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What Fane Lozman Can Teach Us About Free Speech

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I. INTRODUCTION

October Term 2017 produced a dizzying slate of contentious free-speech cases.[1] Starting in the early 20th century, the Supreme Court began to craft and shape the concepts of what free speech would entail in a modern society.[2] Justice Oliver Wendell Holmes Jr. exposited in 1919 that while "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,"[3] in the typical case, "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[4] Justice Louis D. Brandeis espoused a few years later that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[5] Fast-forward to the 21st century, these comments seem quaint. In the past ten years, we learned that robust free-speech rights exist for corporations,[6] videographers of

[1] *See, e.g.*, James Coppess, *Symposium: Four Propositions that Follow from Janus*, SCOTUSBLOG (June 28, 2018, 2:36 PM), http://www.scotusblog.com/2018/06/symposium-four-propositions-that-follow-from-janus/; Alice O'Brien, *Symposium: Janus' Radical Rewrite of the First Amendment*, SCOTUSBLOG (June 27, 2018, 9:58 PM), http://www.scotusblog.com/2018/06/symposium-janus-radical-rewrite-of-the-first-amendment/; Richard Epstein, *Symposium: The Worst Form of Judicial Minimalism—Masterpiece Cakeshop Deserved a Full Vindication for Its Claims of Religious Liberty and Free Speech*, SCOTUSBLOG (June 4, 2018, 8:29 PM), http://www.scotusblog.com/2018/06/symposium-the-worst-form-of-judicial-minimalism-masterpiece-cakeshop-deserved-a-full-vindication-for-its-claims-of-religious-liberty-and-free-speech/.

[2] *Supreme Court Landmark Case:* Schenck v. United States (C-SPAN television broadcast Nov. 2, 2015), https://www.c-span.org/video/?327714-1/supreme-court-landmark-case-schenck-v-united-states [https://archive.org/details/CSPAN3_20151103_020000_Supreme_Court_Landmark_Case_Schenck_v._United_States.].

[3] Schenck v. United States, 249 U.S. 47, 52 (1919).

[4] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[5] Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[6] *See* Citizens United v. FEC, 558 U.S. 310, 345 (2010).

animal cruelty,[7] funeral protestors,[8] liars of military service,[9] and internet-surfing sex offenders.[10]

October Term 2017 undulated free-speech precedents by asking the Court to decide whether wedding cakes could constitute protected speech,[11] states could compel public employees to pay union fees,[12] and pro-life organizations could resist mandatory-disclosure obligations about state-funded abortion services.[13] The Court also considered—albeit tangentially—how far a president can go before his words can be used against him to prove animus.[14] With the Court either divided 5–4,[15] or unable to reach a consensus on the free-speech question,[16] Justice Kagan laid bare her frustration: "The First Amendment was meant for better things."[17] Reflecting on October Term 2017 and its portents, some lamented that the best approach is to "settle in"[18] because "Winter is Coming."[19]

The Court also decided that term *Lozman v. City of Riviera Beach, Florida*, which broke from the high-profile, divisive cases and returned to cardinal aspects of the First Amendment articulated first by Justices Holmes and Brandeis almost one hundred years ago.[20] In November 2006, Fane Lozman rose to speak during the public-comments portion of a regular meeting of the city council of Riviera

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[7] *See* United States v. Stevens, 559 U.S. 460, 468 (2010).

[8] *See* Snyder v. Phelps, 562 U.S. 443, 459 (2011).

[9] *See* United States v. Alvarez, 567 U.S. 709, 716 (2012) ("Although the statute covers respondent's speech, the Government argues that it leaves breathing room for protected speech, for example speech which might criticize the idea of the Medal or the importance of the military. The Government's arguments cannot suffice to save the statute.").

[10] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017).

[11] *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

[12] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018).

[13] *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368 (2018).

[14] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J. concurring) ("The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression.").

[15] *See, e.g.*, *Janus*, 138 S. Ct. at 2459.

[16] *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

[17] *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

[18] *First Mondays Podcast, The Annual: OT2017 in Review*, SCOTUSBLOG at 00:13:30 (July 9, 2018, 9:30 AM), http://www.scotusblog.com/2018/07/the-annual-ot2017-in-review/.

[19] *Game of Thrones: Winter is Coming* (HBO television broadcast Apr. 17, 2011).

[20] *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Beach, Florida.[21] When Lozman began to talk about corrupt local politicians, he was cut off by a councilperson and asked to stop speaking.[22] Upon refusal to comply, he was arrested, handcuffed, and removed from the meeting.[23] In 2008, Lozman brought a civil-rights lawsuit against the city, alleging retaliatory arrest for his exercise of free speech.[24] Although not cited or relied on during the arrest or consideration of charges, a district court in 2014 dismissed the lawsuit because probable cause to arrest may have existed under a latent state law, which "prohibits interruptions or disturbances in schools, churches, or other public assemblies."[25] The U.S. Court of Appeals for the Eleventh Circuit affirmed in 2017.[26] The Supreme Court granted certiorari "on the issue whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest."[27]

Justice Anthony M. Kennedy, in his penultimate majority opinion in an argued case, concluded in a 7–1 decision that vacatur and remand was appropriate because "Lozman need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City."[28] Justice Kennedy described the issue decided as "a narrow one" because the appeal did not challenge "the constitutionality of Florida's statute criminalizing disturbances at public assemblies."[29] Perhaps had Lozman done so, he could have succeeded on the merits in striking down a law that stymied his ability to participate in local government.

Although Justice Kagan did not provide examples of the "better" aspects of the First Amendment to which she alluded,[30] it would be hard to argue that protecting people from a government policy of censorship and restraint is not salutary.[31] Something so axiomatic reminds that, while some may disagree about whether special-interest groups are now "weaponizing the First Amendment" for deregulation,[32] the best parts of the First Amendment remain as a redoubt against silencing political dissent.

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[21] Lozman v. City of Riviera Beach (*Lozman V*), 138 S. Ct. 1945, 1949 (2018).

[22] *See id.*

[23] *See id.* at 1950.

[24] *See id.*

[25] *See id.* (citation omitted).

[26] Lozman v. City of Riviera Beach (*Lozman IV*), 681 F. App'x 746, 748 (11th Cir. 2017) ("Lozman claimed his arrest violated the First and Fourth Amendments, and constituted a false arrest under Florida state law. The case was tried before a jury and the jury returned a verdict in favor of the City on all claims. Lozman appeals (1) the district court's denial of his motion for new trial, and (2) various instructions the district court gave the jury. After careful review, we affirm.").

[27] *Lozman V*, 138 S. Ct. at 1951.

[28] *Id.* at 1955.

[29] *Id.* at 1951.

[30] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting).

[31] *See id.*

[32] *Id.* at 2501.

This Article argues that the lawsuit filed by Fane Lozman teaches what free speech, at its core, is about and how similarly situated cases can win on multiple fronts. The Article first chronicles the contentious free-speech cases decided during October Term 2017.[33] It then discusses *Lozman* and explains why optimism should exist that future cases will succeed on the merits and in the court of public opinion.[34] Certainly Justices Holmes and Brandeis could not have foreseen how speech would be implicated by restrictions on campaign financing, video content, or safe spaces and trigger warnings in classrooms. Yet much of the contemporary conversation and litigation about free speech touches on how far to push an individual's freedom of choice in all areas of life.[35]

Lost in this search, and what *Lozman* helps find, is the idea that freedom is abiding so long as the government relents and enables everyone to listen and learn the truth. Framed against the brooding omnipresence of a law used to circumscribe political discussion, *Lozman* reminds that legal options exist to access and petition government officials.[36] So to instantiate what Justice Kagan might have intended when suggesting that "[t]he First Amendment was meant for better things," courts and advocates need only look to and rediscover the past.[37] *Lozman* is a filigree of a bygone era when the concerns animating the First Amendment were the discovery of "truth"[38] to propel "deliberative"[39] democratic processes. Erstwhile aspirations, then, can still have meaning today. And, as *Lozman* shows, the First Amendment can still embody the search for truth and deliberation.

II. THE FREE-SPEECH FISSURES EXPOSED DURING OCTOBER TERM 2017

The apparent frustrations among the justices over free speech at the conclusion of October Term 2017 rest, in part, on the genesis behind and development of the Court's working hypothesis of what is speech and how free should it be.

