Preserving the Telephone Consumer Protection Act: The Underlying Disconnect on Severability in the Supreme Court

Sean Linehan & Reilly Dougherty
Student Fellows
Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law

INTRODUCTION

Robocalls have been bothering consumers for over thirty years, but Congress has not treated all robocallers equally. Last term the American Association of Political Consultants convinced the Supreme Court to review a case involving the Telephone Consumer Protection Act ("Act"), which prohibited political robocalls while allowing robocalls made to collect a debt owed to or guaranteed by the United States.[1] The American Association of Political Consultants alleged that this exception violated the Free Speech Clause of the First Amendment by imposing a content-based restriction on speech.[2] These political consultants and organizations wanted the ability to place robocalls to cell phones and argued that the government-debt exception unconstitutionally discriminated against political speech. The Association asked the Court to invalidate the entire Act to remedy the First Amendment violation.

Congress originally enacted the Telephone Consumer Protection Act in 1991 to address widespread consumer frustration with unwanted telemarketing robocalls. Technology at that time was rapidly improving, paving the way for a surge in automated telemarketing phone calls. The nuisances and privacy invasions created by these calls began to take their toll on consumers. By the end of 1991, seven million people were receiving automated calls each day from over 180,000 telemarketers. Consumer complaints spurred Congress to pass the Act. In 2015,

[1] *Barr v. American Assn. of Political Consultants*, 140 S.Ct. 2335, 2344 (2020).
[2] *American Assn. of Political Consultants*, 140 S.Ct. at 2343.

Congress amended the Act, carving out the government-debt exception that allowed for robocalls made solely to collect a debt owed to or guaranteed by the United States.

On July 6, 2020, the Court held that the Act violated the First Amendment and severed the government-debt exception from the general robocall restriction established in 1991. In effect, this decision allowed the remainder of the Act to function as it was first enacted and to impose a general prohibition on robocalls. Still, the decision produced ripple effects, raising broader questions about relief and highlighting the divergence of Justices Kavanaugh and Gorsuch on the question of severability.

I. LIABILITY

A. Strict Scrutiny for Content-Based Restriction

The Justices were divided on both the liability and relief issues before the Court. Six members of the Court concluded that "Congress had impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment."[3] The Chief Justice and Justice Alito joined in full Justice Kavanaugh's majority opinion announcing the judgment of the Court. Justice Sotomayor concurred in this judgment, and Justices Thomas and Gorsuch ultimately agreed that the Act violated the First Amendment.[4] A different group of seven Justices agreed that "the [Communications] Act's severability clause require[d] that the Court sever the 2015 government-debt exception from the remainder of the statute," whereas Justices Gorsuch and Justice Thomas (in relevant part) dissented on the issue of relief and severability.[5]

According to Justice Kavanaugh's opinion, the government-debt exception violated the cardinal rule of the First Amendment by imposing a content-based restriction on speech. A law is

[3] *Id.* at 2343.
[4] *Id.* at 2344.
[5] *Id.* at 2343-44.

content-based if the regulation of speech on its face draws distinctions based on the message a speaker conveys.[6] Content-based laws are subject to strict scrutiny.[7] In this case, Justice Kavanaugh succinctly demonstrated that the robocall distinction was solely based on content. Under the Act, a robocall was legal if the message was "please pay your government debt." A robocall was illegal if the message was "please donate to our political campaign." Content was the determining factor for legality and made clear to the Court that the government-debt exception was a content-based regulation.

The Government advanced several counterarguments, claiming the statute was in fact content-neutral. First, the Government posited that the distinction was based on speakers, not based on content. Second, the Government argued that the legality of a robocall turned on whether the caller was engaged in an economic activity, not on the content of speech. Third, the Government tried to liken the statute to the Fair Debt Collection Practices Act, contending that if the Act is content-based because it singles out debt-collection, other statutes that regulate debt-collection, namely the FDCPA, would also have to be designated as content-based.[8]

While Justice Breyer agreed on the issue of relief and severability, he would have validated the 2015 amendment under intermediate scrutiny, because it involved commercial regulation of speech.[9] A majority of Justices found Justice Breyer's arguments as well as the Government's justifications unpersuasive. Given that the legality of a call depended on the specific message it conveyed, the Court found that the 2015 government-debt exception violated the First Amendment.

