1-1-2011

Is the Roberts Court Really a Court?

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INTRODUCTION

Judges at all levels of the state and federal judiciaries are expected to resolve legal disputes by examining prior positive law, such as text and precedent, and then providing transparent explanations for their decisions. Of course, there are many situations in which the binding legal text is vague, and the applicable law is unhelpful, incomplete, or even contradictory. In those circumstances, judges must, out of necessity, fill in the gaps of the law or simply extend or narrow prior law as best they can.[1]

But even when prior law does not point to clear answers, judges are under a general obligation to examine and interpret that law in good faith to arrive at their decisions. Judges must then explain those decisions honestly and transparently. In numerous important constitutional law cases decided by the Roberts Court, however, the Justices did not seem to grapple with prior law in good faith nor provide the true basis for their decisions. In light of these cases, whether the Roberts Court acts like a court at all is a serious question.

This question, of course, could just as easily be asked of the Rehnquist, Burger, and Warren Courts, as well as all of the other previous Supreme Courts. A comparative analysis of the various Supreme Courts' reliance on prior law is well beyond the scope of this Article. The Roberts Court has, however, decided many important cases that suggest the current Court does not take the

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 Professor of Law, Georgia State College of Law. I would like to thank the participants of the Constitutional Law Discussion Forum at the University of Louisville Louis D. Brandeis School of Law for their helpful comments and the *Stetson Law Review* for its support of the conference. Mostly, a big debt of gratitude to Russ Weaver, who as usual, but this time in the face of an ice storm, organized and implemented a wonderful and intellectually stimulating constitutional workshop.

1. *See* H.L.A. Hart, *The Concept of Law* 273–274 (2d ed., Clarendon Press 1994) (arguing that it is within the discretion of a judge to expand or constrict the law according to legal principle).

requirement of transparency seriously and does not believe that prior positive law (such as precedent) places any real constraint on Supreme Court decisionmaking. Regardless of whether prior Courts can be accused of similar attitudes, the general indifference of the Roberts Court to these rule-of-law values is troubling.

I. PARTIAL-BIRTH ABORTION AND PRECEDENT

In *Stenberg v. Carhart* (*Carhart I*),[2] while William Rehnquist was still Chief Justice, the Supreme Court reviewed a Nebraska law prohibiting so-called partial-birth abortions.[3] Both the media and the courts use the term "partial-birth abortion" when referring to a medical procedure called "dilation and extraction" (D&X), which is a relatively rare method of performing mostly second-term abortions.[4] The D&X procedure involves the termination of a pregnancy by partially extracting a fetus from the uterus and then collapsing its skull to remove its brain.[5] The fetus is then removed in as intact a manner as possible.[6] The more common method of performing abortions after twenty weeks is the standard "dilation and evacuation" (D&E), in which the doctor dismembers the fetus and pulls out the parts.[7] The basic difference in the two procedures is that the D&X procedure removes the fetus as whole as possible, whereas the doctor conducting a standard or non-intact D&E removes the fetus part by part.[8] Some doctors and medical experts consider the standard D&E method inferior because it can involve substantial blood loss and may increase the risk of puncturing the cervix, which could impair the woman's ability to have children in the future.[9] There is substantial disagreement within the medical community regarding the pros and cons of both procedures.[10]

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2. 530 U.S. 914 (2000).
3. Neb. Rev. Stat. § 28–328 (2003).
4. Am. Pregnancy Assn., *Surgical Abortion Procedures*, http://www.americanpregnancy.org/unplannedpregnancy/surgicalabortions.html (updated Nov. 2006).
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. Julie Rovner, *NPR, News, "Partial-Birth Abortion:" Separating Fact from Spin*, http://www.npr.org/templates/story/story.php?storyId=5168163 (accessed Apr. 12, 2011).
10. *See id.* (detailing the medical and political controversy surrounding partial-birth abortions).