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[33] *See infra* notes 39–135 and accompanying text.

[34] *See infra* notes 136–249 and accompanying text.

[35] Richard M. Re, *Tribute: Seeing Justice Kennedy Think*, SCOTUSBLOG (June 29, 2018, 10:39 AM), http://www.scotusblog.com/2018/06/tribute-seeing-justice-kennedy-think/ ("But at the end of perhaps the most influential judicial career in a century, Kennedy deserves respect and our best efforts at understanding. And I think he will ultimately receive both. Kennedy represents a distinctive judicial philosophy marked by two words: freedom and dignity. Those values are united for Kennedy in that each requires and demands the other. To lead a dignified life is to speak, worship, work and love freely. Other values, including equality, responsibility, and, yes, civility are all important but derivative. Kennedy wants choice first, even if it means choices that go wrong.").

[36] *Lozman V*, 138 S. Ct. 1945, 1951 (2018).

[37] *See Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

[38] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[39] Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

A. What the Past Century Has Taught About Free Speech

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[40] Although the First Amendment says "Congress," the Supreme Court has concluded that speakers are protected against the entire panoply of governmental agencies and actors, whether federal, state, local, legislative, executive, or judicial.[41] A blank space existed in this area until the early 20th century, at which time the Court awoke from its reticence and began to expound on the First Amendment.[42]

In *Schenck v. United States*, the case to which many scholars point as the landmark beginning of free-speech jurisprudence,[43] the Court addressed a free-speech challenge to the Espionage Act of 1917, which the government used to convict Charles Schenck and others of distributing anti-war leaflets in an effort to conspire against the recruiting and enlistment of military service members.[44] In a unanimous opinion, Justice Holmes upheld the convictions, first observing that "in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights."[45] He then pivoted, explaining "the character of every act depends upon the circumstances in which it is done."[46] "The most stringent protection of free speech," he warned, "would not protect a man in falsely shouting fire in a theatre and causing a panic."[47]

Roughly eight months later, in *Abrams v. United States*, Justice Holmes, with whom Justice Brandeis joined, dissented from an opinion that affirmed convictions under the same federal law for anti-war protests committed under similar circumstances.[48] The trial court refused to entertain extensive discovery

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[40] U.S. CONST. amend. I.

[41] *See* Geoffrey R. Stone & Eugene Volokh, *A Common Interpretation: Freedom of Speech and the Press*, NAT'L CONST. CTR.: CONST. DAILY (Dec. 1, 2016), https://constitutioncenter.org/blog/a-common-interpretation-freedom-of-speech-and-the-press ("But starting in the 1920s, the Supreme Court began to read the First Amendment more broadly, and this trend accelerated in the 1960s. Today, the legal protection offered by the First Amendment is stronger than ever before in our history.").

[42] *See Supreme Court Landmark Case*, *supra* note 2.

[43] *See id.*; Amy E. Feldman, *First Amendment Limits: Is 'Bingo' the New 'Fire'?*, NAT'L CONST. CTR.: CONST. DAILY (Mar. 29, 2013), https://constitutioncenter.org/blog/first-amendment-limits-is-bingo-the-new-fire ("One of the seminal cases to the understanding of free speech rights involved a man named Charles Schenck, who was chairman of the U.S. Socialist Party.").

[44] Schenck v. United States, 249 U.S. 47, 48–49 (1919).

[45] *Id.* at 52.

[46] *Id.*

[47] *Id.*

[48] *See* Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

before entering judgment because the protests were mere "soapbox advocacy" inciting "hellish anarchy."[49] Justice Holmes retreated from *Abrams*, offering the marketplace-of-ideas stimulus for future cases:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[50]

Some commentators consider this opinion "one of the most important dissents" in Court history because of its recognition that truth is best discovered in an uninhibited marketplace of ideas, which Judge Billings Learned Hand purportedly influenced through sustained correspondence with Justice Holmes about the value of "tolerance" in the aftermath of *Schenck*.[51]

A few years later, in *Whitney v. California*, the Court upheld a conviction under a state law proscribing criminal syndicalism on grounds that barring involvement with the Communist Labor Party of California did not violate due process or equal protection under the Fourteenth Amendment.[52] Understood through the developing lens of due process, the Court dismissed the notion that the state law restrained a cognizable right of free speech:

> That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or

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[49] *See Make No Law, The First Amendment Podcast: Fighting Faiths*, LEGAL TALK NETWORK 00:09:00 (July 27, 2018), https://legaltalknetwork.com/podcasts/make-no-law/2018/07/fighting-faiths/ [hereinafter *Fighting Faiths*] (transcript available at URL).

[50] *Abrams*, 250 U.S. at 630; *see also* United States v. Alvarez, 567 U.S. 709, 728 (2012) (quoting and endorsing the marketplace-of-ideas concept from *Abrams*).

[51] *See Fighting Faiths*, *supra* note 49, at 00:20:00.

[52] Whitney v. California, 274 U.S. 357, 371 (1927) ("We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged.").

> endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.[53]

That the arguments focused on due process and equal protection—and only addressed speech as a tertiary argument—demonstrates the nascent efficacy of free-speech challenges around 1927.[54]

Justice Brandeis concurred, arguing that "valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled."[55] Although Justice Brandeis concluded that evidence existed of a conspiracy to commit "serious crimes,"[56] he made clear his belief that "[t]hose who won our independence by revolution were not cowards"; "[t]hey did not fear political change"; and "[t]hey did not exalt order at the cost of liberty."[57]

Justice Brandeis also exhorted in one long paragraph that more political speech is better than less speech because only then can people reason against and resist governmental coercion:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination;

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[53] *Id.*

[54] *Id.* ("We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged.").

[55] *Id.* at 373 (Brandeis, J., concurring).

[56] *Id.* at 380.

[57] *Id.* at 377.

> that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[58]

Fifty years later, the Warren Court captured the visions of Justices Holmes and Brandeis.[59] For example, in 1969, the Court permitted the Ku Klux Klan to march because "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[60] That same year, the Court permitted high-school students to protest the Vietnam War by wearing black armbands in school so long as the conduct did not "materially and substantially" interfere with school operations.[61]

The Rehnquist Court carried on where the Warren Court left off in the context of free-speech rights.[62] In 1989, flag burning became protected speech.[63] In 1992, statutes prohibiting cross burning could not be justified as constitutional

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[58] *Id.* at 375–77; *see also* United States v. Alvarez, 567 U.S. 709, 727–28 (2012) (citing Whitney v. California, 247 U.S. 357 (1927), approvingly).

[59] *See, e.g.*, Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459, 460 (1997) ("The paradigmatic protection of individual liberty is the Free Speech Clause of the First Amendment, which first received its most extensive interpretations at the hands of the Warren Court."); Ronald Collins, *Ask the Author: Floyd Abrams & His Fighting Faith*, SCOTUSBLOG (May 17, 2013, 4:05 PM), http://www.scotusblog.com/2013/05/ask-the-author-floyd-abrams-his-fighting-faith/ ("There are generally three situations in which the government can constitutionally restrict speech under a less demanding standard. . . . I feel obliged to add that an awful lot of academics who seemed unconcerned at (and even celebrated) the breadth of many decisions of the Warren Court seem terribly preoccupied by the scope and procedural history of *Citizens United*.").

[60] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (citing Dennis v. United States, 341 U.S. 494, 516–17 (1951)).

[61] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[62] *See* Ronald Collins, *Ask the Author: Paul Moke on Earl Warren—The Man & His Measure*, SCOTUSBLOG (Nov. 27, 2015, 12:39 PM), http://www.scotusblog.com/2015/11/ask-the-author-paul-moke-on-earl-warren-the-man-his-measure/.

[63] *See* Texas v. Johnson, 491 U.S. 397, 418 (1989) ("We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.").

on the basis of preventing fighting words.[64] And in 2002, the Court explained that the government cannot prevent the creation of computer images depicting sexually explicit images of children.[65]

The Roberts Court so far has festinated the inexorable progression of free-speech rights.[66] Under the leadership of Chief Justice John G. Roberts Jr., corporations achieved expansive free-speech rights,[67] purveyors of videos of women crushing animals and other depictions of extreme animal cruelty were able to avoid criminal prosecution,[68] protesters realized the right to brandish signs proclaiming "God Hates Fags" and "God Hates the USA/Thank God for 9/11" outside of military funerals,[69] individuals could lie with criminal impunity about receiving military service medals,[70] and convicted sex offenders gained the right to access the internet in "the Cyber Age."[71] October Term 2017 added to these precedents by examining freighted culture-war issues against what limits (if any) exist on speech.

