

OF BENEDICK AND BEATRICE: *CITIZENS UNITED* AND THE REIGN OF THE LAGGARD COURT

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INTRODUCTION

The *Citizens United* decision struck down long-established prohibitions on the use of corporate funds to provide direct financing for independent political advocacy campaigns.¹ The decision stimulated a predictably dire response that wealthy corporations would now determine elections and, by extension, public policy. In this Article, we explain the behavior of the *Citizens United* Court as part of a larger pattern of behavior by a “laggard” or counter-majoritarian Court, where a 5–4 conservative majority rendered a decision that is part of a larger exercise in posturing and signaling to the other institutions of government. The actual consequences of *Citizens United*, much like previous conservative signaling decisions by this Court over the past decade, have few substantive policy consequences. These decisions instead articulate a set of principles held by the minimal winning coalition on the Court, and are mainly an effort of the counter-majoritarian Court to gather power to itself in a political system that moved away from the Court’s core principles.

Since *Bush v. Gore*,² no decision of the Supreme Court has elicited as much national consternation as *Citizens United v. FEC*. In two separate commentaries in the *New York Review of Books*, for example, eminent legal theorist Ronald Dworkin entitled his articles, *The Decision*

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¹ See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

² See 531 U.S. 98 (2000).

that *Threatens Democracy*,³ and *The “Devastating” Decision*.⁴ Aside from the legal cognoscenti, the most notable reaction to the opinion came from President Barack Obama during his State of the Union address one week after the decision:

With all due deference to separation of powers, last week the Supreme Court reversed a century of law that, I believe, will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests or, worse, by foreign entities. They should be decided by the American people. And I urge Democrats and Republicans to pass a bill that helps correct some of these problems.⁵

Seated with his Court brethren amidst those sympathetic to the President’s criticisms of *Citizens United* who stood to applaud, Justice Samuel Alito appeared to mouth the retort, “Not true!”⁶ The decision’s critical reception, then, along with the very public exchange between the President and the Associate Justice seemed to portend a political battle with the Judiciary on one side and the Executive Branch and a majority of the Congress on the other. The potential Judicial–Executive face off reminded some of the New Deal clash in the years leading up to 1937.⁷

We seek to make sense of *Citizens United* from an empirical political science perspective that discounts both the positive and negative rhetoric that has surrounded the decision. We do this by integrating both an empirical and historical/contextual perspective. In the most immediate sense, *Citizens United* does not portend the anti-democratic effects that critics predict nor does it stand as a bastion of free speech doctrine like its proponents suggest. Instead, *Citizens United* is the product of a Republican-entrenched Court that, at this moment, is lagging behind the policy preferences of the elected political branches of American govern-

³ Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. OF BOOKS, May 13, 2010, at 39, available at <http://www.nybooks.com/articles/archives/2010/may/13/decision-threatens-democracy>.

⁴ Ronald Dworkin, *The “Devastating” Decision*, N.Y. REV. OF BOOKS, Jan. 28, 2010, at 63, available at <http://www.nybooks.com/articles/archives/2010/feb/25/the-devastating-decision/>.

⁵ See Robert Barnes, *Reaction Split on Obama’s Remark, Alito’s Response at State of the Union*, WASH. POST, Jan. 29, 2010, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802893.html>.

⁶ *Id.*

⁷ For the classic account of the battle, see WILLIAM EDWARD LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940, 231–39 (1st ed. 1963).

ment.⁸ The decision is thus more important for what it says about the Roberts Court more generally than what it says about campaign finance reform and democracy at present.

Part I presents an empirical argument that the immediate substantive effects of *Citizens United* will be modest, and does not represent a substantial departure from the status quo of American campaign finance; whatever threat exists to democracy under the previous campaign finance regime is not meaningfully enhanced. Part II seeks to explain more broadly the significant and far-reaching effects of *Citizens United*, which have less to do with campaign finance reform than with the Court's continued efforts to stake out a preeminent position in national politics, despite the incongruence of the existing Court majority with the broader popular and electoral coalition that predominates in other national institutions. We demonstrate that this pattern of behavior is evident in two areas since the ascendancy of the conservative majority on the Court—campaign finance and redistricting.

I. *CITIZENS UNITED* IN THE CONTEXT OF CAMPAIGN FINANCE

Interpreting the substantive impact of the *Citizens United* case requires consideration of the broader context of campaign finance in elections. There are fundamental truths about money in politics: the candidate who spends the most money usually wins;⁹ money often flows to candidates who are expected to win, or who exhibit prior success in elections, either in winning down-ticket offices or by holding congressional office;¹⁰ and contributions from economic interests—corporate, trade association, and labor union political action committees (PACs)—are usually structured by policy priorities and the ability of incumbents to deliver policy for a reasonable “purchase price.”¹¹

⁸ For a discussion of the use of federal court appointments to entrench the goals of political parties, see generally Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 511–24 (2002) [hereinafter Gillman, *How Political Parties*].

⁹ See Stanton A. Glantz, Alan I. Abramowitz & Mark P. Burkhardt, *Election Outcomes: Whose Money Matters?*, 38 J. POL. 1033, 1033–48; Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AM. POL. SCI. REV. 469, 469–83 (1978); Gary C. Jacobson, *Practical Consequences of Campaign Finance Reform: An Incumbency Protection Act?*, 24 PUB. POL'Y 1, 1–24; Samuel C. Patterson & Gary W. Copeland, *Reform of Congressional Campaign Spending*, 5 POL'Y STUD. J. 424, 424–31; see generally GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* (1st ed. 1983) [hereinafter JACOBSON, *CONGRESSIONAL ELECTIONS*].

