

Summer 2012

# Playing Well with Others - But Still Winning: Chief Justice Roberts, Precedent, and the Possibilities of a Multi-Member Court

William Araiza

*Brooklyn Law School*, [bill.araiza@brooklaw.edu](mailto:bill.araiza@brooklaw.edu)

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Administrative Law Commons](#)

---

## Recommended Citation

46 Ga. L. Rev. 1059 (2011-2012)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

## ESSAY

# PLAYING WELL WITH OTHERS—BUT STILL WINNING: CHIEF JUSTICE ROBERTS, PRECEDENT, AND THE POSSIBILITIES OF A MULTI-MEMBER COURT

*William D. Araiza\**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1060
II.	WINNING BY LOSING .....	1065
III.	WINNING ONE CASE AT A TIME .....	1068
IV.	WINNING BY REDEFINING THE PRECEDENT.....	1071
V.	THE IMPORTANCE OF INDIVIDUAL JUSTICES' VOTES AND THE LIMITS OF INDIRECTION: THE FATE OF <i>FLAST V. COHEN</i> .....	1075
	A. <i>HEIN</i> .....	1076
	B. <i>WINN</i> .....	1078
VI.	STARE DECISIS AND DOCTRINAL COHERENCE .....	1080
VII.	CONCLUSION.....	1084

---

\* Professor of Law, Brooklyn Law School. Thanks to Barry Friedman, Rick Hasen, Nelson Tebbe, and attendees at the 2010 Southeastern Association of Law Schools' constitutional law roundtable for helpful comments on a previous version of this Essay. Thanks also to Jonathan Cohen and David Shapiro for fine research assistance.

## I. INTRODUCTION

How can a judge undermine precedent while still following it? This Essay considers the methods by which Supreme Court Justices may weaken precedent without explicitly overruling cases by strategically adopting an approach to *stare decisis* that is less explicitly aggressive than their colleagues'. Adding to the literature of "stealth overruling," this Essay considers examples of such methods from Chief Justice Roberts's first five years on the Supreme Court. These examples indicate that Chief Justice Roberts knows how to engage in stealth overruling and, more broadly, how to use his colleagues' preferences to maintain a formal commitment to judicial humility while achieving jurisprudential change. As such, they reveal important insights about how Justices can operate strategically to achieve their preferences within both the opportunities and the confines inherent in a multi-judge court.

After five years, many have accused the Roberts Court of aggressively attacking precedent. No less a figure than Justice O'Connor, whose retirement marked the effective start of that Court, has expressed concern about the Roberts Court's willingness to overrule prior decisions.<sup>1</sup> Then-Judge Roberts's famous confirmation hearing analogy of judging to umpiring<sup>2</sup> and his professed respect for *stare decisis*<sup>3</sup> make for a dramatic narrative in which a nominee piously describes a humble role for judges but then, once safely confirmed, sets out with a wrecking ball.

The charge may have merit, but a short essay is not the vehicle to make that determination. Simply pointing to a few high-profile

---

<sup>1</sup> See Joan Biskupic, *Sandra Day O'Connor Says Rulings Are Being 'Dismantled,'* USA TODAY, Oct. 5, 2009, at A1 (noting that O'Connor "regrets that some of her decisions 'are being dismantled' by the current Supreme Court"); Adam Liptak, *Court Under Roberts is Most Conservative in Decades*, N.Y. TIMES, July 24, 2010, at A1 (quoting O'Connor).

<sup>2</sup> *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. 56 (2005) [hereinafter *Confirmation Hearing*] (statement of John G. Roberts, Jr., Nominee, Chief Justice of the United States Supreme Court).

<sup>3</sup> *Id.* at 158 (expressing the preference to be "known as a modest judge," which involved "respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of *stare decisis*").

overrulings, as critics sometimes do, proves little.<sup>4</sup> Rather, an in-depth examination of the issue requires considering the situations where the overruling dog did not bark—that is, where the Court could have overruled a prior case but declined to do so.<sup>5</sup> Such an investigation also calls for both historical perspective and nuance.<sup>6</sup> Reaching interesting conclusions about the Roberts Court's treatment of *stare decisis* requires that we identify a baseline of how previous Courts have treated that principle. If impressionistic conclusions based on a few dramatic examples are enough to consider the charge proven, then the Rehnquist<sup>7</sup> and Warren<sup>8</sup> Courts are presumably guilty also.

Moreover, not all overrulings are created equal. Determining the extent of the Roberts Court's alleged disregard of precedent also requires considering the importance of the precedents the Court has in fact rejected. Consider Justice White's dissent in *INS v. Chadha*.<sup>9</sup> White characterized the majority's rejection of the legislative veto as effectively striking down hundreds of statutes and eliminating a then-major feature of the modern administrative state.<sup>10</sup> *Chadha* was not a case where the Court overruled precedent. Justice White's complaint about the far-reaching nature of the Court's decision, however, reminds us that identifying judicial aggressiveness, whatever its form, requires

---

<sup>4</sup> See, e.g., Tom Goldstein, *Everything You Read About the Supreme Court is Wrong (Updated)*, SCOTUSBLOG (June 30, 2010, 5:55 PM), <http://www.scotusblog.com/2010/06/everything-you-read-about-the-supreme-court-is-wrong/#more-22491> (noting that "generalizations are often misleading or outright wrong").

<sup>5</sup> See, e.g., *Randall v. Sorrell*, 548 U.S. 230, 236 (2006) (declining to overrule *Buckley v. Valeo*, 424 U.S. 1 (1976)).

<sup>6</sup> See Orin S. Kerr, *Upholding the Law*, LEGAL AFF. 31, 34 (March/April 2003) (arguing that evaluating the Warren and Rehnquist Courts' activism by comparing the number of federal laws they struck down is misleading given the Warren Court's focus on ensuring that state governments complied with constitutional requirements).

<sup>7</sup> See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); see also Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 COLO. L. REV. 1139, 1168 (2002) (noting criticism of the Rehnquist Court's "disregard of *stare decisis*").

<sup>8</sup> See, e.g., Stephen F. Smith, *Activism As Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1112 n.215 (2002) (noting that the Warren Court overturned "scores of . . . precedents" in the criminal procedure field).

<sup>9</sup> 462 U.S. 919, 967 (1983).

<sup>10</sup> *Id.*

more than simply adding up the number of cases where the Court has acted aggressively.<sup>11</sup>

This Essay considers the Roberts Court and stare decisis from a different angle. It examines several methods by which Chief Justice Roberts arguably has used the multi-judge nature of the Supreme Court to his advantage in undermining precedent without explicitly calling for its overruling.<sup>12</sup> These examples do not prove that the Court as a whole, or the Chief Justice in particular, is bent on undoing the work of prior Courts. Instead, they illustrate the ways in which a Justice can work within the formal confines of precedent to achieve fundamentally different results, either in the short or long term.<sup>13</sup>

The methods described below depend in part on the distinction between the result a court reaches in a case and the reasoning it employs. The nature of the Supreme Court as a multi-judge court makes this distinction possible: often times, the Court may agree on a result but split sharply on its reasoning.<sup>14</sup> This opens up room for a creative Justice to undermine precedent, even as the Justice expresses reasons that appear moderate—in particular, more moderate than those who are more inclined to overrule explicitly. In so doing, the Justice may create the conditions for the ultimate rejection of that precedent, even while publicly counseling restraint—indeed, even while voting to uphold that

---

<sup>11</sup> See Kerr, *supra* note 6, at 32 (describing varied manifestations of judicial activism). For example, Professor Barry Friedman's examination of the Court's treatment of *Miranda v. Arizona*, 384 U.S. 436 (1966), makes clear that a relatively small set of Supreme Court opinions construing one precedent can impact government behavior that occurs thousands of times every day. See generally Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

<sup>12</sup> For another look at this same issue, see Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, EMORY L.J. (forthcoming 2012) (manuscript at 2–3) (on file with author), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1750398](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1750398) (discussing the various tools Supreme Court Justices use to “move the law”).