B. October Term 2017 and the Growing Pains of Free-Speech Protection

October Term 2017 produced both expected and curious outcomes in the area of free speech, which ignited divisions among the justices about the types of behavior for which the Constitution provides protection and those over which it relinquishes control.[72] Each opinion shows in almost raw detail how far the Court has come in just one hundred years and how far it intends to go.

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[64] *See* R.A.V. v. St. Paul, 505 U.S. 377, 396 (1992) ("Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.").

[65] *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002) ("The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*.").

[66] Ronald Collins, *The Roberts Court and the First Amendment*, SCOTUSBLOG (July 9, 2013, 11:34 AM), http://www.scotusblog.com/2013/07/the-roberts-court-and-the-first-amendment/ ("By that measure, the Roberts Court has sometimes enriched the First Amendment by way of unprecedented protection, while at other times it has devalued the currency of that fundamental freedom.").

[67] *See* Citizens United v. FEC, 558 U.S. 310, 345 (2010).

[68] *See* United States v. Stevens, 559 U.S. 460, 468 (2010).

[69] *See* Snyder v. Phelps, 562 U.S. 443, 454, 459–61 (2011).

[70] *See* United States v. Alvarez, 567 U.S. 709, 715 (2012) ("Although the statute covers respondent's speech, the Government argues that it leaves breathing room for protected speech, for example speech which might criticize the idea of the Medal or the importance of the military. The Government's arguments cannot suffice to save the statute.").

[71] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1736–38 (2017).

[72] *See supra* note 1 and accompanying text.

1. Can Baking a Cake Constitute Protected Speech?

In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, a case receiving much attention from the public and leading to five separate opinions,[73] the Court left undecided—and largely untouched—the contours of when protected expression begins as merchants sell commercial goods in the general marketplace.[74] The case involved an appeal from a Colorado state-court decision, which concluded that refusing to bake a wedding cake for a same-sex wedding violated certain state laws against discrimination in the marketplace on the basis of sexual orientation.[75] The question presented was "[w]hether applying Colorado's public accommodations law to compel petitioner to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment."[76] The Court ruled in favor of the baker on the basis that certain state actors had expressed skepticism of the baker's religious sincerity, which bore "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."[77]

Although that case was decided on the basis that "laws be applied in a manner that is neutral toward religion,"[78] dueling concurring opinions authored by Justice Kagan (joined by Justice Steven G. Breyer), and Justice Neil M. Gorsuch (joined by Justice Samuel A. Alito Jr.), jousted over theories of what it would take in future cases for specialty commercial goods to suddenly acquire constitutional protection.[79] Justice Clarence Thomas, with whom Justice Gorsuch

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[73] Mark Walsh, *A "View" from the Courtroom: Setting the Table for a Major Ruling*, SCOTUS BLOG (Dec. 5, 2017, 4:44 PM), http://www.scotusblog.com/2017/12/view-courtroom-setting-table-major-ruling/.

[74] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018) ("The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.").

[75] *Id.* at 1723–25.

[76] Kate Howard, *Petition of the Day*, SCOTUSBLOG (Sept. 7, 2016, 11:23 PM), http://www.scotusblog.com/2016/09/petition-of-the-day-991/.

[77] *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

[78] *Id.* at 1732.

[79] *Compare id*. at 1733 n.* (Kagan, J., concurring) ("But that is wrong. The cake requested was not a special 'cake celebrating same-sex marriage.' It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike."), *with id.* at 1738 (Gorsuch, J., concurring) ("Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction. Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' intentional wish to avoid participating in that message too.").

joined, staked out the most clear view of when commercial products can achieve free-speech protection: "Phillips' creation of custom wedding cakes is expressive" because "[t]he cake's purpose is to mark the beginning of a new marriage and to celebrate the couple."[80] Those justices therefore seemed to abide that makers of custom products in the general marketplace are entitled to some measure of free-speech protection. In dissent, Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, argued that any general commercial decision "not [to] provide a good or service to a same-sex couple that [the seller] would provide to a heterosexual couple" constitutes unprotected activity.[81] That no consensus emerged is emblematic of the deep fissures in how to approach new theories of protected speech.

2. Can the Government Compel Disclosures in Violation of Sincerely Held Beliefs?

National Institute of Family and Life Advocates v. Becerra, too, brought to the fore disagreements about free speech.[82] Writing for a five-justice majority, Justice Thomas concluded that certain disclosure obligations imposed by California on family-planning and pregnancy-related facilities to notify individuals of abortion-related services violated the First Amendment because, among other reasons, the law "target[ed] speakers, not speech, and impose[d] an unduly burdensome disclosure requirement that [would] chill their protected speech."[83] Unlike some of the laws the Court had upheld previously that touched on "the practice of medicine" through compelled disclosures about the risks of abortion and childbirth, Justice Thomas explained that the compelled notice in *Becerra* "does not facilitate informed consent to a medical procedure" and "is not tied to a procedure at all."[84]

Justice Kennedy, joined by Chief Justice Roberts and Justices Alito and Gorsuch, authored a concurrence excoriating the law as "compel[ling] individuals to contradict their most deeply held beliefs, beliefs grounded in basic

[80] *Id.* at 1743 (Thomas, J., concurring in part and concurring in judgment).

[81] *Id.* at 1750 (Ginsburg, J., dissenting).

[82] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368 (2018) ("The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) requires clinics that primarily serve pregnant women to provide certain notices. Cal. Health & Safety Code Ann. §123470 et seq. (West 2018). Licensed clinics must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call. Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services. The question in this case is whether these notice requirements violate the First Amendment.").

[83] *Id.* at 2378.

[84] *Id.* at 2373 (citations omitted).

philosophical, ethical, or religious precepts, or all of these."[85] Castigating the thought that requiring the disclosure of abortion-related services is productive, Justice Kennedy made clear his view on what is "forward thinking":

> It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.[86]

Justice Breyer dissented for himself and three other justices.[87] Justice Breyer warned that the majority's "constitutional approach threatens to create serious problems" for most governmental regulation because "much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content."[88] Justice Breyer worried that the majority "invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle."[89] "Even during the *Lochner* era," Justice Breyer continued, "when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession."[90] Empowering courts to strike down laws on the basis of free speech, in the dissent's view, has the perverse effect of undermining free-speech precepts: "Using the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech."[91]

Perhaps most interesting was Justice Breyer's discussion on how to view laws regulating messages about the availability of abortion-related services.

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[85] *Id.* at 2379 (Kennedy, J., concurring).

[86] *Id.*

[87] *Id.* at 2379 (Breyer, J., dissenting) ("In my view both statutory sections are likely constitutional, and I dissent from the Court's contrary conclusions.").

[88] *Id.* at 2380.

[89] *Id.* at 2381.

[90] *Id.* at 2382.

[91] *Id.* at 2383.

After reviewing precedent enabling laws that compelled the disclosure of information about adoption, he questioned "[i]f a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?"[92] Invoking the axiom that "the rule of law embodies evenhandedness," Justice Breyer observed "what is sauce for the goose is normally sauce for the gander."[93] Questioning the legitimacy of the majority's argument that the law at issue was not directed to a "medical procedure," Justice Breyer was incredulous: "Really? No one doubts that choosing an abortion is a medical procedure that involves certain health risks."[94] "[A] Constitution that allows States to insist that medical providers tell women about the possibility of adoption," Justice Breyer proposed, "should also allow States similarly to insist that medical providers tell women about the possibility of abortion."[95]

3. Can the President's Exercise of Free Speech Circumscribe Executive Action?

Minutes after the Court released *Becerra*, it announced *Trump v. Hawaii*, which asked whether political rhetoric by the president could be used to demonstrate animus and deem unlawful certain executive actions on immigration.[96] In another 5–4 decision, Chief Justice Roberts reviewed presidential tweets and other expressive media before concluding that President Donald J. Trump's executive orders about certain restrictions on immigrant entry into the United States did not violate federal statutory law or the Establishment Clause.[97] In separate dissents authored by Justices Breyer and Sotomayor, four of the justices saw the representations in a different light, spotlighting something antithetical to the promise of governmental religious neutrality.[98]

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[92] *Id.* at 2385.