¹⁰ David Canon, *ACTORS, ATHLETES, AND ASTRONAUTS: POLITICAL AMATEURS IN THE UNITED STATES CONGRESS 75* (1990); RONALD KEITH GADDIE & CHARLES S. BULLOCK, III, *ELECTIONS TO OPEN SEATS IN THE U.S. HOUSE: WHERE THE ACTION IS* 13 (2000); JACOBSON, *CONGRESSIONAL ELECTIONS*, *supra* note 9, at 38–39.

¹¹ Kevin B. Grier, Michael C. Munger & Brian E. Roberts, *The Determinants of Industry Political Activity, 1978–1986*, 88 AM. POL. SCI. REV. 911, 911–26 (1994) [hereinafter Grier et

There are also misconceptions about money in politics that merit attention. First, PACs do not dominate campaign financing. Incumbents, challengers, and open seat candidates generally receive most of their money from individual donors. Second, the ability to spend more and more money does not necessarily lead to unlimited return on investment—there are diminishing returns to each additional dollar spent by candidates.¹²

In the context of *Citizens United*, corporations are still banned under the Tillman Act directly contributing to candidates.¹³ The decision opened the door for corporations and labor unions to do something unprecedented in American politics for a century—to use dollars from corporate or union coffers for campaign advocacy.

Critics of the *Citizens United* decision fear that the ability of corporations to use their profits to influence elections directly will result in the outright purchase of election results by corporate interests. There are several reasons that these fears are overblown, or at the very least misstated. Why?

First, corporate influence in the campaign process is already substantial. Labor unions and corporations give hundreds of millions of dollars to candidates, mainly incumbents, and those dollars are targeted based on the economic needs of the sponsors.¹⁴ These are not direct corporate dollars, but come from prominent employees, friends of corporations, and shareholders—in other words, individuals who benefit from the profitability of the corporation and are effectively plowing their economic gains back into the political system in order to continue those gains in the future through a favorable regulatory environment.

Second, the corporate and union moneys that are opened up for use by the *Citizens United* decision do not exist in a vacuum, sitting in a

al., *Determinants*]; Kevin B. Grier & Michael C. Munger, *The Impact of Legislator Attributes on Interest-Group Campaign Contributions*, 7 J. LAB. RES. 349, 349–61 (1986); Kevin B. Grier, Michael C. Munger & Brian E. Roberts, *The Industrial-Organization of Corporate Political-Participation*, 57 S. ECON. J. 727, 727–38 (1991) [hereinafter Grier et al., *Industrial-Organization*]; Amy J. Hillman, Gerald D. Keim & Douglas Schuler, *Corporate Political Activity: A Review and Research Agenda*, 30 J. MGMT. 837, 837–57 (2004); Robert A. Smith, *Interest Group Influence in the U.S. Congress*, 20 LEGIS. STUD. Q. 89–139 (1995); David Soherr-Hadwiger, *Military Construction Policy: A Test of Competing Explanations of Universalism in Congress*, 23 LEGIS. STUD. Q. 57, 57–78 (1998); Thomas Stratmann, *How Reelection Constituencies Matter: Evidence from Political Action Committees' Contributions and Congressional Voting*, 39 J. L. & ECON. 603, 603–35 (1996).

¹² See Kevin B. Grier, *Campaign Spending and Senate Elections, 1978–84*, 63 PUB. CHOICE 201, 201–19 (1989).

¹³ See Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2006)); Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 27, 27–60 (Anthony Corrado et al. eds., 2005).

¹⁴ See Grier et al., *Determinants*, *supra* note 11; Grier et al., *Industrial-Organization*, *supra* note 11.

massive Scrooge McDuck money vault. These moneys, whether from profits or member dues, also have other obligations. They are to be invested on behalf of shareholders or members, or used to pay dividends, or put to purposes that benefit those who are economically dependent on the corporation or union. Political activities must be balanced against a variety of other needs and priorities for institutional money.

Third, the moneys now eligible to enter the campaign finance system do not go directly to candidates; these moneys go into issue advocacy or candidate advocacy not formally under the control of a candidate. This is a legal reality, though it is something of a convenient fiction, to say that candidate beneficiaries have no say in the use of coordinated campaign or independent expenditures on their behalf (or to their opponent's detriment). Candidates do have a notion of how these dollars are used, where they come from, and the expectations of the contributors.

Fourth, the impact of independent expenditures in campaigns is real, but independent expenditures are not necessarily deterministic of election outcomes. When the *Buckley* decision loosened the fetters on independent expenditures, there was an initial impact on the campaign environment.¹⁵ The targeting of Sen. Dick Clark (D-Iowa) by the National Conservative Political Action Committee is often cited as the first example of an independent advocacy campaign defeating an incumbent lawmaker.¹⁶ Republicans would follow this strategy to gain a Senate majority in 1980, but the use of independent expenditures to defeat incumbents soon waned. Subsequent scholarship shows that independent expenditures mattered no more than any other form of spending in U.S. Senate elections.¹⁷

The rate of independent expenditure rose slowly and systematically through the 1980s and early 1990s. Over 99% of the \$135 million in independent expenditures made by PACs in the 2007–2008 election cycle came from labor union PACs, non-connected PACs, and trade association PACs. Over 43% of all independent expenditures came from labor PACs, with another 33.2% from trade association PACs.¹⁸ Less than one-tenth of one percent of independent expenditures came from corporate PACs, and cooperative PACs made no independent expenditures,

¹⁵ See *Buckley v. Valeo*, 424 U.S. 1, 29 (1976) (per curiam); Richard N. Engstrom & Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections*, 55 POL. RES. Q. 885, 885–905 (2002) [hereinafter Engstrom, *Effects*].

