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Chief Justice John Roberts: Institutionalism or Hubris-in-Chief?

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Chief Justice John Roberts: Institutionalist or Hubris-in-Chief?

Eric J. Segall*

Abstract

The conventional wisdom among Supreme Court scholars and commentators is that Chief Justice John Roberts is an institutionalist who cares deeply about both his personal legacy and the Supreme Court's prestige over time. This essay challenges that belief. While the Chief certainly cares about how the Court is perceived by the public, as do most of the justices, what most defines Roberts is his hubris—not a concern for the Court's legitimacy or even his own place in history. Across the vast landscape of constitutional law, Roberts has distorted precedent and ignored text and history to further his own policy preferences. A master of the long game and the catchy sound bite, hubris, not institutionalism, most defines the Chief Justice of the United States.

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INTRODUCTION

The prevailing wisdom inside and outside legal academia is that Chief Justice John G. Roberts, Jr., is first and foremost an institutionalist who cares deeply about his personal legacy and how his Court will be viewed when he retires.¹ Supreme Court commentators point to his two votes to uphold the Affordable Care Act,² as well as his decision to abide by the Court's recent precedent when he upheld an abortion law in *June Medical v. Gee*,³ as the main support for the notion that the Chief sometimes subsumes his personal preferences to the greater good of Supreme Court legitimacy over time. This oft-told tale, however, is mostly fiction. The defining feature of Chief Justice Roberts' jurisprudence is not his alleged institutionalism, but his judicial hubris.

I use the term judicial hubris to signify judicial behavior that flouts convention, is overly aggressive, and substantially distorts prior law to reach policy outcomes sought by the judge. As this essay documents, Justice Roberts, across the spectrum of our most contested and controversial constitutional law questions, has led the Court to coerce both state and federal governments to abide by his personal preferences, whether or not positive legal sources supported those decisions and at times even when prior law quite clearly did not justify the Chief's

1. See Oliver Roeder, *Is Chief Justice Roberts a Secret Liberal?*, FIFTYTHREE (Nov. 27, 2017, 12:42 PM), <https://perma.cc/4W5W-E3ST> (detailing how institutional realities might explain a few of Roberts' defections); Robin J. Effron, *Institutional Integrity and the Roberts Court: Will the Judicial Get Political?*, BROOK. L. SCH., <https://perma.cc/226R-LYFB> ("Justice Roberts . . . might have genuine conservative priors. But he is also deeply committed to protecting the institution of the Supreme Court itself and insulating it from the charge that it has just become a third political branch of the federal government.").

2. See Nat'l Fed'n. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (upholding the 2010 Patient Protection and Affordable Care Act); King v. Burwell, 135 S. Ct. 2480 (2015) (upholding IRS regulation that extended the tax credits the Affordable Care Act authorized to federal exchanges as well as those created by states).

3. See June Med. Servs., LLC v. Gee, 139 S. Ct. 663 (2020) *sub nom* June Med. Servs., LLC v. Russo, 140 S. Ct. 2103 (2020) (holding that the Act in question violates the Constitution).

opinions and votes. He has dictated important social policies in cases ranging from affirmative action to campaign finance reform to voting rights to the relationship between church and state.⁴ In all of these areas, as well as many more, the Chief has used catchy sound bites and worn clichés as justifications for ignoring and/or distorting what is supposed to be the content of constitutional interpretation: text, history, and prior case law.

Part I demonstrates that the most important characteristic of the Chief's jurisprudence is hubris. Part II offers a tentative explanation for why this aspect of his behavior has been largely ignored by academics and pundits and why that silence is so dangerous to the rule of law and the functioning of the Supreme Court in our national politics.

I. HUBRIS AS CONSTITUTIONAL INTERPRETATION

A. *Affirmative Action*

Parents, teachers, students, and school board officials in both Seattle and Louisville tried for years to come up with plans to increase the racial diversity of their public schools which had been stymied by neighborhood segregation and other forms of institutional racism.⁵ Although their plans differed in some ways, both cities required minimum levels of diversity in their schools by adopting racial balancing requirements.⁶ These plans did not affect large numbers of students, but to reach these goals some students were not given their first-choice neighborhood schools.⁷ These desegregation markers were the products of

4. See *infra* Part I.

5. See Devon McCurdy, *Parents Involved In Community Schools v. Seattle School District No. 1 (2007)*, BLACK PAST (Nov. 24, 2007), <https://perma.cc/TS46-KNGN> (discussing the details of the decision).

6. See *id.* (explaining that the Seattle plan classified students as white or non-white and sought to ensure that the racial balance of each high school was more or less proportional to the district's overall composition of 41 percent white and 59 percent non-white students, while the Louisville plan used similar tools to ensure that each school had a Black population of at least 15 percent and no more than 50 percent).

