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SUPREME COURT—OCTOBER TERM 2009 FOREWORD: CONSERVATIVE JUDICIAL ACTIVISM

*Erwin Chemerinsky**

Over twenty years ago, my Foreword on the Supreme Court's October 1988 Term titled The Vanishing Constitution discussed how the conservative majority on the Court emphasized deference to majoritarianism. Momentous decisions that term included ones that upheld the death penalty for juveniles and the mentally retarded, allowed random drug testing for government employees, permitted greater government regulation of abortion, and significantly narrowed the availability of habeas corpus in federal courts. Over the last two decades, the Supreme Court has become significantly more conservative, but the conservatism of October Term 2009 differs from that of October Term 1988. The latter emphasized great deference to the decisions of the elected branches of government, but the current conservatism shows little such deference, especially when deference conflicts with the conservative judicial ideology.

Today's Court—the Roberts Court—is a conservative, activist Court. I think that the three most important decisions from October Term 2009 were Citizens United v. Federal Election Commission, which found a First Amendment right of corporations to spend unlimited amounts of money in elections; McDonald v. City of Chicago, which held that the Second Amendment applies to state and local governments; and Berghuis v. Thompkins, which is the most significant limit on Miranda rights since that case came down in 1966. In this Foreword, I examine these three cases to establish my central point: we are at a time of significant conservative judicial activism; the Court has replaced the deference of twenty years ago with a very different brand of judicial conservatism.

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Over twenty years ago, I was asked to write a Foreword on the Supreme Court's October 1988 Term.¹ I titled the article *The Vanishing Constitution*. The central thesis was that the conservative majority on the Court was emphasizing deference to majoritarianism, which meant that less and less of the Constitution was being enforced. October Term 1988 was particularly momentous² as the Court upheld the death penalty for juveniles and the mentally retarded,³ allowed random drug testing for government employees,⁴ permitted greater government regulation of abortion,⁵ and significantly narrowed the availability of habeas corpus in federal courts.⁶

In 5–4 decisions, the majorities generally consisted of Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and White. The dissents were composed of Justices Brennan, Marshall, Blackmun, and Stevens.⁷

Over the last two decades, the Supreme Court has become significantly more conservative. The most dramatic change was Thurgood Marshall being replaced by Clarence Thomas in 1991; one of the most liberal justices in recent history was replaced by one of the most conservative.⁸ The most significant change in terms of altering results was Samuel Alito replacing Sandra Day O'Connor in

1. Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 44 (1989).

2. The term was the focus of a fascinating account written by Edward P. Lazarus, a law clerk for Justice Blackmun, titled CLOSED CHAMBERS.

3. See *Penry v. Lynaugh*, 492 U.S. 302, 492 (1989) (allowing capital punishment of the mentally retarded); *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (allowing capital punishment of sixteen- and seventeen-year-olds).

4. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (upholding random drug testing for customs service employees).

5. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520–22 (1989) (upholding a statute that restricted the availability of abortions in public health facilities).

6. See *Teague v. Lane*, 489 U.S. 288, 316 (1989) (holding that federal courts may not recognize a "new right" in habeas corpus unless it is a right that would apply retroactively).

7. For example, in *Webster*, which was one of the highest-profile cases of the term whereby the court upheld a Missouri law regulating abortions, this was exactly the split among the justices, though the Court had no majority opinion. *Webster*, 492 U.S. at 496.

8. See SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 29 (1999) (quoting Julian Abele Cook, Jr., Chief Justice of the U.S. District Court for the Eastern District of Michigan, "[I]t is indisputable that the fundamental philosophies of Thurgood Marshall and Clarence Thomas are diametrically opposed").

2006.⁹ Thomas and Alito join with Chief Justice John Roberts and Justices Antonin Scalia and Anthony Kennedy to comprise the most conservative foursome on the Court since the mid-1930s. Although Justice Kennedy sometimes joins the more liberal bloc, much more often than not he is with the conservatives.¹⁰ Last year, there were nine 5–4 decisions in which the Court split along ideological lines, with Chief Justice Roberts and Justices Scalia, Thomas, and Alito on one side, and Justices Stevens, Ginsburg, Breyer, and Sotomayor on the other.¹¹ Justice Kennedy sided with the conservatives in six out of the nine and with the liberals in three.¹² The year before, there were sixteen 5–4 decisions in which the justices split along ideological

9. Adam Liptak, *The Roberts Court; The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1 (“[T]he data show that only one recent replacement altered [the Court’s] direction, that of Justice Samuel A. Alito Jr. for Justice Sandra Day O’Connor in 2006, pulling the court to the right.”); see also NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, EXECUTIVE SUMMARY, TIPPING THE BALANCE: THE RECORD OF SAMUEL ALITO AND WHAT’S AT STAKE FOR WOMEN (2005), available at <http://www.nationalpartnership.org/site/DocServer/AlitoExecutiveSummaryDec20.pdf?docID=999> (“Justice Sandra Day O’Connor’s retirement threatens to alter the balance on the U.S. Supreme Court and undermine years of progress on women’s rights, civil rights and the right to privacy. . . . Judge Alito would turn the Supreme Court sharply to the right, and vote to reverse crucial gains from recent years. From protections against discrimination such as sexual and racial harassment, to a woman’s right to make her own reproductive health decisions, to accountability if states violate the Family & Medical Leave Act (FMLA), Judge Alito’s appointment would put the rights and liberties of women, working people, minorities and families at grave risk.”).

10. William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. OF LEGAL ANALYSIS 775, 782–83 (2009) (providing data indicating that in nonunanimous cases through the 2006 Term, Justice Kennedy cast a conservative vote 64.7 percent of the time; using the same metric, the study ranked Justice Kennedy as the tenth most conservative of the forty-three justices who served on the Court from the 1937 to 2006 Terms).