¹⁶ See RICHARD F. FENNO, *SENATORS ON THE CAMPAIGN TRAIL* 150–56 (1996); Engstrom, *Effects*, *supra* note 15.

¹⁷ See Engstrom, *Effects*, *supra* note 15.

¹⁸ Computed by authors from data accessed at the FEC Press Office. See Press Office, FED. ELECTION COMMISSION, <http://www.fec.gov/press/press.shtml> (last visited Jan. 12, 2011).

being focused mainly on donating to Agriculture Committee members in both chambers of Congress.¹⁹

In congressional elections, most money still enters the process through individual, direct donation. For the 2004 and 2008 election cycles, contributions from individuals dwarfed the combined PAC contributions and PAC independent expenditures for U.S. Senate races (see Table 1), and in House races the majority of all money entering campaigns came from individuals, although House candidates take proportionally more direct contributions than Senate candidate from PACs.

TABLE 1: INDEPENDENT EXPENDITURES, PAC CONTRIBUTIONS, AND INDIVIDUAL CONTRIBUTIONS, LAST TWO PRESIDENTIAL CYCLES

<u>Senate</u>	<u>2003-04</u>	<u>2007-08</u>
PAC Independent Expenditures	7.5*	14.6
PAC Contributions	63.7	79.3
Individual Contributions	324.0	270.0
<u>House</u>		
PAC Independent Expenditures	6.4	21.8
PAC Contributions	225.4	300.7
Individual Contributions	396.7	528.8

*Millions of nominal dollars.

Source: Computed from data collected from multiple reports for various election years available at the Federal Election Commission press website.²⁰

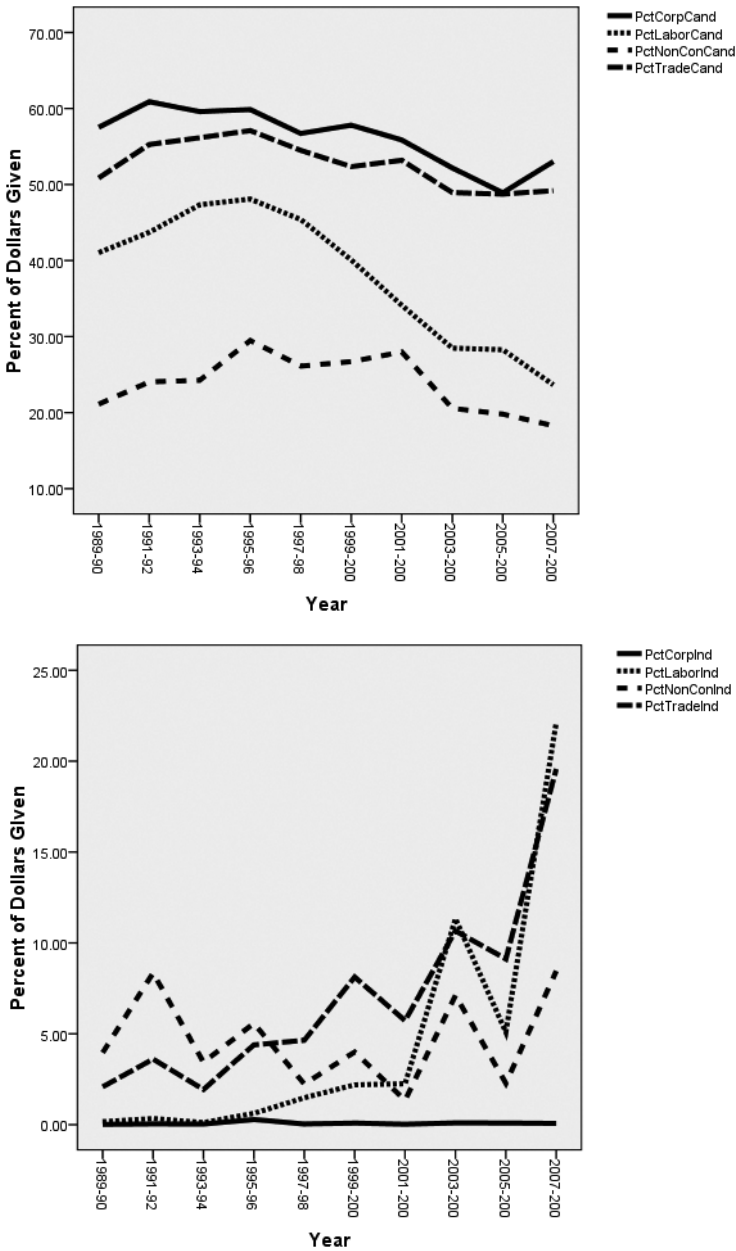
The concerns that massive corporate expenditures will overwhelm political campaign advocacy defy the structure and use of money in the campaign process. As indicated in Figure 1 (below), of the four major categories of PACs engaged in federal campaigns, corporate and trade association PACs consistently distribute the majority of their funding directly to candidates. These PACs also have the greatest disposition to structure their donations using a bipartisan, incumbent-oriented policy purchase model of the sort described by Arthur Denzau and Michael Munger.²¹ Non-connected (ideological) PACs are least prone to give funds to candidates. Labor PACs have moved away from a heavy emphasis on direct giving—candidate contributions as a share of PAC expenditures fell from a peak of 47% in 1995–1996 to less than one-quarter of expenditures by 2007–2008 (see Figure 1).

¹⁹ Regarding agriculture cooperative PAC strategy, see James L. Regens & Ronald Keith Gaddie, *The Economic Realities of Political Reform: Elections and the U.S. Senate*, 22 PROGRESS HUM. GEOGRAPHY 307 (1998).

²⁰ Press Office, FED. ELECTION COMMISSION, <http://www.fec.gov/press/press.shtml> (last visited Aug. 17, 2010).