7. See Lee Hochberg, *Supreme Court Revisits Race in Public Schools*, PBS NEWS HOUR (Dec. 4, 2006, 12:00 AM), <https://perma.cc/6PW6-72YM> (discussing with Kathleen Brose how her daughter, Elizabeth, did not get her first three choices of high school because of the racial breakdown of her preferred schools).

local decision-making at its best.⁸ No judge required these plans and their adoptions were made in good faith by government officials and parents to help lessen to some degree the impact on our public schools of centuries of formalized and legal racial discrimination.⁹

The Supreme Court decided to hear these cases after Justices Alito and Roberts joined the Court in 2006 when Justices Rehnquist and O'Connor died and retired respectively.¹⁰ Justice Roberts wrote the plurality opinion on behalf of himself and Justices Scalia, Thomas, and Alito.¹¹ Justice Kennedy wrote a concurring opinion and the four liberal Justices dissented.¹² According to Kennedy, Roberts' opinion was overly simplistic and did not engage fully with the issues and the facts.¹³ Those observations are understatement.

There is much to criticize in Roberts' opinion even if one believes that these plans to integrate the public schools of two American cities violated the Fourteenth Amendment. The most egregious and controversial part of Roberts' opinion invalidating these diversity measures came at the end of the opinion where he wrote this [in]famous sound bite: "The way to stop discrimination based on race is to stop discriminating based on

8. See *Parents Involved in Community Schools v. Seattle School District No. 1*, BRENNAN CTR. FOR JUST. (June 28, 2007), <https://perma.cc/Y2AM-SQSM> (noting that the integration programs used in Seattle and Louisville were voluntary).

9. See *id.* (discussing the hope for producing an educational environment that reflects the "pluralistic society" in which children will live).

10. See Alberto R. Gonzales, *In Search of Justice: An Examination of the Appointments of John G. Roberts and Samuel A. Alito to the U.S. Supreme Court and Their Impact on American Jurisprudence*, 22 WM. & MARY BILL RTS. J. 647, 653 (2014) (noting the impact the appointment of Justice Roberts and Justice Alito had on jurisprudence after the death of Chief Justice Rehnquist and retirement of Justice O'Connor).

11. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 701 (2007) (authoring the majority opinion, Roberts and the Court held that the integration plan to desegregate schools was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

12. See *id.* at 788, 799 (noting the concurring opinions of Justice Thomas and Justice Kennedy, and the dissents filed by Justice Stevens and Justice Breyer).

13. See *id.* at 788 (Kennedy, J., concurring) (stating his belief that public schools may sometimes consider race to ensure equal educational opportunity).

race.”¹⁴ Kennedy responded that that this trope is “not sufficient to decide these cases.”¹⁵

As numerous academics have argued, the Fourteenth Amendment’s original meaning does not support the invalidation of affirmative action programs and, of course, the text of the Amendment does not even mention race.¹⁶ As the Court announced in one of its earliest decisions interpreting the Amendment, the newly freed slaves:

[N]eeded the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.¹⁷

The limited racial balancing that the school districts in Seattle and Louisville employed to make up for centuries of racial oppression were designed to afford their children the opportunity to go to school with students of other races for the laudable purpose of alleviating at least a little of the institutional racism that still haunts our country.¹⁸ There may be policy arguments, such as those repeatedly made by Justice Thomas in affirmative action cases,¹⁹ that using race in this

14. *Id.* at 748.

15. *Id.* at 788 (Kennedy, J., concurring).

16. See, e.g., Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 798 (1985) (“From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks.”).

17. *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

18. See *Parents Involved in Community Schools v. Seattle School District No. 1*, *supra* note 8 (arguing that “integrated public schools serve as the fora for educating young Americans to become tolerant citizens in a pluralistic nation”).

19. See Morgan Whitaker, *Justice Thomas Compares Affirmative Action to Slavery, Segregation*, MSNBC (June 24, 2013, 1:00 PM), <https://perma.cc/29C3-6ZAW> (highlighting Justice Thomas’ comments comparing affirmative action to slavery).

manner ultimately leads to unwanted backlash and stigma.²⁰ These concerns are not frivolous and should be considered by policymakers but they have nothing to do with the Constitution's text and history or whether affirmative action plans are constitutional.

