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Selective Judicial Activism in the Roberts Court

Alan B. Morrison[1]

The opinion in *Dobbs v. Jackson Women's Health Organization*[2] does not use the phrase "judicial activism" to describe how the majority in *Roe v. Wade*[3] found a right to an abortion in the Constitution. However, in three places in the opinion, Justice Samuel A. Alito quoted Justice Byron R. White's dissent in *Roe,* in which he accused the majority of exercising "raw judicial power" in striking down Texas's prohibition on abortion, which is another way of accusing the majority of engaging in judicial activism.[4] Aside from those who would define a judicial activist as a judge whose decision they do not agree with, one could hardly dispute the assertion that, at the very least, the majority in *Roe* aggressively interpreted the Constitution to reach its conclusions. According to Justice Alito, the *Roe* majority egregiously erred, and "[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives."[5]

Justice Alito's opinion, one would believe that he and others on the Roberts Court believe strongly in having controversial policy judgments always be made by our elected representatives, instead of by judicial activists. That approach to judging is a defensible one, but, as this essay argues, the current majority of the Roberts Court has a very selective approach to judicial activism. Time and again, in a wide variety of subject areas, when the constitutional claim at issue aligns with the policy position of the political party of the President that nominated these Justices (*i.e.,* the Republican party), they are every bit as activist as the *Roe* majority.

Justice Alito's opinion has a built-in response. On page 1, he observes that "the Constitution makes no mention of abortion," which he repeats with only slight variance on seven occasions.[6]

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[1] The writer is an Associate Dean at George Washington University Law School where he teaches constitutional law. This essay treats the Roberts Court as if it were monolithic in all of these cases, but that would be incorrect as Chief Justice John G. Roberts concurred in the result in *Dobbs,* but not the decision to overrule *Roe.*

[2] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[3] Roe v. Wade, 410 U.S. 113 (1973).

[4] *Jackson Women's Health Org*., 142 S. Ct. at 2241, 2260, 2279.

[5] *Id.* at 2243.

[6] *Id.* at 2240, 2241, 2245, 2246, 2247, and 2253.

His response would be that, in the other cases, in which the majority of the Roberts Court supported a limit on legislative actions, there was a word or a phrase that is "mentioned" in the Constitution, such as the "free exercise" of religion, the "freedom of speech," the right "to keep and bear arms," the prohibition on the "tak[ing]" of "private property," or that, under Article I, Section 3, the President "shall take Care that the Laws be faithfully executed." But, of course, the majority in *Roe* did point to the word "liberty," which is in the Constitution;[7] it is just that Justice Alito did not read that word in the same (expansive) way that Justice Harry A. Blackmun did in *Roe.* According to Justice Alito, the flaw in *Roe* was that it examined the words in the Constitution at a "high level of generality," which he concluded led to a vast expanse of rights protected by the Constitution.[8] In other words, the *Dobbs* majority rejected a constitutional right to abortion because the text of the Constitution did not support such an approach.

This essay argues that the majority of the Roberts Court has often latched on to a word or phrase "mentioned" in the Constitution, examined its meaning at a "high level of generality," and reached a result that took the decision away from "the people's elected representatives." It has, however, done so only when the outcome supports the positions of the party of the Republican President who appointed those Justices. Of course, this selective judicial activism does not explain every constitutional decision, and this essay does not discuss every such ruling since John Roberts became Chief Justice in 2003. But the pattern is too consistent to admit of any conclusion other than that the Justices abhor judicial activism, except when it serves to produce the political goals that they support. Judicial activism may or may not be a proper way to understand the Constitution, but it should at least be applied evenly across all cases.

This examination of the cases proceeds in the following order. First, I review *Washington v. Glucksberg*,[9] the case that is at the heart of the *Dobbs* opinion and show that it need not be read to provide the door-closing impact on a due process argument that the majority embraces. Next, I turn to a sampling of the election-related cases and show that the Roberts Court has failed to follow the premises of *Dobbs* and has been an activist court when it suits the goals of the Republican Party, but not otherwise. Then I turn to the success of the Roberts Court in undermining the power of labor unions, by broad readings of the First and Fifth Amendments. In the final section, I point to other expansive readings of the Constitution by the Roberts Court that also coincide with the political goals of the party whose President appointed them.

One further word about the analysis of the cases below. In each of the cases, the majority opinion was lengthy, and it covered many arguments. There were always dissents and there were often concurrences. This essay does not attempt to discuss each decision in full. Instead, it will focus on what are the two central ingredients of *Dobbs*: (1) its conclusion that the text of the

[7] *Roe*, 410 U.S. at 152–53. Justice Potter Stewart also relied on liberty in his concurrence. *Id.* at 168-171.
[8] *Jackson Women's Health Org.*, 142 S. Ct. at 2258.
[9] Wash. v. Glucksberg, 521 U.S. 702 (1997).