²¹ Arthur T. Denzau & Michael C. Munger, *Legislators and Interest Groups: How Unorganized Interests Get Represented*, 80 AM. POL. SCI. REV. 86, 86–106 (1986).

FIGURE 1: TRENDS IN DIRECT GIVING AND INDEPENDENT EXPENDITURES BY MAJOR CATEGORIES OF PACs.



Source: Computed by authors from data at the Federal Election Commission website.²²

²² Press Office, FED. ELECTION COMMISSION, <http://www.fec.gov/press/press.shtml> (last visited Aug. 17, 2010).

With regard to independent expenditures by PACs, two categories remain largely unchanged. Non-connected PACs continue to display an oscillating pattern of independent spending, ranging from about 2% to 9% of all funds expended. Corporate PACs have spent almost nothing on independent expenditures over the last two decades. However, the remaining two categories of PACs moved dramatically toward independent expenditure models. Trade association PACs spent an average of 2% of their moneys on independent expenditures from 1989 to 1994, but devoted almost 20% of their budgets to independent expenditures in 2007–2008. And, labor PACs, which limited their independent expenditures to less than 2.5% through 2001–2002, increased this type of allocation to almost 11% in 2003–2004, 9% in 2005–2006, and 19.6% in 2007–2008.

Independent expenditures have always been available to corporate PACs, and other categories of PACs have shown an inclination to use this option. Even though every election cycle finds ample corporate dollars still sitting on the sidelines in PACs, available for independent expenditures (over five million dollars at the end of 2008), those moneys are not making their way directly into advocacy campaigns. Why? One speculative explanation is informed by the historic behaviors of corporations in campaigns, and by the nature of the different organizations PACs are affiliated with. Corporate actors have traditionally used trade associations and charitable associations as vehicles to shape political debate and engage in advocacy. Non-connected PACs are often aligned with grassroots and issue movements. In both instances, independent expenditures are mechanisms to do what these sorts of groups often do—promote a particular perspective of interest to a group defined by one major issue or one major policy. Labor PACs, having active members who can provide boots on the ground for campaigns, and organized by a set of values governed by a common world view or interest, can marry money with issue advocacy and vote mobilization activities that are the traditional strengths of independent expenditure activities.

Corporations operate under a different constraint. They exist in a marketplace where consumers and clients, in addition to government policymakers, can determine their success or failure. The political activity of non-connected PACs, union PACs, and trade association PACs do not cost them clients, but are in fact the means by which they create and maintain clients.²³ Historically, corporate PACs' foremost concern has been the tax code, which affects their profits. Corporate actors also seek predictability in the regulatory environment, which affects competitive

²³ MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 67–76 (1965).

entry by other firms, the ability to capture rents,²⁴ and long-term business planning.²⁵ Political action beyond these highly technical policy concerns can actually serve to imperil the primary objective of any firm, which is keeping clients and customers. The tax code and the structure of the competitive marketplace through regulation help firms keep clients and make profits. Taking controversial and highly visible political stands can potentially cost clients and therefore lead to financial costs.²⁶ Corporate stocks and corporate products have been punished by consumers for overt political activity (boycotts of Coors products and Target stores);²⁷ activities that harmed the public space (oil spills by Exxon and British Petroleum);²⁸ and for their investments with politically unpopular regimes such as South Africa.²⁹ A rise in overt, direct political action by most corporations carries with it risks far exceeding the political gains that might be achieved by acting through other agents.

II. THE REAL SIGNIFICANCE OF *CITIZENS UNITED*: A LAGGARD COURT, NOT A COUNTER-MAJORITARIAN COURT

The widespread criticism of *Citizens United* has focused on three aspects of the case: the role of stare decisis, the majority's acceptance of a facial as opposed to an as-applied challenge, and the more general role of judicial minimalism that the dissenters assert should have been the governing standard. These criticisms are often levied from a purely legal or doctrinal perspective and result in charges that the Court is inconsistent in its doctrinal development as well as unfaithful to precedent.³⁰ While campaign finance reform doctrine still remains muddled terrain

²⁴ A "rent" is a profit above the marginal rate that is gained due to a regulatory advantage rather than a competitive advantage. A *THEORY OF THE RENT-SEEKING SOCIETY* 39–50 (James M. Buchanan et al. eds., 1980).

²⁵ See George Stigler, *The Theory of Economic Regulation*, *BELL J. ECON. & MGMT. SCI.* 3, 3–18 (1971).

²⁶ Michele Micheletti et al., *Politics, Products, and Markets: Exploring Political Consumerism Past and Present*, 84 *ECON. GEOGRAPHY* 123, 123–25 (2008); Dietlind Stolle, Marc Hooghe & Michele Micheletti, *Politics in the Supermarket: Political Consumerism as a Form of Political Participation*, 26 *INT'L Pol. Sci. Rev.* 245, 245–69 (2005).

²⁷ See *Union at Coors May Be Broken But It Hasn't Halted Its Boycott*, *N.Y. TIMES*, May 28, 1979, at A7; J.L. Yang & D. Eggen, *Exercising New Ability to Spend on Campaigns, Target Finds Itself a Bull's-eye*, *WASH. POST*, Aug. 19, 2010, at A7.

²⁸ See, e.g., *BP in More Trouble for Alaska Oil Spills*, *UPI.COM* (Nov. 20, 2010 1:51 PM), http://www.upi.com/Top_News/US/2010/11/20/BP-in-more-trouble-for-Alaska-oil-spills/UPI-94501290279102/; *Stocks Hurt Most by the Gulf Deepwater Oil Spill*, *WILD INVESTOR* (May 1, 2010), <http://thewildinvestor.com/stocks-hurt-most-by-the-gulf-deepwater-oil-spill/>.

