The Three Rs: Rosen, Roberts, and Restraint

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The past two years have witnessed the most important changes in the United States Supreme Court in over a decade, as John G. Roberts, Jr., and Samuel A. Alito succeeded William H. Rehnquist and Sandra Day O'Connor. These past two years have also seen the publication of two significant books on the Court by Professor Jeffrey Rosen—first *The Most Democratic Branch: How the Courts Serve America* (2006) and then *The Supreme Court: The Personalities and Rivalries That Defined America* (2007).

Writing recently in *Law and Social Inquiry*, the scholarly journal of the American Bar Foundation, Professor Thomas M. Keck lauded *The Most Democratic Branch* as "a remarkable achievement, the best general treatment of the Court's role in American political development" in almost fifty years.[1] Professor Mark Graber rightly describes Rosen as "personally gracious and humble,"[2] notwithstanding published plaudits acclaiming him as "the nation's most widely read and influential legal commentator."[3] In a wonderful turn of phrase, Graber commends Rosen for "tirelessly championing judicial modesty without being tiresome,"[4] and there is no questioning the fact that Rosen "has been a consistent and principled critic of judicial intervention in political battles irrespective of whether courts' rulings advance liberal or conservative causes."[5]

Yet championing judicial modesty and restraint is not without some serious and perhaps insuperable obstacles. In Professor Rosen's Foulston Siefkin Lecture, he repeatedly warns that the U.S. Supreme Court must avoid acting "unilaterally."[6] What that entails, Rosen explains, is that "the Court should avoid unilateralism by not imposing constitu-

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1. Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511, 524 (2007).

2. Mark A. Graber, *False Modesty: Felix Frankfurter and the Tradition of Judicial Restraint*, 47 WASHBURN L.J. 23 (2007).

3. David J. Garrow, *A Modest Proposal*, L.A. TIMES, June 25, 2006, at R12 (reviewing JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006)).

4. Graber, *supra* note 2, at 24.

5. Garrow, *supra* note 3, at R12.

6. Jeffrey Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L.J. 1, 1 (2007).

tional visions that are actively and intensely contested by a majority of the American people."[7] Rosen presents that stricture as a negative command, yet he also articulates his standard as an affirmative canon—"Judges should enforce only those constitutional values that a majority of the nation views as fundamental, but identifying what those values are is often difficult."[8]

Both of these formulations require some careful unpacking and analysis. In the 'though shalt not' version, constitutional "visions" could entail both more, and perhaps less, than textually-specified constitutional rights,[9] but as imprecise as "visions" may be, the far more delimiting words are "actively," "intensely," and "majority." Indeed, in this formulation of Rosen's standard, no matter what "constitutional visions" may exist in the United States, the only ones that are off limits for the U.S. Supreme Court are those that a "majority" of the American people—i.e. well over 100 million individuals—both "actively" and indeed "intensely" contest. Of course, the great likelihood is that there are very few, if any, "constitutional" possibilities of any sort that a majority of the American people would "actively and intensely" oppose. Perhaps the abolition of Congress, or the replacement of the President with a multi-member executive, or maybe—just maybe—the adoption of Christianity as an official state religion would qualify but this articulation of Rosen's standard seems to set so high a bar as not to rule out very many "constitutional visions" whatsoever.

The affirmative, "judges should" articulation of Rosen's standard is thus more potentially promising, but once again serious questions arise. Constitutional "values" may be somewhat less amorphous than "visions," yet this proliferation of "v-words" may be indirect evidence of Rosen's quiet desire to avoid using the word or phrase that would give some firm substance to his formulations, namely constitutional *rights*. Rosen again specifies only those values that a national "majority" views as "fundamental," and fundamentality thus becomes the operative concept. Were Rosen to bite the bullet and rephrase his standard in terms of fundamental *rights*, it would of course immediately and directly hearken back to the so-called "preferred freedoms" doctrine that was articulated in a series of Stone Court rulings.[10] Yet Rosen's public opinion-based approach to fundamentality—those values that "a majority of the nation views as fundamental"[11]—leaves itself gapingly open to the

7. *Id.* at 5.
8. *Id.* at 6.
9. Might "visions" be in any way related to "emanations" or "penumbras"? Egads. The horror! The horror! *Cf.* Jeffrey Rosen, *Penumbras Formed By Emanations: How the Right to Privacy Was Invented*, ATLANTIC MONTHLY, Apr. 1994, at 121-27.
10. *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Palko v. Connecticut, 302 U.S. 319, 325 (1937).
11. Rosen, *supra* note 6, at 6.

charge that only those constitutional provisions and guarantees that can garner contemporaneous popular endorsement merit any degree of judicial enforcement or protection.

