



THE CLASSICALLY LIBERAL ROBERTS COURT

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ABSTRACT

When John Roberts was nominated by President George Bush to be the next Chief Justice of the Supreme Court after Chief Justice William Rehnquist, it marked a shift in constitutional jurisprudence. With some exceptions, the Roberts Court has produced classically liberal decisions on a whole host of constitutional issues. Classically liberal decisions have been produced in the realms of free speech, campaign finance, gun rights, gay rights, searches and seizures, and religious freedom. The member Justices have produced these decisions consistent with natural law and libertarianism both unanimately and in close decisions, including decisions involving Justices voting against their traditional liberal-conservative blocs. Despite creating a litany of libertarian decisions, no single member of the Roberts Court self-identifies as a libertarian. This has puzzled academics and commentators, leading many to write off the Roberts

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Court as simply inconsistent. The Justices of the Roberts Court, including new Justices Sonia Sotomayor and Elena Kagan, offer differing jurisprudences richer than the popular bimodal right-left paradigm. Both liberal and conservative Justices, despite their vast differences on Constitutional topics like textualism and purposivism, have arrived at classically liberal conclusions in their rulings, advancing individual rights instead of government regulations. The Declaration of Independence, Constitution, and Bill of Rights were written with natural law and classical liberal principles in the forefront of the Founder's minds, which means that a Supreme Court charged with upholding the Constitution should produce results consistent with libertarianism. A libertarian impulse grounded in natural law sets the stage for the Roberts Court deciding opinions that are classically liberal. This libertarian instinct model, however, is not perfect and does not explain many decisions because the Court is not intentionally libertarian. Although no single Justice is classically liberal, however, the Roberts Court as a whole is more classically liberal than any of its members.

I. INTRODUCTION

On September 29, 2005, John Roberts became Chief Justice of the United States Supreme Court. For the past ten years, he has led the Court in making landmark decisions across a whole host of issues. However, the jurisprudence of the Roberts Court has confounded many. The Roberts Supreme Court is often criticized as "inconsistent" because the member Justices swing from their liberal and conservative blocs instead of remaining predictably entrenched.¹

¹ Jeff Shesol, *The Mystery and Mystique of John Roberts*, SLATE (July 3, 2012, 11:36 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/john_roberts_aca_decision_should_remind_us_why_judges_are_not_the_best_people_to_decide_questions_of_national_policy.html. Conservative members of the Court being Chief Justice Roberts,

Occasionally, the Justices themselves complain about the Court's inconsistencies.² Sometimes, however, Justices are praised for voting against their traditional blocs.³ The Justices of the Roberts Court offer much more than two-dimensional partisan divisions. I offer a different interpretation that the Roberts Court's oscillation reflects classically liberal values embedded in the Constitution and the Justices' own libertarian-esque judicial methodologies. The Declaration of Independence, Constitution, and Bill of Rights provide broad protections of individual liberty and autonomy. This libertarian model of government envisioned by the Founders should produce results in the Supreme Court consistent with those same principles. The Justices of the Roberts Court have consistently produced many classically liberal decisions that reaffirm the Constitution's natural rights protections. Classically liberal decisions have been produced in the realms of free speech, campaign finance, gun rights, gay rights, searches and seizures, and religious freedom. A libertarian impulse, despite its decentralized and fractured nature, forces the Justices to respect individual liberty and in fact serves as a makeshift shield against heavy handed government intrusion. Because the classical liberal element is unconscious and not intentional, the libertarian dimension of the Roberts Court does not explain every decision or doc-

Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito. Liberal bloc members being Justices Stevens, Ginsburg, Souter, Breyer, Sotomayor, and Kagan.

² See *Maricopa County v. Lopez-Valenzuela*, 135 S. Ct. 428 (2014) (Thomas, J., statement).

³ See, e.g., Ariane de Vogue, *4 things we learned about John Roberts*, CNN.COM (June 25, 2015), <http://www.cnn.com/2015/06/25/politics/supreme-court-john-roberts-obamacare-takeaways>.

trinal developments. Although no single Justice on the Roberts Supreme Court is classically liberal,⁴ the Roberts Court as a whole is more classically liberal than any of its individual member Justices.

II. BACKGROUND

Academics and commentators have traditionally placed the Justices on a right-left spectrum, much like the two dominant political parties, to explain their jurisprudence.⁵ “Liberal” Justices, usually appointed by Democratic Presidents, have a more functionalist, interventionist mindset.⁶ “Conservative” Justices, usually appointed by Republican Presidents, tend to have a formalist, restrained approach.⁷ This rugged, bimodal model of judicial interpretation works for many cases, but it fails to explain judges switching sides, unanimous opinions, and opinions that counter both binary options. A libertarian dimension on the Court, grounded in natural law principles, can often explain these “inconsistencies” on the Roberts Court, especially in divided opinions where a one or two Justice swing decides the case.

⁴ Except perhaps Clarence Thomas. See Bill Kauffmann, *Clarence Thomas*, REASON MAGAZINE, Nov. 1987, available at <http://reason.com/archives/1987/11/01/clarence-thomas/2> (“I certainly have some very strong libertarian leanings, yes. I tend to really be partial to Ayn Rand, and to The Fountainhead and Atlas Shrugged. But at this point I’m caught in the position where if I were a true libertarian I wouldn’t be here in government”).

⁵ See, e.g., Luke M. Milligan, *Stacking in Criminal Procedure Adjudication*, 85 CHI.-KENT L. REV. 331, 342 (2010); David Leonhardt, *A More Nuanced Breakdown of the Supreme Court*, N.Y. TIMES (June 26, 2014), http://www.nytimes.com/2014/06/27/upshot/a-more-nuanced-breakdown-of-the-supreme-court.html?_r=0&abt=0002&abg=1.

⁶ Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws*, 61 EMORY L.J. 737 (2012).

⁷ *Id.*

Justice Anthony Kennedy is usually considered the “swing Justice” on the Court, having been the determinative vote in many decisive and contested cases.⁸ Justice Kennedy’s “faint-hearted libertarianism”⁹ proves the inherent weaknesses of the liberal-conservative jurisprudence narrative for the high court. Justice Kennedy’s periodic eschewal of his own conservative bloc reflects a classically liberal element to his judicial decision-making. Justice Kennedy’s willingness to rebuke the expectations of the right-left paradigm has allowed him to oscillate between the conservative and liberal blocs to often further libertarian interests, notably in the areas of sexual autonomy¹⁰ and free speech.¹¹ However, all of the Roberts Court Justices have, at one time or another, voted against their bloc.

Some of the most libertarian decisions produced by the Roberts Court have been the most celebrated. These celebrated decisions are often unanimous or near-unanimous. For example, *Snyder v. Phelps*, decided 8-1, provides robust libertarian free speech protections for protestors at military funerals.¹² Chief Justice Robert’s majority opinion is reminiscent of the seductive but apocryphal Voltaire quote “I disapprove of what you say, but I will defend to the death your right

⁸ Memorandum, SCOTUSBLOG (June 30, 2012), available at http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SCOTUSblog_Summary_Memo_OT11.pdf (“Justice Kennedy remained the Justice most likely to be in the majority of a 5-4 decision”).

⁹ Ilya Shapiro, *A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy the Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty*, Helen J. Knowles, Rowman & Littlefield 2009, 33 HARV. J.L. & PUB. POL’Y 333, 360 (2010).

¹⁰ Although not decided during Chief Justice Robert’s tenure, Justice Kennedy authored *Lawrence v. Texas*, which protected homosexual sexual relations despite laws criminalizing sodomy. 539 U.S. 558 (2003). See also Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, CATO SUP. CT. REV., 21-41 (2002-2003).

¹¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

¹² 562 U.S. 443 (2011).

to say it.”¹³ Even Justice Alito, the lone dissenter in *Snyder*, focused his dissenting opinion on the *injuries* caused by the protestors,¹⁴ which can be reconciled with the non-aggression principle’s reasoning.¹⁵ In *United States v. Jones*, the Roberts Court unanimously blocked the Federal Government’s warrantless placement of GPS tracking devices onto cars, holding that it constituted a warrantless search in violation of the Fourth Amendment.¹⁶ Justice Scalia, in an opinion joined by the “liberal” Justice Sotomayor, recognized that protecting citizens from such warrantless physical intrusions was the “monument of English freedom” at the time of the Founding.¹⁷ In the recent *Riley v. California* decision, a unanimous Supreme Court again held unconstitutional state and Federal government attempts to search without a warrant the entirety of cellphones seized incident to arrest.¹⁸ Seven other Justices, three liberal and four conservative, signed onto the Chief Justice’s opinion, which shows the power of the Justices’ libertarian impulses to vote with members of the rival bloc to protect liberty interests. However, some decisions that advance natural law and classically liberal principles have been met with criticism and scorn.

The most divided cases that advance libertarian interests are also the most contested, usually because the Justices vote with their bloc.

¹³ S. TALLENTYRE, *THE FRIENDS OF VOLTAIRE* 199 (1907). In an early opinion of Justice Stevens, he centered an entire free speech opinion on that quote. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976).

¹⁴ *Snyder*, 562 U.S. at 443 (Alito, J., dissenting).

¹⁵ Even libertarian legal theorist Stephan Kinsella recognizes the right to sue for intentional infliction of emotional distress, the tort at issue in *Snyder*. See N. STEPHAN KINSELLA, *AGAINST INTELLECTUAL PROPERTY* 58 (2008), available at http://mises.org/sites/default/files/Against%20Intellectual%20Property_2.pdf.

