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OP-ED CONTRIBUTOR

The Trial of John Roberts

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FOUR years ago, when John Roberts became chief justice of the United States, he said that he hoped to emulate the modesty and unanimity of his greatest predecessor, John Marshall. But if Chief Justice Roberts presides over a broad, ideologically divided ruling in a campaign finance case the court heard last week, he risks being remembered instead as a conservative Earl Warren.

For decades conservatives have attacked Warren, who was chief justice from 1953 to 1969, as the face of liberal judicial activism. They have criticized him for presiding over a court that imposed a contested vision of social justice on an unwilling nation — overturning decades of precedents and scores of federal and state laws in the process.

Moreover, conservatives view Warren as a Machiavellian former politician (he had been governor of California) who used incremental strategies to pursue radical ends — handing down a series of cautious decisions that favored the police, for example, and then tying their hands by requiring officers to read suspects their rights in the 5-to-4 Miranda decision of 1966.

Likewise, if the Roberts court issues a sweeping 5-to-4 decision in the current case, Citizens United v. the Federal Election Commission, striking down longstanding bans on corporate campaign expenditures, it would define John Roberts as indelibly as Miranda defined Earl Warren. And there is no reason for the court to do so: it would be easy for the justices to rule narrowly in the Citizens United case, holding that the corporate-financed political material in question — a documentary called “Hillary: the Movie” — isn’t the kind of campaign ad that federal law was intended to regulate.

But many conservatives, and even some liberal devotees of the First Amendment, are urging the Roberts court to uproot federal and state regulations on corporate campaign spending that date back to 1907, as well as decades of Supreme Court precedents. If Chief Justice Roberts takes that road, his paeans to judicial modesty and unanimity would appear hollow.

In his confirmation hearings in 2005, Judge Roberts talked about the “jolt to the legal system” that occurs whenever the Supreme Court overturns its own precedents. And soon after taking office, he expressed concern that his colleagues were acting more like law professors than members of a collegial court in their willingness to divide along predictable party lines. He said he would try to persuade his colleagues to converge around narrow, unanimous opinions that avoided the most contentious constitutional issues. The result, he said, would help shore up the court’s legitimacy in a polarized age.
During his four terms as chief justice, Mr. Roberts has had mixed success in achieving his vision of narrow, unanimous opinions, although he surely deserves credit for trying. Under his leadership, the percentage of 5-to-4 decisions has fluctuated from a low of 11 percent in his first term to a high of 33 percent in the term that ended in 2007. Chief Justice Roberts has been most successful in achieving unanimity in cases involving business interests, which now represent some 40 percent of the court’s docket. According to the United States Chamber of Commerce, 79 percent of these cases are decided by margins of 7-to-2 or better.

At his best, Chief Justice Roberts has distanced himself from the most ardent conservative culture warriors on the court, Antonin Scalia and Clarence Thomas. In his most impressive act of judicial statesmanship, he persuaded his colleagues to converge around a narrowly written 8-to-1 decision in June that sidestepped the constitutional difficulties raised by a bipartisan amendment to the federal Voting Rights Act. (Only Justice Thomas dissented.) And Justice Roberts pointedly refused to join Justices Scalia, Thomas and Anthony Kennedy when they called in 2007 for gutting campaign finance regulations — endorsing a more modest position that Antonin Scalia attacked as “faux judicial restraint.”

If, however, in the Citizens United case, Justices Roberts and Samuel Alito now join Justices Scalia, Kennedy and Thomas in a 5-to-4 decision that broadly overturns longstanding bans on corporate campaign expenditures, the 2007 Scalia critique will be vindicated. And liberals will conclude that John Roberts is guilty of precisely the kind of strategic temporizing that conservatives have long ascribed to Earl Warren.

There is, of course, a case to be made for Warren Court activism, and it was made in the Citizens United argument last week by Floyd Abrams, a principled liberal who opposes campaign finance regulations on free speech grounds. (Paradoxically, he was arguing on behalf of Senator Mitch McConnell, the very conservative leader of the Senate Republicans.) Mr. Abrams invoked the landmark 1964 decision in New York Times v. Sullivan — which held that public figures could not sue the press for defamation unless there was “actual malice” involved — as one in which the court was right to rule broadly and overturn 150 years of settled jurisprudence.

But the Sullivan decision was 9-to-0: not a single justice believed that The New York Times could be sued for running an ad that the police commissioner in Montgomery, Ala., viewed as critical of his actions against civil rights protesters. Moreover, it was a decision that was acceptable to the country as a whole at a time when all three branches of government agreed about the importance of federal civil rights laws.

In fact, the most successful decisions of the Warren era fit the same model. Despite conservative caricatures of him as an activist who didn’t care about public opinion, Warren was a canny politician who viewed his role as working harmoniously with the governing majority in the White House and Congress to solve the nation’s problems. The unanimous Brown v. Board of Education was popular with 54 percent of the country when it came down in 1954. Baker v. Carr, the landmark 6-to-2 decision (Justice Charles Evans Whittaker did not participate) from 1962 that Warren considered the most important of his tenure, was hailed by voters from both parties for recognizing the principle of “one man, one vote.” Griswold v. Connecticut, the 7-to-2 decision from 1965 striking down an archaic Connecticut law forbidding the use of contraceptives by married couples, was supported by broad national majorities.

HOW, then, by the late 1960s did Warren become a symbol of judicial arrogance? The answer, according to the historian Lucas A. Powe Jr., can be found in its controversial decisions on criminal procedure. These cases tended to be closely divided along ideological lines and intensely opposed by national majorities. Mapp
v. Ohio of 1961, for example, was a 6-to-3 decision that imposed the exclusionary rule on the states, changing the law in half of them and freeing guilty defendants across the country. Escobedo v. Illinois of 1964, the 5-to-4 decision that held that suspects have a right to a lawyer during police interrogations, created a political firestorm.

The success of Earl Warren’s bipartisan decisions, and the intense controversy produced by his ideologically divided ones, offers a cautionary tale for Chief Justice Roberts. If he presides over a court that establishes itself as the adversary rather than the partner of the president and Congress — imposing hotly contested visions of free speech and racial equality with a narrow court majority — he will become as polarizing a figure at the beginning of his tenure as Warren became at the end of his own.

John Roberts clearly understands the stakes. During an interview at end of his first term, he told me that the most successful chief justices in American history have been able to persuade their colleagues to speak with one voice. By contrast, he said, 5-to-4 decisions involving the most controversial questions in American politics make it harder for the public to respect the court as an institution that transcends politics.

Now he can support a narrow, restrained campaign finance decision that Republicans and Democrats can embrace, or he can hand down a broad, activist decision that turns our political system upside down. John Marshall or Earl Warren: the choice is his.

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