²⁹ Judith F. Posnikoff, *Disinvestment from South Africa: They Did Well by Doing Good*, 15 *CONTEMP. ECON. POL'Y* 76, 76–86 (1997).

³⁰ See, e.g., Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 *MINN. L. REV.* 1064, 1064–69 (2007) [hereinafter Hasen, *Beyond Incoherence*].

after *Citizens United* there is another plausible explanation for the Court's actions that can make sense not only of our counter-intuitive findings, but can also explain the otherwise puzzling doctrinal state of campaign finance jurisprudence.

Especially since the 1950s, legal scholars have been, in the words of Barry Friedman, "obsessed" with the purported "counter-majoritarian" function of the Supreme Court, a characterization that certainly seems appropriate for *Citizens United*.³¹ From this perspective, judicial review is a potentially deviant function because it "thwarts the will of representatives of the actual people of the here and now" and "exercises control, not on behalf of the prevailing majority, but against it."³² The assumption, of course, is that courts act independently of other institutions, so if and when they use judicial review to overturn actions of Congress, the President, or even state governments, they are automatically, and by definition, "thwarting" majoritarian will. The heavy-lifting of twentieth century constitutional theory was devoted to devising alternative theories of the proper use of judicial review by courts that would help legitimize this function. Sometimes the counter-majoritarian powers of the Court could be used legitimately to open the channels of the political process to "discrete and insular minorities,"³³ or to vindicate substantive individual rights,³⁴ or to enforce original conceptions of the Constitution's enumerated rights, structures, and duties.³⁵ Whatever the model for judicial review, though, all assumed that when the Supreme Court exercises this power it is inimical to the wishes of the majority.

But an increasing number of political scientists, legal historians, and legal academics have questioned the utility and historical accuracy of the purported counter-majoritarian difficulty, and they have begun to construct theories of judicial decision-making that view this process through a larger political lens. Inspired by Robert Dahl's analysis of judicial decision-making at the height of the behavioral revolution in the 1950s that questioned the assumptions of the Supreme Court as a "Galahad" that vindicates minority rights in the face of majority deprivations, the regime politics approach has, in the words of Howard Gillman, sought to "incorporate legal studies into a more general set of hypotheses about how

³¹ See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998).

³² See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

³³ See *United States v. Carolene Products*, 304 U.S. 144 (1938). For the definitive account, see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

³⁴ See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 11–12 (1985).

³⁵ See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 153–60 (1990).

political regimes organize, exercise, and protect their power.”³⁶ According to Dahl, the Court has rarely used judicial review to strike down national legislation. Instead, use of judicial review has generally been consistent with and supportive of the contemporary dominant national coalition.³⁷ Contrary to more legally normative conceptions of the judicial role, the Court is not simply “a legal institution,” but “also a political institution . . . for arriving at decisions on controversial questions of national policy.”³⁸ The relationship of the Court to other political institutions is structured by “relatively cohesive alliances that endure for long periods of time.”³⁹ The result of these alliances is that except for key transitional periods, Court majorities have been appointed by, and hence supportive of, those alliances. When the Court advances purportedly legal, as opposed to overtly political reasoning, this is simply window dressing designed to ensure the legitimacy of the judicial function as it conforms its decisions to the dominant political coalition.

Variations and advances on Dahl’s theme of the Court’s relationship to the national policy-making process have made important contributions to our understanding of Supreme Court decision-making that move past the strictures of the legally-centered assumptions of the counter-majoritarian difficulty. Mark Graber and others have shown, for example, how legislatures often find that deferring difficult issues to sympathetic or regime-affiliated courts can be effective in securing policy goals that would otherwise remain dead on arrival.⁴⁰ Judicial review is thus

³⁶ See Howard Gillman, *Courts and the Politics of Partisan Coalitions*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 645, 645–62 (R. Daniel Kelemen et al. eds., 2008); see also Cornell Clayton & David A. May, *A Political Regimes Approach to the Analysis of Legal Decisions*, 32 POLITY 233, 233–52 (1999) [hereinafter Clayton & May, *Political Regimes*]; Cornell W. Clayton & J. Mitchell Pickerill, *Guess What Happened on the Way to Revolution? Precursors to the Supreme Court’s Federalism Revolution*, 34 PUBLIUS 85, 85–114 (2004) [hereinafter Clayton & Pickerill, *Guess What*]; J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. ON POL. 233, 233–48 (2004) [hereinafter Pickerill & Clayton, *Rehnquist Court*]; Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY 511, 511–44 (2007) [hereinafter Keck, *Party Politics*].

³⁷ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 282 (1957), reprinted in 50 EMORY L. J. 563, 563–82 (2001) [hereinafter Dahl, *Decision-Making*]; see also Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 50–63 (1976).

³⁸ See Dahl, *Decision-Making*, *supra* note 37, at 563.

³⁹ *Id.* at 580.

