

# Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations

---

*Leo E. Strine, Jr.†*

*At the beginning of our nation and throughout much of our history, corporations, as a creation of society, were seen as distinctive from human citizens. Human beings were born with certain inalienable rights that government could not take away. By contrast, corporations were the opposite of Lockean-Jeffersonian citizens, in the sense that they had only such rights as society gave them. Under this understanding, society could charter corporations and benefit from their wealth-creating potential while reserving for itself the right to limit corporate activities through externality-reducing legislation and other means so as to protect the public interest.*

*But, in recent decades, the interactive effect of federal jurisprudence is eroding the ability of society to constrain its own corporate creations. First, recent Supreme Court decisions like Citizens United have freed corporations to use treasury funds to make unlimited political expenditures. This is likely to make politicians more responsive to moneyed interests, including both corporations and the economic elites who control them. Corporations have exercised their newfound ability to use treasury funds to influence the political process, often in the form of untraceable "dark money." Second, the Supreme Court's decisions in other areas have dampened the political influence of minorities and less affluent citizens. For example, Shelby County struck down important elements of the Voting Rights Act, despite the fact that the Act, like the McCain-Feingold Act struck down in Citizens United, had overwhelming bipartisan support. Similarly, the Court has not intervened in cases involving legislative action that is likely to diminish the voting power of less affluent voters, such as voter identification laws and extreme gerrymandering. And at the same time, as the Court has freed corporations to act on the political process without stockholder consent, it continues to subject labor unions to more election spending restrictions than corporations, diminishing the voice of workers as compared to moneyed interests. Third, recent Supreme Court decisions like National Federation of Independent Business v. Sebelius and Burwell v. Hobby Lobby, Inc. have made it more expensive for Congress to adopt regulatory and social welfare legislation, and have also suggested that expansions of the social security net will be struck down as unconstitutional. Fourth, although it might be thought that these shifts in jurisprudential direction result in a more favorable*

---

†Leo E. Strine, Jr. is Chief Justice of the Delaware Supreme Court; Austin Wakeman Scott Lecturer on Law and Senior Fellow, Program on Corporate Governance, Harvard Law School; Adjunct Professor of Law, University of Pennsylvania Law School, and University of California Berkeley Law School; and Henry Crown Fellow, Aspen Institute.

The author is grateful for incisive thoughts from Erin Daly, Larry Hamermesh, Alan Palmiter, Jeff Peck, Elizabeth Pollman, Robert Post, Roberta Romano, Ted Ruger, Luke Scheuer, Randall Thomas, and Nicholas Walter. The author also thanks Elane Boulden, Yulia Buyanin, Garrett Rice, Dorothy Shapiro, and Sonia Steinway for their diligent work on this paper. This article formed the basis for the Judge Ralph Winter Lecture on Corporate Law and Governance at Yale Law School on October 13, 2015, and the Keynote Address at the Corporations & The Constitution Conference at Loyola Law School on November 20, 2015.

*environment for executive branch regulators, who have been able to put in place measures to regulate corporate behavior, the reality has been on balance otherwise. Although there has been lipservice to deferential review, federal judges have overturned important corporate regulatory measures, in decisions that can be seen as involving a substitution of the judiciary's own policy views over the judgment made by the regulator selected by Congress. Taken together, the decisions of the Roberts Court and other like-minded federal judges have had the practical effect of increasing the power of corporations to influence the electoral and regulatory process, diminishing the ability of human citizens to constrain their corporate creations in the public interest, and reducing the practical ability of Congress and executive agencies to adopt and implement externality regulations and new social welfare regulation. The result has been to alter the relationship between society and the corporations that it has created.*

*Finally, this Article considers whether this pattern of decisions is the result of jurists applying precedent and exercising judicial restraint. Because the decisions involve a conscious choice by judges to depart from precedent and to overturn the decisions of the political branches, these decisions are properly regarded as involving judges willing to break new ground, depart from traditional principles of judicial restraint, and move the law in a direction they think better for society.*

## I. INTRODUCTION

In an important decision, Chief Justice John Marshall clarified the relationship between a business corporation and the society that gave it legal life: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created."<sup>1</sup> In this

---

<sup>1</sup> Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819). Chief Justice Marshall's articulation was anticipated by and grounded in legal scholarship of his day. See *The Case of Sutton's Hosp.*, (1613) 77 Eng. Rep. 937, 973 (K.B.); 10 Co. Rep. 1a, 32b (Coke, C.J.) ("[Corporations] cannot commit treason, nor be . . . outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney. A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear, it is not subject to imbecilities, death of the natural body, and divers other cases."); 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 13 (London 1793) ("A corporation . . . is a collection of many individuals, united into one body, under a special denomination, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence." (emphasis omitted)).

After his own articulation, Marshall's own words became the standard ones for use throughout much of the Nineteenth Century. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, lec. XXXIII, § 3, at 280 (1826) ("A corporation being merely a political institution, it has no capacities or powers than those which are necessary to carry into effect the purposes for which it was established. A corporation is incapable of a personal act in its collective capacity."); *id.* at 298–99 ("The modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. . . . No rule of law comes with a more reasonable application, considering how lavishly charter privileges have

Article, I will focus on the directional thrust of recent federal jurisprudence, a thrust that is increasingly turning Chief Justice Marshall's conception of the relationship between the creator and its artificial creation upside down.

