Lyle Denniston
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Syracuse University
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"The Dynamism and Activism of the Roberts Court"

A few years ago, professor Thomas Keck, who teaches constitutional law and politics in the Maxwell School here at Syracuse, wrote a compelling book about the U.S. Supreme Court under Chief Justice William H. Rehnquist. Its main title was: "The Most Activist Supreme Court in History." The conservative Court, he argued, was every bit as muscular in its use of judicial power as was the liberal Court under Earl Warren. A prime example, of course, was the 2000 decision in *Bush v. Gore.*

We now know, after six years of the Roberts Court, that what Professor Keck discerned did not come to an end with the elevation of John G. Roberts, Jr., to the Chief Justiceship. This is a conservative Court, to be sure. I would argue that it is, in fact, even more conservative, in its philosophy, than was the Rehnquist Court.

And a case can be made that the trend toward activism not only has continued; it has intensified. It also exists across the bench, from Right to Left (so far as it is possible to say that there remains a Left, at all My sense is that there is not. Justice Kagan, I would say, is no Justice Stevens.).

But let me get to the activism bit in a moment. I would like to begin with what I call the "dynamism" of the Roberts Court. If by that word we mean a quality of "force and energy," the word perfectly fits this Court. I had thought, after observing a Court on which even David Souter could be an energetic participant in oral argument, that the Rehnquist Court was perhaps the hottest bench I had ever observed – even more so than the one on which Felix Frankfurter imagined himself to be the very reincarnation of Socrates.

To witness the Roberts Court in its public activity is to observe "force and energy" near, or perhaps at, its peak. From Elena Kagan on one end, to Sonia Sotomayor on the other, with Antonin Scalia and the Chief Justice and Ruth Ginsburg in the middle, this is a Court that has the lungs of a Webster, and the impatience of a teenager. And, when Stephen Breyer finishes his meandering wind-ups, he can be a force of his own. Also, when Samuel Alito is not in one of his fretful moods, he can be a menacing bulldog. Anthony Kennedy's vote, of course, still has most of the power, but his public voice in oral argument is waning. Clarence Thomas still keeps his own counsel,

reserving the working of that really quite polished intellect to the inner councils of the Court. Thomas' choice, it seems to me, is only a self-limiting approach: he does not have a role in using the oral argument to shape the discussion agenda for the Conference.

It must be admitted, of course, that this is a Court that still does too little work, overall. Given the low volume of its decision docket, for a good many years now, this is a marvelous judicial resource that is quite seriously under-utilized. It is not lazy, mind you. But it is too selective, and the Court no longer has Byron White around to complain grumpily when it refuses to resolve a conflict among the lower judiciary.

There are perhaps many explanations for this low productivity rate, but my own preferred one is that the clerks' pool is keeping the numbers 'way down. This is a Court that would benefit, enormously, if the clerks' pool memoes in the case-selection process were abandoned altogether.

This Court's dynamism also shows in the selection of the cases it does choose to decide. (Its activism also shows in this respect. More on that later.) The Court definitely has an agenda, several agendas, in fact, and it pursues them with some vigor. The Court has declared a kind of war on all forms of class litigation, and its decision to step into the *Wal-Mart* sex bias case was a clear example of that. It is also in a war against some criminal law doctrines, like the exclusionary rule, and a case in that line always has an improved chance of being granted. Similarly, it is determined to put some significant limits on the sharply rising incidence among criminal defendants of claiming that their defense lawyers were constitutionally deficient. It is working away at narrowing the *Miranda* doctrine. It is hell-bent on dismantling controls on money in politics. And it has an abiding fascination with preemption doctrine, and with arbitration law, both of which tend predictably to produce yawns among much of the press corps covering the Court – a group, by the way, that also is diminishing in numbers.

The law clerks in the pool, of course, know the Justices' agendas, and so they are more willing to go a bit out on a limb to recommend grants in all of those areas of inquiry.

The dynamism of this Court also shows in the opinion-writing process. These are Justices who regularly produce quite compelling opinions, and one seldom sees the kind of Chaucerian obfuscation that was David Souter's unfortunate habit. Any observer who follows the Court remains eager for the Justices to divide 5-4, since that brings out the best in writing skills (though sometimes it brings out the worst in manners – especially from Justice Scalia).

But this "hot" Court, I suspect, is going to be remembered more in the long reach of history for its activism. My primary examples of this are two: the decision last year in *Citizens United v. Federal Election Commission*, and the decision four years ago in the Louisville and Seattle voluntary school desegregation cases. As legal necessity goes, neither ruling had to go nearly as far as it did, but one gets the sense that the Court majority – in both decisions – felt absolutely driven to speak expansively. Justice Kennedy has been pursuing his First Amendment-in-politics agenda for years, very impatiently, and *Citizens United* gave him exactly the vehicle he had been hoping would come along. Similarly, Chief Justice Roberts was determined to strike a sweeping blow at the use of race as a deciding factor in public policy, especially in schools, and he did just that – to the total dismay, and displeasure, of his more liberal colleagues.

Let me digress a bit at this point to define my use of the term "activism." First, though, I would like to put aside several meanings of the word that I am not using here.

