

2009

# The Roberts Court and Access to Justice

Gene R. Nichol

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

---

## Recommended Citation

Gene R. Nichol, *The Roberts Court and Access to Justice*, 59 Case W. Res. L. Rev. 821 (2009)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol59/iss4/7>

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

## KEYNOTE

### THE ROBERTS COURT AND ACCESS TO JUSTICE

*Gene R. Nichol*<sup>†</sup>

I am honored to be here. Just off a stint as a university president, I may be the only person in America who actually misses talking to lawyers. And I'm glad to be here at Case Western—to be re-introduced to old friends, and new. That includes, for me, your former dean, Gary Simson, who was my teacher.

Dean Simson is largely responsible for my becoming an academic. I wrote a paper for one of his classes that he convinced me to have published. I certainly never would have done that on my own. And since I was too bull-headed to do law review—not as thoughtful as the marvelous group of students who have put together these discussions—if I hadn't published that article, I would never have been able to get a job as an academic. The University of Texas wasn't exactly a "feeder" school.

There has been a time or two in the last couple of years when I thought about Gary getting me into the academy, and I've been fairly bitter about it. But I've always had great affection for Dean Simson. When I was sitting in his equal protection class in 1976, I was a football player from Oklahoma State University, with hair down his back, who, on most days, dressed only in overalls. It is horrifying to contemplate.

---

<sup>†</sup> Professor of Law and Director, Center on Poverty, Work and Opportunity, University of North Carolina. A version of this essay was given as the keynote address of the *Case Western Reserve Law Review's* symposium, "Access to the Courts in the Roberts Era."

I am also glad to come to Cleveland. Anybody who still believes that “Major League” is the greatest American film, and Randy Newman’s “Burn On” is the closest we’ve come to true classical music, has to look forward to coming to Cleveland. I also clerked for Squire Sanders & Dempsey after my second year of law school. I lived, for the summer, in a non-air conditioned third floor walk-up in East Cleveland. It was there that I learned that Ohio is actually much hotter than Texas in the summer. About that same time, the Supreme Court decided my favorite case, *Moore v. East Cleveland*.<sup>1</sup> I had always understood why Mrs. Moore wanted to be able to live in the same house with her two grandkids. After that summer, I just never knew why she wanted to do it in East Cleveland.

I do have a topic, you’ll be relieved to hear: “The Roberts Court and Access to Justice.” Not simple. Not narrow. Not uniform. Not, I think, single-minded. Not unimportant. Not good, I started to say. But I’ll hold off on that for a bit.

Thinking about access—for this Court and for its predecessors—necessarily includes much. It surely implicates a bevy of issues even well beyond the long list we are discussing today. It explores, of course, the traditional tools of access—standing,<sup>2</sup> mootness, ripeness, political question,<sup>3</sup> the congressional bestowal and stripping of jurisdiction,<sup>4</sup> the expansion of the Eleventh Amendment<sup>5</sup> and other immunities,<sup>6</sup> the continued dwindling of the writ of habeas corpus (both statutorily and through judicial crankiness), and the increased reluctance to entertain facial<sup>7</sup> or vagueness challenges<sup>8</sup> to statutory regimes.

But it moves, as well, far beyond concepts of jurisdiction to broadened standards of federal preemption,<sup>9</sup> to tightened statutes (or

---

<sup>1</sup> 431 U.S. 494 (1977) (invalidating application of zoning law as violation of the right to privacy).

<sup>2</sup> See *Lance v. Coffman*, 549 U.S. 437 (2007); *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006); *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531 (2008) (Roberts, C.J., dissenting).

<sup>3</sup> See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (political question doctrine).

<sup>4</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (enforcement of the habeas corpus suspension clause).

<sup>5</sup> See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

<sup>6</sup> See, for example, this spring’s decision in *Van De Kamp v. Goldstein*, 129 S. Ct. 855 (2009), outlining prosecutorial immunities.

<sup>7</sup> See *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); *United States v. Williams*, 128 S. Ct. 1830 (2008); *Baze v. Rees*, 128 S. Ct. 1520 (2008); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006).

<sup>8</sup> See *Williams*, 128 S. Ct. 1830 (vagueness challenge to child pornography statute).

