Tulsa Law Review

Volume 46
Issue 3 *Supreme Court Review*

Spring 2011

Trumping Politics: The Roberts Court and Judicial Review

Gene Nichol

TRUMPING POLITICS: THE ROBERTS COURT AND "JUDICIAL" REVIEW

Gene Nichol*

I am delighted, I think, to write about the Roberts Court and its theories of judicial review. God knows any treatment could be pithy, and brief. I'm not sure the Roberts Court could easily be accused of theorizing. It seems now, more accurately, merely to sign up, to choose sides. The justices wield power, like other brokers — just to greater consequence, and duration. It is lovely, and, I'd guess hugely fulfilling, to discover that the U.S. Constitution codifies, permanently, one's most deeply felt political predilections. And how delightful it must be to learn that the outcomes one's ideological companions have urged since you met them in law school are, in fact, after all, compelled by foundational constitutional commitment — enforceable in every American venue, high and low, schooled and un-schooled, bumbling and urbane. Heady validation that. No wonder Sam Alito takes such umbrage at criticism from the likes of an unperfected Barack Obama. Didn't he notice the robe? And does he not know that these aggressive Justices will be there, working their now-vaunted will, long, long after he's gone?

But, perhaps, I get ahead of myself.

I will explore the Roberts Court through the lens of its two most famous cases, *Citizens United v. Federal Election Commission*[1] and *District of Columbia v. Heller*.[2] Unfair? Perhaps. Certainly these rulings are not broadly representative. No court re-casts the legal landscape every day. None would have the energy, or the stomach, for that. Even God rested after six days. And surely, if only to re-charge partisan batteries, the most thoroughly lathered ideologues must, on occasion, turn their attentions to the dusty and the mundane. So, I would concede, much of the Roberts Court's work product is less stunning and less, how to put it, vile, than these paired landmarks.

But whether what we refer to as "The Roberts Court" lasts another fortnight, or another decade, or two, or more, *Citizens United* and *Heller* will punctuate and define its challenging legacy. And that legacy will again mark the U.S. Supreme Court as an institution deployed to trump the democratic operation of the American political process. That has, no doubt, happened before.[3] It is more unseemly, of course, when majoritarian

* Professor of Law and Director, Center on Poverty, Work & Opportunity, University of North Carolina, President Emeritus, College of William & Mary.

1. 130 S. Ct. 876 (2010).
2. 544 U.S. 570 (2008).
3. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating child labor laws).

frameworks are cast aside in favor of the dissenting claims of the privileged and the powerful. But that, too, has before marked our history.[4] This time, though, the justices' eyes seem to be opened wide. They have decided, unreservedly, to dance with those who "brung 'em." In opting for political, and even partisan power — in coming so visibly out of the closet — the slim Roberts Court majority has permanently tainted whatever is the remainder of its work. So perhaps a tight compass around these two unfortunate products is justified, or, at least excusable.

I. DECIDING *CITIZENS UNITED*

Citizens United, as it is now very widely known, began as a challenge to the application of federal laws prohibiting corporations from using their treasury general funds to engage in "electioneering communications."[5] The non-profit corporation plaintiff sought constitutional protection for advertisements purportedly hawking a disparaging "documentary" about Hillary Clinton.[6] Though Citizens United had dropped its broad-ranging facial challenge to the statutes, the Supreme Court launched one of its own — ordering re-argument, reaching well beyond the litigants' claims, and asking, ominously, whether an array of its central campaign finance precedents should be overruled.[7] Answering the invitation enthusiastically, Justice Anthony Kennedy's[8] majority opinion concluded, for the first time in American history, that corporations enjoy an inviolate free speech right to spend unlimited amounts of money from their ample treasuries to sway the outcome of candidate elections.[9] *Austin v. Michigan Chamber of Commerce*[10] (fully) and *McConnell v. Federal Election Commission*[11] (partially) were overruled — thus removing any "basis for allowing the Government to limit corporate independent expenditures."[12]

4. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); Lochner v. New York, 198 U.S. 45 (1905); Dred Scott v. Sanford, 60 U.S. 393 (1856).

5. *See Citizens United*, 130 S. Ct. at 886.