First, as I suggested earlier, the selection of cases may have an activist tinge to it. The Court majority's eagerness to decide the First Amendment issue in the *Citizens United* campaign finance case is that kind of activism. Although I tend to believe that the Court was obliged, constitutionally, to take on the *Bush v. Gore* controversy in 2000, its intervention in that case is considered to be truly activisit by many observers. But this is not my kind of activism, in the sense pursued here.

Second, some people think the Court is activist when it announces a bold, or innovative ruling. Typical of that last Term, of course, was the decision in *Snyder v. Phelps*, finding a First Amendment right to stage a peaceful, anti-gay protest at the funeral of a military service member. The Chief Justice's opinion in that case, while highly controversial, was a straightforward application of established free-expression principle. That it gave offense did not make it activist, in my view.

Third, the Court may be perceived as favoring some litigants over others. The liberal political community is absolutely sure that the Roberts Court is activist with a strong bent of favoring Big Business. The decision in *AT&T Mobility v. Concepcion*, refusing to let states compel the use of group arbitration for small-dollar consumer complaints, was probably agenda-driven, with Justice Scalia's opinion for the Court expressing his, and the majority's, hostility to most class or group litigation. That is not the activism I am talking about with this Court.

Rather, activism that this Court more often indulges is deciding more than is necessary to reach a decision. Again, *Citizens United* fits in that category, too, because the Court easily could have decided that issue by interpreting the scope of a federal statute, but opted instead to reach out to make a major pronouncement on the First Amendment right of corporations to spend lavishly in politics.

In the *Wal-Mart* case, the Court reached out to decide an issue only tangentially raised by the appeal, in order to make a sweeping declaration against class-action lawsuits. Again, it spoke through Justice Scalia. In fact, in that case, the Court re-worded the questions it would decide, in order to make sure it got the opportunity it wanted to go far toward shutting down class lawsuits against major corporations.

This past Term, Justice Kennedy probably would take the prize for writing opinions that swept more broadly than necessary to decide a given case. He did so most noticeably – though speaking only for himself – in a concurring opinion in the case of *Ashcroft v. al-Kidd*, spelling out an extravagantly broad conception of legal immunity for Cabinet members in Washington. Justice Scalia's main opinion would not go that far.

Kennedy wrote for the Court in the case of *Arizona Christian School Tuition Organization v. Winn*, going almost to the point of blocking taxpayers from bringing any lawsuits to challenge channeling of state tax credits to religious organizations' funding patrons.

He also created an entirely new constitutional theory in writing the Court's opinion in *Bond v. U.S.*, allowing a private citizen to sue to protect the sovereign interests of a state government. His new theory: the doctrine of federalism exists, in part, to advance individual rights, not just states' rights.

And, in a business case, *Global Tech Appliances v. SEB*, he wrote a separate opinion going beyond Justice Alito's opinion for the Court. In a case only about patent law, Kennedy pushed for a new doctrine of criminal law: willful blindness to a law can substitute for a specific intent to violate it.

Even though no other Justice joined him in that view, or embraced his special theory of federalism in the *Bond* case, the fact that the suggestions are now in the United States Reports may encourage their adoption by other courts in due course. That might be particularly so, since Kennedy is considered to be such an influential Justice.

The tendency to push an opinion beyond the point of necessity was plain in the work of a number of the other Justices, too.

Chief Justice Roberts reached out to strike down a bankruptcy law in a case (*Stern v. Marshall*) that could have been decided much more narrowly; Justice Sotomayor pushed a police emergency theory very far in allowing the use in a criminal prosecution of a dying witness's statement to police about his shooter (*Michigan v. Bryant*), Justice Kagan crafted a new form of appeal rights for officials claiming immunity to lawsuits in a case that actually was moot (*Camreta v. Greene*), Justice Alito wrote very expansively on police immunity to claims of unconstitutional searches in order to further the Court's campaign against the so-called "exclusionary rule" (*Davis v. U.S.*), and Justice Thomas spun a new theory of the Supremacy Clause in a case dealing with consumers' right to sue generic drug companies for injuries from taking a particular medicine (*PLIVA v. Mensing*).

And that recital is about just one Term of the Court.

It is not easy to explain this phenomenon. Perhaps it may reflect the supreme self-confidence that this group of Justices has; they tend to believe that judicial power is to be used, and, apparently, not sparingly. It may be that, taking so few cases, they invest each one with a greater importance than perhaps it really has, with the result that it becomes a more consequential precedent (and, incidentally, makes it appear they are doing heavy lifting in deciding so few cases).

And, finally, it could be that the Justices simply have more time on their hands, and they are freer to let their legal imaginations roam a bit. As Professor Keck has suggested in his book, this is not judicial conservatism in the classic sense. But it certainly gives the Roberts Court a chance to have a greater impact on the development of law than a lower court might have, since someone is always watching over the shoulder of lower courts.

It will be most interesting to see, as the Court confronts some heavy new constitutional controversies -- the new health care law, Arizona's crackdown on undocumented aliens, same-sex marriage, and college affirmative-action plans – how active it is in taking on such cases, and in deciding them.

Perhaps it has a reputation to maintain. Stay tuned.

Thank you, very much.