The Roberts Court v. the First Amendment

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Our present Supreme Court has developed an unfortunate and disturbing interpretation of the First Amendment, transforming the amendment into a weapon of the rich and powerful. The new interpretation has thwarted legislative efforts to address the increasing political and economic inequality that afflicts our society. The long-term consequence is a weakening of American democracy.

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Free speech is a cause traditionally advanced by outsiders, people espousing dissident ideas or supporting social or economic changes. In the seventeenth century, writers like John Milton led the battle against the suppression of religious dissent. And in the eighteenth century, printers like John Peter Zenger, who opposed efforts to suppress criticism of the government, were in the forefront of the struggle for freedom of the press. Similarly, in the nineteenth century, when southern slaveholders attempted to prohibit any debate regarding the subject of slavery, the principal proponents of free speech were abolitionists who sought to criticize the slaveholders' attempt to build a proslavery antidemocratic state. In his "Plea for Free Speech," Frederick Douglass proclaimed that "slavery cannot tolerate free speech," and when the antilynching advocate Ida Wells founded a newspaper in Memphis, she named it *Free Speech*, thus maintaining the tradition of making free speech a central part of the struggle for racial justice.

This pattern continued in the early and middle years of the twentieth century. During those years, the principal litigants in First Amendment cases in the Supreme Court were outsiders such as civil-rights organizations representing minority groups. The NAACP, for example, prevailed in a number of important cases, including a

case holding that disclosure of the names of its members to the state of Alabama would violate the organization's "freedom to engage in association for the advancement of beliefs and ideas." Similarly, a Communist Party member convicted of conducting a peaceful party meeting successfully challenged Oregon's Criminal Syndicalism Act. And Jehovah's Witnesses who, as the result of their religious beliefs, refused to recite the Pledge of Allegiance secured a ruling that they could not be compelled to do so. Thus, people and organizations who had very little economic, political, or social power typified free-speech litigants, and their challenges sought to alter the status quo.

Most less-heralded First Amendment cases also involved similar claimants. As a lawyer, I handled several free-speech cases, and all of them fell into this category. One involved a somewhat unstable young man, David, who was deeply upset because his father had died during the course of an operation and believed that the surgeon was responsible. He made several phone calls to the surgeon's office accusing him of wrongdoing. As a result, the district attorney charged him with making harassing phone calls. The statute defining telephone harassment, however, was poorly drafted and criminalized some legitimate speech, and the court determined that it was overbroad in violation of the First Amendment. Thus, a troubled but harmless young man was spared a criminal record.

Another case involved a Wisconsin statute prohibiting state employees from seeking appropriations exceeding the amount of their agencies' official budget requests. The statute, known as the gag law, was designed to insulate legislators from requests for appropriations. Lawrence Barnett, an associate professor at the University of Wisconsin and the president of his union, challenged the law. Like David, Barnett was an outsider, a union activist whose objections leaders in state government had little interest in hearing. Also, like David, Barnett prevailed in court; a federal judge struck the law down, stating that it prohibited protected speech without an adequate justification.

A third instance involved a young African American named Todd Mitchell, whose case wound up in the Supreme Court of the United States. Mitchell argued that the two-year penalty enhancer that he

received under the Wisconsin hate-crimes law for participating in an assault because of antiwhite bias punished his thought in violation of the First Amendment. The enhancer was on top of the two-year sentence Mitchell received for the assault. The Wisconsin Supreme Court struck down the enhancer, but the US Supreme Court rejected Mitchell's First Amendment argument and reinstated it. Mitchell, a black male challenging a criminal statute that was strongly supported by the civil-rights establishment as well as by law enforcement, was even more of an outsider than David or Lawrence Barnett.

The outsider status of these free-speech litigants is important because it tells us something about the development of the First Amendment. Many claimants not only sought vindication of their right to free speech but also a form of equality, the right to speak on equal terms as other speakers—speakers who had greater power and status than they did. They sought what might be called the right to expressive equality, urging courts interpreting the First Amendment to pay attention not only to the content of their utterances but also to the economic, political, and social factors that affected their capacity and that of others to engage in expressive activity.