11. Memorandum re: *End of Term Statistical Analysis—October Term 2009*, SCOTUSBLOG.COM (July 7, 2010), http://www.scotusblog.com/wpcontent/uploads/2010/07/Final-Stats-OT09-070710_visual-5-41.pdf. Two 5–3 decisions split along ideological lines, with Justice Sotomayor recusing herself: *Stolt-Neilson, S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010) and *Conkright v. Frommert*, 130 S. Ct. 1640 (2010). *Id.* SCOTUSblog “regard[s] these two cases as 5–4 decisions because it seems very likely that had all Justices participated, the vote would have split that way.” *Id.* The nine 5–4 cases are: *Sears v. Upton*, 130 S. Ct. 3259 (2010); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010); *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010); *Salazar v. Buono*, 130 S. Ct. 1803 (2010); *Perdue v. Kenny A. ex. rel. Winn*, 130 S. Ct. 1662 (2010); and *Wellons v. Hall*, 130 S. Ct. 727 (2010). *Id.*

12. The six cases are: *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010); *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Salazar v. Buono*, 130 S. Ct. 1803 (2010); and *Perdue v. Kenny A. ex. rel. Winn*, 130 S. Ct. 1662 (2010).

lines.¹³ Justice Kennedy sided with the conservatives in eleven of sixteen.¹⁴

The conservatism of October Term 2009 differs from that of October Term 1988. The latter emphasized great deference to the decisions of the elected branches of government,¹⁵ but the current conservatism shows little such deference, especially when deference conflicts with the conservative judicial ideology.¹⁶

I always have been skeptical of the phrase “judicial activism” and have long thought that it is simply a label for decisions with which one disagrees. But one can use the conservative justices’ definition of judicial activism to see how much the Roberts Court is a conservative, activist Court.¹⁷ Justice Scalia, for example, has indicated that the Court is activist when it overrules elected branches’ decisions and restrained when it upholds them.¹⁸ It is restrained when it follows precedent and activist when it overrules it. It is restrained when it rules narrowly and activist when it rules broadly.

By this definition, *Brown v. Board of Education*¹⁹ was very much an activist decision: it struck down laws existing in many states, it overruled precedent, and it broadly ruled that separate can never be equal when it comes to public schools.²⁰ “Activism” thus can be good or bad, though it is used rhetorically in a manner that implies that it is undesirable. The 2008 Republican platform

13. Akin Gump Strauss Hauer & Feld LLP & SCOTUSblog.com, *Memorandum, End of Term Statistical Analysis—October Term 2008*, SCOTUSBLOG.COM (June 30, 2009), <http://www.scotusblog.com/wp-content/uploads/2009/07/summary-memo-final.pdf>.

14. *Id.*

15. Chemerinsky, *supra* note 1, at 48–49.

16. For a detailed analysis of Supreme Court deference to agency statutory interpretation, see William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

17. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

18. *See* David C. Gray, *Why Justice Scalia Should Be a Constitutional Comparativist . . . Sometimes*, 59 STAN. L. REV. 1249, 1263 (2007) (“Justice Scalia argues, given democratic commitments to legitimacy and collective will formation, it is improper for judges to usurp the political authority of the elected branches to resolve normative contests.” (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 9–14 (Amy Gutmann ed., 1997)).

19. 37 U.S. 483 (1954).

20. *See id.* at 488, 490–92, 495.

declares: “Judicial activism is a grave threat to the rule of law because unaccountable federal judges are usurping democracy, ignoring the Constitution and its separation of powers, and imposing their personal opinions upon the public. This must stop.”²¹

The great irony of this statement is that the activism of today on the Supreme Court is very much from the right. Conservatives continue to attack liberal judicial activism even when conservatives are solidly in control of the Supreme Court and they are the activists.²²

This was evident in October Term 2009. I think that the three most important decisions were *Citizens United v. Federal Election Commission*,²³ which found a First Amendment right of corporations to spend unlimited amounts of money in elections²⁴; *McDonald v. City of Chicago*,²⁵ which held that the Second Amendment applies to state and local governments²⁶; and *Berghuis v. Thompkins*,²⁷ which is the most significant limit on *Miranda* rights since that case came down in 1966.²⁸

In this Foreword, I examine these three cases to establish my central point: we are at a time of significant conservative judicial activism; the Court has replaced the deference of twenty years ago with a very different brand of judicial conservatism. I then conclude by offering some thoughts as to why this has occurred.

To be clear, I am not suggesting that every decision of the Roberts Court is conservative or activist. There were notable losses for conservatives in October Term 2009.²⁹ But it is a mistake to treat

21. Republican Nat'l Comm., 2008 REPUBLICAN PLATFORM, <http://www.gop.com/2008Platform/GovernmentReform.html> (last visited Feb. 17, 2011).

22. See Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 ARIZ. ST. L.J. 709, 717 (2009) (“If judicial activism is defined as the Court overturning the acts of the elected branches and the States, as well as reversing its own precedent, then Justices Scalia and Thomas are just as activist as their more liberal colleagues.”).

23. 130 S. Ct. 876 (2010).

24. *Id.* at 900.

25. 130 S. Ct. 3020 (2010).

26. *Id.* at 3024.

27. 130 S. Ct. 2250 (2010).

28. *Id.* at 2263; see *Miranda v. Arizona*, 384 U.S. 436 (1966).

29. See, e.g., *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2977, 2989 (2010) (holding 5–4 that a public university law school could have an all-comers policy and exclude a Christian Legal Society chapter that discriminated based on religion and sexual orientation).

every case as if it is equally important. Few would deny that these three cases were at least among the most important of the term, if not, as I believe, the most important cases. Each was a 5–4 decision with conservatives in the majority and each must be understood as conservatives following their conservative ideology to a conservative result.

I. *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*

In a 5–4 decision, the Supreme Court declared unconstitutional a provision of the McCain-Feingold Bipartisan Campaign Finance Reform Act of 2002.³⁰ The provision prohibited corporations and unions from using their funds for broadcast advertisements for or against an identifiable candidate thirty days before a primary or sixty days before a general election.³¹

The Supreme Court had upheld this provision in *McConnell v. Federal Election Commission*³² in 2003. The Court also previously had upheld state laws limiting corporate spending in election campaigns in *Austin v. Michigan Chamber of Commerce*.³³ In *Citizens United*, the Supreme Court expressly overruled *Austin* and partially overruled *McConnell*.³⁴

Citizens United arose out of a conservative political-action corporation making a video-on-demand movie very critical of then-Democratic presidential candidate Hillary Clinton.³⁵ The issue came to the Supreme Court the year before as to whether the McCain-Feingold Act provision limiting broadcast advertisements by corporations applied to video-on-demand.³⁶ Rather than deciding this issue, on June 29, 2009, the Court asked for new briefing as to whether the provision should be declared unconstitutional and whether *McConnell* and *Austin* should be overruled.³⁷

In a 5–4 decision, the Court did exactly that.³⁸ The Court broadly

30. *Citizens United*, 130 S. Ct. at 884–86.