¹⁶ 132 S.Ct. 945 (2012).

¹⁷ *Id.* at 949 (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886)).

¹⁸ 134 S.Ct. 2473 (2014).

The divisive *Hobby Lobby* decision furthered a closely-held corporation's religious liberty against a backdrop of government regulations in the healthcare sector.¹⁹ Libertarianism found an early foothold in religious toleration and freedom because it stresses freedom of conscience as a fundamental human right.²⁰ Justice Alito's *Hobby Lobby* decision furthers those protections against government intervention.²¹ Much of the criticism of the *Hobby Lobby* decision stems from the Justices voting squarely with their blocs with no vote-switching.²² The gun rights cases, *District of Columbia v. Heller*²³ and *McDonald v. Chicago*,²⁴ are also contested and criticized because the Justices, although advancing libertarian interests, remained entrenched in their blocs. The property-protecting *Horne II* decision saw numerous opinions by the Justices with no cross-voting along conservative-liberal lines.²⁵ *Horne II* recognized that personal property received the same constitutional takings protection as real property over a vocal Sotomayor dissent.²⁶ These cases are not unanimous, but they still advance classically liberal jurisprudence on the whole.

This stands in contrast to the celebrated decisions *Obergefell v. Hodges*²⁷ and *United States v. Windsor*²⁸ because Justice Kennedy

¹⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

²⁰ DAVID BOAZ, *LIBERTARIANISM: A PRIMER* 31 (1998).

²¹ Cf. Ilya Somin, *Alito's Libertarian Streak*, *THE AMERICAN SPECTATOR* (Nov. 9, 2005), <http://spectator.org/articles/47794/alitos-libertarian-streak> (discussing Alito's history as a Court of Appeals Judge advancing religious freedom during his nomination to the Supreme Court).

²² Tom Cohen, *Hobby Lobby Ruling Much More than Abortion*, *CNN* (July 2, 2014, 12:03 AM), <http://www.cnn.com/2014/07/02/politics/scotus-hobby-lobby-impacts/>.

²³ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²⁴ *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

²⁵ *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).

²⁶ "[T]he retention of even one property right that is not destroyed is sufficient to defeat a claim of a *per se* taking" *Horne*, 135 S. Ct. at 2438 (Sotomayor, J., dissenting).

²⁷ *Id.* at 2584.

²⁸ *Id.* at 2675.

voted with the liberal bloc to strike down both state laws banning gay marriage, and the Defense of Marriage Act's federal definition of marriage as a man and a woman, respectively. Chief Justice Robert's *N.F.I.B. v. Sebelius* decision, which upheld the Affordable Care Act under Congress's taxing power,²⁹ advanced libertarian interests in the sense that it recognized an activity-inactivity distinction for Congressional commerce power,³⁰ which had remained largely unchecked for over 70 years, but betrayed those same natural law principles by upholding the interventionist law. Chief Justice John Roberts was hailed as a "statesman"³¹ for voting against his bloc in *N.F.I.B.* The celebration of *N.F.I.B.* and gay marriage decisions compared to the criticism of *Hobby Lobby* and the gun rights cases show that citizens, academics, and commentators alike reward Justices for voting against their partisan blocs because it reaffirms the image of the Supreme Court as a neutral decision maker.

III. THE CONSTITUTION IS CLASSICALLY LIBERAL

The Constitution provides robust protections for a whole host of individual liberties consistent with a classically liberal governance structure.³² The Preamble of the Constitution spells out that the Constitution was designed to "secure the blessings of liberty to ourselves and our posterity."³³ The Preamble also dictates that the Federal

²⁹ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

³⁰ Damon Root, *We Won in our Effort to Preserve the Constitution*, REASON MAGAZINE, Oct. 2012, available at <http://reason.com/archives/2012/09/18/we-won-in-our-effort-to-preserve-the-con>.

³¹ Laurence Tribe, *Chief Justice John Roberts's Ruling Restores Faith in the Court's Neutrality*, THE DAILY BEAST (June 28, 2012), <http://www.thedailybeast.com/articles/2012/06/28/chief-justice-john-roberts-ruling-restores-faith-in-the-court-s-neutrality.html>.

³² RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

³³ U.S. Const. Pmb. l.

Government must “establish Justice,”³⁴ which requires protecting all citizens equally before the law. This broad, libertarian language was not written by James Madison in a vacuum. The Framers were influenced by classically liberal writers like John Locke, David Hume, and Adam Smith. For instance, the famous Scottish Enlightenment philosopher David Hume wrote that justice requires stability in possession, transfer by consent, and the keeping of promises.³⁵ This contract-based theory of justice found a home in the United States Constitution, which bans laws “impairing the Obligation of Contracts”³⁶ and holds prior debt contracts against the United States as valid.³⁷

In a similar vein, John Locke wrote that a just government must protect the natural rights of life, liberty, and property.³⁸ These classically liberal ideas were in the air during the Founding, and influenced the Declaration of Independence’s pronouncement that the protection of “Life, Liberty and the pursuit of Happiness” are unalienable rights.³⁹ The Declaration of Independence is the full libertarian recognition that rights exist outside of government and there are certain domains that no majoritarian democracy can interfere in.

Dr. Martin Luther King, Jr., pointed to this rich, libertarian language in his seminal “I Have a Dream” speech, referring to the contract-as-justice language in the Constitution, by stating that:

In a sense we've come to our nation's capital to cash a check.
When the architects of our republic wrote the magnificent

³⁴ *Id.*

³⁵ DAVID HUME, III A TREATISE OF HUMAN NATURE VI (L.A. Selby-Bigge ed., 1888).

³⁶ U.S. CONST. art. I, § 10.

³⁷ U.S. CONST. art. VI, § 1.

³⁸ JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690).

³⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the 'unalienable Rights' of 'Life, Liberty and the pursuit of Happiness.' It is obvious today that America has defaulted on this promissory note, insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked "insufficient funds."⁴⁰

Dr. King recognized that for almost 200 years the natural law rhetoric of the Declaration of Independence and the Constitution was not extended to African-Americans by the Federal and state governments.⁴¹ The natural law exists for all people in all times and all places, yet a country founded on libertarian principles denied those protections for so long. Dr. King's focus on the contractual nature of natural rights resonates with Hume's justice model and Locke's aforementioned just government framework. Dr. King recognized the proliferation of property right protections in the Constitution as an extension of human rights and the right to self-ownership.⁴²

The American natural law tradition also borrows from ancient Roman law.⁴³ The writings of Cicero helped lay the foundation

⁴⁰ Martin Luther King, Jr., *I Have a Dream: Keynote Address at the March on Washington for Jobs and Freedom* (Aug. 28, 1963), available at <http://www.archives.gov/press/exhibits/dream-speech.pdf>.

⁴¹ For a well-researched look into Dr. King as a natural law and religious thinker, see Justin Buckley Dyer & Kevin E. Stuart, *Rawlsian Public Reason and the Theological Framework of Martin Luther King's "Letter from Birmingham City Jail"*, 6 *POL. & RELIGION* 145 (2013), available at <http://politicalscience.missouri.edu/docs/paper/Dyer-Stuart-2013-Rawlsian-Public-Reason.pdf>.

⁴² DAVID BOAZ, *LIBERTARIANISM: A PRIMER* 36 (1998).

⁴³ Edward D. Re, *The Roman Contribution to the Common Law*, 39 *LOY. L. REV.* 295 (1993).

for classical liberalism in ancient Rome. Cicero wrote of a “true law” grounded in nature that exists in all times and all places, and his writings have remained influential even today.⁴⁴ Cicero himself saw his Republic transform into a dictatorship and Empire. The American Founders were well aware of the successes and failures of both the Roman Republic and the giant, brooding Roman Empire.⁴⁵ After all, the Founders wrote the Federalist Papers and Anti-Federalist Papers under Roman pseudonyms like Publius.⁴⁶ The Founders looked to examples like the Twelve Tables, which were an early Roman attempt at codifying the rights of the citizenry in governmental affairs, including the judiciary. The Twelve Tablets were “placed in the Forum, so that every citizen could easily read them. They were created after extensive public debate and discussion, by a committee of ten (decemvirs) which relied in part on Greek law, and which made revisions based on public comment by citizens.”⁴⁷ This served as a forerunner to the debates surrounding the American Constitution and Bill of Rights, which also recognize the rights of the citizenry in governmental affairs. The natural law espoused by Roman theorists has echoed throughout the ages, and it certainly influenced the Constitution.

The Constitution gives the Federal government, in theory, limited and enumerated powers to govern. Congress was not given general plenary police powers but was instead limited to those powers

⁴⁴ 1 MARCUS TULLIUS CICERO, THE POLITICAL WORKS OF MARCUS TULLIUS CICERO; COMPRISING HIS TREATISE ON THE REPUBLIC; AND HIS TREATISE ON THE LAWS 270 (Francis Barham trans., Edmund Spettigue 1st ed. 1841) (c. 54-51 B.C.E.). See also William R. Nifong, Note, *Promises Past: Marcus Atilius Regulus and the Dialogue of Natural Law*, 49 DUKE L.J. 1077, 1103 (2000).

⁴⁵ George Anastaplo, *The Constitution at Two Hundred: Explorations*, 22 TEX. TECH L. REV. 967, 1064 (1991).

⁴⁶ THE FEDERALIST No. 10 (James Madison).

⁴⁷ David B. Kopel ET. AL., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 108 (2007).