⁴⁰ See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35–73 (1993) [hereinafter Graber, *Nonmajoritarian*]; Keith E. Whittington, *Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 583–96 (2005) [hereinafter Whittington, *Interpose*]. On legislative deferrals more generally, see GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* (2003). Howard Gillman and Keith Whittington have further mapped the contours of this process. See Gillman, *How Political Parties*, *supra* note 8.

best understood as “nonmajoritarian” rather than “counter-majoritarian,” and resolution of these legislative issues by the Court often indicates that its powers are being employed in the service of larger majoritarian goals rather than in the service of the rights or interests of minorities. Not only do courts seldom overturn the political preferences of the dominant national coalition, they sometimes act as “a forum for the resolution of disputes that present political problems for party leaders.”⁴¹ More broadly, others have shown how the Court’s decisions in such diverse areas as criminal procedure rights, school desegregation, federalism concerns, voting rights, executive power, and abortion, to name just a few, are best understood as complements, rather than impediments, to the larger political regime’s visions of constitutional governance.⁴² Consequently, we should expect that justices, appointed by presidents and confirmed by the Senate, will reflect broadly the goals of the regimes which appointed them.⁴³

The most systematic advocates of the regime approach put forward a developed and nuanced theory of the political dynamics of judicial decisions that moves beyond the rather prosaic assumption that the Court simply “follows the election returns.” The political regimes approach nevertheless brings the role of “law” back into the study of courts even as it acknowledges a significant relationship between the Court and the larger governing regime. Leading this charge, Cornell Clayton and David May argue that “legal principles” do indeed shape judicial outcomes, but the “law” in this sense is the product of larger social and political forces. As they describe this dynamic, “Judges reach the deci-

⁴¹ See Howard Gillman, *Martin Shapiro and the Movement from ‘Old’ to ‘New’ Institutional Studies in Public Law Scholarship*, 7 ANN. REV. POL. SCI. 377 (2004); see also Whittington, *Interpose*, *supra* note 40.

⁴² On criminal procedure, see LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* (2000); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996). On *Brown v. Board of Education*, see KEVIN J. McMAHON, *RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN* (2004). On federalism, see Clayton & Pickerill, *Guess What*, *supra* note 36; Pickerill & Clayton, *Rehnquist Court*, *supra* note 36. On voting rights, see Whittington, *Interpose*, *supra* note 40. On executive power, see Justin J. Wert, *Nothing New Under the Sun: The Development of Habeas Corpus and Executive Power During the Bush Administration*, 29 AM. REV. POL. 273, 273–89 (2008–2009); JUSTIN WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* 13–20 (2011). On abortion, see generally David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post- New Deal Period*, 47 J. POL. 652, 652–66 (1985); Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 425–51 (2005); Graber, *Nonmajoritarian*, *supra* note 40; William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 87–101 (1993).

⁴³ In a variant of this argument, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1069 (2001) (“[J]udges—and particularly Supreme Court Justices—tend to reflect the vector sum of political forces at the time of their confirmation.”) [hereinafter Balkin & Levinson, *Understanding*].

sions they do for a variety of reasons, some undoubtedly having to do with immediate policy preferences and perceived institutional constraints, but most having to do with a desire to give a professionally principled interpretation of law or an authentically held view about the appropriate mission of courts.”⁴⁴ Building on Dahl’s insight, but contrary to judicial behavioralists of the attitudinal variety, they put forward a model of judicial decision-making that attends to the legal factors involved in this process as much as the political ones.⁴⁵ The influences of “patterns of party politics, group coalition building, critical elections, the policy agenda of governing elites, and other features of the political regime” reveal a pattern of political influences on the judiciary’s construction and institutional understanding of how the law constrains its own decisions.⁴⁶

Critics of the regime politics approach argue that it tends to swing the pendulum of judicial decision-making too far in one direction, often sacrificing judicial independence and conceptions of the “law” at the altar of politics and political regimes.⁴⁷ The most prominent criticism levied against the regime politics approach is that it too often portrays the Court’s relationship to the dominant national coalition in a way that loads all judicial decisions in the direction of supporting (or at least sympathizing with) some political majorities in some political institutions all of the time. As long as there are political majorities that would seem to benefit from a decision (and there almost invariably are), then these scholars are in danger of committing the cardinal sin of social science by “selecting on the dependent variable” because we can always identify *some* relationship between the Court and the dominant national coalition.⁴⁸ Thus a complete reliance on “external sources of the Court’s decisions” suggests that “someone [other than the Justices] is behind the

⁴⁴ See Clayton & May, *Political Regimes*, *supra* note 36, at 246.

⁴⁵ See, e.g., JEFFREY ALLAN SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 1–43 (2002).

⁴⁶ See Cornell W. Clayton & Mitchell J. Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 *Geo. L.J.* 1391 (2005).

⁴⁷ See Keck, *Party Politics*, *supra* note 36; Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 *AM. POL. SCI. REV.* 321, 321–38 (2007). Keck’s criticism is directed mainly at three recent applications of the regimes approach: MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006); MARK V. TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003); Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 *LAW & SOC. INQUIRY* 89 (2005).

⁴⁸ See GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 75114 (1994); Keck, *Party Politics*, *supra* note 36, at 533.

wheel.”⁴⁹ As a result, the relative independence of the judiciary and its unique institutional role is relegated to nothing more than a forum for the judicialized policy preferences of any number of political coalitions. But as we argue below, although the dominant forces of a previous political regime may indeed exert measurable influence on the current Court, the unique institutional role of the judiciary—and the justices themselves—mitigates any claim that this influence is complete.

Through the regime politics lens, the thornier issues in *Citizens United* come into better focus. The Roberts Court, and the Rehnquist Court before it—are the products of three decades of Republican Party efforts to remake the Supreme Court in its own image.⁵⁰ Republicans have occupied the White House for twenty-eight of the forty-two years since the Warren Court ended. Across those four decades, only two Democratic presidents have made appointments to the Court. While not all Republican appointments were simply carbon copy extensions of conservative Republicanism, it is safe to say that the Court as a whole has become increasingly conservative, especially since the departure of Justice Sandra Day O’Connor and the appointment of Chief Justice John Roberts by George W. Bush. In this sense, then, *Citizens United* is of a piece with an increasingly conservative line of cases not only in the realm of campaign finance but in others as well.