The Roberts Court and other like-minded federal judges have done so in four related, mutually reinforcing ways. First, recent U.S. Supreme Court decisions have made elected officials more responsive to corporations and other moneyed interests, most famously in *Citizens United v. FEC*.<sup>2</sup> Under Chief Justice Marshall's conception, which reflected the prevailing understanding at the time the Constitution was enacted, a corporation was the opposite of a Lockean-Jeffersonian human citizen.<sup>3</sup> Human beings were born with inalienable rights that government could not take away.<sup>4</sup> By contrast, a corporation was an artificial entity that had only the rights given to it by society.<sup>5</sup>

---

been granted. As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined in their operations to the mode, and manner, and subject matter prescribed."); JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE § 1, at 34 (John Lathrop ed., 9th ed. 1871) (citing to *Trustees of Dartmouth* and comparing a corporation to natural person thusly: "A corporation . . . is a political institution merely, and it has, therefore, no other capacities than such as are necessary to effect the purpose of its creation."); PLATT POTTER, TREATISE ON THE LAW OF CORPORATIONS: GENERAL AND LOCAL, PUBLIC AND PRIVATE, AGGREGATE AND SOLE 4 (1881) (adopting Chief Justice Marshall's "classic" and "practical" definition of a corporation: an "artificial being . . . possessing only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence"); see also *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 546 (1837) (Taney, C.J.) ("That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied. The exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation.").

<sup>2</sup> 558 U.S. 310 (2010).

<sup>3</sup> See *Trs. of Dartmouth*, 17 U.S. at 636–37 ("If, then, a natural person, employed by individuals . . . would not become a public officer, or be considered as a member of the civil government, how is it, that this artificial being, created by law, for the purpose of being employed by the same individuals, for the same purposes, should become a part of the civil government of the country?"); see also Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1678–80 (2015) (summarizing the history of business corporations in America, including the U.S. Supreme Court's evolving approach to corporate constitutional rights); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives From History*, 41 STAN. L. REV. 1471, 1504–05 (1989) (citing *Trustees of Dartmouth*) ("These sentences offer a functionalist conception of the corporation: Its powers have purposes; they are means to ends. This functionalism follows from Chief Justice Marshall's anti-realist conception: Since the corporation is not a natural person it has no ability to formulate its own purposes and follow them. Less than a person, it is only a means to prescribed ends."); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 881 (2016).

<sup>4</sup> See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 170–71 (27th ed. 1836).

<sup>5</sup> For a provocative and engaging argument that the Constitution in fact provides no rights at all to corporations and that corporations should be entirely subject to the law adopted from majoritarian politics, see Daniel H. Greenwood, *Person, State or Not: The Place of Business*

In *Citizens United*, the Supreme Court reversed its own precedent allowing elected legislators to take into account the unique attributes of business corporations in regulating their involvement in the political process.<sup>6</sup> The Roberts Court instead asserted that business corporations possess free speech rights equal to those of human citizens.<sup>7</sup> The Court did so despite the obvious differences between flesh and blood citizens and corporate citizens, including that corporations do not have the capacity or inclination to think and act like a human being with the full range of human concerns, must put profit first under the predominant corporate law in the United States, and have investors with diverse interests and viewpoints who did not entrust their capital to have the corporation's managers deploy it for political purposes. *Citizens United* freed corporations to pour money directly into the political process, which has had the collateral effect of making political candidates more susceptible to the influence of the wealthy.

Second, this effect has been compounded by the Supreme Court's decisions in other areas, decisions that are likely to dampen the political influence of minorities and less affluent citizens.<sup>8</sup> By way of example, the Supreme Court struck down key parts of the Voting Rights Act in 2013, rejecting an overwhelmingly bipartisan congressional judgment that an extension was justified.<sup>9</sup> Impatient with fifty years of remediating roughly four centuries of invidious discrimination, the Supreme Court held that "[o]ur country has changed"<sup>10</sup> such that the protection provided by the Act against such discrimination is no longer necessary, even as it acknowledged that "no one doubts" that "voting discrimination still exists."<sup>11</sup>

---

*Corporations in Our Constitutional Order*, 87 U. COLO. L. REV. 351, 358–59 (2016) ("Thus, a text-based constitutional interpretive tradition ought to begin by asking whether corporations have any constitutional rights at all. Democratic theories point in the same direction: Constitutional silence suggests that corporate rights should be entirely subject to majoritarian politics and the police power. So do fundamental republican and liberal principles: Rights are to protect individuals against their governors, not the other way around."); *id.* at 11 ("The basic principles of republican democracy and market capitalism require that we control our governing institutions, not the other way around. Accordingly, business corporations ordinarily should have no constitutional rights under the Fourteenth Amendment or the Bill of Rights. On the contrary, we should have basic rights against them."); *see also* *Trs. of Dartmouth*, 17 U.S. at 636–37 (explaining that the corporation is a human construct that is given certain powers by the government).

<sup>6</sup> The Supreme Court had upheld the same provision of the Bipartisan Campaign Reform Act of 2002 (popularly known as the McCain-Feingold Act), Pub. L. No. 107-55, 116 Stat. 81 (codified in scattered sections of 2, 18, 36, and 47 U.S.C.), in *McConnell v. FEC*, 540 U.S. 93 (2003). *Citizens United* partially overruled *McConnell*, and expressly overruled another precedent upholding limits on corporate political spending, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

<sup>7</sup> *Citizens United*, 558 U.S. at 371.

<sup>8</sup> *See infra* Part II.B.

<sup>9</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013). The Voting Rights Act extension was approved by a vote of 98-0 in the Senate, and 390-33 in the House. 152 CONG. REC. H5207 (July 13, 2006); 152 CONG. REC. S8012 (July 20, 2006).

<sup>10</sup> *Shelby Cty.*, 133 S. Ct. at 2631.

<sup>11</sup> *Id.* at 2619.

At the same time, the Supreme Court has declined to intervene to prevent state legislators from gerrymandering or creating strict voter identification laws, likely resulting in state legislatures and congressional delegations with fewer representatives from the Democratic Party than their proportionate voting power would otherwise have produced.<sup>12</sup> As is widely known, Democratic voters in general, and minority and less affluent voters in particular, are more likely to support government measures to expand the social welfare state and to regulate corporations in the public interest.<sup>13</sup>

---

<sup>12</sup> See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 831 (2015) (“[I]n recent years—and peaking in the 2012 election—plans have exhibited steadily larger and more pro-Republican gaps. In fact, the plans in effect today are the most extreme gerrymanders in modern history. And what is more, several are likely to remain extreme for the remainder of the decade, as indicated by our sensitivity testing.”); see also Theodore S. Arrington, *Gerrymandering the House, 1972–2014*, The University of Virginia Center for Politics (June 4, 2015), <http://www.centerforpolitics.org/crystalball/articles/gerrymandering-the-u-s-house-1972-2014/>, archived at <https://perma.cc/Z5TB-FM6R>.