“herein granted”⁴⁸ under Article 1, Section 8, which included the power to regulate interstate commerce and declare war.⁴⁹ Combined with the Tenth Amendment’s broad language prohibiting Congress from acting outside of its enumerated powers,⁵⁰ the Constitution makes Congress textually restricted in power, which should advance liberty. Chief Justice Roberts, in his *N.F.I.B.* opinion, lays out this enumerated powers framework nicely:

Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.⁵¹

The irony is that the Affordable Care Act falls far outside the scope of Congressional powers and yet was still upheld. There is one enumerated power that should worry classical liberals – the necessary and proper clause.⁵² The fuzzy language of “necessary and proper” should worry libertarians because it does not provide any clear rules and governments often push the boundaries of vagueness. The modifier “and” provides minimal reassurance to those skeptical of government power because both “necessary” and “proper” have no tangible meaning. The Supreme Court has confirmed libertarians’ fears

⁴⁸ *Id.*

⁴⁹ U.S. CONST. art. I, § 8.

⁵⁰ U.S. CONST. amend. X.

⁵¹ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012).

⁵² U.S. CONST. art. I, § 8.

from practically the beginning, holding that “necessary and proper” essentially means “convenient.”⁵³ Libertarians argue that convenience should not be the guiding government principle because it undermines the democratic imprimatur of political policy agendas⁵⁴ and devalues the bastion of liberties that natural rights provides.

Another troublesome provision for classical liberals in Article I’s grant of power to Congress is the Commerce Clause.⁵⁵ Despite its language to simply “regulate” commerce, the Commerce Clause has been read broadly by the Supreme Court. In *Wickard v. Filburn*, a progressive Supreme Court hostile to laissez-faire capitalism held that a farmer consuming their own production grown and eaten intra-state can still be regulated by Congress because it affects the interstate economy in the aggregate.⁵⁶ The Court also read the Commerce Clause to allow Congress to curb racism in businesses like local hotels⁵⁷ and restaurants.⁵⁸ This aggregate model of Commerce Clause jurisprudence led to decades of no Federal laws being struck down for violating the Commerce Clause. The Rehnquist Court later restricted Congress’ power to regulate Commerce by creating a substantive economic activity restriction.⁵⁹ The Rehnquist Court struck down a school zone gun safety law⁶⁰ and the Violence Against Women Act⁶¹ passed by Congress as violative of the Commerce Clause. However, the Rehnquist Court did still agree with the aggregate Commerce model in *Gonzales v. Raich*, a case in which libertarian Randy Barnett argued and lost. In *Gonzales v. Raich*, the

⁵³ *McCulloch v. Maryland*, 17 U.S. 316, 413 (1819).

⁵⁴ See F.A. HAYEK, *THE ROAD TO SERFDOM* 65 (Routledge Classics 2001) (1944).

⁵⁵ U.S. CONST. art. I, § 8.

⁵⁶ 317 U.S. 111, 127-29 (1942).

⁵⁷ *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

⁵⁸ *Katzenbach v. McClung*, 379 U.S. 294 (1964).

⁵⁹ *United States v. Lopez*, 514 U.S. 549 (1995).

⁶⁰ *Id.*

⁶¹ *United States v. Morrison*, 529 U.S. 598 (2000).

Rehnquist Court held that Congressional regulation of a person's individual growing and personal use of marijuana with no intention of ever buying or selling that marijuana was Constitutional under the Commerce power because aggregately it affected the inter-state commerce market for marijuana.⁶² This broad reading of Congressional power should worry libertarians concerned about limitations on government power.

The Bill of Rights to the Constitution, adopted as a compromise with the Anti-Federalists, delineate areas of our private life that the government must respect.⁶³ The Bill of Rights tells the Federal Government what it cannot do, which is a significant departure from the text of the Constitution that largely empowers the Federal Government by providing grants of power. The Bill of Rights recognizes broad protections of the right of conscience through the religious and free speech clauses of the First Amendment. The Bill of Rights recognizes the right of self-defense and the protection of a "free State" in the Second Amendment. The Bill of Rights provides procedural protections of the home to shield against government intrusion through the Third and Fourth Amendments. The Fifth, Sixth, Seventh, and Eighth Amendments provide more procedural and substantive protections in the criminal and judicial context.

The Ninth Amendment, however, provides the most robust defense of liberty in the Bill of Rights. The Ninth Amendment, famous termed "The Forgotten Amendment,"⁶⁴ provides "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁶⁵ The Founders feared an ever-growing government so they wanted to make sure that other

⁶² 545 U.S. 1 (2005).

⁶³ See John S. Baker, Jr., *The Effectiveness of Bills of Rights*, 15 HARV. J.L. & PUB. POL'Y 55 (1992).

⁶⁴ BENNETT PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955).

⁶⁵ U.S. CONST. amend. IX.

natural rights, although not enumerated in the Constitution, were still sheltered from government intrusion. This is the broadest protection of natural rights and libertarian principles in the Bill of Rights, but the Supreme Court in the past has mostly ignored it, as natural rights often stand in the way of government growth.⁶⁶ However, the Ninth Amendment has not been completely forgotten. The most famous Ninth Amendment opinion was Justice Goldberg's concurrence in *Griswold v. Connecticut* in which he argued that the "right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment."⁶⁷ Justice Goldberg's opinion reasserted the Ninth Amendment in the national consciousness by recognizing an unenumerated right of privacy. The Supreme Court has also found libertarian success in other domains.

The Reconstruction Amendments,⁶⁸ adopted between 1865 and 1870, fortify the Constitution's natural law and classical liberal foundations. The Thirteenth Amendment bans slavery throughout the United States, which constitutionally solved America's slavery tragedy and bars government authorization and entrenchment of the absolute domination of people's personhood and labor. The libertarian implications of the Thirteenth Amendment could not be clearer: people in the United States have a right to own their body and their labor.

The Fourteenth Amendment transformed America's Constitution and federalist mandates. The Fourteenth Amendment provides, in part:

⁶⁶ See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006).

⁶⁷ *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965).

⁶⁸ U.S. CONST. amends. XIII-XV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁶⁹

The Fourteenth Amendment also assigns Congress the power to enforce the provisions against the states,⁷⁰ which shifts the previous model of dual sovereignty because now Congress and the Federal government has constitutional authority to inquire into the laws and civil rights of the various states. This also signals that the protection of individual rights is not a mere statutory matter but rather a significant Constitutional affair. The introduction of citizenship to freed blacks was the Constitutional response to the infamous *Dred Scott*⁷¹ decision that barred blacks from American citizenship, often called the worst Supreme Court decision in U.S. history.⁷² This broad bestowal of citizenship parallels the classical liberal natural law that sees past color and creed and instead looks to the humanity of every individual. The Privileges or Immunities clause,⁷³ meant to enforce against the states the rights contained in the Bill of Rights and elsewhere,⁷⁴ was made practically dead letter by the Supreme Court in

⁶⁹ U.S. CONST. amend. XIV, § 1.

⁷⁰ *Id.* at § 5.

⁷¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

⁷² See, e.g., BERNARD SCHWARTZ, *A BOOK OF LEGAL LISTS* (1997).

⁷³ U.S. CONST. amend. XIV, § 1.

⁷⁴ Clark M. Neily III & Robert J. McNamara, *Getting Beyond Guns: Context for the Coming Debate over Privileges or Immunities*, 14 *TEX. REV. L. & POL.* 15 (2009).

the 1870s.⁷⁵ However, the Supreme Court revived what the Privileges and Immunities Clause was meant to protect through the Due Process Clause.⁷⁶ Using the Due Process Clause instead of the Privileges or Immunities Clause to apply the Bill of Rights to the states has not been without its critics.⁷⁷

The Equal Protection Clause also fits a natural law mold because it requires that everyone be equal before the law. This legal egalitarianism of the Fourteenth Amendment duplicates the Declaration of Independence's recognition of "the separate and equal station to which the Laws of Nature and of Nature's God entitle" men and universal pronouncement that "all men are created equal."⁷⁸ Unfortunately, the Supreme Court initially muted the Equal Protection clause by endorsing "separate but equal" as the legal standard,⁷⁹ which further institutionalized racist norms and entrenched minorities in subpar occupations.⁸⁰ Justice Harlan wrote a powerful dissent embracing a colorblind Constitution, writing "[t]here is no caste here" and that the U.S. Constitution "neither knows nor tolerates classes among citizens."⁸¹

After a momentous legal effort led by the NAACP, the Supreme Court finally struck down "separate but equal" and instead held that

⁷⁵ *Slaughter-House Cases*, 83 U.S. 36 (1872).

⁷⁶ See *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908).

⁷⁷ E.g., *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring) ("I cannot agree that it is enforceable against the States through a clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.").

⁷⁸ THE DECLARATION OF INDEPENDENCE para. 1-2 (U.S. 1776).

⁷⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁸⁰ Cf. GAVIN WRIGHT, *OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR* (La. State Univ. Press 1996) (1986) (outlining the shifting sands of the Southern and minority labor markets post-Civil War).

⁸¹ *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

separate government facilities across racial lines is “inherently unequal.”⁸² The Burger Court further developed the Court’s Equal Protection jurisprudence further by holding that race-conscious university affirmative action programs, if designed properly, are constitutional.⁸³ The Rehnquist Court clarified that rigid, mechanical applications of race consciousness in public universities were unconstitutional⁸⁴ but still upheld an individualized holistic review of applicants that took race into account.⁸⁵ Affirmative action programs have long come under fire for violating the race blindness ideal Justice Harlan pined for,⁸⁶ and they actually aggregately harm minority student achievement.⁸⁷ The Fourteenth Amendment’s text and history were framed in the natural law tradition, but previous Supreme Court regimes have curbed or altered its libertarian implications.