31. *Id.* at 887.

32. 540 U.S. 93 (2003).

33. 494 U.S. 652 (1990).

34. 130 S. Ct. at 913.

35. *Id.* at 887.

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

37. *Id.*

38. *Citizens United*, 130 S. Ct. at 913.

held that corporations have the same First Amendment rights as individuals³⁹ and that restrictions on corporate spending in election campaigns are unconstitutional.⁴⁰ The Court focused only on “independent expenditures” by corporations, the corporations’ ability to spend money on their own in election campaigns. The constitutionality of restrictions on corporate contributions to candidates was not before the Court. The Court upheld the provisions requiring disclosures of corporate spending.⁴¹

The Court split along ideological lines, with Justice Kennedy writing for the Court, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Stevens wrote a lengthy dissent, vehemently disagreeing with every aspect of the majority opinion.⁴²

What is this decision likely to mean for the future? The implications of the case, on many different levels, are likely to be enormous.

First, in holding that corporations can spend unlimited amounts of money in election campaigns, the Court has likely changed the nature of federal, state, and local elections across the country. This, of course, does not mean that corporations will spend large amounts in every election or that such spending always will be decisive. But corporations (and unions) sometimes will spend greatly in some elections and such spending can make a huge difference.

It is important to remember that corporations and unions could spend money in election campaigns prior to *Citizens United*.⁴³ They needed to create Political Action Committees to do so and to raise money for them.⁴⁴ *Citizens United* is key in that it holds that corporations and unions can spend money directly from their treasuries to get candidates elected or defeated.⁴⁵

One effect of the decision that has not yet been analyzed is in judicial elections. In thirty-nine states, judges face some form of

39. *See id.* at 900.

40. *See id.* at 913.

41. *Id.* at 913–14.

42. *Id.* at 929–79 (Stevens, J., dissenting).

43. *Id.* at 887 (majority opinion).

44. *Id.*

45. *Id.* at 913.

electoral accountability.⁴⁶ The costs of such elections already have escalated tremendously in many states.⁴⁷ Corporate spending will mean further dramatic increases in spending.

The issue will arise with increasing frequency as to when such corporate spending requires a judge's disqualification. The year before, in *Caperton v. Massey Coal Co.*,⁴⁸ the Court held that due process required the recusal of a West Virginia Supreme Court justice after the officials of a company with a case before that court had spent \$3 million to get him elected. It really was John Grisham's novel *The Appeal*⁴⁹ come to life. Such challenges will become far more common as corporations with cases pending before courts can spend unlimited sums to have judges elected or defeated. Corporations and unions now must engage in a perverse guessing game: they need to spend enough to get their candidates elected but not so much as to require recusal if their campaigns succeed. Since the Court has not yet defined the line at which recusal is required, it really is a guessing game for corporate and union officials.

Second, campaign finance laws other than those about disclosure requirements seem very vulnerable after *Citizens United*. The Supreme Court's decision rested on two key premises: spending money in election campaigns is political speech under the First Amendment, and corporations have the same free speech rights as citizens.

But these assumptions and the Court's holding in *Citizens United* can be used to challenge other campaign finance laws. Although the Court dealt only with corporate spending, the decision

46. David C. Brody, *The Use of Judicial Performance Evaluations to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DEN. U. L. REV. 115, 126 (2008) ("In thirty-nine states, judges are theoretically held accountable by the public through either contested elections or retention elections." (citing Rachel Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 629 (2005)); see also American Judicature Society, *Judicial Selection in the States*, <http://www.judicialselection.us/> (last visited Feb. 18, 2011) (providing a map of the states with each state's methods of judicial selection).

47. Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1603 (2009) ("Between 1990 and 2004, average campaign spending in nonpartisan elections increased by 100 percent, from approximately \$300,000 to \$600,000. Average spending in partisan elections during this period increased from approximately \$425,000 to \$1.5 million, an increase of over 250 percent." (citation omitted)).

48. 129 S. Ct. 2252 (2009).

49. JOHN GRISHAM, *THE APPEAL* (2008).

surely applies to union expenditures as well. More dramatically for the future, federal law long has prohibited corporations and unions from contributing money directly to candidates for federal elective office.⁵⁰ Many state and local governments have similar restrictions for their elections.⁵¹ As mentioned above, *Citizens United* concerned only independent expenditures by corporations and not their right to make contributions directly.⁵²

But it is hard to see a basis for a distinction once it is held that corporations are entitled to the same free speech rights as citizens and this includes spending money to influence elections. The Court also did not consider the constitutionality of restrictions on campaign spending by foreign corporations.⁵³ A distinction seems difficult because foreign corporations, like American ones, have the capacity to inform the public and to increase discussion and debate.

In fact, the Court in *Citizens United* implicitly rejected any notion that free speech is limited to citizens.⁵⁴ Corporations obviously are not citizens. Yet, they are accorded First Amendment protection in *Citizens United*.⁵⁵ But this is in marked tension with earlier cases that held that the First Amendment protects only speech by citizens. Just four years ago, in *Garcetti v. Ceballos*,⁵⁶ the Supreme Court held that there is no First Amendment protection for the speech of government employees on the job in the scope of their duties.⁵⁷ As was the case in *Citizens United*, the opinion was written by Justice Anthony Kennedy and joined by Chief Justice Roberts and

50. Adam Liptak, *Justices, 5–4, Reject Corporate Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1 (“The majority opinion did not disturb bans on direct contributions to candidates.”); *Supreme Court OKs Corporate Campaign Contributions*, PBS NEWSHOUR (Jan. 21, 2010), http://www.pbs.org/newshour/bb/law/jan-june10/supremecourt_01-21.html (“But today’s decision did leave in place other restrictions, including a century-old ban on donations by companies directly to candidates for federal office. Direct contributions from political action committees created by corporations, unions and individuals will still be allowed.”).