Social science research reaching back more than a half-century details how Americans' support for core principles of individual civil liberties often exists only in the abstract, and not in times of stress.[12] In fact, as James W. Prothro and Charles M. Grigg wrote in their landmark 1960 article, unpopular rights may prevail only because "many people express undemocratic principles in response to questioning but are too apathetic to act on their undemocratic opinions in concrete situations."[13] Similar findings have recurred in recent years,[14] showing how "Americans, in the mass, believe in 'free speech' and a 'free press' only in theory. In practice they reject those concepts."[15] Those data have led one senior journalist to observe that the perpetuation of First Amendment freedoms remains "dependent not on the goodwill of the masses but on the goodwill and philosophical disposition of the nine men and women of the Supreme Court of the United States."[16] Indeed, one Kansas newspaper editor has articulated the ongoing concern as memorably as anyone by stating, "I'd hate to think what the Bill of Rights would look like today if we put it up to a vote."[17] The most recent public opinion polling data may offer some very modest grounds for relative optimism,[18] but Rosen's insistence that "judges should enforce only those constitutional values"—or rights?—"that a majority of the nation views as fundamental"[19] ought to leave at least journalists and controversialists deeply worried that any present- or future-day Supreme Court Justices

12. *See generally* SAMUEL A. STOUFFER, COMMUNISM, CONFORMITY AND CIVIL LIBERTIES (1955); Raymond W. Mack, *Do We Really Believe in the Bill of Rights?*, 3 SOC. PROBLEMS 264 (1956).

13. James W. Prothro & Charles M. Grigg, *Fundamental Principles of Democracy: Bases of Agreement and Disagreement*, 22 J. POL. 276, 293-94 (1960). They further suggested that "those with the most undemocratic principles are also those who are least likely to act." *Id.* at 294.

14. *See, e.g.*, Robert O. Wyatt, FREE EXPRESSION AND THE AMERICAN PUBLIC: A SURVEY COMMEMORATING THE 200TH ANNIVERSARY OF THE FIRST AMENDMENT (1991); Julie L. Andsager & M. Mark Miller, *Willingness of Journalists and Public to Support Freedom of Expression*, 15 NEWSPAPER RES. J. 102 (1994).

15. Richard Harwood, *The Press and "the People,"* WASH. POST, Oct. 15, 1997, at A21.

16. *Id.*

17. Doug Anstaett, *Do We Really Believe in the Bill of Rights*?, THE KANSAN, May 2, 2002, http:// wwww.thekansan.com/stories/ 050202/vie_0502020032.shtml.

18. *See State of the First Amendment 2006 Final Annotated Survey* (Nov. 11, 2006), http:// www.firstamendmentcenter.org/PDF/SOFA2006FinalSurvey.pdf; *see also Methodology*, http:// www.firstamendmentcenter.org/PDF/SOFA2006methodology.pdf. Forty percent of respondents to that survey believe "the press in America has too much freedom," fifty-five percent of respondents disagreed either strongly (forty-two percent) or mildly (thirteen percent) with the statement that "[p]eople should be allowed to say things in public that might be offensive to racial groups," and seventy-five percent of respondents agreed either strongly (fifty-seven percent) or mildly (eighteen percent) with the statement that "[n]ewspapers should honor government requests to withhold publishing information that might hurt efforts to win the war on terrorism." *State of the First Amendment 2006 Final Annotated Survey* (Nov. 11, 2006), http:// www.firstamendmentcenter.org/PDF/ SOFA2006FinalSurvey.pdf.

19. Rosen, *supra* note 6, at 6.

might adopt Rosen's version of constitutional minimalism.