<sup>13</sup> See, e.g., Andrew Dugan, *In U.S., Half Still Say Gov’t Regulates Business Too Much*, GALLUP (Sept. 18, 2015), [http://www.gallup.com/poll/185609/half-say-gov-regulates-business.aspx?g\\_source=POLITICS&g\\_medium=topic&g\\_campaign=titles](http://www.gallup.com/poll/185609/half-say-gov-regulates-business.aspx?g_source=POLITICS&g_medium=topic&g_campaign=titles), archived at <https://perma.cc/9V82-MAY7> (observing that only 26% of Democrats believe that the government regulates business too much); Jim Lardner, *Americans Agree on Regulating Wall Street*, U.S. NEWS & WORLD REPORT (Sept. 16, 2013), <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/09/16/poll-shows-americans-want-more-wall-street-regulation-five-years-after-the-financial-crisis>, archived at <https://perma.cc/S4YF-ADG7> (observing that although the majority of Americans support financial regulations, the greatest support comes from Democrats); *Religion and the Environment: Polls Show Strong Backing for Environmental Protection Across Religious Groups*, PEW RESEARCH CENTER (Nov. 2, 2004), <http://www.pewforum.org/2004/11/02/religion-and-the-environment-polls-show-strong-backing-for-environmental-protection-across-religious-groups/>, archived at <https://perma.cc/L8X7-MFVE> (suggesting that minorities are less concerned with environmental regulations because they are “preoccup[ie]d with more immediate economic and social welfare concerns . . . .”); Bruce Stokes, *Public Attitudes Toward the Next Social Contract*, Pew Research Center, (Jan. 2013), [http://www.pewglobal.org/files/pdf/Stokes\\_Bruce\\_NAF\\_Public\\_Atitudes\\_1\\_2013.pdf](http://www.pewglobal.org/files/pdf/Stokes_Bruce_NAF_Public_Atitudes_1_2013.pdf) (finding that 78% of Black respondents, compared to 52% of Whites, agree with the statement that “[t]he government should guarantee every citizen enough to eat and a place to sleep”); Richard Morin & Shawn Neidorf, *Surge in Support for Social Safety Net*, Pew Research Center, (May 2, 2007), <http://www.pewresearch.org/2007/05/02/surge-in-support-for-social-safety-net/> (reporting that 61% of black respondents, compared to 38% of whites, agreed that the government should help more needy people, even if the national debt increases, guarantee food and shelter for all, and take care of people who cannot care for themselves; 55% of Democrats agreed with all three statements, compared to 25% of Republicans); Rosa Ramirez, *Poll: Minorities View Labor Unions More Favorably*, NAT’L J., <http://www.theatlantic.com/politics/archive/2012/10/poll-minorities-view-labor-unions-more-favorably/429102/> (last visited April 10, 2016) (explaining that Black people are also more supportive of labor unions, noting that in one poll, 73% of Blacks reported that they viewed unions either “very favorably” or “mostly favorably,” compared to 54% of Latinos and 47% of whites); Jocelyn Kiley & Michael Dimock, *The GOP’s Millennial Problem Runs Deep*, PEW RESEARCH CENTER, (Sept. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/09/25/the-gops-millennial-problem-runs-deep/>, archived at <https://perma.cc/6U92-9W84> (noting that 73% of Democrats compared to 37% of Republicans believe that “stricter environmental laws and regulations are worth the cost” and that 69% of Democrats compared to 40% of Republicans believe that “business corporations make too much profit”); Frank Newport, *Democrats Racially Diverse; Republicans Mostly White*, GALLUP (Feb. 8, 2013), <http://www.gallup.com/poll/160373/democrats-racially-diverse-republicans-mostly-white.aspx>, archived at <https://perma.cc/6G2H-P53Y> (“Non-Hispanic whites ac-

Third, on top of making the political system more susceptible to influence by corporate and financial elites, and upholding state action that has the practical effect of reducing the voting power of minorities and less affluent groups, Supreme Court decisions have also made it more expensive for Congress to adopt regulatory and social welfare legislation. For instance, in a frequently overlooked portion of *National Federation of Independent Business v. Sebelius*,<sup>14</sup> the Court limited the ability of Congress to broaden the scope of existing federal-state partnership programs, even though Congress had expressly reserved the right to amend the program at issue, and had done so several times in the past.<sup>15</sup> And, of course, the extended discourse of Chief Justice Roberts and other conservative Justices on their view that the Commerce Clause did not justify regulating individuals' participation in one of the nation's most economically important activities—the procurement of health care—was hardly inviting to legislative expansions of the social welfare or regulatory state. The Court's decision in *Burwell v. Hobby Lobby*<sup>16</sup> put additional pressure on congressional action by requiring any new legislation to accommodate expensive carve-outs and work-arounds.

Fourth, although it might be thought that these shifts in jurisprudential direction—whose authors have often expressed support for deference to a strong Executive<sup>17</sup>—might result in a more favorable environment for execu-

---

counted for 89% of Republican self-identifiers nationwide in 2012, while accounting for 70% of independents and 60% of Democrats. Over one-fifth of Democrats (22%) were black, while 16% of independents were Hispanic.”)

<sup>14</sup> 132 S. Ct. 2566 (2012).

<sup>15</sup> *Id.* at 2631–33 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>16</sup> 134 S. Ct. 2751 (2014).