Justice Roberts' casual dismissal of the efforts by local government officials to bring the races together relies on neither text nor history. He does rely, erroneously, on the plaintiffs' brief in *Brown v. Board of Education*,²¹ for the proposition that "the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."²² But this out-of-context snippet, not from the case, but from a brief, ignores all of the history and dynamics of the *Brown* decision. As Justice Stevens remarked in dissent:

There is a cruel irony in The Chief Justice's reliance on our decision in *Brown v. Board of Education*. The first sentence in the concluding paragraph of his opinion states: "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin." This sentence reminds me of Anatole France's observation: "[T]he majestic equality of the la[w], . . . forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.²³

There is not a syllable in *Brown* discussing the possibility of local school districts trying on their own to address racial segregation in public schools.²⁴ The efforts by Louisville and Seattle to do so by utilizing limited racial balancing, whether good or bad, right, or wrong, do not violate any prior positive law materials such as text, history, tradition, or precedent.

20. See *Grutter v. Bollinger*, 539 U.S. 306, 364–66 (2003) (Thomas, J., dissenting) (accepting the proposition that race-based jurisprudence can lead to unintended stigma).

21. 347 U.S. 483 (1954).

22. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007).

23. *Id.* at 798–99 (Stevens, J., dissenting).

24. *Brown*, 347 U.S. 483 (1954).

Justice Roberts' clichéd sound bite that the way to end racial discrimination is to stop discriminating on the basis of race hides numerous difficult and contestable value judgments underlying his personal distaste of voluntary efforts by state governments to alleviate the burdens on our country caused by centuries of slavery, segregation, and formalized racial discrimination. How to address those problems raises difficult questions for our country's elected officials and school administrators. But the idea that the Justices should interfere and overrule those decisions when the beneficiaries are children and schools, when the text and history of the Constitution are silent on the issue, and when racial discrimination still haunts our country, smacks much more of judicial hubris than principled constitutional interpretation.²⁵

B. Voting Rights

The Supreme Court's decision in *Shelby County v. Holder*, striking down Section 5 of the Voting Rights Act, is on many scholar's lists as one of the worst decisions in our country's history.²⁶ In addition to its policy implications for voting rights, the opinion written by Justice Roberts adopted an equal state sovereignty principle which requires Congress to have a strong reason to treat different states differently when it exercises its power to enforce the Fifteenth Amendment through, according to the constitutional text, "appropriate legislation."²⁷ To justify that anti-historical and non-textual equal state sovereignty principle, Roberts relied on misleading dicta in a previous case that he had written.²⁸ That case, *Northwest Austin v. Holder*, involved an earlier challenge to the Voting Rights Act that was

25. See Laura McKenna, *How a New Supreme Court Ruling Could Affect Special Education*, ATLANTIC (Mar. 23, 2017), <https://perma.cc/CXD9-9AFQ> (discussing impacts of Supreme Court decisions at the primary and secondary school level).

26. See Paul Campos, *This Supreme Court is a disgrace*, SALON (June 26, 2013, 12:20 PM), <https://perma.cc/4GYF-FE7A> (discussing the flaws in the *Shelby County v. Holder* opinion).

27. *Shelby Cty. v. Holder*, 570 U.S. 529, 536 (2013).

28. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (stating in dicta that preclearance requirements under the Voting Rights Act represent an intrusion into areas of state and local responsibility).

decided on non-constitutional grounds.²⁹ No case exemplifies the Chief's hubris more than *Northwest Austin*.

In *Austin*, Roberts said the following:

The [Voting Rights] Act also differentiates between the States, despite our historic tradition that all the States enjoy "equal sovereignty" Distinctions can be justified in some cases. "The doctrine of the equality of States . . . does not bar . . . remedies for local evils which have subsequently appeared." But a departure from the *fundamental principle of equal sovereignty* requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.³⁰ (citations omitted).

As others have pointed out, before Roberts penned those words, there never was any, much less a "fundamental principle," of equal state sovereignty limiting Congress' powers under the Reconstruction Amendments.³¹ As to the Fifteenth Amendment specifically, the provision governing race discrimination in voting, the Court in *Katzenbach* explicitly rejected that fanciful notion in the same sentence Roberts cites above, but with key words replaced by, to be generous, an egregious ellipse.³²

Here is the original passage from *Katzenbach*: "In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, *for that doctrine applies only to the terms upon which States are*

29. See *id.* at 205 (noting that the Supreme Court will not decide a constitutional question if there is another remedy).

30. *Id.* at 203 (emphasis added).

31. See, e.g., Joseph Fishkin, The Dignity of the South, 123 Yale L.J. Online 175, 177 (2013) (explaining that while a "fundamental principle of equal sovereignty of the states . . . has a nice ring to it," it has no "basis in either constitutional text or in existing constitutional doctrine"); Corey J. Wasserburger, Note, *If It's Not Broken, then Why Fix It? The U.S. Supreme Court Signals a Shift Under Section 5 of the Voting Rights Act in Northwest Austin Municipal Utility District Number One v. Holder*, 129 S. Ct. 2504 (2009), 89 NEB. L. REV. 420, 429 (2010) (arguing that Chief Justice Robert's opinion struggled to find support for its proposition).

