The Supreme Court in the 21st Century

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Abstract: How does the Supreme Court serve the "common good"? What is the Court's responsibility, as the ultimate interpreter of the Constitution, in our constitutional system of government? This essay explores that question with an eye on the recent performance of the Court in highly controversial and divisive cases. What explains the Court's decisions in cases involving such issues as campaign finance regulation, gun control, abortion, affirmative action, health care reform, voting rights, and even the 2000 presidential election? This essay argues that there is a right and a wrong way for the Supreme Court to interpret and apply the Constitution; and whereas the Warren Court properly understood its responsibilities, the Court in more recent decades has adopted a less legitimate and more troubling mode of constitutional interpretation.

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The Supreme Court plays an essential role in the American constitutional system. As John Roberts stated in his confirmation hearings, the role of the Court is to serve as a neutral and detached "umpire" when it enforces the fundamental guarantees of our Constitution.[1] To fulfill that essential role, the Court must have the confidence and respect of the American people. This is a tricky business because when the Court enforces the guarantees of our Constitution, it usually frustrates the will of the majority. That is, when it holds a law unconstitutional it is in effect telling the majority of citizens who supported that law that they cannot do what they want to do. This is not the way to be popular.

Nonetheless, the Supreme Court has consistently been the most respected of the three branches of the federal government. This is so because, although the Court often frustrates the short-term preferences of the majority, the public generally seems to understand that it is acting in a principled manner that will serve the long-term interests of the nation. Since 2000, however, the percentage of Americans who approve of the way the Supreme Court handles its responsibilities has fallen from 62 percent to only 46 percent. Indeed, in recent years the

Court's approval rating has fallen to its lowest level since polling began in 1972.[2]

In this essay, I explore three possible reasons for the decline in public respect for the Supreme Court: 1) the politicization of the confirmation process; 2) the polarization and apparent politicization of the justices; and 3) the Court's current approach to constitutional interpretation.

Conventional wisdom says that the confirmation process for Supreme Court justices is now terribly broken. The prevailing assumption is that the process has become so polarized and so politicized that nominees feel they must mask their views from members of the Senate in a way that makes informed consideration impossible. As one commentator has observed, many "Americans would like to think the manner in which people become justices on the Supreme Court is governed by merit and objectivity," but "recent events suggest something very different."[3] Supreme Court nominations, it is said, "have become public pitched battles involving partisans, ideological groups, single-issue groups, and the press."[4] The common refrain is that "if only we could get back to the way we did things in the past, the process would be so much better."

This turns out to be mostly correct. In one sense, though, the assessment is wrong. It is usually assumed that the change in the Supreme Court confirmation process began with the Robert Bork confirmation battle in 1987, but in fact it did not occur until after 2000.[5] The change, though, has been dramatic. Between 1964 and 2000, only 27 percent of eighteen Supreme Court nominees received twenty or more negative votes in the Senate. In the four confirmations since 2000, 100 percent of the nominees (Roberts, Alito, Sotomayor, and Kagan) received more than twenty negative votes. Moreover, between 1964 and 2000, only 30 percent of the opposing-party senators opposed confirmation. Since 2000, 74 percent of the opposing-party's senators voted against confirmation. This is an extraordinary shift. In the four confirmations since 2000, 67 percent of Democrats voted against Roberts and Alito, and 81 percent of Republicans voted against Sotomayor and Kagan. Even more striking, the four most recent nominees were viewed at the time of confirmation as more moderate on average than the eighteen nominees put forth between 1964 and 2000. Thus the dramatic change in voting since 2000 cannot be explained by any shift in the perceived ideologies of the nominees themselves.[6]

Several factors seem to have contributed to this much more polarized approach to Supreme Court confirmations. First, the Court's most controversial decision in the years leading up to this era – *Bush v. Gore*[7] – undoubtedly highlighted the ideological inclinations of the justices in both the public and political consciousness. In that decision, there was a bitter divide between the more conservative and more liberal justices, with dramatic consequences for the nation, at a moment when Americans were paying close attention to the Court. The role of ideology could not have been clearer, and it was missed by neither the public nor their elected representatives.