Rosen's insistent call for judicial self-restraint both implies and presupposes that the present-day Supreme Court remains far too aggressively "activist" almost four decades after Earl Warren's departure as Chief Justice. In line with the now-universal convention that any and every approach to constitutional interpretation must demonstrate how it is fully in accord with the Court's 1954 decision in *Brown v. Board of Education*,[20] Rosen declares that "*Brown* was not intensely countermajoritarian" as *Brown* "was not actively and intensely contested by a majority of the country."[21] Given just how powerfully limiting and exclusionary those two adverbial qualifiers are, even historians who are most thoroughgoingly critical of the highly distorted and downright inaccurate portrayals of *Brown* that have appeared in the legal literature over these past two decades cannot quarrel with the precise accuracy of Rosen's exceptionally circumscribed claim.[22]

But Rosen's benchmark—"actively and intensely contested by a majority of the country"[23]—is one that arguably not a single Supreme Court decision of the entire last century has met. *Carter v. Carter Coal Co.*,[24] to cite merely one notable example from the pre-1937 era, may have been intensely unpopular among those citizens who were sufficiently attentive to appreciate the ruling's meaning and implications. In the pre-television, pre-internet era, however, "a majority of the country" was probably not even aware of the decision's existence. Both *Buck v. Bell*[25] and *Korematsu v. United States*[26] are among the Court's most notorious rulings from the half-century before *Brown*, but neither decision was in any way highly unpopular at the time it came down, and indeed, both appealed to popular prejudices.

Rosen observes that "the Court only provokes intense national backlashes when it makes decisions that national majorities intensely oppose," but he rightly acknowledges that no such occurrence has taken

20. 347 U.S. 483 (1954).
21. Rosen, *supra* note 6, at 7.
22. *See generally* David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151 (1994); David J. Garrow, *"Happy" Birthday,* Brown v. Board of Education*?* Brown*'s Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 VA. L. REV. 693 (2004). One must, however, cavil at Rosen's passing characterization that desegregation finally came to deep south public schools because of "federal guidelines, which allowed southern district judges to put some teeth" behind *Brown*. Rosen, *supra* note 6, at 8. Instead, it was the initiative taken by the United States Court of Appeals for the Fifth Circuit, especially Judge John Minor Wisdom, in school cases from Jackson, Mississippi, and Birmingham, Alabama, that tardily kick-started the integration of deep south public schools. *See generally* David J. Garrow, *Visionaries of the Law: John Minor Wisdom and Frank M. Johnson, Jr.*, 109 YALE L.J. 1219 (2000).
23. Rosen, *supra* note 6, at 7.
24. 298 U.S. 238 (1936).
25. 274 U.S. 200 (1927).
26. 323 U.S. 214 (1944).

place in at least seventy years.[27] The set of mid-1950s anti-subversion decisions that peaked on "Red Monday" certainly set off an intense and widespread negative reaction against the Court,[28] but Rosen again correctly allows that that response fell short of his benchmark. One might consider both the school prayer rulings of the 1960s,[29] and the high-profile criminal justice decisions of that decade,[30] as potential candidates for majority contestation, but Rosen mentions neither. Nor does he consider the political backlash to *Baker v. Carr*[31] and especially *Reynolds v. Sims*,[32] which included first a majority vote in the U.S. House of Representatives to eliminate the federal courts' jurisdiction over challenges to state legislative apportionment, and a majority vote in the U.S. Senate in favor of a constitutional amendment that would overturn *Reynolds*.[33]

In addition to the Communist subversion cases of the 1950s, Rosen cites *Roe v. Wade*[34] as another instance where hostile reactions did not represent majority sentiment. However, in an intriguing if not necessarily accurate gambit, Rosen suggests that it was only the *breadth* of *Roe*'s holding—how the decision went so far as to protect a woman's right to obtain an elective abortion in the second trimester of pregnancy as well as the first—and not the core principle of the decision that stimulated vociferous opposition. "The parts of *Roe* that provoked a backlash were those that called into question later term restrictions that most Americans support," he writes, implying that resistance to *Roe* on the part of people who oppose all abortions was significantly less consequential than hostility from those who would have accepted or at least tolerated a ruling allowing only early term abortions.[35]

That reading of the historical record may have much to offer for the years after 1995, when the salience of the so-called "partial birth abortion" ban debate came to dominate much of the national discussion of the subject. Yet in 1973 initial hostility to *Roe* was not only relatively modest in scale but also came almost exclusively from people and groups whose opposition to abortion was deeply rooted and virtually all-

27. Rosen, *supra* note 6, at 8.

28. *See, e.g.*, Service v. Dulles, 354 U.S. 363 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957); Yates v. United States, 354 U.S. 298 (1957); Slochower v. Bd. Educ., 350 U.S. 551 (1956); Pennsylvania v. Nelson, 350 U.S. 497 (1956); *see also* ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY (1999).

29. Abington Twp. Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

30. Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

31. 369 U.S. 186 (1962).

32. 377 U.S. 533 (1964).

33. *See* David J. Garrow, *Bad Behavior Makes Big Law: Southern Malfeasance and the Expansion of Federal Judicial Power, 1954-1968*, 82 ST. JOHN'S L. REV. (forthcoming 2007-08).