[93] *Id.* (internal quotation marks and citation omitted).

[94] *Id.* at 2386.

[95] *Id.* at 2388.

[96] *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[97] *Id.* at 2417 (discussing "retweet[s]," "television interview[s]," and a published "Statement on Preventing Muslim Immigration").

[98] *See id.* at 2433 (Breyer, J., dissenting) ("If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in Justice Sotomayor's opinion, a sufficient basis to set the Proclamation aside. And for these reasons, I respectfully dissent."); *id.* at 2448 (Sotomayor, J., dissenting) ("By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying [*Korematsu v. United States*, 323 U.S. 214 (1944)] and merely replaces one 'gravely wrong' decision with another.").

Although the majority and two dissents debated the propriety of President Trump's statements and whether their provenance rested on animus against minorities, those three opinions did not address the free-speech issues articulated in a related lower-court opinion by Circuit Judge Alex Kozinski:

> Candidates say many things on the campaign trail; they are often contradictory or inflammatory. No shortage of dark purpose can be found by sifting through the daily promises of a drowning candidate, when in truth the poor shlub's only intention is to get elected. No Supreme Court case—indeed no case anywhere that I am aware of—sweeps so widely in probing politicians for unconstitutional motives. And why stop with the campaign? Personal histories, public and private, can become a scavenger hunt for statements that a clever lawyer can characterize as proof of a -phobia or an -ism, with the prefix depending on the constitutional challenge of the day.[99]

Judge Kozinski warned that "this path is strewn with danger" and "will chill campaign speech."[100] Justice Kennedy, the justice for whom Judge Kozinski once clerked, came the closest to attempting a détente between tolerating some leeway in rhetoric with protection of individual rights.

In his last writing in an argued case, Justice Kennedy attempted to find "some common ground between the opinions."[101] Justice Kennedy explained that "the guarantee of freedom of speech" also provides "freedom of belief and expression" among people:

> There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.[102]

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[99] Washington v. Trump, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting from the denial of reconsideration en banc).

[100] *Id.*

[101] *Trump*, 138 S. Ct. at 2423 (Kennedy, J., concurring).

[102] *Id.* at 2424.

He rested his pen with the admonition that "[a]n anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts."[103]

4. Can the Government Require Public Employees to Subsidize Unions?

The Court also revisited and—on the last day of the term[104]—overruled precedent in the area of whether public employees can refuse to subsidize union efforts to engage in collective bargaining.[105] *Janus v. AFSCME, Council 31* assessed whether *Abood v. Detroit Board of Education* was correct to decide in 1977 that state governments could force non-union members, without abridging their free-speech rights, to pay agency fees to public unions to support activity germane to collective bargaining.[106] Justice Alito, writing for a five-justice majority, overruled *Abood* because the case "was poorly reasoned," "led to practical problems and abuse," was "undermined by more recent decisions," and accounted "no reliance interests on the part of public-sector unions . . . sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years."[107] The Court granted certiorari to review the same issue in 2015, but divided equally after the death of Justice Antonin Scalia.[108] This time, however, a majority coalesced to conclude that it was impossible to split the atom between subsidizing union political activities, which could not be compelled under *Abood*, and union collective-bargaining efforts, which could be compelled under *Abood*, because all public-employee union representation touches on "sensitive political topics."[109]

Justice Alito found dubious the foundation on which *Abood* rested, arguing that "labor peace" would not dissolve in the absence of agency fees.[110] In the Court's view, the public employee who brought the case "is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person

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[103] *Id.*

[104] Mark Walsh, *A "View" from the Courtroom: A River Runs Through It*, SCOTUSBLOG (June 27, 2018, 6:41 PM), http://www.scotusblog.com/2018/06/a-view-from-the-courtroom-a-river-runs-through-it/.

[105] Matthew Forys, *Symposium: Free Speech for Public Employees Restored—Justice Alito Plays the Long Game*, SCOTUSBLOG (June 28, 2018, 10:48 AM), http://www.scotusblog.com/2018/06/symposium-free-speech-for-public-employees-restored-justice-alito-plays-the-long-game/.

[106] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018) (citing Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977)).

[107] *See id.*

[108] Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (mem.) (per curiam) (affirming decision below by equally divided Court).

[109] *See Janus*, 138 S. Ct. at 2476.

[110] *Id.* at 2465.

shanghaied for an unwanted voyage."[111] Justice Alito also rejected originalist arguments, impugning that "even if public employees enjoyed free speech rights, the First Amendment was nonetheless originally understood to allow forced subsidies like those at issue here."[112] The Court also considered the force of stare decisis in this case, concluding that *Abood* "was wrongly decided and is now overruled" because the decision had no constitutional foothold either today or in 1977:

> We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members. But we must weigh these disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.[113]

Justice Kagan led a four-justice dissent, arguing that "[r]arely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of stare decisis."[114] She defended *Abood*, asserting that its "account of why some government entities have a strong interest in agency fees (now often called fair-share fees) is fundamentally sound," and that its balance "between public employers' interests and public employees' expression is right at home in First Amendment doctrine."[115] She aspersed the majority's analysis for failing to grapple with the pragmatic "interests of every government entity that thinks a strong exclusive-representation scheme will promote stable labor relations":

> But that response avoids the key question, which is whether unions without agency fees will be able to (not whether they will want to) carry on as an effective exclusive representative. And as to that question, the majority again fails to reckon with how economically rational actors behave—in public as well as private workplaces. Without a fair-share agreement, the class of union non-members spirals upward. Employees (including

[111] *Id.*

[112] *Id.* at 2471.

[113] *Id.* at 2485–86.

[114] *Id.* at 2487 (Kagan, dissenting). Justice Sotomayor offered a one-paragraph dissent, which explained her willingness to join in full the principal dissent.

[115] *Id.* at 2489.

> those who love the union) realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union.[116]

She even accused the majority of creating a "sui generis," "unjustified hole in the law, applicable to union fees alone" because, in her view, precedent "allows a government entity to regulate that expression in aid of managing its workforce to effectively provide public services."[117] To buttress the argument in favor of stare decisis, Justice Kagan referenced the "22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions," all of whom have "enacted statutes authorizing fair-share provisions."[118] The dissent could have ended there. But it did not.

"There is no sugarcoating today's opinion," Justice Kagan explained, because it "prevents the American people, acting through their state and local officials, from making important choices about workplace governance."[119] She accused the majority of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."[120] She, too, did not hold back in coloring the majority as "now bursting with pride in pick[ing] the winning side in what should be—and until now, has been—an energetic policy debate."[121] "The majority has chosen the winners by turning the First Amendment into a sword," Justice Kagan observed, and those justices are "using it against workaday economic and regulatory policy."[122] The dissent also touched on a theme espoused by Justice Breyer in his dissent in *Becerra*: "Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long. And at every stop are black-robed rulers overriding citizens' choices."[123] Justice Kagan offered a plaintive closing: "The First Amendment was meant for better things."[124]

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[116] *Id.* at 2490–91.

[117] *Id.* at 2497 (emphasis omitted).

[118] *Id.* at 2499.

[119] *Id.* at 2501.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id* at 2502.

