly content-based. He wrote the Court's decision in *United States v. Playboy Entertainment Group, Inc.*, invalidating a federal law that required cable operators to block sexually oriented programs during hours when children watch television because of the problem of signal bleed.[47] "It is rare that a regulation restricting speech because of its content will ever be permissible," he wrote.[48]

Kennedy reasoned that the law could not pass strict scrutiny even though the government has a compelling interest in protecting minors. The problem was that the law was not narrowly tailored enough, there was a less-speech restrictive alternative: "Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests."[49]

Kennedy wrote the Court's opinion in *Ashcroft v. Free Speech Coalition*, invalidating two provisions of the Child Pornography Prevention Act of 1996, designed to address the problems of virtual pornography.[50] The law allowed for the punishment of material that "appeared to be" a minor engaged in sexually explicit conduct. This troubled Justice Kennedy, in part because the law was clearly too broad and could apply to such mainstream, award-winning movies as *Traffic* and *American Beauty*.[51] But, he objected to the

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43. Helen J. Knowles, *What a Difference Five Years Haven't Made: Justice Kennedy and the First Amendment, 2007-2012*, 82 UMKC 79, 103-04 (2013).

44. Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

45. *Citizens United*, 558 U.S. at 319 ("We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*.").

46. *Austin*, 494 U.S. at 699 (J. Kennedy, dissenting).

47. U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

48. *Id.* at 818.

49. *Id.* at 815.

50. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

51. *Id.* at 247.

law for another more profound reason. He feared that the government was drifting dangerously close to thought control, a concept anathema to Justice Kennedy's conception of liberty. He wrote: "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[52]

Even in the area of zoning adult businesses, Kennedy was more sensitive to speech concerns than most of his colleagues. In zoning cases, the Supreme Court allows municipalities and county officials to impose selective zoning restrictions on adult oriented businesses and treat such laws as content-neutral.[53] The Court relies on the so-called secondary effects doctrine. The idea is that government officials are not banning or regulating speech because they find it offensive but because they are addressing the adverse, secondary effects associated with such speech – such as increased crime or decreased property values.[54] The doctrine is controversial to many First Amendment advocates because it leads to content-based laws being treated as content-neutral laws.[55]

Justice Kennedy recognized that the designation of a content-based law as content-neutral was an anomaly and a "fiction" in First Amendment jurisprudence in his concurring opinion in *City of Los Angeles v. Alameda Books, Inc*.[56] However, he still held that a city's zoning laws of adult businesses could be evaluated as content-neutral, presuming the laws actually address secondary effects and do not reduce speech.[57] "This capacity of zoning regulation to address the practical problems without eliminating the speech is, after all, the only possible excuse for speaking of secondary-effects zoning as akin to time, place, or manner regulations."[58]

VI. THE COERCION TEST IN CHURCH-STATE CASES

Justice Kennedy contributed to Establishment Clauses jurisprudence by introducing the coercion test. In 1989, Kennedy first articulated his vision in a separate opinion that concurred in part

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52. *Id.* at 253.

53. Young v. American Mini Theatres, 427 U.S. 50 (1976); Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

54. David L. Hudson, Jr., The Secondary Effects Doctrine: The Evisceration of First Amendment Freedoms, 47 WASHBURN L.J. 55 (1997).

55. David L. Hudson, Jr. The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms. 23 STAN. LAW & POLY REV. 19 (2012).

56. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (J. Kennedy, concurring).

57. *Id.*

58. *Id.* at 457.

and dissented in part from the main opinion in *Allegheny County v. ACLU*.[59] The case involved challenges to both a crèche display from Allegheny County and a menorah display from Pittsburgh. The Court upheld the menorah display, which was next to a Christmas tree. However, the Court invalidated the crèche display, which was in a county courthouse. The Court utilized the Lemon test to evaluate the constitutionality of the displays.[60]

Justice Kennedy wrote separately, contending that both displays did not violate the Establishment Clause. Kennedy emphasized the importance of coercion, that the government may not coerce someone to support or advance religion or "give direct benefits to religion" that create the appearance of a state-sanctioned religion.[61] Kennedy explained: "The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object."[62] Applying the coercion principle to the religious displays, Kennedy concluded that "the risk of infringement of religious liberty by passive or symbolic accommodation is minimal."[63]

Kennedy applied his coercion analysis – this time in a majority opinion – to invalidate school-sponsored graduation prayer at a middle school in *Lee v. Weisman*.[64] A rabbi had delivered a prayer at a Providence middle school. Kennedy reasoned that school-sponsored prayer at a graduation imposed subtle coercive pressures upon religious minorities and, therefore, violated the Establishment Clause:

The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.[65]

To Kennedy, young students could face a significant "conflict of conscience" when faced with such school-sponsored prayer.[66] Kennedy's opinion drew the wrath of Justice Antonin Scalia who

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59. Allegheny County v. ACLU, 492 U.S. 573 (1989).

60. *Id.* at 628-29. The Lemon test refers to the three-part developed by the Court in Lemon v. Kurtzman 403 US 602 (1971).

61. *Allegheny County*, 492 U.S. at 659 (J. Kennedy, concurring in the judgment in part and dissenting in part).

62. *Id.* at 661 (J. Kennedy, concurring in the judgment in part and dissenting in part).

63. *Id.* (J. Kennedy, concurring in the judgment in part and dissenting in part).

64. Lee v. Weisman, 505 U.S. 577 (1992).

65. *Lee*, 505 U.S. at 593.