The Nebraska statute at issue in *Carhart I* prohibited any partial-birth abortion[11] unless that procedure was necessary to save the life of the mother.[12] There was, however, no exception in the law for the health of the mother. Violating the law was a felony and led to the automatic revocation of a convicted doctor's license.[13] Leroy Carhart, a Nebraska physician, brought a lawsuit claiming that the Nebraska statute violated the Constitution because it placed an undue burden on his clinical practice and on his female patients seeking abortions.[14]

The Court struck down the law by a five-to-four vote. Justice Breyer, writing for the majority and joined by Justices Ginsburg, Stevens, Souter, and O'Connor, found the law unconstitutional for two reasons.[15] First, to the extent that the law was vague and barred not only the intact D&X procedure but also the much more commonly used D&E method, it posed an undue burden on a woman's right to an abortion.[16] This broad provision violated the test set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[17] Second, and more importantly for our purposes, the Court also held the law unconstitutional because it contained no exception for the health of the mother.[18] Nebraska argued that the intact D&X was never necessary for a mother's health because the standard non-intact D&E could always be performed.[19] The Court rejected that position, stating that the medical evidence was conflicting, and Nebraska bore a heavy burden in showing that banning the D&X was never necessary for the health of the mother—a burden it could not meet.[20] Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy each separately dissented,[21] with Justice Kennedy arguing strenuously that the majority had violated core principles of the *Casey* decision.[22]

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11. Neb. Rev. Stat. § 28-326(9) (defining partial-birth abortion as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery").
12. *Id.* at § 28-328(1).
13. *Id.* at § 28-328(2), (4).
14. *Carhart I*, 530 U.S. at 922.
15. *Id.* at 930.
16. *Id.* at 938.
17. 505 U.S. 833 (1992).
18. *Carhart I*, 530 U.S. at 930.
19. *Id.* at 931.
20. *Id.* at 930–938.
21. *Id.* at 952 (Rehnquist, C.J., dissenting); *id.* at 953–956 (Scalia, J., dissenting); *id.*

The debate over partial-birth abortion was far from over. Congress had tried to enact two laws prohibiting the procedure in the 1990s, but both were vetoed by President Clinton.[23] In 2003, however, President George W. Bush signed a new federal partial-birth abortion law prohibiting the procedure.[24] Aware of the Court's earlier decision overturning Nebraska's law partly on the grounds that the law barred the standard D&E, Congress carefully wrote the statute to define the procedure that would be illegal, so that only D&X was prohibited.[25] Congress failed to address, however, the Court's other concern in *Carhart I*—that there was no exception for the health of the mother. At the time, the Court had never approved an abortion statute that did not include such an exception.

The federal partial-birth abortion law was immediately challenged in federal court, and not surprisingly, it was struck down by several judges on the ground that it did not contain an exception for the health of the mother.[26] When the federal law finally came before the Supreme Court in 2007, Chief Justice Roberts and Justice Alito had replaced Chief Justice Rehnquist and Justice O'Connor. With the substitution of Justice Alito for Justice O'Connor, Justice Kennedy was able to turn his *Carhart I* dissent into the law of the land.

In light of the Court's prior decision overturning Nebraska's partial-birth abortion law, the Supreme Court in *Gonzales v. Carhart* (*Carhart II*)[27] had three options available to it if the Court was going to take prior positive law seriously and act like a court. The Court could have (1) affirmed its previous decision and overturned the federal law; (2) reversed *Carhart I* and upheld the

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at 956–979 (Kennedy, J., Rehnquist, C.J., dissenting); *id.* at 980–1020 (Thomas, J., Rehnquist, CJ., Scalia, J., dissenting).

22. *Id.* at 960–961 (Kennedy, J., Rehnquist, C.J., dissenting).

23. *See* Tamara F. Kushnir, Student Author, *It's My Body, It's My Choice: The Partial-Birth Abortion Ban Act of 2003*, 35 Loy. U. Chi. L.J. 1117, 1149–1152 (2004) (describing the House and Senate votes and President Clinton's subsequent vetoes); Rovner, *supra* n. 9 (providing history about the Partial-Birth Abortion Ban Act).

24. 18 U.S.C. § 1531 (2006).

25. *Id.*

26. The United States District Court for the District of Nebraska granted a permanent injunction to prohibit the statute's enforcement except when there was no dispute over the fetus' viability. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1048 (2004). The Eighth Circuit affirmed. *Carhart v. Ashcroft*, 413 F.3d 791 (2005).