51. Fredreka Schouten & Joan Biskupic, *It’s a New Era for Campaign Spending: High Court Rejects Limits on Well Funded Backers*, USA TODAY, Jan. 22, 2010, at 1A (“Twenty-four states have similar laws prohibiting or restricting corporate spending in state candidate elections.”).

52. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010); see also Liptak, *supra* note 50.

53. *Citizens United*, 130 S. Ct. at 911.

54. *Id.* at 886.

55. *Id.*

56. 547 U.S. 410 (2006).

57. *Id.* at 426.

Justices Scalia, Thomas, and Alito.⁵⁸ Justice Kennedy stressed that such speech by government employees is not protected because it is not speech in their capacity as “citizens.”⁵⁹ He wrote: “We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁶⁰

But if corporations have First Amendment rights, then it makes no sense to limit free speech protection to expression by citizens. Indeed, the claim for free speech protection by government employees is even stronger than that for corporations; government employees do not relinquish their citizenship when they enter the workplace.

The Court’s decision certainly opens the question of whether any campaign finance laws other than disclosure requirements are likely to stand. Justices Scalia, Kennedy, and Thomas have previously argued that contribution limits violate the First Amendment.⁶¹ Justice Clarence Thomas, for example, declared: “I would reject the framework established by *Buckley v. Valeo* Instead, I begin with the premise that there is no constitutionally significant difference between campaign contributions and expenditures: [b]oth forms of speech are central to the First Amendment.”⁶² *Citizens United* certainly provides a basis for inferring that there are now five justices who share this view of campaign finance law.

Third, the case has important implications for the role of precedent in constitutional decision-making in the Roberts Court. In *Citizens United*, the Supreme Court expressly overruled *Austin* and partially overruled *McConnell*, two decisions that had upheld the constitutionality of government restrictions on corporate spending in election campaigns: *McConnell v. Federal Election Commission* and

58. *Id.* at 412.

59. *Id.* at 420–21.

60. *Id.* at 421.

61. *See* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 626–27, 631–34 (1996).

62. *Id.* at 631, 640 (Thomas, J., concurring in the judgment and dissenting in part).

Austin v. Michigan Chamber of Commerce.⁶³

In fact, in *McConnell* the Court had upheld the constitutionality of the same provision that *Citizens United* invalidated.⁶⁴ What changed in the intervening seven years? Justice Sandra Day O'Connor, who had been part of the majority to uphold the Bipartisan Campaign Finance Reform Act provision, was replaced by Justice Samuel Alito, who voted to strike it down.⁶⁵

In a concurring opinion in *Citizens United*, Chief Justice John Roberts said that the Court should overrule the earlier decisions because they were “erroneous.”⁶⁶ But what made them erroneous was simply that a majority of the current Court disagreed with the prior rulings. During their confirmation hearings, John Roberts and Samuel Alito talked a great deal about “precedent” and “super precedent.”⁶⁷ It is clear now that was empty rhetoric. The Roberts Court obviously gives little weight to precedent, as evidenced last term by decisions overruling prior rulings in changing the standards for pleading in federal court,⁶⁸ in creating major new exceptions to the exclusionary rule,⁶⁹ and in limiting the protections of the Sixth Amendment right to counsel.⁷⁰ Not coincidentally, each of these decisions overruling prior decisions was 5–4, with the same five conservative justices in the majority.

Finally, *Citizens United* should put to rest the constant conservative attack on judicial activism. By any measure, *Citizens United* was stunning in its judicial activism. The deference to the democratic process so often preached by conservatives in attacking liberal rulings protecting rights was nowhere in evidence as the conservative majority struck down restrictions on corporate spending that have existed for decades.⁷¹

63. *Citizens United v. FEC*, 130 S. Ct 876, 912 (2010).

64. *Id.* at 913.

65. *McConnell v. FEC*, 540 U.S. 93, 94 (2003); see *Citizens United*, 130 S. Ct at 886.

66. See *Citizens United*, 130 S. Ct at 920 (Roberts, C.J., concurring).

67. See Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1204–05, 1217 (2006).

68. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

69. See *Herring v. United States*, 555 U.S. 135 (2009).

70. See *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

71. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, was decided in 1990, remaining valid law for twenty years before the *Citizens United* decision overruled it.

The Court could have ruled narrowly on the issue before it, whether the McCain-Feingold Act provision applied to the medium of video-on-demand.⁷² But instead it reached out on its own to ask for briefing and argument as to whether the earlier decisions should be overruled and then did so.⁷³

Conservatives have lambasted prior decisions protecting rights not stated in the Constitution or intended by its Framers.⁷⁴ But there is no evidence that the First Amendment's drafters contemplated spending money in election campaigns as a form of protected speech. Nor did they intend the First Amendment, or any part of the Bill of Rights, to protect corporations. It was not until 1978, in *First National Bank of Boston v. Bellotti*,⁷⁵ that the Court first found any First Amendment protection for speech by corporations.⁷⁶ Only by stating the First Amendment right at a fairly high level of abstraction can Justice Scalia justify the protection of corporate spending under an originalist philosophy.⁷⁷ But once originalism is about the abstract understanding of a provision, rather than its specific intentions, anything can be justified under the Constitution.⁷⁸ At an abstract level, the Framers intended to advance liberty and equality and virtually any decision can be justified in these terms.

Few Supreme Court decisions are more important on as many different levels as *Citizens United*. It likely will change elections across the country. It portends even greater changes in campaign finance in the years ahead as other laws are now far more vulnerable to challenge. It also is very revealing about the Roberts Court and its views about precedent and constitutional interpretation.

II. *MCDONALD V. CITY OF CHICAGO*

Another major decision of the term was *McDonald v. City of Chicago*,⁷⁹ in which the Court held that the Second Amendment is

72. See *Citizens United*, 130 S. Ct at 889–90.

73. *Id.* at 888, 913.

74. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 122 n.2 (1989).

75. 435 U.S. 765 (1978).