66. *Id.* at 596.

ridiculed Kennedy's "psycho-coercion" test.[67] Scalia called the test "boundless" and criticized what he termed the Court's "psycho-journey."[68]

But, the Court later used Kennedy's coercion analysis to strike down a Texas high school district's practice of announcing prayers over the loudspeaker.[69] The Court wrote that "we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship."[70]

VII. A BLOT ON HIS RECORD

Kennedy's contributions to the First Amendment have not all been positive. A candid assessment of Kennedy's First Amendment record requires analysis of his decision in the public employee free-speech decision *Garcetti v. Ceballos*.[71] The decision has led to a significant loss of protection for the free-speech protections of public employees.[72]

Traditionally, the U.S. Supreme Court had evaluated public employee free-speech cases under something known as the Pickering-Connick test – a test named after two public employee free-speech decisions *Pickering v. Bd. of Educ.* (1968)[73] and *Connick v. Myers* (1983).[74] Under this test, the initial question is whether the public employee spoke on a matter of public concern or importance or rather uttered what amounts to a private grievance.[75] If the employee speaks on a matter of public concern, the court must balance the employee's right to free-speech against the employer's efficiency interests in a disruptive-free workplace.[76]

Garcetti added a new threshold categorical rule in public-employee free-speech cases.[77] Justice Kennedy declared in *Garcetti*: "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate

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67. *Id.* at 644 (J. Scalia, dissenting).

68. *Id.* at 643 (J. Scalia, dissenting).

69. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

70. *Id.* at 312.

71. *Garcetti*, 547 U.S. 410.

72. *See* Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 726 (2011).

73. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

74. Connick v. Myers, 461 U.S. 138 (1983).

75. *Id.* at 146.

76. *Id.* at 150.

77. Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561, 572 (2008).

their communications from employer discipline."[78]

Thus, under *Garcetti*, if a public employee engages in official job duty speech, she or he has zero free-speech protections.[79] It doesn't matter how important the speech, that the speech may blow the whistle on the most abject of corruption, or the speech contributes vitally to societal understanding of how the government operates. The decision is a blot on his free-speech record.[80]

The decision has been a jurisprudential disaster[81] and has led to a sharp reduction in the free-speech rights of police officers,[82] public school teachers,[83] and others. The decision now has become something of an eponym, as plaintiffs' attorneys representing public employees now refer to being "Garcettized."[84]

VIII. CONCLUSION

Most scholars have considered Justice Kennedy a strong defender of freedom of speech. He certainly showed a strong distaste for censorship[85] and content discrimination, often waxing quite eloquently against them.[86] He abhorred viewpoint discrimination, once referring to as "an egregious form of content discrimination."[87] His record on the First Amendment may depend on whether one views money as speech or property, as *Citizens United* is often considered his most important free-speech opinion.[88]

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78. *Garcetti*, 547 U.S. at 421.

79. David L. Hudson, Jr. "No Free Speech for You: Anthony Kennedy Has the Chance to Undo his worst anti-First Amendment decision. He should take it." *Slate*, Aug. 4, 2017, at http://www.slate.com/articles/news_and_politics/jurisprudence/2017/08/anthony_kennedy_has_the_chance_to_undo_his_worst_first_amendment_decision.html.

80. David L. Hudson, Jr. "Justice Kennedy Made His Mark on First Amendment Jurisprudence," *First Amendment Encyclopedia*, July 1, 2018, at https://mtsu.edu/first-amendment/post/157/hudson-justice-anthony-kennedy-made-his-mark-on-first-amendment-jurisprudence.

81. *Id.*

82. David L. Hudson, Jr. "Another public employee 'Garcettized' in Chicago cop case," *The First Amendment Encyclopedia*, May 12, 2018, at https://mtsu.edu/first-amendment/post/126/another-public-employee-garcettized-in-chicago-cop-case.

83. Erica R. Salkin, *Caution in the Classroom: Teacher In-Class Speech, the Federal Courts, and Garcetti*, 15 Comm. L & Pol'y 175 (2010); Martha M. McCarthy and Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209 (2008).

84. David L. Hudson, Jr. "Garcettized!: 06 Ruling Still Zapping Speech," Freedom Forum Institute, Jan. 5, 2010, at https://www.freedomforuminstitute.org/2010/01/15/garcettized-06-ruling-still-zapping-speech/.

85. Justice Kennedy once wrote: "Self-assurance has always been the hallmark of a censor." Florida Bar v. Went For It, 515 U.S. at 645 (J. Kennedy, dissenting).

86. *See, e.g.*, "Content-based restrictions are the essence of censorial power." *Austin*, 494 U.S. at 699 (J. KSuennedy, dissenting).

87. Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 829 (1995).

88. Erwin Chemerinsky, Anthony Kennedy and free speech, SCOTUSBLOG (Jul. 2,

However, even if one adamantly opposes the concept of money as speech and despises the *Garcetti* decision, Justice Kennedy often valued individual liberty in free-expression cases. He often wrote quite eloquently about First Amendment principles.[89]

2018, 2:38 PM), http://www.scotusblog.com/2018/07/anthony-kennedy-and-free-speech/ (calling Citizen United Justice Kennedy's "most important" free speech decision).

89. David L. Hudson, Jr. "Justice Kennedy Made His Mark on First Amendment Jurisprudence," *First Amendment Encyclopedia*, July 1, 2018, at https://mtsu.edu/first-amendment/post/157/hudson-justice-anthony-kennedy-made-his-mark-on-first-amendment-jurisprudence.