By Daniel J. Canon

The Roberts Court and the First Amendment: Implications for Trial Lawyers

Whether you are representing a public employee, a university student or any citizen wronged by government conduct, it should go without saying that the First Amendment matters. Indeed, free speech is one of the few tried-and-true constitutional claims that consistently provided relief to plaintiffs and criminal defendants alike throughout the last century. An essential element of any litigator's toolbox—the First Amendment—is one of the few that applies to the conduct of state actors through the Fourteenth Amendment and can stand alone as a cause of action under 42 U.S.C. 1983.[1]

The U.S. Supreme Court is, of course, the ultimate arbiter of what the First Amendment means. Since John G. Roberts was sworn in as Chief Justice in 2005, the high court has decided more than two dozen free expression cases involving the First Amendment.[2] This article examines a few of the more important of those decisions and their implications for the plaintiffs' bar.[3]

Snyder v. Phelps 562 U.S. ___, 131 S. Ct. 1207 (2011)

What it says:

In this case, the father of a Marine corporal killed in the line of duty sued the infamous Westboro Baptist Church. Westboro picketed the Marine's funeral, carrying signs bearing highly offensive slogans. The plaintiff sued for state tort claims of intentional infliction of emotional distress (IIED), intrusion upon seclusion, and civil conspiracy. A jury returned a multi-million dollar verdict against Westboro, but the Fourth Circuit overturned the verdict. Holding that signs such as "Thank God for Dead Soldiers" constitute speech relating to public concern, the Roberts Court held 8-1 that the First Amendment protected the picketing and upheld the Fourth Circuit's decision.

What it means:

By now, hopefully most of the plaintiffs' bar in Kentucky is aware that the bar for recovery in an IIED or "outrage" claim has been set uncomfortably high by our state courts.[4] Nonetheless, surely the facts underlying *Snyder* fit the bill. However, this decision may set that bar even higher by erecting the First Amendment as a nigh-impenetrable barrier to any such claim based solely on a defendant's speech. Still, it is important to note that the Court based its analysis, in part, on the fact that Phelps' protest was at least 200 feet away and did not disrupt the funeral. Furthermore, the speech that was allegedly of "public concern" did not directly relate to Snyder, but to general topics such as American soldiers and homosexuality. In addition, the Court, in its first footnote, dodged the issue of whether Westboro could be held liable for Internet postings made after the funeral that pertained to the Snyders specifically. This slight loophole suggests that an action for IIED (or intrusion upon seclusion) based solely on the speech of the defendant might survive First Amendment defenses as long as the speech dealt with the plaintiff in no uncertain terms. Perhaps the Court's analysis would have been different had Westboro's signs said "God Hates Matthew Snyder." It is also worth noting that *Snyder* does not appear to abrogate any prior jurisprudence concerning defamation (as opposed to IIED), but certainly does suggest that this Court is not likely to restrict the use of the First Amendment as a shield to such claims, no matter how despicable the defendant's speech might have been.

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

What it says:

A deputy district attorney spoke out against what he perceived to be serious misrepresentations made by a deputy

sheriff in a search warrant. After testifying against the deputy sheriff at trial, the D.A. was transferred and not given a promotion. The D.A. sued under 42 U.S.C. §1983 for First Amendment retaliation. Here, as in *Snyder*, a key issue was whether the speech used was of public concern. The Court held that since Ceballos' speech related only to his official duties, it was not a matter of public concern, and therefore, it was not protected speech.

What it means:

This case represents a dramatic shift in the approach that federal courts have taken with regard to the free speech rights of public employees. Before *Garcetti*, this sort of claim was fairly common.[5] This restriction of an individual employee's First Amendment rights indicates a far more government-friendly approach than even the Burger or Rehnquist Courts ever entertained.[6]

However, this case does not appear to replace the line of cases dealing with freedom of association or political patronage discrimination under the First Amendment.[7] More importantly, it does not preclude actions based on state whistleblower statutes (see, e.g., KRS 61.101 et seq.). Indeed, the existence of such statutes was part of the Court's rationale in denying First Amendment application to Ceballos' claim. The prudent practitioner must therefore give serious consideration to the inclusion of a state whistleblower claim, even if the case is premised on 42 U.S.C. 1983.

As an aside, this case is a testament to the old adage that bad facts make bad law. Without a clear adverse employment action, such as a demotion or discharge,[8] plaintiffs in Ceballos' position were in a legally precarious position under any legal theory even before this decision. That Ceballos received no relief is perhaps no great surprise; the real ambush on public employees everywhere was the Court's abrogation of decades of First Amendment jurisprudence.

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

What it says:

A high-school student showed up to an off-campus event displaying a banner that said, "BONG HiTS 4 JESUS." The student was suspended and filed a lawsuit under §1983. The Supreme Court held 5-4 that the speech was not protected. The Court's decision was based on the idea that the speech supposedly advocated illegal drug use, and the off-campus activity was a school-sponsored event.