27. 550 U.S. 124 (2007).

federal law; or (3) explained why the law or facts at issue in *Carhart II* were constitutionally distinguishable from the law or facts in *Carhart I* and affirm the federal law. The Court, however, did not choose any of those options. Instead, it upheld the federal law, even though it did not contain an exception for the health of the mother, without overturning its previous decision, which came to the opposite conclusion on the identical question.[28]

Justice Kennedy's opinion said that the main issue in the case was whether the federal partial-birth abortion law placed a substantial obstacle in the path of women seeking abortions.[29] He first distinguished the federal law from the Nebraska statute invalidated in *Carhart I* on the basis that the federal law very clearly prohibited only the intact D&X procedure and not the standard D&E procedure.[30] He then turned to the plaintiffs' argument that sometimes it is better for women's health to use the intact D&X procedure rather than the standard D&E, and therefore the lack of a health exception in the law made it unconstitutional.[31] This was exactly the argument that the Court accepted in *Carhart I* when it overturned Nebraska's partial-birth abortion law. By the time *Carhart I* had reached the Supreme Court, there had been extensive factual hearings on the question of whether the intact D&X procedure could ever be necessary for the health and safety of the mother.[32] The strongest argument for the necessity of the intact D&X procedure was that some women are better off if the fetus is removed as whole as possible rather than cutting it into pieces and removing the fetus' parts one by one.[33] Some doctors disputed this idea at trial in *Carhart I*. The Court held in *Carhart I*, however, that such medical uncertainty and debate required the health exception under a proper reading of the Court's decision in *Casey*:

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28. *See id.* at 132–133 (reevaluating the constitutionality of the Partial-Birth Abortion Ban Act).

29. *Id.* at 156.

30. *Id.* at 148–150.

31. *Id.* at 161.

32. *See Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1124–1126 (Neb. Dist. 1998) (discussing expert medical testimony presented at trial on the safety of various abortion methods).

33. *Id.* at 1105 n. 10.

> [T]he division of medical opinion about the matter at most means uncertainty, a factor that signals the presence of risk, not its absence. That division here involves highly qualified knowledgeable experts on both sides of the issue. Where a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view, we cannot say that the presence of a different view by itself proves the contrary. Rather, the uncertainty means a significant likelihood that those who believe that [D&X] is a safer abortion method in certain circumstances may turn out to be right. *If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.*
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> In sum, Nebraska has not convinced us that a health exception is "never necessary to preserve the health of women." . . . Rather, a statute that altogether forbids D&X creates a significant health risk. The statute consequently must contain a health exception. . . . [W]here substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." . . . Requiring such an exception in this case is no departure from *Casey*, but simply a straightforward application of its holding.[34]

When the Court returned to this issue in *Carhart II*, it came to a completely different conclusion without explaining or even hinting that it was overruling *Carhart I*. The Court framed the issue as follows: "[W]hether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where 'necessary, in appropriate medical judgment, for the preservation of the . . . health of the mother.'"[35] The Court conceded that the law would be unconstitutional if it "subject[ed women] to significant health risks."[36] And

34. *Carhart I*, 530 U.S. at 937–938 (emphasis added).
35. *Carhart II*, 550 U.S. at 161 (citation omitted).
36. *Id.*

the Court did not refute the factual determination that it previously made in *Carhart I* that "whether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position[s]."[37] The Court then spent several paragraphs detailing the factual arguments for both sides and concluding that the presence of medical uncertainty does not require a health exception for women.[38] The Court did not overturn *Carhart I* nor did it explain why the Court's analysis there was incorrect or even unpersuasive. The Court simply changed its mind.[39]

Under *Casey* and *Carhart I*, if there was uncertainty about the medical necessity of an abortion procedure, the tie would go to preserving women's health and the statute would be unconstitutional. Conversely, under *Carhart II*, when there is medical uncertainty, the tie goes to those wishing to ban the procedure.[40] This change did not occur because of a change in text, precedent, history, or even an open acknowledgment of a legal mistake. It came about because Justice Alito replaced Justice O'Connor on the Court. Worse, the Court did not even admit it was changing such a core legal principle. This is not judging according to the rule of law but judging under the rule of which side currently has five votes. Nor is it judging by taking precedent seriously and wrestling with it in good faith. When the Court overturns a prior case, it should be transparent about that decision. Reversing a prior decision without discussion might be fine for an overtly political institution charged with making "all things considered" decisions without regard for prior decisions, but it is not appropriate for a Supreme "Court" charged with acting as a court of law.

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37. *Id.*

38. *See id.* at 164 (stating that "[m]edical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts").

39. *See id.* at 165–67 (failing to provide a reasoned basis for a departure from the Court's prior decision in *Carhart I*). The Court did leave open the possibility of an as applied challenge to the federal law. *Id.* at 167–168. But the chance of finding a woman or doctor who would challenge the ban at a time when an abortion procedure is imminent is extremely unlikely.

40. *See* Dahlia Lithwick, *Slate, Father Knows Best*, http://www.slate.com/id/2164512/ (Apr. 18, 2007) (describing Justice Kennedy's opinion as reversing precedent without proper justification).