<sup>9</sup> See *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008); *Rowe v. N.H. Motor Transp. Ass’n*, 128 S. Ct. 989 (2008); *Chamber of Commerce of U.S. v. Brown*, 128 S. Ct. 2408 (2008);

notions) of limitation,<sup>10</sup> to new restrictions on the availability of punitive damages<sup>11</sup>—decisions which have led many, including, the Kiplinger Business Report,<sup>12</sup> the Wall Street Journal, and Erwin Chemerinsky,<sup>13</sup> three brothers in the bond, to tag the Court as decidedly pro-business.<sup>14</sup>

A portrait of effective access would also turn to narrowed doors for implied statutory causes of action<sup>15</sup> and to similar sentiments in *Bivens*<sup>16</sup> claims—arguing that “*Bivens* is a relic of the heady days in which [the] Court assumed common-law powers to create causes of action.”<sup>17</sup> A relic, the argument goes, that should be interred. And I have at least one friend, a trier of civil rights cases, who claims that the most worrisome limitation on judicial access of the past two decades is the dramatically altered availability of summary judgment in section 1983 cases—with its resulting foreclosure of rights to jury trial.<sup>18</sup>

Nor can the just-beginning-to-unfold legacy of the Roberts Court and access to the judiciary be illustrated only by door-closing ventures. Though the newest appointees have usually dissented, the high Court’s recent detainee decisions break remarkable ground in the assurance of a federal judicial forum.<sup>19</sup> *Boumediene v. Bush*<sup>20</sup> is a surprising and, by my lights, courageous decision for this or any other

---

Preston v. Ferrer, 128 S. Ct. 978 (2008); Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007).

<sup>10</sup> See Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

<sup>11</sup> See Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008); Philip Morris USA v. Williams, 549 U.S. 346 (2007).

<sup>12</sup> Jonathan Crawford, *Bush’s Lasting Legacy: A Pro-Business Judiciary*, Mar. 10, 2008, [http://www.kiplinger.com/businessresource/forecast/archive/Bush\\_Leaves\\_a\\_Last\\_Ing\\_Legacy\\_080310.html](http://www.kiplinger.com/businessresource/forecast/archive/Bush_Leaves_a_Last_Ing_Legacy_080310.html).

<sup>13</sup> See Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947 (2008), *quoted in* Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983 (2008).

<sup>14</sup> See Jess Bravin, *Court Under Roberts Limits Judicial Power*, WALL ST. J., July 2, 2007, at A1; *see also* Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASH. POST, June 22, 2007, at D1.

<sup>15</sup> See *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008). *But see* *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008).

<sup>16</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>17</sup> *Wilkie v. Robbins*, 127 S.Ct. 2588, 2608 (2007) (Thomas, J., & Scalia, J., concurring) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., joined by Thomas, J., concurring)); *see also* *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831 (2008) (restricting claims under federal tort claims act).

<sup>18</sup> See *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Saucier v. Katz*, 533 U.S. 194 (2001).

<sup>19</sup> See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *see also* *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>20</sup> 128 S. Ct. 2229.

tribunal. Not only did the Court invalidate a statute under the habeas corpus clause, rule against two branches of government acting in concert under claims of national security, and prevent an explicit and unequivocal effort to restrict the jurisdiction of the federal courts, but, it has been argued, it offered “the most aggressive exercise of judicial review of wartime measures adopted by the political branches in our nation’s history.”<sup>21</sup> *Boumediene* is neither timid nor exclusionary.

And few modern constitutional law decisions open the courthouse doors more generously and more enthusiastically than *District of Columbia v. Heller*,<sup>22</sup> last summer’s handgun case. Until then, as Justice Stevens indicated, it had been understood that legislatures could “regulate the civilian use . . . of firearms so long as they [did] not interfere with the preservation” of, as the term goes, “a well-regulated militia.”<sup>23</sup> The Roberts majority decidedly “upset[] that settled understanding” while leaving to “future cases the formidable task of defining the scope of permissible regulations.”<sup>24</sup>

The *Heller* opinion speaks in sweeping terms, reminding that any “balancing” of interests required had already been accomplished, in 1791, by the people. Alan Morrison may be right that, under *Heller*, we’re in for a “round of [lawyers’] full employment”—though I’m guessing it’s not listed as part of the federal stimulus package.<sup>25</sup> But reportedly the National Rifle Association has already launched.<sup>26</sup> And the Justices are seemingly unconcerned about their stunning absence of expertise to venture so boldly into such an arena.

So it is possible to see the Roberts Court’s commitment to judicial access from different and varied vantage points, and as reflecting differing levels of consistency and commitment. I suppose it is not surprising, speaking broadly though, that scholars like Kathleen Sullivan would declare: “[w]hat we actually have is a pretty bold conservative agenda but it’s clothed in the gentle language of traditional modesty and restraint.”<sup>27</sup> Or that the Wall Street Journal would enthuse that “the biggest change under Chief Justice John

---

<sup>21</sup> Adler, *supra* note 13, at 986.

<sup>22</sup> 128 S. Ct. 2783 (2008).

<sup>23</sup> *Id.* at 2846 (Stevens, J., dissenting).

<sup>24</sup> *Id.*

<sup>25</sup> See Marcia Coyle, *Man in the Middle: Justice Kennedy Continues His Role as a Pivotal Vote on a Divided Court*, NAT’L L.J., Aug. 6, 2008, at 1 (quoting Alan Morrison on *Heller*).