And to some extent they succeeded. As the University of Chicago law professor Genevieve Lakier explains, in the middle years of the twentieth century, in some cases, the Supreme Court recognized that an equality guarantee was implicit in the First Amendment. The court understood that too much expressive inequality would threaten one of the central purposes of the First Amendment, ensuring wide-open public debate. As Justice Thurgood Marshall put it, the First Amendment guarantees not just freedom of speech but "equality of status in the field of ideas." In 1943, for example, the court struck down an ordinance prohibiting distributors of handbills from knocking on doors to distribute them. The rationale for the decision was that the ordinance prohibited a channel of communication essential to people with limited resources.

The court also granted people seeking to express themselves access to public spaces, even if privately owned. In 1946, for instance, the court determined that a state antitrespass law could not be used

to prevent a Jehovah's Witness from distributing literature on the sidewalks of a company-owned town. And in 1968, the Warren Court held that a prohibition on the right to picket in a privately owned mall violated the First Amendment. These decisions reflected the court's view that the prohibitions at issue diminished the communicative power of people who already had very little such power and thus interfered with the creation of a robust public sphere in which the viewpoints of different classes of people could be presented. Cases like these represented modest steps in the direction of what Lakier calls an antisubordinating First Amendment.

The court also employed the equality dimension of the First Amendment in several cases involving the media. In 1969, for example, the court rejected a First Amendment challenge to a regulation requiring broadcasters to give a right of reply to those whom they criticized or to the opponents of candidates they endorsed. Crucial to the decision was the fact that the broadcasters had significant power to decide what was heard on the radio, and market competition was not adequate to redress this disparity in power. Also, through its licensing power the government had substantially contributed to creating the broadcasters' power. Under these circumstances, the court determined that the First Amendment not only allowed the FCC to mandate a right of reply but might even require it.

The most forceful spokesperson for construing the First Amendment to include a right to speak on equal terms was Thurgood Marshall. Marshall, a champion of free speech, has received insufficient recognition for his contributions to First Amendment jurisprudence. He consistently emphasized that the principal purpose of the First Amendment was to ensure that all speakers have roughly equal opportunity to participate in the public sphere. For Marshall, the key to the First Amendment was not formal equality but expressive equality. Thus, in the area of campaign finance, for example, Marshall supported limitations on the political spending of the wealthy, both because of the public interest in protecting democracy against the corrupting effect of big money and because allowing unrestricted freedom to the wealthy would drown out other voices and result in a

less diverse public debate. Marshall came from a less-privileged background than most Supreme Court justices and was personally familiar with the economic disparities in American life. He understood that, in the First Amendment context as well as others, formal guarantees of liberty and equality in conditions of substantive economic inequality do not produce anything approaching actual liberty and equality.

Unfortunately, Marshall's influence on the court was never great, and, beginning in the 1970s, the court began to move further and further away from the concept of expressive equality. The court became increasingly conservative and less interested in promoting open public debate that included the voices of outsiders. To some extent, the problem began in 1976, when the court (then led by Warren Burger) decided *Buckley v. Valeo*, the seminal campaign-finance case. *Buckley* recognized only one government interest important enough to justify imposing limits on the First Amendment right to spend money on elections: the interest in preventing corruption or the appearance of corruption. It stated expressly that the government lacked authority to equalize the relative ability of individuals and groups to influence elections. Decades later, the Roberts Court built on *Buckley* to interpret the First Amendment so as to make it extremely difficult to prevent the rich and powerful from entirely dominating the public sphere.