II. GUNS AND HISTORY

The Second Amendment to the United States Constitution provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[41] From 1788, when the Second Amendment was ratified, until 2008, when the Supreme Court decided the landmark case of *District of Columbia v. Heller*,[42] the Court had *never* ruled for a plaintiff asserting a Second Amendment claim.[43] Moreover, all lower federal courts during that same 220-year period assumed that the Second Amendment did not apply to individuals asserting the right to own guns for self-defense or hunting but merely protected the right of the people to own guns so that state militias could be called into service.[44] In *Heller*, however, the Supreme Court held that a District of Columbia law that prohibited the ownership of all handguns violated the personal right to bear arms protected by the Second Amendment.[45] Although this was not the first time the Court had created a brand new constitutional right, *Heller* is important because the Court justified its decision almost entirely on originalist grounds. Controversial decisions such as *Lochner v. New York*,[46] *Brown v. Board of Education*,[47] *Griswold v. Connecticut*,[48] and *Roe v. Wade*[49] were based on the Court's self-identification of fundamental values balanced against competing state interests. Although many disagree with some or all of those decisions, few would argue that they lack transparency. Justice Scalia's opinion for the Court in *Heller*, on the other hand, raises significant transparency issues.

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41. U.S. Const. amend. II.

42. 554 U.S. 570 (2008).

43. *See* Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1347 (2009) (stating, "there were virtually no relevant Supreme Court precedents, and certainly none that could be considered dispositive"); *see also United States v. Miller*, 307 U.S. 174, 178 (1939) (denying that the Second Amendment had been violated in the absence of showing that the prohibited firearm affected a well-regulated militia); *but see McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3050 (2010) (incorporating the Second Amendment into the Fourteenth Amendment's Due Process Clause).

44. *Heller*, 554 U.S. at 676 n. 38 (Stevens, Souter, Ginsberg, Breyer, JJ., dissenting).

45. *Id.* at 635.

46. 198 U.S. 45 (1905).

47. 347 U.S. 483 (1954).

48. 381 U.S. 479 (1965).

49. 410 U.S. 113 (1973).

Justice Scalia wrote the majority opinion overturning the District's ban on handguns. Chief Justice Roberts and Justices Alito, Thomas, and Kennedy joined the majority opinion. The most important issue the *Heller* Court decided was the relationship between the opening words of the Second Amendment: "[a] well regulated Militia, being necessary to the security of a free State . . . ," and the closing words: "the right of the people to keep and bear Arms, shall not be infringed."[50] Justice Scalia said that "[t]he Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose."[51] Justice Scalia's use of the word "naturally" is astonishing given that the Second Amendment is the only section of the Bill of Rights that has both a prefatory and an operative clause.

The majority then spent about fifty pages discussing the pre- and post-ratification history of the Second Amendment to support the conclusion that the Second Amendment protects an individual right to own guns.[52] Justice Scalia relied on pre- and post-constitutional treatises and laws, state constitutions ratified both before and after the Federal Constitution, letters from several of the founding fathers, and caselaw dating from before and even after the Civil War.[53] It is difficult to read this lengthy ode to history without a high degree of skepticism that Justice Scalia was trying to justify a conclusion that he and the rest of the majority had already reached on other grounds. One legal scholar who has studied the history of the Amendment has called Justice Scalia's historical analysis "disingenuous and unprincipled," as well as "objectively untenable."[54] In addition, the same scholar notes that conservative and well-respected Court of Appeals Judges Richard Posner and Harvie Wilkinson have "savaged" Justice Scalia's opinion as "results-oriented historical fiction."[55] These experts believe that the Second Amendment was discussed primarily in the context of the virtues of having an organized

50. U.S. Const. amend. II.

51. *Heller*, 554 U.S. at 577.

52. *Id.* at 579–628.

53. *See id.* at 581–627 (citing a variety of historical sources relating to the Second Amendment).

54. William G. Merkel, The District of Columbia v. Heller *and Antonin Scalia's Perverse Sense of Originalism*, 13 Lewis & Clark L. Rev. 349, 352 (2009).