To illustrate this outside the campaign finance regime, consider the Voting Rights Act of 1965. A series of voting rights cases in the first decade of the twenty-first century reinforces the generally conservative tenor of the Court, and provides increasingly strong, conservative signals. These signals build on the signals first sent in the stylized *Shaw/ Miller* cases⁵¹ of the 1990s, by holding racially-prescriptive remedies to strict scrutiny and a narrow range of potential remedies; advancing a race-neutral application of the concept of discrimination in violation of the Fourteenth Amendment; and, holding the Department of Justice (DOJ) to very high standards in the application of its emergency powers under the Voting Rights Act § 5. The Court sent a strong signal to Congress that DOJ may have exceeded its authority when applying those same emergency powers.

Having narrowed the consequences of an aggressive use of § 5 authority by DOJ, a minimum conservative majority—Kennedy,

⁴⁹ See Keck, *Party Politics*, *supra* note 36, at 535.

⁵⁰ On the Republican Party’s success in remaking the federal courts generally, and the Supreme Court particularly, in their own image, see generally THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004); Balkin & Levinson, *Understanding*, *supra* note 43.

⁵¹ See *Bush v. Vera*, 517 U.S. 952 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *U.S. v. Hays*, 515 U.S. 737 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996); *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996).

O'Connor, Scalia, Rehnquist, Thomas—then curtailed the aggressive use of § 2 of the Voting Rights Act in *Holder v. Hall*.⁵² In *Holder*, a sole commissioner government in Bleckley County, Georgia, was challenged for diluting black voting rights in the county. Voters had rejected a referendum expanding the commission from one to five members. An appellate court reversed a district court decision for the county, determining that the totality of circumstances necessitated expanding the commission and drawing single-member districts. The Supreme Court reversed the appellate court, and, in concurrence, Justices Thomas and Scalia called for a narrowed reading of § 2 that precluded the aggressive reconstruction of local and state governmental institutions.

In *Georgia v. Ashcroft*,⁵³ the same majority that handed down *Bush v. Gore* expanded the discretion of state governments when complying with § 5 of the Voting Rights Act. At issue was whether a districting plan for Georgia's Senate that reduced African-American concentrations in majority-black districts violated the non-retrogression standard.⁵⁴ The trial court refused to preclear three districts.⁵⁵ On appeal, the Supreme Court ruled that the lower court had looked too narrowly at the districts and overlooked other enhancements of black voting opportunities that made the new Georgia map an improvement over the non-retrogression baseline.⁵⁶ The Court opinion gave states latitude to determine how to comply with the non-retrogression standard.⁵⁷

Similarly, in *LULAC v. Perry*,⁵⁸ the Court approved most of a Texas congressional map that substantially reduced Democratic Party electoral opportunities while also excluding non-majority minority districts from the non-retrogression baseline. The majority opinion excluded the new logic of the plaintiffs that, since non-majority minority districts might count towards offsetting reductions of minority voter concentrations elsewhere, so too such districts should count toward the baseline.

The Court has resisted efforts to bootstrap race as a redistricting criterion. The *Shaw/Miller* series of cases in the 1990s chastised the DOJ for incorporating § 2 criteria into the § 5 non-retrogression reviews. DOJ-compelled majority-minority legislative districts were overturned in

⁵² See 512 U.S. 874 (1994).

⁵³ See 539 U.S. 461 (2003).

⁵⁴ See CHARLES S. BULLOCK, III & RONALD KEITH GADDIE, *THE TRIUMPH OF VOTING RIGHTS IN THE SOUTH* 111–40 (2009) [*hereinafter* BULLOCK & GADDIE].

⁵⁵ *Ashcroft*, 539 U.S. at 475.

⁵⁶ *Id.* at 485.

⁵⁷ See BULLOCK & GADDIE, *supra* note 54, at 3–25. As evidence that the Court was out of step with congressional preferences, when extending § 5 in 2006, Congress reversed *Ashcroft* and reinstated non-retrogression as the sole criterion for judging compliance with § 5. The 2006 statute also overturned *Reno v. Bossier Parish*, 520 U.S. 471 (2000), using another interpretation of how to implement § 5.

⁵⁸ See 548 U.S. 399 (2006).

Texas, North Carolina, Georgia, and South Carolina, and in Florida a non-compelled, legislature-crafted district in north Florida was also rejected as being too narrowly tailored on the basis of race. The Court has proved consistently unwilling to expand the scope of racial remedies beyond the requirement that majority minority districts be created when minorities have fewer opportunities than whites to elect their preferred candidates. Most recently, in *Bartlett v. Strickland*,⁵⁹ the Court again determined that § 2 remedies that violated other, traditional state redistricting criteria must lead to majority minority districts—jurisdictions have no obligation to create coalitional or minority-influence districts.

The voting rights case *Northwest Austin Municipal Utility District (NAMUDNO) v. Holder* drives home the conservative position of the Court.⁶⁰ In a Potemkin 8–1 decision, the Court found that a small utility district in Travis County, Texas, had improperly been denied the right to pursue bailout from coverage by § 5 of the Voting Rights Act.⁶¹ The eight justices in the majority, signing onto an opinion by Chief Justice Roberts, held that the utility district had the right to bail out from under § 5.⁶² Because relief existed for the plaintiff-appellant under the existing law, the Court did not visit the larger constitutional issues. Nonetheless, Justice Roberts recounted the progress in voting rights that potentially mooted the continued need for emergency preemption of state authority to regulate the conduct of elections, laying out the case for a challenge to the constitutionality of those parts of the Voting Rights Act vested in the logic of the *City of Boerne* decision.⁶³ In his partial concurrence/dissent, Justice Thomas went further, explicitly visiting the constitutional issues and presenting what looked like a draft of an argument to overturn § 5.⁶⁴

These Voting Rights Act cases reflect a larger trend on the Court, as it has become more conservative under Chief Justice Roberts. Returning to the topic of campaign finance and the antecedents to *Citizens United*, we should consider the three most recent campaign finance cases preceding *Citizens United*. In *Wisconsin Right to Life v. FEC*, the Court allowed an exception to the restrictions put in place by the Bipartisan Campaign Reform Act.⁶⁵ This case did not overturn *McConnell*; instead, it is a singular case in an as-applied challenge that carved out an exception to the Court's earlier holding. The Court held that corporate and

⁵⁹ See 129 S. Ct. 1231 (2009).