Second, historically the confirmation process was a largely non-public event. The press has always covered the most controversial nominees, such as Alexander Wolcott in 1811, Louis Brandeis in 1916, and Hugo Black in 1937; but apart from such rare exceptions, the public was largely unaware of – and uninterested in – the details of nomination and confirmation. The process therefore had little political salience. Today, however, the news media cover Supreme Court nominees as they do presidential candidates; and senators, presidents, and nominees

are all acutely aware that television cameras are beaming their faces and words to millions of Americans. People eagerly await the opportunity to watch the hearings "to see whether the nominee survives." As legal scholar Chris Eisgruber has observed, the hearings now take on the aura of "a high-stakes reality show."[8] This attention has dramatically increased the political salience of the process.

Third, the politicization of the confirmation process has been made even more dramatic by the increasingly aggressive involvement of interest groups. Although such groups have long played a role in the process, there has been a dramatic increase in interest-group participation. An average of 1.6 interest groups participated in the hearings for the nine nominees between 1952 and 1967; the average rose to 8.8 for the nine nominees between 1968 and 1983; and it rose again to 27.6 for the eight nominees between 1984 and 1994. The average number of interest groups has skyrocketed to almost one hundred for the four nominees since 2000.[9] Not only do these groups attempt directly to persuade senators to their point of view, but they often carry out aggressive public relations campaigns to gather public support by portraying nominees as either harmful or helpful to the political goals of their members, which may involve such divisive issues as abortion, affirmative action, law enforcement, capital punishment, gun control, state's rights, women's rights, immigration, and the rights of gays and lesbians. Senators pay careful attention to these groups because they communicate directly with their constituents, generate substantial contributions for political campaigns, and can help make or break a bid for reelection. A senator who ignores these groups does so at his peril.

Fourth, the more general polarization of the political process has had a substantial impact on the confirmation process. As public law expert Richard Pildes reports, the political parties are now "internally more unified and coherent, and externally more distant from each other, than anytime over the last 100 years." Indeed, "in 1970, moderates constituted 41 percent of the Senate; today, they are 5 percent." The center "has all but disappeared."[10] In the confirmation process, this has significantly magnified the effects of the other three factors.

The impact of these four factors seems clear. With a heightened public awareness of the central role the Supreme Court plays in resolving fundamental and often highly controversial conflicts in American society, a greater public appreciation of the political/ideological nature of the Court's decision-making process, effective mechanisms – such as cable news programs, radio talk shows, the Internet, and energetic interest groups – to bring public and political pressure to bear on senators, and a political environment that is increasingly polarized for reasons unrelated to the confirmation process, the traditional understanding that senators ordinarily should err on the side of deference to reasonable presidential nominations has fallen by the boards. The consequence is a highly politicized and polarized confirmation process unlike anything we have seen before.

It is often thought that, as in *Bush v. Gore*, the justices generally vote their ideological convictions. That is, the "conservative" justices vote for politically conservative positions, and the "liberal" justices vote for politically liberal positions. The assumption, moreover, is that they do this not because of principled differences in their overall judicial philosophies, but because they are permitting their ideological preference to trump whatever principled approach to constitutional interpretation they purport to hold. Is this a fair criticism?

Before going any further, I should note that I am using the terms *conservative* and *liberal* rather loosely. In fact, as federal judge Richard Posner, legal scholar Lee Epstein, and economist William Landes have demonstrated, relative to all justices who have served in the past seventy-five years, recent "conservative" justices (especially Rehnquist, Scalia, Thomas, Roberts, and Alito) have been *very* conservative. Indeed, they are the five *most* conservative justices to serve on the Supreme Court in three-quarters of a century. On the other hand, the recent "liberal" justices (Stevens, Souter, Ginsburg, Breyer, Sotomayor, and Kagan) have been only *moderately* liberal. They are nowhere near as liberal as justices like Brennan, Warren, Marshall, and Douglas. They have not been nearly as extreme in their liberalism as recent conservative justices have been in their conservatism. Moreover, the two so-called swing justices in recent years (O'Connor and Kennedy) have in fact been quite conservative, though not as extreme in their conservatism as Rehnquist, Scalia, Thomas, Roberts, and Alito.[11]