The Fifteenth Amendment, the last Reconstruction Amendment, provides that “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude” and that Congress can enforce this through legislation.⁸⁸ This Amendment was designed to restrict the use of racist voting devices, like poll taxes, that were aimed at disenfranchising black voters.⁸⁹ The classi-

⁸² *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

⁸³ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁸⁴ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

⁸⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁸⁶ *But see Plessy*, 163 U.S. at 561 (1896) (Harlan, J., dissenting) (“There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.”).

⁸⁷ RICHARD SANDER & STUART TAYLOR JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (2012).

⁸⁸ U.S. CONST. amend. XV.

⁸⁹ *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959).

cal liberal instinct behind this amendment reifies the natural law inherent in America's constitution. The Supreme Court, although hesitant at first,⁹⁰ has long recognized the importance of this Amendment in stamping out collectivist racism against blacks, which stopped them from exercising one of their fundamental democratic rights, the right to vote.⁹¹ The Twenty-Fourth Amendment, adopted in 1964, provides similar protection against polling taxes at the federal level.⁹² Congressional enforcement in this context means that the people of this nation can oversee fair voting in elections by making voting equality across racial lines a national mandate.

IV. THE ROBERTS COURT IS MORE CLASSICALLY LIBERAL THAN ANY OF ITS JUSTICES.

A Supreme Court tasked with upholding a Constitution grounded in important classical liberal themes should produce decisions consistent with those principles.⁹³ The Constitution is not fully libertarian given that it originally allowed slavery and now permits an income tax, among other provisions hostile to freedom. The Roberts Court has continued this imperfect but inherent trend toward libertarianism. The Roberts Court has provided the broadest protections of free speech⁹⁴ and gay rights⁹⁵ in American history. The Roberts Court, although made up of a majority of conservative Justices, has followed the natural law instincts inherent in the Constitution

⁹⁰ See *Guinn v. United States*, 238 U.S. 347 (1915).

⁹¹ See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944).

⁹² U.S. CONST. amend. XXIV.

⁹³ See RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014).

⁹⁴ See *Snyder v. Phelps*, 562 U.S. 443 (2011).

⁹⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S.Ct. 2675 (2013).

and is chipping away at Federal and state governments' intrusions into citizens' daily lives.

Majority decisions in the Roberts Court often rely on eschewing the traditional bimodal blocs to come to a classically liberal opinion. In order for the Roberts Court to produce a majority "liberal" decision, at least one "conservative" Justice *must* vote against his bloc. Naturally, it should be easier for a conservative Justice to vote against their bloc when the liberal position on that particular issue is also the libertarian, natural law position. The same holds true for liberal vote-switching to the conservative side. Vote-switching most often happens in the Roberts Court when producing classically liberal decisions because the text and history of the Constitution provides a fountain of natural law theory and application.

The conservative bloc is thought to be hostile to gay rights, but a gay-friendly majority decision in the Roberts Court requires at least one conservative to side with the liberal bloc. The Roberts Court has consistently done just that. Justice Kennedy has traditionally been the conservative Justice most likely to side with the liberals on gay-friendly cases, but in *Hollingsworth v. Perry* it was Chief Justice Roberts and Justice Scalia in the majority on a same-sex couples-friendly decision.⁹⁶ In fact, Justice Kennedy dissented and sided against arguments in *Hollingsworth* that led to a pro-same sex marriage outcome, an unusual move for him, and Justice Sotomayor broke rank and joined the conservative position in dissent as well. This decision had rampant vote switching yet a classically liberal decision was announced. Chief Justice Roberts and Justice Scalia are assuredly not libertarians, but their judicial methodologies differ just enough from

⁹⁶ 133 S.Ct. 2652 (2013). Supreme Court decision denying standing to proponents of California's Proposition 8, defining marriage as between one man and one woman, due to a lack of cognizable injury after California refused to defend the Proposition after a District Court judge struck it down as unconstitutional.

a pure conservative entrenchment model to produce libertarian decisions.

Most famously, Justice Kennedy joined the liberal wing in the landmark *Obergefell* decision that declared laws banning same-sex marriage unconstitutional and, further, that states must recognize same-sex marriages performed out of state.⁹⁷ Following his liberty-based jurisprudence in previous gay rights decisions,⁹⁸ Justice Kennedy laid out his vision of the constitution that recognized the “abiding connection between marriage and liberty.”⁹⁹ “Liberty” appeared over twenty-five times in Justice Kennedy’s majority opinion. The libertarian instinct model played a strong role in the Court’s recognition of gay marriage.

The recent campaign finance and speech decisions have also produced mixed libertarian decisions. The Roberts Court has produced decisions that recognize unions, for-profit corporations, and not-for-profit corporations as having First Amendment free speech rights¹⁰⁰ and struck down aggregate campaign donation limits as unconstitutional.¹⁰¹ The campaign finance and electioneering jurisprudence of the Roberts Court is intriguing for two reasons. First, it is not entirely clear which is the “conservative” position and which is the “liberal” position. Second, despite the uncertainty of bloc predictability, the member Justices voted purely with their blocs, remaining entrenched, yet still produced classically liberal opinions.

Surprisingly, the conservative and liberal positions on campaign finance and electioneering laws are not predictable. Granted, all of the conservative Justices in *Citizens United* and *McCutcheon* voted to advance free speech in a classically liberal fashion. However, the

⁹⁷ *Obergefell*, 135 S. Ct. at 2584.

⁹⁸ See Barnett, *supra* note 10, at 21-41.

⁹⁹ *Obergefell*, 135 S. Ct. at 2599.

¹⁰⁰ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

¹⁰¹ *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

American Civil Liberties Union, a liberal legal interest group, filed an *amicus* brief with the Supreme Court urging the Court to advance free speech instead of upholding the government regulations of political speech in *Citizens United*.¹⁰² Despite this, the liberal Justices all voted to uphold the government regulations in both cases. The willingness of the Roberts Court liberal Justices to prevent political speech is a shocking departure from the protections proffered by liberal Justices during the Burger Court, in which the conservative Justices wanted to restrict speech.¹⁰³ During the oral argument of *Citizens United*, Justice Kennedy clarified with the Assistant Solicitor General that upholding the law would lead to banning books, signifying the magnitude of the switch the liberal Justices made on campaign finance decisions.¹⁰⁴ The Roberts Court had decided almost unanimously that Westboro Baptist protestors could display inflammatory signage at a soldier's funeral,¹⁰⁵ but campaign finance laws crossed a free speech line for the liberal Justices. Justice Alito, on the other hand, apparently thought that campaign speech and regulations on political donations crossed that same line in the other direction by virtue of his voting with the majority in *Citizens United* and *McCutcheon*. *Citizens United* and *McCutcheon* were displays of bloc solidarity but maybe for misunderstood reasons. Perhaps every Justice on the Supreme

¹⁰² Brief for American Civil Liberties Union as Amicus Curiae Supporting Appellants, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365203.

¹⁰³ See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (striking down the Federal Government's attempt at banning the dissemination of the Pentagon Papers). But see *Buckley v. Valeo*, 424 U.S. 1 (1976) (voting by Burger Court liberal Justices to uphold restrictions on campaign finance).

¹⁰⁴ A. Barton Hinkle, *How Liberals Became the New Book Banners*, REASON MAGAZINE (Oct. 1, 2014), <http://reason.com/archives/2014/10/01/how-liberals-became-the-new-book-banners>.

¹⁰⁵ *Snyder v. Phelps*, 562 U.S. 443 (2011).

Court broke rank by switching their vote and a classically liberal decision emerged from the smoke and fiery ashes.¹⁰⁶ The Roberts Court is more libertarian than any of its member Justices in an indirect and unconscious way.

The Roberts Court's gun rights decisions do fit the left-right paradigm, but the reasoning in the decisions draws on classical liberal reasoning and values. The Second Amendment provides that the right to bear arms is necessary for a "free State,"¹⁰⁷ which conjures up images of a "land of liberty" free from government oppression.¹⁰⁸ The Founders fought against an oppressive English monarchy to establish a free state, which serves as a model of the right to defend yourself against intruders and a tyrannical government. Under classical liberalism, a right to self-defense must include a right to the means of self-defense. In the *District of Columbia v. Heller* decision, the Roberts Court, Justice Scalia writing for a 5-4 majority, held that D.C.'s handgun ban and other firearm regulations were unconstitutional.¹⁰⁹ Justice Scalia's opinion is vivid of libertarian pronouncements. Justice Scalia wrote that the Second Amendment right to bear arms is "secured to them as individuals, according to 'libertarian political principles,' not as members of a fighting force."¹¹⁰ Justice Scalia, subject to his own unconscious libertarian impulses,¹¹¹ protected the value of self-defense, perhaps the proto-natural right. The

¹⁰⁶ However we must also keep in mind that Citizens United distributed anti-Hillary Clinton media, perhaps explaining the outcome on those terms.

¹⁰⁷ U.S. CONST. amend. II.

¹⁰⁸ See Eugene Volokh, *Necessary to the Security of A Free State*, 83 Notre Dame L. Rev. 1, 6 (2007).

¹⁰⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹¹⁰ *Id.* at 593 (quoting L. Schworer, *The Declaration of Rights* 283 (1981)).