6. *Id.* at 887-92.

7. Citizens United v. FEC, 129 S. Ct. 2893 (2009).

8. This essay makes the intemperate claim that the Roberts Court majority has become an extraordinarily interventionist, activist, ideological, and even partisan force in our present structure of government. I claim the Court's decisions are frequently reckless intrusions on the operation of the American democratic process — risky ventures that threaten both majoritarian decision-making processes and the Court. This broad change, by now, wraps rather easily around the efforts of Justices Scalia, Thomas, Alito, and Chief Justice Roberts. I would not make the same radicalized claim about Justice Kennedy. He wrote the *Citizens United* opinion and embraced the Court's conclusions in *District of Columbia v. Heller*. But he also wrote *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating Texas's harsh anti-homosexual sodomy law) and *Boumediene v. Bush*, 553 U.S. 723 (2008) (applying rights to habeas corpus to detainees at Guantanamo Bay, Cuba). These are hardly the handiwork of a hard-right political ideologue. My candid assessment in cases like *Citizens United* and *Heller* is that Justice Kennedy is badly mistaken rather than purposefully partisan. His quirkiness, though, regularly enables the forced ideological march of Roberts, Alito, Scalia, and Thomas. In that capacity, he does immense damage to the commonwealth and to the Court as an institution.

9. *Citizens United*, 130 S. Ct. at 886.

10. 494 U.S. 652 (1990). In *Austin*, the Court upheld restrictions on political speech based on the speaker's corporate status. *Id.* at 660. The *Citizens United* Court expressly overruled this holding. *Citizens United*, 130 S. Ct. at 913.

11. 540 U.S. 93 (2003). *McConnell* relied in part on *Austin* to affirm federal prohibitions on "electioneering communications." *Id.* at 206. To the extent that *McConnell* relied on the *Austin* holding, that case was overruled as well. *Citizens United*, 130 S. Ct. at 913.

12. *Citizens United*, 130 S. Ct. at 882.

As lynchpin, the opinion determined, without apparent irony, that "the proposition that . . . the Government may impose restrictions on certain disfavored speakers" has no place in American law.[13] The previously often-stated concern that "the corrosive and distorting effects of immense aggregations of [corporate] wealth" might pose significant barriers to the effective operation of egalitarian democracy was discarded as paternalistic and repressive.[14] Rejecting over a century of law that the Court now apparently considered as reflecting a "censorship . . . vast in its reach,"[15] Justice Kennedy argued that corporate-funded speech is essential to assure "that the people have access to the views of every group in the community."[16]

The *Citizens United* Court then grounded its holding in a distinction that no one who has ever been involved in politics believes to be true: "[t]he absence of prearrangement and coordination of an expenditure with the candidate" ". . .defeats concerns for corruption or the appearance of corruption, and eliminates the risk of improper influence on or commitments by candidates."[17] This was followed by a comment that caused many in the public arena to shake their heads — "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."[18]

Accordingly, corporations and unions now enjoy an unfettered liberty to spend whatever they may choose in federal, state, and local elections for legislators, executives, and judges. The ruling is breathtaking in both its sweep and departure. Almost as if to mock and humiliate generations of campaign reformers across the nation, Justice Kennedy reached a crescendo by citing *Mr. Smith Goes to Washington* to illustrate, apparently, the utter democratic necessity of pouring more corporate money into our politics.[19] A notable tour de force.

After *Citizens United*, as the *New York Times* has reported, lobbyists can feel free to "tell any elected official: if you vote wrong, my company . . . will spend unlimited sums advertising explicitly against your re-election."[20] It renders all campaign contribution limits silly and futile. What sense does it make to say that a citizen is prohibited from giving more than two or three or four or five-thousand dollars to a campaign, while corporations and unions down the road can spend many millions unmolested? It's not hard to guess that swamping the entire system of contribution limitation is the central purpose of *Citizens United.* The Roberts Court thus ruled, implicitly, that the American democracy is literally powerless to fight back against the scourge of cash register politics. That conclusion, of course, is demeaning to both our national history and purpose.