In the rest of this discussion I will therefore refer to the "very conservative" justices (Rehnquist, Scalia, Thomas, Roberts, and Alito), the "moderately conservative" swing justices (O'Connor and Kennedy), and the "moderately liberal" justices (Stevens, Souter, Ginsburg, Breyer, Sotomayor, and Kagan). How, then, have these justices actually voted? To get a handle on this question, I asked several colleagues (without telling them why I was asking) to identify the most important constitutional decisions since 2000. They came up with a list of eighteen cases, ranging across a broad spectrum of constitutional issues involving, for example, the 2000 presidential election, gun control, voter disenfranchisement, affirmative action, abortion, habeas corpus, due process for terrorism suspects, takings of private property, the death penalty, the free speech rights of corporations, freedom of religion, the rights of gays and lesbians, and the commerce clause.[12]

The moderately liberal justices voted for what would generally be understood as the more liberal political position 97 percent of the time (seventy of seventy-two votes; Justice Stevens joined the conservative justices in one of the Guantánamo cases and in a voting case). The very conservative justices voted for the politically conservative position 98 percent of the time (fifty-nine of sixty votes; Chief Justice Roberts broke ranks in the Affordable Care Act decision). Based on these votes, it is easy to see why both the public and members of the Senate perceive the justices as both ideological and polarized. The all-important swing justices, by the way, voted two-thirds of the time with the very conservative justices.[13]

With this information, it is easy to see why the public is suspicious of the justices and why the stakes in the nomination and confirmation process are so high. Indeed, if one more moderately liberal justice had been on the Court since 2000 in lieu of one of the very conservative justices, the moderately liberal justices would have won seventeen of the eighteen cases.[14] If one more very conservative justice had been on the Court in place of one of the moderately liberal justices, the very conservative justices would have won sixteen of the eighteen cases.[15]

Citizens United v. Federal Election Commission[16] is a useful example of how the conservative justices have played fast-and-loose with the law in order to reach the outcomes they prefer. In *Citizens United*, the Court, in a 5-4 decision, held unconstitutional a key provision of the Bipartisan Campaign Reform Act of 2002 (BCRA).[17] The specific provision the Court invalidated limited the amount of money that corporations could spend in certain cir-

cumstances to support or oppose the election of named candidates for federal office.[18]

To understand *Citizens United*, it is first necessary to establish the constitutional context of the decision. In 1976, in *Buckley v. Valeo*,[19] the Supreme Court struck down several provisions of the Federal Election Campaign Act of 1971.[20] In a key part of the decision, the Court held in *Buckley* that the government cannot constitutionally limit the amount *individuals* can spend to support or oppose the election of political candidates. The Court reasoned that because expenditure limitations "limit political expression 'at the core of our electoral process and of the First Amendment freedoms,'" they cannot withstand First Amendment scrutiny.[21]

The question later arose whether corporations have the same First Amendment rights as individuals to spend unlimited amounts of money in the electoral process. In 1990, the Supreme Court held in *Austin v. Michigan Chamber of Commerce*[22] that corporations do *not* have the same right in this respect as individuals. In a 6-3 decision, the Court upheld a Michigan statute that limited the amount that corporations could spend to support or oppose the election of candidates for state office. The Court explained that "the unique legal and economic characteristics of corporations" – such as "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets" – enable corporations "to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"[23] Noting that the act was designed to deal with "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas," the Court concluded that "the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations."[24]

The Court adhered to this view for the next twenty years. In 2003, for example, in *McConnell v. Federal Election Commission*,[25] the Court upheld the same provision of the BCRA that it later invalidated in *Citizens United*. In *McConnell*, in a 5-4 decision, the Court followed *Austin* and held that the provision of the 2002 legislation that limited the amount that corporations could spend in the political process did not violate the First Amendment. The Court reaffirmed that government's "power to prohibit corporations . . . from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates . . . has been firmly embedded in our law."[26]

In the seven years between *McConnell* and *Citizens United*, it became clear that the positions of the justices on this question were fixed in stone. Beginning with *Austin*, Justices Scalia, Kennedy, and Thomas voted consistently, in dissent, to protect what they saw as the First Amendment rights of corporations, without regard to precedent; and after joining the Court in 2005 and 2006, respectively, Chief Justice Roberts and Justice Alito quickly made clear that they too were in that camp.[27] As legal expert Lillian BeVier astutely observed at the time, "[D]ebate on these issues has reached an impasse. . . . The chasm that separates the Justices from one another appears unbridgeable."[28]