<sup>17</sup> *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting) (describing the majority opinion as a “jaw-dropping . . . assertion of judicial supremacy over the people’s Representatives in Congress and the Executive”); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1566 (D.C. Cir. 1984) (Scalia, J., dissenting) (criticizing the majority for applying a “complete inversion of constitutional doctrine” that “[t]he judiciary, in other words, has some *special* charter to keep the Executive in line, beyond its responsibility to protect individuals against unlawful private action”), *vacated*, *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 859–60 (1989) (“It is apparent from all this that the traditional English understanding of executive power . . . was fairly well known to the founding generation, since [those powers] appear repeatedly in the text of the Constitution in formulations very similar to those found in Blackstone. It can further be argued that when those prerogatives were to be reallocated in whole or part to other branches of government, or were to be limited in some other way, the Constitution generally did so expressly. One could reasonably infer, therefore, that what was not expressly reassigned would—at least absent patent incompatibility with republican principles—remain with the executive.”); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (“When, in a statute to be implemented by an executive agency, Congress leaves an ambiguity that cannot be resolved by text or legislative history, the ‘traditional tools of statutory construction,’ the resolution of that ambiguity necessarily involves policy judgment. Under our democratic system, *policy judgments are not for the courts but for the political branches*; Congress having left the policy question open, it must be answered by the Executive.”) (emphasis added); *see also* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010) (Roberts, C.J.) (“The evaluation of the facts by the executive, like Congress’s assessment, is entitled to deference.”); Judge Samuel Alito, Third Circuit Court of Appeals, *Administrative Law and Regulation: Presidential Oversight and the Administrative*

tive branch regulators, who have been able to put in place measures to regulate corporate behavior, the reality has been on balance otherwise. Although there has been lipservice to deferential review, federal judges have overturned several important corporate regulatory measures, in decisions that can be seen as involving a substitution of the judiciary's own policy views over the judgment made by the regulator selected by Congress under the governing statute. In particular, although the Roberts Court has not hesitated to make clear to circuit courts when their jurisprudence does not meet its favor,<sup>18</sup> it has done comparatively little to constrain the U.S. Circuit Court for the District of Columbia, likely the most important court for administrative regulations. That court continues to employ its own intensive standard of scrutiny, one which is stricter than that required by the Administrative Procedure Act (the "APA") or the Supreme Court's precedent. Based on its own uniquely intensive "hard look" doctrine, the D.C. Circuit has invalidated regulations adopted by the Securities and Exchange Commission that Congress had explicitly authorized through the landmark Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").<sup>19</sup> Similarly, in recent years, the Supreme Court's conservative majority and other like-minded federal judges, have struck down regulatory efforts to protect the environment.<sup>20</sup> And although for the time being, the stated administrative law of the Supreme Court continues to require deference to regulators in promulgating regulations and interpreting statutes they must implement, some influential members of the Court have been pressing to break with precedent in that area and there is evidence that others in fact are quite inclined to overturn regulations even while purporting to apply a deferential form of review.<sup>21</sup> Thus, even when the political branches are able to overcome corporate resistance by adopting legislation and regulations constraining corporate behavior, corporations find the courts to be another hospitable venue to impede regulatory action, or at least to use litigation as leverage to obtain more concessions.<sup>22</sup>

---

State, Panelist Address before the Federalist Society (Nov. 16, 2000) (discussing his work at the Office of Legal Counsel in the 1980s and explaining that "I thought then, and I still think that this [unitary executive] theory best captures the meaning of the Constitution's text and structure" and that under that theory, "the president has not just some executive powers, but *the* executive power—the whole thing") (emphasis in original).

<sup>18</sup> See *Harrington v. Richter*, 562 U.S. 86, 91 (2011) ("[J]udicial disregard is inherent in the opinion of the Court of Appeals for the Ninth Circuit here under review."); Robert Barnes, *Supreme Court Reversals Deliver a Dressing-Down to the Liberal 9th Circuit*, WASH. POST, Jan. 31, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/30/AR2011013003951.html> ("Sometimes the Supreme Court simply decides cases, and sometimes it seems to have something bigger in mind. In the past two weeks it has been in scold mode, and its target has been the U.S. Court of Appeals for the 9th Circuit.").

<sup>19</sup> See *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1146 (D.C. Cir. 2011).

<sup>20</sup> See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>21</sup> See *infra* notes 214–19 and accompanying text.

<sup>22</sup> As this article was being finalized, the Supreme Court enjoined the effectiveness of the Environmental Protection Agency's regulation limiting greenhouse-gas emissions in the impor-

Despite claiming to be “conservatives” who are committed to “judicial restraint” and “deference to the political branches,”<sup>23</sup> the judges responsible for these decisions can be viewed as activist in at least two senses. First, rather than observing the traditional deference to the work of the political branches, these courts have struck down (even clearly worded) legislation passed on a bipartisan basis or regulations promulgated by administrative agencies that Congress had explicitly authorized to act. Second, many of the Roberts Courts’ high-profile decisions overturned long-standing precedents that were supported by and, in several cases, authored by conservative justices. These deviations from *stare decisis* have had the tendency to undercut the ability of elected officials and their appointed agencies to regulate corporations and thus to protect the environment, consumers, or even corporate stockholders.

This tendency to deviate from precedent is manifested in another overarching way.