55. *Id.*

militia and the dangers of having a standing and professional army.[56] They suggest that any notion that the Second Amendment, as a historical matter, was intended to protect the right to own guns for personal self-defense or recreational purposes is fanciful.[57]

My point is not that the holding in *Heller*—that the Second Amendment protects an individual's right to own guns—is incorrect. Any number of plausible methods of constitutional interpretation could support the Court's conclusion. Rather, my point is that the historical analysis, which comprises almost the entire justification for the Court's decision, does not transparently explain the Court's result. Moreover, the Court never explains why it relied so much on history in this case, yet almost never mentions original meaning in other major constitutional cases decided by the same Justices. In overturning voluntary affirmative action plans by elementary and secondary schools;[58] overturning acts of Congress regulating campaign finance[59] and regulating speech;[60] closing the courthouse doors to taxpayers suing the White House for alleged Establishment Clause violations;[61] as well as numerous other significant constitutional cases decided over the last few years by the Roberts Court, the Justices almost never referred to, much less relied exclusively upon, the original meaning of the constitutional provision at issue. So why was that meaning so important in *Heller*? Justice Scalia did not even begin to provide an explanation.

The Supreme Court in *Heller* created a brand new constitutional right, overturned several precedents, and invalidated an important piece of social legislation based on an historical argument that was *at best* plausible and at worst totally frivolous. Yet the Court's opinion reads as if its historical analysis clearly supported its legal conclusion. Moreover, the Court dropped this

56. *Id.*

57. *See id.* at 352–359 (expounding upon the historical record at the time the Second Amendment was drafted that unequivocally reflected a military and collective purpose rather than one protecting the right to own a firearm for purely private self-defense).

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

59. *Citizens United v. Fed. Election Commn.*, 130 S. Ct. 876 (2010).

60. *United States v. Stevens*, 130 S. Ct. 1577 (2010).

61. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007).

historical approach when it casually announced that, even though the Second Amendment protects an individual right to own guns,

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.[62]

Why not? Several times in the opinion, the Court analogized the Second Amendment right to the right to free speech in the First Amendment, though the latter cannot be so casually limited. The Court did not even try to justify these conclusions, much less engage in any historical analysis of their premises.

The Supreme Court of the United States is supposed to answer constitutional questions by looking at prior positive law and then transparently explaining how that law applies to a particular legal controversy. The prior positive law may be constitutional text, constitutional history and tradition, or prior cases. The Supreme Court is not supposed to engage in an all-things-considered, cost–benefit analysis of the validity of the law it is reviewing. But in many prior important constitutional cases, such as *Roe*, *Brown*, and *Lawrence v. Texas*,[63] the Court did engage in an all-things-considered analysis, but *at least* it did so openly and transparently.[64] In *Heller*, conversely, the Roberts Court reached a decision at odds with all prior, relevant positive law but tried—albeit unpersuasively—to justify its decision exclusively on that prior law. This is not judging transparently according to the rule of law. In fact, it is not judging at all; it is advocacy—and not very good advocacy at that.

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62. *Heller*, 554 U.S. at 625–627.

63. 539 U.S. 558 (2003).

64. *See e.g. Brown*, 347 U.S. at 492–493 (explaining that in addressing the constitutionality of segregation in public schools, the Court "cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted .... [The Court] must consider public education in the light of its full development and its present place in American life throughout the Nation").

III. CITIZENS UNITED *AND SUPREME HUBRIS*

Much has been written and will be written about the Court's holding in *Citizens United v. Federal Election Commission*,[65] which held that corporations have the same free-speech rights to influence political campaigns as individual citizens. The balancing of First Amendment rights with the desire to limit the influence of corporate spending on state and federal elections is difficult and complex. Whether one agrees or disagrees with the result in *Citizens United*, what is clear is that the Court took a tortured and inappropriate path to reach its decision.

Justice Kennedy's majority opinion in *Citizens United* held that Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA)[66] was *facially* unconstitutional because it violated the First Amendment.[67] This federal law made it illegal for corporations or labor unions to use general treasury funds to pay for broadcast, cable, or satellite communications that urge the relevant electorate to vote for or against a specific candidate within thirty days of a primary, or within sixty days of a general federal election.[68] The communication at issue in *Citizens United* was a movie (*Hillary: The Movie*) made by a nonprofit corporation portraying Hillary Clinton in an unfavorable light.[69] Citizens United wanted to make the movie available on video-on-demand, but out of concern that doing so would violate BCRA, it filed for a preliminary injunction, arguing both that BCRA was unconstitutional and that, in any event, it did not apply to *Hillary: The Movie* as a matter of statutory interpretation.

