Decisions on campaign finance, speech and religion

US Supreme Court rulings mark a swing to the right

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On June 25, the US Supreme Court issued decisions on three cases involving the First Amendment to the United States Constitution, which guarantees the right to free speech and forbids government promotion of religion. All three decisions were reactionary rulings promoting the interests of corporate America, weakening the constitutional separation of church and state, or attacking freedom of speech. All were approved by the same five justices: Chief Justice John Roberts and associate justices Antonin Scalia, Clarence Thomas, Samuel Alito and Anthony Kennedy.

The emergence of this five-member bloc has been the hallmark of the current term, the first in which all five served together for the entire year. The four most consistently reactionary—Kennedy occasionally wavers—function as advocates of a consistently right-wing political agenda.

The recent spate of decisions underscores the complicity of Senate Democrats, who refused to seriously challenge the nominations by President Bush of Roberts and Alito, whose records left no doubt as to their right-wing views.

Federal Election Commission v. Wisconsin Right to Life, Inc. involved the restriction in the 2003 McCain-Feingold campaign finance law on how organizations could fund radio or television advertisements that mentioned a federal election candidate in the jurisdiction where the candidate was running for office within 30 days of a federal primary election or 60 days of a federal general election.

Direct corporate expenditures to elect or defeat candidates have been banned for nearly a century, a prohibition upheld long ago by the Supreme Court, which cited the "corrosive and distorting effects of immense agglomerations of [corporate] wealth" on the election process. McCain-Feingold barred companies and unions from giving large amounts to party committees in the form of "soft money," and restricted such donations to organizations engaged in issue advocacy when that advocacy was simply a screen for backing a political candidate.

In 2003, the Supreme Court ruled in the case *McConnell v. Federal Election Commission* that McCain-Feingold on its face did not violate the First Amendment because many groups used "issue ads" as surrogates for actually targeting a candidate. But two years ago, the court shifted its position, allowing specific organizations to bring test cases to set a standard on what kinds of ads were permissible.

Wisconsin Right to Life, Inc., a non-profit anti-abortion advocacy group, sought to obtain permission to run advertisements at election time. The ads stated that a group of US senators were filibustering to delay and block Senate confirmation of right-wing judges nominated by President Bush. They told voters to contact Wisconsin senators Russell Feingold and Herbert Kohl, both Democrats, to oppose the filibuster. Feingold was running for the reelection at the time.

The group argued that the McCain-Feingold restriction was unconstitutional as applied to their ads.

Chief Justice John Roberts, writing for the majority, agreed. As he wrote in his decision, "A court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Translated into plain English, this means that virtually anything goes.

The next corporate-financed smear campaign will be legal. The Roberts' standard would permit, for example, an election eve attack ad like the "Swift boat" ad that was used to discredit John Kerry, the Democratic presidential candidate in 2004, as long as the conclusion was, "Write John Kerry and tell him to give back his medals," and avoided the words, "Vote for George Bush" or "Defeat John Kerry."

The dissenting opinion by Justice David Souter identified one the central myths of American politics, the equation of corporations and persons. "What is called a 'ban' on speech," he wrote, "is a limit on the financing of electioneering broadcasts by entities... that insist on acting as conduits from the campaign war chests of business corporations."

Right-wing justices Scalia, Thomas and Kennedy joined in the result, but pointed out that the attempt to distinguish the Wisconsin case from the previous decision in *McConnell* was disingenuous. They instead called for overturning the previous decision outright. (All three had voted against it at the time).

Roberts also wrote for the majority in *Morse v. Frederick*. The case involved the suspension of a Juneau, Alaska high school student for refusing to take down a banner that said "BONG HITS FOR JESUS." The youth raised the banner while students were watching the 2002 Winter Olympics torch parade as it passed by the school building. The school authorities had given the students permission to gather outside to watch the procession.

While the court voted by 6-3 against the student's suit, one of the six in the majority, Stephen Breyer, did not side with the argument of the other five on the substance of the case, claiming that as a matter of law the school principal could not be sued for her decision to impose a disciplinary suspension on the youth.

Since a 1969 decision involving antiwar protests in Des Moines, Iowa, the Supreme Court has held that high school students have constitutional rights to freedom of speech and expression even while in school, so long as they do not interfere substantially with the work of the school.