32. See *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (holding that the Fifteenth Amendment is a valid constitutional basis for the Voting Rights Act of 1965).

admitted to the Union, and not to the remedies for local evils which have subsequently appeared."³³

The phrase "for that doctrine applies only to the terms upon which States are admitted to the Union," disappeared from Roberts' quotation.³⁴ Nevertheless, in *Shelby County*, Chief Justice Roberts used this alleged "fundamental principle" of equal state sovereignty several times to argue that Section 5 of the VRA was unconstitutional despite the undeniable facts that no text in the Constitution supports such an idea, and the unambiguous text of the Fifteenth Amendment says that Congress may enforce it through "appropriate legislation."³⁵ Roberts simply cited his own opinion in *Northwest Austin*, which misquoted and mischaracterized what *Katzenbach* said about the issue. In fact, *Katzenbach* said the exact opposite about equal state sovereignty in the part of the opinion that Roberts omitted with ellipses in *Austin*.³⁶

The idea that Congress cannot treat some states, especially Southern ones, differently than others when it comes to racial discrimination in voting (absent a strong reason) when Congress acts under the authority given to it by the Reconstruction Amendments, adopted in large part to change the racist behavior of southern states, is absurd. Yet, by mere ipse dixit, Roberts and the other conservative Justices employed this facile idea to render mostly useless what many people think is the most important statute ever enacted by the Congress—the Voting Rights Act (the specific version of which was passed by a unanimous Senate and signed by Republican President George W. Bush).³⁷

The real hubris here, however, is not the misreading of text, history, and precedent for political purposes which both the liberals and conservatives on the Court do on a relatively equal

33. *Id.* at 328–29 (emphasis added).

34. Compare *Katzenbach*, 383 U.S. at 328–29, with *Shelby Cty.*, 570 U.S. at 544 (omitting the end of the original quote).

35. *Shelby Cty.*, 570 U.S. at 530, 536.

36. Compare *Katzenbach*, 383 U.S. at 328–29, with *Northwest Austin*, 557 U.S. at 203 (noting the issue with an omission of an ellipses).

37. See *Case: Northwest Austin Municipal Utility District No. 1 v. Holder, NAACP LEGAL DEF. FUND*, <https://perma.cc/4Z6S-Y5MU> (noting the important potential consequences of the *Northwest Austin* decision).

basis.³⁸ Rather, it is the overturning of a major constitutional principle in a landmark case by omitting key words and replacing them with ellipses. Did Roberts think no one would notice? Justice Ginsburg pointed out all of this in dissent so he knew what he was writing was demonstrably false.³⁹ Openly overturning *Katzenbach* on this point would have been bad enough but doing it in this misleading manner, which he must have known, smacks of hubris all the way down.

C. Campaign Finance Reform

The Chief Justice is proud of his First Amendment decisions. He has said “I’m probably the most aggressive defender of the First Amendment. Most people might think that doesn’t quite fit with my jurisprudence in other areas People need to know that we’re not doing politics. We’re doing something different. We’re applying the law.”⁴⁰ Despite the Chief’s statement, law has very little to do with most of his free speech decisions but is especially absent from his campaign finance opinions.

In the eyes of much of the public, liberal politicians, and law professors, *Citizens United v. Federal Election Commission*⁴¹ is often considered the most offensive example of judicial aggression by the Roberts Court. Although Justice Kennedy wrote the majority opinion, Justice Roberts penned a concurrence.⁴² If the Court had simply held that *Citizens United*, a non-profit ideological organization, had the First Amendment right to show its highly critical movie about Hillary Clinton shortly before a national election, the decision would

38. See ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 5 (2012) (arguing that the Supreme Court functions more like a veto council than a court of law).

39. See *Shelby Cty.*, 570 U.S. at 559–94 (Ginsburg, J. dissenting) (discussing the majority opinion’s mischaracterization of *Katzenbach*).

40. See *John Roberts and Free Speech: A Report on the Roberts Court’s First Amendment Jurisprudence*, CATO INST. (Oct. 12, 2020), <https://perma.cc/BT3Q-W79C> (analyzing Robert’s role in First Amendment jurisprudence).

41. See *Citizens United v. Fed. Election Comm’n.*, 558 U.S. 310, 372 (2010) (holding corporate funding of independent political broadcasts cannot be limited under the First Amendment).

42. See *id.*

make sense. Instead, the Court used the occasion to announce that corporations have the same free speech rights as people.⁴³ This overbroad, anti-originalist holding is totally unwarranted but the reality is that *Citizens United*, as a matter of pure results, is not close to the worst and most unpersuasive campaign finance case of the Roberts Court.