For more than half a century, federal courts had been most likely to intervene to overturn the decisions of the political branches when, in keeping

---

tant power sector. Absent these regulations, the United States likely could not have secured agreement in December 2015 on the Paris Climate Accord to mitigate greenhouse-gas emissions. Absent the regulations’ effectiveness, the United States is unlikely to be able to meet its obligations under the Accord, which include submitting national climate targets every five years and meeting both short-term and long-term emissions reduction goals. In a simple order without explanatory reasoning, a five-member majority of the court, comprised entirely of supposedly conservative justices, stayed the effectiveness of the regulations until litigation challenging them was final. *West Virginia v. E.P.A.*, 136 S. Ct. 1000 (Feb. 9, 2016). In staying the regulations, the majority did not cite to precedent of the Court doing something similar, and it appears that they could not do so, as mainstream sources have called the ruling “unprecedented” and the first time the Supreme Court has “blocked regulation while a case about it was being heard by an appeals court.” Coral Davenport, *Supreme Court’s Blow to Emissions Efforts May Imperil Paris Climate Accord*, N.Y. TIMES (Feb. 20, 2016), [http://www.nytimes.com/2016/02/11/us/politics/carbon-emissions-paris-climate-accord.html?\\_r=0](http://www.nytimes.com/2016/02/11/us/politics/carbon-emissions-paris-climate-accord.html?_r=0); Robinson Meyer, *The Supreme Court’s Devastating Decision on Climate*, THE ATLANTIC (Feb. 10, 2016), <http://www.theatlantic.com/technology/archive/2016/02/the-supreme-courts-devastating-decision-on-climate/462108/>, archived at <https://perma.cc/D3GR-5B37>; Michael B. Gerrard, *The Supreme Court Stay of the Clean Power Plan and the Paris Pledges*, CLIMATE L. BLOG, COLUM. L. SCH. (Feb. 10, 2016), <http://blogs.law.columbia.edu/climatechange/2016/02/10/the-supreme-court-stay-of-the-clean-power-plan-and-the-paris-pledges/>, archived at <https://perma.cc/3QAX-ZE8A> (explaining that the Court’s decision was “unprecedented, unexpected and unexplained” and that it “is one of the most environmentally harmful judicial actions of all time”). The practical consequence of this ruling will be to undermine the international credibility of the current President, the United States going forward, and at the very least, delay our society’s ability to limit greenhouse-gas emissions as part of an effort to address a looming environmental, economic, and human crisis.

<sup>23</sup> See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Subcomm. on the Judiciary*, 109th Cong. 251 (2005), <http://purl.access.gpo.gov/GPO/LPS65331> (“Given my view of the role of a judge, which focuses on the appropriate modesty and humility, the notion of dramatic departures is not one that I would hold out much hope for.”); *id.* at 353 (“Judges need to appreciate that the legitimacy of their action is confined to interpreting the law and not making it. And if they exceed that function and start making the law, I do think that raises legitimate concerns about legitimacy of their authority to do that.”).



with the intuition of *United States v. Carolene Products*,<sup>24</sup> judicial intervention was necessary to protect “discrete and insular minorities”<sup>25</sup> who could not sufficiently protect themselves at the ballot box.<sup>26</sup> By contrast, federal courts were the most reluctant to interfere in government action that regulated economic activity, including regulatory action intended to protect workers, consumers, and the public from corporate overreach.<sup>27</sup> But, in recent years, the distinction between these approaches has seemed to increasingly blur, or even reverse. When those with the most resources—such as business corporations—have been subjected to legislative or regulatory restrictions, federal courts appear more inclined to come up with reasons to upset the determinations of the political branches, seeming to replace the traditional deference given to economic regulation with a *de facto* form of heightened judicial scrutiny.<sup>28</sup> Several recent decisions employing this more intensive review have had the effect of insulating businesses from regulations adopted by federal agencies.<sup>29</sup> This heightened review appears more characteristic in substance of the scrutiny previously reserved for racial or sex-based classifications.<sup>30</sup> This higher level of scrutiny thus operates to aid those who need it least, including corporate elites, the dominant source of political campaign financing, who spend far more money on lobbying Congress and influencing the regulatory process for their own benefit than organizations advocating the protection of the environment or the rights of workers.<sup>31</sup> In sum, although courts have been more receptive to business

---

<sup>24</sup> 304 U.S. 144 (1938).

<sup>25</sup> *Id.* at 153 n.4.

<sup>26</sup> *See, e.g.,* *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Palmore v. Sidoti*, 466 U.S. 429 (1984).

<sup>27</sup> *See* *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *W. Coast Hotel v. Parish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>28</sup> *See* Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1448 (2013) (noting that the fraction of both decisions and individual votes supporting business has been higher during the Roberts Court than in previous Courts dating back to 1945); *see also id.* at 1450–51 (observing that Justice Alito and Chief Justice Roberts, respectively, were the two most business-friendly Justices during the 1946–2011 terms).

<sup>29</sup> *See, e.g.,* *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (holding that under the Clean Air Act, 42 U.S.C. §§ 7401–7671q (2014), the EPA must consider costs when regulating pollution emitted from power plants); *Util. Air Regulatory v. EPA*, 134 S. Ct. 2427, 2449 (2014) (holding that the EPA could not regulate potential greenhouse gas emissions from small “stationary sources” of pollution like shopping centers and schools by requiring them to obtain a permit).

<sup>30</sup> *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 571 (1996) (“It is well settled . . . that we evaluate a statutory classification based on sex under a standard that lies ‘between the extremes of rational basis review and strict scrutiny.’ We have denominated this standard intermediate scrutiny . . . .”) (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1910); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201 (1995) (“All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”)).

<sup>31</sup> According to the Center for Responsive Politics, the “top spender” on lobbying in 2015 was the U.S. Chamber of Commerce, “the world’s largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions,” which advocates for “pro-business policies.” *About the U.S. Chamber*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/about-us/about-us-chamber> (last visited July 9, 2015). Indeed,

litigants seeking to overturn the decisions of the political branches, the more intensive judicial scrutiny traditionally given to legislative policies that are disadvantageous to minority groups and women has seemed to relax.<sup>32</sup>

Taken together, the decisions of the Roberts Court and other like-minded federal judges have had the practical effect of increasing the power of corporations to influence the electoral and regulatory process, diminishing the ability of human citizens to constrain their corporate creations in the public interest, and reducing the practical ability of Congress and executive agencies to adopt and implement externality regulations and new social welfare regulation. The result has been to alter the relationship between society and the corporations that it has created.

