

More Speech Everywhere: Justice Kennedy and the Public Forum

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I respectfully dissent from Dean Chemerinsky's remarks.¹ I am going to try and convince you that Justice Kennedy was, not always, but was in fact a free speech advocate. Five years ago, my then TA Matt Struhar and I published an article in the *McGeorge Law Review* on the occasion of Justice Kennedy's twenty-fifth anniversary on the Court, in which we did an empirical analysis of all the current and recent Justices and their votes on First Amendment issues. We concluded that Justice Kennedy was in fact the most free speech-friendly Justice on the Court.² I'm going to try and figure out here why that is so. I'm going to talk about a few cases including *Packingham v. North Carolina*³ to explain why Justice Kennedy was so speech-protective, and why I'm the only Democrat in the country who believes that *Citizens United v. Federal Election Commission*⁴ was correctly decided.

I want to talk about public forum cases to start because I think they are interesting. In 1992, the Court decided a case called *International Society for Krishna Consciousness, Inc. v. Lee*.⁵ The issue in the case was the constitutionality of regulations passed by the New York and New Jersey Port Authority banning the distribution of literature or the solicitation of funds in the public areas of airports (areas you reached before you go through security).⁶ Remember, this is pre-9/11, so the public areas of airports were much more extensive back then. There was shopping, there were restaurants. Justice O'Connor described them as basically a shopping mall.⁷

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1. Erwin Chemerinsky, *Justice Kennedy: A Free Speech Justice? Only Sometimes*, 70 HASTINGS L.J. 1193 (2019).

2. Ashutosh Bhagwat & Matthew Struhar, *Justice Kennedy's Free Speech Jurisprudence: A Quantitative and Qualitative Analysis*, 44 MCGEORGE L. REV. 167 (2013).

3. 137 S. Ct. 1730 (2017).

4. 558 U.S. 310 (2010).

5. 505 U.S. 672 (1992).

6. *Id.* at 674–77.

7. *Id.* at 688–89 (O'Connor, J., concurring).

The key question for the Court was whether or not these public spaces, which were open to anybody, should be treated as public forums and therefore create a strong presumption in favor of permitting speech.⁸ The majority—five Justices, Chief Justice Rehnquist writing—said no.⁹ They said traditional public forums are streets and sidewalks.¹⁰ Airports haven't been around for very long, so they can't be traditional forums.¹¹ Think about that reasoning.

Designated forums are forums that the government intentionally opens up to speech, but obviously, the New York Port Authority was not doing that because they were banning speech.¹² *Ipsa facto*, airports are not a public forum, and the government has pretty much *carte blanche* to regulate speech in them.

Justice Kennedy wrote what was a concurrence, but effectively a dissent on this issue, in which he said that this is all wrong. He said that we do not want to do this categorical analysis in which, except for streets and sidewalks, the government gets to do whatever it wants¹³—which is, by the way, currently the law. We need to take an objective approach. When an area is open to the public and it is government owned, the question we should be asking is, “Is speech consistent with the uses of the property? Is speech going to interfere significantly with the uses of the property, given that you can adopt narrower time, place, and manner regulations to minimize disruption?” If the answer is yes, if speech could be tolerated, then speech must be tolerated.¹⁴

Under that analysis, he said, airports are clearly a public forum because there are people walking around them like a shopping mall, and distributing literature is not going to interfere with people in any significant way.¹⁵ The takeaway is that very early in his career, this was just four years after he joined the Court, Justice Kennedy was taking a very aggressive stance over how we define public forums. (That fight hopefully will be won someday, though twenty-five years later it's still not won yet.) He was taking a very aggressive approach on the theory that more speech is generally better and also on the belief that one shouldn't allow fears of disruption to trump free speech claims. The disruption can be managed.

Jump forward twenty-five years later to *Packingham*. I'm not going to repeat the facts because Dean Chemerinsky had already summarized them.¹⁶ *Packingham* is the North Carolina case from 2017 involving the sex offender

8. *Id.* at 674 (majority opinion).

9. *Id.* at 680.

10. *Id.* at 679–80.

11. *Id.* at 680.

12. *Id.* at 680–81.

13. *Id.* at 693–95 (Kennedy, J., concurring).

14. *Id.* at 695–700.

15. *See id.* at 700.

16. Chemerinsky, *supra* note 1, at 1193.

and the Internet.¹⁷ Justice Kennedy wrote for the majority, striking down a North Carolina statute banning any sex offenders from accessing social media.¹⁸

He starts off his opinion by pointing out the importance of the public forum. He talks about how democratic dialogue in the public forum is the heartbeat of democracy and without it, democracy cannot continue.¹⁹ He then notes that while in the past there may have been difficulty in identifying the most important places in a spatial sense for the exchange of views, today the answer is clear. It is cyberspace. “[T]he ‘vast democratic forums of the Internet’ in general, and social media in particular.”²⁰

He goes on to talk about the revolution that the Internet has created in free speech.²¹ It’s an entirely optimistic opinion and he ends up, of course, striking down the ban because this is a regulation that effectively takes a group of citizens, sex offenders, and completely cuts them off from the social and political life of the country; and that has to be too broad.²²

Again, there are two lessons to be taken from this opinion. One, optimism about technology. You can contrast this to the separate opinion by Justice Alito which basically expresses deep dark fears about what technology is going to do and how it can be used in abusive ways.²³ In *Packingham*, the Kennedy majority is very optimistic about technology and its promises. Second, once again he strongly suggests that one should not let deep dark fears trump free speech. You need to have something more tangible than concerns that something bad may happen someday.