<sup>13</sup> See also *id.* (describing four ways in which the Court engages in “stealth overruling”—anticipatory overruling, invitations, time bombs, and inadvertence).

<sup>14</sup> See generally Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986) (considering some of the implications of this fact for the consistency of a multi-judge court's results and the coherence of its analysis).

precedent.<sup>15</sup> In short, this Essay considers methods by which Justices can play well with others—both those that came before (via respect for stare decisis) and current colleagues (by strategically positioning themselves among them)—and still achieve their ultimate goal.<sup>16</sup>

This Essay situates itself at the intersection of two ongoing debates about judicial behavior. The first examines the concept of stealth overruling—the practice of limiting or even eviscerating a precedent while ostensibly remaining faithful to it.<sup>17</sup> This phenomenon has become a major topic of scholarly discussion during the last five years,<sup>18</sup> as scholars have identified and analyzed examples of the Roberts Court engaging in such conduct—conduct generally thought to have resulted from the replacement of a sometimes centrist Justice O'Connor with a more reliably conservative Justice Alito.<sup>19</sup> The examples in this Essay illustrate instances where the Court or a plurality thereof arguably has engaged in such conduct.<sup>20</sup> The lessons one can draw from these examples will help shape an understanding of the stealth overruling phenomenon, and the extent to which the Roberts Court performs it.

Second, this Essay engages the debate about the implications of the Supreme Court's character as a collegial body. Scholars long have acknowledged that critiques of the Court must account for its collegial nature rather than simply treating it as a purposive

---

<sup>15</sup> See Friedman, *supra* note 11, at 1 (stating that stealth overruling allows Justices to overrule precedent without "arousing negative public opinion").

<sup>16</sup> Thus, this Essay can be understood as considering the mirror image of the question of how the collegial nature of appellate courts influences the consistency and analytical coherence of the Court's output. For a discussion of this question, see Kornhauser & Sager, *supra* note 14, at 102–15.

<sup>17</sup> Friedman, *supra* note 11, at 3 n.2.

<sup>18</sup> See, e.g., *id.* (discussing stealth overruling in the context of *Miranda v. Arizona*); Hasen, *supra* note 12, at 2–3 (describing four tools Justices use to move the law).

<sup>19</sup> Friedman, *supra* note 11, at 30.

<sup>20</sup> See *infra* Parts III–V. These are not the only examples. Among the most prominent of the others is *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007), where the Court upheld a federal abortion restriction that was largely indistinguishable from a state-law restriction struck down seven years earlier while not expressly overruling that earlier precedent. See *id.* at 170, 187–88 (Ginsburg, J., dissenting) (accusing the Court of ruling inconsistently with *Stenberg v. Carhart*, 530 U.S. 914 (2000)).

individual.<sup>21</sup> This Essay contributes to that debate by considering how Chief Justice Roberts may in certain cases strategically use his colleagues' calls for more explicit overruling of precedent as a tool in maintaining his and the Court's reputation as faithful to stare decisis while nevertheless pushing the law away from precedents.

In essence, this Essay considers how the practice of stealth overruling may be influenced by the Court's multi-judge nature. It therefore contributes to the ongoing debates about both the general implications of the Court's collegial character and the practice of stealth overruling.

Nothing in this Essay is intended to suggest that Chief Justice Roberts is in fact pursuing a strategy of stealth overruling or manipulating his position on a multi-member court. A judge's subjective motives are exceptionally difficult to discern, and to make confident assessments of what a Justice or a Court is doing requires far deeper investigation than this short space will permit. Instead, the examples below merely illustrate the strategies a judge in Chief Justice Roberts's position can employ.<sup>22</sup> Still, the extent to which one finds the Chief Justice engaging in the strategies sketched below might serve as circumstantial evidence of his ultimate motives. More generally, identifying the methods illustrated below may assist in the larger project of assessing whether the Roberts Court is guilty as charged of engaging in these tactics. Finally, as stated earlier, this investigation helps illuminate how the multi-judge nature of the Court opens up such possibilities for "playing well" while still winning.

---

<sup>21</sup> See, e.g., Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 804 (1982) ("[T]he Justices believe that a show of agreement is beneficial to the institution . . . and collegial work and compromise are essential to the ability of the Justices to agree."); Kornhauser & Sager, *supra* note 16, at 99 n.24 (recognizing the collegiality of the Court as a significant factor in granting or denying certiorari, and in deliberations concerning an accepted case); see also Friedman, *supra* note 11, at 32–33 (considering whether the value of collegial decision making justifies the Court's practice of stealth overruling).

<sup>22</sup> This Essay does not address whether Chief Justice Roberts's formal position as leader of the Court provides him with additional means of accomplishing this goal. Further study likely should continue on this subject. See *infra* Part VII (suggesting further areas for study).

## II. WINNING BY LOSING

One way to subtly push law away from current precedent is to concede the likely error of that precedent but conclude that prudential factors counsel against overruling—at least right away. Chief Justice Roberts used this method in *Rothgery v. Gillespie County*,<sup>23</sup> a case that considered the question of when in the criminal justice process the Sixth Amendment right to counsel attaches.<sup>24</sup> Justice Souter, writing for eight Justices, concluded that the right attaches when defendants first appear before a judicial officer, they learn of the charge against them, and their liberty is subject to restriction.<sup>25</sup> He based this conclusion on analysis of Supreme Court precedent as well as the practice of the vast majority of states to provide criminal defense counsel at approximately that point in the process.<sup>26</sup>

Justice Thomas dissented.<sup>27</sup> He concluded that the original understanding of the term “criminal prosecutions” as used in the Sixth Amendment referred to the “filing [of] formal charges in a court with jurisdiction to try and punish the defendant.”<sup>28</sup> He dismissed the Supreme Court precedents relied on by the majority as not fully reasoned and providing only dicta on the precise issue before the Court.<sup>29</sup>

So far this description presents a fairly standard story of a modern Supreme Court constitutional case: one opinion relies on precedent while another discounts the significance of the precedent and uses originalist analysis to reach a different conclusion. What is interesting for this Essay is Chief Justice Roberts’s separate concurrence, particularly the first paragraph of his brief, two-paragraph opinion: “Justice Thomas’s analysis of the present issue is compelling, but I believe the result here is

---

<sup>23</sup> 554 U.S. 191 (2008).

<sup>24</sup> *Id.* at 194–95; see U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

<sup>25</sup> See *Rothgery*, 554 U.S. at 213.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 218.

<sup>28</sup> *Id.* at 223.

<sup>29</sup> *Id.* at 228–36.



controlled by [the cases relied on by Justice Souter]. A sufficient case has not been made for revisiting those precedents, and accordingly I join the Court's opinion."<sup>30</sup>

In one sense, the Chief Justice's approach is a paragon of modesty: even if a precedent is wrong—as he suggested<sup>31</sup>—the wiser course is not to revisit it unless “a sufficient case” has been made for doing so.<sup>32</sup> Still, one can be forgiven for being suspicious. Rather than simply finding an insufficient case to overrule, Chief Justice Roberts all but stated that the dissent was correct but that other, presumably prudential, reasons counseled against applying that “compelling”<sup>33</sup> understanding of the law. With one stroke, the Chief Justice both reaffirmed and undermined precedent.<sup>34</sup>

Will this approach have a material effect on the *Rothgery* rule? Predictions, of course, are hazardous. But it seems plausible that the Chief Justice's concurrence, by announcing that *Rothgery* was correct only by dint of stare decisis rather than its intrinsic merit, will place more pressure on the rule. Surely it suggests a view

---

<sup>30</sup> *Id.* at 213.