13. *Id.* at 883.
14. *Id.* (citations omitted) (brackets in original).
15. *Id.* at 884.
16. *Id.* at 901 (citiations omitted).
17. *Id.* at 908 (citations omitted).
18. *Citizens United*, 130 S. Ct. at 910.
19. *Id.* at 916-17.
20. David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES, Jan. 21, 2010, at A1, *available at* http://www.nytimes.com/2010/01/22/us/politics/22donate.html.

II. *HELLER*

In *District of Columbia v. Heller*,[21] as is almost equally well known, the Roberts Court struck down a law that banned the possession of hand guns in the troubled nation's capital. Splitting again 5-4, the justices concluded that the Second Amendment assures, despite its prefatory language, an individual right to own firearms, unconnected with service in a militia.[22] Upsetting, once more, the settled legal understandings of over a century, the same five-member[23] majority ruled that individual self-defense is "the central component" of the Second Amendment right to bear arms.[24] This time, with Justice Scalia writing, the Court employed a perhaps-odd historical focus — measuring what, despite the text of the contested amendment, the framers of the provision "most undoubtedly thought . . . even more important[:] . . . self-defense and hunting."[25] Although he conceded that the newly ascribed right to arms could not be considered absolute, Justice Scalia overtly rejected any balancing of interests to determine a regulation's acceptability. He thus refused to consider any empirical evidence proffered to justify firearm restrictions.[26] The Second Amendment, he crowed, "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[27] The D.C. provision, therefore, did not stand a chance.

The sweep of Justice Scalia's move, and its implications for the future of gun control, were impressive:

> The very enumeration of the right takes it out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.[28]

This is true, as well, apparently, for a right at odds with the text of a constitutional provision, discovered belatedly by a judge employing "law office" history,[29] to reveal interests "undoubtedly thought . . . even more important" to the framers than those they chose to write down. We have had, of course, a good measure of difficulty with this methodology in the jurisprudence of the eleventh amendment.[30] But, niceties notwithstanding, in one afternoon Justice Scalia's newly-minted version of the Second Amendment went from last place in our long-developed hierarchy of constitutional

21. 554 U.S. 570.

22. *Id.* at 624-26.

23. *Id.* at 572. Justice Scalia's majority opinion was joined by Justices Kennedy, Thomas, Alito, and Chief Justice Roberts. Justice Stevens, as in *Citizens United*, filed a principal dissenting opinion. It was joined by Justices Souter, Ginsburg, and Breyer.

24. *Id.* at 599 (emphasis omitted).

25. *Id.*

26. *Id.* at 634- 36.

27. *Heller*, 554 U.S. at 635.

28. *Id.* at 634-35.

29. *See* Jeffrey Shaman, *The Wages of Originalist Sin*: District of Columbia v. Heller, AMERICAN CONSTITUTION SOCIETY (Sept. 2008), http://www.acslaw.org/files/Shaman%20Issue%20Brief.pdf.

30. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890).

values, to first. Impressive work, grand in stature.[31]

With its companion piece, *McDonald v. City of Chicago*,[32] *Heller* has triggered a bevy of lawsuits aimed at an array of the reported 20,000 gun control laws in the United States.[33] It is stunning, and surely eventually tragic, to contemplate that amidst the challenges of twenty-first century American life, the power of legislatures to deal with the dangers of firearms has been dramatically diminished. Ultimately, *Heller* may invalidate more statutes thought essential by legislative majorities across the nation than any judicial decision in our history.

III. ON NEUTRAL REFEREES

Chief Justice John Roberts professed in his confirmation hearing's opening salvo, now somewhat notoriously, that:

> Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath. And judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.[34]

Reading Roberts's vacuous and hypocritical homily with the benefit of hindsight can, of course, leave one breathless, and nauseated. Never has there been so wide a chasm between the jurist calculatingly advertised and the one subsequently, knowingly, delivered. Even Justice Scalia has marveled at his new colleague's' disingenuous window-dressing — asserting, in exasperation, that "this last pretense of minimalism,"[35] this "faux judicial restraint" is simply "judicial obfuscation."[36]