76. *Id.* at 795.

77. 130 S. Ct. at 925 (Scalia, J., concurring) (defending First Amendment protection for corporations on originalist grounds).

78. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

79. 130 S. Ct. 3020 (2010).

incorporated and applies to state and local governments.⁸⁰ From 1791, when the Second Amendment was adopted, until 2008, the Court never found any law to violate this provision.⁸¹ In the handful of Second Amendment cases over the course of American history, the Court viewed the Second Amendment as protecting a right to have guns for the purpose of militia service.⁸² But in 2008, in *District of Columbia v. Heller*,⁸³ the Court held that the Second Amendment is not limited to this and ruled that it protects a right to have guns for personal safety, especially in the home.⁸⁴ The District of Columbia, of course, is a part of the federal government so the Court had no occasion to consider whether the Second Amendment applies to state and local governments.

Two years later, in *McDonald*, the Court by the same 5–4 margin as in *Heller*, held that the Second Amendment is incorporated into the Fourteenth Amendment.⁸⁵ Justice Alito’s plurality opinion, joined by Chief Justice Roberts and Justices Scalia and Kennedy, did so through the due process clause of the Fourteenth Amendment’, while Justice Thomas, concurring in the judgment, used the privileges or immunities clause.⁸⁶

The Second Amendment has enigmatic language. It says: “A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”⁸⁷ One way to interpret it is that it protects a right of individuals to have guns for the purpose of militia service.⁸⁸ An alternative interpretation would be that it is about the right of individuals to have firearms, even apart from militia service.⁸⁹

Throughout American history, the Court chose the former

80. *Id.* at 3024.

81. *District of Columbia v. Heller* was the first time the Supreme Court found that a law violated the Second Amendment. 554 U.S. 570 (2008).

82. *See, e.g.*, *United States v. Miller*, 307 U.S. 174 (1939).

83. 554 U.S. 570 (2008).

84. *Id.* at 634.

85. The same five justices were in the majority, but Justice Souter, who had dissented, was replaced by Justice Sotomayor, who dissented in *McDonald*. 130 S. Ct. at 3020.

86. *Id.* at 3059 (Thomas, J., concurring).

87. U.S. CONST. amend. II.

88. *See McDonald*, 130 S. Ct. at 3056.

89. *Id.*

interpretation.⁹⁰ It seems most consistent with the text's statement of the purpose for possessing guns; otherwise the amendment is the same as if it just said "the right of the people to keep and bear Arms shall not be infringed." In *Heller*, Justice Scalia said that the first half of the Second Amendment is "prefatory" language and the second half is "operative" language.⁹¹ But there is no reason why the entire text of the Second Amendment should not be regarded as "operative" language. Also, the original version of the Second Amendment drafted by James Madison had an exemption from militia service for conscientious objectors, obviously a strong indication that the provision was about militia service.⁹² Besides, every time the Supreme Court had interpreted the Second Amendment it had said that it was solely about a right to have guns for militia service.⁹³

I am not sure when it was that views on guns came to so track ideology, with liberals favoring gun control and conservatives favoring gun rights. But that is the social reality and it explains the Supreme Court's decisions in *Heller* and *McDonald*. What is striking about these decisions is their activism. Conservatives who have so long preached the need for judicial restraint and deference to the democratic process showed no hesitation in striking down these laws.⁹⁴ Conservatives who for the last several decades have taken a narrow approach to individual liberties and refused to recognize new rights had no difficulty in finding a Second Amendment right of individuals to have handguns.⁹⁵ Quite powerfully, in separate articles, conservative federal court of appeals judges Richard Posner and J. Harvie Wilkinson criticized the *Heller* decision precisely for its judicial activism.⁹⁶

90. *United States v. Miller*, 307 U.S. 174, 178 (1939).

91. 554 U.S. at 577 ("The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.").

92. *District of Columbia v. Heller*, 554 U.S. 570, 656 (2008) (Stevens, J., concurring).

93. Robert Barnes, *Justices Reject D.C. Ban on Handgun Ownership; 5-4 Rulings Finds 1976 Law Incompatible with Second Amendment*, WASH. POST, June 27, 2008, at A01.

94. Justice Scalia drafted the majority opinions in both *Heller* and *McDonald*. See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Role of Law*, 95 VA. L. REV. 253, 254, 264 (2009).

95. See *id.* at 264-65.

96. *Id.* at 254; Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32, 35 ("If constitutional decisions are to be determined by the balance between liberals and conservatives on the Supreme Court, the fig-

At the very least, one would expect that a Court committed to judicial restraint would have used the ambiguity inherent to the Second Amendment to interpret it to defer to the political process and to follow precedent. Nowhere did Justice Scalia's majority opinion mention the need for judicial deference to the democratic process that is so characteristic of his opinions when he sides with the government in cases involving other individual liberties.⁹⁷ Nor, of course, was there any deference to precedent.

The cases left open many questions concerning when and under what circumstances the government may regulate firearms. Justice Scalia, writing for the Court in *Heller*, was clear that it is not an absolute right.⁹⁸ He said, for example, that the government can regulate where people have guns, such as by preventing guns in schools or government buildings.⁹⁹ He said that the government can keep those with a history of serious mental illness or a prior felony conviction from having firearms.¹⁰⁰ The Court, though, did not indicate the level of scrutiny to be used for this right.¹⁰¹ Justice Scalia, writing for the majority stated: "Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to "keep" and use for protection of one's home and family,' would fail constitutional muster."¹⁰²

This seems clearly wrong, for as Justice Breyer wrote in a dissent, the District of Columbia law at least met rational basis review.¹⁰³ Studies indicate that gun laws decrease gun violence and however much those studies are in dispute, they are enough to meet rational basis review.¹⁰⁴ Justice Breyer explained:

[T]he District's decision represents the kind of empirically

leafing that we find in *Heller*—the historicizing glaze on personal values and policy preferences—will continue to be irresistibly tempting to the justices, with their large and tireless staffs and their commitment to a mystique of 'objective' interpretation.").

97. See Wilkinson, *supra* note 94, at 256.

98. District of Columbia v. Heller, 554 U.S. 570, 595, 626 (2008).

99. *Id.* at 626.