---

the Chamber was the “top spender” for all years in the Center’s database, spending a total of \$1,160,065,680 from 1998 to 2015. See *Top Spenders*, CENTER FOR RESPONSIVE POL., <https://www.opensecrets.org/lobby/top.php?showYear=a&indexType=s> (last visited July 9, 2015). To date in 2015 alone, the Chamber has spent \$19,680,000 on lobbying. *Id.* Professors Bebchuk and Jackson observe that the sources of the Chamber’s money are largely unknown: “In 2011, for example, Prudential Financial, Chevron, and WellPoint spent \$570,000, \$500,000, and \$500,000, respectively, on contributions to the Chamber. Many other companies of similar size, however, such as Dell and EMC, contributed nothing at all to the Chamber. Thus, for the thousands of public companies that do not make voluntary disclosures, investors can only speculate as to the amount of spending the companies do through intermediaries—with no means of verifying their guesswork.” Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 934–35 (2013).

A number of corporations by themselves are also in the Center’s Top Spenders list, including Google and General Electric, both of which have spent approximately \$5 million on lobbying so far in 2015. *Top Spenders*, CENTER FOR RESPONSIVE POL., <https://www.opensecrets.org/lobby/top.php?showYear=a&indexType=s> (last visited July 9, 2015). By contrast, the total amount spent by all labor organizations (including public sector, transportation, industrial, and building trade unions) during the same time period was \$9,962,667. *Sector Profile: Labor*, CENTER FOR RESPONSIVE POL., <https://www.opensecrets.org/lobby/indus.php?id=P> (last visited July 9, 2015). Environmental groups have spent \$3,100,324. *Industry Profile: Environment*, CENTER FOR RESPONSIVE POL., <https://www.opensecrets.org/lobby/indusclient.php?id=Q11> (last visited July 9, 2015).

Beyond spending and lobbying, scholars have compiled evidence that the Chamber of Commerce’s influence on the Roberts Court has been substantial. See Jeffrey Rosen, *Santa Clara Law Review Symposium: Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929, 934 (2009) (“The Court currently accepts less than two percent of the petitions it receives every year in the absence of amicus support; the Chamber of Commerce’s petitions between 2004–07 were granted at the rate of twenty-six percent. Lazarus found that the Court reverses the lower court in sixty-five percent of the cases it agrees to hear when the petitioner is represented by elite Supreme Court practitioners; often working with the Chamber, the success rate is seventy-five percent.”); Adam Chandler, *Cert.-Stage Amicus “All Stars”: Where Are They Now?*, SCOTUSBLOG (Apr. 4, 2013, 3:00 PM), <http://www.scotusblog.com/2013/04/cert-stage-amicus-all-stars-where-are-they-now/> (observing that among organizations that file amicus briefs, “the Chamber has cemented its status as the country’s preeminent petition-pusher,” and explaining that in a 2013 study “[n]ot only did the Chamber once again file the most briefs, but it had the second-highest success rate” and “was one of only two members [of the sixteen organizations that filed the most amicus briefs] to improve its success rate from five years ago”).

<sup>32</sup> See *infra* Part II.B.2.

## II. CORPORATE POWER TO INFLUENCE THE POLITICAL PROCESS

### A. *Citizens United and the Flow of Money into Politics*

As is well known, the Supreme Court's 2010 decision in *Citizens United* gave corporations the ability to influence the political process more directly, which has therefore in turn made elected officials more responsive to moneyed interests, and therefore as a matter of logic, less responsive to less wealthy citizens.<sup>33</sup> Because a full discussion of *Citizens United* is beyond the scope of this Article,<sup>34</sup> I will only briefly sketch out how that decision and others following it have changed the nature of American politics, and made it less likely that elected officials will support legislation regulating corporate externalities or extending the social welfare state.<sup>35</sup>

---

<sup>33</sup> One effect of *Citizens United* has been an increase in corporate political spending. See Albert W. Alschuler, *Limiting Political Contributions After McCutcheon, Citizens United, and SpeechNow*, 67 FLA. L. REV. 389, 418 (2015) ("A stunning increase in outside spending in federal election campaigns followed *Citizens United* and *SpeechNow*. The first post-*Citizens United* congressional elections came in 2010, ten months after the Supreme Court's ruling. In the campaign leading up to the preceding nonpresidential federal election in 2006, outside spending totaled \$69 million. In 2010, it was \$309 million. In 2014, at the time of the second non-presidential election following *Citizens United* and *SpeechNow*, it was \$585 million."); Jennifer S. Taub, *Money Managers in the Middle: Seeing and Sanctioning Political Spending After Citizens United*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 443, 465 (2014) ("For example, in the 2010 midterm election cycle outside organizations unaffiliated with candidates or political parties spent more than \$300 million, nearly half of which came from secret sources—organizations that do not have to disclose their donors. This total was more than four times the \$68.8 million spent by outside organizations on the 2006 midterm election."); see also Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217, 223 (2010) ("*Citizens United* has provoked such a strong reaction because it stands for a series of opinions that, together, allow the potential for independent corporate speech to overwhelm a democratic system built to serve individual voters."). See generally Leo E. Strine, Jr., & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 359–62, 387 (2015) (compiling data on post-*Citizens United* spending increases) [hereinafter *Conservative Collision Course*]; Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012); Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643 (2011).

<sup>34</sup> In other writings with Nicholas Walter, I have considered in much more detail the implications of *Citizens United* for our society, in general, and corporate regulation and law in particular. See generally Strine & Walter, *Conservative Collision Course*, *supra* note 33. We have also analyzed whether *Citizens United* can be rationalized as an application of the originalist method of interpretation. See generally Strine & Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, *supra* note 3. For a learned and thorough consideration of *Citizens United*, see generally ROBERT C. POST, *CITIZENS DIVIDED: A CONSTITUTIONAL THEORY OF CAMPAIGN FINANCE REFORM* (2014).