The third case, *Rosenberger v. Rectors & Visitors of University of Virginia*,²⁴ involved a program at the University of Virginia (UVA) in which the university paid for the printing costs of student publications, but there was a religious exception. The program excluded publications that primarily promoted or manifested a particular belief about a deity or an alternate reality.²⁵

A group of students who wanted to publish a magazine called *Wide Awake*, which provided a Christian perspective on social and political issues, was excluded from the program. Justice Kennedy says that the Student Activities Fund, which is the funding program that paid for the printing costs, was a forum, albeit “more in a metaphysical than in a spatial or geographic sense.”²⁶ In that sense I think *Rosenberger* is the predecessor of *Packingham*, in the very infancy of the Internet. Both cases express the idea that we should treat the concept of

17. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733–34 (2017).

18. *Id.* at 1733, 1738.

19. *See id.* at 1735.

20. *Id.* (citation omitted) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

21. *Id.* at 1735–36.

22. *Id.* at 1737.

23. *Id.* at 1743–44 (Alito, J., concurring).

24. 515 U.S. 819 (1995).

25. *Id.* at 825.

26. *Id.* at 830.

public forums broadly, not limiting it to streets and sidewalks, but also include other places where speech is created as well; and that we should be maximizing speech by doing so.

Justice Kennedy then concludes that the exclusion of religious publications constituted viewpoint discrimination,²⁷ and that including the publication in the program would not violate the Establishment Clause.²⁸ I'm not going to get into the Establishment Clause. The key point of his opinion is that we must condemn viewpoint discrimination, because you want to have all voices spoken. Once again, I think the lessons are, first, define forums broadly. Second, all speech is valuable and all perspectives should be heard. Third, just because you have limited resources—that was an excuse that UVA was putting forward—doesn't mean that you can pick and choose what speech you fund based on viewpoint.²⁹

Finally, a seeming counter example that is not a true counter example is a case called *Arkansas Educational Television Commission v. Forbes*.³⁰ The Arkansas Educational Television Commission (AETC) is a state agency that owns a bunch of public TV stations in Arkansas.³¹ It was hosting a congressional debate for candidates for the 1992 congressional elections. It decided it was only going to include major party candidates and candidates who had strong support, significant support. On that basis, they excluded Forbes, who had qualified for the ballot but they concluded did not have any significant support.³² He sued and he lost in an opinion written by Justice Kennedy.

Justice Kennedy said we cannot treat public TV stations as public forums, because part of journalism is controlling content and editing content.³³ If you impose some sort of a viewpoint neutrality position on them, they won't be able to control how they present facts.³⁴ That has to be right, by the way. If a public TV station has a documentary about the Holocaust, they don't have to give Nazis equal time. However, he conceded that a political debate is different. In such a debate, viewpoint discrimination would be problematic, because after all, the debate is an opportunity for candidates, not the station, to speak.³⁵

Ultimately Justice Kennedy concluded that the view that the Eighth Circuit had adopted, which was that all qualified candidates had a constitutional right to participate in the debate, actually was not speech-enhancing, it was potentially speech-reducing for two reasons.³⁶ One, if you have eight, ten, twelve candidates sitting there, all of whom would get equal time, the candidates that actually

27. *Id.* at 831.

28. *Id.* at 846.

29. *Id.* at 835, 837–38.

30. 523 U.S. 666 (1998).

31. *Id.* at 669.

32. *Id.* at 670–71.

33. *See id.* at 674.

34. *See id.* at 673–75.

35. *Id.* at 675.

36. *Id.* at 666–67.

might get elected get reduced to two minutes. They do not have a chance to say their say, which is a problem.³⁷ I think about this image, I think about the early debates in the 2016 Republican nomination race when there were twenty people up there at a time and no one could say much of anything.

Justice Kennedy also said that if public TV stations who want to put on these debates—because commercial TV stations do not do debates for congressional elections—if you give them the option of either everyone has to be included, or you have a First Amendment problem, they may well cancel the debates altogether, which in fact happened during the following election with a Nebraska TV station after the Eighth Circuit decision in this case.³⁸ Even though this decision is seemingly anti-free speech, I think it actually was correct. What it illustrates is that sometimes in order to maximize speech, you actually have to restrain speech. That is not often or even usually true, but occasionally it is.