100. *Id.*

101. *Id.* at 634.

102. *Id.* at 628–29.

103. See *id.* at 687–88.

104. See *id.* at 704–05.

based judgment that legislatures, not courts, are best suited to make. In fact, deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions.¹⁰⁵

Not surprisingly then, Justice Scalia admitted that the Court would use more than rational basis review.¹⁰⁶ Unlike *Lawrence v. Texas*,¹⁰⁷ which was silent about the level of scrutiny to be used for the right to engage in consensual homosexual activity,¹⁰⁸ Justice Scalia's majority opinion was explicit that the Court would use more than a reasonableness test in evaluating government regulation of firearms.¹⁰⁹ He stated, "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."¹¹⁰

Although much remains uncertain as to which gun laws will survive after *Heller* and *McDonald*, it is accurate to say that the Second Amendment is the only new right that the Court has recognized in the last thirty-five years when it has approved more than rational basis review. It is hardly coincidental that it is an area where conservative political ideology favors the right. As conservative federal appellate judges Richard Posner and J. Harvie Wilkinson III argued, the Court's Second Amendment cases can be understood only as conservative judicial activism.¹¹¹

III. BERGHUIS V. THOMPKINS

In *Berguis v. Thompson*,¹¹² the Supreme Court took a major step toward lessening the Constitution's protection against self-incrimination. The Supreme Court held that a criminal suspect's

105. *Id.* at 705 (Breyer, J., dissenting).

106. *Id.* at 626 n.27 (majority opinion).

107. 539 U.S. 558 (2003).

108. *See id.*

109. *See Heller*, 554 U.S. at 626 n.27.

110. *Id.*

111. Wilkinson, *supra* note 94, at 254.

112. 130 S. Ct. 2250 (2010).

silence, even for a period of hours, is not enough to invoke the right to remain silent.¹¹³ Even a single word after hours of silence is enough to waive this right.¹¹⁴

In *Miranda v. Arizona*,¹¹⁵ the Supreme Court described the inherently coercive nature of custodial interrogation and held that to lessen this coercion suspects must be informed of their rights.¹¹⁶ Even children can recite the famous *Miranda* warnings, which include informing a suspect of his or her right to remain silent.

In *Berguis v. Thompkins*, Ohio police arrested the defendant, Van Chester Thompkins, on suspicion of having committed murder.¹¹⁷ He was given his *Miranda* warnings and asked to sign a statement that he understood them.¹¹⁸ He refused.¹¹⁹ There is a factual dispute as to whether he orally indicated his understanding.¹²⁰

Police officers questioned Thompkins for three hours.¹²¹ Thompkins remained almost entirely silent during this time.¹²² Occasionally he would answer a question with a single word or a nod.¹²³ Almost two hours and forty-five minutes into the interrogation, the police officer asked Thompkins, “Do you believe in God?”¹²⁴ Thompkins said, “Yes.”¹²⁵ The officer then asked Thompkins whether he prays to God and once more he said, “Yes.”¹²⁶ The officer then asked, “Do you pray to God to forgive you for shooting that boy down?”¹²⁷ Thompkins again said, “Yes.”¹²⁸

This statement was admitted against Thompkins at trial and was

113. *See id.* at 2259–60.

114. *Id.*

115. 384 U.S. 436 (1966).

116. *Id.* at 444–47.

117. *Thompkins*, 130 S. Ct. at 2256.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 2256–57.

124. *Id.* at 2257.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

crucial evidence in gaining his conviction.¹²⁹ The issue before the Supreme Court was whether this violated the privilege against self-incrimination.¹³⁰ In a 5–4 decision, the Court ruled against Thompkins and found that his Fifth Amendment rights had not been infringed.¹³¹ Justice Kennedy wrote for the majority, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.¹³²

The Court concluded that a suspect's silence is not sufficient to invoke the right to remain silent.¹³³ Rather the Court said that there must be an "unambiguous" invocation of this right.¹³⁴ Earlier, in *Davis v. United States*,¹³⁵ the Supreme Court held that an invocation of the right to counsel under *Miranda* must be done in a clear and unambiguous manner.¹³⁶ In *Thompkins*, the Court ruled that the same is true of the right to remain silent.¹³⁷

The Court then found that Thompkins had validly waived his right to remain silent.¹³⁸ The Court said that the waiver of this right need not be explicit.¹³⁹ It said that "[a]n 'implicit waiver' of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence."¹⁴⁰ From the majority's perspective, Thompkins could have stayed silent.¹⁴¹ Once he spoke, he waived his right to remain silent under the Fifth Amendment.¹⁴² The Court thus upheld Thompkins's conviction.¹⁴³

Justice Sonia Sotomayor wrote a vehement dissent joined by Justices Stevens, Ginsburg, and Breyer.¹⁴⁴ She accused the majority of turning *Miranda* on its head and lamented the irony that silence is

129. *Id.*

130. *Id.* at 2259.

131. *Id.* at 2263.

132. *Id.* at 2255.

133. *Id.* at 2259–60.

134. *Id.* at 2260.

135. 512 U.S. 452 (1994).

136. *Id.* at 459.

137. *Thompkins*, 130 S. Ct. at 2260.

138. *Id.* at 2262.

139. *Id.* at 2261.

140. *Id.*

141. *See id.*

142. *See id.*

143. *See id.* at 2265.

144. *Id.* at 2266 (Sotomayor, J., dissenting).

not sufficient to invoke the right to remain silent.¹⁴⁵

It is impossible to reconcile the Supreme Court's decision in *Thompkins* with *Miranda*. This is yet another example, and there have been many, of the Roberts Court's lack of concern with precedent and stare decisis. In *Miranda*, the Court said that "[i]f [an] interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination"¹⁴⁶ But in *Thompkins*, the Court said that the government need not show a knowing and intelligent waiver in order to find a suspect's statements admissible.¹⁴⁷

In *Miranda*, the Court said:

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.¹⁴⁸

Under this analysis, *Thompkins*'s incriminating statements should have been excluded.