<sup>26</sup> See Nat’l Rifle Ass’n of Am., Inc. v. City of Chicago, 567 F.3d 856 (7th Cir. 2009) (challenging city handgun regulation), *petition for cert. filed*, 77 U.S. L. WK. 3679 (June 3, 2009) (No. 08-1497); *Nordyke v King*, 563 F.3d 439 (9th Cir.) (challenging county gun regulation), *reh’g en banc granted*, 575 F.3d 890 (9th Cir. 2009).

<sup>27</sup> Nina Totenberg, *The Roberts Court and the Role of Precedent* (National Public Radio broadcast July 3, 2007) (quoting Kathleen Sullivan, director of the Stanford Law Constitutional Law Center), available at <http://www.npr.org/templates/story/story.php?storyId=11688820>.

Roberts might not involve who wins on the merits. Rather, it may be who gets through the courthouse door in the first place.<sup>28</sup>

Like the Burger and Rehnquist Courts before it, the Roberts tribunal seems to show greater zest for limiting the forms, remedies, and processes of constitutional adjudication than in reversing the bold strokes of its predecessors on the merits.<sup>29</sup> This is, after all, mere lawyers' work; hardly the stuff of major headlines and pointed political campaigns—though Lilly Ledbetter proved the exception to that generally-accurate rule.<sup>30</sup>

But the predilection for process is why, to wildly over-generalize, constitutional law casebooks seem like something of a mish-mash of stutter-steps expanding and contracting constitutional accountability; while federal courts books deliver more of a forced march, across an array of fronts, with decisions pointedly opening the federal forum in the '60s and early '70s, followed by a current of cases later in the '70s and then again in the '80s and '90s, and now taking away what seemed to have been given.

I add only two brief points before turning, as requested, to the underappreciated wonders of the case or controversy requirement. The first is that, as we explore, throughout the day, the multiple dimensions of the Roberts Court's treatment of access, it might be well to remind of what we invariably leave out. Any discussion of access to our judicial system with a thoughtful visitor from a distant culture and clime would surely begin with our strongest transgression against access and equality—the exclusion from the voluntary use of the civil justice system of that huge proportion of the populace who cannot afford to pay the fare. Not to put too fine a point on it, but we carve “equal justice under law” on our courthouse walls. For decades, we have announced as a fundamental principle of our constitutive law that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>31</sup> Yet study after study shows that at least 80 percent of the legal need of the poor in this country is unmet.<sup>32</sup> And the circumstance is almost as bleak for middle-income Americans. What passes for civil justice among the have-nots is astonishing. It cannot be counted, actually, as a system of

---

<sup>28</sup> Bravin, *supra* note 14.

<sup>29</sup> See Gene R. Nichol, Jr., *An Activism of Ambivalence*, 98 HARV. L. REV. 315 (1984) (book review).

<sup>30</sup> Ms. Ledbetter's case became part of the 2008 presidential campaign and resulted in statutory changes bearing her name. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, *superseding* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

<sup>31</sup> Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that a state must provide a trial transcript to an indigent criminal defendant contesting his conviction).

<sup>32</sup> See Gene Nichol, *The Charge of Equal Justice*, JUDGES' J., Summer 2008, at 38, 38–41.

justice. Yet the inequity does not provoke the attention of the Court that sits atop its structures.<sup>33</sup> Nor, too frequently, does it make it to the core of curricula and research in the legal academy we love. For that, it is hard to find anything like an adequate excuse.

Second, having just returned from a cold twentieth of January trip to the nation's capital, one of the most important things to be said about access to justice and a Roberts Court—apart from my prediction that our ever-confident Chief Justice will use a cheat-sheet in 2013, or else turn the duties over to Justice Stevens, who will, by then, be approximately 109—may well be that there won't really be one. That is, there won't be a "Roberts Court."

The high Court of the next decade may well bear the Chief Justice's name, but it will be a good deal less likely to profoundly bear the marks of his predilections. An Obama presidency, whatever else it might do, will not add to a Roberts, Alito, Scalia, Thomas ascendancy. I'm not sure it's fair to characterize this Court as "the most conservative Court since the mid-1930s" with Chemerinsky,<sup>34</sup> or an "unbreakable phalanx" of conservative justices" with Dworkin,<sup>35</sup> or the Court "conservatives had long yearned for and that liberals feared" with Linda Greenhouse,<sup>36</sup> or the "Return of the Four Horsemen" with Jonathan Turley,<sup>37</sup> or even to say, as Justice Breyer did a year and a half ago, "[i]t is not often in law that so few have so quickly changed so much."<sup>38</sup>

Nor am I certain, as has been often asserted, that a studied agenda, traceable to earlier stints in the Meese Justice Department, drives Roberts Court decision-making. That agenda has been described as "largely unchanged" in the decades since: "Expand executive power. End racial preferences . . . Speed executions. Welcome religion into the public sphere. And, above all, reverse *Roe v. Wade*."<sup>39</sup> It includes,

---

<sup>33</sup> Though some members of the Court have seen fit to disparage the very question. See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 252 (2003) (Scalia, J., dissenting) (deriding "Robin Hood Taking"—the "taking from the rich to give to indigent defendants").