---

[6] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).
[7] *Id.* at 164.
[8] *American Assn. of Political Consultants*, 140 S.Ct. at 2346-47.
[9] *Id.* at 2357 (Breyer, J., dissenting).

II. RELIEF: COMPETING VIEWS ON SEVERABILITY

While six of the Justices agreed that the 2015 amendment to the Act violated the First Amendment, Justice Thomas and Justice Gorsuch dissented as to what remedy should be provided. Significantly, these fractured opinions reflect a major split in support for the severability doctrine and the Court's future rulings in this area.

A. Justice Kavanaugh on Relief and Severability

Justice Kavanaugh provided a brief overview of how the severability doctrine developed over the last thirty years.[10] He noted that Supreme Court precedent establishes a simple analysis when express severability or non-severability clauses are present. Even when no clause is present, a strong presumption of severability exists from as far back as *Marbury v. Madison*. This presumption recognizes judicial minimalism and instills deference to Congress.

Here, six other Justices agreed with Justice Kavanaugh's severability determination. His opinion held that the amendment should be severed because the Act contained an express severability clause covering the unconstitutional government-debt exception.[11] Even if there were no express severability clause, Justice Kavanaugh reasoned that severance would be proper due to the Court's strong presumption of severability. The combination of the law's constitutionality before the amendment was the enacted and the Court's presumption of severability guided the Court's decision. The law functioned properly for twenty-four years before the amendment; it was safe to assume it would function properly after the severance. This additional analysis suggests that Justice Kavanaugh went out of his way to strengthen the presumption of severability and avoid "wholesale destruction" of the Act.[12]

---

[10] *Id.* at 2349 (citing the *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)).
[11] *Id.* at 2352.
[12] *Id.* at 2351.

Next, Justice Kavanaugh noted that some of his fellow Justices would have liked to directly reconsider the severability doctrine. In the same term, both Justice Gorsuch and Justice Thomas raised grave doubts as to the appropriateness of this doctrine in *Seila Law v. Consumer Financial Protection Bureau*.[13] In *Seila Law*, Chief Justice John Roberts expressed his support for the severability doctrine, stating "unless there is strong evidence that Congress intended otherwise," the doctrine is intended as "a scalpel rather than a bulldozer."[14]

Further, Justice Kavanaugh seemed disappointed in Justice Gorsuch's unwillingness to collaborate in recent cases.[15] This frustration can be summed up by Justice Kavanaugh's statement with clever reference to famed former Boston Celtics coach Rick Pitino and the team's loss of Larry Bird. In the context of severability, Justice Kavanaugh noted that "John Marshall" like Larry Bird, "is not walking through that door" to support Justice Gorsuch's position.[16] The Court could not go back in time to decide the severability doctrine as a matter of first impression, but as things currently stand this doctrine has offered a reliable and workable approach since *Marbury v. Madison*.[17] Thus, the modern severability approach seems poised to survive for the foreseeable future, especially given that Justice Barrett appeared amenable to the severability doctrine in her 2020 confirmation hearing.[18]

---

[13] *See generally Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S.Ct. 2183 (2020) (Thomas, J., dissenting); Abbe Gluck*, "A scalpel rather than a bulldozer": Severability is in the spotlight as the newest ACA challenge looms*, SCOTUSBLOG (Jul 28, 2020, 10:33 AM), https://www.scotusblog.com/2020/07/a-scalpel-rather-than-a-bulldozer-severability-in-the-spotlight-as-the-newest-aca-challenge-looms/

[14] *Selia Law*, 140 S.Ct. at 2210.

[15] *American Assn. of Political Consultants*, 140 S.Ct. at 2356.