<sup>31</sup> The Chief Justice's concurrence can be read more charitably: On the merits he did not believe the precedents supporting the *Rothgery* majority opinion to be wrong. This seems unlikely, however, unless those precedents and Justice Thomas's “compelling” analysis of “the present issue” are somehow both right in the Chief Justice's mind. *Id.* Thanks to Nelson Tebbe for suggesting this possibility.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 213.

<sup>34</sup> One might compare this approach to that taken by Justices O'Connor, Kennedy, and Souter in their joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In that case, in the course of reaffirming what those Justices called “the essential holding” of *Roe v. Wade*, *id.* at 846, the authors hedged on their views as to *Roe*'s correctness. *Id.* at 853 (“While we appreciate the weight of the arguments made on behalf of the State in the case before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by . . . the force of stare decisis[, among other factors].”). Of course, two of the three authors already had expressed their discomfort—to put it mildly—with *Roe*. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 521 (1989) (Kennedy, J., joining in the judgment) (modifying and narrowing *Roe*'s reach); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (warning that the “*Roe* framework . . . is clearly on a collision course with itself”). But that is exactly the point. Rather than openly disagree with a precedent they were reaffirming for reasons of stare decisis, they instead demurred, even though two of the authors' views on the underlying precedent were already more than an open secret. By contrast, Chief Justice Roberts's concurrence in *Rothgery* nearly explicitly embraced the dissent.

that *Rothgery* and its precedent cases should not be expanded. If such a view attracts additional adherents, the accumulation of precedents refusing to extend *Rothgery* to new circumstances inevitably will raise the question whether those new cases effectively have overruled the old ones or, at the very least, have eroded them to the point of rendering stare decisis a less weighty consideration when deciding whether to overrule them.

This would be a long-term process. But when Justice Thomas's analysis could not attract five votes, such incremental undermining may have been the most efficient use of the Chief Justice's prestige, especially given his desire to avoid being seen as aggressively calling for the overruling of precedent.<sup>35</sup> Indeed, as suggested above, the combination of his overt attack on the correctness of the majority's reasoning and his adoption of it only as a matter of stare decisis presumably increases his credibility as a modest jurist.<sup>36</sup> At the same time, his strategy invites future litigants to suggest cabining the *Rothgery* precedent, thereby isolating and ultimately undermining it. If this dynamic eventually leads to a situation where *Rothgery* is not extended, and thus evolves into an aberration, then the way would be clear for the Chief Justice to justify overruling in pursuit of the larger doctrinal coherence he openly has elevated, at least in some cases, over stare decisis.<sup>37</sup>

---

<sup>35</sup> See *Confirmation Hearing*, *supra* note 3, at 158.

<sup>36</sup> Another example of Chief Justice Roberts claiming credibility as a modest jurist can be seen in his concurrence in *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010), which was devoted to the stare decisis issues implicated in the Court's decision to overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and part of *McConnell v. FEC*, 540 U.S. 93 (2003). In his defense of the Court's decision, Chief Justice Roberts cited the Court's decision, the previous term, to refrain from striking down the Voting Rights Act in favor of adopting a more limited reading of the statute that provided relief to the plaintiff. See *Citizens United*, 130 S. Ct. at 918 (Roberts, C.J., concurring) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2508 (2009)). One can read the Chief Justice's *Citizens United* concurrence as arguing that the Court's approach in *NAMUDNO* demonstrates that the current Court does not instinctively adopt the most extreme approach to deciding cases.

<sup>37</sup> See *Citizens United*, 130 S. Ct. at 917, 920–21 (Roberts, C.J., concurring) (“[W]e must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*.”); *id.* at 921 (“Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law’s coherence and curtail the

## III. WINNING ONE CASE AT A TIME

As exemplified in *Rothgery*, one approach for a Justice inclined to undermine precedent without doing so explicitly is to concede the correctness of the revisionist view while counseling prudence. Another way, at least in some cases, is to respect precedent governing the facial constitutionality of a statute but to interpret it so that it does little practical work. Chief Justice Roberts adopted such an approach in *FEC v. Wisconsin Right to Life (WRTL II)*.<sup>38</sup> *WRTL II* considered an as-applied challenge to section 203 of the Bipartisan Campaign Finance Reform Act of 2002. Section 203 restricts corporations' and unions' use of their general treasury funds to pay for political advertisements immediately before elections if those ads could be understood as appeals to vote for or against a particular electoral candidate.<sup>39</sup> In the 2003 case of *McConnell v. FEC*,<sup>40</sup> the Court upheld the facial validity of section 203 against a First Amendment challenge.<sup>41</sup> After *McConnell*, and prior to *WRTL II*, however, the Court held that would-be speakers could mount as-applied challenges to section 203.<sup>42</sup>

*WRTL II* considered such an as-applied challenge and sustained it on a 5-to-4 vote.<sup>43</sup> The four dissenters were the still-active Justices who had voted in *McConnell* to uphold the facial validity of section 203.<sup>44</sup> Of the five Justices in the majority, three—Scalia, Kennedy, and Thomas—had dissented from *McConnell*'s facial upholding of section 203.<sup>45</sup> In *WRTL II* these three Justices would have overruled that part of *McConnell* and struck down section

---

precedent's disruptive effects."). See also *infra* Part V (discussing Chief Justice Roberts's possible preference for high-level doctrinal coherence).

<sup>38</sup> 551 U.S. 449 (2007).

<sup>39</sup> *Id.* at 455–57.

<sup>40</sup> 540 U.S. 93 (2003).

<sup>41</sup> *Id.* at 209.

<sup>42</sup> *Wis. Right to Life v. FEC (WRTL I)*, 546 U.S. 410, 412 (2006).

<sup>43</sup> *WRTL II*, 551 U.S. at 454–57.

<sup>44</sup> *Id.* at 483; *McConnell*, 540 U.S. at 110–11. The fifth member of the *McConnell* majority was Justice O'Connor, who had retired by the time *WRTL II* was decided. *McConnell*, 540 U.S. at 110–11.

<sup>45</sup> *Id.*

203 as unconstitutional on its face.<sup>46</sup> This lineup left the two Justices who joined the Court after *McConnell*—Roberts and Alito—in the middle. Chief Justice Roberts wrote the lead opinion, in the relevant parts of which only Justice Alito joined.<sup>47</sup> That opinion interpreted the ad in question as not analogous to the type of ad that *McConnell* held could constitutionally be regulated.<sup>48</sup> In other words, Chief Justice Roberts construed *McConnell*'s application of section 203 to cover a relatively narrow set of ads. Thus, he was able to rule for the speaker without having to reconsider *McConnell*.<sup>49</sup>

The Chief Justice's analysis is hard to credit. Both Justice Souter, writing for the dissenters, and Justice Scalia, writing for the Justices concurring in the judgment, rightly criticized his reading of *McConnell*.<sup>50</sup> But his analysis paid dividends. First, his seemingly moderate, cautious approach arguably preserved nothing but the shell of *McConnell* by interpreting its favorable verdict on section 203 such that it regulated very few ads. Indeed, in the wake of *Citizens United v. FEC*, the case that delivered the formal *coup de grace* to restrictions on corporate political speech, some scholars observed that the real overruling of *McConnell* occurred in *WRTL II*.<sup>51</sup>

Second, to the extent that his explanation of what ads come within section 203's restrictions was itself so vague as to chill

---

<sup>46</sup> *WRTL II*, 551 U.S. at 483, 499–500 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in part and concurring in the judgment).

<sup>47</sup> *Id.* at 454.

<sup>48</sup> *Id.* at 464–70.