Nor is it consistent with the right to remain silent to hold that silence is insufficient and that a defendant must specifically say that he or she invokes the privilege against self-incrimination. Few suspects realistically will have the knowledge to recite these magic words. After *Thompkins*, police can continue to question a silent suspect for hours and hours until they finally obtain an incriminating

145. *Id.* at 2278.

146. 384 U.S. 436, 475 (1966).

147. *See Thompkins*, 130 S. Ct. at 2264 (ruling that "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police," and emphasizing that police need not obtain a waiver of *Miranda* rights before interrogating the suspect).

148. 384 U.S. at 476.

answer.¹⁴⁹

Miranda created a strong presumption that confessions are inadmissible if obtained after questioning unless there has been an explicit waiver of the Fifth Amendment privilege against self-incrimination.¹⁵⁰ In sharp contrast, *Thompkins* creates a strong presumption that confessions are admissible if obtained after questioning unless there has been an explicit invocation of the right to remain silent.¹⁵¹ This really does turn *Miranda* upside down.

Ultimately, the underlying issue is whether *Miranda* matters. *Miranda* was based on great concern about the inherent coercion when suspects are subjected to in-custody police interrogation.¹⁵² The Supreme Court has explained that *Miranda* reflects our society's "preference for an accusatorial rather than an inquisitorial system of criminal justice" and a "fear that self-incriminating statements will be elicited by inhumane treatment and abuses."¹⁵³ It is based on a realization that while the privilege is "sometimes 'a shelter to the guilty,' [it] is often 'a protection to the innocent.'"¹⁵⁴

In 2000, in *Dickerson v. United States*,¹⁵⁵ the Court, in a 7–2 decision, reaffirmed *Miranda*.¹⁵⁶ But the Court's decision in *Thompkins* shows the hollowness of this commitment. As Justice Sotomayor observed in her dissent, "Today's decision bodes poorly for the fundamental principles that *Miranda* protects."¹⁵⁷

Thompkins is not activist in the sense of overturning the decisions of popularly elected officials. But it is activist in changing the law from what it had been for the decades since *Miranda* and for ruling broadly when it could have decided narrowly. As Justice Sotomayor pointed out in her dissent, the Court could have narrowly ruled that relief was not available on habeas corpus.¹⁵⁸ Instead, the

149. 130 S. Ct. at 2259–60.

150. See *Miranda*, 384 U.S. at 476.

151. See *Thompkins*, 130 S. Ct. at 2259–60.

152. See *Miranda*, 384 U.S. at 448–49.

153. *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (quoting *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964)).

154. *Id.*

155. 530 U.S. 428 (2000).

156. *Id.* at 432.

157. 130 S. Ct. at 2273 (Sotomayor, J., dissenting).

158. *Id.* at 2274.

Court's holding is broad and significantly limits the protections created by *Miranda*.¹⁵⁹

IV. THE TRANSFORMATION OF JUDICIAL CONSERVATISM

The Court decided each of these cases 5–4 with the same justices in the majorities and the dissents.¹⁶⁰ The issues were completely different and totally unrelated to one another. Yet, in each case there was a clear conservative—as opposed to liberal—position, and the Court split exactly along these lines.¹⁶¹

The conservatism of October Term 2009 is quite different from the conservatism of twenty years ago, which far more emphasized majoritarianism and deference to the elected branches of government. In describing October Term 1988, I wrote:

If a jurisprudential theme can be identified, it is the Court's search for judicial neutrality. Expressing a desire to defer to legislative and executive decisionmaking, the Court frequently declared that it would hold government actions unconstitutional only when guided by clearly established constitutional principles that exist entirely apart from the preferences of the Justices.¹⁶²

I noted that “the Rehnquist Court's jurisprudence is privative—defined not positively, but negatively. The Court is animated not by an affirmative view of the Court's role or of constitutional values to be upheld, but rather by a vision of the bounds of judicial behavior.”¹⁶³ The result I worried about was that

the approach is leading to a vanishing Constitution. Fewer clauses of the Constitution, whether dealing with the structure of government or with individual liberties, are being enforced. Majoritarianism is a jealous philosophy that tolerates little judicial review. If judges can intervene only

159. *See id.* at 2278.

160. *See* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3020, 3024 (2010); *Berghuis v. Thompson*, 130 S. Ct. 2250, 2255 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 572 (2008).

161. *See* William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 788 (2009).

162. Chemerinsky, *supra* note 1, at 48–49 (footnote omitted).

163. *Id.* at 49.

when there are clear “objective” standards, wholly apart from the views of the individual Justices, judicial review will serve primarily to uphold and legitimate legislative and executive decisions.¹⁶⁴

Cases like *Citizens United*, *Heller*, and *McDonald* show that the Roberts Court of 2009–2010 is quite different than the Rehnquist Court of 1988–1989 in its deference to majoritarian decision making. What accounts for this shift and what is it likely to mean for constitutional law, at least in the immediate future?

Most obviously, there is a more solid conservative majority today than there was twenty years ago. The conservative majority then comprised Rehnquist, White, O’Connor, Scalia, and Kennedy.¹⁶⁵ Rehnquist and Scalia were the most consistently conservative of these five justices.¹⁶⁶ Today, four justices are that conservative: Roberts, Scalia, Thomas, and Alito.¹⁶⁷ Never since 1937 have there been four justices this conservative at the same time on the Supreme Court.¹⁶⁸ Chief Justice Roberts and Justice Alito have been everything that conservatives could have hoped for and that liberals could have feared. Whereas in 1988–1989, Justice O’Connor or Justice White would have been regarded as the swing justice, now it is Justice Kennedy.¹⁶⁹ He is significantly more conservative than Justice O’Connor was on issues such as campaign finance, abortion, separation of church and state, and affirmative action.¹⁷⁰

But it is not just that a more solid conservative majority will be emboldened to more aggressively pursue a conservative agenda. There has been a shift in the approach to judicial review. The conservatism of twenty years ago was fashioned as a response to the Warren Court and especially to *Roe v. Wade*.¹⁷¹ An emphasis on judicial deference was seen as the antidote to the Warren Court’s

164. *Id.* at 47.

165. *See id.* at 44–45.

166. Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1040, 1071–72 (2006).

167. *See* Landes & Posner, *supra* note 10, at 788.