34. 410 U.S. 113 (1973).

35. Rosen, *supra* note 6, at 8.

encompassing.[36] Rosen's characterization of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[37] the 1992 ruling in which the Court reaffirmed much of *Roe* while assertedly jettisoning *Roe's* trimester framework, as a decision in which "the Court perfectly aligned itself with public understandings of the right to choose," is wholly accurate as far as it goes.[38] Yet this evaluation of *Casey* is in dire tension with Rosen's novel critique of *Roe*, for *Casey* did not in any way alter or cut back upon *Roe*'s identification of fetal viability as *the* decisive point up to which a pregnant woman's right to elect to have an abortion cannot be unduly burdened by the government. If indeed *Casey*'s mixture of reaffirmation and curtailment was "perfectly aligned . . . with public understandings of the right to choose," then the "backlash" against *Roe*'s extension of the abortion right—up to the point of viability—had evaporated or morphed into something else.

Commentators on *Roe* and *Casey* must always keep in mind Frederick Schauer's pointed reminder that "the salience of abortion is never as great as American constitutionalists and political pundits seem to suppose."[39] Even more notable, however, is the manner in which Schauer's important 2006 article suggests a trenchant explanation for why no Supreme Court decision—or "vision"—in more than seventy years has met Rosen's test of generating intense opposition from a national majority. "In reality neither constitutional decision-making nor Supreme Court adjudication occupies a substantial portion of the nation's policy agenda or the public's interest," Schauer has persuasively argued.[40] If that indeed is so, then the potential for any imaginable Supreme Court ruling to stir the degree of popular outrage which Rosen specifies is virtually nil, irrespective of whether or not justices seek to heed Rosen's caution. "The erroneous assumption that the Court is deeply involved in what the people believe to be their most important problems" lies at the root of many legal commentators' "tendency to exaggerate the Court's importance,"[41] Schauer explains, and those failings can and do lead to a vastly overstated fear of the danger and frequency of "unilateral" judicial decision-making.

A significant counterbalance to overheated warnings about judicial activism comes from the prominent argument that "throughout history," as Rosen puts it, "the Court has tended to reflect popular views about

36. *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 605-07 (1994).
37. 505 U.S. 833 (1992).
38. Rosen, *supra* note 6, at 9.
39. Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 22 (2006).
40. *Id.* at 9.
41. *Id.* at 12, 62.

contested constitutional issues."[42] The inescapable limitations of this claim are much the same as those that hamstring any meaningful specification of "those constitutional values that a majority of the nation views as fundamental."[43] Professor Graber, however, looking back upon the last two decades, rightly concludes that "the Rehnquist Court was consistently more centrist than either the Democratic or Republican Party."[44]

Professor Rosen seeks to extend that interpretation to encompass the most recent term of the newly constituted Roberts Court. With particular reference to the Court's two most controversial rulings of 2007—*Gonzales v. Carhart*,[45] upholding the constitutionality of the federal Partial Birth Abortion Ban Act,[46] and *Parents Involved in Community Schools v. Seattle School District No. 1*,[47] sharply limiting or perhaps eliminating the ability of public schools to consider students' race in school assignment decisions[48]—he writes that "[i]n many cases in which the Roberts Court is turning right, it appears to have at least a narrow majority of the country on its side."[49] That is certainly the case with regard to the "partial birth" abortion ban, and most likely with overt government use of racial classifications, as Rosen notes.

But Rosen also offers insights and prognostications concerning the new Chief Justice that may prove to be prescient or may end up looking unduly optimistic in the extreme. Earlier this year, reporting comments that Chief Justice Roberts made during a July 2006 interview, Rosen quoted him as saying that "[i]t's a high priority to keep any kind of partisan divide out of the judiciary."[50] Similarly, Justices "don't want the Court to seem to be lurching around because of changes in personnel,"[51] and it was important for him, as a new Chief, not to be perceived as having any sort of ideological agenda. "[I]f other Justices, [Roberts said,] think '[t]hat's just Roberts trying to push some agenda again,' they're not likely to listen" all that agreeably to the new Chief's conference presentations about how argued cases should be addressed and decided.[52]

That conversation took place just after the conclusion of the remarkably harmonious October Term 2005, and Roberts told Rosen that "I do think people were being particularly helpful and accommodating