In *McCutcheon v. Federal Election Commission*, Chief Justice Roberts wrote the majority opinion for the other conservatives in a five-to-four case invalidating limits on the total amount of money a person may contribute to candidates or political action committees.⁴⁴ Roberts equated donating money to candidates with speaking about politics and ruled that the only even legitimate (much less compelling) governmental interest that can justify campaign finance reform is stopping direct quid pro quo corruption.⁴⁵ That bizarre notion, which has no foothold in the original meaning or text of the First Amendment, led former Judge Richard Posner to write the following:

Can so naive-seeming a conception of the political process reflect the actual beliefs of the . . . chief justice? Maybe so, but one is entitled to be skeptical. Obviously, wealthy businessmen and large corporations often make substantial political contributions in the hope (often fulfilled) that by doing so they will be buying the support of politicians for policies that yield financial benefits to the donors . . . Isn't this *obviously* a form of corruption?⁴⁶

McCutcheon is a classic case of judicial overreaching and living constitutionalism. Congress placed limits on how much money wealthy donors could contribute to political candidates and unelected, life tenured judges decided that writing checks to candidates and speaking on behalf of candidates are exactly the same thing for constitutional law purposes. But they are not. The checks facilitate speech, but they are not themselves speech.

43. *See id.*

44. *See* *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 227 (2014) (holding that a two-year aggregate campaign contribution limit is unconstitutional under the First Amendment).

45. *Id.*

46. Richard A. Posner, *SCOTUS end of term: Is Roberts casual about the truth in the campaign finance case McCutcheon?*, SLATE (June 25, 2014, 1:06 PM), <https://perma.cc/NXZ8-K2JS>.

Writing checks to plumbers, mechanics, and chefs is not speech. Activity that leads to speech certainly can and should be constitutionally protected, depending on the government's interest in regulating that activity. However, Posner's point is spot on when it comes to giving money to political candidates which quite obviously raises the specter of undue influence and at times corruption.⁴⁷ Such interests might not be sufficient to justify limits on speech itself but should be more than enough to support reasonable limits on campaign spending. Whether such laws are good or bad policy of course should not be the Court's concern, but reading *McCutcheon* makes clear Roberts' utter distaste of campaign finance reform laws.⁴⁸ That distaste, however, does not justify using the First Amendment as weapon to implement the Chief's policy preferences.

There are many First Amendment cases that reflect Justice Roberts' strong personal values, but one merits special attention. After a major political scandal, Arizona's voters passed a state constitutional amendment approving public financing of state campaigns.⁴⁹ No candidate was required to take the money (which, if they did so, meant forfeiting all other contributions).⁵⁰ If a candidate rejected the state's money, and her opponent accepted it, the state would kick in some extra money to equalize the funding up to a modest limit.⁵¹

In *Arizona Free Enterprise Fund v. Bennett*,⁵² Roberts, in yet another five-to-four decision, struck down this admirable attempt by Arizona to lessen political corruption. Once again, no originalist sources were cited. Moreover, no politician's speech was limited or restricted, and no candidate's ability to fundraise was hampered unless she voluntarily accepted the public funds. As Justice Kagan said in dissent:

The First Amendment's core purpose is to foster a healthy, vibrant political system full of robust discussion and debate. Nothing in Arizona's anti-corruption statute, the Arizona

47. *Id.*

48. *McCutcheon*, 572 U.S. at 191.

49. *See* *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011).

50. *Id.* at 728–30.

51. *Id.* at 729–30.

52. *Id.* at 754–55.

Citizens Clean Elections Act, violates this constitutional protection. To the contrary, the Act promotes the values underlying . . . our entire Constitution by enhancing the “opportunity for free political discussion to the end that government may be responsive to the will of the people.”⁵³

In all of these campaign finance cases, reasonable people can disagree over whether the laws at issue constituted welcome tools in the fight against political corruption or restrictions on the facilitation of political speech that caused more harm than good. But that balancing of values should be made by voters and legislatures not unelected judges. None of the laws restricted speech based on content or viewpoint, and all of them except *Citizens United* did not even involve pure speech.⁵⁴

Chief Justice Roberts might think that his vendetta against these laws is based, in his words, on “the law,”⁵⁵ but his opinions cite little text or history to support the rulings and are based almost entirely on policy concerns. The line between good and bad campaign finance reform may be hard to discern and is fraught with subjectivity and personal preference but the line between constitutional and unconstitutional laws designed to combat political corruption should consider the desire of voters and their elected officials to limit some of the corrosive effects of money on political campaigns. It takes no ordinary share of hubris for the Chief to substitute his policy preferences for those of accountable governmental officials and voters on these important election issues that so impact our nation’s state and federal elections.