168. *Id.* at 782.

169. *See, e.g.*, Douglas M. Parker, *Justice Kennedy: The Swing Voter and His Critics*, 11 GREEN BAG 2D 317 (2009).

170. *See* Landes & Posner, *supra* note 10, at 782.

171. 410 U.S. 113 (1973).

activism and to the Court's invalidation of abortion laws that existed in forty-six states.¹⁷²

The Warren Court ended in 1969 and *Roe* was decided four years later.¹⁷³ John Roberts was fourteen in 1969 and eighteen in 1973.¹⁷⁴ His conservatism was forged during the Reagan era, not the Nixon years.¹⁷⁵ Over time, conservatives have fashioned their own areas in which they want an aggressive judiciary overturning the choices of majoritarian decision making; campaign finance laws and gun laws are examples of this.

A crucial transition in judicial conservatism occurred in the 1990s with the Rehnquist Court's federalism decisions. In a series of rulings, the Supreme Court narrowed the scope of Congress's commerce power,¹⁷⁶ revived the Tenth Amendment as a limit on federal power,¹⁷⁷ and limited Congress's authority to legislate under section five of the Fourteenth Amendment.¹⁷⁸ No longer was judicial conservatism about deference to the political branches. For the first time in sixty years, the Court struck down federal laws on federalism grounds.¹⁷⁹

To be clear, I do not suggest that conservative justices are more activist than liberal ones. My point is that for a period of time

172. KENNETH DAUTRICH & DAVID A. YALOF, *AMERICAN GOVERNMENT: HISTORICAL, POPULAR & GLOBAL PERSPECTIVES*, BRIEF EDITION 249 (2009).

173. *Roe*, 410 U.S. 113.

174. See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (stating that John Roberts was born on January 27, 1955) (last visited Feb. 27, 2011).

175. See, e.g., *John Roberts—Reagan Era Documents Speak to School Prayer and Abortion*, AMERICAN CENTER FOR LAW & JUSTICE, <http://www.aclj.org/Issues/Resources/Document.aspx?ID=1812> ("John Roberts advised the White House to support congressional efforts to allow school prayer.") (last visited Feb. 27, 2011).

176. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun Free School Zone Act as exceeding the scope of Congress's commerce clause power); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the civil damages provision of the Violence Against Women Act as exceeding the scope of Congress's commerce clause power).

177. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (invalidating a provision of the Brady Handgun Control Act, which required state and local law enforcement personnel to do background checks before issuing permits for firearms); *New York v. United States*, 505 U.S. 144 (1992) (invalidating a provision of a federal law requiring state and local governments to clean up their nuclear waste).

178. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (declaring the Religious Freedom Restoration Act unconstitutional as applied to state and local governments).

179. I have criticized these decisions in ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY*, 68–71, 75–85 (2008).

judicial conservatism strongly emphasized deference to majoritarian decision making. However, this began to fade in the 1990s as the conservative majority grew and the conservative justices asserted their own agenda. The legacy last term was cases like *Citizens United* and *McDonald*.

What will this mean when some of the most controversial constitutional issues of our time come before the Supreme Court? How will the Court handle the constitutionality of the mandate that individuals purchase health insurance or pay a monthly sum via their taxes?¹⁸⁰ Will the Court defer to Congress and the president? How will the Court deal with the constitutionality of Arizona's Senate Bill 1070, which requires state and local law enforcement personnel to enforce federal immigration laws?¹⁸¹ Will the Court follow precedent and find that the bill is preempted by the federal government's exclusive control over immigration or will it follow conservative ideology and uphold the Arizona law?¹⁸² These cases, perhaps even more than the ones during October Term 2009, will reveal the ideology of the Roberts Court and how much it is a conservative activist Court.

CONCLUSION

The most important development during October Term 2009 was not in any decision and is not reflected on the docket sheets for the year. It occurred when Justice John Paul Stevens announced his retirement from the Court at age ninety after thirty-five years. His departure will make an enormous difference, in ways large and small, readily apparent and subtle.

For lawyers who appear before the Court, his avuncular presence will be missed. I argued several cases before the Court with Justice Stevens there and observed many more. I was always struck

180. The lower courts are split as to the constitutionality of this provision. See *Commonwealth ex rel. Cuccinella v. Sebelius*, 2010 WL 5059718 (E.D. Va. Dec. 13, 2010); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. Oct. 7, 2010); *Baldwin v. Sebelius*, No. 10CV1033, 2010 WL 3418436 (S.D. Cal. Aug. 27, 2010).

181. S. 1070, 49 Leg. 2nd Reg. Sess. (AZ 2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>.

182. A federal district court has issued a preliminary injunction against the most important provisions of the law on preemption grounds. *United States v. Arizona*, 703 F. Supp. 2d 980, 980–91 (D. Ariz. 2010).

by his decency to all, including both the most famous lawyers and those struggling in their first appearances. I have also seen more than one lawyer get devastated by Justice Stevens' gentle, but incisive, questioning.

Justice Stevens brought a wealth of life and judicial experience to the bench. He is the last justice who will have ever served during World War II. He is one of the last who grew up during the Great Depression. He is the last to have served on the Burger Court and was the bridge from the great liberals like Justices Brennan and Marshall to the present.

In a more direct way, his absence will matter greatly in who writes which opinions. When the chief justice is in the majority, he assigns who writes for the Court. But when the chief justice is in the dissent, the most senior associate justice assigns the majority opinion. Last year, when Justice Kennedy joined with Justices Stevens, Ginsburg, Breyer, and Sotomayor, Justice Stevens assigned the majority opinion. Now, if Justice Kennedy joins with Justices Ginsburg, Breyer, Sotomayor, and Kagan, Justice Kennedy will assign the majority opinion.

In his next-to-the-last day on the Court, June 28, 2010, in *McDonald v. City of Chicago*, Justice Stevens wrote a lengthy dissent defending his view of a "living Constitution" and disagreeing with those who believe that the Constitution's meaning is limited to its original understanding.¹⁸³ This, too, is part of his remarkable legacy to constitutional law.

183. 130 S. Ct. 3020, 3088–3136 (2010) (Stevens, J., dissenting).