Constitution does not protect the right to an abortion or other rights in other cases; and (2) where the right at issue is not mentioned in the Constitution, the Court should defer to the views of the elected representatives. The question that is at the center of this essay is how closely the Roberts Court adhered to those principles in these other cases.

I. Washington v. Glucksberg – *The Basis of* Dobbs

The backbone of *Dobbs* is the portion of the majority opinion in *Washington v. Glucksberg*, stating that in order for a right to be protected under the Due Process Clause, it must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[10] The opinion was written by Chief Justice William H. Rehnquist, who was one of the two dissenters in *Roe.* The case involved a facial challenge to an assisted-suicide ban under which a "person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide."[11] However, another state law clarified that the "withholding or withdrawal of life-sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide."[12] In rejecting the claim of the three plaintiff-physicians, the Court identified a number of significant interests that supported the law,[13] while also recognizing the interests of individuals nearing death who were in serious pain and no longer wished to live.

Although the judgment in *Glucksberg* was unanimous, four Justices concurred only in the result. In addition, Justice Sandra Day O'Connor joined the majority opinion, but wrote a short concurrence that *Dobbs* does not mention, and that makes three important points. The first, as a reason for the Court not to step in, points out the difficulty in drawing lines as to what assistance is and is not appropriate: As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues. In such circumstances, "the . . . challenging task of crafting appropriate procedures for safeguarding . . . liberty interests is entrusted to the 'laboratory' of the States . . . in the first instance."[14] The second is that the states are already doing much to alleviate the end-of-life suffering of many patients:

There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths. The difficulty in defining terminal illness and the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide we uphold here.[15]

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[10] *Id.* at 721.
[11] *Id.* at 707.
[12] *Id.*
[13] *Id.* at 728-34.
[14] *Id.* at 737 (citations omitted).
[15] *Id.* at 738.

Third, Justice O'Connor pointed to a political dynamic regarding assisted suicide that is surely very different from the one that pertains to the debate over abortion:

Every one of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure.[16]

Justice Alito read *Glucksberg* as a door-closing ruling, so that, unless a right fell within the confines of being "deeply rooted" or "implicit in the concept of ordered liberty," it would receive almost no constitutional protection. But as Justice O'Connor's concurrence showed, it need not have been read that way. Moreover, because there was no sharp difference between the major political parties over the issue of assisted suicide, and because every Justice supported the result in *Glucksberg*, the political divide that is an inescapable element of the abortion debate did not affect the outcome there. But as I show, the political divide over many controversial issues discussed in this essay goes a long way toward explaining the aggressive assertion of other rights by the majority of the Roberts Court, in contrast to the approach they took to abortion in *Dobbs.*

II. The Election Cases

In *Shelby County v. Holder,*[17] the plaintiff challenged the provisions of the Voting Rights Act that required certain states and some of the subdivisions in other states to obtain pre-clearance by either the Department of Justice or a three-judge district court in the District of Columbia for any changes in their laws affecting voting, in order to protect against further loss of the rights of racial minorities.[18] The Act was first passed in 1965, and a challenge to it was rejected by the Supreme Court then, as were the lawsuits over four subsequent re-enactments, which included certain additions to the coverage of the pre-clearance requirement.[19] In *Shelby County*, the challenge was to the 2006 amendments, which had passed the House by a vote of 390 to 33 and the Senate by a vote of 98 to 0.[20]

The majority conceded that the Act was necessary when it was passed, but it concluded that there had been a vast increase in the ability of minorities to vote in the covered jurisdictions since 1965.[21] As a result, it decided that the law was no longer needed, and therefore its prior intrusions on the rights of state legislatures to pass their own voting laws could no longer be tolerated. In particular, the majority found fault with the formula in Section 4 that determined

[16] *Id.* at 737.
[17] Shelby Cnty., Ala. v. Holder, 570 U.S. 529 (2013).
[18] *Id.* at 537.
[19] *Id.* at 538-39.
[20] *Id.* at 565 (Ginsburg, J., dissenting).
[21] *Id.* at 545-47.

which states and localities were subject to pre-clearance, finding them to be out of date and not justified by that formula.[22]

To justify his conclusion that Section 4 was unconstitutional, Chief Justice Roberts cited two principles of law, neither of which appears in the text of the Constitution: "basic principles of federalism," and the "principle that all States enjoy equal sovereignty."[23] As for federalism, that is hardly a barrier because the Voting Rights Act relied on the Fifteenth Amendment, which was enacted specifically to prevent states from passing racially discriminatory voting laws and which gives Congress the authority to enforce it "by appropriate legislation." Whatever weight federalism may have in other contexts, it surely can have very little here. As for the principle of "equal sovereignty," those words do not appear in the Constitution, and whatever force that principle may have, it was not sufficient for pre-Roberts Court Justices to overturn the Act when it was previously before the Court. To the extent that there needed to be textual support for rejecting Section 4, it was plainly lacking.