What do I get from all of this? One thing is that Justice Kennedy's usual instinct, *Garcetti v. Ceballos*³⁹ notwithstanding—and I think *Garcetti* is problematic, I agree with you [Dean Chemerinsky]—is that usually maximizing speech is better than minimizing speech. The reason for that is: A, speech is good; and B, we have to trust listeners to be able to sort out valuable from not valuable speech. We have to trust listeners to be able to figure out what they believe. We have to trust listeners to find out what they need to find out, and by listeners, I mean citizens. We shouldn't be worried about drowning out, frankly, because people will figure out who to take seriously or not, so that if it's corporate speech, as long as you have disclosure requirements, they'll figure it out.

Sometimes you have to think hard about whether or not protecting speech enhances or undermines public debate. I think that insight, whether or not one agrees with it, is a very libertarian approach towards free speech. It's basically no rules, in most contexts. A couple of things about that. One, I think that that approach explains Justice Kennedy's approach towards commercial speech. He wrote the majority opinion in a case called *Sorrell v. IMS Health Inc.* in 2011 in which he struck down a Vermont statute that prohibited the use of data regarding how doctors prescribe medications.⁴⁰ The data was being bought by pharmaceutical companies and used to market prescription drugs to doctors⁴¹ and he, for a six-Justice Court, struck down the statute.⁴²

He hinted that he thought Big Data was speech and deserved First Amendment protection⁴³—a big deal, though he did not actually hold that. He

37. *Id.* at 681–82.

38. *Id.*

39. 547 U.S. 410 (2006).

40. 564 U.S. 552 (2011).

41. *Id.* at 558.

42. *Id.* at 557.

43. *Id.* at 570. For a detailed analysis of this aspect of *Sorrell*, see Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855 (2012).

held that commercial speech deserves protection and here, all you're doing is restricting advertising.⁴⁴ There's no reason to do that because this advertising is not in any way misleading or false. Again, I think if you trust doctors to not be flimflammed by pharmaceutical companies—which hopefully one does because they're prescribing the medication—then there is really no reason to restrict commercial speech.⁴⁵ I happen to disagree with this particular holding, but it's consistent, I think, with Justice Kennedy's broader views.

Citizens United, same deal.⁴⁶ I think in *Citizens United*, the question is, should we be concerned that corporate speech will drown out everybody else and people will be completely fooled and believe that, in fact, Facebook is your friend or GM is your friend? Maybe, but I don't think so. I think especially in the context of democratic debates, the idea that we don't trust citizens to work out who to listen to and who are not trustworthy is pretty inconsistent with the assumptions of popular sovereignty that drive our system. In the context of political speech like that in *Citizens United*, I actually think the decision is correct. You do have to trust people and not worry about drowning out and figure it will all work out.

In closing, I want to pose a problem. Obviously, going forward, the Internet is going to change everything. Justice Kennedy said that he thinks none of current free speech law is going to survive unchanged. That's what I do for a living, I point out that hey that's right. *Packingham* talks about the public forum being the Internet and social media today. That's great but there's a problem. The problem is, of course, that the public forum doctrine was written with government-owned property in mind, but Mark Zuckerberg is not the government, and neither is Twitter.

They are not really public forums in the traditional sense because they are privately owned. This creates a conundrum that we don't really know quite what to do with. The conundrum is this. Right now, social media censors a lot. It's very funny, people criticize Facebook for being really, really bad, and then they want them to censor more. I think about those two thoughts and realize there's a problem here. The critics of Facebook need to make up their mind. Either Facebook is really bad and should not be censoring or it is great and it should be censoring away, but the combination makes no sense.

Here's the problem. If we're serious about these platforms being the new public fora, it suggests that we should pull a *Marsh v. Alabama*⁴⁷ and extend the First Amendment's protections to speech on these forums, which means that hate speech on Facebook is fully protected. There is at least some suggestion in *Packingham* that maybe, that's what we should be thinking about, though Justice

44. *Sorrell*, 564 U.S. at 557.

45. *Id.* at 576.

46. 558 U.S. 310 (2010) (striking down prohibition on corporate spending to fund political advertising).

47. 326 U.S. 501 (1946) (applying public forum doctrine to the streets and sidewalks of a "company town" owned by a private corporation).

Kennedy didn't say it. He didn't reach the issue, but that seems the implication of his rhetoric in *Packingham*.

The other side of the problem is that historically, we have always understood that private owners of media like the editors of the *New York Times* or the owners of AETC have a right to manage their speech and their platform. Indeed, it's a First Amendment editorial right. That right, in fact, enhances speech because it does not force the *New York Times* every time they write editorial criticism of President Trump, i.e. every day, to give equal time to the other side. Mark Zuckerberg is a media owner. Twitter is a media platform. Here, you have the insight from *AETC*, which is that sometimes control enhances debate,⁴⁸ clashing with the insight from *Packingham*, which is the Internet is the new public forum so we should let 100 flowers bloom.⁴⁹

Those two ideas both seem great and they're entirely incompatible with each other. I think both in principle are correct. But moving forward, we don't know what to do. Frankly, if you look at all of the press coverage, all of the protest, all of the this, all of that, the answer is no one knows what to do. No one knows how to reconcile these two principles and we're going to spend the next quarter of a century figuring that one out. At which time I'll be retired and it'll be your problem.

48. See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

49. See *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).