¹¹¹ Noah Feldman, *Court's DNA Ruling Brings U.S. a Step Closer to 'Gattaca'*, BLOOMBERG VIEW (June 3, 2013, 1:12 PM), <http://www.bloomberglaw.com/articles/2013-06-03/court-s-dna-ruling-brings-u-s-a-step-closer-to-gattaca> (detailing Scalia's libertarian impulse regarding DNA collection).

McDonald v. Chicago decision, with Justice Alito writing the opinion, applied the broad Second Amendment protections espoused in *Heller* against the city of Chicago via the Fourteenth Amendment's Due Process Clause.¹¹²

Justice Clarence Thomas, writing a lone concurrence, argued that instead the right to bear arms for self-defense should properly be applied against the states and municipalities via the Fourteenth Amendment's Privileges or Immunities Clause instead of the Due Process Clause.¹¹³ Justice Thomas provides a magnum opus of libertarian thought and history regarding self-defense in the United States, particularly for disenfranchised blacks after the Civil War. Justice Thomas, although remaining well entrenched in the conservative bloc, wrote a lucid opinion steeped in natural law and classical liberal principles. Justice Thomas's opinion drew on the *amicus* brief filed by the non-profit public interest libertarian law firm the Institute for Justice, which also recognized the intent and history behind the Privileges or Immunities Clause as providing for broad protections of a right to bear arms for self-defense.¹¹⁴ The dissents, on the other hand, argued for a collectivist and state-centric model of self-defense.¹¹⁵ The collectivist view of self-defense ignores the individualism inherent in the Constitution and a conservative bloc Justice signing onto that dissent would betray the libertarian dimension to their jurisprudence. The Roberts Court's insistence that this fundamental right be protected highlights the classical liberal impulse of the Court.

¹¹² *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (plurality opinion).

¹¹³ *Id.* at 805 (Thomas, J., concurring).

¹¹⁴ Brief for Institute for Justice as Amicus Curiae Supporting Petitioners, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521), 2009 WL 4099506.

¹¹⁵ *E.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 645 (2008) (Stevens, J., dissenting) ("These rights contemplate collective action").

**VI. THE ROBERTS COURT HAS PROTECTED SEPARATION OF POWERS
AND FEDERALISM, WHICH ARE KEY TO PREVENTING TYRANNY IN A
CLASSICALLY LIBERAL GOVERNMENT.**

The Constitution separates out the various powers of government into different branches. The power to create laws belongs to the Legislative Branch. The Executive Branch is tasked with enforcing the laws. The Judicial Branch must interpret and apply the laws. Under the system of checks and balances, all three branches have the ability to limit the power of the other branches. This simple framework for the Federal Government has remained intact since the Founding. In the Federalist Papers, James Madison wrote that the separation of powers is crucial for protecting liberty. He stated, "In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own."¹¹⁶ Madison continues that a system of checks and balances preserves liberty by stopping governmental encroachments.¹¹⁷ The protection of freedom was at the forefront of Madison's mind in designing the Constitution's separation of powers, and the Roberts Court has maintained both the separation of power and the checks and balances that protect freedom.

In the *Noel Canning* decision, The Roberts Court unanimously struck down President Obama's decision to appoint members to the National Labor Relations Board (NLRB) when the Senate said it was still in session.¹¹⁸ President Obama attempted to usurp the Senate's ability to ratify Presidential nominees, and the Roberts Court preserved the separation of powers. This decision is significant because

¹¹⁶ THE FEDERALIST No. 51 (James Madison).

¹¹⁷ *Id.*

¹¹⁸ *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550 (2014).

both the liberal and conservative wings of the Court agreed that it was unconstitutional, including two Justices appointed by President Obama. The liberal-conservative model of jurisprudence would indicate that the liberal Justices would uphold the President's actions and the conservatives vote to strike it down, but again a libertarian dimension to the Court shows that in practice the Justices voted to preserve the system of checks and balances designed to limit tyranny. Justice Scalia, in concurrence, plainly writes, "Since the separation of powers exists for the protection of individual liberty, its vitality 'does not depend' on 'whether 'the encroached-upon branch approves the encroachment.'"¹¹⁹ Justice Scalia further acknowledges that "[c]onvenience and efficiency ... are not the primary objectives of our constitutional framework."¹²⁰ This rhetoric undermines the necessary and proper clause's interpretation as just meaning "convenient," and Justice Scalia's concurrence is full of the language of Friedrich Hayek.

Friedrich Hayek's chapter "Planning and Democracy" from *The Road to Serfdom* provide similar arguments as Scalia's libertarian concurring opinion.¹²¹ Hayek writes, "Democracy is essentially a means, a utilitarian device for safeguarding internal peace and individual freedom."¹²² Hayek points out that the failure of a democracy to adequately plan a national economy drives a citizenry to call for a strong central government figure.¹²³ Justice Scalia's concurrence agrees with Hayek's bold statement that:

The false assurance which many people derive from this belief is an important cause of the general unawareness of the

¹¹⁹ *Id.* at 2593 (Scalia, J., concurring).

¹²⁰ *Id.* at 2597-98 (internal quotations omitted).

¹²¹ F.A. HAYEK, *THE ROAD TO SERFDOM* (Routledge Classics 2001) (1944).

¹²² *Id.* at 73.

¹²³ *Id.* at 74.

dangers which we face. There is no justification for the belief that so long as power is conferred by democratic procedure, it cannot be arbitrary; the contrast suggested by this statement is altogether false: it is not the source but the limitation of power which prevents it from being arbitrary. Democratic control may prevent power from becoming arbitrary, but it does not do so by its mere existence.¹²⁴

Justice Scalia's statement that efficiency is not the ultimate aim of government but rather the protection of liberty reflects his formalist style. Although Hayek has never been cited by the Supreme Court,¹²⁵ his influential writings have created shockwaves through academia, policy circles, and the judiciary. Justice Scalia's classically liberal concurring opinion, in which three other "conservative" Justices signed onto, reaffirms the libertarian dimension on the Court.

Shelby County v. Holder was another decision in which the Roberts Court protected the federalist system envisioned by the Founders.¹²⁶ The Constitution's federalism framework provides that the Federal Government and the various State governments are both dually sovereign over the people.¹²⁷ After the success of the Civil Rights movement, Congress passed the Voting Rights Act of 1965, which aimed to increase minority voting turnout by combating the racially-charged voting devices employed by Southern states.¹²⁸ The Voting Rights Act's main operative provision is Section 5, which calls for covered states¹²⁹ to seek preclearance from the Federal Department

¹²⁴ *Id.*

¹²⁵ M. Todd Henderson, *The Influence of F.A. Hayek on Law: An Empirical Analysis*, 1 NYU J.L. & Liberty 249, 283 (2005).

¹²⁶ *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

¹²⁷ See, e.g., U.S. CONST. amend. X.

¹²⁸ *Id.*

¹²⁹ Pursuant to § 4's coverage formula. *Id.*

of Justice or the United States District Court for the District of Columbia before making any changes in their voting laws, including redistricting.¹³⁰ The Voting Rights Act, especially Section 5, has always been constitutionally controversial, but the Supreme Court held in *South Carolina v. Katzenbach* that the Voting Rights Act is constitutional under Congress's power to enforce the Fifteenth Amendment to combat the "insidious and pervasive evil" of racist voting devices.¹³¹ Chief Justice Warren wrote that Section 5 is only constitutional because "exceptional conditions can justify legislative measures not otherwise appropriate."¹³² Chief Justice Roberts pointed out that the exceptional nature of the rampancy of racist voting devices is now long gone when he wrote, "Nearly 50 years later, things have changed dramatically."¹³³ After all, the Voting Rights Act Section 5 was originally intended to last only five years, which highlights the emergency nature of its constitutionality.¹³⁴ The Voting Rights Act was being applied by the federal government to *every* election law and ordinance, including silly things like utility district election boards.¹³⁵ If the Roberts Court allowed this broad and exigent law to continue, it would harken back to Ronald Reagan's proclamation that "a government bureau is the nearest thing to eternal life we'll ever see on this earth."¹³⁶ The Roberts Court, in a 5-4 decision along right-left paradigm lines, struck down the pre-clearance coverage formulas of the Voting Rights Act as being "based on 40-year-

¹³⁰ 42 U.S.C. § 1973 (now codified as 52 U.S.C. § 10301) et seq.

¹³¹ *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

¹³² *Id.* at 334.

¹³³ *Shelby County v. Holder*, 133 S. Ct. 2612, 2616 (2013).

¹³⁴ Brief for Cato Institute as Amicus Curiae on behalf of Petitioner. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 75423.

¹³⁵ *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

¹³⁶ Ronald Reagan, A Time for Choosing (Oct. 27, 1964), available at <http://www.reagan.utexas.edu/archives/reference/timechoosing.html>.

old facts having no logical relation to the present day.”¹³⁷ This is a stunningly libertarian decision that upbraids the growth of government. Libertarian economist Robert Higgs pointed out that governments often use “emergencies” and “crises” to push the boundaries of their power,¹³⁸ and the Voting Rights Act was no different given Chief Justice Warren’s defense of the law as falling under “exceptional conditions.”¹³⁹ Higgs’ “ratchet effect” theory identifies the problem of boundary-pushing in that it remains largely permanent – once the crises subsides the power is almost never returned to pre-crisis levels.¹⁴⁰ The Voting Rights Act was renewed in 2006 for another 25 years yet still used the old coverage formula from the 1960s-70s.¹⁴¹ This would mean that when the renewal would expire the federal government would be using extraordinary power meant for emergencies using a coverage formula almost 70 years old. This should not be surprising. Even James Madison warned of “the old trick of turning every contingency into a resource for accumulating force in government.”¹⁴² This is a trend that has continued throughout the history of American governance. The “Sage of Baltimore” H.L. Mencken noted:

Government, like any other organism, refuses to acquiesce in its own extinction. This refusal, of course, involves the resistance to any effort to diminish its powers and prerogatives. There has been no organized effort to keep government down since Jefferson's day. Ever since then the American

¹³⁷ *Shelby County*, 133 S. Ct. at 2629.