D. Church and State

In *Everson v. Board of Education*,⁵⁶ decided in 1947, the Supreme Court applied the First Amendment’s Establishment Clause to the states for the first time.⁵⁷ Although the Justices upheld the public financing of busing school children to religious schools, the Court also talked about the wall of separation

53. *Id.* at 757 (Kagan, J., dissenting).

54. *Id.* at 734–35.

55. See *John Roberts and Free Speech: A Report on the Roberts Court’s First Amendment Jurisprudence*, *supra* note 40 and accompanying text.

56. 330 U.S. 1 (1947).

57. *Id.* at 16–18.

between church and state.⁵⁸ Justice Black said the following in a memorable paragraph:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’⁵⁹

For the next fifty-three years, the Court spent considerable time and energy deciding what aid the government may constitutionally provide to religious schools.⁶⁰ For some time, the doctrine was completely incoherent with the Court allowing the government to provide textbooks and bus transportation for religious school students but virtually no other equipment or materials could be publicly financed and neither could school field trips.⁶¹ After the Court’s personnel changed, the Justices held that virtually any secular aid provided to non-religious private schools could also constitutionally be given to religious schools if the government wanted to do so.⁶² At no time during this fifty-three year period, did the Court even hint that school districts *had* to provide the same aid to both religious and non-religious schools under the Free Exercise Clause. Rather,

58. *Id.* at 15–16.

59. *Id.* at 15–16.

60. *See Mitchell v. Helms*, 530 U.S. 793, 807–14 (discussing cases).

61. *See* Ethan Bronner, *The Nation: Church, State and School; Squeezing Through the Holes in the Wall of Separation*, N.Y. TIMES (June 28, 1998), <https://perma.cc/KQ3C-PV6T>.

62. *See Mitchell*, 530 U.S. at 836.

the issue was always whether the Establishment Clause prevented aid that school districts or the government wanted to provide.

Then came the Roberts Court. In *Trinity Lutheran v. Comer*,⁶³ the Court confronted a provision of the Missouri Constitution prohibiting public money going to religious institutions.⁶⁴ Trinity Lutheran challenged this exclusion when it was denied an opportunity to compete for state grants to improve school playgrounds.⁶⁵ The lower courts upheld the constitutional provision which also exists in many other states.⁶⁶ Although some of these state provisions were enacted due to anti-Catholic bias in the nineteenth century, there was no evidence in the record that Missouri made its decision because of such bias.⁶⁷ Rather, the state said it was trying to further Establishment Clause values by categorically denying public money to religious organizations.⁶⁸

On the merits, the case was not easy. While most people would agree that state aid cannot go directly to the religious mission of private schools, and while most people believe that generally available public services like police and fire protection cannot be denied to religious groups simply because of their religiosity, this case falls in the middle of those easy cases. The Court ruled for the Church in an extremely narrow decision.⁶⁹ Roberts' hubris came through in two parts of the opinion.

The church did not seek actual damages but simply prospective relief that its applications be treated equally in the future with all other schools. A few months before the decision was handed down, however, the newly elected Republican Governor of Missouri announced that he was changing the state's policy.⁷⁰ In the future, he said, religious groups will be

63. 137 S. Ct. 2012 (2017).

64. *Id.* at 2017.

65. *Id.* at 2018.

66. *Id.* at 2018–19.

67. *Id.* at 2024.

68. *Id.* at 2023–24.

69. *Id.* at 2024.

70. Celeste Bott, *Greitens Instructs DNR to Consider Religious Organizations for Grants*, ST. LOUIS POST-DISPATCH (Apr. 13, 2017), <https://perma.cc/S5R5-6FGE>.

treated exactly the same as non-religious groups, which was the very relief Trinity Lutheran asked for in its complaint.⁷¹

After the Governor made his announcement, the Court asked the parties whether the case was now moot. Not surprisingly, both Church and State, now on the same side of the dispute, asked the Court to resolve the case because they wanted a formal decision striking down the state's constitutional amendment.⁷² The legal basis for their request that the Court rule on the merits was an exception to the mootness doctrine that a defendant's voluntary cessation of its allegedly illegal conduct does not necessarily moot a case.⁷³ The Court accepted that argument in a footnote and held that the "[d]epartment has not carried the 'heavy burden' of making 'absolutely clear' that it could not revert to its policy of excluding religious organizations. The parties agree."⁷⁴ The Court only cited one case for that proposition, but in that case, there was a claim for money (not true in *Trinity*),⁷⁵ and one of the parties in that case wanted the Court to dismiss it (not true in *Trinity*).⁷⁶

The Court should never have ruled on the merits in *Trinity*. Reciting the magic words "voluntary cessation of [illegal conduct] does not [necessarily] moot a case"⁷⁷ did not give the plaintiffs a personal injury that could be redressed by the Court nor did it make the claims ripe for adjudication. The state said it had no plans to resume the allegedly illegal behavior, and there was no reason to doubt that promise.⁷⁸ All the parties

71. See Lawrence Hurley, *U.S. Top Court Urged to Decide Church Case Despite State Policy Flip*, REUTERS (Apr. 18, 2017, 1:20 PM), <https://perma.cc/FQF8-F2P9>.