In the 1970s and 1980s, the Burger Court and its successor led by William Rehnquist made several other decisions that the Roberts Court relied on to redefine the First Amendment. These included decisions extending First Amendment protection to corporate expenditures on state referenda and to commercial speech such as advertising. Decisions like these laid the groundwork for a new approach to interpreting the First Amendment, an approach that did little for the marginalized and disenfranchised, but provided enormous benefits to corporations and other powerful actors. All that was necessary were Supreme Court justices who wanted to make such a change. And it wasn't very long before such justices came along. George W. Bush, whose election as president in 2000 was itself brought about by the court in the infamous *Bush v. Gore* case, was able to nominate both John Roberts, who replaced Rehnquist, and Samuel Alito,

who replaced Justice O'Connor. Although Rehnquist and O'Connor were very conservative, Roberts and Alito are even more so. Both are products of the conservative legal movement which commenced in the early 1980s with the formation of the Federalist Society, and both are intent on dramatically redirecting the path of the Constitution.

This brings us to the disturbing story of what the Roberts Court is actually doing to the First Amendment. Probably the best thumbnail description of the court's jurisprudence is Justice Kagan's statement that the conservative majority on the court is weaponizing the First Amendment. Kagan is unquestionably correct. The court has turned the First Amendment into a battering ram against governmental efforts aimed at establishing a less hierarchical and more equal society. Not only has the court totally repudiated Thurgood Marshall's ideal of expressive equality in favor of a highly formal and abstract conception of the First Amendment, but it has used the amendment to strike down virtually any governmental initiative aimed at assisting people other than the rich and powerful.

The Roberts Court's use of the First Amendment is comparable to the way the court interpreted liberty under the Fifth and Fourteenth Amendments a century ago. As legislators in the Progressive Era moved to curb the excesses of industry, the court blocked reform, holding that liberty included a virtually absolute right to contract and pursue one's livelihood. In *Lochner v. New York*, a case that has come to stand for judicial resistance to laws protecting employees and consumers, the court held that a statute imposing a minimum number of work hours violated the constitutional freedom of contract. The Roberts Court's decisions invoking the First Amendment to strike down campaign finance reform, pharmaceutical regulation, union financing, and other progressive legislation and to promote conservative speech have led critics to characterize its approach as the new Lochnerism or First Amendment Lochnerism.

Let me provide a few examples. A good place to start is the Court's 5–4 decision in *Janus v. American Federation of State, County and Municipal Employees*. In *Janus*, the conservative majority reversed a forty-year-old decision that public-sector unions could

collect "fair-share" or agency fees from nonmembers to fund collective bargaining. After all, nonmembers benefited as much as members from the contracts that the unions negotiated. To justify the reversal of course, Justice Alito declared that fair-share fees imposed an excessive burden on nonmembers' First Amendment rights. This was so, according to Alito, because all union speech, even collectively bargaining with employers, is fundamentally political. The court's analysis flouted precedent, providing government with considerable power over public-employee speech, and indicated a strong hostility to unions. In a powerful dissent, Justice Kagan wrote that the court had unleashed "judges, now and in the future, to intervene in economic and regulatory policy."

Janus also reflects the court's powerful animus toward governmental assistance to entities that could challenge the authority of those who, by virtue of existing economic arrangements, are in charge, whether in the public or private sector. For example, when legislatures enact campaign-finance regulations or authorize labor unions to collect a fee from nonmembers for whom they bargain, they engage in the allocation of political power, and they provide more power to those who, as the result of existing economic arrangements, have little. As the legal scholar Jedediah Purdy sees it, the Roberts Court has enlisted the First Amendment in a crusade to prevent government from making these kinds of decisions. Of course, as Purdy explains, the court's hostility to allowing government to do anything that could be construed as allocating power to any constituency does not mean that power is not allocated. It means only that power is not allocated by democratic institutions. Instead, it is allocated by markets. And while rules made by a democratically elected government are likely to seek to achieve some sort of rough equality, markets have no interest in equality, and market distributions are, in fact, highly unequal.

Further, by using the First Amendment to prohibit the exercise of power by democratic institutions and leaving the matter to the private sector, the court enhances the already-formidable power of a class consisting of the wealthy. The court tries to convey the impression that its approach is neutral and seeks only to prohibit government

from favoring or disfavoring a person or group. Its opinions striking down campaign-finance regulations, for example, liberally use the language of nondiscrimination, as if by treating corporations and the poor the same, it is striking a blow for equality. But a jurisprudence that totally ties the hands of government does no more than assure the persistence of the inequality produced by the market.