Sure enough, in *Citizens United*, the Court overruled *Austin* and *McConnell* in a 5-4 decision. It held that corporations, like individuals, have a First Amendment right to spend unlimited funds in order to elect or defeat particular political candidates. The five justices in the majority were Roberts, Scalia, Kennedy, Thomas, and Alito. The only "relevant" change in the

seven years since *McConnell* was that the moderately conservative Justice O'Connor (who had voted with the majority in *McConnell*) had been replaced by the very conservative Justice Alito.[29]

Justice Kennedy, who wrote the opinion of the Court in *Citizens United*, reiterated the arguments of the dissenters in the earlier cases, declaring, for example, that even though corporations are granted special powers and prerogatives to enable them to function efficiently as economic entities, "'[i]t is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights,'"[30] and that corporations should not "be treated differently under the First Amendment simply because [they] are not 'natural persons.'"[31]

Citizens United has been criticized on a variety of grounds. The most interesting criticisms suggest not only that the majority was wrong on the merits of the First Amendment issue, but also that the conservative justices behaved disingenuously in their handling of the case. There are at least three reasons for this accusation.

First, there is the issue of precedent. In theory, at least, "conservative" judges claim to be respectful of *stare decisis*. Indeed, that is part of what it has traditionally meant to be conservative. Yet in this instance there were two definitive decisions of the Supreme Court in the twenty years leading up to *Citizens United* – *Austin* and *McConnell* – in which the Court had held unequivocally that government can constitutionally limit corporate political expenditures. The plain and simple fact is that nothing had changed in the intervening years – except the makeup of the Court itself.

Second, there is the issue of judicial overreaching. Both Citizens United and the solicitor general offered the Court several ways to resolve the case in favor of Citizens United without requiring the Court even to consider the continuing vitality of *Austin* and *McConnell*.[32] Traditionally, conservatives have insisted that courts should resolve constitutional controversies on narrow rather than broad grounds and should avoiding holding laws unconstitutional unless there is no other way to dispose of the case. In *Citizens United*, however, the conservative justices eschewed the narrow grounds of decision that were available to it, and actually ordered the parties to file briefs on the much broader and more controversial question of whether *Austin* and *McConnell* should be overruled. Because this sort of aggressive overreaching has traditionally been disdained by conservatives, the Court's performance in *Citizens United* was fair and easy game for those who condemned the majority's evident eagerness to reach out unnecessarily to pronounce the limit on corporate spending unconstitutional.

Third, there is the question of judicial activism versus judicial restraint. This is, for me, the most intriguing facet of the decision in *Citizens United*. How should courts decide how much deference/how much scrutiny is appropriate in considering the constitutionality of government action? That is the central question of American constitutional law, at least insofar as courts are concerned. In the last half-century, conservatives have derided judicial activism as illegitimate and called for a more restrained exercise of the power of judicial review. In *Citizens United*, however, the conservative majority embraced an aggressively activist approach, disregarding an effort by our nation's elected officials to bring order to what they regarded as a dangerously out-of-control electoral process. The stakes were clearly high, and members of Congress and the president (Bush II, by the way) obviously have a high degree of expertise in such matters. Why, then, didn't the conservative justices exercise restraint

and defer to the judgment of our elected leaders? This is the question to which I now turn.

It is often assumed that liberals like judicial activism and conservatives like judicial restraint. It is not so simple. For one thing, judicial activism and judicial restraint do not necessarily correlate with liberal and conservative outcomes. For example, on such questions as the constitutionality of affirmative action, regulations of commercial advertising, gun control laws, and campaign finance regulation, judicial restraint would lead to politically "liberal" results (upholding the laws) and judicial activism would produce politically "conservative" results (invalidating the laws). Not surprisingly, then, at some times in our history judicial activism has been embraced by conservatives and criticized by liberals, and at other times judicial activism has been embraced by liberals and criticized by conservatives.