¹³⁸ ROBERT HIGGS, *CRISIS AND LEVIATHAN* (1987).

¹³⁹ *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

¹⁴⁰ See HIGGS, *supra* note 138.

¹⁴¹ *Shelby County*, 133 S. Ct. at 2615.

¹⁴² RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 351 (1990). Cf. Daniel McCarthy, *Enemy of the State*, *THE AMERICAN CONSERVATIVE* (May 9, 2005), <http://www.theamericanconservative.com/articles/enemy-of-the-state/>.

people have been bolstering up its powers and giving it more and more jurisdiction over their affairs. They pay for that folly in increased taxes and diminished liberties. No government as such is ever in favor of the freedom of the individual. It invariably seeks to limit that freedom, if not by overt denial, then by seeking constantly to widen its own functions.¹⁴³

The fact that the Roberts Court could assemble a *majority* of Justices willing to strike down the Federal Government's attempts at maintaining a veto power over state and local election laws shows its willingness to protect federalist principles and cabin the ratchet effect, both strong concerns of libertarians.

Although the Justices in *Shelby County* voted along liberal-conservative lines, the liberal and conservative positions are not apparent. Congress and the Presidency have amended or reauthorized the Voting Rights Act numerous times since its original 1964 inception.¹⁴⁴ This includes amendments and reauthorizations in 1970, 1975, 1982, 1992, and 2006, which include Presidents and Congresses of different political parties. Also, the 2006 Voting Rights Act reauthorization at issue in *Shelby County* was passed unanimously in the Senate and overwhelmingly in the House, again across both Democratic and Republican Parties.¹⁴⁵ President Bush, who nominated both Chief Justice Roberts and Justice Alito, signed off on the reauthorization. Furthermore, the coverage formula included several Southern states as

¹⁴³ H.L. MENCKEN, MINORITY REPORT 197 (1956).

¹⁴⁴ U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION (2006), available at <http://www.usccr.gov/pubs/051006VRAStatReport.pdf>.

¹⁴⁵ See Jaime Fuller, *Republicans Used to Unanimously Back the Voting Rights Act. Not Any More.*, WASHINGTON POST (June 26, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/26/republicans-used-to-unanimously-back-voting-rights-act-not-any-more/>.

well as “the States of Alaska, Arizona, and Texas, as well as several counties in California, Florida, Michigan, New York, North Carolina, and South Dakota.”¹⁴⁶ There was no one political party that was heavily incentivized to have the law upheld or struck down because both “red” states and “blue” states were covered under the coverage formula. The right-left paradigm of jurisprudence correctly described the 5-4 split in *Shelby County* but did not provide any predictive value, whereas a recognition of the Roberts Court classical liberalism did have predictive success in this highly publicized case.

VII. THE LIBERAL JUSTICES ALSO HAVE A LIBERTARIAN EDGE

The Roberts Court’s liberal wing has been crucial in deciding classically liberal decisions as well. In order for the liberal bloc of the Roberts Court to receive a majority, at least one conservative Justice must switch their vote, which often happens in decisions advancing classical liberal principles. Justices Sonia Sotomayor and Elena Kagan have continued this classical liberal trend as well.

In almost Hayekian fashion, the Court has endorsed the view first espoused by Justice Brandeis that the various states serve as fifty “laboratories of democracy.”¹⁴⁷ This concession of the value of decentralization of knowledge and power from the liberal Justice Ginsburg is significant because it reflects the original federalist framework of the Constitution in which the various States can decide important political decisions for themselves¹⁴⁸ and citizens can *vote with their feet*, whereby citizens can move to communities that share their morals and provide better legal frameworks. Classical liberal law professor Richard Epstein wrote, “Federalism works best where it is

¹⁴⁶ *Shelby County v. Holder*, 133 S. Ct. 2612, 2620 (2013).

¹⁴⁷ See *Oregon v. Ice*, 555 U.S. 160, 171 (2009) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

¹⁴⁸ See U.S. CONST. amend. X.

possible to vote with your feet. The state that exploits its productive individuals runs the risk that they will take their business elsewhere. The exit threat therefore enforces the competitive regime.”¹⁴⁹ This decentralization federalist model reinforces Hayek’s powerful thesis that the knowledge of factual circumstances is decentralized and fragmented, which means whatever knowledge just a few people have in the system can be conveyed via prices to the vast majority who need to know nothing.¹⁵⁰ The liberal Justices sometimes talk like Hayek, look like Hayek, and quack like Hayek, but they still do not always vote like Hayek.¹⁵¹ However, that still does not mean the Liberal bloc lacks a libertarian element.

The Liberal bloc places high value on the protection of certain individual and minority rights, and that often allows for libertarian decisions in those areas. The Liberal Justices often vote to advance homosexual rights instead of upholding state laws that discriminate on the basis of sexual orientation. It is the liberal wing of the Roberts Court that has provided the bulk of the votes necessary for homosexual equality.¹⁵² The bloc so willing to defer to government authority in other areas like the economy¹⁵³ and healthcare¹⁵⁴ understands the value of individual sexual autonomy and the importance of shielding the people from government intrusion into relationships. It is not just the unenumerated right to privacy that *Griswold*¹⁵⁵ laid out decades ago. Rather, the liberal wing has signed onto opinions that state

¹⁴⁹ Richard A. Epstein, *Exit Rights Under Federalism*, 55 *LAW & CONTEMP. PROBS* 147, 150 (1992).

¹⁵⁰ F.A. Hayek, *The Use of Knowledge in Society*, 35 *THE AM. ECON. REV.* 519, 526 (1945).

¹⁵¹ See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

¹⁵² See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013).

¹⁵³ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) for the Supreme Court’s foundation on which economic deference has been built.

¹⁵⁴ See, e.g., *Sebelius*, 132 S. Ct. at 2615 (Ginsburg, J., concurring).

¹⁵⁵ 381 U.S. 479 (1965).

that homosexual conduct's immunity to state interference is based on a *liberty* interest.¹⁵⁶ Because none of the liberal Justices identify as a libertarian outright, their willingness to ground the advancement of individual rights in the principles of freedom and liberty is not generally applicable but rather limited to individualized contexts and cases. Freedom of speech is another domain where the Liberal Justices perpetuate classical liberal norms.

The Liberal Justices provided the votes necessary to strike down the Stolen Valor Act as unconstitutional in *United States v. Alvarez*.¹⁵⁷ The Stolen Valor Act,¹⁵⁸ signed into law in 2006, provided criminal sanctions if someone lied about receiving military decorations or medals. Xavier Alvarez, a habitual liar, stated at a municipal water district board meeting that he was once injured in war and had received the Congressional Medal of Honor, which violated the Stolen Valor Act. Justice Kennedy, writing a plurality with Chief Justice Roberts and Liberal Justices Ginsburg and Sotomayor, struck down the law as a violation of the First Amendment. Justice Kennedy noted that "The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain."¹⁵⁹ The importance Justice Kennedy placed on the Act's lack of an element requiring material gain fits into the libertarian non-aggression principle because non-truths that result in no harm should not cause *criminal* sanctions. Furthermore, Justice Kennedy points out the severe intrusiveness of the law, saying it goes so far as to "apply with equal force to personal, whispered conversations within a home."¹⁶⁰ The Stolen Valor Act created a victimless

¹⁵⁶ *Windsor*, 133 S. Ct. at 2695.

¹⁵⁷ 132 S. Ct. 2537 (2012).

¹⁵⁸ 18 U.S.C. § 704.

¹⁵⁹ *Alvarez*, 132 S. Ct. at 2547.

¹⁶⁰ *Id.*

crime out of whispers in the home. The Liberal Justices Ginsburg's and Sotomayor's signing onto Justice Kennedy's plurality opinion signals their agreement with libertarian reasoning taken right from John Stuart Mill.¹⁶¹ Mill reasoned that allowing lies to be protected as free speech would allow for a fuller understanding of the truth, a "better truth."¹⁶² Justice Breyer and Justice Kagan, both on the Roberts Court's liberal bloc, went further than Mill and Kennedy in *Alvarez*, instead recognizing the positive value of lying in a concurrence. Justice Breyer provided a long litany of valuable lies, including lies to "prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence ... stop a panic or otherwise preserve calm in the face of danger."¹⁶³ The libertarian component of the Liberal bloc based on Mill's writings goes back almost 100 years. In developing a "marketplace of ideas" model of free speech, Justice Oliver Wendell Holmes advocated for a *free exchange* of ideas:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own

¹⁶¹ See generally JOHN STUART MILL, ON LIBERTY (1859).

¹⁶² *Id.*

¹⁶³ *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring).

conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.¹⁶⁴

The Liberal bloc of the Roberts Court, as did Holmes and Mill, believes in the value of competition and the marketplace for the exchange of information and beliefs, which is compatible with the classical liberal principles of free trade and free thought. The Roberts Court's liberals gain are well positioned to advance decisions that promote the natural law and libertarian ideas.