42. Rosen, *supra* note 6, at 6.
43. *Id.*
44. Graber, *supra* note 2, at 33.
45. 127 S. Ct. 1610 (2007).
46. *Id.* at 1638-39.
47. 127 S. Ct. 2738 (2007).
48. *Id.* at 2767-68.
49. Rosen, *supra* note 6, at 9.
50. Jeffrey Rosen, *Roberts' Rules*, ATLANTIC MONTHLY, Jan./Feb. 2007, at 104, 112.
51. *Id.*
52. *Id.* at 107.

in the first term. . . . Maybe they won't feel the same way the second. We'll see."[53] "Boy did we" many observers might now remark. Early in that second term, Rosen hypothesized that "on a divided Court where neither camp can be confident that it will win in the most controversial cases, both sides have an incentive to work toward unanimity, to achieve a kind of bilateral disarmament."[54] But that premise of a divided Court where uncertainty about voting patterns abounds, is a far different situation than an intensely divided Court where the supposed "swing" Justice instead votes with one of two sharply-defined four Justice camps, in the heavy majority of ideologically-loaded decisions—as of course happened during October Term 2006 (OT06) with Justice Anthony M. Kennedy.

Writing in February 2007, several months before that pattern had begun to fully manifest itself, one of the best-informed and most perceptive journalistic analysts of the Court, Jan Crawford Greenburg of ABC News, astutely predicted that notwithstanding the Chief Justice's public declarations about how a continuation of October Term 2005's conspicuous unity would benefit both the Justices themselves and the Court institutionally, "we will not see [] consensus and unanimity" in the controversial constitutional cases that highlighted the OT06 docket.[55] Indeed, Greenburg said, "Roberts'[s] real challenge will be reining in Justice Kennedy so that he is not presiding over the 'Kennedy Court.'"[56] Alluding to Roberts's statements that the narrower a decision is, the better,[57] Greenburg additionally speculated that Roberts's "idea of constraint and narrowness is targeted more at limiting Kennedy's power to dictate the Court's direction" than at anything else.[58]

The results of OT06—with Justice Kennedy in the majority in all twenty-three 5-4 cases, and indeed voting in dissent only twice during the entire term—made Greenberg's comments seem perspicacious. Reflecting on the Chief Justice's second year at the Court's helm, Rosen now surmises that "Roberts presumably understands that he cannot preside over a decade of 5-4 decisions."[59] If that OT06 pattern were to continue in succeeding terms, Roberts "would be perceived as the leader of a partisan and polarized conservative Court."[60]

Rosen continues to credit, and praise, what he calls Roberts's "judicial humility,"[61] and he likewise maintains that the Chief Justice is

53. *Id.* at 112.
54. *Id.* at 107.
55. Jason Harrow, *"Ask the Author" with Jan Crawford Greenburg: Part 2*, Feb. 8, 2007, http://www.scotusblog.com/movabletype/archives/ 2007/02/ask_the_author_17.html.
56. *Id.*
57. *See, e.g.*, Rosen, *supra* note 50, at 105-06.
58. Harrow, *supra* note 55.
59. Rosen, *supra* note 6, at 4-5.
60. *Id.* at 5.
61. *Id.* at 10.

"genuinely humble" and "has a knack for charming his ideological opponents."[62] But after the conclusion of OT06, there is no question that Roberts's professed lack of any ideological agenda, like his claim of jurisprudential modesty, is now seriously doubted by at least some—and perhaps as many as four—of his fellow Justices. Rosen acknowledges that "Roberts's success or failure" as Chief Justice will ultimately depend upon "the temperaments and dispositions of his colleagues," at least "several of whom have made it clear that they have little interest in supporting his efforts to achieve unanimity and consensus."[63]

Professor Graber writes that "open commitments to judicial activism are democratically superior to false professions of judicial modesty,"[64] and that is a sentiment that Justices Stephen G. Breyer,[65] Ruth Bader Ginsburg,[66] David H. Souter,[67] and John Paul Stevens[68] all appear to share most heartily. These particular OT06 dissents, among others, and the manner in which they were announced, indicate that some, and perhaps all four of the non-conservative Justices, feel decidedly less optimistic about and more distrustful of their new Chief Justice than they did at the end of October Term 2005. This is a development that merits careful attention and critical analysis. Writing soon after the end of OT06, Jan Crawford Greenberg revealed that "Supreme Court practitioners on the Left and Right were taken aback by" the tone and intensity of Justice Ginsburg's dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*,[69] "a case that, in practice, has limited impact."[70] Ginsburg's statements there, like Justice Souter's in *Bowles v. Russell*,[71] Justice Stevens' in *Uttecht v. Brown*,[72] and especially Justice Breyer's spontaneous remarks when he announced his dissent in *Parents Involved*,[73] all suggest that for those four dissenters, the import and implications of these 5-4 decisions loomed far, far larger than many outside observers thought