In 1986, the court carved out an exception for speech that was "offensively lewd and indecent." The new decision carves out a further exception, based on the claim by the principal that the student's sign, using a slang word ("bong") for drug paraphernalia, amounted to advocating drug use. The student denied this charge, saying he was simply trying to attract attention and get on local television.

In deciding the case, Chief Justice Roberts and the majority departed from court precedent, which called for giving deference to the protection of speech. The opinion conceded that the banner's message was subject to varying interpretations, that its message was "cryptic," and that the student's intention was to be noticed by television camera crews in the vicinity. But the court decided nonetheless to defer to the school administrator's interpretation and support her suppression of speech.

The third case, *Hein, Director, White House Office of Faith-Based and Community Initiatives v. Freedom From Religion Foundation, Inc*., dealt with the Bush administration's decision to organize conferences where White House aides explained to religious groups how they could compete for federal grants to provide various social services, as part of Bush's promotion of "faith-based" organizations.

An atheist group and three of its members sued under the First Amendment's Establishment Clause, which provides that "Congress shall make no law respecting an establishment of religion." The government was promoting religious over secular groups, they charged, and this was unconstitutional.

Normally, taxpayers have no standing to sue in court for government expenditure of funds with which they disagree. However, in a 1968 decision the Supreme Court ruled that federal taxpayers may file suit to block expenditures specifically prohibited by the Establishment Clause. That case involved the expenditure of federal funds for religious schools.

In *Hein*, the court's five-member right-wing majority ruled, in an opinion authored by Justice Alito, that the plaintiffs had no standing simply because Congress had not set up or authorized spending on the Bush program. This was said even though the program was funded by congressional appropriation of general administrative funds for the executive branch.

As the dissenting opinion written by Justice David Souter and joined by justices Stevens, Ginsburg and Breyer pointed out, no one has ever suggested that the Establishment Clause lacks applicability to executive uses of money. It would surely violate the Establishment Clause, they argued, for the Department of Health and Human Services, for example, to draw on a general appropriation to build a chapel for weekly church services. Forcing taxpayers to contribute to support any religion against their conscience was a violation of the separation of church and state embedded in the First Amendment, they insisted.

A separate concurring opinion by Justice Scalia, joined by Justice Thomas, went further in attacking the separation of church and state than that of Alito. It conceded that the majority's result led to absurd results and rested on artificial distinctions. For example, if Congress passed money to give to a church school it would be prohibited, but not if it appropriated money to the president knowing that he would spend it on such schools. Scalia concluded, however, that the prior case granting the right to sue to block expenditures of funds for religious purposes should be overturned.

What do these latest decisions show? Corporate power to influence elections is defended as free speech, while free speech rights of students are abridged in deference to the political views of school administrators and the interests of "order." Citizens who oppose state expenditure on religion cannot challenge right-wing attempts to promote religion through government.

In each case, the five-member majority was divided internally, although in different proportions each time, between a faction that wanted to go all the way, overturning previous decisions outright, and a faction that wanted to limit the decision to the particular case, without an open reversal of precedent.

In the Wisconsin case, three of the right-wing justices wanted to overturn McCain-Feingold, while Roberts declined to do so, with Alito's support. In the Alaska high school case, Clarence Thomas called for overturning the 1969 Des Moines decision, declaring that high school students are children under adult supervision with no free speech rights, and upholding "the traditional authority of teachers to maintain order in schools." The other four held back. In the *Hein* decision, Scalia and Thomas called for striking any right to challenge any government spending for religious purposes, while Roberts, Alito and Kennedy made an absurd distinction between congressional and executive spending, as though the First Amendment applies only to the legislature, not the president.

These divisions illustrate a basic feature of the new majority on the court: their determination to pursue a political agenda, working backwards from the desired result and choosing eclectically and inconsistently whatever legal or constitutional arguments can be made to "fit."

There is one other aspect worth noting. All three cases touch on the intersection of religion and politics, and in each decision, the five-member majority (all, incidentally, conservative adherents of the Roman Catholic Church) came down on the side of religion: for the free speech rights of Wisconsin Right-to-Life; against the free speech rights of a student whose sign seemed to mock religion; against the right of atheists to challenge the pro-religion campaign launched by the White House.