As for the other principal justification for *Dobbs*—deference to the legislature—*Shelby County* was just the opposite. Although the majority went through the evidence adduced in the extension hearings before Congress, both leading up to the 2006 amendments and those before them, it concluded that Congress was, in effect, mistaken when it retained Section 4 because that provision was no longer necessary. Justice Ruth Bader Ginsburg in her dissent, joined by Justices Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan, explained in great detail why the majority was wrong and why the pre-clearance sections were still essential to prevent back-sliding and to counteract new forms of discrimination.[24] But for these purposes, the point is not who was right about necessity, but whether the majority did what Justice Alito said the Supreme Court should do and defer to the judgment of the elected legislature. Plainly not. Moreover, it is hardly a coincidence that the states that were covered before Shelby County are all Republican strongholds that are now in a position to solidify their control of the state legislatures and redistricting for the House of Representatives.[25]

In 1976, in *Buckley v. Valeo*,[26] the Court held that the First Amendment's Free Speech Clause protected certain aspects of raising and spending money on campaigns for elected office, on the theory that money is essential to campaigning for elected office today. The decision nonetheless upheld limits on what individuals could contribute directly to candidates, but struck down limits on what candidates could spend, and freed up individuals to make independent

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[22] *Id.* at 552-54.
[23] *Id.* at 535.
[24] *Id.* at 563-66.
[25] Those states are those originally covered in 1965 (Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia) as well as those added later (Alaska, Arizona, and Texas). *Id.* at 537-538. In 2006, with the exception of Virginia, these states were controlled by the political party whose President nominated each of the Justices in the *Shelby County* majority.
[26] Buckley v. Valeo, 424 U.S. 1 (1976).

expenditures in any amount that they chose, as long as they did not coordinate with the candidate.

Money is not mentioned in the First Amendment, but it is hard to quarrel with the Court's conclusion regarding the vital role that it plays in the ability of candidates to get their messages out, which is surely one of the highest forms of political speech. On the deference side, the Court was rightly concerned that, if it deferred to the wishes of Congress, and severely limited the amount a challenger could spend, and it would thereby "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign," *i.e.*, help incumbents who wrote the law setting the ceiling.[27]

Opponents of the parts of the law that the Court had sustained in *Buckley* sought to explore potential loopholes, and Congress responded with efforts to close them. One limit on campaign spending that had existed since 1907 was a ban on corporations making direct contributions to candidates or political parties, which had been expanded in 1947 to include independent expenditures. Most, but not all, states had similar rules regarding corporate spending when *Citizens United v. Federal Election Commission*,[28] came before the Roberts Court. Writing separately to concur in part and dissent in part, Justice John Paul Stevens pointed out that there were many ways that the case could have been decided for the plaintiff on narrow grounds,[29] but instead the majority reached out and overturned the principle that spending by for-profit corporations could be treated differently from spending by individuals. There is, of course, no mention of corporations making campaign expenditures in the First Amendment or any other place in the Constitution, nor is there any structural reason why the judgments of Congress and numerous state legislatures that campaign contributions by business corporations should be banned, or at least limited, should not be sustained, which are the two reasons why *Dobbs* rejected a constitutional basis for a right to an abortion. Furthermore, there can be no question as to the alignment between the outcome in *Citizens United* and the Republican party, because the Republican Leader in the Senate, Mitch McConnell, has been at the forefront of every recent challenge to campaign finance limitations.[30]

Just this term, in *Federal Election Commission v. Cruz*,[31] the Court further extended its willingness to strike down various forms of prophylactic measures designed to prevent actual corruption or

[27] *Id.* at 653.
[28] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[29] *Id.* at 404-08.
[30] The Court has so far declined to decide whether the ban on candidate contributions, as opposed to independent expenditures, is constitutional. *United States v. Danielczyk,* 683 F.3d 611 (4th Cir. 2012), *cert denied,* 568 U.S. 1193 (2013). For a view that the explosion in campaign spending is not primarily due to *Citizens United*, but rather to the erroneous ruling in *Buckley* that prohibited all limits on independent expenditures by individuals, see Alan B. Morrison, *McCutcheon v. FEC, Roberts v. Breyer: They're Both Right, They're Both Wrong,* AMERICAN CONST. SOC'Y (2014).
[31] Fed. Election Comm'n v. Cruz, 142 S. Ct. 1638 (2022).