[16] *Id.*

[17] *Id.*

[18] Jordan Carney, Barrett signals ObamaCare could survive mandate being struck down, *The Hill*, (Oct. 24, 2020 10:55 AM) https://thehill.com/homenews/senate/520981-senators-press-barrett-on-if-obamacare-can-survive-mandate-being-struck-down

B. Justice Gorsuch on Relief and Severability

Justice Gorsuch, on the other hand, opposed severability and harped on the practical effect of the Court's decision: no one would receive the relief that they were hoping to obtain. As he moved through a content-based analysis in his dissenting opinion, Justice Gorsuch first concluded that there was a First Amendment violation. His next step was to determine the appropriate remedy, which was where Justice Gorsuch found himself at odds with the majority. In Justice Gorsuch's opinion, the majority's severability determination deprived both parties of the remedy they sought.[19] Plaintiffs did not ask to have the government-debt exception severed from the Act. In fact, they may not have even had the standing to demand such a result. Justice Gorsuch reasoned that the entire 1991 robocall restriction should have been voided.[20]

Should the Court provide a remedy that was not requested by either party and not even beneficial to either party? In light of this practical question, the Court found itself in a bit of a conundrum. Plaintiffs were not better off after the ruling because they still could not place robocalls regarding political candidates, polling, and any other political information. Defendants were also worse off since the government-debt exception they had been utilizing had now been revoked. As Justice Gorsuch suggested, the result of the decision begged some serious questions: what was the point of the litigation?[21] Were fees and time spent preparing for trial wasted? Perhaps even more perturbing is Justice Gorsuch's point about the decision's effects on speech. Justice Gorsuch highlighted the paradox in the remedy by stating, "in the name of vindicating the First Amendment, our remedial course today leads to the unlikely result that not a single person will be allowed to speak more freely, and, instead, more speech will be banned."[22] These

[19] *American Assn. of Political Consultants.* 140 S.Ct. at 2365.
[20] *Id.* at 2366.
[21] *Id.*
[22] *Id.*

thoughtful, provocative questions cannot be met with firm answers; however, the insidious effects of robocalls may provide some answers as to why the decision ultimately supported consumers and not the parties to the suit.

EFFECTS OF THE DECISION

A. Win for Consumers?

In the grand scheme, robocalls may seem like a minor nuisance. Nobody wants to be bothered by phone calls from unknown numbers, especially during times of leisure, family meals, or late into the evening. An unfamiliar number appearing on a cell phone screen is often met with a sigh or the exasperated rhetorical question: "why is this number calling me?" However, robocalls operate with an additional, more sinister purpose: to prey on unsuspecting consumers and fraudulently obtain money. One in ten Americans are scammed annually as a result of robocalls, accumulating a total loss of $9.5 billion.[23] This monumental loss demonstrates how the number of robocalls have sadly increased in volume year over year. As regulations have tightened, the methods of scammers, such as spoofing, have become more sophisticated and effective. The Act is therefore necessary to combat this sustained, costly problem for American consumers.

On a deeper level, consumers are united in their disdain for robocalls, as Justice Kavanaugh noted at the forefront of his opinion.[24] By maintaining a legislative ban on something that is so universally disliked, the Court actually could improve the everyday lives of Americans with a favorable decision. This valuable opportunity should not be downplayed. Robocalls are also unique in a psychological sense because they damage consumers' trust in using their cell

[23] N.F. Mendoza, *Robocalls annually scam one in 10 Americans, to a loss of $9.5 billion*, TECHREPUBLIC (Oct. 8, 2019), https://www.techrepublic.com/article/robocalls-annually-scam-one-in-10-americans-to-a-loss-of-9-5-billion/#:~:text=An%20astonishing%20one%20in%2010,)%2C%20an%20authorized%20AT%26T%20retailer.
[24] *American Assn. of Political Consultants*, 140 S.Ct. at 2343.

phones at all. Consumers are hesitant to answer their phones and view a call not in their contact list with serious skepticism. The distrust subsequently hurts businesses, who face difficulty with contacting customers. Subsequently, consumers often perceive legitimate business calls and follow-ups as spam. Business have had to adjust to consumer preferences by converting many interactions that would typically occur by phone to occur over the internet.[25] Given how frequently cell phones are now used, the Act is an exceptionally influential tool in directly shaping Americans' lives.