In the early years of the twentieth century, for example, conservative justices employed an aggressive form of judicial activism to invalidate a broad range of progressive legislation. During the *Lochner* era,[33] which lasted for some forty years,[34] the Supreme Court invoked "economic substantive due process" in the name of protecting the "liberty of contract" to invalidate more than 150 state and federal laws regulating such matters as child labor, the insurance industry, banks, minimum wages, maximum hours, the rights of labor, and the transportation industry.[35] Progressive critics of the *Lochner*-era jurisprudence, like Felix Frankfurter, concluded that judicial activism was presumptively illegitimate and unwarranted. The only principled stance for a responsible justice, he argued, was judicial restraint.[36]

Other critics of *Lochner*, however, took away a very different lesson. In their view, *Lochner* was wrong not because judicial activism is wrong, but because *Lochner* was not an appropriate situation for judicial activism. It was this view that Chief Justice Harlan Fiske Stone set forth in 1938 in his famous footnote #4 in *United States v. Carolene Products Co.*[37] While burying the doctrine of economic substantive due process, Stone at the same time suggested that "there may be narrower scope for operation of the presumption of constitutionality when legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or when it discriminates "against discrete and insular minorities" in circumstances in which it is reasonable to infer that prejudice, intolerance, or indifference might seriously have curtailed "the operation of those political processes ordinarily to be relied upon to protect minorities."[38]

This conception of *selective* judicial activism is deeply rooted in the original understanding of the essential purpose of judicial review in our system of constitutional governance. The framers of our Constitution wrestled with the problem of how to cabin the dangers of overbearing and intolerant majorities. For example, those who initially opposed a bill of rights argued that a list of rights would serve little, if any, practical purpose, for in a self-governing society the majority could simply disregard whatever rights might be "guaranteed" in the Constitution. In the face of strenuous objections from the Anti-Federalists during the ratification debates, however, it became necessary to reconsider the issue.

On December 20, 1787, Thomas Jefferson wrote James Madison from Paris that, after reviewing the proposed Constitution, he regretted "the omission of a bill of rights."[39] In response, Madison expressed doubt that a bill of rights would "provide any check on the passions and interests of the popular majorities." He maintained that "experience proves the inefficacy of

a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State" that already had a bill of rights. In such circumstances, he asked, "What use . . . can a bill of rights serve in popular Governments?"[40]

Jefferson replied, "Your thoughts on the subject of the Declaration of rights" fail to address one consideration "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent . . . merits great confidence for their learning and integrity."[41] This exchange apparently carried some weight with Madison. On June 8, 1789, Madison proposed a bill of rights to the House of Representatives. At the outset, he reminded his colleagues that "the greatest danger" to liberty was found "in the body of the people, operating by the majority against the minority."[42] Echoing Jefferson's letter, he stated the position for judicial review, contending that if these rights are "incorporated into the constitution, independent tribunals of justice will consider themselves . . . the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights."[43]

This reliance on judges, whose lifetime tenure would hopefully insulate them from the need to curry favor with the governing majority, was central to the framers' understanding. Alexander Hamilton, for example, strongly endorsed judicial review as "obvious and uncontroversial." The "independence of the judges," he reasoned, is "requisite to guard the constitution and the rights of individuals from the effects of those ill humours which . . . sometimes disseminate among the people themselves." Judges, he insisted, have a duty to resist invasions of constitutional rights even if they are "instigated by the major voice of the community."[44]

It was this "originalist" conception of judicial review that informed the Warren Court's selective judicial activism, as well as the approach of the moderate liberals who are currently on the Court. As a rule, the Warren Court gave a great deal of deference to the elected branches of government – except when such deference would effectively abdicate the responsibility the framers had imposed upon the judiciary to serve as an essential check against the inherent dangers of democratic majoritarianism. They therefore invoked activist judicial review primarily in two situations: 1) when the governing majority systematically disregarded the interests of a historically underrepresented group (such as blacks, ethnic minorities, political dissidents, religious dissenters, and persons accused of crime); and 2) when there was a risk that a governing majority was using its authority to stifle its critics, entrench the political status quo, and/or perpetuate its own political power.