[124] *Id.*

5. October Term 2017 Closed with Frustration and Uncertainty

The Court released *Janus* on the last day of an acerbic term.[125] Justice Kagan read portions of her dissent from the bench, a statement for any justice and a rare occurrence for her.[126] Witnesses observed that her voice was "stern and sometimes angry-sounding" as she spoke.[127] By coincidence of a seniority-based seating arrangement on the bench, Justice Alito, who sits immediately to her left, "lean[ed] back in his chair and at times seem[ed] to be peeking over her shoulder at her statement."[128] Just the day before, Justice Breyer read from the bench portions of his dissent in *Becerra* and *Trump*, and Justice Sotomayor did the same for her dissent in *Trump*.[129] Hours later Justice Kennedy would announce his retirement, accelerating a tailspin against consensus.[130]

Reviewing cases from October Term 2017, Professor Cass Sunstein questioned the conventional wisdom that "[t]hose on the left used to like freedom of speech—but now, not so much," and that "those on the right used not to like free speech—but now they're all in."[131] Offering a revisionist view that that "narrative is mostly wrong," he argued that progressives long have sought to protect "political dissenters," "libel law," and "prior restraints," while conservatives have sought to protect "corporate expenditures and commercial speech" and expressed concern that speech could prove dangerous even if not imminent; that "libelous speech could do real damage; [and] that in the Pentagon Papers case national security was at risk."[132] "Neither the left nor the right has really shifted," he explained, because "[c]urrent free-speech battles don't look even a little bit like those of the 1950s and 1960s."[133] So "[i]t's not hypocrisy, and it's not even surprising," Professor Sunstein concluded, "if those on the left,

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[125] *See* Kedar Bhatia, *Final October Term 2017 Stat Pack and Key Takeaways*, SCOTUSBLOG (June 29, 2018, 9:00 AM), http://www.scotusblog.com/2018/06/final-october-term-2017-stat-pack-and-key-takeaways/ ("OT17 saw an uncommonly low level of unanimity."); Kedar S. Bhatia, *Stat Pack for October Term 2017*, SCOTUSBLOG 15–16, (June 29, 2018), http://www.scotusblog.com/wp-content/uploads/2018/06/SB_Stat_Pack_2018.06.29.pdf.

[126] Walsh, *supra* note 104.

[127] *Id.*

[128] *Id.*

[129] Mark Walsh, *A "View" from the Courtroom: The "Court of History" Is in Session*, SCOTUSBLOG (June 26, 2018, 4:47 PM), http://www.scotusblog.com/2018/06/a-view-from-the-courtroom-the-court-of-history-is-in-session/.

[130] Walsh, *supra* note 104 ("Roberts wishes all three well in their retirement. Kennedy has taken this all in without betraying any hint of what is to come this afternoon.").

[131] Cass R. Sunstein, Opinion, *The Left and the Right, Consistent on Free Speech*, BLOOMBERG (July 5, 2018, 8:00 AM), https://www.bloomberg.com/view/articles/2018-07-05/free-speech-divides-the-left-and-the-right.

[132] *Id.*

[133] *Id.*

long focused on the protection of political speech and dissent, are not so excited about protecting commercial advertising, or about striking down disclosure requirements from the Securities and Exchange Commission."[134]

Against the discordant views among the justices, one additional case decided that term touched on political discourse and represents hope of rekindling consensus. In many ways, *Lozman* offered the Court an opportunity to return to the edifications of Justices Holmes and Brandeis, which coalescence around the idea that reasoned deliberation must be allowed to occur, if only so public servants and the polity they serve can decide the merits of a debate.[135]

III. *LOZMAN V. CITY OF RIVIERA BEACH* AND THE PROMISE OF THE RIGHT TO BE HEARD

A. Fane Lozman and His Second Trip to the Supreme Court

There are many sides to Fane Lozman: he is a two-time victor in the Supreme Court, self-described "activist," one-time owner of a floating house, and the proud caretaker of a dachshund ("Lady"), parrot ("Stormy"), and cat ("Jet"), the latter of whom apparently is capable of leaping "30 feet" in a single bound.[136] He also served in the U.S. Marine Corps, holds a patent on computer software, and worked as a "zombie day trader" for a spell in Chicago.[137] Some of his appellations include "political gadfly, relentless opponent of public corruption, and bored rich guy always spoiling for a fight."[138] As Macklemore would say, "[t]here's layers to" Lozman not unlike "tiramisu, tiramisu."[139]

1. Lozman's Arrival at Riviera Beach and the Birth of Two Supreme Court Cases

Lozman, a native of Miami, purchased a floating house in 2002[140] and moved back to Florida in 2003.[141] He docked the floating house in North Bay Village,

[134] *Id.*

[135] *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[136] *First Mondays Podcast, OT2017 #30: "Most Ambitious Crossovers"*, SCOTUSBLOG 01:22:00 (June 25, 2018, 8:30 AM), http://www.scotusblog.com/2018/06/ot2017-30-most-ambitious-crossovers/.

[137] Robert Barnes, *A Florida Provocateur Has His Day Before the U.S. Supreme Court—Again*, WASH. POST (Feb. 25, 2014), https://www.washingtonpost.com/politics/courts_law/a-florida-provocateur-has-his-day-before-the-supreme-court--again/2018/02/25/925c9c26-1595-11e8-8b08-027a6ccb38eb_story.html?utm_term=.93f2fac7dale.

[138] *See id.*

[139] MACKLEMORE, *Downtown*, *on* THIS UNRULY MESS I'VE MADE (Macklemore, LLC 2015).

[140] Lyle Denniston, *Argument Preview: Defining a Houseboat—A House or a Boat?*, SCOTUSBLOG (Sept. 28, 2012, 12:07 AM), http://www.scotusblog.com/2012/09/argument-preview-defining-a-houseboat-a-house-or-a-boat/.

[141] Barnes, *supra* note 137.

Florida, where he lived for three years.[142] Hurricane Wilma damaged the house in 2005, which prompted Lozman to move 80 miles north to Riviera Beach.[143] He had the house towed and docked in a marina run by the City of Riviera Beach.[144] He signed a lease with the city in March 2006, intending to live in the structure indefinitely.[145] Yet shortly upon his arrival, he learned of the city's preparations to sell the marina to private developers.[146] Acrimony set in almost immediately.

Lozman became an active participant in local government, which no doubt propelled a budding antagonistic relationship, testifying "more than 200 times" at city-council meetings.[147] Within two months of his residency, the city had already forcibly removed him from a regularly scheduled meeting.[148] The city council also denied him access to a "special meeting" of the council to discuss, among other topics, his status as a resident.[149]

In June 2006, he filed a pro se lawsuit against the city on allegations that it had violated the state's open-meetings law when the city council denied him access to the special meeting.[150] Later that month, the council held another closed-door session, in part to discuss Lozman's open-meetings lawsuit.[151]

A few months later, in September 2006, the city filed a lawsuit in state court, seeking to evict Lozman's floating house from the marina.[152] Lozman successfully asserted a free-speech retaliation defense, thereby thwarting the city's efforts to evict the structure from the marina.[153]

During another council meeting in November 2006, Lozman, as he had done countless times before, made his way to the podium during the public-comment, non-agenda portion of the meeting—but this time he experienced

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[142] Denniston, *supra* note 140.

[143] *See id.*

[144] *See id.*

[145] *See id.*

[146] *See id.*

[147] Editorial, *The Supreme Court Protects Even the Unruliest of Government Critics from Retaliation*, L.A. TIMES (June 20, 2018), http://www.latimes.com/opinion/editorials/la-ed-scotus-retaliate-20180620-story.html#.

[148] Lozman v. City of Riviera Beach (*Lozman II*), 39 F. Supp. 3d 1392, 1400 (S.D. Fla. 2014).

[149] *Id.*

[150] *Id.*; Denniston, *supra* note 140 (observing that the jury ultimately found for Lozman, including a finding that he had been the target of improper retaliation for speaking out against city policies).

[151] *Lozman V*, 138 S. Ct. 1945, 1949 (2018).

[152] *Lozman II*, 39 F. Supp. 3d at 1401.

[153] *See id.*

a slightly different reaction from the city.[154] Less than a minute after he began speaking, Riviera Beach City Council Chairperson Elizabeth Wade directed a city police officer to remove Lozman from the podium.[155] The episode was captured on video.[156] Lozman began his comments with no attempt to be conciliatory: "As is typical, the Mayor and [another Councilperson] aren't here during my comments."[157] The council remained silent as Lozman proceeded: "The U.S. Attorney's Office has arrested the second corrupt local politician . . . former Palm Beach County Commissioner Tony Masilotti."[158] Wade interjected to stop him: "You will not stand up and go through that kind of . . . ."[159] Lozman interrupted and said, "Yes, I will."[160] Wade exclaimed, "No, you won't."[161] After Lozman continued his allegations, Wade called out, "Officer," which prompted Lozman to speak louder and continue on: "I am informing the citizens that two County Commissioners . . . ." [162] After Officer Francisco Aguirre walked up to the podium, Lozman inveighed against his removal: "Excuse me? I'm not walking outside, I haven't finished my comments."[163] Wade responded by directing, "Well, carry him out."[164] "Why am I being arrested," Lozman retorted, "I have a First Amendment right!"[165]

At Wade's direction, Officer Aguirre handcuffed Lozman, escorted him from the meeting, and transported him to the police headquarters, where Lozman was charged with disorderly conduct and trespass after warning.[166] Lozman alleged that city officials later altered the charging document "with a 'white-out' of the trespass charge, and replacement with the words 'resisting w/out violence, to wit obstruction.'"[167] The state attorney dismissed all charges in January 2007.[168]

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[154] *Id.* at 1402.