⁶⁰ See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009).

⁶¹ See *id.* at 2516.

⁶² *Id.*

⁶³ See *id.* at 2511–13; cf. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁶⁴ See *id.* at 2517–27 (Thomas, J., concurring in part and dissenting in part); see generally BULLOCK & GADDIE, *supra* note 54.

⁶⁵ See 546 U.S. 410 (2006); see also *Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

union ads were protected so long as they did not explicitly endorse or oppose candidates; McCain–Feingold did not prohibit the mere mention of candidate names, issue positions, or activities. The decision allows corporations and unions to bring as-applied challenges to BCRA, in order to obtain an exemption to the existing regulation.

In *Randall v. Sorrell*, the Court overturned significant components of a Vermont campaign finance law on state and local elections.⁶⁶ The Court, in a 6–3 ruling, determined that Vermont’s campaign contribution limits were set so low as to preclude effective voice in political speech through money, and that the limitations violated First and Fourteenth Amendment guarantees, and effectively constrained the ability of challengers to conduct effective elections.⁶⁷ Also, the Court concluded that the state law violated the right of parties to make independent expenditures in state political campaigns.⁶⁸ Justice Breyer delivered the opinion of the Court, but a concurring opinion by Justices Thomas, Scalia, and Kennedy took aim at the assumptions for continued regulation of money in politics in the *Buckley* decision, wanting contribution and expenditure limits to be treated with the same decision rule, that of strict scrutiny.

In *Davis v. FEC*, which challenged the so-called ‘millionaires amendment’ to BCRA, the Court found that the provision violated the First Amendment rights of self-financed candidates by allowing opponents to raise funds through contributions equal to treble the normal limits.⁶⁹ So, where a candidate might previously be able to collect \$5,000 from an individual committee, they would now be able to collect three times that amount.⁷⁰

In each of these cases, a Court majority built on the “Core Four” conservative justices, rendered opinions that sought to reverse state or national law designed to constrain the potential influx of large money into electoral politics. Each decision, in succession, expands the scope and foundation of the concept of money as speech, how money can be used without fetters in expressing campaign speech, and the scope of those “persons” eligible to engage in such unfettered speech.⁷¹ In this respect, the expansion of the Court’s control over the issue of campaign finance and the signals transmitted from the Court track nicely with the

⁶⁶ See 548 U.S. 230 (2006).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See 554 U.S. 724 (2008).

⁷⁰ See *id.*

⁷¹ In this respect, the development of the modern campaign finance regime created by the conservative Court reflects the systematic expansion of the concept of equal protection through one person, one vote in the 1960s, by first taking control of the issue then systematically expanding the scope and interpretation of the core values of the Court in establishing a preferred set of policy preferences.

Court's previous signals and actions in the Voting Rights Act cases. Potentially other similarities exist. As with voting rights, the Court's counter-majoritarian decision risks not simply a rebuke from the President as occurred at the State of the Union, but action by Congress to narrow the impact of the holding. But for the need to secure sixty votes to break a Senate filibuster, the Democratic majority would almost certainly have already acted to limit the effect of *Citizens United*.

CONCLUSION

The Roberts Court is now a “laggard” Court with respect to the dominant national party. The increasingly conservative decisions of the Roberts Court were less risky before the 2008 election because they were largely in line with the dominant national coalition. But even then, Congress reversed two of its voting rights decisions that seemed to chart new territory. Now the Court, with a slim 5–4 majority, has to craft its decisions in a way that furthers the interests of a previously dominant Republican coalition as well as their own interests. Entrenched themselves, then, the Court is now further entrenching judicial review of congressional and state level decisions. Without sympathetic legislative majorities or a Republican executive, the Court is both advancing the goals of a previous regime at the same time that it is further entrenching its own institutional power.

The three extant criticisms of *Citizens United* fit this pattern. First, with respect to stare decisis, it is evident that the Roberts Court is now not shy about overturning precedent. One can only imagine that Chief Justice Roberts's separate concurring opinion addressing this issue was both a defense of the particular decision at hand and a signal that a majority of justices are willing to overturn precedent at will.⁷² Second, the Court's handling of the as-applied/facial distinctions in *Citizens United* and other recent cases further shows how the Court can use this to its advantage in determining for itself whether discrete factual scenarios or entire segments of Constitutional doctrine will be upheld.⁷³ Third, like the as-applied/facial distinction, this entrenched Court shows no signs now—and indeed has fewer incentives—to proceed to pursue their agendas in a minimalist, case-by-case progression.⁷⁴

⁷² 130 S. Ct. 876, 917 (Roberts, C.J., concurring).

⁷³ For an overview of the as-applied vs. facial challenge issues in *Citizens United*, see Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions*, 2008 SUP. CT. REV. 89, 101–02.

⁷⁴ See Hasen, *Beyond Incoherence*, *supra* note 30, at 1065; Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011).

In sum, then, this Court, with an entrenched conservative majority that might well represent a minority coalition more generally on the political landscape, is utilizing its decision-making powers to reserve solely for itself the power to shape the meaning of the Constitution.