the appearance of corruption in campaign financing. The provision at issue focused on money raised by federal candidates after they had won an election. It did not place any new limits on the amounts or sources of that money, but it did impose a cap of $250,000 on how much of the post-victory money could be used by candidates to pay off money that they had personally loaned to their campaigns, on the theory that the excess "campaign donations" would go right into the pockets of the winners, who would then be indebted to the donors for personally enriching them.

What makes this decision (written by the Chief Justice) so inconsistent with the "leave it to the elected representatives" theme in *Dobbs* is that this law was approved by the very same members of Congress who are likely to be most adversely affected by it. Thus, in contrast to some campaign finance laws, this provision would directly harm the members who voted for it. The reason is simple: The candidates who receive post-election contributions are typically only the winners of elections, and since most incumbents win re-election, their votes in support of this legislation were votes against self-interest, yet the Court said, in effect, we know better, and the law cannot stand.

However, the Roberts Court has been anything but activist when the result would injure the Republican Party, as it generally does in redistricting disputes. The Court's ruling in *Baker v. Carr*[32] and the cases that followed it have found workable solutions to the problem of unequal numbers of residents in comparable legislative districts, by more-or-less strictly imposing a requirement of "one person, one vote."[33] But the Justices have struggled and failed to solve the gerrymandering problem, in which, while the number of voters are equal, the lines have been drawn by partisan legislatures to produce outcomes that strongly favor the political party in power, generally, although not always, the Republican Party. It is not as if the Justices believe that partisan gerrymandering is constitutional; they concluded just the opposite in *Vieth v. Jubelirer*.[34] Instead, the Justice have held, most recently in *Rucho v. Common Cause*,[35] that they are incapable of devising a remedy that would not involve the Court in making the kind of political choices that federal courts are forbidden from making under the political question doctrine.[36]

Unlike the other cases, this one involves an excess of "judicial inactivism." The problem, according to the Court, is its inability to draw lines in a manner that is judicially defensible and does not make the courts into political institutions. As the Chief Justice stated in his conclusion, "we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority."[37] But as

[32] Baker v. Carr, 369 U.S. 186 (1962).
[33] *Id*. at 237.
[34] Vieth v. Jubelirer, 541 U.S. 267 (2004).
[35] Rucho v. Common Cause, 139 S. Ct. 2484 (2019).
[36] Even in *Rucho*, as Justice Kagan showed in her dissent, the majority conceded that partisan gerrymanders were inconsistent with democratic principles. *Id.* at 2512.
[37] *Id.* at 2508.

Justice Kagan pointed out in her *Rucho* dissent, there are multiple ways that a court could review claims of partisan gerrymandering and at least strike down the most egregious among them.[38] Indeed, no court need actually draw the district lines, but instead it can send the case back to the legislature or other body charged with drawing the lines and order it do it again (and again) until they get it right, or at least not wrong. Attacking partisan gerrymandering does not require perfection, but it can surely produce re-drawn lines that do less harm to fundamental principles of democracy than do highly partisan gerrymanders, Democratic and Republican alike, as there were in *Rucho*'s two cases. More fundamentally, as Chief Justice John Marshall said in *Marbury v Madison,* "it is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." [39] And even if that Chief Justice overstated his point a little, he was surely correct in admonishing the courts that, when it comes to remedies, the perfect should not the enemy of the good, and at least the courts should be able to make the situation better, or less bad, than it was before.

Although not in a case involving election law, the Roberts Court (minus the Chief Justice) six months before *Dobbs* was overcome by another case of judicial inactivism. In *Whole Women's Health v. Jackson*,[40] the majority refused to block the Texas law that created a system of exclusively private enforcement of its ban on all abortions after six weeks. The six-week ban plainly violated existing abortion law, although that is no longer true post-*Dobbs.* The author of the Texas law and the members of the Texas legislature that supported it embraced the fact that it was designed to chill doctors from performing abortions that were currently constitutionally protected by preventing any judicial review in federal court, with the only court review available in a case against a doctor who had violated the Texas law. As shown by the opinions of the Chief Justice Roberts[41] and Justice Sotomayor,[42] both dissents from the principal rulings, there were a number of paths to immediate federal-court review, although some would require extending existing doctrine in ways that had never been used before. But any extension would be necessary, because there had never been a law like this, whose principal goal was to deter conduct that was currently constitutionally protected. The majority did leave open one possible state-law means to obtain court review, but the Fifth Circuit, not surprisingly, referred the question to the Texas Supreme Court, which promptly closed that door.[43] The majority's willingness to leave the Texas law in place can be explained (but not justified) by the fact that the Justices had already concluded, but not announced, that *Roe* was dead, and there was no reason to prolong its life.