[155] *Id.*

[156] Lozman v. City of Riviera Beach (*Lozman IV*), 681 F. App'x 746, 748–49 (11th Cir. 2017); *see also* Supreme Court Media Resources Video File, *Lozman v. City of Riviera Beach* (Docket No. 17-21), SUP. CT. (June 18, 2018) https://www.supremecourt.gov/media/video/mp4files/Lozman_v_RivieraBeach.mp4.

[157] *Lozman IV*, 681 F. App'x at 749.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Lozman II*, 39 F. Supp. 3d 1392, 1402 (S.D. Fla. 2014).

[167] *Id.*

[168] *Id.*

In 2008, Lozman filed another pro se lawsuit against the city, alleging six counts of constitutional violations, including a free-speech claim on grounds that the city retaliated against him and a petition claim based on alleged interference with Lozman's right to petition the government for redress of grievances.[169] The case was assigned to Senior District Judge Daniel T. K. Hurley.[170]

Around the time Lozman filed that case, and after the city's private-development project scuttled, the city imposed a new marina-docking agreement with more stringent conditions, requiring that any vessel in the marina be fitted so that it could be moved in an emergency.[171] Lozman refused to sign the agreement, which provoked an admiralty lawsuit filed by the city in 2009.[172]

Yet again as a pro se litigant, Lozman requested that the district court dismiss the admiralty case for lack of jurisdiction because the floating house was not a "vessel" consistent with admiralty law.[173] The district court found in favor of the city, and the Eleventh Circuit affirmed in 2011.[174] Upon court order, Lozman sold the floating house at auction, which the city promptly purchased and had destroyed.[175]

Lozman googled "appellate lawyers" after his losses at trial and on appeal, finding Jeffrey L. Fisher of the Stanford Law School Supreme Court Litigation Clinic, who agreed to represent him in the Supreme Court.[176] The Court granted certiorari to the Eleventh Circuit in 2012, and Justice Breyer's majority opinion concluded in 2013 that Lozman was correct to argue that the floating house was not a vessel under admiralty law because "a reasonable observer, looking to the home's physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water."[177]

2. The Unlikely Posturing of Another Grant of Certiorari

Just as the admiralty case began to simmer, Lozman's civil-rights case started to heat up. After a jury returned a verdict for the city in 2014, Lozman sought a new trial, which the district court denied.[178] Although not cited or relied on

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[169] *Id.*

[170] *Id.*

[171] Barnes, *supra* note 137.

[172] *Id.*

[173] Lozman v. City of Riviera Beach (*Lozman I*), 568 U.S. 115, 119 (2013).

[174] *Id.*

[175] *Id.* at 120.

[176] *First Mondays Podcast*, *supra* note 136, at 01:22:00.

[177] *Lozman I*, 568 U.S. at 118.

[178] *Lozman IV*, 681 F. App'x 746, 750 (11th Cir. 2017) (discussing the order denying retrial).

during the arrest or consideration of charges, the district court entered judgment to the city because probable cause to arrest may have existed under a latent state law, which "prohibits interruptions or disturbances in schools, churches, or other public assemblies."[179] That latent law was one of three proposed alternatives advocated by the city for the first time at trial.[180]

After litigating pro se at trial, Lozman secured counsel and appealed to the Eleventh Circuit.[181] The appeals court affirmed the judgment in 2017 because, among other reasons, the jury had found that the arresting officer had probable cause to arrest Lozman, which under circuit precedent precluded plaintiffs from prevailing on a First Amendment retaliatory-arrest claim if probable cause justified the arrest.[182] In another appeal from a separate order in the case, the Eleventh Circuit affirmed an award of roughly $35,000 in fees to the city, which were assessed against Lozman.[183] Lozman would later represent that the district judge who assessed the fees against him "spent half the year in Europe."[184]

After losing on the merits at trial and on appeal, Lozman discovered—through his own research—a circuit split on the issue of whether the existence of probable cause is sufficient to negate a free-speech retaliatory-arrest claim.[185] He again enlisted the able counsel of Professor Fisher,[186] and the Court again granted certiorari to the Eleventh Circuit—this time on the non-admiralty issue of "[w]hether the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law."[187] Lozman, perhaps colored by the apparent advantages realized when he retained counsel, would later comment on how pro se litigants in the courts before which he argued, unlike attorneys, are relegated to hardcopy filing only and are unable to access cell phones for litigation assistance during court sessions.[188]

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[179] *Lozman V*, 138 S. Ct. 1945, 1950 (2018) (citation omitted).

[180] *See* Heidi Kitrosser, *Argument Preview: Justices to Consider Whether Probable Cause Defeats Claims of Retaliatory Arrest for First-Amendment-Protected Expression*, SCOTUSBLOG (Feb. 21, 2018, 3:11 PM), http://www.scotusblog.com/2018/02/argument-preview-justices-consider-whether-probable-cause-defeats-claims-retaliatory-arrest-first-amendment-protected-expression/.

[181] *Lozman IV*, 681 F. App'x at 749–50.

[182] *Id.* at 751.

[183] Lozman v. City of Riviera Beach (*Lozman III*), 679 F. App'x 979, 981 (11th Cir. 2017) ("In sum, the district court did not abuse its discretion in awarding the City its costs as the prevailing party or in its evaluation of the City's claimed cost amounts."); *see also First Mondays Podcast*, *supra* note 136, at 01:34:30.

[184] *First Mondays Podcast*, *supra* note 136, at 01:34:30.

[185] *See id.*

[186] *Id.*

[187] *Lozman V*, 138 S. Ct. 1945, 1950–51 (2018); Lozman v. City of Riviera Beach, 138 S. Ct. 447 (2017) (mem.); Aurora Barnes, *Petition of the Day*, SCOTUSBLOG (Aug. 8, 2017, 4:22 PM), http://www.scotusblog.com/2017/08/petition-of-the-day-1199/.

[188] *First Mondays Podcast*, *supra* note 136, at 01:42:15.

The parties at the merits stage took opposing views about the salience of probable cause.[189] Unlike a retaliatory-prosecution claim, which the Court has concluded probable cause nullifies, Lozman argued that retaliatory arrests are different.[190] While prosecutors enjoy broad immunity from civil-rights lawsuits in most circumstances, cities and police officers have much less protection.[191] In addition, countenancing a probable-cause defense, Lozman explained, also encourages government actors to shift positions from the initial arrest to determine how best to defend a lawsuit.[192] Lozman cited his own case as an example in which the notice to appear listed two charges later dismissed, the government proffered three new charges during litigation, and the trial court ultimately asked the jury to consider whether probable cause existed for an offense neither contemplated at arrest nor during charging.[193] The city's response to Lozman's arguments was simple: no constitutionally meaningful difference exists between retaliatory prosecution and retaliatory arrest.[194] "[A]rrests backed by probable cause," the city argued, "pose little danger to the freedom of speech."[195] The city also attempted to reassure the Court that, in practice, most officers are already aware of free-speech freedoms when deciding to arrest.[196] The Office of the Solicitor General filed an unsolicited amicus brief in support of the city, and then-Acting Solicitor General Jeffery B. Wall secured a portion of oral argument to advocate the government's position.[197]

Ahead of oral argument, Professor Heidi Kitrosser suggested that court watchers should attend to "what extent, if at all, the justices' questions reflect recent events, such as the demonstrations and violence in Charlottesville, Virginia, protests against President Donald Trump's administration, and protests by Black Lives Matter."[198] Lozman, too, offered public thoughts before oral argument: "If I lose this case, it will be a sad day for our democracy. Our country will slide further into a police state. . . . It sounds hokey, but this is kind of a noble battle to fight."[199]

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[189] Kitrosser, *supra* note 180.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] Heidi Kitrosser, *Argument Analysis: Justices Weigh Threats to Free Speech Against Constraints on Local Policing*, SCOTUSBLOG (Feb. 28, 2018, 5:28 PM), http://www.scotusblog.com/2018/02/argument-analysis-justices-weigh-threats-free-speech-constraints-local-policing/; *Lozman v. City of Riviera Beach, Florida*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/lozman-v-city-riviera-beach-florida/ (last updated June 25, 2018).