62. *Id.* at 4.
63. *Id.* at 11.
64. Graber, *supra* note 2, at 34.
65. *See* Joan Biskupic, *Roberts Steers Court Right Back to Reagan*, USA TODAY, June 29, 2007, at 8A; Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race in Integration Plans*, N.Y. TIMES, June 29, 2007, at A1 (each quoting Justice Breyer as remarking from the bench that "[i]t is not often in the law that so few have so quickly changed so much" while delivering his dissenting opinion in *Parents Involved*).
66. *See* Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2178 (2007) (Ginsburg, J., dissenting).
67. *See* Bowles v. Russell, 127 S. Ct. 2360, 2367 (2007) (Souter, J., dissenting).
68. *See* Uttecht v. Brown, 127 S. Ct. 2218, 2238 (2007) (Stevens, J., dissenting); Charles Lane, *Ruling Affirms Judges' Authority; High Court Backs Exclusion of Juror in Capital Case*, WASH. POST, June 5, 2007, at A3.
69. 127 S. Ct. 2162 (2007).
70. Jan Crawford Greenburg, *The Sky's Still Up There*, ABC NEWS.COM, July 20, 2007, http://www.blogs.abcnews.com/legalities/2007/07/the-skys-still-.html (last visited Oct. 8, 2007).
71. 127 S. Ct. 2360 (2007).
72. 127 S. Ct. 2218 (2007).
73. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2797 (2007) (Stevens, J., dissenting).

should be the case.

Private comments from inside the Court since the end of OT06 indicate that public evidence of internal stress and strain is indeed correct, and that some Justices do indeed believe that a substantial gap exists between Chief Justice Roberts's public declarations of intent and his private attachment to particular case outcomes. The anger manifested by Justices Breyer, Ginsburg, Souter, and Stevens was echoed by a surprisingly large number of observers who reacted to those Justices' emotionalism. As Jan Crawford Greenburg wrote, "[S]ome of the liberal commentary on the Court" at the end of OT06 "has been almost breathtaking in its over-the-top hysteria."[74] The increasingly partisan and increasingly hostile tone of much commentary—and some journalistic coverage—concerning the Court is a new and troubling development that deserves a more rigorous critique than has yet taken place. The Roberts Court is undeniably a Court in significant transition, but as Greenburg rightly says, "[I]t's the outrage on the Left that's most striking" amongst all the elements concerning the current Court.[75]

Jeffrey Rosen's winsomely optimistic expectations about the Chief Justiceship of John G. Roberts, Jr., may thus to some significant degree be disproven by developments that are already underway. But it is likewise true that even if the Roberts Court does move forward with "a decade of 5-4 decisions" that paint Roberts himself as "the leader of a partisan and polarized conservative Court,"[76] the popular national response to those rulings will inevitably fall well short of generating sufficient opposition to meet the extremely demanding standard that Professor Rosen articulates here. Given the extent to which most of the American people, as Professor Schauer has shown, do not intensely engage with the work of the Supreme Court or the issues that come before it, Rosen's argument highlights—whether intentionally or not—how much free rein the Justices—or even a narrow majority of five Justices—truly do enjoy when they have the judicial or ideological will to use the largely unbridled powers they possess. It is unlikely indeed that the Roberts Court will usher in an era of true judicial restraint, but if yet another epoch of poorly cloaked judicial activism does in fact come to pass, we can be certain that we will witness Jeffrey Rosen evolve from one of John Roberts's most enthusiastic fans into one of his most emphatic critics.

74. Greenberg, *supra* note 70. A particularly splenetic and embarrassing example is Ronald Dworkin, *The Supreme Court Phalanx,* N.Y. REV. OF BOOKS, Sept, 27, 2007, at 92, which begins by calling Chief Justice Roberts and Justice Alito "ultra-right-wing" and proceeds to claim that they, along with Justices Scalia and Thomas, constitute "an unbreakable phalanx" and are "guided by no judicial or political principle at all, but only by partisan, cultural, and perhaps religious allegiance." This is risible and, in its last allegation, an odious slur.

75. Greenburg, *supra* note 70.

76. Rosen, *supra* note 6, at 4-5.