<sup>34</sup> See Adler, *supra* note 13, 985 (quoting Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, at 962 (2008)).

<sup>35</sup> *Id.* at 984 (quoting RONALD DWORKIN, *THE SUPREME COURT PHALANX: THE COURT'S NEW RIGHT-WING BLOC* 47 (2008)).

<sup>36</sup> Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1; see also Bravin, *supra* note 14 ("a score of decisions conservatives have long yearned for").

<sup>37</sup> See Jonathan Turley, *The Roberts Court and the Return of the Four Horsemen* <http://jonathanturley.org/2008/07/02/the-roberts-court-and-the-return-of-the-four-horsemen/> (July 2, 2008).

<sup>38</sup> Greenhouse, *supra* note 36.

<sup>39</sup> Jeffrey Toobin, *Five to Four*, NEW YORKER, June 25, 2007, at 35; see also Ctr. for Am. Progress, *The Roberts Four: Men on a Mission*, Oct. 1, 2007, [www.americanprogress.org/issues/2007/10/roberts\\_court.html](http://www.americanprogress.org/issues/2007/10/roberts_court.html).

as well, guidelines advocating tightened standing principles, even when jurisdiction is bestowed by the United States Congress.<sup>40</sup>

If these verdicts are overstated, a recent empirical study of Supreme Court decisions from 1986 to 2004 by professors Lindquist, Smith and Cross finding that judicial “restraint [has been] contingent on the source of the law at issue” is likely not.<sup>41</sup> Two decades of cases, they conclude, demonstrate not “judicial restraint” but “commitment to a particular understanding of the Constitution . . . in which both states and the executive branch [but not the Congress] enjoy relatively great autonomy from legal restrictions.”<sup>42</sup> These studies measure, of course, the work of the Roberts Court’s predecessor. But few would doubt that the present configuration of conservative judges, if bolstered by new additions, would seek to take us at least this far. If it is true, as many have claimed, that we now have a Kennedy Court rather than a Roberts one;<sup>43</sup> that, as it’s said, “‘Roberts presides but Kennedy pivots,’”<sup>44</sup> the high Court of the next ten years will likely reveal no dominant and overarching Roberts imprint. I would be less than candid to deny my relief that this is so.

But enough of prognostication. As Mr. Berra famously noted, “It’s tough to make predictions, especially about the future.”<sup>45</sup> And if the past calendar year has taught us anything, it is that we actually have no idea what’s about to come down the pipe. If we did, I assume that everyone in this room would have made a fortune last year selling the market short.

And what of the present Court’s treatment of the mainstays of the Article III case or controversy requirement—the demand for concrete, distinct, and palpable harm caused by the defendant and likely to be redressed by favorable determination?<sup>46</sup> Well here, surely, the Roberts Court’s rulings are not radical and studied efforts at door closing. *Hein v. Freedom from Religion Foundation*,<sup>47</sup> to my surprise, didn’t overturn *Flast v. Cohen*<sup>48</sup>—even if it treated it rudely. There Justice Alito said, simply put, we’ve been idiotic on this front for forty years

---

<sup>40</sup> See Lily Henning, *Roberts and Scalia: Standing Side by Side*, LEGAL TIMES, Aug. 1, 2005, at 8.

<sup>41</sup> Stefanie A. Lindquist, Joseph L. Smith & Frank B. Cross, *The Rhetoric of Restraint and the Ideology of Activism*, 24 CONST. COMMENT. 103, 105 (2007).

<sup>42</sup> *Id.* at 125.

<sup>43</sup> See Totenberg, *supra* note 27; see also Linda Greenhouse, *On Court That Defied Labeling, Kennedy Made the Boldest Mark*, N.Y. TIMES, June 27, 2007, at 1.

<sup>44</sup> Totenberg, *supra* note 27 (quoting Yale Law Professor Akhil Amar).

<sup>45</sup> See WorkingHumor.com, *Humorous Quotes of Yogi Berra*, [http://www.workinghumor.com/quotes/yogi\\_berra.shtml](http://www.workinghumor.com/quotes/yogi_berra.shtml) (last visited Dec. 13, 2009).

<sup>46</sup> See *Allen v. Wright*, 468 U.S. 737 (1984).

<sup>47</sup> 127 U.S. 2553 (2007).

<sup>48</sup> 392 U.S. 83 (1968).

and idiotic we'll remain.<sup>49</sup> It was a little like your teenage daughter indicating "you're no stupider, dad, than you've always been."