No one, literally no one, reading *Citizens United* and *Heller* could even approach the conclusion that the Roberts Five are behaving like modest, neutral arbiters — applying the rules, not making them; servants of text and process and precedent; cautious umpires, exercising only limited visions of judicial power. Hungrily casting aside precedent, reaching boldly beyond the actual cases presented, employing the widest possible compass, invalidating acts of Congress and state legislatures at whim and by boatload, constitutionalizing arenas of vibrant political controversy, weighing in potently, decidedly, in the interests and causes of previous political benefactors, the

---

31. *Heller*, of course, imposed a categorical personal Second Amendment right in the District of Columbia. It did not speak to the enforceability of the Second Amendment against state and local governments. Unsurprisingly, in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Roberts Court held that the Fourteenth Amendment incorporates the Second Amendment against state and local governments.

32. 130 S. Ct. 3020 (2010) (holding that the Second Amendment is incorporated against the states).

33. Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, AMERICAN CONSTITUTION SOCIETY (Oct. 2010), http://www.acslaw.org/files/Mehr%20and%20Winkler%20Standardless%20Second%20Amendment.pdf.

34. CNN POLITICS, *Roberts: 'My job is to call balls and strikes and not to pitch or bat,'* (Sept. 12, 2005), http://articles.cnn.com/2005-09-12/politics/roberts.statement_1_judicial-role-judges-judicial-oath?_s=PM:POLITICS [hereinafter Roberts Statement].

35. Hien v. Freedom From Religion Found., 551 U.S. 587, 630 (2007).

36. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 499 (2007) (Scalia, J. concurring) (in decision denying standing to challenge religious expenditures by the executive branch of the federal government).

Roberts tribunal embodies activism writ large. Imagine if Chief Justice Roberts had, before the Senate Judiciary Committee, professed his intention to repeatedly ditch centuries of settled law, invalidating the fruits of the democratic process, without textual warrant, without historical justification, without a shred of precedent, without even the request of the parties, in order to further his particularized political ideology and to solidify the power of the strongest economic forces in the nation. At least it would have made for an interesting hearing.

Of course, John Roberts is neither the first nor, sadly, the last judicial nominee to portray himself in dramatically different terms than his behavior on the high court would justify. It could be our hope, though, that the absurd and astonishing disconnection between his words and his deeds of leadership would be enough to force us to drop the "modest," "restrained," "passive," "non-activist," "rule applying," and "neutral referee" jargon from our political lexicon. There are no restrained, deferential, passive jurists on the U.S. Supreme Court. There have not been for decades. And it now appears that the more jurists mouth the phrases of restraint, the more decidedly they act to violate them. It is beyond time to turn the conversation in different directions.

IV. ON OCCASIONAL ORIGINALISM

If Justice Scalia can be forgiven for tiring of Chief Justice Roberts's "faux restraint," the rest of us might, as well, be given a pass for losing patience with Scalia's feints toward originalism. His positions, in both *Citizens United* and *Heller*, are assertedly based in history — the demonstrated intentions of the framers and ratifiers of the First and Second Amendments. I will not rehearse the arguments here. But, in short, Justice Scalia finds apparently potent links between the framing generation's designs for constitutionally secured "freedom of speech" and a derivative right of modern mega-corporations to spend millions of dollars to affect the political process.[37] This, despite the remarkable hopscotch required to move from legislators who would, undoubtedly, not have regarded corporations as "persons" or money as "speech" — to the Amendment's boldly worded, and absolutely framed, guarantees.[38] In *Heller*, on the other hand, he inverts the ordering of the language of the Second Amendment, removes the guiding premise of the preamble, and discovers a non-textual purpose for the provision which he deems more central to the framers' intentions than anything they happened to write down.[39]

It is not that these aren't impressive moves. As proof of dexterity, they no doubt astound. But originalism is designed to be an interpretive theory of constraint. It cabins, purportedly, the freewheeling ability of adventurous judges to deploy the capacious phrases of the American constitution to suit their own value-based predispositions. Accordingly, it prevents unelected judges from stepping beyond their appointed constitutional authorities.

