THE CORPORATIST FREE SPEECH SUPERIORITY OF THE ROBERTS COURT

Adam Liptak has a pretty interesting article up in today's New York Times on the relative free speech strength of the Supreme Court under the leadership of John Roberts.

> The Supreme Court led by Chief Justice John G. Roberts Jr., the conventional wisdom goes, is exceptionally supportive of free speech. Leading scholars and practitioners have called the Roberts court the most pro-First Amendment court in American history.
>
> A recent study challenges that conclusion. It says that a comprehensive look at data from 1953 to 2011 tells a different story, one showing that the court is hearing fewer First Amendment cases and is ruling in favor of free speech at a lower rate than any of the courts led by the three previous chief justices.

It is no joke that such has been the "conventional wisdom" about free speech in the Roberts era. The validity and veracity of that claim have always mostly escaped me though, and not solely, nor even predominantly because (as the eminent Floyd Abrams argues in Adam's piece) because of the dreaded progressive evil hobby horse, *Citizen's United*.

The root numbers derive from an article by Monica Youn at the American Constitution society's ACSBlog, which in turn were reviewed for NYT by Lee Epstein and Jeffrey Siegal, who previously wrote a comprehensive law review article (excellent I might add) on the topic in the Journal of Law & Policy. While the root numbers and percentages are interesting, and certainly support the proposition that the

Roberts Court is really not all that on the First Amendment free speech protection; they really do not tell the full story of how much, and why, this is really the case.

While both Liptak and Youn discuss some of this depth, I want to emphasize the real nature of the intellectual, and ideological, dichotomy of Roberts court jurisprudence. The Roberts Court has indeed engaged in some notable free speech engagement, but it has been almost entirely in the service of what I would call the "corporatist ideology". The corporatist ideology is not limited to just corporations and their investors that underpin them, but also to the governmental and military/industrial complex that is now one with business power.

I do not know that I have ever seen a better description of the corporate/government linkage than that offered by Montana Supreme Court Judge Nelson in his dissent in the recent *Western Traditions* case:

> The truth is that corporations wield inordinate power in Congress and in state legislatures. It is hard to tell where government ends and corporate America begins; the transition is seamless and overlapping.

Oh so true, and the same increasingly applies to the courts as well, especially via the Federalist Society mindset that courses rampant in federal courts, including at SCOTUS in the Roberts conservative bloc.

This manifests itself in the legal and factual nature of the Roberts Court's free speech jurisprudence. As Liptak points out, a "majority of the Roberts court's pro-free-speech decisions – 6 of 10 – involved campaign finance laws", of which *Citizens United* obviously tops the list. And as Erwin Chemerinsky points out, that is likely not so much a preference for free speech as a conservative antagonism toward campaign finance restriction laws, and that is not really

a calling card of free speech at all. It is, instead, the hallmark of a corporatist ideology.

But the real proof of this pudding comes from an analysis of the four significant decisions *not* involving campaign finance. Youn described them this way:

> Out of the four non-campaign finance cases in which the Roberts Court has supported a free speech claim, three – the animal cruelty videos case, the funeral picketing case, and the violent video games case – were what I will call free speech "slam-dunks" – that is, cases that were decided by an 8-1 or 7-2 majority, and in which (contrary to the usual Supreme Court's certiorari practices) there was no split among circuit courts, and the Court affirmed the lower court decision. These free speech slam-dunks, with their colorful facts, were among the Roberts Court's cases that have attracted the most press attention, but they are hardly indicative of a conservative majority with an expansive view of First Amendment freedoms. The remaining case in which the Roberts Court was willing to uphold a non-campaign finance related free speech claim was Sorrell v. IMS Health Inc., a relatively low-profile commercial speech case in which a 6-3 majority of the Court struck down a state "prescription confidentiality" law, which barred sale or disclosure of doctors' prescription practices to pharmaceutical marketers.