In at least two decisions the Court has oddly welcomed suits brought by states that would, we assume, otherwise be cast out as exercises in general whining.<sup>50</sup> *Massachusetts v. EPA* held, easily, that the extraordinarily widespread nature of harm from global warming "presents [no] insuperable jurisdictional obstacle" and that "a litigant to whom Congress has 'accorded a procedural right'" of intervention "can assert that right without meeting all the normal standards for redressability and immediacy."<sup>51</sup> Proving, once again, that the Justices, a case or two notwithstanding,<sup>52</sup> will treat environmental disputes more generously than any other line of federal cases—except perhaps actions brought to challenge the use of race in drawing electoral districts. No wonder Justices Roberts and Scalia sounded furious.

Rather than weighing the pros and cons of these forays—and the shifting and transient majorities that produced them, I want, in my final pages, to return to fundamentals. To the validity, the sensibility, the comprehensibility, and, I suppose, the legitimacy, of the Court's implementation of a bolstered and constitutionally-rooted injury requirement. As you might have guessed, I'm not as big a fan as some. And, as I was thinking about how to get at that—to draw out the point—it occurred to me that I have one means that belongs, perhaps, to none other.

You never know what will happen in this life. About fifteen years ago I did another lecture, not unlike this one, at a distinguished law school, set up by a noted law review, dealing with federal standing questions and followed by a learned panel of commentators explaining, as is traditional, that I didn't know what I was talking about—all subsequently published in an accomplished journal.<sup>53</sup>

With no offense to anyone, and apologies for my own poor memory, suffice to say that until three or four years ago, I had forgotten the entire transaction. That is, until John Roberts got nominated to be Chief Justice and my phone started ringing incessantly. The soon-to-be-chief had apparently been one of the

---

<sup>49</sup> *Hein*, 127 S.Ct. 2553.

<sup>50</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Lance v. Coffman*, 549 U.S. 437 (2007) (distinguishing *Smiley v. Holm*, 285 U.S. 355 (1932)).

<sup>51</sup> *Massachusetts*, 549 U.S. at 517–18 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)). See also the assignee standing decision in *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531 (2008).

<sup>52</sup> See *Lujan*, 504 U.S. 554.

<sup>53</sup> See Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993).

commentators and his article—or as he referred to it in his hearings—his “little comment”—was one of the few published records of his legal thought.<sup>54</sup> So it was briefly explored much more widely than a law review article has any inherent right to expect.

Apparently all that could be conclusively proved before Roberts took the highest legal seat on the planet was that he didn’t think much of my jurisdictional theories. When all this transpired, I was a new public university president who was already engaged in a political struggle or two. Struggles, for any aficionados among you, upon which I ultimately did not prevail. So I repeatedly said to the press only something that was undoubtedly true: “If John Roberts was critical on my standing theories that lands him soundly and irrefutably in the legal and academic mainstream.”<sup>55</sup>

I mention all this to focus on Roberts’s conclusion, as an advocate for a tightened case or controversy requirement, even in the face of congressional acts to the contrary:

“Standing[’s injury requirement],” Roberts wrote, “is an apolitical limitation on judicial power. It restricts the right of conservative public interest groups to challenge liberal agency action or inaction, just as it restricts the right of liberal public interest groups to challenge conservative agency action or inaction. . . . [The assumption that it cloaks a political agenda is] facile.”<sup>56</sup>

This enthusiasm for a vigorously implemented injury standard is apparent as well in Roberts’s forceful opinions in *DaimlerChrysler Corp. v. Cuno*,<sup>57</sup> *Massachusetts v. EPA*,<sup>58</sup> and *Sprint Communications Co. v. APCC Services, Inc.*<sup>59</sup> I’ll conclude by expressing, perhaps unsurprisingly, my modest disagreement.

I don’t mean just that the Court’s use of injury is often non-neutral in the crassest political sense—like when judges, liberal and conservative, simply switch positions, abandoning their traditional colors to suit the day. Like a jockey deciding to ride temporarily for another owner. Or Brett Favre donning a Jets uniform. As in *Elk Grove Unified School District v. Newdow*<sup>60</sup>—the pledge of

---

<sup>54</sup> See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993); *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. 342 (2005) (statement of John G. Roberts, Jr.) (referring to “that small little Law Review comment”).

<sup>55</sup> See generally Lily Henning, *D.C. Circuit Shows Its Right Stripes*, LEGAL TIMES, Aug. 8, 2005, at 1 (describing the D.C. Circuit at the time of Roberts’s rise to the Supreme Court as conservative, but not overly ideological).

<sup>56</sup> Roberts, *supra* note 54, at 1230.

<sup>57</sup> 547 U.S. 332 (2006).