A segment of the oral argument in *Janus* illustrates starkly how the Roberts Court has enlisted the First Amendment as a weapon against governmental distribution of political power. Justice Kennedy pressed the union's lawyer to acknowledge that the law requiring payment of fair-share fees increased the ability of the union to engage in expressive activity. When the lawyer conceded the obvious, that the fees increased the union's assets, Kennedy replied, "Isn't that the end of the case?" making clear that, as he saw it, a law that provided resources that the union could use for advocacy constituted an automatic violation of the First Amendment.

The court's weaponization of the First Amendment has been particularly intense in the area of campaign finance. In 2015 in *McCutcheon v. FEC*, the Court rejected, for the seventh consecutive time, a limit on electoral spending on the grounds that it violated the First Amendment. The six cases preceding *McCutcheon* included the notorious *Citizens United* decision, which authorized corporations to make unlimited independent election expenditures. In *McCutcheon*, the court struck down the aggregate contribution limit, which capped the amount that a single donor could give to federal candidates and parties at $123,200 in a single election cycle. In doing so, the court reinforced its view that the First Amendment is an insurmountable constraint on the power of government to limit the campaign spending of the wealthy. As the court sees it, the government's interest in safeguarding elections from the corrupting effects of corporate wealth is not only not compelling, it is not even legitimate. Further, contribution and expenditure limits are not reasonable efforts to equalize the political influence of different classes of people, but illegitimate attempts to suppress the voices of the affluent.

The court's campaign-finance jurisprudence has led to an enormous increase in spending on elections, most of it coming from the extremely wealthy. The court's judgments have also made American citizens far less equal in terms of their ability to influence the decisions of elected officials. And unlike the traditional beneficiaries of the First Amendment, the beneficiaries of the court's judgments are the wealthiest people in the country.

As Justice Breyer pointed out in a thoughtful dissent in *McCutcheon*, the First Amendment does not have to be construed in the extraordinarily individualistic way that the Roberts Court does, protecting the right of every person, natural or corporate, to speak and spend as much as they wish without regard to its effect on American democracy. Another approach would be to pay attention to the effect of a regulation on the body politic. For example, the reason that we are concerned about corruption, Breyer explains, is not because it is a terrible crime per se but because it undermines our belief in representative government. And when elected officials are selected by and dependent on a small number of affluent people, the same loss of faith occurs. Statutes that impose reasonable limitations on the influence of wealthy people, therefore, build confidence in the integrity of our electoral institutions. Such statutes do not violate the First Amendment; on the contrary, they ensure that citizens are an active and important part of the self-governance project that American democracy represents.

The court has not only weaponized the First Amendment against the power of government to attempt to equalize political influence but also against its power to regulate the conduct of private-sector actors. This is particularly true when the court sees the regulation as conflicting with an important conservative value, such as corporate power or Christian belief. Consider *Sorrell v. IMS Health, Inc.*, which involved a Vermont statute prohibiting pharmacies from selling data regarding prescriptions without the consent of the prescribing physicians. The purposes of the legislation were to protect the privacy of physicians and patients, to protect doctors from being harassed

by pharmaceutical company salespersons urging them to make purchases, and to reduce the cost of health care by curbing the disproportionate sale of expensive drugs. The law exempted academic researchers and nonprofits because they did not pose the same problems as pharmaceutical-industry representatives.