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[38] *Id*. at 2516-23.
[39] Marbury v. Madison, 5 U.S. 137, 147 (1803).
[40] Whole Woman's Health v. Jackson, 595 U.S. 30 (2021).
[41] *Id.* at 543.
[42] *Id.* at 545.
[43] Whole Women's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2021).

III. Undermining Labor Unions

It is no secret that the Republican Party, as the party of business, has long opposed all efforts to strengthen the ability of workers to bargain collectively for wages and conditions of employment. In order for there to be vibrant labor unions, they must have the ability to require workers to pay agency fees (for those who do not wish to join the union) to support the union's work on their behalf regarding wages, benefits, and other conditions of employment. Although most of the members' mandatory dues and fees are spent to protect the economic interests of the workers, some unions used a portion of that money to support political, electoral, and social campaigns that not all members supported. In 1977, the Court in *Abood v. Detroit Board of Education*,[44] upheld the basic right of unions (in this case of public employees) to collect agency fees from those non-members that it represented. However, it also ruled that using any portion of those fees used for political expenditures violated the First Amendment rights of those who disagreed with the causes that the union leaders supported. It then required unions to set up rebate systems to accommodate those who chose not to be members, but who were required by law to pay their fair share of the non-political expenses of the union. The constitutional argument that prevailed for the objectors was that forcing workers to pay for political causes which they opposed was a form of compelled speech forbidden by the First Amendment. And while state legislatures for state employees had enacted laws requiring workers to pay dues or an equivalent, those laws did not specifically approve collecting and spending money for political and other purposes unrelated to collective bargaining.[45]

Abood and subsequent decisions left in place a system that, while not ideal for the unions, provided a tolerable accommodation. In addition, Congress in 1947, in the Taft-Hartley Act, had authorized states to enact "Right-to-Work" laws, under which individuals could not be required to join or even support a union as a condition of their employment, thus making it much harder for unions to organize and fund their activities on behalf of their members in Right-to-Work states. But the anti-unionists were not satisfied, and so they sought and obtained further relief from the Roberts Court. In *Janus v. AFSCME*, the Court, in another opinion by Justice Alito, following a series of cases in which the *Abood* rules gave increasing protection to objecting workers, extended the First Amendment to create a defense to workers who did not want to pay *any* money to support even the collective bargaining activities of all workers, overruling the part of *Abood* that sided with the union.[46]

The basis for the complaint was that the plaintiffs objected strongly to the positions that their union took in collective bargaining against the state, including those on behalf of the economic

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[44]Abood v. Detroit Bd. of Educ., 431 U.S. 209, 240–42 (1977), *overruled by* Janus v. Am. Fed'n of State, Cnt., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

[45] *Abood* involved a state law applied to state employees. Subsequently, the Court applied the *Abood* principal to workers in the private sector whose unions were established and given the right to collect dues by Congress. *Communications Workers of America v. Beck*, 487 U.S. 735, 761–763 (1988).

[46]Janus v. American Fed'n of State, Cnty., and Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

benefits for the workers that it represented. The Court concluded that the First Amendment protection extended to the right to oppose economic benefits that the union obtained for all the workers, and so the objecting plaintiffs did not have to pay their fair share of the costs of obtaining them. Although the Court eliminated the obligation of objectors to pay for any portion of the union's collective bargaining activities, it did not lessen the union's duty to treat all workers fairly, whether they contributed financially or not. There is, of course, no "constitutional right to free-ride" mentioned in the First Amendment, and the results are directly the opposite of what the elected representatives who enacted collective bargaining laws provided.[47] The result is just the opposite of the two principal bases in which the *Dobbs* opinion overturned *Roe*, but the anti-union outcome is exactly what the Republican Party wanted.

Another example involves the portion of the Fifth Amendment that prohibits governments from "taking private property for public purposes" without paying "just compensation."[48] The Court has correctly realized that some intrusions other than the government acquiring ownership or seizing physical possession of a person's land or other property may be so disruptive as to prevent the owner from being able to fully use it. On the other hand, the Court has also upheld laws that impose reasonable regulations on the way that owners may use their property.[49] Similarly, no one would doubt the right of the government to enter private property temporarily to assure that the owner is complying with generally applicable laws.