That is all true, as far as it goes. But take a deeper look. The "violent video games" case, *Brown v. Entertainment Merchants*, involved free speech, but also very much centered on regulations on content regulations on an extremely large and powerful entertainment industry, so the resulting decision was indeed supportive of free speech, but not so much

regulative authority and conduct. The same generally holds true for the "animal cruelty videos" case, *Brown v. Entertainment Merchants Assoc*. As Youn explained, *Sorrell v. IMS Health, Inc.* involved enhancement of commercial business speech, but it was at the direct detriment to personal privacy. And, lastly, "funeral protest" decision, *Snyder v. Phelps*, which rightly blasted tort liability on protected free speech, also very much reaffirmed time, place and manner restrictions on protected speech, on which corporations and governments rely on substantially to both blunt and restrict free speech (a reaffirmation, by the way, that is one of the reasons I consistently say the OWS protesters will never get any First amendment relief from *Clark v. CCNV* from the Roberts Court).

The net result is that, whether in the six campaign finance cases, or the other four cases, even where the Roberts Court has found in *favor* of free speech, there is always a pro-corporatist foundation beneath the surface.

But the "corporatist" tendencies on free speech issues with the Roberts Court do not end with the above, there is the governmental component of the corporatist ideology. As Chemerinsky describes in the Arizona Law Review piece linked above, this may be even more disturbing:

> The Roberts Court has consistently ruled against free speech claims when brought by government employees, by students, by prisoners, and by those who challenge the government's national security and military policies. The pattern is uniform and troubling: when the government is functioning as an authoritarian institution, freedom of speech always loses.

This fact really cannot be emphasized enough, it is of critical importance and lies behind much of what we do here at Emptywheel. Chemerinsky takes the reader though the gauntlet of blows to

free speech in this arena. *Garcetti v. Ceballos*, which involved retaliation for ethical disclosure speech and results effectively in whistleblowers who expose wrongdoing by others within their workplaces having little to no First Amendment protection. *Borough of Duryea v. Guarnieri*, where the Court held government employees may utilize the First Amendment protection of a right to petition the government for redress of grievances only if such speech involves a matter of public concern. And *Beard v. Banks*, where the Court gave effectively total deference to the government in regulating prisoner access to newspapers, magazines, or photographs.

But Chemerinsky saves, perhaps, his strongest words — and rightfully so — for our old favorite *Holder v. Humanitarian Law Project*.

> Perhaps the most troubling First Amendment decision by the Roberts Court was in 2010 in Holder v. Humanitarian Law Project. Federal law prohibits providing "material support" to a "foreign terrorist organization." Material support is defined to include such activities as "training," providing "personnel," and giving "expert advice or assistance." Two groups of Americans brought a lawsuit seeking to establish First Amendment protection for their assistance to groups that had been designated by the Department of State as foreign terrorist organizations. One group of Americans sought to help a Kurdish group, which sought to form an independent state, use international law and the United Nations to peacefully resolve disputes. The other group of Americans sought to help a group in Sri Lanka, which similarly aimed to form a separate nation, apply for humanitarian assistance.
>
> The Court, in a 6–3 decision, ruled that this speech could constitutionally be

> punished.
>
> ….
>
> **In other words, the Court allowed the government to prohibit speech that in no way advocated terrorism or taught how to engage in terrorism solely because the government felt that the speech assisted terrorist organizations. The restriction on speech was allowed even without any evidence that the speech would have the slightest effect on increasing the likelihood of terrorist activity. The deference that the Court gave to the government was tremendous and the restrictions it placed on speech were great.** (citations omitted; emphasis added)

Erwins entire law review article, which was also a keynote speech, is a great read if you want more depth on the different ways the Roberts Court has acted contrary to the founding ideals of free speech.

But, when you add up the blows to individual expression and blatant support for corporate and governmental interests in the Roberts Court Free Speech decisions, it is hard to conclude they are a free speech court at all, much less an admirably expansive one as is so often claimed in the media. No, rather, the Roberts Court is merely an expansive corporatist court.