VIII. THE LIBERTARIAN DIMENSION TO THE COURT DOES NOT EXPLAIN EVERYTHING

Because some decisions of the Roberts Court run counter to libertarian principles, there must be another explanation. The unintentional, fractured nature of the Roberts Court's libertarianism instinct means the Court limits freedom. Plus, we have to remember that the Justices of the Supreme Court are government employees with lifetime tenure, nominated by powerful Presidents and affirmed by calculating Senators.

The Roberts Court, although positive in some regards, has created some problematic Fourth Amendment decisions that are incompatible with classical liberalism. In *Maryland v. King*, the Roberts Court held that the police can take DNA swabs of arrestees and run that through a national index upon arrest, even if wrongly arrested.¹⁶⁵ The Roberts Court has also held that a police officer's

¹⁶⁴ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

¹⁶⁵ 133 S.Ct. 1 (2012).

search can be justified even if there was a mistake of law on the officer's part.¹⁶⁶ In *Heien v. North Carolina*, a police officer pulled over a car and searched it because it had only one brake light working, which is in fact legal in North Carolina.¹⁶⁷ Chief Justice Roberts wrote that "because the mistake of law was reasonable, there was reasonable suspicion justifying the stop."¹⁶⁸ This should worry classical liberals because it creates two sets of laws, one for citizens and one for government, by failing to apply the famous maxim "ignorance of the law is no excuse" to the government.

The *Obergefell* gay marriage decision also has an imperfect libertarian reading. Although the majority recognized a right to gay marriage, the decision betrayed the "laboratories of democracy" framework that *Shelby County* upheld. *Obergefell* struck down decades of democratically-enacted state marriage laws, arguably betraying federalist concerns. I still choose to categorize the *Obergefell* decision as heavily libertarian because it ultimately advances people's freedoms, but I recognize the implementation was not necessarily perfect from a federalist perspective.¹⁶⁹ As mentioned in Chief Justice Roberts's dissent, even Justice Ginsburg recognized this federalism tension in the abortion context by writing "Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."¹⁷⁰ This reflects the unconscious nature of the libertarian instincts on the Court because Justices are weighing multiple, often non-libertarian, values.

¹⁶⁶ *Heien v. North Carolina*, 135 S. Ct. 530 (2014).

¹⁶⁷ *Id.* at 532.

¹⁶⁸ *Id.* at 540.

¹⁶⁹ However, this federalism concern is *always* present when striking down any state legislation, no matter how anti-libertarian the statute.

¹⁷⁰ Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 385-86 (1985), *quoted in* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

Although perhaps the strongest Court ever in the free speech domain, the Roberts Court is not perfectly libertarian regarding speech. In *Morse v. Frederick*,¹⁷¹ the Roberts Court, Chief Justice Roberts himself writing, held that a student banner reading “Bong Hits 4 Jesus” at a school event during the 2002 Olympic Torch Relay was not constitutionally protected speech. Chief Justice Roberts wrote that the sign promoted illegal drug use and undermined the educational and safety goals of the school.¹⁷² Roberts continued that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings” and “that the rights of students “must be ‘applied in light of the special characteristics of the school environment.’”¹⁷³ Chief Justice Roberts ignores the fact that the student was 18 years old when the sign was unraveled, which means he was a legal adult.¹⁷⁴ Furthermore, compulsory education laws require that students attend school,¹⁷⁵ which means that the government is *forcibly limiting* students’ Constitutional rights. The liberal Justice Stevens, in dissent, argued that “carving out pro-drug speech for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment.”¹⁷⁶ At least Justice Stevens and his co-signers, liberal Justices Ginsburg and Souter, remain true to the foundation principle of natural law that rights exist for *all people* in all times and all places, not limited by the “special characteristics” of their environment. Despite

¹⁷¹ *Morse v. Frederick*, 551 U.S. 393 (2007).

¹⁷² *Id.* at 394.

¹⁷³ *Id.* at 396-97.

¹⁷⁴ Bill Mears, “*Bong Hits for Jesus*” case limits Student Rights, CNN (June 26, 2007, 11:45 AM), <http://www.cnn.com/2007/LAW/06/25/free.speech/>.

¹⁷⁵ See, e.g., ALASKA STAT. ANN. § 14.30.010 (West 2014).

¹⁷⁶ *Morse*, 551 U.S. at 438-39 (Stevens, J., dissenting).

the Chief Justice's assurances that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"¹⁷⁷ the message sent by his opinion is quite the opposite.

Justice Thomas, the closest thing to a libertarian judge on the Roberts Court,¹⁷⁸ wrote a concurring opinion that argued that elementary and secondary students actually have no free speech rights, grounding his opinion on the pedagogical and legal norms of the early 1800s.¹⁷⁹ Justice Thomas's analogy is inappropriate because those early norms and decisions were before the passage of the 14th Amendment, which means school actions did not implicate the First Amendment's bar that "Congress shall make no law."¹⁸⁰ Thomas posited that under the *in loco parentis* legal doctrine that the state acts in place of the students' parents during school hours,¹⁸¹ which should disturb libertarian distrust of state paternalism. Thomas further reasoned that since the 18 year old plaintiff was still a student then *in loco parentis* still applies, rendering the student's status as a legal adult inconsequential.¹⁸² This is problematic under both libertarianism and natural law because individual rights exist in all times and all places.

Rampant deference over the past several decades to Congressional and state statutes, no matter how absurd, is a feature of the

¹⁷⁷ *Id.* at 396 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

¹⁷⁸ James Ostrowski, *A Libertarian Supreme Court Justice*, LewRockwell.com (Dec. 5, 2005), <http://www.lewrockwell.com/1970/01/james-ostrowski/a-libertarian-supreme-court-justice/>.

¹⁷⁹ *Morse*, 551 U.S. at 410-12 (Thomas, J., concurring).

¹⁸⁰ U.S. CONST. amend. I. *See also* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment to the states via the 14th Amendment's Due Process clause).

¹⁸¹ *Morse*, 551 U.S. at 413 (Thomas, J., concurring).

¹⁸² *Id.* at n. 3 (Thomas, J., concurring).

Supreme Court, the Roberts Court included, that is vexing to libertarians. The Supreme Court has held that the Court should defer to legislatures on economic issues if there is a rational basis for the regulation, meaning that if someone could rationally think the law *could* further the compelling government interest then it will be upheld.¹⁸³ The rational basis test has been broadened to force the Supreme Court to look at compelling *unstated* interests that the legislature *might* have considered.¹⁸⁴ This lap-dog form of jurisprudence means that judges must disregard their Solomonic equitable duties and instead invent abstractions to allow government interventions. Perhaps instead of viewing the judicial branch as coequal with the Executive and Legislative Branches, the Supreme Court views their deference to economic matters as one of institutional incompetence.

The argument goes that, unlike Congress, the Supreme Court does not face constituents or listen to interest groups, which are both tools Congress and state legislatures uses to enact legislation.¹⁸⁵ The Court excels at adjudicating rights and procedure between individuals and governments. The Court is institutionally incompetent to make major economic decisions for our nation while still being the proper forum for human rights. The Court is not made up of expert economists but rather lawyers, which allegedly justifies the deference.¹⁸⁶ This is why the Court has had such great success advancing unenumerated rights like voting rights and privacy. This understanding of the Court's role is seen in both the Commerce Clause which grants Congress power over economic affairs and the various

¹⁸³ *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

¹⁸⁴ *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180-81 (1980) (“[W]e must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature”).

¹⁸⁵ See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988)

¹⁸⁶ See F.A. HAYEK, *THE ROAD TO SERFDOM* 65 (Routledge Classics 2001) (1944).

broad provisions in the Reconstruction Amendments which grant individual rights to all, which the Court must enforce. *Carolene Products* spells out that the Court should defer to Congress and legislatures on economic matters but remain ever vigilant in the protection of minorities and human rights.¹⁸⁷ One problem with this is that it ignores the Hayekian reality that everyone is incompetent to make major economic decisions that affect the entire nation – the knowledge required is dispersed and humanly unattainable. Further, if the Court is best positioned to focus on individuals, then the pro-deference arguments would seemingly be self-defeating and warrant less deference because individuals are always affected by regulations. This Hayekian insight should compel the Court to be more willing to strike down economic regulations that are protectionist and ineffective, if not economic harmful. Especially given the prevalence of the “Brandeis Brief” stressing economic and social science statistics,¹⁸⁸ the Court generally has the information available to weigh the pros and cons of legislation in a manner similar to the Hand Formula.¹⁸⁹

IX. THE NEAR FUTURE

The libertarian tinge to the Roberts Court has provided crucial insights into future cases. Individuals and corporations have won crucial protections against government interference across the spectrum of Constitutional issues. The Roberts Court’s willingness to wrestle with the Obama Administration especially has produced key Constitutional showdowns. The Roberts Court has ruled against the Obama Administration unanimously well over a dozen times, which

¹⁸⁷ See *Carolene Products Co.*, 304 U.S. at 152 n.4 (1938).

¹⁸⁸ David L. Faigman, “Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541 (1991). See also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (justifying deference in the administrative law context).

¹⁸⁹ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

is a stunning rebuke of Executive overreach.¹⁹⁰ The Roberts Court has created a friendly environment to the judicial protection of the Constitution and liberty, and a somewhat hostile environment to Executive violations.