<sup>49</sup> This approach required the Chief Justice to consider whether the ads in question could be regulated as a consequence of an application of section 203 broader than *McConnell*'s. Applying strict scrutiny because this was political speech, he concluded that the Constitution did not permit that regulation. *Id.*

<sup>50</sup> *Id.* at 498 n.7 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 525–27 (Souter, J., dissenting).

<sup>51</sup> See, e.g., Friedman, *supra* note 11, at 11 (“[I]t was almost impossible to maintain that the holding of *McConnell* had any force after *WRTL*.”); *id.* at 31 (“*WRTL* gutted *McConnell*, leaving nothing but the burial.”); see also *WRTL II*, 551 U.S. at 504 (Souter, J., dissenting) (arguing that *WRTL II* “effectively” overruled *McConnell*); Richard Hasen, *What the Court Did—And Why*, AM. INT. (July/August 2010), available at <http://www.the-american-interest.com/article-bd.cfm?piece=853> (suggesting that “[i]t is easy to both overstate and understate the importance of *Citizens United*” in light of *WRTL II*).

protected speech,<sup>52</sup> the Chief Justice's analysis arguably included a built-in self-destruct button that eventually could have brought down section 203 as part of the collateral damage. Justice Scalia argued that the Chief Justice's interpretation of Section 203 would impermissibly chill speech.<sup>53</sup> Justice Alito recognized this in his own concurring opinion, in which he all but invited a facial challenge to section 203 as newly interpreted.<sup>54</sup> In embracing an interpretation that experience may have proved to be unworkable,<sup>55</sup> thus requiring reconsideration of section 203's facial validity, Chief Justice Roberts arguably started the timer on that self-destruct button.<sup>56</sup> As with *Rothgery*, the picture presented to the world was of a careful, prudent treatment of precedent in contrast to other Justices' more explicit call for overruling. But again as with *Rothgery*, the Chief Justice's approach all but invited attack on that precedent.

Of course, we know now how the story turned out. In *Citizens United* the Court declined to rely on narrower grounds to vindicate what even the dissent called the group's "substantial" First Amendment challenge.<sup>57</sup> Rather, it simply overruled *McConnell* and the precedent on which it relied.<sup>58</sup> In essence, if the Chief Justice did intend to insert a time bomb in *WRTL II*, the bomb

---

<sup>52</sup> Justice Scalia made this argument. *WRTL II*, 551 U.S. at 483, 492–93 (Scalia, J., concurring in part and concurring in the judgment).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 482–83 (Alito, J., concurring). This type of opinion can be understood as a species of the "invitations to overrule" Professor Rick Hasen identifies as one of the ways Justices can move the law without doing so explicitly. Hasen, *supra* note 12, at 6.

<sup>55</sup> The locution "may have proved" is required because, as events developed, the Court moved forthrightly to confront *McConnell*. See *infra* notes 57–59 and accompanying text.

<sup>56</sup> The metaphor of a "self-destruct button" or "time bomb" as used here is distinct from Hasen's. Hasen, *supra* note 12, at 10–12 (explaining his concept of "time bombs" as seemingly innocuous language in an opinion that later can be used to move the law in the author's desired direction). For another take on the same basic idea—that *WRTL II* created a system that was likely to fail constitutional requirements, thus setting the stage for striking down the entire system—see Friedman, *supra* note 11, at 31–32 (explaining how in *Citizens United* the Court noted the complexity of the FEC's regulations as a factor in striking down the underlying statute even though the FEC's rules arose in response to the Court's *WRTL II* analysis).

<sup>57</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 929, 938 (Stevens, J., dissenting).

<sup>58</sup> *Id.* at 913.

never had a chance to explode.<sup>59</sup> The speech in *Citizens United* was so clearly an exhortation to vote against Hillary Clinton that any perceived vagueness or chill inherent in the Chief Justice's *WRTL II* formula was simply irrelevant to the analysis.<sup>60</sup> Rather, the speech in *Citizens United* so clearly advocated a candidate's defeat that the question was squarely posed whether such speech could be constitutionally restricted.<sup>61</sup> The stark facts of *Citizens United* rendered moot any claim that the Chief Justice's vague interpretation of section 203 in *WRTL II* unconstitutionally chilled protected speech.

Still, what remains relevant for purposes of this Essay is that the Chief Justice's statutory interpretation strategy in *WRTL II* arguably undermined *McConnell* without overruling it explicitly. Moreover, by offering an interpretation of section 203 that was susceptible to claims that the interpretation was too vague to constitutionally restrict speech, he may have written a roadmap for explicitly overruling *McConnell* in a future case. Of course, as noted above, while the Court in *Citizens United* soon thereafter overruled *McConnell*, it did not do so as the culmination of this supposed strategy. Still, speculation about the Chief's strategy in *WRTL II* reveals another way in which a Justice can undermine precedent without overruling it directly, particularly when a colleague has called for such a direct overruling.

#### IV. WINNING BY REDEFINING THE PRECEDENT

A competent judge cannot simply deny the existence of undesirable precedent, but he can recast it so that, newly understood, it does not stand in the way of the judge's preferred outcome. Chief Justice Roberts arguably managed this feat at two points in the September 2009 reargument in *Citizens United*. First, consider his colloquy with then-Solicitor General Elena Kagan

---

<sup>59</sup> See *supra* note 56 and accompanying text.

<sup>60</sup> See *supra* notes 52–53 and accompanying text.

<sup>61</sup> Of course, it must be noted that the *Citizens United* Court had available to it several avenues to rule for the would-be speaker on narrower grounds. *Citizens United*, 130 S. Ct. at 888–96 (rejecting these narrower grounds); see also *id.* at 936–38 (Stevens, J., dissenting) (arguing that the Court should have resolved the case on those narrower grounds).

about the reasoning in *Austin v. Michigan Chamber of Commerce*,<sup>62</sup> a key precedent the FEC relied on in the *Citizens United* litigation.<sup>63</sup>

CHIEF JUSTICE ROBERTS: Counsel, what do you - what do you understand to be the compelling interest that the Court articulated in *Austin*?

GENERAL KAGAN: I think that what the Court articulated in *Austin* -- and, of course, in the government briefs we have suggested that *Austin* did not articulate what we believe to be the strongest compelling interest, which is the anticorruption interest. But what the Court articulated in *Austin* was essentially a concern about corporations using the corporate form to appropriate other people's money for expressive purposes.

CHIEF JUSTICE ROBERTS: Right. So but you -- you have more or less -- "abandoned" is too strong a word, but as you say you have relied on a different interest, the quid pro quo corruption. And you -- you articulate on page 11 of your brief -- you recognize that this Court has not accepted that interest as a compelling interest.

So isn't it the case that as you view *Austin* it is kind of up for play in the sense that you would ground it on an interest that the Court has never recognized?<sup>64</sup>

As election law expert Professor Rick Hasen observed regarding this exchange, "[o]ne could almost hear the gears turning in the Chief Justice's head, as he got the government basically to admit it was abandoning the *Austin* distortion argument and relying on

---

<sup>62</sup> 494 U.S. 652 (1990).

<sup>63</sup> 130 S. Ct. at 903 (addressing the FEC's contention that two compelling interests support *Austin*'s affirmation of corporate speech restrictions).