Through his practical, surgical application of Supreme Court precedent, Justice Kavanaugh severed the government-debt collection exception without eliminating the Act's overall protections for consumers.[26] Plaintiffs wanted to make robocalls to cell phones, and evidently, they did not receive that relief. However, the First Amendment complaint was at its core a suit based on unequal treatment. By invalidating and severing the government-debt exception, the Court eliminated that unequal treatment. Justice Kavanaugh, speaking for the majority, applied the severability doctrine to remedy that aspect of the constitutional violation. Though unequal treatment cases under the First Amendment may implicate strangers in the world who have no role in the litigation, the effect on people outside of litigation may have been inevitable. In the way Justice Gorsuch suggested, it would be impossible for the Court to account for every non-participant to a First Amendment suit.

More importantly, severability must be predictable. In this case, Congress specifically included a severability clause in the Act. There was no need for Justice Gorsuch to question whether to sever the exception; the answer was expressly written in the statutory text. Justice

[25] *Stop Unwanted Robocalls and Texts*, FCC (Oct. 13, 2020), https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts.
[26] This opinion is attributed to Sean Linehan.

Kavanaugh successfully furthered the doctrine's predictability with his deferential application of express statutory language and fundamental principles of severability in this case.

A strong Act will inevitably help unsuspecting consumers who may be likely to be deceived by a fraudulent automated phone call. If legislation can accomplish good for those with less of a voice to advocate for themselves, that outcome is desirable, and the Court should support Congress's efforts. Therefore, the ultimate winner in *American Association of Political Consultants* was neither the Plaintiff nor the Defendant. It was the consumer.

B. *A Loss for Separation of Powers?*

Justice Gorsuch, on the other hand, pointed out important separation-of-powers issues raised by Justice Kavanaugh's approach. According to Justice Gorsuch, Justice Kavanaugh's remedy exceeded the proper role of the Court and raised separation-of-powers concerns. Justice Gorsuch argued that the Court's severability determination improperly rewrote the statute for Congress. Also, the Court should not have presumed Congress's general intent to protect consumers, given that Congress signaled different feelings about protecting consumers when it passed a massive exception to the Act in 2015. Lastly, new technological developments rendered the 1991 Act obsolete and called out for an update from Congress.

Justice Gorsuch raised a serious concern regarding the separation of powers and the Court's constitutionally mandated role. The Court should not presume to know what type of statute Congress would want now, nor does the Court know better than Congress what type of robocall ban should be in place. Once the Court found the Act to be unconstitutional, it should have left the job of rewriting of the legislation to Congress. What the majority undertook was outside the scope of a traditional judicial role because the Supreme Court is not empowered to

amend legislation.[27] This is a legislative role assigned to Congress under Article I of the Constitution, and the Court should have deferred to Congress to decide how best to respond to the Court's ruling.

Further, the Court's ruling offered an opportunity for Congress to demonstrate how important robocall protections actually are. Maybe, Congress still cares about robocalls and finds them to be a salient issue. If they are pesky and annoying as claimed, Congress can demonstrate how the massive exception it passed in 2015 did not eliminate the previous concern for consumers. It can act quickly to draft a robust, content-neutral law to prevent robocalls of all sorts.

Additionally, the plaintiffs argued that congressional willingness to enact such a prominent exception undermined the Act's general purpose of protecting consumer privacy. Their argument accused Congress of being hypocritical in claiming to care about consumers yet authorizing a massive invasion of privacy through certain debt-related robocalls. In the plaintiff's view, this was evidence of a lack of credibility for the consumer protection rationale of the Act, and it showed that the whole 1991 law was unconstitutional.[28] Justice Gorsuch endorsed this view by emphasizing the size and diversity of robocalls authorized by the 2015 exception. As he pointed out, the exception included robocalls related to business loans, home mortgages, and student loans, which involved $150 billion and seven million Americans.[29] If consumer privacy was such an important goal, Congress inconsistently protected it by creating this significant exception.[30] Instead, Justice Kavanaugh's opinion ignored this concern and adopted a broad pro-