72. Compare Letter from David A. Cortman, Counsel for Petitioner, to the Hon. Scott S. Harris, Clerk of the Supreme Court of the United States (Apr. 18, 2017), <https://perma.cc/8YZ9-TQMT>, with Letter from D. John Sauer, Missouri Attorney General's Office, to the Hon. Scott S. Harris, Clerk of the Supreme Court of the United States (Apr. 17, 2017), <https://perma.cc/Z3HP-T7ZY>.

73. Compare Letter from David A. Cortman, *supra* note 72 at 1–2, with Letter from D. John Sauer, *supra* note 72, at 2.

74. See *Trinity Lutheran*, 137 S. Ct. at 2019 n.1.

75. See *Friends of the Earth Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 179 (2000).

76. *Id.* at 189.

77. *Id.* at 174.

78. See Letter from D. John Sauer, *supra*, note 73, at 1–2.

agreed on every issue in the case, both on the merits and on the jurisdictional question. If nothing else, Article III's requirement of a "case or controversy"⁷⁹ at a minimum requires two adverse parties arguing over something real. In this case we had two aligned parties arguing over nothing. But Roberts and the other Justices wanted to hear the case so they heard the case. In any event, the jurisdictional issues were substantial enough that Roberts, who wrote the opinion, should not have relegated them to a particularly brief footnote.

The Court ruled for the church and held that religious schools could not be categorically excluded from the grant program.⁸⁰ There is a lot to criticize in the opinion but that is not my point. The hubris comes in yet another short footnote. Perhaps to keep Justices Kagan and Breyer in the majority (the other two liberals, Ginsburg and Sotomayor dissented), or for other unrelated reasons, Justice Roberts said the following in footnote three:

This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or *other forms of discrimination*.⁸¹

This footnote is absurd. Roberts is essentially saying that the case has no precedential value. How often will the issue of playground resurfacing come up again in a church/state dispute? As Justice Gorsuch remarked in his concurrence criticizing that footnote, Supreme Court opinions are supposed to be "governed by general principles, rather than ad hoc improvisations."⁸² The limiting footnote confused commentators,⁸³ and no doubt would have confused lower courts for years to come except that, as he often does, Justice Roberts was simply playing the long game.

79. U.S. CONST. art. III, § 2, cl 1.

80. *Trinity Lutheran*, 137 S. Ct. at 2024–25.

81. *Id.* at 2024 n.3 (emphasis added).

82. *Id.* at 2026 (Gorsuch, J., concurring).

83. See Alice O'Brien, *Symposium: Playground Resurfacing Case Provides Soft Landing for State "No Aid" Provisions*, SCOTUSBLOG (June 28, 2017, 12:41 PM), <https://perma.cc/RD62-BZWD>.

A few years after the Court decided *Trinity* came *Espinoza v. Montana Department of Revenue*.⁸⁴ This case had a complicated procedural background, but the holding required governments that assist secular private secular schools to provide the same aid to private religious schools.⁸⁵ Montana argued that its exclusion of religious schools from its aid program was to promote Establishment Clause concerns.⁸⁶ The Court had previously accepted a similar argument in a prior aid case.⁸⁷ Justice Roberts rejected the argument, however, and laid down a ruling strongly favoring religious groups and casually discarding the state's interests in avoiding religious establishments.⁸⁸ He took his *Trinity* opinion and expanded it well beyond playgrounds to all kinds of aid. As the dissent recognized, the Court held:

[T]hat the Free Exercise Clause forbids a State to draw any distinction between secular and religious uses of government aid to private schools that is not required by the Establishment Clause. The majority's approach and its conclusion in this case, I fear, risk the kind of entanglement and conflict that the Religion Clauses are intended to prevent.⁸⁹

The point of these aid to religious schools cases is not necessarily to criticize *Espinoza*, though the decision is hard to justify, but rather to show that, like with voting rights, the Chief Justice had a long-term plan in mind and used narrow cases as stepping-stones to slowly unravel and then reverse well-founded and well-established constitutional doctrine. This long game strategy requires planning, smarts, and a large amount of judicial hubris.

In numerous major areas of constitutional law, Justice Roberts, acting contrary to his sworn testimony and promises at his confirmation hearing, did not act like an “umpire” enforcing

84. 140 S. Ct. 2246 (2020).