Consider, for example, *Brown v. Board of Education*,[45] which prohibited racial segregation in public schools, *Loving v. Virginia*,[46] which invalidated laws forbidding interracial marriage, *Engel v. Vitale*,[47] which prohibited school prayer, *Goldberg v. Kelly*,[48] which guaranteed a hearing before an individual's welfare benefits could be terminated, *Reynolds v. Sims*,[49] which guaranteed "one person, one vote," *Miranda v. Arizona*,[50] which gave effect to the prohibition of compelled self-incrimination, *Gideon v. Wainwright*,[51] which guaranteed all persons accused of crime the right to effective assistance of counsel, *New York Times v. Sullivan*,[52] which limited the ability of public officials to use libel actions to silence their critics, and *Elfbrandt v. Russell*,[53] which protected the First Amendment

rights of members of the Communist Party. Each of these decisions clearly reflected the central purpose of judicial review – to guard against the distinctive dangers of majoritarian abuse.

As I noted at the outset of this essay, anti-majoritarian decisions generally do not sit well with the majority. It is therefore hardly surprising that this jurisprudence excited biting criticism, especially in the political arena. By the late 1960s, Richard Nixon was able to make the Court's "judicial activism" a significant issue in national politics. Within a few short years, Nixon appointed Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist to the Court. Although these justices varied over time in their adherence to "judicial restraint," their presence soon transformed the Court, leaving the vision of the Warren Court in its wake.

The change in the Court's understanding of its role since 1968 has been dramatic. In the twenty-five years between 1968 and 1993, Republican presidents made *twelve* consecutive appointments to the Court. The movement to the right continued under George W. Bush, who appointed the very conservative Samuel Alito to replace the moderately conservative Sandra Day O'Connor. But that still leaves the question: what does "conservative" mean in the modern era?

This brings me back to *Citizens United*. If conservative justices adhered to the judicial restraint conception of judicial review, they would surely have upheld the law at issue in *Citizens United*. Only by invoking a high degree of judicial scrutiny and aggressively second-guessing the judgments of Congress and the president could the conservative justices justify their position in *Citizens United*. How, then, could the five conservative justices have invalidated the challenged law in *Citizens United*? The answer is simple. John Roberts, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito are not committed to judicial restraint. Rather, like the liberal justices of the Warren Court, they employ a form of *selective* judicial activism. But these justices would have joined few, if any, of the Warren Court decisions I listed earlier. Nonetheless, and despite the conservative rhetoric about "strict constructionism," "originalism," "judicial restraint," and "call[ing] balls and strikes,"[54] the current conservative justices are just as activist as their liberal predecessors – but in a wholly different set of cases.

In a series of aggressively activist decisions, the current conservative justices have held unconstitutional affirmative action programs,[55] gun control regulations,[56] limitations on the authority of corporations to spend at will in the political process,[57] restrictions on commercial advertising,[58] laws prohibiting groups like the Boy Scouts from discriminating on the basis of sexual orientation,[59] policies of the state of Florida relating to the outcome of the 2000 presidential election,[60] and federal legislation regulating guns, age discrimination, the environment, and violence against women.[61] The challenge is to figure out what theory of judicial review or constitutional interpretation drives this particular form of activism.

Conservative justices and politicians repeat endlessly that, in their interpretation and application of the Constitution, they are strict constructionists who apply rather than invent the law. They are judicially restrained. They just call balls and strikes. But *Citizens United*, and a host of other similarly activist decisions in recent years, cannot be explained or justified with any of these clichés. What, then, is going on in these cases?

To answer that question, we need to step back and do the same thing with the

Rehnquist and Roberts Courts that I suggested earlier about the Warren Court. That is, we should look at the outcomes and identify those cases in which the conservative justices tend to be judicially restrained and deferential and those in which they take an activist approach. If we do that, we discover two obvious patterns. First, the conservative justices have generally been very deferential in cases in which minorities (whether African Americans, Hispanics, gays and lesbians, women, religious minorities, or persons accused of crime) challenge the constitutionality of government action that disadvantages them.[62] But these are precisely the cases in which activist judicial scrutiny is most appropriate. Second, these same justices have generally been most activist in protecting the interests of corporations, commercial advertisers, gun owners, whites challenging affirmative action programs, the Boy Scouts when that organization claims a First Amendment right to exclude gay scoutmasters, and George W. Bush in the 2000 presidential election.