The issue in *Cedar Point Nursery v. Hassid*, was whether a California law that allowed union organizers to make limited visits to a farm to urge workers to join their union constituted the "taking" of the owner's property in violation of the Fifth Amendment.[50] There was no claim that those visits actually interfered with the owner's ability to engage in farming, that they deprived the owner of the use of any physical space while the organizers were on the premises, or that the owner suffered any monetary damage or loss of income from their presence (other than the possible loss of income if the workers organized and obtained higher wages). Nor was there a claim that the state permitted an unreasonably large number of visits by the organizers. According to the majority opinion of the Chief Justice, the repeated entrances constituted a trespass and hence an unconstitutional taking, even though the California legislators had reached a contrary conclusion and even though the state had "taken" nothing from the owner, other than the ability to exclude union organizers from using a small portion of the property for a short period of time. And, like the other cases, the California law was opposed by the business interests that support the Republican Party whose Presidents appointed the Justices who struck down the California law.

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[47] Ellis v. Bhd. of Ry, Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emps., 466 U.S. 435, 438, 446-48 (1984) (Congress intended to eliminate free riders).

[48] U.S. CONST. amend. V.

[49] Penn Cen. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978).

[50] Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

IV. Other Cases of the Roberts Court and Judicial Activism

In 2020 and 2021, the Roberts Court, in keeping with the Federalist Society wing of the Republican Party, moved ahead on a long-standing policy of theirs—giving greater power to the President over the administrative agencies under the "Unitary Executive" theory. In the first case, *Seila Law v Consumer Financial Protection Bureau*, with the Chief Justice writing for the majority, the Court held that the statute that limited the ability of the President to remove the head of the Consumer Financial Protection Bureau ("CFPB"), except for good cause, was unconstitutional because it interfered with the ability of the President to carry out his constitutional obligation in Article I, Section 3 to "take Care that the Laws be faithfully executed."[51]

There is no mention of the power to remove officers in either the Take Care or the Appointments Clauses, although that term is found in the Impeachment Clause. The director of CFPB and the other officers who have good cause requirements for removal are recent creations of Congress, and so there is no long-standing tradition that was offended when Congress specifically decided that no President should have the power to remove those officers at will. It is only at the highest level of generality that the text of the Take Care Clause can be said to create something approaching an absolute power of the President to remove those officers on the theory that, if he cannot, he will be held accountable for the maladministration of their agencies and thereby interfere with his Take Care responsibilities.[52] As for Justice Alito's reliance on deference to the legislature in *Dobbs*, it is plain that Congress balanced the considerations for and against good cause removal and came to the opposite judgment from the one adopted by the Roberts Court.

At issue in a second case in which the Roberts Court relied on an expansive reading of the Constitution is *United States v. Arthrex*,[53] was a statute that assigned the duty to assess the validity of patents being challenged before the Patent and Trademark Office to administrative patent judges ("APJs"), who are appointed by the head of their department, the Secretary of Commerce. Relying again on the Take Care Clause, which does not "mention" patents or the use of administrative law judges, the Chief Justice concluded that the entire review process was invalid unless the decisions were made by, or subject to approval of, principal officers,[54] *i.e.*, those who are appointed by the President with the advice and consent of the Senate, as set forth in the Appointments Clause.[55] However, that same Clause also allows Congress to enact laws providing for the appointment of "such inferior Officers as they think proper," without Senate confirmation. Nevertheless, the Court concluded that it had the final say on whether an officer who performed certain functions had to be a principal officer, regardless of what Congress had

[51] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).
[52] *Id.* at 2197-98, 2203-04.
[53] United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).
[54] *Id.* at 1978-79.
[55] U.S. CONST. art. II, § 2, cl. 3.

decided in the law creating the office. In this instance, not only was there no textual basis for insisting on presidential control over basic administrative procedures, but the text of the Appointments Clause points in the direction of giving specific deference to Congress—"as they think proper"—when it assigns a duty to an inferior rather than a principal officer.

In addition to its expansive reading of the Free Speech Clause in *Janus,* the Roberts Court has also used that clause to advance other ends of the business community that the Republican Party generally supports. For example, consider *Sorrell v. IMS Health, Inc.*[56] When doctors write prescriptions, pharmacies keep records of the drugs prescribed and by which doctor. There is often more than one drug that a doctor can prescribe for a given ailment, and naturally drug companies would prefer that doctors prescribe one of their own. One way to increase the likelihood of that happening is for the company to send out representatives to visit doctors and try to sell them on the company's products. Some doctors may say to a company representative that they prescribe a certain drug, but do not always follow through. One way that the companies can verify what a doctor is telling their salespeople is by gaining access to the records of the pharmacy, which will give the company a very good idea of each doctor's prescribing practices.