What it means:

Although at first glance, the decision appears to deal a blow to student speech. However, this is not necessarily so. It must be observed that this narrow holding only applies – at least for now – to high school students, as the lower standard of First Amendment protection[9] has never been applied by the Supreme Court to University students. Furthermore, the Court went to some length to stress that its holding was limited to messages advocating drug use (although it is difficult to see exactly how this particular message advocates anything). The idea that a school may regulate off-campus speech is unsettling, but Justice Kennedy's opinion suggests that the school's authority would not extend beyond school-sponsored activities. Jurisprudence regarding student speech remains, for the time being, strongly in favor of student plaintiffs.[10]

Citizens United v. Federal Election Commission 558 U.S. 50, 130 S.Ct. 876 (2010)

What it says:

This 5-4 decision holds that the First Amendment prohibits spending limitations on political speech by corporations during election campaigns. Essentially, the decision takes the concept of corporate "personhood" to its logical extreme by extending a similar degree of constitutional protection to corporations as that accorded to individuals.

What it means:

By now, so much has been written about the campaign finance aspect of this case that there is little more this author can add, especially in this short overview. However, the way in which the Court speaks of corporations—as if they were to be accorded the same rights as "disadvantaged" individual speakers—has some disturbing implications that have not garnered much popular attention, but should be noted by civil practitioners of all stripes.[11] The idea of corporate personhood, taken to this extreme, "would have been laughed out of court 30 years ago."[12] What then, does the decision mean for the First Amendment as a defense to torts of a corporation through its officers and/or employees? And perhaps more importantly, what does the decision mean about the extent of other constitutional rights corporations should enjoy? Are corporations entitled to the same de-

gree of due process as an individual? Do they have Second Amendment rights? While the decision ostensibly favors small non-profit corporations as well as, say, Exxon-Mobil, it is difficult to conceptualize the opinion as anything other than a nod and a wink to big business. Still, commentators disagree about the significance of this case in the long run, and it is still far too early to tell exactly what it will mean.

It is clear that, for individuals at least, the degree of protection enjoyed under the First Amendment has changed under the Roberts Court, and not for the better. This is true despite the fact that the Court (and especially Justice Roberts himself) still uses strong rhetoric to describe the importance of the First Amendment in U.S. jurisprudence. One commentator has quipped that "the Roberts Court appears to take seriously the notion that speakers are entitled to all the free speech they can afford."[13] Litigators, especially those of us who must go toe-to-toe with state actors, should be mindful of this turn of events and adjust their practices accordingly. While the First Amendment is often the most obvious cause of action, the prudence of including state law claims in any well-pleaded complaint cannot be overstated.

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1 *Gitlow v. New York*, 268 U.S. 652 (1925).

2 Corn-Revere, Robert (American Bar Association First Amendment & Media Litigation News & Developments), *The Roberts Court and the Fight for First Amendment Freedoms*, March 17, 2011, available at http://apps.americanbar.org/litigation/committees/firstamendment/news.html (accessed May 25, 2011).

3 For purposes of this brief article, with the exception of *Citizens United*, I have focused on civil challenges by plaintiffs to government actions rather than facial challenges to statutes or challenges to criminal conviction. However, several important cases of the latter variety have been decided by the Roberts Court, and should be reviewed by the criminal practitioner: See, e.g., *United States v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010); *Skilling v. United States*, 561 U.S. ___ (2010).

4 See, e.g., *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295 (Ky. App. 1993); *Humana of Ky., Inc. v. Seitz*, 796 S.W.2d 1 (Ky. 1990).

5 See Wells, Section 1983, *The First Amendment and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 Ga L Rev 939, Spring 2001.

6 See, e.g., *Connick v. Meyers*, 461 U.S. 138 (1983).

7 See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976); *Lucas v. Monroe County Sheriff,* 203 F.3d 964, 977 (6th Cir., 1999)

8 See *Burlington Northern & Santa Fe (BNSF) Railway Co. v. White*, 548 U.S. 53 (2006).

9 Per the Court's Vietnam-era decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

10 Practitioners interested in this area should be especially interested in the rare en banc opinion to be issued by the Third Circuit in *Layshock v. Hermitage Sch. Dist.*, 2010 U.S. App. LEXIS 7362 (Docket No. 07-4465) regarding student speech and the Internet.

11 Justice Kennedy's opinion states: "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each." *Citizens United v. FEC*, 130 S. Ct. 876, 899 (U.S. 2010)

12 Lat, David (presenting a live blog of professors and practitioners), *Citizens United v. FEC: The Decision, Its Implications, and the Road Ahead*, available at http://abovethelaw.com/2010/06/citizens-united-v-fec-the-decision-its-implications-and-the-road-ahead/ (accessed May 24, 2011).

13 http://prawfsblawg.blogs.com/prawfsblawg/2011/01/the-first-amendment-politics-of-the-roberts-court-a-panel-discussion.html