These patterns cannot plausibly be explained by any principled theory of constitutional interpretation. Rather, to paraphrase Justice Frankfurter's critique of an earlier generation's judicial activism, the selective activism of the current conservative majority seems to be born out of "their prejudices and their respective pasts and self-conscious desires."[63] These decisions reflect not a principled approach to constitutional interpretation, but a set of personal and ideological preferences about such matters as guns, corporations, gays, commercial activity, religion, and George W. Bush. This is, to say the least, a worrisome state of affairs. It is no wonder that the Supreme Court has fallen, and fallen hard, in the eyes of the American people.

A central responsibility of the Supreme Court is to promote the common good by thoughtfully interpreting and applying the U.S. Constitution in a disinterested and principled manner. The American republic is deeply dependent on the confidence of our citizens in the Constitution and in the rule of law. When justices undermine that confidence, they betray their most fundamental responsibility and endanger the common good.

ENDNOTES

1 *Hearings on the Nomination of John G. Roberts to be Chief Justice of the Supreme Court of the United States Before the Committee on the Judiciary*, 109th Cong., 1st Sess. 56 (2005) (testimony of John G. Roberts).

2 See http://www.gallup.com/poll/4732/supreme-court.aspx.

3 Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (New York: Oxford University Press, 2005), 4.

4 Ibid.

5 See Geoffrey R. Stone, "Understanding Supreme Court Confirmations," *Supreme Court Review* (2010): 415–440.

6 Ibid., 421–425.

7 531 U.S. 98 (2000).

8 Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton, N.J.: Princeton University Press, 2007), 151–152.

9 See Stone, "Understanding Supreme Court Confirmations," 451.

10 Richard H. Pildes, "Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America," *California Law Review* 68 (2011): 277.

11 See Lee Epstein, William M. Landes, and Richard A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Cambridge, Mass.: Harvard University Press, 2013), chap. 3.

12 See *United States v. Morrison*, 529 U.S. 598 (2000) (commerce clause); *Bush v. Gore*, 531 U.S. 98 (2000) (2000 presidential election); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (religion); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (affirmative action); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (habeas corpus); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (terrorism detainees); *Lawrence v. Texas*, 539 U.S. 558 (2003) (rights of gays and lesbians); *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty); *Kelo v. City of New London*, 545 U.S. 469 (2005) (takings of private property); *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005) (religion); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (terrorism detainees); *Gonzales v. Carhart*, 550 U.S. 124 (2007) ("partial birth" abortion); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (racial integration of schools); *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) (right to vote); *Boumediene v. Bush*, 553 U.S. 723 (2008) (terrorism detainees); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (gun control); *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2009) (free speech rights of corporations); *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012) (commerce clause/Affordable Care Act).

13 Justice O'Connor voted with the moderate liberals in four of the eleven cases in which she participated, involving affirmative action, the rights of gays and lesbians, one of the three Guantánamo cases, and one of the two religion cases; Justice Kennedy voted with the moderate liberals in six of the eighteen cases, involving the rights of gays and lesbians, the death penalty, takings of private property, and all three of the Guantánamo cases.

14 The one exception would be *Crawford*, a voting rights case.

15 The two exceptions would be *Lawrence*, a gay rights case, and *Hamdi*, a terrorism case.

16 130 S.Ct. 876 (2009).

17 Pub.L. 107-155, 116 Stat. 81, enacted March 27, 2002, H.R. 2356.

18 2 U.S.C. sec. 441b. The act also limited labor unions, but for the sake of simplicity I will refer only to corporations.

19 424 U.S. 1 (1976).

20 Pub.L. 92-225, 86 Stat. 3, enacted February 7, 1972, 2 U.S.C. sec. 431 et seq.

21 424 U.S. at 39, quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

22 494 U.S. 652 (1990).

23 Ibid. at 659, quoting *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986).

24 Ibid. at 659 – 660.

25 540 U.S. 93 (2003).

26 Ibid. at 203.

27 See, for example, *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

28 Lillian R. BeVier, "Full of Surprises – And More to Come: *Randall v. Sorrell*, the First Amendment, and Campaign Finance Regulation," *Supreme Court Review* (2006): 195 – 196.

29 Justice Roberts replaced Chief Justice Rehnquist, but because Rehnquist had dissented in *McConnell*, this did not affect the vote in *Citizens United*.