Vermont decided that allowing pharmacies to provide such information to the drug companies was a bad idea, even though the practice did not give the companies any personal information about the identity of the patients. The doctors did not like being confronted with the records of their prescribing practice, and the Vermont legislature agreed with them, making it unlawful to provide that information. The data companies that collected the prescription information and sold it to the drug companies, claimed that the prohibition violated the First Amendment, and the Roberts Court agreed in *Sorrell*.

Although on its face, and according to the dissent of Justice Breyer, the Vermont law was no more than "a lawful government effort to regulate a commercial enterprise,"[57] that is not how the Roberts Court saw it. According to the majority, the law interfered with the free speech rights of the pharmacists, who wished to sell the prescription data, and the comparable rights to receive the information by the drug companies. The problem is not that freedom of speech is not mentioned in the Constitution; the problem is that the Court, in an effort to side with business at the expenses of doctors and others whom the Vermont legislature sought to protect, read the text at a high level of generality and greatly expanded the concept of freedom of speech to include basic economic regulation. By relying on the First Amendment, the Court was able to avoid a charge that they were relying on substantive due process (as in *Roe*) to achieve their desired political result, which, to no one's surprise, was the outcome favored by the Republican Party and its big business allies and opposed by the Obama administration.

[56] Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).
[57] *Id.* at 581.

The Roberts Court has also taken an expansive view of the Free Exercise Clause in the First Amendment, at least as applied to expanding the protections available to mainstream religions. Public education is an important responsibility of the states. The Court has long held that parents have a constitutional right to send their children to schools of their choosing, including religious schools, provided that the schools meet minimum state standards. Montana has a provision in its constitution that forbids the state from spending state funds to support religious schools.[58] Several years ago, the state decided that, for a variety of reasons, it needed to support private schools to supplement the state's public secondary school system by providing for tax credits for the parents of students who attended certain eligible private schools. Consistent with the state constitution, no credits were available if the school was a religious-based one, and the denial of tax credits for donations to religious schools was challenged in *Espinoza v. Montana Department of Revenue*.[59] The Roberts Court sided with the three parents who argued that Montana was discriminating against religion, thereby interfering with the parents' "free exercise" of their religion. From a text perspective, Montana did not interfere with the religious practices or beliefs of any person; it defended the case on the ground that the parents had no constitutional right to have the state subsidize the education of their children at a religious school. But the Roberts Court ruled that if the state were going to use tax credits to support private schools, it could not exclude otherwise qualified religious institutions, even though the state's constitution and the wishes of the citizens of Montana were to the contrary.[60]

The Court continued on this broad reading of the Free Exercise Clause in *Carson v. Makin*,[61] handed down three days before *Dobbs*. At issue was a Maine law that provided funding to assist students in rural sections of the state that did not have a local public high school that they could attend to pay for private schools. The state had concluded that it did not wish to spend state funds to support any religious school, and the Roberts Court by a vote of 6-3 ruled that this exclusion was an unconstitutional incursion on the religious freedom of those otherwise eligible students who would rather attend a parochial school. The state did not, in the words of the First Amendment, "prohibit" any student from freely exercising their religious beliefs or interfere with any of their religious practices. Instead, it read the First Amendment, including its ban in the "establishment of religion," to create a preferred status for religious schools so that states now must fund religious schools with tax dollars if they fund any private secondary education

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[58] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020).

[59] *Id*.

[60] The Republican Party Platform of 2016 (there was none in 2020) took a strong stance in favor of religious liberty and free exercise, although it did not specifically endorse overturning the Montana law: "We support laws to confirm the longstanding American tradition that religious individuals and institutions can educate young people . . . without having to check their religious beliefs at the door." COMMITTEE ON ARRANGEMENTS FOR THE 2016 REPUBLICAN NATIONAL CONVENTION, REPUBLICAN PLATFORM 2016(2016) [hereinafter 2016 PLATFORM], 11–12, https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf.

[61] Carson *ex rel.* O.C. v Makin, 142 S. Ct. 1987 (2022).

at all. Had Maine decided that bilingual schools or those that did not have competitive athletic teams were ineligible for state funding, those decisions would have been upheld, unlike religious schools that now have a preferred and non-textual place before the Roberts Court.

In the final area, there are two cases in which the Roberts Court has read the Constitution in an expansive manner to protect the right to bear arms in the Second Amendment. The first case, *District of Columbia v. Heller*,[62] was decided before three current members of the Roberts Court majority were appointed, but the other, *New York State Rifle & Pistol Assn., Inc. v. Bruen*,[63] was issued the day before *Dobbs*. Both rulings are further examples of an activist and non-textual interpretation of the Constitution when that approach serves the political ends of the Republican Party.