As the legal scholar Amy Kapczynski explains, the court's conservative majority saw this different treatment not as a rational response to a marketplace structured by forces that give profit-seeking actors particular incentives but as legislative interference with the marketplace. In the Roberts Court's view, the marketplace by definition is a neutral, even benign, space that Vermont was essentially contaminating by discriminating against pharmaceutical marketers. Once again, the court treated government not as an embodiment of the public will but as a coercive force interfering with corporate rights. Put simply, the court once again chose markets over majorities. Further, the "speech" that the court presumably protected was not actually speech but the sale of data. In the commercial-speech cases of several decades earlier, the court connected its protection of commercial speech to the formation of intelligent opinion by the public and the value of democracy. The Roberts Court sees no need to insist on such a connection. To the Roberts Court, the First Amendment provides a means of preventing the public from interfering with economic markets. *Sorrell*, then, is a triumph for the position that the marketplace should be shielded from democratic power.

In *Burwell v. Hobby Lobby*, the Roberts Court provided corporations with yet another gift, this one involving their right to be free from a regulation that the corporation's owners regard as interfering with their Christian beliefs. While in the hate-crime case, Todd Mitchell's objectionable beliefs about Caucasians subjected him to a two-year prison sentence, in *Hobby Lobby* the company's owners' beliefs were held to outweigh the requirement in the Affordable Care Act that health-insurance plans offer their female employees insurance coverage of contraceptives. The court's conservative majority held that a large secular corporation with over five hundred stores and thirteen thousand employees was a "person" engaged in the "exercise of religion" within the meaning of the Religious Freedom Restoration

Act, a law designed to protect religious liberty and therefore closely related to the First Amendment. The court then went on to say that providing coverage for health benefits to which Hobby Lobby's owners objected constituted an excessive burden on the corporation's religious freedom.

Thus, Hobby Lobby received a virtually unprecedented religious exemption from a duly enacted statute, an exemption that resulted in significant harm to third parties, the company's female employees, who lost an important benefit. Further, although the *Hobby Lobby* case involved contraception, the religious rights that the decision protects are arguably much broader. Under the reasoning of *Hobby Lobby*, corporations could bring religious free-exercise challenges to numerous laws protecting workers. Forces on the political and religious right, for example, could argue that minimum-wage laws and collective bargaining violate the teachings of Jesus and the Bible. As Justice Ginsburg put it in her dissent, the decision is one "of startling breadth" with the majority holding that "commercial enterprises, including corporations, along with partnerships and sole proprietorships can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs."

Thus, the Roberts Court has weaponized the First Amendment against a variety of types of laws that it dislikes: laws that attempt to equalize political influence, laws that interfere with the freedom of businesses to operate as they wish, and laws that arguably impinge on a corporation owners' Christian beliefs. In the latter connection, I should also mention *National Institute of Family and Life Advocates (NIFLA) v. Becerra,* in which the court's conservative majority in essence provided more free-speech rights to opponents of abortion than are available to abortion providers. *NIFLA* involved a California law targeting "crisis pregnancy centers," antiabortion entities that attempt to deceive pregnant women to prevent them from having an abortion. The law required licensed facilities to inform potential clients that California provided a range of prenatal services including abortion for eligible women. It also required unlicensed facilities to disclose that they were unlicensed. As the legal commentator Ian Millhiser points out, in many respects the law is a mirror image of

similar laws enacted by antiabortion legislatures, which require genuine abortion clinics to provide a state-sponsored message about the health risks of abortion.

The *NIFLA* decision, written by Justice Thomas, held that the California law was unconstitutional because it compelled antiabortion advocates "to speak a particular message," while at the same time the court permits the state to compel abortion providers to do much the same thing. The conservative majority bent over backward to use the First Amendment to strike down a straightforward law that helped provide important and accurate information to pregnant women and ensured that entities claiming to provide medical care are held to a high standard of honesty. Yet the same majority endorses fake women's-health centers that pose as impartial caregivers while their only goal is to stop abortions.

In a relatively short time, then, the Roberts Court has transformed the First Amendment. The landmark cases that made the First Amendment prominent involved outsiders such as civil-rights activists, public employees, students, and dissidents. Now things have changed dramatically: the Harvard law professor John C. Coates IV recently completed an empirical study demonstrating that First Amendment cases in which businesses are the primary beneficiary have increasingly displaced cases involving individuals, and that the Supreme Court's First Amendment docket is now roughly split between cases involving businesses and cases involving individuals. Coates also found that prior to the 1970s, only expressive businesses challenging laws that directly impeded their core business were able to convince the Court to strike down laws on their behalf, whereas other businesses seeking to achieve deregulatory goals generally were not successful.