<sup>58</sup> 549 U.S. 497 (2007) (Roberts, C.J., dissenting).

<sup>59</sup> 128 S. Ct. 2531 (2008).

<sup>60</sup> 542 U.S. 1 (2004).

allegiance case—where Justices Rehnquist, O'Connor, and Thomas argued for novel door-opening theories and Justice Stevens's majority opinion (for the liberals) employed an entirely new theory of prudential restraint. Or the similar flop that occurred in *Gratz v. Bollinger*.<sup>61</sup> Or in *Shaw v. Reno*.<sup>62</sup> Or when we see Justice Scalia advocate the broadest possible reading of the zone of interest test—and then enthuse, in *Bennett v. Spear*,<sup>63</sup> over “enforcement by so-called ‘private attorneys general’” of environmental claims in which all have a common interest<sup>64</sup>—leading my federal courts students to wonder whether the book contained a misprint. That is, until they read the facts more fully. This sort of manipulation is simply the *Bush v. Gore*<sup>65</sup> shuffle. Any legal standard, with even the tiniest imprecision, is subject to its variations. And, two hundred years into the venture, to understate, we have not been able to render the definition of a case or controversy precise.

Nor has the injury standard managed to avoid repeated applications that employ controverted, non-neutral and unexplained visions of the reach, status, and enforceability of constitutional provisions. *Federal Election Commission v. Akins*,<sup>66</sup> for example, appears as a simple case to most members of the Court. There, voters opposed to policies advocated by American Israel Public Affairs Committee challenged the Federal Election Commission's refusal to require disclosure of its membership and contribution records under the Federal Election Campaign Act.<sup>67</sup> Even when “large numbers of Americans suffer alike,”<sup>68</sup> the Court wrote, their “inability to obtain information” that must be publicly disclosed pursuant to a statute constitutes an “injury in fact.”<sup>69</sup>

Of course, *United States v. Richardson*<sup>70</sup> has, for decades, stood testament to the fact that an analogous provision of the Constitution—the Accounts Clause—provides no such legally cognizable interest.

---

<sup>61</sup> 539 U.S. 244 (2003). Justices Stevens and Souter pointed out standing difficulties, *id.* at 282–91 (Stevens, J., dissenting); *id.* at 291–92 (Souter, J., dissenting), which were rejected by Chief Justice Rehnquist. *Id.* at 260–68 (majority opinion).

<sup>62</sup> 509 U.S. 630 (1993).

<sup>63</sup> 520 U.S. 154 (1997).

<sup>64</sup> *Id.* at 165.

<sup>65</sup> 531 U.S. 98 (2000). The conservatives on the court took the position that a recount would violate Bush's equal protection rights, despite their normal skepticism of such claims.

<sup>66</sup> 524 U.S. 11 (1998).

<sup>67</sup> *Id.* at 15–16.

<sup>68</sup> *Id.* at 23.

<sup>69</sup> *Id.* at 21. Justice Scalia argued in dissent that the plaintiffs in *Akins* had no more right to the requested information than did any other American. *Id.* at 31 (Scalia, J., dissenting). As a result, Justice Scalia insisted that the case should have been barred by the Court's generalized grievance decisions. *Id.* at 35.

<sup>70</sup> 418 U.S. 166 (1974).

Leaving the odd result, though an odd result we've long become accustomed to, that if a widely shared interest is seen as so compelling that it is written into the text of the Constitution, it provides less litigating "oomph" than a similarly generalized statutory interest or even an apparently commonly accepted social value (like an interest in the plight of the snail-darter<sup>71</sup>).

*Hein* can be seen in this way as well.<sup>72</sup> The case has its complications: the unexplainable distinction between executive and legislative expenditures, the embrace of the open laundering of funds to avoid the strictures of the First Amendment, the beyond-wooden reading of the Court's jurisdictional rules, the fact that three distinct groups of Justices can call one another disparaging names and all be correct.

But the Court's "individual injury only" reading of the Establishment Clause is hard to square, as Chip Lupu and Robert Tuttle have argued, with the limited government, restricted-sphere, bounded separationist designs of the First Amendment.<sup>73</sup> Or with what even Chief Justice Roberts has ruled the Madisonian right "not to "contribute three pence . . . for the support of any one [religious] establishment.""<sup>74</sup> It is unsurprising, perhaps, that the full panel of the Fifth Circuit Court of Appeals would, last year, read *Hein* as blocking standing in an action challenging prayers conducted at a local school board meeting.<sup>75</sup> Concurring, Judge DeMoss wrote that mere exposure to government-sponsored prayer inflicts no greater injury on the observer than does a taxpayer's forced contribution.<sup>76</sup>

Injury may be swell. But with so little textual grounding, and so much mystery in definition, it is difficult to see why it should delimit or trump various constitutional interests of far clearer pedigree.