The ideologies of the Justices pit differing methods of statutory interpretation against each other. Justice Scalia has led a conservative legal movement beginning in the 1980s by advocating the return to the actual text as the foundation of interpreting statutes and legal texts.¹⁹¹ Justice Scalia's textualist arguments have found favor among many legal conservatives and liberals alike, and he has influenced the entire Supreme Court.¹⁹² Justice Scalia's firebrand textualism fits a classically liberal mold because it ensures clarity and predictability in the law instead of vagueness and holes for government exploitative opportunism.¹⁹³ Textualism confines judges to interpreting the law instead of making the law. Hard textualism also punishes Congress for poor draftsmanship by just reading and interpreting the law as plainly written, which should incentivize Federal Representatives and Senators to be more careful in drafting statutes.¹⁹⁴ On the other hand, purposivism focuses on the legislative history and Congressional intent behind laws, often employing tortured reading of statutes to advance Congressional intent.¹⁹⁵ Purposivism allows Congress to escape poor drafting as long as the Court can find

¹⁹⁰ See Brett Logiurato, *Barack Obama Got Destroyed at the Supreme Court*, BUSINESS INSIDER (July 1, 2014, 10:18 AM), <http://www.businessinsider.com/obama-supreme-court-term-hobby-lobby-mccutcheon-harris-2014-7>.

¹⁹¹ See JONATHAN O'NEILL, ORIGINALISM IN AMERICA LAW AND POLITICS: A CONSTITUTIONAL HISTORY 158 (2005).

¹⁹² ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2014).

¹⁹³ *Id.*

¹⁹⁴ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 20-23 (1994).

¹⁹⁵ John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

a “purpose,”¹⁹⁶ an inherently nebulous and collectivist concept with no tangible meaning. A critical question not immediately answerable by purposivism is “Whose purpose?” as well. Is it the purpose of the interest group that advanced and lobbied for the bill? Is it the purpose in the Senate Committee Reports? Is it the purpose of the legislator that constitutes a majority vote? Justice Scalia’s textualism draws upon the lessons learned from Hayek about the local knowledge problem. In a well-cited and vociferous dissent early in Scalia’s tenure on the Court, before he made his textualist imprint, Justice Scalia wrote that the failure of purposivism is that, “[t]he number of possible motivations, to begin with, is not binary, or indeed even finite”¹⁹⁷ and “of course, he may have had (and very likely did have) a combination of some of ... many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.”¹⁹⁸ Finding the purpose of a legislature is inherently collectivist because it assumes that a group has a single consciousness, which is an impossibility because groups are made up of individuals with their own motivations and desires with dispersed knowledge. A majority of the Roberts Court are textualists, or at least soft textualists,¹⁹⁹ but even then they’re not fixed textualists because unfavorable consequences of reading the law as written can overcome “strong” plain meaning arguments.²⁰⁰

Recently, the Roberts Court granted certiorari to *Friedrichs v. California Teachers Association*, a free speech and right of association case

¹⁹⁶ John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 67 (2001).

¹⁹⁷ *Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987).

¹⁹⁸ *Id.* at 637.

¹⁹⁹ The conservative wing of the dual liberal-conservative model generally embraces textualism.

²⁰⁰ *King v. Burwell*, 135 S. Ct. 2480, 2495 (2015). Chief Justice Roberts held that the structure of the entire Affordable Care Act overrides the plain textual meaning of the one section at issue viewed in isolation.

involving a public teacher's union.²⁰¹ In California, public school teachers are required to join the public school teacher union and pay union dues under the aegis of "agency shop" laws grounded in *Abood v. Detroit Bd. of Educ.*²⁰² Rebecca Friedrichs is a public school teacher in California, and she objects to the mandatory union fees taken out of her paycheck that are often spent on supporting political causes she does not agree with and she does not support the teacher union in general. Friedrichs asserts that money taken out of her paycheck to support causes she does not agree with violates her First Amendment right to free speech and her right of association. Friedrichs is asking Supreme Court to overrule *Abood* and hold that individuals have the right to control their own speech by voluntarily spending their own money on causes they support instead of being forced to financially support causes they detest. Both the liberal-conservative and libertarian instinct models of the Roberts Court predict that the Roberts Court will vote for the teacher and strike down the compulsory union dues, especially considering the Roberts Court has provided the strongest defense of free speech in our nation's history.

Although often characterized as "political fodder,"²⁰³ Speaker of the House John Boehner is suing President Obama in Federal Court for his unilateral delay of the Affordable Care Act. The theory of the lawsuit is simple: the President took an oath to faithfully execute the laws of the United States and the President is unilaterally not fulfilling that obligation. Speaker Boehner convinced prominent liberal law professor Jonathan Turley of George Washington University

²⁰¹ Friedrichs v. California Teachers Ass'n, 135 S. Ct. 2933 (2015).

²⁰² 431 U.S. 209 (1977).

²⁰³ Pema Levy, *House Republicans Vote to Sue Obama*, NEWSWEEK (Sept. 30, 2014, 7:35 PM), <http://www.newsweek.com/republicans-obama-lawsuit-democrats-john-boehner-obama-impeachment-obamacare-262246>.

Law School to be his attorney for the lawsuit,²⁰⁴ which should appeal to Judges amenable to vote switching. Furthermore, it is not entirely clear that this is a right-left issue with predictable voting behavior. Executive overreach is something that affects all citizens. There were major cries for criminal prosecution of George Bush when he was President,²⁰⁵ especially because of John Yoo's infamous "Torture Memos."²⁰⁶ If an Executive becomes a "do something" dictator like Karl Schmitt wanted,²⁰⁷ that is a price everyone pays²⁰⁸ so it is not an overtly conservative or liberal issue – it's a freedom v. subordination issue. Granted, if this lawsuit were to reach the Supreme Court it would take years because of the infamous speediness of Federal appeals.²⁰⁹ However, the atmosphere of the Roberts Supreme Court thus far has been much more accommodating to such upstart lawsuits than previous Courts, which should provide, at least in theory, a fighting chance for the lawsuit's success. The Roberts Court is more classically liberal than any of its member Justices individually, which should generate libertarian ramifications in the near future.

²⁰⁴ Ashley Parker, *House G.O.P. Files Lawsuit in Battling Health Law*, N.Y. TIMES, Nov. 21, 2014, at A10, available at <http://www.nytimes.com/2014/11/22/us/politics/obamacare-lawsuit-filed-by-republicans.html>.

²⁰⁵ See, e.g., VINCENT BUGLIOSI, *THE PROSECUTION OF GEORGE W. BUSH FOR MURDER* (2008).

²⁰⁶ See, e.g., Glenn Greenwald, *John Yoo's War Crimes*, SALON (Apr. 2, 2008, 6:08 AM), http://www.salon.com/2008/04/02/yoo_2/.

²⁰⁷ Bill Scheuerman, *The Rule of Law Under Siege: Carl Schmitt and the Death of the Weimar Republic*, 14 *Hist. of Pol. Thought* 265 (1993).

²⁰⁸ A negative externality.

²⁰⁹ However, the United States District Court for the District of Columbia has granted the House standing to challenge the appropriations. See *United States House of Representatives v. Burwell*, No. CV 14-1967 (RMC), 2015 WL 5294762 (D.D.C. Sept. 9, 2015).

X. CONCLUSION

Although no single Justice on the Roberts Court self-identifies as a libertarian, the Roberts Court is a uniquely libertarian-esque Supreme Court unlike any other in American history. The Roberts Court's decentralized, fractured libertarianism creates decisions that advance classical liberal principles over an extensive array of Constitutional topics. This fragmentary element also means different Justices, on both the liberal and conservative blocs, split their votes in a libertarian fashion – both liberal and conservative Justices write libertarian opinions that reflect America's classically liberal natural law tradition. However, even voting patterns predicated on the liberal-conservative bloc paradigm produce binding libertarian decisions as well. This classically liberal model, although unintentional by the Justices, has developed natural law decisions that reflect a concern for individual liberty and human rights, most notably in the domains of free speech and gun rights.

The New York Times asked if America was on the verge of a "libertarian moment,"²¹⁰ and the answer is that America, through its Supreme Court, is already in the midst of one. The splintered Roberts Court has produced libertarian decisions that parallel Hayekian insights about decentralized knowledge and a distrust of government intervention. The Cato Institute, the foremost libertarian Washington think-tank co-founded by Murray Rothbard, went 10-1²¹¹ and 15-3²¹² in recent terms in its Supreme Court *amicus* filings, meaning the Supreme Court sided with the party the Cato Institute argued should

²¹⁰ Robert Draper, *Has the 'Libertarian Moment' Finally Arrived?*, N.Y. TIMES (Aug. 7, 2014), http://www.nytimes.com/2014/08/10/magazine/has-the-libertarian-moment-finally-arrived.html?_r=0.

²¹¹ Ilya Shapiro, *Cato Went 10-1 at Supreme Court This Term*, CATO INSTITUTE (July 2, 2014, 4:01 PM), <http://www.cato.org/blog/cato-went-10-1-supreme-court-term>.

²¹² The Cato Institute, *The Effectiveness of Cato's Center for Constitutional Studies at the Supreme Court*, <http://www.cato.org/about/cato-amicus-program>.

win many more times than it did not. That is a high winning percentage, and it is doubtful any other *amicus* party can boast similar results given that the Cato Institute is in a unique position to capitalize on the libertarian dimension of the Court. Reason Magazine went so far as to claim that the Roberts Court is in fact “libertarian-leaning.”²¹³ The libertarian-tinted Roberts Court should advance the natural law and classical liberal principles going forward.

²¹³ Damon Root, *The Supreme Court Now Leans Libertarian*, REASON MAGAZINE (July 8, 2014, 4:00 PM), <http://reason.com/blog/2014/07/08/the-supreme-court-now-leans-libertarian>.