Today, however, the cases in which businesses invoke the First Amendment generally involve plaintiffs who are primarily interested in influencing government or increasing their profits or both. In *Sorrell*, for example, the plaintiff was not interested in vindicating any expressive interest but simply in making it easier to make money. From an historical standpoint, as Coates makes clear, this is a very new phenomenon. Not until relatively recently has the court used the First Amendment to strike down a statute of any type, and not until

1965 did the court rely on the amendment to strike down a federal law. In addition, in cases like *Janus, Sorrel, Hobby Lobby, Becerra* and others, the Roberts Court has shown how the First Amendment can be used to impede legislation designed to advance social welfare. Freedom of speech, association, and religion were once regarded as effective nonviolent means by which the downtrodden could contest their subordination. But under the current court, First Amendment freedoms have become additional resources available to the wealthy to preserve their advantages.

So far, I have focused on the harm that the court has done by using the amendment in new ways, but the court has also done harm by reducing the scope of protections that the amendment provides. In fact, when a plaintiff comes along espousing a cause that the court dislikes, it retreats dramatically from long-established First Amendment principles. Probably the best example of this is the court's decision in *Holder v. Humanitarian Law Project*, which involved a challenge to a law enacted to protect national security after the terrorist attacks of 11 September 2001. The law punishes the provision of "material support" to organizations designated by the United States government as "foreign terrorist organizations." Material support includes, among other things, speech. The speech at issue in *Holder* was advocacy directed at a Kurdish organization in Turkey that had been designated as a foreign terrorist organization. The advocacy called on the organization to pursue only lawful goals and to engage only in nonviolent conduct. Nevertheless, by a 6–3 vote, the court held that the First Amendment permitted criminal prosecution of the defendant's advocacy. In order to reach this conclusion, the court had to disregard long-standing First Amendment precedent barring prosecution of the type of speech at issue unless its goal was to incite "imminent lawless action" and it was likely to achieve that goal.

Scholars and commentators criticized *Holder* on numerous grounds. The *New York Times* noted that "by preserving an extremely vague prohibition on aiding and associating with terrorist groups, the court reduced the First Amendment rights of American citizens." And the First Amendment scholar Aziz Huq contrasted the Roberts Court's loose First Amendment scrutiny in *Holder* with its much more

demanding analysis in *Citizens United*. Huq noted the "striking divergence between the court's magnanimous gestures of broad deference to elected actors in the national security domain and its beady-eyed skepticism in the campaign finance context." His analysis highlighted the Roberts Court's general tendency to approach First Amendment cases differently depending on the type of claim being brought. Claims brought by unions, government employees, humanitarian organizations, or whistleblowers are treated much less favorably than claims brought by businesses or Christian or prolife organizations. Thus, the court's political views determine the outcome of a case.

The court's habit of approaching First Amendment cases depending on the type of claim brought is also evident in the recent distressing case in which the court held that partisan gerrymandering was beyond the reach of the federal courts. Partisan gerrymandering poses a flagrant and immediate burden on the First Amendment rights of voters because it penalizes them for their political beliefs and associations. In Wisconsin, for example, in the 2010 redistricting, the Republican majority in the legislature intentionally diluted the value of Democratic votes. In virtually any context other than redistricting, such an action would constitute unconstitutional viewpoint discrimination, a clearly prohibited practice under the First Amendment. But the majority opinion, written by the Chief Justice and clearly impelled by the court's willingness to abandon the Constitution when its guarantees conflict with practices that entrench Republican political power, declined to take any action to remedy this blatant constitutional violation.

The unhappy performance of the Roberts Court in the First Amendment area is doubly sad because there is so little that can be done about it. Supreme Court justices have life tenure, and, although the justices now on the court have already done much harm, it is only a fraction of what they might do in the future.