[27] Josh Blackman, *Part IV: Barr v. AAPC and Modern Severability Doctrine*, REASON (Jul. 8, 2020, 7:15 AM) https://reason.com/volokh/2020/07/08/part-iv-barr-v-aapc-and-modern-severability-doctrine/.
[28] *American Assn. of Political Consultants*, 140 S.Ct. at 2348.
[29] *Id.* at 2363 (Gorsuch, J., dissenting).
[30] *Id.* at 2364-2365 (Gorsuch, J., dissenting) (explaining the inconsistency in the amendment to the Act).

consumer remedy through severability when it is unclear how much Congress truly cared about consumers.

Furthermore, Justice Gorsuch highlighted the folly of Justice Kavanaugh's decision to revamp a technologically obsolete statute. Justice Gorsuch noted differences in cell phone charges between 1991 and now and that cell phone plans have drastically changed. Decades ago, Congress was concerned with the cost to consumers as they were charged per phone call. However, that concern is irrelevant now because most consumers pay a flat monthly fee for unlimited cell phone minutes. Not only has the pricing changed, but the way American citizens use cell phones has evolved. Technology has passed this law by. When Congress passed the Act in 1991, the first text message had not yet been sent.[31] The way we communicate is starkly different almost thirty years later, particularly the younger generation's growing aversion to phone calls. Technology allows consumers to block and screen calls easily. Nobody could have predicted the technological advancements we would make in 30 years. For example, the Act sought to prevent unsolicited faxes. Since the Act was passed, the internet exploded in popularity and the fax became less relevant as people began using different technology like emails to send documents. Further, even the fax industry has completely changed because of the cheaper, more reliable internet fax.[32]

The recent oral arguments in *Facebook v. Duguid* similarly highlighted how the Act lagged behind technology with its definition of an "automatic telephone dialing system."[33] The Justices seemed hesitant to make a decision that updated the outdated Act with current

[31] 25 years since the world's first text message, *Vodafone*, (Dec. 4, 2017) https://www.vodafone.com/news/technology/25-anniversary-text-message.
[32] Dave Ross, *How Internet Faxing Works*, HOWSTUFFWORKS, https://home.howstuffworks.com/how-internet-faxing-works.htm.
[33] Amanda Shanor, Argument analysis: Justices at odds over federal robocall ban in the face of technological change, SCOTUSBLOG (Dec. 10, 2020, 6:26 PM), https://www.scotusblog.com/2020/12/argument-analysis-justices-at-odds-over-federal-robocall-ban-in-the-face-of-technological-change/.

technology, when that decision should be handled by Congress.[34] Justice Sotomayor recognized the archaic nature of the law and asked the petitioner Facebook, "If what Congress wanted to do was stop a call that was automatic and that's what it accomplished, wouldn't it be its job, not ours, to update the Act to bring it in line with the times?"[35]

Therefore, despite efforts to keep the Act current, the changes in telecommunications have been so quick and revolutionary that what made sense in 1991 does not make sense today. It is time for Congress, and not the Supreme Court, to reevaluate how to protect consumer privacy in a different technological age. Thus, Justice Gorsuch argued that the Supreme Court should have sent the Act back to Congress and forced it to develop a more current and effective way to protect consumers.

CONCLUSION

American Association of Political Consultants is a seminal case in demonstrating how the Court remains fractured on the doctrine of severability. Justice Kavanaugh and Justice Gorsuch posed two competing, persuasive arguments on the proper remedy for this First Amendment case. A common thread in both positions was the idea that the Court should abide by a proper judicial role. However, the application of this idea varied widely. Should the Court defer to Congress by allowing most of the Act to survive and simply subtract – using severability as a scalpel – the portion found unconstitutional? Or, should the Court respect the separation of powers and therefore pass the responsibility of rewriting the Act to Congress? Both positions have merit, and ultimately both approaches leave room for legislation to adopt an approach that will better serve American consumers.

---

[34] *Id.*
[35] Transcript of Oral Argument at 14, Facebook v. Duguid, (2020) (No. 19-511).