Justice Scalia's originalist moves in *Citizens United* and *Heller*, in operation, though, make mockery of any identifiable concept of restraint. His use of history is

37. *Citizens United*, 130 S. Ct. at 897 (2010) (Scalia, J. concurring).
38. *Id.*
39. *Heller*, 554 U.S. 570.

almost taunting. It says, most evidently: See, I'm the smartest guy around and I can make the history of the framing do anything, literally anything, I want. The only thing history cannot do, apparently, is lead to a conclusion contrary to Justice Scalia's present political predispositions. That is the one impossible step. Beyond that, he can take the valise of history in any direction required.

In *Heller* and *Citizens United*, Justice Scalia used history to prove that the constitution means something other than what it actually says. In *Printz v. United States*, on the other hand, he used history to construct, from whole cloth, a constitutional barrier enjoying no textual foundation whatsoever — which also flew in the face of an array of accepted founding era practices.[40] But even these manipulations are easier to comprehend than his ready and unexplained willingness, when essential, to abandon historical inquiry altogether — as in the federal affirmative action cases — where no matter how nimble, it is beyond impossible to attribute to Madison and crew either an equal protection principle or a cultural aversion to race discrimination. Under such circumstances, apparently, the correct course is to forget the demands of originalism completely. Only then, one supposes, is it possible to invalidate a federal contracting racial set-aside.[41] Thus, we are now required to develop not only a theory of originalism that is comprehensible and constraining, but also a test to dictate when originalism will be deployed and when it will be casually and silently discarded. This, in short, is a slalom that none but Justice Scalia could successfully navigate. And even he should be required to explain its implementation.

It would be better by now to simply curb these enthusiastic but disingenuous declarations of fealty to theories of original intention. There are, assuredly, no practicing originalists on the U.S. Supreme Court. Nor, one doubts, one hopes, will there ever be.

V. TRUMPING DEMOCRACY

If *Heller* and *Citizens United* spring from neither text nor history nor precedent, what is their studied genesis? What theory of constitutional interpretation do they implement? What foundational values or processes lie at their core? If it is "emphatically the province and duty of the judicial department to say what the law is,"[42] what basis for such bold and path-breaking exercises of judicial authority is declaimed?

In broad terms, the answer is a mystery; though, quite clearly, Justices Scalia and Kennedy would cling to the mantle of textualism, even if the language and the history of their respective constitutional phrases are at war with their vigorous conclusions. What is clear, though, is that *Heller* and *Citizens United* can find no respite in theories of democratic failure that often sustain potent exercises of judicial intervention.[43] The

40. Printz v.United States, 521 U.S. 898 (1997). *See also* Gene Nichol, *Justice Scalia and the* Printz *Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953 (1999).

41. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (invalidating the federal racial minority set-aside program).

42. Marbury v. Madison, 5 U.S. 137, 177 (1803).

43. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating statutory scheme requiring female, but not male, members of the armed services to prove their spouses' dependent status in order to qualify for certain benefits); Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating state law mandating public schooling as violative of the religious freedom of Amish and Mennonite petitioners); Baker v. Carr, 369 U.S. 186 (1962) (invalidating a state electoral districting scheme which gave unequal representation to certain voting groups);

members and leadership of the National Rifle Association are not classic "discrete and insular" minorities, removed and cordoned from the channels of American political power. Quite the contrary. And, of course, *Citizens United* makes a literal mockery of the concept. No one wields greater political clout in this country than corporate interests of massive wealth.[44] The perennial question for the modern American democracy is whether citizens without great economic majesty can manage, by any measure, to make their preferences even register in our deliberative processes. With the largest gulfs between rich and poor in the western industrial world firmly secured[45] and growing, the richest among us seem to fare well in our cash-register democracy.[46] It is an extraordinarily long road, in other words, from *United States v. Carolene Products*'s famous footnote[47] to the privilege-based jurisprudence of the Roberts Court.

The hyper-activism of the present U.S. Supreme Court is seemingly more accurately rooted in a pointed set of ideological preferences — coinciding noticeably with proffered and treasured values of the political right. A working majority of the Roberts Court — obviously in *Citizens United* and *Heller* — has chosen to carry constitutional water in the name of economic political privilege and an unfettered, near-absurd access to firearms. It is difficult to believe that any five persons — no matter where sought — could survey the landscape of modern American life and determine that the two touchstones for which we should abandon long-asserted claims of process and principle in a determined rush to new outcomes at any cost would be to put more guns on the streets and more money in our politics. Truth is, indeed, sometimes stranger than fiction. But that is the U.S. Supreme Court we now enjoy.