[198] Kitrosser, *supra* note 197.

[199] Barnes, *supra* note 137.

City Council Chairperson Wade also offered public comments, which were more directed to the city council's relationship with Lozman than oral argument: "I told him I would put my foot so far up his behind, he would think my toe was his tonsil."[200] No love lost, for sure, between the litigants.

The Court heard the case in February 2018, with the justices expressing concerns over how to prevent governments from exploiting the probable-cause defense through post hoc rationalizations while also affording leeway to law-enforcement officers to make arrests without fear of lawsuits.[201] On the one hand, Chief Justice Roberts suggested that the video of the arrest was "pretty chilling": "I mean, the fellow is up there for about 15 seconds, and the next thing he knows, he's being led off in—in handcuffs, speaking in a very calm voice the whole time."[202] Justice Kennedy suggested the same: "[T]here is evidence that there was a pre-determined plan to arrest somebody on account of his political speech in a political forum. And it seems to me that this is a very serious First Amendment problem."[203] Justice Kagan homed in on the facts and pragmatic consequences of a decision in favor of the city:

> [I]n a local government there are people who become real sorts of pains to local officials, and—and local officials want to retaliate against them. . . . And just the nature of our lives and the nature of our criminal statute books, there's a lot to be arrested for. . . . So that's a pretty big problem, it seems to me, and it's right here in kind of the facts of this case.[204]

On the other hand, Justice Kennedy also expressed concern over riot-type situations in which the consequences would be lawsuits against arresting officers simply because rioters insulted the police while committing violence.[205] Stan Dvoretzky, on behalf of the city, seized on these comments by arguing it is "critical to understand that police officers must concededly take account of speech when deciding to arrest in many situations," and that it is "virtually impossible for police officers . . . to disaggregate their own thought processes" and determine the role played by arrestee's speech in arrest decisions made in the middle of violence.[206] Several justices also suggested that probable cause might matter more in instances in which the charged offenses are for more serious crimes, like rape and

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[200] *Id.*

[201] Kitrosser, *supra* note 197.

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

murder.[207] Now in the capacity of deputy solicitor general, Wall acknowledged that "the facts here are troubling," but called it a "one-in-a-thousand" case around which a rule ought not to be built.[208] Pamela Karlan, arguing on behalf of Lozman, pushed back, suggesting that adopting the rule of the city and federal government would have the effect of saying that "all of the [First Amendment] protections that this Court is giving don't mean very much on the ground when you're dealing with local governments."[209] The decision answered some of these questions, touched on others, and left others unresolved.[210]

B. Probable Cause Does Not Insulate Policymakers From Retaliatory-Arrest Claims

1. A "Narrow" Decision on the Surface

The Court decided *Lozman* in June 2018, and its implicit message may carry more constitutional significance than its explicit holding. Justice Kennedy, joined by seven justices in his penultimate majority opinion, concluded that, under circumstances like those presented by Lozman, a city cannot defeat a civil-rights claim of retaliatory arrest for protected speech simply by pointing to some additional basis on which it could have arrested the plaintiff.[211] Justice Kennedy began by observing that "[t]he issue before the Court is a narrow one."[212] Perhaps the most important passage as to free speech came in the opening paragraph of section two, when the Court observed what Lozman did not challenge: "the constitutionality of Florida's statute criminalizing disturbances at public assemblies"; "that the statute is overly broad"; "that it impermissibly targets speech based on its content or viewpoint"; "that it was enforced in a way that curtailed Lozman's right to peaceful assembly"; or "the validity of the City Council's asserted limitations on the subjects speakers may discuss during the public-comment portion of city-council meetings."[213]

Focusing on the question presented—"whether the existence of probable cause bars that First Amendment retaliation claim"[214]—the Court determined that a lawsuit brought against a city for a retaliatory policy directed against an individual is not negated by probable cause because "the existence and enforcement

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[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *See infra* notes 211–49 and accompanying text.

[211] *Lozman V*, 138 S. Ct. 1945, 1954–55 (2018)

[212] *Id.* at 1951.

[213] *Id.* (citations omitted).

[214] *Id.*

of an official policy motivated by retaliation separates Lozman's claim from the typical retaliatory arrest claim."[215] "[W]hen retaliation against protected speech is elevated to the level of official policy," Justice Kennedy explained, "there is a compelling need for adequate avenues of redress."[216] Justice Kennedy observed that, unlike police officers and other government actors who can be dismissed or punished, "there may be little practical recourse when the government itself orchestrates the retaliation," which "is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer."[217] "Lozman's speech is high in the hierarchy of First Amendment values" because "right to petition is one of the most precious of the liberties safeguarded by the Bill of Rights," said Justice Kennedy.[218]

In vacating and remanding for further consideration, the Court cautioned that relief is still uncertain for Lozman.[219] The Court impugned whether a reasonable juror could find that the city developed a retaliatory policy, that the arrest was an official act by the city, or that the arrest would not have occurred absent animus toward Lozman.[220]

In a solo dissent, Justice Thomas did not question the free-speech precepts of the majority, yet he argued that probable cause should bar these types of claims because of "the importance of probable cause when defining the torts of malicious prosecution and malicious arrest."[221] Justice Thomas reasoned that "[t]he presence of probable cause will tend to disprove that the arrest was done out of retaliation for the plaintiff's speech, and the absence of probable cause will tend to prove the opposite."[222] He closed by explaining that "officers almost always exchange words with suspects before arresting them," by which the majority's rule will "permit plaintiffs to harass officers with the kind of suits that common-law courts deemed intolerable."[223]

Professor Kitrosser reflected that the decision offers "some encouragement to future plaintiffs," "some warning to future defendants," but "leaves much to be determined."[224] Others had similar expressions of tacit sanguinity for Lozman:

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[215] *Id.* at 1954.

[216] *Id.*

[217] *Id.*

[218] *Id.* at 1954–55.

[219] *Id.* at 1955.

[220] *Id.*

[221] *Id.* at 1957 (Thomas, J., dissenting).

[222] *Id.* at 1958.

[223] *Id.*

[224] Heidi Kitrosser, *Opinion Analysis: With Facts Like These…*, SCOTUSBLOG (June 19, 2018, 10:38 AM), http://www.scotusblog.com/2018/06/opinion-analysis-with-facts-like-these/.

"In brief, Lozman won a battle Monday, but the war over his First Amendment right to complain to local government officials goes on."[225] Lozman represented that the decision got his lawsuit "to the 50-yard line," but "the last couple of pages of the opinion gave the Eleventh Circuit a road map to mess with [him] again."[226] Still the prospect of success on remand tells only part of the story.

2. A Reassuring Decision Between the Margins

A myopic focus on the outcome in *Lozman* overlooks a story that should hearten anyone holding fealty to the values expressed by Justices Holmes and Brandeis, which seek to preserve the right to petition and deliberate through political dissent. Even if the Eleventh Circuit continues to "mess" with Lozman, a pathway exists for similar cases to succeed on merits and in the court of public opinion.

The Court approbated that Lozman could have challenged the law under which the city was operating through a variety of theories.[227] The opening paragraph of section two telegraphed how lawsuits can proceed and succeed when the government uses sweeping laws to silence political discourse.[228] Not even the dissent suggested otherwise.[229] And the Court reached almost unanimous consensus in an area fraught with complications over how unbridled free speech should be in modern society.[230] While success in the courts is a benchmark by which to measure litigation success, exogenous effects on society can be just as powerful.

Following the decision, Lozman represented that he received "hundreds" of emails and calls about government officials in other cities removing speakers from public meetings under similar circumstances.[231] After reading and listening to individuals tell their stories, Lozman realized that his case gave political dissenters "a tool to fight back" against "[e]lected officials [who] use police powers

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[225] Clay Calvert, Opinion, *Fane Lozman's Long Fight to Criticize Riviera Beach May Go On, Supreme Court Rules*, TAMPA BAY TIMES (June 18, 2018), http://www.tampabay.com/opinion/columns/Column-Fane-Lozman-s-long-fight-to-criticize-Riviera-Beach-may-go-on-Supreme-Court-rules_169259588.