<sup>64</sup> Transcript of Oral Argument at 45–46, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205) [hereinafter Oral Argument] (emphasis added).

two new arguments which had never been accepted by the Court in the context of independent corporate spending . . . .”<sup>65</sup>

At another point in the oral argument Chief Justice Roberts was even more abrupt. Much of the discussion of precedent had centered on whether the Court in *First National Bank of Boston v. Bellotti*<sup>66</sup> had stated that elections were sufficiently different from referendums with regard to their potential for corruption that Congress could regulate corporate contributions to influence the former, even if it could not restrict contributions to referendum campaigns.<sup>67</sup> Consider the following discussion on this point between Justice Stevens, defending this reading of *Bellotti*, Theodore B. Olson, counsel for Citizens United,<sup>68</sup> Justice Scalia, and the Chief Justice:

JUSTICE STEVENS: [*Bellotti*] more than said we are not deciding [the acceptability of limits on corporate contributions to electoral campaigns]. It said [referendum campaigns and electoral campaigns] are entirely different situations. You read that long footnote which has been cited six or eight times by our later cases.

MR. OLSON: Yes. And I also read the footnote 14 in the *Bellotti* case that cited case after case after case that said corporations had rights, protected rights under the First Amendment. I am not disagreeing with what you just said, Justice Stevens. The Court said it was -- it was dicta, because the Court did not deal with --

JUSTICE STEVENS: But it has been repeated -- that footnote has been repeatedly cited in subsequent cases, most of which were unanimous.

---

<sup>65</sup> Rick Hasen, *Initial Thoughts on the Re-Argument in Citizens United*, ELECTION LAW BLOG (Sept. 9, 2009, 10:51 AM), <http://electionlawblog.org/archives/014401.html> (emphasis added).

<sup>66</sup> 435 U.S. 765 (1978).

<sup>67</sup> See, e.g., Oral Argument, *supra* note 64, at 16–18 (discussing significance of *Bellotti* holding).

<sup>68</sup> *Citizens United*, 130 S. Ct. at 886.



MR. OLSON: Well, because it was -- and I agree the *Bellotti* Court was not discussing that. But [t]he *Bellotti* Court --

JUSTICE STEVENS: It did discuss it precisely in that footnote and it said it's a different case.

MR. OLSON: I understand and I don't disagree with what you have just said, Justice Stevens.

JUSTICE SCALIA: It didn't say it would come out differently. It just said, we're not deciding that case, right?

MR. OLSON: That -- that is -- that's the point I'm trying to make.

JUSTICE SCALIA: I don't mind citing that. *Bellotti* didn't decide that.

MR. OLSON: What *Bellotti* also said is -- and I think this is also in many decisions of this Court -- the inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.

CHIEF JUSTICE ROBERTS: Now that we've cleared up that *Bellotti* didn't decide the question, what is the distinction that -- why don't you think that distinction makes sense?<sup>69</sup>

With Justice Scalia's assistance, Chief Justice Roberts effectively shut down the discussion about whether *Bellotti* had decided Congress's authority to regulate corporate spending on electoral campaigns. Having dispensed with the possibility of precedent constraining his choice, the Chief Justice was ready, as the last few words of the excerpt indicate, to argue against such restrictions.

Though one should not make too much of oral arguments, one can sometimes discern Justices' thought processes as they work through a series of questions with an advocate.<sup>70</sup> Here, one gets the

---

<sup>69</sup> Oral Argument, *supra* note 64, at 16-18 (emphasis added).

<sup>70</sup> See Hasen, *supra* note 65 (basing conclusions of how each Justice would vote on the oral argument questions).

sense that the Chief Justice was working his way through unfavorable precedent by either cornering the advocate into a position where the precedent does not stand in his way<sup>71</sup> or simply by decreeing the dispute about precedent to be settled in his favor.<sup>72</sup>

In *Citizens United*, the Chief Justice's plantings bore fruit in Justice Kennedy's opinion for the Court. Justice Kennedy relied on the first of these exchanges to undermine *Austin*.<sup>73</sup> In addition, the opinion tracked the view of *Bellotti*'s key footnote in the way proposed by Justice Scalia and Chief Justice Roberts in the second of these exchanges.<sup>74</sup> Thus, one can see the oral argument questioning as potentially aimed at pointing the way for a colleague's later analysis expressly discrediting undesirable precedent.<sup>75</sup>

#### V. THE IMPORTANCE OF INDIVIDUAL JUSTICES' VOTES AND THE LIMITS OF INDIRECTION: THE FATE OF *FLAST V. COHEN*

*Rothgery* and *WRTL II* suggest how a Justice inclined to surreptitiously undermine precedent can do so by exploiting the distinction between results and rationales.<sup>76</sup> Ultimately, however, the success of any such strategy requires support—or at least acquiescence—from four other Justices. This basic fact is reflected in two recent cases considering how broadly to read the Court's limited allowance of taxpayer standing in *Flast v. Cohen*:<sup>77</sup> *Hein v. Freedom From Religion Foundation*<sup>78</sup> and *Arizona Christian School Tuition Organization v. Winn*.<sup>79</sup>

<sup>71</sup> Oral Argument, *supra* note 64, at 45–46 (discussing *Austin* with then-Solicitor General Kagan).

<sup>72</sup> *Id.* at 16–18 (foreclosing the discussion of *Bellotti*).

<sup>73</sup> *Citizens United*, 130 S. Ct. at 904 (citing oral argument transcript).

<sup>74</sup> *Id.* at 909 (“A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption.” (emphasis added)).

<sup>75</sup> Cf. TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 2 (2004) (arguing that “Supreme Court Justices use oral arguments as an information-gathering tool to help them make substantive legal and policy decisions as close as possible to their preferred outcomes”).

<sup>76</sup> See *supra* Parts II–III.

<sup>77</sup> See 392 U.S. 83, 105–06 (1968) (allowing taxpayers to sue when they allege that government expenditures violate the Establishment Clause).

<sup>78</sup> 551 U.S. 587 (2007).

<sup>79</sup> 131 S. Ct. 1436 (2011).

A. *HEIN*

In *Hein*, a five-Justice majority held that a plaintiff suing as a taxpayer lacked standing to challenge Executive Branch actions that allegedly violated the Establishment Clause.<sup>80</sup> In so doing, *Hein* refused to apply *Flast*'s Establishment Clause exception to the rule against taxpayer standing.<sup>81</sup> However, the Court split sharply in its reasoning. Writing the lead opinion for a plurality of himself, Chief Justice Roberts, and Justice Kennedy, Justice Alito agreed that the plaintiff lacked standing.<sup>82</sup> He merely distinguished *Flast*, however; he did not overrule it.<sup>83</sup> Justice Alito concluded that *Flast* controlled only when the plaintiff challenged a direct congressional appropriation of money for the activity alleged to constitute a religious establishment, as opposed to the general congressional appropriation for Executive Branch activities challenged in *Hein*.<sup>84</sup>

As with the Chief Justice's reading of *McConnell* in *WRTL II*,<sup>85</sup> Justice Alito's constitutional analysis in *Hein* attracted fire from both sides. Justice Scalia, joined by Justice Thomas, agreed with the plurality's conclusion that the plaintiffs lacked standing.<sup>86</sup> He also agreed, however, with the four dissenters that *Flast* controlled the plaintiffs' standing claim.<sup>87</sup> Unlike the dissenters, though, he would have overruled *Flast*.<sup>88</sup> Writing for the four dissenters, Justice Souter would have reaffirmed *Flast* and applied it to the *Hein* plaintiffs' claim.<sup>89</sup> But both he and Justice Scalia agreed in their critique of Justice Alito's attempt to distinguish *Flast*.

---

<sup>80</sup> 551 U.S. at 593 (plurality opinion); *id.* at 618 (Scalia, J., concurring in the judgment).

<sup>81</sup> *Id.* at 593 (plurality opinion).

<sup>82</sup> *Id.* at 592–93.

<sup>83</sup> *Id.* at 603–05.

<sup>84</sup> *See id.* (noting that the *Hein* expenditures “resulted from executive discretion, not congressional action”).

<sup>85</sup> *See supra* Part III.