<sup>35</sup> Several respected commentators have noted that corporations may, on average, have less opposition to the expansion of the social safety net than to externality regulation, because government supports for workers can help corporations keep their own pay and benefits expenditures down and make workers more reliable in their ability to show up (e.g., if government subsidizes child care). I concede that that is a good point, but the point should not obscure realities that make it less telling. That certain corporations may be supportive of social welfare spending does not mean that most are, or that the overall trend of corporate influence over the political process is not toward the election of candidates who are less inclined to expand the social welfare state and corporate regulation. In that regard, corporate opposition

For present purposes, I do not focus on whether *Citizens United* was rightly or wrongly decided, but simply on its objectively demonstrated effects. In *Citizens United*, the Court struck down Section 203 of the Bipartisan Campaign Reform Act of 2002,<sup>36</sup> more commonly known as the McCain-Feingold Act after its two lead sponsors, Republican Senator John McCain and Democratic Senator Russ Feingold. Section 203 prohibited corporations and unions from spending money directly on “electioneering communication” or from using their dollars to advocate for specific candidates.<sup>37</sup> Writing and ruling broadly, the Court held, in a 5-4 decision written by Justice Kennedy, that § 203 was facially unconstitutional.

Justice Kennedy essentially determined that the government may not distinguish between corporate and flesh-and-blood personhood when regulating “political speech.”<sup>38</sup> Building on other decisions by the Roberts Court,<sup>39</sup> *Citizens United* thus enabled corporations to make unlimited politi-

---

to tax policies that would fund social welfare spending cannot be ignored, unless one believes, as I do not, that government does not have to pay for what it does. As an historical matter, one might also doubt that corporate managers and other affluent interests are likely to pursue policies in the interests of more typical working stiffs. The data on where they direct their political spending does not tend to dispel that doubt, as it is heavily tilted toward candidates who are associated with opposing expanded social welfare spending or influencing elected officials on committees directly charged with regulating their industries. See IAN VANDEWALKER, SHADOW CAMPAIGNS: THE SHIFT IN PRESIDENTIAL CAMPAIGN FUNDING TO OUTSIDE GROUPS, BRENNAN CENTER FOR JUSTICE 5 (2015), [https://www.brennancenter.org/sites/default/files/publications/Shadow\\_Campaigns.pdf](https://www.brennancenter.org/sites/default/files/publications/Shadow_Campaigns.pdf), archived at <https://perma.cc/EP6H-MSSB> (“Republicans have generally benefited far more from shadow campaigns than Democrats. Overall, the campaign committees of Democrats tied those of Republicans, with approximately \$65 million for each party. But the Democratic candidates’ shadow campaigns have been outraised by a factor of twelve.”); James Cohen, *The Same Side of Two Coins: The Peculiar Phenomenon of Bet Hedging in Campaign Finance*, 26 N. ILL. U. L. REV. 271, 313 (2006) (“[S]ome donors may contribute to both sides because they fear retaliation. As Bruce Cain framed a frequent complaint of lobbyists: ‘[L]egislators force groups to give money in order to maintain access to the legislator, or to keep the legislator from taking some threatened action (that is, so-called “tree-shaking” activities).’ There is likely some basis for this view. According to a 2000 survey of 300 corporate executives, ‘at least 51 percent . . . agreed that turning down requests for campaign contributions could bring retaliation in the form of adverse legislation.’”); Tessa Berenson, *Here’s Why These Donors Gave to Both Hillary Clinton and a Republican*, TIME, July 22, 2015, <http://time.com/3968470/hillary-clinton-jeb-bush-donors/>, archived at <https://perma.cc/D7KR-VTZU> (observing a variety of reasons why top donors give to both parties, such as friendship, business interests, and “ideological goals”); Rui J. de Figueirido & Geoff Edwards, *Does Private Money Buy Public Policy? Campaign Contributions and Regulatory Outcomes in Telecommunications* 20 (Inst. of Gov’t Studies, Univ. of Cal., Berkeley, Working Paper 2005-40) (finding that “private money in the form of campaign finance contributions can influence public policy outcomes,” and also finding that “the effects of campaign finance on regulatory outcomes can be rapid”).

<sup>36</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.), *invalidated by Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>37</sup> 2 U.S.C. §§ 434(f)(3)(A), 441(b)(2), 441b(a) (2006), *invalidated by Citizens United*, 558 U.S. 310 (2010).

<sup>38</sup> *Citizens United*, 558 U.S. at 384

<sup>39</sup> See *Davis v. FEC*, 554 U.S. 724, 744 (2008) (striking down the so-called “Millionaire’s Amendment” in the McCain-Feingold Act); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481 (2007) (striking down McCain-Feingold’s limitation on the use of corporate funds to finance “electioneering communications” during pre-federal-election periods); *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (holding that state contribution limits on the amounts that individuals,

cal expenditures, overruling the Court's own recent precedent permitting legislators to take into account the distinctions between corporations and people.<sup>40</sup> Chief Justice Roberts wrote separately to emphasize that "corporations as well as individuals enjoy the pertinent First Amendment rights."<sup>41</sup> In reaching this conclusion, the Court held that the channels Congress had left open to corporations to influence the political process were too restrictive. Those channels were considerable.

The bipartisan McCain-Feingold bill and pre-*Citizens United* precedent, while having the imperfections inherent in any human product, took into account the realities of the actual corporate governance system we have in a manner that did not place stress on conservative corporate theory. In prior decisions, the Supreme Court had adroitly protected the ability of individuals to use nonprofit corporations as an aggregating tool for effective speech on their collective behalf, and had restricted statutory limitations on corporate political spending largely to for-profit corporations.<sup>42</sup> Under McCain-Feingold and prior statutory law, even for-profit corporations were not inhibited from using corporate funds to employ lobbyists to advance the corporation's

---

organizations, and political parties could contribute to campaigns of candidates for state office violated the First Amendment).