85. *Id.* at 2262.

86. *Id.* at 2260.

87. *See Locke v. Davey*, 540 U.S. 712, 725 (2003).

88. *Espinoza*, 140 S. Ct. at 2257–60.

89. *Id.* at 2281 (Breyer, J., dissenting).

rules but rather a league commissioner changing the rules.⁹⁰ His opinions dramatically changed the constitutional doctrines of freedom of speech, voting rights, equal protection, and the relationship between church and state, among many other areas. It would be one thing if Roberts conceded his role but, by talking the talk of incrementalism and umpires, he has blithely and obviously mischaracterized his role as a Supreme Court Justice. That sleight of hand, hiding unabashed judicial aggression against both state and federal laws, is not worthy of the role of Chief Justice. Nevertheless, Roberts' hubris has gone largely unnoticed even if individual decisions sparked criticism. The next section suggests why this so, and why that reason is so dangerous.

II. HUBRIS IGNORED

Legal scholars and commentators, as well as pundits and politicians, rarely discuss the Justices as people. Court watchers freely criticize opinions and doctrines (such as with the recent spate of academic criticism of the Court's "shadow docket"),⁹¹ and maybe occasionally the institution as a whole. But unlike academic and other forms of criticism of presidents, governors, senators, and a diverse array of elected officials, it is quite rare that a pattern of misbehavior by a particular Justice is the subject of public debate. For example, during his career, former Chief Justice Rehnquist was addicted to painkillers for his injured back impairing his performance,⁹² but at the time those facts were not reported. Justice Alito spoke to religious groups about his fear that "religious liberty" was in grave danger even though he knew cases implicating that perceived threat were

90. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts) ("Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role.").

91. See Steve Vladeck, "Shadow Dockets" Are Normal. *The Way SCOTUS Is Using Them Is the Problem.*, SLATE (Apr. 12, 2021, 6:09 PM), <https://perma.cc/3YC5-BFJ8>.

92. See Jack Shafer, *Rehnquist's Drug Habit*, SLATE (Sept. 9, 2005, 5:28 PM), <https://perma.cc/28Z3-FGRW>.

headed to the Court.⁹³ And Justice Kagan should have recused herself from the first Obamacare decision⁹⁴ because the Solicitor General's Office she headed litigated the case in the lower courts. But she did not recuse, and only a few critics and commentators noticed.⁹⁵

The Supreme Court of the United States is one of, if not the most, powerful judicial institutions in the world. Because we don't elect and can't fire the Justices, it is imperative that the institution be seen in a proper light and the Justices evaluated fairly and accurately. As a society, we also tend to make the Justices larger than life as they work in a huge marble palace on a hill dispensing their wisdom in written opinions and rarely, if ever, discussing their work. But the reality is that the Court is a political institution made up of former lawyers who we fund with our tax dollars and who are government officials. Criticism (or praise when deserved) from Court experts is an imperative component of our representative, constitutional democracy. Unfortunately, we tend to only criticize legal results and doctrines not the Justices themselves.

Chief Justice John Roberts is no umpire simply enforcing pre-existing rules. He is also not a judge, as this essay has shown, who takes prior law as he finds it. Instead, he is a master tactician who uses long game techniques to install his personal values into the law. Worse, he often does so through misleading statements of prior law and well-planned sound bites that play well on the news and in social media, but do not derive from constitutional text, history, or precedent. That method of deciding cases is a dangerous one and reflects judicial hubris much more than a devotion to institutionalism.

CONCLUSION

The Chief Justice of the United States Supreme Court has a unique leadership role in our country's judicial system. Unfortunately, the present Chief often bends the rules and the

93. See Eric Segall, *Judges Speaking Out: Justice Alito and Religious Liberty*, DORF ON LAW (May 20, 2017, 7:51 AM), <https://perma.cc/6UNC-MLW3>.

94. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

95. See Eric J. Segall, *Kagan and Recusal: The Story That Won't Go Away*, NAT'L REV. (Dec. 18, 2011, 4:38 PM), <https://perma.cc/564U-UZFK>.

law to achieve the outcomes he wants while maintaining that he is just following the “law.” His opinions, unlike those of former Justice Antonin Scalia, are written in a professional tone and tend to sound in doctrinal language (except for his pithy sound bites). But the reality is that, like all the Justices, the Chief is a politician who works hard to further his personal values and preferences. Those values are usually deeply conservative and often out-of-step with prior law. Ingraining those values into Supreme Court doctrine, no matter how much it distorts text, history, and precedent, is the Chief’s main ambition. And that is why hubris, not institutionalism, is the defining characteristic of Chief Justice John G. Roberts, Jr.