<sup>86</sup> 551 U.S. at 618 (Scalia, J., concurring in the judgment).

<sup>87</sup> *Id.* at 628–31 (Scalia, J., concurring in the judgment); *see also id.* at 643 (Souter, J., dissenting) (noting that the dissenters “see no basis for [distinguishing *Flast*] in either logic or precedent”).

<sup>88</sup> *Id.* at 637 (Scalia, J., concurring in the judgment) (“*Flast* should be overruled.”). *Cf. id.* at 637 (Souter, J., dissenting).

<sup>89</sup> *Id.*

What *Hein* adds to this Essay's discussion of precedent and multi-judge court dynamics is the importance of an individual Justice's views—in this case, the views of Justice Kennedy. In *Hein*, Kennedy performed his well-known role as the swing Justice by joining Justice Alito's plurality opinion<sup>90</sup> but also writing separately.<sup>91</sup> In a crucial departure from Justice Alito's analysis, Justice Kennedy explicitly stated that he agreed with *Flast*.<sup>92</sup> Thus, five Justices in *Hein*—Justice Kennedy and the four dissenters<sup>93</sup>—explicitly reaffirmed the precedent case.

Justice Kennedy's actions in *Hein* remind us that as much as the results/rationale distinction allows for the incremental undermining of precedent, creativity has its limits. In *Hein*, Justice Alito did everything right if his goal was to perform the same maneuver that Chief Justice Roberts performed in *Rothgery* and *WRTL II*.<sup>94</sup> He wrote what seems to be a moderate, cautious opinion, and refused the temptation to join Justice Scalia in calling for *Flast*'s overruling. He used the language of restraint; indeed, he even went further than Chief Justice Roberts did in *Rothgery*<sup>95</sup> to avoid criticizing the opinion he was declining to overrule.<sup>96</sup> Notably, he discussed the separation of powers facet of the issue that Justice Kennedy focused on in his concurrence.<sup>97</sup> Indeed, Justice Alito's placement of this argument toward the end of his own case in chief<sup>98</sup> and its arguably odd fit in the flow of his analysis suggest that the argument might have been inserted to address Justice Kennedy's concerns.

---

<sup>90</sup> *Id.* at 593 (plurality opinion).

<sup>91</sup> *Id.* at 615 (Kennedy, J., concurring).

<sup>92</sup> *Id.* at 616 ("In my view the result reached in *Flast* is correct and should not be called into question.").

<sup>93</sup> *Id.* at 637 (Souter, J., dissenting).

<sup>94</sup> See *supra* Parts II–III.

<sup>95</sup> See *supra* Part II.

<sup>96</sup> 551 U.S. at 614 (plurality opinion) ("Over the years, *Flast* has been defended by some and criticized by others. But the present case does not require us to reconsider that precedent.").

<sup>97</sup> See *id.* at 611–12 (noting "serious separation-of-powers concerns"); *id.* at 615–18 (Kennedy, J., concurring).

<sup>98</sup> By "case-in-chief," I simply mean Justice Alito's own analysis, which he offered before considering (and rejecting) the lower courts' and the plaintiffs' arguments in favor of applying *Flast*.

Nevertheless, none of this was enough to convince Justice Kennedy to remain agnostic as to *Flast*. Instead, Justice Kennedy explicitly agreed with the four dissenters in reaffirming *Flast*'s correctness, and thereby frustrated most of the work Justice Alito's opinion might have accomplished in gradually undermining it as precedent.<sup>99</sup> This fact suggests that artful writing and concealed self-destruct buttons, even when combined with professions of caution and respect for precedent, cannot stop a Justice from simply stating his own view of the law as Justice Kennedy did when he reaffirmed *Flast*. When that Justice is the fifth vote for reaffirming a precedent, no amount of artfulness can overcome the brute force of what Justice Brennan called "the rule of five."<sup>100</sup>

The fundamental independence of each Justice therefore stands as a limit on any Justice's—even a clever Chief Justice's—attempts to subtly push law where four of his colleagues do not want it to go. Thus, a Justice's ability to undermine precedent turns only partly on creative drafting; in addition, it turns on the preferences of the other Justices, and in most high-profile cases, on Justice Kennedy in particular.

#### B. WINN

If more proof was needed of the last statement, the Court provided it in 2011 in yet another case cutting back on *Flast*. In *Winn*, the Court held that a plaintiff taxpayer lacked standing under *Flast* to challenge Arizona's provision of tax credits for contributions to organizations that provided scholarships to religious schools.<sup>101</sup> While *Winn* essentially featured the same

---

<sup>99</sup> *Id.* at 616; *id.* at 637 (Souter, J., dissenting). To the extent the very result in *Hein* comes to be seen as inconsistent with *Flast*, *Hein* may still end up undermining *Flast*. But Justice Kennedy's explicit approval of *Flast* presumably will slow that process down.

<sup>100</sup> Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763 (1995); see also Friedman, *supra* note 11, at 32–33 ("The 'committee' explanation [*i.e.*, the fact that the Court is a multi-judge body] does not justify stealth overruling . . . because in each case it is possible to separate the Court majority into the actions of individual Justices. Each Justice has a choice: either vote to overrule explicitly or not. In any given case, the question is whether an individual Justice's decision to overrule by stealth was appropriate.").

<sup>101</sup> *Az. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1440 (2011).

voting lineup as *Hein*,<sup>102</sup> the majority was not as fractured. In *Winn*, all the Justices voting to deny standing joined the majority opinion written by Justice Kennedy.<sup>103</sup>

Justice Kennedy distinguished, for standing purposes, between the Arizona tax credit and the direct government appropriation that *Flast* allowed a taxpayer to challenge.<sup>104</sup> According to him, the difference between a tax credit and a direct appropriation mattered for standing purposes because the underlying Establishment Clause principle vindicated by "*Flast* standing" centered on government exactions from citizens to fund religion, which is absent in a tax credit provision.<sup>105</sup> Justice Kennedy signaled early on his intent to distinguish *Flast*. Immediately after citing that case, he hastened to "note[ ] at the outset" that "*Flast*'s holding provides a 'narrow exception' to 'the general rule against taxpayer standing.'" <sup>106</sup>

For the purposes of this Essay, the important part of Justice Kennedy's analysis is his treatment of precedent. Writing for the four dissenters, Justice Kagan argued that the majority's analysis effectively overruled five Supreme Court cases in which the Court had proceeded to the merits of a taxpayer's Establishment Clause suit.<sup>107</sup> In response to Justice Kennedy's argument that the Court should not be bound by resolutions of issues (such as standing) that it did not explicitly address,<sup>108</sup> Justice Kagan argued that those five opinions should not be understood as having left the standing issue undecided.<sup>109</sup> She pointed out that the Court subsequently cited some of those cases as authority for standing

---

<sup>102</sup> *Id.* at 1439. In *Winn*, Justices Sotomayor and Kagan had replaced, respectively, Justices Souter and Stevens but voted in the same way as their predecessors. *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1447.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1445 (internal citations omitted).

<sup>107</sup> *Id.* at 1453–54 (Kagan, J., dissenting) (noting that the Court did not question the litigants' standing in any of these five prior cases "filed by taxpayers alleging that tax expenditures unlawfully subsidized religion").

<sup>108</sup> *Id.* at 1448–49.