But the toughest medicine of the injury requirement is not its theoretical justification, but its practical implementation. I wouldn't, perhaps, agree with every word of Justice Scalia's zesty opinion in *Hein*. But he is surely right, in fleshing out his proffered distinction between "Wallet" injuries and "Psychic" ones, to say:

---

<sup>71</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

<sup>72</sup> *See Hein v. Freedom from Religion Found., Inc.*, 127 S.Ct. 2553 (2007).

<sup>73</sup> Ira C. Lupu & Robert W. Tuttle, *The Cross at College: Accommodation and Acknowledgement of Religion at Public Universities*, 16 WM. & MARY BILL RTS. J. 939, 960–62 (2008); *see also* Douglas W. Kmiec, *Standing Still—Did the Roberts Court Narrow, but Not Overrule, Flast to Allow Time to Re-Think Establishment Clause Jurisprudence?*, 35 PEPP. L. REV. 509 (2008).

<sup>74</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 347 (2006) (quoting *Flast v. Cohen*, 392 U.S. 83, 103 (1968)) (distinguishing a state taxpayer standing case from *Flast* and *Hein*).

<sup>75</sup> *See Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (en banc).

<sup>76</sup> *See id.* at 499–501 (DeMoss, J., concurring).

The basic logical flaw in our cases is thus twofold: We have never explained why Psychic Injury was insufficient in the cases in which standing was denied, and we have never explained why Psychic Injury, however limited, is cognizable under Article III[, in the cases in which standing was granted].<sup>77</sup>

Well said.

Why, then, do plaintiffs challenging racially crafted districts need prove no vote dilution, no diminished representational capacity, and no hampered ability to aggregate votes with like-minded citizens? It is enough, apparently, to assert that a constitutionally questionable practice sends abroad an unfortunate message.<sup>78</sup> This theory, though, has been regularly rejected on less favored fronts.<sup>79</sup>

Why can plaintiffs attacking affirmative action programs escape the usual obligation of showing that they actually lost something concrete—like a contract, a job, or a seat in a medical school class—as a consequence of the purportedly illegal practices?<sup>80</sup> They “need not allege that [they] would have obtained the benefit but for the barrier in order to establish standing.”<sup>81</sup> According to the Justices, the “tension” resulting with traditional standing decisions like *Warth v. Seldin* and *Allen v. Wright* is “minimal.”<sup>82</sup> This says, implicitly, that the white challengers may not have suffered injury, but they’ve come close. It constitutes standing law’s special treatment program for those challenging special treatment programs.

Compare these rulings with decisions like *Lewis v. Casey*.<sup>83</sup> There the Court held that a petitioner denied access to a prison library in violation of *Bounds v. Smith*<sup>84</sup> asserts no concrete injury unless he can demonstrate the materials would have yielded claims apt to overturn his conviction. The opinion calls to mind certain images about carts preceding horses. And I don’t know what the parallel would be in an

---

<sup>77</sup> *Hein*, 127 S. Ct. at 2575 (Scalia, J., concurring).

<sup>78</sup> *See Bush v. Vera*, 517 U.S. 952, 1045 (1996) (Souter, J., dissenting); *see also* Gene R. Nichol, Jr., *Standing For Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 313–16 (2002).

<sup>79</sup> *See Allen v. Wright*, 468 U.S. 737 (1984).

<sup>80</sup> *See Gratz v. Bollinger*, 539 U.S. 244, 282–91 (2003) (Stevens, J., dissenting) (comparing first year and transfer student admissions policies); *Ne. Fla. Chapter of the Associated General Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 659 (1993); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (Powell, J. concurring).

<sup>81</sup> *Ne. Fla. Chapter*, 508 U.S. at 666 (“The ‘injury in fact’ is the inability to compete on an equal footing in the bidding process, not the loss of a contract.”); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007).

<sup>82</sup> *Ne. Fla. Chapter*, 508 U.S. at 668.

<sup>83</sup> 518 U.S. 343 (1996).

<sup>84</sup> 430 U.S. 817 (1977).

affirmative action admissions case. Perhaps the petitioner would have to prove not only that he would actually get admitted to law school, but pass the bar, and land a job?

The Article III cases attempt, first, to make the injury test operate with a precision and solidity it likely cannot sustain. They then compound the challenge by failing to offer comprehensible justifications for the choices the Justices make. The bolstered standing requirement becomes an opaque labeling exercise, often employed as surrogate for larger currents—currents of federalism, or separation of powers, or an unbounded urge to reach the case on the merits, either to embrace its theories or to bury them.