The extent of the protection of the right to bear arms in the Second Amendment has a significant ambiguity: How far does that right extend, and what deference should legislative determinations be given when states and localities seek to control the possession of certain arms in certain places? To begin, there is the introductory militia clause that is expressly included (mentioned) in that Amendment—"a well regulated Militia, being necessary to the security of a free State."[64] Its scope was fully debated in the opinions in *Heller* and elsewhere. But for purposes of this essay, it only needs to be noted that the majority read the eleven words as functionally irrelevant.[65] Moreover, from the perspective of the second rationale for eliminating any constitutional basis for the right to an abortion in *Dobbs*—the lack of deference to the judgment of elected legislators—that was also present, but given short shrift in *Heller*. The District of Columbia's judgment that handguns were a major source of crimes in that urban setting and that the District's residents should be entitled to protect themselves in ways that other jurisdictions would find unnecessary, was simply disregarded because the "right" at issue was inconsistent with the Justices' view of the role of privately owned firearms in our society—and that of the Republican Party.[66]

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[62] D.C. v. Heller, 554 U.S. 570 (2008).

[63] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

[64] U.S. CONST. amend. II.

[65] "The 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." *Heller*, 554 U.S. at 577. It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. *Id.* at 599. The majority found other support for a broad reading of the Second Amendment, but they were not found in the text of the operative clause either.

[66] "We uphold the right of individuals to keep and bear arms, a natural inalienable right that predates the Constitution and is secured by the Second Amendment." 2016 PLATFORM, *supra*, note 53, at 12. *See also* Katie Glueck, et al., *In More Than 100 G.O.P. Midterm Ads This Year: Guns, Guns, Guns*, N.Y. TIMES (May 27, 2022), https://www.nytimes.com/2022/05/25/us/politics/republicans-campaign-guns.html.

That approach was extended in *Bruen* where the plaintiffs objected to the requirement that a person seeking a permit to carry a concealed handgun in public had to show "proper cause," which required more than an ordinary citizen's concern for their safety. In siding with the challengers, the Court, by a 6-3 vote, established a new test by which all Second Amendment cases will be decided: If the practice was not regulated at the time of the Founding (or perhaps when the Fourteenth Amendment was adopted), and in a manner comparable to the law being challenged, the right to bear arms will prevail.[67] Thus, because New York City did not have a subway in 1789, and because there were no laws limiting the age at which firearms in that era could be owned or even possessed, state efforts to impose limits in those circumstances are likely to fail. Moreover, in contrast to *Dobbs,* which extolled the benefits of representative democracy, the *Bruen* majority was clear that while "judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here" because the People struck the proper balance in the Second Amendment which are courts must follow.[68]

Conclusion

A word about the limitations of the claims made in this essay. First, *United States v. Windsor*[69] and *Obergefell v. Hodges*[70] are Roberts Court decisions in which the judicial activism side produced results contrary to the positions of the Republican Party. But there is an explanation for those outcomes that does not undermine the thesis of this essay: Justice Anthony Kennedy provided the deciding vote to strike down the laws in both cases that disfavored same sex couples, and he is no longer on the Court.

Second, the cases discussed in this essay do not include any criminal or statutory cases, which make up the bulk of the Court's docket. And within the criminal docket, there are constitutional claims by defendants that may be viewed as seeking a result that some would see as judicial activist. My view is that including those cases would not alter the conclusions of this essay, but I recognize that further study of them might lead to another conclusion.

Third, I do not suggest that I have reviewed all of the constitutional decisions of the Roberts Court in civil cases or that they can all be explained in the manner described above. This essay examines only a few decisions, albeit important and controversial ones, and there are many others that may not fit this pattern, although not many that contradict it.

With those qualifications, I believe that the implicit charge against *Roe*—that it is a product of judicial activism—can also be made against many of the most important and most controversial decisions of the Roberts Court. If the charge of judicial activism can properly be based on a combination of an absence of textual support in the Constitution and a lack of deference to the

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[67] *N.Y. State Rifle & Pistol Ass'n, Inc.*, 142 S. Ct. at 2131-34.
[68] *Id.* at 2131.
[69] United States v. Windsor, 570 U.S. 744 (2013).
[70] Obergefell v. Hodges, 576 U.S. 644 (2015).

decisions of the legislatures, then the Roberts Court has been as guilty of that charge on the same grounds that majority opinion in *Dobbs* found the decision in *Roe* to be.

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