In the district court, Citizens United *expressly waived* its claim that Section 203 of BCRA was facially unconstitutional,[70] and in its jurisdictional statement to the Supreme Court, Citizens United said that it was raising only an as-applied challenge to the federal law.[71] Not surprisingly, the lower court never reached the merits of any facial challenge to Section 203, and the issue was

65. 130 S. Ct. 876 (2010).
66. Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (2002) (amending 2 U.S.C. § 441b).
67. *Citizens United*, 130 S. Ct. at 913.
68. 2 U.S.C. § 434(f)(3)(A)(i)(II)(aa)–(bb) (2006).
69. *Citizens United*, 130 S. Ct. at 887.
70. *Id.* at 892.
71. *Id.* at 931–932 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part).

not part of the original case argued in the Supreme Court during the 2008–2009 term. On the last day of that term, however, the Court set the case for reargument, and it asked the parties to file supplemental briefs addressing the facial validity of Section 203 and whether the Court should overrule two prior cases upholding the law[72]—*Austin v. Michigan Chamber of Commerce*[73] and *McConnell v. Federal Election Commission*.[74] In other words, the Court reached out to decide an important issue not raised by the parties and not part of the record below. Moreover, in the second paragraph of the Court's eventual opinion, it said the following: "In this case we are asked to reconsider *Austin* and, in effect, *McConnell*."[75] In fact, it was the Justices themselves who asked the parties to reconsider those cases, not the other way around. As Justice Stevens quipped in dissent, "Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."[76] This desire to reach out and change pre-existing law, even when the parties have not asked the Court to do so, is not proper judicial behavior.

On the merits, the Court overruled *Austin* and parts of *McConnell* without giving significant deference to the importance of stare decisis. The Court's essential holding, that corporations have the same First Amendment rights as individuals, is inconsistent with a twenty-year-old decision (*Austin*) that was reaffirmed by the Court in 2003 (*McConnell*) and undercuts state and federal laws that have been on the books for almost fifty years.[77] Justice Kennedy's discussion of precedent occupies about seven paragraphs in a fifty-seven-page opinion and amounts to little more than a discussion of why *Austin* was incorrectly decided.[78] As Justice Stevens argued in his dissent:

> [I]f [the] principle [of stare decisis] is to do any meaningful work in supporting the rule of law, it must at least demand a

72. *Id.* at 888 (majority).
73. 494 U.S. 652 (1990).
74. 540 U.S. 93 (2003).
75. *Citizens United*, 130 S. Ct. at 886.
76. *Id.* at 932 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part).
77. *Id.* at 930 (listing six cases "blaze[d] through" by the majority).
78. *Id.* at 911–913 (majority).

> significant justification, beyond the preferences of five Justices, for overturning settled doctrine. . . .
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> In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*, "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals."[79]

The Court in *Citizens United* overturned two prior cases and announced a new rule of law because Justice Alito replaced Justice O'Connor, and consequently there were five votes to hold that the First Amendment requires corporations to have the same First Amendment rights as individuals. Moreover, the Court reached this result with virtually no discussion whatsoever about whether this new rule was consistent with the original understanding of the First Amendment (even Justice Scalia's concurrence on this point is more about the text than the history of the Amendment).[80] In one case, *Heller*, the Roberts Court was concerned almost exclusively with original understandings (even as it got those understandings wrong), and in another case, *Citizens United*, it barely referred to those understandings at all. In neither case are we told why original understanding was either very important or not important at all. This kind of decisionmaking is not transparent, nor is it consistent with the idea that judges are supposed to take prior positive law seriously. With five votes, the Justices can distort history, consider it important or not, rewrite or overturn prior cases, and even reach out to decide issues not raised by any of the parties so that the Justices

79. *Id.* at 938, 941–942 (Stevens, Ginsburg, Breyer & Sotomayor, JJ., concurring in part and dissenting in part (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

80. *Id.* at 929 (Scalia, J., concurring).

can pursue their own political agendas. None of this is appropriate behavior for a court of law.

IV. CONCLUSION

In *Carhart II*, the Roberts Court implicitly overturned an important decision without any discussion of stare decisis. In *Heller*, the Court created a brand new constitutional right, displacing centuries of caselaw, based on a controversial (at best) historical account that raised serious questions about how the Court actually reached its decision. And, in *Citizens United*, the Court reached out to decide an important and settled issue of constitutional law not raised by the parties, and it did so without any meaningful discussion of history or stare decisis concerns. In all three cases, the only persuasive descriptive account of why the Court veered from prior positive law is that the people on the Court changed (Justice Alito for Justice O'Connor). This is not judging according to the Rule of Law but judging according to the Rule of Five Justices, and it seriously calls into question whether the Roberts "Court" is, in fact, a court at all.