A rule of concrete, palpable, rugged, redressable harm that embraces an intensely subjective and yet non-personalized concern over the racial aesthetics of voting district lines,<sup>85</sup> a shared apprehension over congressional expenditures that aid religious groups,<sup>86</sup> an apparently individuated or representational interest in the impacts of global warming,<sup>87</sup> the generalized “benefits of living in an integrated community,”<sup>88</sup> personal annoyance over the structuring of a government bidding process, even if one would never have successfully obtained a bid,<sup>89</sup> and the borrowed interest in representing a class even after one’s own dispute has been rendered moot;<sup>90</sup> is, perhaps, an odd one.<sup>91</sup> Then, by comparison, a standard that rejects summarily an action based on the palpable fear of a second choking by the Los Angeles Police Department,<sup>92</sup> or judicially-assumed instances of exclusionary zoning,<sup>93</sup> or challenges to religious spending by the executive branch<sup>94</sup> and analogous compliance claims under the Commerce Clause,<sup>95</sup>—the Elections Clause,<sup>96</sup> the Accounts Clause,<sup>97</sup> and the Incompatibility Clause<sup>98</sup>—

---

<sup>85</sup> See *Shaw v. Reno*, 509 U.S. 630 (1993).

<sup>86</sup> *Flast v. Cohen*, 392 U.S. 83 (1968).

<sup>87</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>88</sup> See *Trafficante v. Met. Life Ins. Co.*, 409 U.S. 205, 208 (1972) (action under the 1968 Civil Rights Act).

<sup>89</sup> *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200 (1995); *Ne. Fla. Chapter of Associated General Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993).

<sup>90</sup> See *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388 (1980).

<sup>91</sup> One could add *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (allowing challenge to statistical sampling in census on the possibility that it could affect vote dilution).

<sup>92</sup> *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

<sup>93</sup> *Warth v. Seldin*, 422 U.S. 490 (1975).

<sup>94</sup> *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007); *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

<sup>95</sup> *DaimlerChrysler v. Cuno*, 547 U.S. 332 (2006).

<sup>96</sup> See *Lance v. Coffman*, 549 U.S. 437 (2007).

<sup>97</sup> *United States v. Richardson*, 418 U.S. 166 (1974).

only compounds the mystery. This purported vision of durable harm is interesting, curious, unexplained, and unexplainable. And, contrary to Chief Justice Roberts's hopes, it is not neutral, an "apolitical limitation on judicial power."<sup>99</sup> The ability to pick and choose entry points with such discretion aggrandizes judicial authority. It doesn't diminish it.

It is also odd, of course, to attempt to enforce such a meandering slalom on the United States Congress. One would think that a well-earned modesty would bar the Justices from exporting their work product to direct collisions with co-equal branches of government.<sup>100</sup>

And the fluttering nature of injury surely makes discussions of Article III originalism, at best, quaint. I remain one who believes, with the historians,<sup>101</sup> that the common law backdrop of the case or controversy requirement allowed the presentation of actions without demonstrable personal injury. But even if that's not so, the harm suffered because my representational prowess is only 96 percent of that of my colleagues in the district next door, I'm guessing, would be well beyond anyone's notion of litigational triggering in 1789.

I close only by adding that there is, perhaps, one thing worse than a legal standard so thin, so conclusory, that it can't do the work for which it is advertised. And that is if it seems, in operation, to more frequently aid the powerful and hinder the powerless. I know it's possible to see the United States Supreme Court's standing decisions of the past two and a half decades from many different lights. But surely one of them is that what has been made demonstrably easier for those who would challenge efforts to increase minority voting representation, or minority access to higher education, or government contracting has been made decidedly more difficult for those seeking to attack government decisions that burden the economically marginalized, or that support private racial discrimination, or that limit the availability of essential social services, or contest brutal law enforcement practices, or that challenge the preferences offered to dominant religions.<sup>102</sup>

In a society still the richest on earth, the richest in human history—but where one in five children lives in stark unrelenting poverty; where we can boast, if that is the word, the largest gaps between rich

---

<sup>98</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

<sup>99</sup> Roberts, *supra* note 54, at 1230.

<sup>100</sup> *But see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>101</sup> See Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1969).

<sup>102</sup> Nichol, *supra* note 78.

and poor in the industrial world; where we spend more on health care than any other nation, but leave dramatically more of our fellows outside the system, in the shadows; where a huge cut of the populace is flatly priced out of the voluntary use of the civil justice system; where we have, yet, rich and poor public schools, not just private ones; where access to higher education is so closely linked to family income,<sup>103</sup> and where the political system itself is perennially skewed toward the interests of the wealthy—I would be loathe to add yet one more regime that, even if indirectly, favors the powerful and chides the powerless. In the world's greatest democracy, we've got enough of that already.<sup>104</sup>

---

<sup>103</sup> Gene Nichol, *Educating for Privilege*, THE NATION, Oct. 13, 2003, at 22.

<sup>104</sup> See Gene R. Nichol, *Law's Disengaged Left*, 50 J. LEGAL EDUC. 547 (2000).