<sup>109</sup> *Id.* at 1454–55 ("[T]he decisions on their face reflect the Court's recognition of what gave the plaintiffs standing . . .").

doctrine.<sup>110</sup> Justice Kagan also questioned the credibility of any claim that the Court was unaware of the standing issues in those cases, noting that amici in each of those five cases (including the U.S. Government) had suggested a lack of standing<sup>111</sup> and further pointing out that the Court decided three of those cases within a year of deciding another important taxpayer standing case.<sup>112</sup> She also reversed the majority's presumption about the force of an implicit jurisdictional decision, arguing that "the Court should not 'disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years.'"<sup>113</sup>

Regardless of the ultimate merits of Justice Kagan's allegation that the majority misused precedent, one can still question the breeziness with which Justice Kennedy pushed past those cases. If nothing else, reasoned decision making would seem to demand a more thoughtful and specific response to Justice Kagan's criticisms. Justice Kennedy's treatment of precedent in *Winn* reveals the flip side of the lesson gleaned from *Hein*: Just as the rule of five may frustrate careful—and possibly calculated—attempts to undermine precedent if the author cannot obtain the fifth vote,<sup>114</sup> the same rule gives license to a Justice to run roughshod over that precedent if the Justice is confident of obtaining the fifth vote—or if, as in *Winn*, the author is the fifth vote.<sup>115</sup>

## VI. STARE DECISIS AND DOCTRINAL COHERENCE

Of the cases discussed above, *Citizens United* features the deepest discussions of stare decisis. A potentially revealing feature about that case is that both Justice Kennedy's majority opinion and Chief Justice Roberts's concurrence centered their discussions of stare decisis on the importance of large-scale doctrinal coherence. Justice Kennedy wove a doctrinal tapestry comprised largely of

---

<sup>110</sup> See *id.* at 1455.

<sup>111</sup> *Id.* at 1454 & n.5.

<sup>112</sup> *Id.* at 1454.

<sup>113</sup> *Id.* at 1455 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962)).

<sup>114</sup> See *supra* text accompanying notes 91–100.

<sup>115</sup> Justice Kennedy's opinion was joined in full by four other members of the Court. *Winn*, 131 S. Ct. at 1439.

dissenting opinions<sup>116</sup> and made some heroic assumptions in characterizing prohibitions on identity-based speech restrictions as a well-established First Amendment rule.<sup>117</sup> He also worked hard to force empirical reality to conform to his constitutional vision, asserting, without support, that unlimited corporate expenditures would not cause the electorate to lose faith in democracy.<sup>118</sup>

As scholars have observed, the coherence Justice Kennedy labored so hard to create is a fragile one.<sup>119</sup> Does free speech protection extend to expenditures by foreigners? It is hard to see why not. Under Justice Kennedy's view, more speech simply makes for a more informed electorate and disclosure rules allow citizens to discount speech if they distrust the source.<sup>120</sup> Does free speech protection extend to expenditures made on behalf of judicial candidates? Apparently it does, even though the Court—led by Justice Kennedy himself—held the previous year that the resulting perception of bias was so great that due process required a judge to recuse himself from a case involving a large supporter.<sup>121</sup> These issues will have to be resolved in the future. For now, the important point is that Justice Kennedy's opinion

---

<sup>116</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 900–01 (2010).

<sup>117</sup> *Id.* at 902–03. Most notably, Justice Kennedy stated that the parties and Court in *Buckley*, in the midst of an otherwise comprehensive discussion of federal campaign finance law, somehow overlooked a major provision of that legislation. *Id.* at 902 (discussing *Buckley's* failure to address 18 U.S.C. § 610).

<sup>118</sup> *Id.* at 909–10. Apparently Justice Kennedy did not fully believe this a year before when he wrote a majority opinion holding that a supporter's independent expenditures on behalf of an elected state court judge could so taint the perception of the judge's fairness in a case involving the supporter that due process required the judge to recuse himself. See generally *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

<sup>119</sup> See, e.g., Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585 (2011) (positing that the analysis in *Citizens United* is “likely to lead to new incoherence”).

<sup>120</sup> See *id.* at 608 (“The majority’s logic [in *Citizens United* as] applied to [campaign expenditures by foreigners] is that we should not be afraid of more speech and that we should trust that full disclosure will allow the American people to decide whether to support candidates who may be supported by foreign interests.”).

<sup>121</sup> *Caperton*, 129 S. Ct. at 2265. It is worth noting that much of the financial support the judge received in *Caperton* took the form of independent expenditures, which the *Citizens United* Court held did not create perceptions of favoritism that undermined democracy. See *Citizens United*, 130 S. Ct. at 967–68 (Stevens, J., dissenting).



attempted to weave together majorities, dissents, and debatable empirical observations to create a simple, coherent doctrine.<sup>122</sup>

Chief Justice Roberts's discussion of stare decisis in his concurring opinion similarly aspired to this higher-level doctrinal coherence. The substance of his discussion leads off with the following statement: "if the precedent under consideration itself departed from the Court's jurisprudence, returning to the 'intrinsically sounder' doctrine established in prior cases' may 'better serv[e] the values of stare decisis.'" <sup>123</sup> It is striking that his opinion's first substantive argument about stare decisis claims that some higher level of doctrinal coherence justifies overruling precedent.

This statement is admittedly a slim read. Still, it suggests that Chief Justice Roberts places significant value in the type of high-level doctrinal coherence Justice Kennedy attempted to construct in his majority opinion. The confluence between these two Justices on this point is striking. Justice Kennedy is sometimes accused of being the biggest judicial imperialist on the Court.<sup>124</sup> He wrote the opinions—and, indeed, created the majorities—in *Alden v. Maine*,<sup>125</sup> *Lawrence v. Texas*,<sup>126</sup> and *Boumediene v. Bush*<sup>127</sup>—all aggressive opinions that have been criticized as instances of severe judicial overreaching.<sup>128</sup> His roughshod

---

<sup>122</sup> So understood, Justice Kennedy's *Citizens United* opinion stands in stark contrast not just to Justice Stevens's dissent, but also to Chief Justice Roberts's much more nuanced application of the First Amendment later that same term in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010). For a discussion comparing these cases, see William D. Araiza, *Citizens United, Stevens, and Humanitarian Law Project: First Amendment Rules and Standards in Three Acts*, 40 STET. L. REV. 821 (2011).

<sup>123</sup> *Citizens United*, 130 S. Ct. at 921 (Roberts, C.J., concurring) (alteration in original) (emphasis omitted).

<sup>124</sup> See, e.g., Douglas Parker, *Justice Kennedy: The Swing Vote and His Critics*, 11 GREEN BAG 317, 331 (2008) (describing a critic's view of Justice Kennedy).

<sup>125</sup> 527 U.S. 706 (1999).

<sup>126</sup> 539 U.S. 558 (2003). It should be noted that six Justices agreed on the result in *Lawrence*. Justice O'Connor would have ruled on an equal protection ground, however, thus rendering Justice Kennedy the key fifth vote for the Court's due-process-based rationale. *Id.* at 579.

<sup>127</sup> 553 U.S. 723 (2008).

<sup>128</sup> See, e.g., Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1555 (2004) (criticizing *Lawrence* on these grounds); John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Construction Supreme Court*, 75

treatment of pre-*Buckley* precedent and breezy rejection of the *Caperton* appearance of corruption concern in *Citizens United* fit within that pattern of supremely confident adjudication. Chief Justice Roberts, meanwhile, pledges humility and respect for precedent.<sup>129</sup> It is noteworthy therefore that in a high-stakes case like *Citizens United* Chief Justice Roberts justified his vote to overrule precedent in part on the same basic concern as that expressed by Justice Kennedy.