It would not be possible, in the second decade of the twenty-first century, to secure a vote by the majority of Americans, or their elected representatives, for untrammeled, categorical, near-absolute gun rights. Nor would anything like a majority of our citizenry opt to open the floodgates to cascades of new corporate money in our politics. These notions may go over enthusiastically in various hard-right caucuses or in the halls of the U.S. Chamber of Commerce, but they are not the accepted fare for the bulk of us. In constitutionalizing these controverted and openly ideological claims, the Roberts Court

---

Brown v. Bd. of Educ., 347 U.S. 483 (1954) (invalidating racial segregation in public schools). *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 88-104 (1980).

44. *See* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER–AND TURNED ITS BACK ON THE MIDDLE CLASS 65-66 (2010); ROBERT G. KAISER, SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT (2010).

45. *See* INEQUALITY MATTERS: THE GROWING ECONOMIC DIVIDE IN AMERICA AND ITS POISONOUS CONSEQUENCES (James Lardner & David Alden Smith, eds., 2005); RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER 15-18 (2009).

46. KAISER, *supra* note 44.

47. 304 U.S. 144, 153 n.4 (1938).

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar conclusions enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities. . . . [W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

has, in effect, come out of the closet. It talks, sheepishly, of deference, restraint, modesty, and process. Yet it acts, wolfishly, in service of the political benefactors that brought it to power. And in the years ahead, it is not unreasonable to assume that the politically-driven platform will move beyond guns and money to school desegregation,[48] affirmative action,[49] abortion,[50] and voting rights.[51] It is no small irony that our high court appears set to cast its lot in favor of an array of partisan causes that might have enjoyed majority appeal a decade, or two decades, or three decades ago — but not now. Our justices are not only activist and ideological, they are, apparently, dated and stale.

When Chief Justice Roberts appeared before the Senate he focused pointedly on his existential commitment to humility. Judges are "servants," he intoned; they play "a limited role. Nobody ever went to a ball game to see the umpire."[52] Judges "have to have the humility to recognize that they operate within a system of precedent" and "the modesty to be open . . . to the considered view of their colleagues."[53] But Chief Justice Roberts and the bulk of his majority colleagues have displayed, instead, a remarkable and reckless hubris rarely witnessed on our greatest tribunal. Justice Alito has engaged in something of a personal snit with the president of the United States — appearing more like a mid-level Federalist Society partisan than a member of the United States Supreme Court. Justices Thomas and Scalia have pushed the envelope of off-the-bench political engagement — participating in partisan and ideological attachments that must make their colleagues shudder. And the Chief Justice has taken to new heights a careless willingness to completely segregate his packaging from his product — travelling the nation professing a touching reticence as he crafts decision after decision meant to re-cast the American constitution in the image of his politics.

This is risky business. The working assumption seems to be that most Americans see the world through the eyes of the right edge of the Republican Party. Surely then, the interests and the sentiments of a democracy-trumping U.S. Supreme Court will ultimately prevail. But the Roberts Five are hardly representative of the diversity, challenge, condition, circumstance, and possibility of American life. They travel in extraordinarily confined quarters. In their insularity, in their ideology, in their remove, in their intense and unapologetic arrogance, they threaten the Court and the people it is meant to serve.

48. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1, 551 U.S. 701 (2007).

49. *See id. See also* Ricci v. DeStefano, 129 S. Ct. 2658 (2009); Grutter v. Bollinger, 539 U.S. 306, 337 (2003).

50. *See* Gonzales v. Carhart, 550 U.S. 124, 132 (2007) (sustaining Partial-Birth Abortion Ban Act of 2003).

51. *See, e.g.*, Bartlett v. Strickland, 129 S. Ct. 1231 (2009).

52. Roberts Statement, *supra* note 34.

53. *Id.*

***