30 130 S.Ct. at 905, quoting Justice Scalia's dissenting opinion in *Austin*, 484 U.S. at 680.

31 Ibid. at 900.

32 These included, for example, a quite plausible statutory interpretation argument that the specific speech at issue in *Citizens United* did not even violate BCRA, and an equally credible argument that the challenged provision was unconstitutional *as applied* to Citizens United because Citizens United is a *nonprofit* corporation and thus in a very different position constitutionally in terms of need for the limitation on corporate spending than *for-profit* corporations such as Exxon Mobil, General Electric, and Pfizer.

33 *Lochner v. New York*, 198 U.S. 45 (1905).

34 The era is generally said to have begun with *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), and ended with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

35 See, for example, *Adair v. United States*, 208 U.S. 161 (1908) ("yellow dog contracts"); *Hammer v. Dagenhart*, 247 U.S. 241 (1918) (child labor); *Adkins v. Children's Hospital*, 261 U.S. 525 (1928) (minimum wage); *Lochner v. New York*, 198 U.S. 45 (1905) (maximum hours).

36 See Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* (Boston: Houghton Mifflin Harcourt, 2010), 101.

37 304 U.S. 144 (1938).

38 Ibid at 152 n.4.

39 Thomas Jefferson to James Madison, December 20, 1787, in Jack N. Rakove, *Declaring Rights: A Brief History with Documents* (Boston: Bedford, 1998), 154, 156.

40 James Madison to Thomas Jefferson, October 17, 1788, in ibid., 160 – 162.

41 Thomas Jefferson to James Madison, March 15, 1789, in ibid., 165.

42 James Madison, Speech to the House of Representatives, June 8, 1789, in *The Papers of James Madison*, vol. 12, ed. Charles F. Hobson, Robert A. Rutland, and William M.E. Rachal (Charlottesville: University of Virginia Press, 1979), 204.

43 James Madison, Speech to the House of Representatives, June 8, 1789, in Rakove, *Declaring Rights*, 170, 179.

44 Alexander Hamilton, The Federalist No. 78, June 14, 1788, in *Federalists and Antifederalists: The Debate Over the Ratification of the Constitution*, ed. John P. Kaminski and Richard Leffler (Madison, Wis.: Madison House, 1989).

45 347 U.S. 483 (1954).

[46] 388 U.S. 1 (1967).

[47] 370 U.S. 421 (1962).

[48] 397 U.S. 254 (1970).

[49] 377 U.S. 533 (1964).

[50] 384 U.S. 436 (1966).

[51] 372 U.S. 335 (1963).

[52] 376 U.S. 254 (1964).

[53] 384 U.S. 11 (1966).

[54] *Hearings on the Nomination of John G. Roberts to be Chief Justice of the Supreme Court of the United States before the Committee on the Judiciary*, 109th Cong., 1st Sess. 56 (2005) (testimony of John G. Roberts).

[55] See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

[56] See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

[57] See *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

[58] See *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

[59] See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

[60] See *Bush v. Gore*, 531 U.S. 98 (2000).

[61] See *Printz v. United States*, 521 U.S. 898 (1997) (guns); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (age discrimination); *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (environment); *United States v. Morrison*, 529 U.S. 598 (2000) (violence against women).

[62] See, for example, *Lawrence v. Texas*, 539 U.S. 558 (2003) (Rehnquist, Scalia, and Thomas dissenting from a decision protecting the rights of gays and lesbians); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (Roberts, Scalia, Kennedy, Thomas, and Alito voting to narrow a woman's right to abortion); *United States v. Virginia*, 518 U.S. 515 (1996) (Scalia dissenting from a decision protecting the equal protection rights of women); *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (2011) (Roberts, Scalia, Thomas, Kennedy, and Alito voting to uphold a state law disadvantaging illegal immigrants); *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010) (Roberts, Scalia, Kennedy, Thomas, and Alito voting to narrow Miranda rights); *Salazar v. Buono*, 130 S.Ct. 1803 (2010) (Roberts, Scalia, Kennedy, Thomas, and Alito voting to uphold the installation of a cross on public property over the objections of members of minority religions).

[63] Melvin I. Urofsky, "Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court," *Duke Law Journal* (1988): 105.