Of course, a Justice can be humble and respect *stare decisis* while still voting to overrule precedent. Certainly, nobody suggests that *stare decisis* should pose an absolute bar to reconsidering precedent. As one continues to watch Chief Justice Roberts, however, it will be interesting to see the degree to which he expresses a preference for doctrinal coherence over doctrinal stability. More to the particular point of this Essay, it will be interesting to track the relationship between that preference and his proven intuition to move incrementally but tactically, with an eye toward using his colleagues' more forthright tendencies to his advantage. In *Rothgery*, for instance, his preference for large-scale coherence based on an originalist approach to the issue may have given way to his incrementalist intuitions, especially in light of the fact that there appeared to be no reasonable chance of Justice Thomas's more radical approach prevailing.<sup>130</sup> In *WRTL II* any preference he had for large-scale coherence based on a strong reading of the First Amendment arguably worked in tandem with Justice Scalia's forthright call for overruling *McConnell*.<sup>131</sup> By resisting that call, Chief Justice Roberts may have preserved his legitimacy as a judge committed to precedent while still setting the stage for *McConnell*'s ultimate demise.<sup>132</sup> In *Citizens United*,

---

NOTRE DAME L. REV. 1091, 1094 (2000) ("Ultimately, Justice Kennedy's opinion [in *Alden v. Maine*] is based on nothing but the Gang of Five's view of how the federal system should work."); John Yoo, *The Supreme Court Goes to War*, WALL ST. J., June 17, 2008, at A23 (criticizing the *Boumediene* Court's infusion into the nation's war making as "micromanagement").

<sup>129</sup> See *supra* notes 2–3.

<sup>130</sup> See *supra* Part II.

<sup>131</sup> See *supra* Part III.

<sup>132</sup> See *supra* text accompanying notes 53–56.

which squarely raised the question about whether to reaffirm *McConnell*,<sup>133</sup> the Chief Justice allowed his large-scale aspirations to surface.

These readings of the Chief Justice's actions are necessarily speculative, but they provide focal points for scholars' continued evaluation of his approach both to precedent and to his colleagues. During the course of what is likely to be a long tenure as Chief Justice, he surely will have many opportunities to use one to affect the other.

## VII. CONCLUSION

The cases discussed in this Essay suggest a few preliminary conclusions about how a Justice intent on stealth overruling can make use of the Court's multi-judge character. First, as scholars have noted, oral argument provides at least some opportunity for a Justice to make arguments—including those related to precedent—that other Justices can pick up on in their opinions.<sup>134</sup> Chief Justice Roberts's questioning of the Solicitor General in the *Citizens United* reargument created opportunities for Justice Kennedy to deny the role that precedent otherwise might have played.<sup>135</sup> Skillful questioning of the sort performed by the Chief Justice regarding the meaning of the key footnote in *Bellotti*, combined with his declaration that the matter was closed,<sup>136</sup> surely provided an additional rhetorical tool available to Justice Kennedy when he set about to explain why *Bellotti* did not implicitly authorize restrictions on corporate speech in electoral campaigns.<sup>137</sup>

Second, the existence of more aggressive—or perhaps simply more forthright—colleagues opens up a space for a Justice to

---

<sup>133</sup> But see *supra* note 61 (noting that narrower grounds were available for the Court to decide the issue in favor of the speaker).

<sup>134</sup> See, e.g., Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of Bush v. Gore*, 54 VAND. L. REV. 1849, 1898–99 (2001) (“[T]his initial dialogue might have . . . an effect on the final opinion[.]”).

<sup>135</sup> See *supra* Part IV.

<sup>136</sup> See *supra* notes 64–69 and accompanying text.

<sup>137</sup> See *supra* notes 73–74 and accompanying text.

undermine a precedent while publicly resisting those colleagues' calls for its explicit overruling.<sup>138</sup> Third, a Justice seeking to undermine precedent may do so by reaffirming the precedent but also inserting a self-destruct button that would pave the way for a future Court to conclude that the precedent cannot be squared with basic constitutional requirements.<sup>139</sup> Any surreptitious undermining a Justice may wish to perform via this or the other methods, however, remains subject to the fifth Justice's power to thwart these attacks by explicitly reaffirming the precedent.<sup>140</sup>

These tentative conclusions raise some interesting follow-on insights as well as questions that need further investigation. For example, consider the second of these conclusions, which focuses on a Justice's ability to leverage colleagues' more forthright calls for overruling by adopting a seemingly moderate stance that nevertheless undermines the precedent in question. Is it appropriate for a Justice to state in an opinion that a precedent likely is wrong but still to adhere to it anyway because of *stare decisis*? Or does *stare decisis* carry with it an implicit gag rule, at least on bald statements that the precedent is wrong? This question requires a deeper investigation about the audiences for Court opinions,<sup>141</sup> the effects of such statements, and the public's requirements of opinions in terms of frankness and adherence to precedent the Justice honestly believes is wrong.<sup>142</sup>

With regard to the third conclusion, is it appropriate for Justices to preserve a precedent—even one they do not like—by interpreting it to require a test that would likely fail to pass constitutional muster? In other words, are self-destruct buttons cynical ploys to let a precedent die a somewhat slower, agonized,

---

<sup>138</sup> See *supra* Part I (discussing *Rothgery*); *supra* Part II (discussing *WRTL II*).

<sup>139</sup> See *supra* notes 52–56 and accompanying text.

<sup>140</sup> See *supra* Part IV.A (discussing *Hein*).

<sup>141</sup> See, e.g., Friedman, *supra* note 11, at 41–62 (discussing the concept of “acoustic separation”—i.e., the idea that opinions may be heard and understood in different ways by different audiences—and the possibility that stealth overruling is a species of the Court's attempt to send different messages to different audiences).

<sup>142</sup> One of the factors that surely would be relevant here is whether the precedent relates to a constitutional or statutory question. Conventional wisdom holds that statutory *stare decisis* should be firmer given Congress's ability to reverse a statutory interpretation with which it disagrees by amending the underlying statute.

but still inevitable death, or are they legitimate attempts to honor *stare decisis* as much as possible? This question probably cannot be answered in the abstract; rather, it requires assumptions about at least the Justice's good faith in preserving the shell of the precedent and the likelihood that this preservative analysis could in fact survive over the long term.

Finally, questions about the power of the fifth Justice in any would-be majority bring us back full circle to the individual Justice's conduct with regard to stealth overruling. The example illustrating this last point—Justice Kennedy's concurrence in *Hein*<sup>143</sup>—throws this uncertainty into sharp relief. While Justice Kennedy played a key role—indeed, *the* key role—in preserving *Flast*, his opinion nevertheless undermined *Flast*, at least partially, by embracing a distinction that is hard to take seriously.<sup>144</sup> The ultimate result—a reaffirmed precedent now limited in an arguably unprincipled way—is in many ways the worst of all possible worlds for a Court committed to principled explanation of its results.<sup>145</sup>

Understanding this dynamic simply returns us to questions about the appropriateness of such arguably unprincipled judicial action. But viewing it in the context of *Hein*—in which one Justice single-handedly was responsible for creating this state of affairs—reveals how important a single Justice's view can be when the Court considers its predecessors' handiwork.

In sum, then, individual Justices' conduct regarding precedent does matter. In particular, on a multi-judge court like the Supreme Court, it matters in the context of their colleagues' approach to the particular precedential issues before them. Therefore, it matters how individual Justices go about navigating not just their own attitudes about *stare decisis* but also how they

---

<sup>143</sup> See *supra* Part V.A.

<sup>144</sup> See *supra* Part V.A.

<sup>145</sup> In this sense it is ironic that the Justice who single-handedly created this situation in *Hein*—Justice Kennedy—is the one who has perhaps waxed most rhapsodic about the importance of the judicial role. See generally *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (striking down a statute limiting the ability of federally funded legal aid lawyers to raise certain legal arguments in litigation on the ground that it interfered with courts' ability to perform their core function).

instantiate those views on the playground inhabited by eight other Justices. Uncovering those approaches therefore becomes an important part of understanding how the Court ultimately views its audience(s), its conception of law, and its role in announcing and guiding that law. For the same reasons, critiquing those approaches constitutes an important part of scholars' overall evaluation of the Court's work.