[226] *First Mondays Podcast*, *supra* note 136, at 01:39:50.

[227] *Lozman V*, 138 S. Ct. 1946, 1951 (2018).

[228] *See id.*

[229] *See generally id.* at 1955 (Thomas, J., dissenting).

[230] Kitrosser, *supra* note 180 ("It will be interesting as well to see to what extent, if at all, the justices' questions reflect recent events, such as the demonstrations and violence in Charlottesville, Virginia, protests against President Donald Trump's administration, and protests by Black Lives Matter. And of course, we can count on old First Amendment chestnuts like the chilling effect and the heightened value of 'core' political speech to crop up throughout the discussion.").

[231] *First Mondays Podcast*, *supra* note 136, at 01:40:45.

to harass" people from engaging in political commentary.[232] Even Lozman, when he made his triumphant return to a city-council meeting, recalled how his presence alone purportedly "scared to death" the city council.[233] Between the surfacing of similar stories and the Riviera Beach city council's realization that political dissent cannot be stymied forever, a palpable shift in power can—and possibly has—occurred. Those stories, if true, belie Justice Thomas's gainsay "that there will be many cases where this rule will even arguably apply."[234] The common and consistent argument is plain no matter where you live: "If you don't like being criticized, don't run for public office."[235]

These social aftereffects are more than epiphenomenal because they are concatenated to the idea that individuals can stand up to local government with confidence that the courts will accept the proposition that government officials cannot adopt censorship policies against disfavored speakers. Sure, Lozman claimed to have celebrated by "hit[ting] the town a few times" after the decision issued,[236] but it is the self-confidence building in others and the behavior adjustments of his city, not merely the decision alone, that are true causes for celebration. Whatever the result of remand ultimately entails, the case is a victory because of its effects writ large and writ small. And those effects represent a return to the precepts edified in the early 20th century by Justices Holmes and Brandeis, which proclaim that free speech should be viewed as a search for truth, safety, deliberation, and redress of grievances.[237]

To be sure, whether Justices Holmes and Brandeis would be right under an originalist understanding of the Constitution has been the subject of renewed debate.[238] But if free-speech jurisprudence from the early 20th century is in tension with and has no sure foothold in the original meaning of the First Amendment, the question then becomes whether original meaning is the right way to resolve issues of free speech?

In an article that Professor Sunstein professed "might well be the most illuminating work on the original understanding of free speech in a generation,"[239] Professor Jud Campbell argued that the founding generation

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[232] *Id.* at 01:41:30.

[233] *Id.* at 01:43:10.

[234] *Lozman V*, 138 S. Ct. at 1956 (Thomas, J., dissenting).

[235] *First Mondays Podcast*, *supra* note 136, at 01:43:40.

[236] *Id.* at 01:41:40.

[237] *See* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[238] Cass R. Sunstein, Opinion, *What If the Founders Had Free Speech Wrong?*, BLOOMBERG (Dec. 14, 2017, 8:00 AM), https://www.bloomberg.com/view/articles/2017-12-14/what-if-the-u-s-has-free-speech-all-wrong.

[239] *Id.*

viewed political dissent with skepticism.[240] Rather than take an absolutist view of free-speech, Professor Campbell cites how the original public understanding of the Constitution approved of laws like the Sedition Act of 1798, which made evident that the concept of promoting the "public good" could provide the government with authority to constrict "liberty to falsely call you a thief, a murderer, an atheist."[241] Professor Sunstein explained that "[f]rom the standpoint of law in the 21st century, that's plainly unconstitutional"; yet, as Professor Campbell argued, "the founders meant to protect a lot less speech than most of us think."[242] As one of the closest data points on what the public thought of free speech in 1791, the Sedition Act of 1798 permitted fines and imprisonment for writing, printing, uttering, or publishing "any false, scandalous, and malicious writing against the government of the United States, or either House of Congress, or the President, with intent to defame, or bring either into contempt or disrepute, or to excite against either the hatred of the people of the United States."[243]

If Professor Campbell is correct, *Lozman* might not be consistent with the original understanding of the First Amendment, but it falls gently within the ideals championed in the Supreme Court for the first time by Justices Holmes and Brandeis.[244] And *Lozman*, if anything, seems less a departure from originalist understanding than *Janus* and *Becerra*.[245] Reaching back to a foothold from English common law applied throughout the colonies, in *Crown v. Zenger*, a jury in 1735 acquitted publisher John Peter Zenger on charges that he made false statements against New York's colonial governor, reflecting what has been deemed a jury nullification largely attributed to the persuasion of Andrew Hamilton's oration that truth is the best defense against libel: "The laws of our country have given us a right to liberty of both exposing and opposing arbitrary power (in these parts of the world at least) by speaking and writing truth."[246]

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[240] Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 262 (2017) ("Viewed historically, however, the First Amendment did not enshrine a particular rationale for expressive freedom.").

[241] *Id.* at 283.

[242] Sunstein, *supra* note 238.

[243] *Id.*; *see also* Steven G. Calabresi, *Neither Kavanaugh nor Constitutional Originalism Are Scary*, HILL (Aug. 21, 2018), http://thehill.com/opinion/judiciary/402851-neither-kavanaugh-nor-constitutional-originalism-are-scary (rejecting that argument that "originalists think that a constitutional provision means the same thing today as when it was adopted, which is unworkable because the world today is so different from what the world was like in 1791 or in 1868").

[244] *See supra* notes 40–71 and accompanying text.

[245] *See supra* notes 72–135 and accompanying text.

[246] Scott Bomboy, *On this Day, an Early Victory for the Free Press*, NAT'L CONST. CTR.: CONST. DAILY (Aug. 4, 2018), https://constitutioncenter.org/blog/a-huge-free-press-victory-by-the-original-philadelphia-lawyer.

Though not a constitutional case, the understanding of and commitment to truth over governmental censorship is unavoidable. *Lozman* is—at a minimum—a rebirth of "better things" from the 20th century and less inconsistent with first principles than other 21st century cases.[247]

It has been described as "unprecedented" for an individual plaintiff to win twice in the Supreme Court in two different cases addressing unrelated and separate issues, especially in an era where the Court rejects around 7,000 cases each year and hears only 80.[248] Lozman, looking back on the journey, offered the following: "This arrest happened in 2006 and the case was filed in February 2008, so we've been fighting this case for over 10 years. It's been a Herculean effort."[249] Regardless of whether Lozman wins on remand, he's already won by standing up for something he believes in, despite the awesome threat of governmental punishment. And society is a winner for that too.

IV. CONCLUSION

If "[t]he First Amendment was meant for better things," what are they?[250] Precluding safe spaces on college campuses? Enabling unbridled campaign contributions by foreign corporations? Preventing state universities from discriminating against certain speakers based on perceived offensive content? Facilitating deregulation? Those topics are not easy. But assuring people of their ability to engage in political dissent should be. Among the controversial cases decided during October 2017, Lozman's lawsuit recalls some of the undisputed values under which free speech has come to be understood. Although he did not win on the merits, that the Court recognized certain vehicles to challenge stifling action by the government is comforting and suggests engagement to ensure public servants treat people better.

Lozman harks back to ideas now set adrift by more complex problems in a modern society. Discovery of those elusive "better things" for which the First Amendment was meant requires remembering what happened before, understanding what worked, and anticipating what will work.[251] Just as "we beat on, boats against the current, borne back ceaselessly into the past,"[252] the rallying points around which to stabilize government and society are "that truth

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[247] Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2502 (2018) (Kagan, J., dissenting).

[248] Alex Daugherty, *South Florida Activist Is 2-0 at the Supreme Court After First Amendment Victory*, MIAMI HERALD (June 18, 2018), https://www.miamiherald.com/news/politics-government/article213374049.html.

[249] *Id.*

[250] *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).

[251] *See id.*

[252] F. SCOTT FITZGERALD, THE GREAT GATSBY (1925).

is the only ground upon which [the people's] wishes safely can be carried out"[253] because "deliberative forces should prevail over the arbitrary."[254] That is the freedom Lozman sought because "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies."[255] "That at any rate is the theory of our Constitution."[256] Channeling Justices Holmes and Brandeis, Lozman summed up his accomplishment and the work still to be done: "I helped move the bar forward on the First Amendment."[257] He sure did.

[253] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[254] Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

[255] *Id.*

[256] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[257] Daugherty, *supra* note 248.