<sup>40</sup> *Citizens United*, 558 U.S. at 312 ("Austin is overruled, and thus provides no basis for allowing the Government to limit corporate independent expenditures. Given this conclusion, the part of *McConnell* that upheld BCRA [Bipartisan Campaign Reform Act] § 203's extension of § 441b's restrictions on independent corporate expenditures is also overruled."). *Austin* upheld a Michigan regulation on corporate spending. In that case, the Supreme Court observed that "Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas. The Act does not attempt 'to equalize the relative influence of speakers on elections'; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659–60 (1990). Justice Stevens points out that there is another important dimension to the Court's decision to overrule *Austin* that the majority did not grapple with: in *Austin*, the Court upheld a provision that "limited the ability of out-of-state entities to influence the outcome of local elections in Michigan. . . . The decision to overrule *Austin* was therefore significant not only because it enhanced the relative importance of cash in contested elections, but also because it enhanced the relative influence of non-voters." John Paul Stevens, *Beyond Citizens United*, 13 J. APP. PRAC. & PROCESS 1, 9–10 (2012).

<sup>41</sup> *Citizens United*, 558 U.S. at 376 (Roberts, C.J., concurring).

<sup>42</sup> See *Wis. Right to Life*, 551 U.S. at 481 (holding that § 203(b) of the McCain-Feingold Act, which makes it a crime for a corporation to broadcast, shortly before an election, a communication naming a federal candidate and targeted to the electorate, was unconstitutional as applied to a nonprofit, nonstock corporation organized for advocacy purposes); *Austin*, 494 U.S. at 668 (upholding the constitutionality of the Michigan Campaign Finance Act, which prohibited corporations from making independent expenditures out of their treasuries in support of, or in opposition to, a candidate in an election for state office, and ruling that the act could be applied to a nonprofit corporation that served as a mouthpiece for for-profit corporations); *Mich. Comp. Laws* § 169.254(1) (1979); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263–64 (1986) (explaining that § 441b of the Federal Election Campaign Act, which prohibited corporations from making expenditures out of their treasuries "in connection with" a federal election, could *not* be applied to a nonprofit, nonstock corporation organized for advocacy purposes, because the "concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace" did not apply to them).

views.<sup>43</sup> Nor were for-profit corporations barred entirely from influencing the election process directly. McCain-Feingold left corporations able to form political action committees (“PACs”) by raising funds through voluntary contributions from their stockholders and employees.<sup>44</sup> These PACs could both make direct contributions to political candidates within statutory limits and engage in unlimited spending to make electioneering communications.<sup>45</sup> But these expenditures could not come from the corporate treasury itself, but only from the resources raised by the PAC from contributors fully on notice that the PAC would engage in expenditures of those kinds.

Thus, McCain-Feingold fit nicely with corporate law theory regarding for-profit firms.<sup>46</sup> By preventing unlimited use of the corporate treasury to directly influence the election process, McCain-Feingold addressed in a proportionate manner the concern that managers solely charged with focusing on profit would have too much ability to use corporate wealth to unfairly tilt the regulatory policymaking process in a manner that would be unfair to other corporate constituencies and society as a whole. By providing a means for corporations to raise funds in a voluntary manner through PACs, McCain-Feingold enabled corporations to rally the expressive concerns of those stockholders who specifically desired that their funds be used politically, while respecting the traditional conservative corporate theory view that it is illegitimate for corporate managers to use the entrusted equity of diverse stockholders for their idiosyncratic views of the common good.<sup>47</sup> Notably, these means reflected the values undergirding the Supreme Court’s own related decisions respecting the expressive rights of workers who did *not* want their wealth used by their union for political purposes. In decisions such as *Abood v. Detroit Board of Education*<sup>48</sup> and *Communications Workers of America v. Beck*,<sup>49</sup> the Supreme Court had held that unions could not spend dues money on the political process except from members who specifically supported that use, thus taking into account the reality that workers did not necessarily use a union as a means of political expression.<sup>50</sup> As a matter of economic reality, moreover, McCain-Feingold did not leave corporations outgunned by other societal interests. Precisely because the corporate form is such a powerful tool for wealth creation and impounds much of the wealth of individuals, for-profit corporations hold and control far more wealth than

---

<sup>43</sup> See generally Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 200–08 (2012) (describing federal and state lobbying regulations).

<sup>44</sup> 2 U.S.C. § 441b(b)(2) (2006) (defining “contribution” to exclude contributions to “separate segregated fund[s]” established by corporations, i.e., PACs); see also 11 C.F.R. § 114.2 (2009) (setting out regulations for contributions by corporations, and by and to their PACs).

<sup>45</sup> See 11 C.F.R. § 114.2 (2009).

<sup>46</sup> See generally Strine & Walter, *Conservative Collision Course*, *supra* note 33, at 387–89 (discussing this in detail).

<sup>47</sup> *Id.* at 344.

<sup>48</sup> 431 U.S. 209 (1977).

<sup>49</sup> 487 U.S. 735 (1988).

<sup>50</sup> *Abood*, 431 U.S. at 135–36; *Beck*, 487 U.S. at 751, 762–63.

individuals and the representatives of other corporate constituencies. Even before *Citizens United*, this reality meant that corporate interests spent far more on lobbying and political activity than labor unions, nonprofits including environmental groups, and others.<sup>51</sup>

Admittedly, *Citizens United* is not the only cause of growing contributions from moneyed interests, and not all of the growing spending is directly from corporations. Much of that increased political spending has come through vehicles such as Super PACs and wealthy individuals. But it is difficult to disconnect these developments from *Citizens United* or to deny that they increase corporate influence. For example, *Citizens United* was critical to the Supreme Court's later decision in *McCutcheon v. FEC*,<sup>52</sup> which struck down McCain-Feingold's aggregate limits on how much individuals may contribute to candidates and committees.<sup>53</sup> And, even if the decision in *SpeechNow*<sup>54</sup> invalidating the contribution limits of the Federal Election Campaign Act as applied to so-called Super PACs that desired to make so-called independent expenditures in support of the election or defeat of political candidates was more a cause of the increase in political spending, especially by economic elites, than *Citizens United*, it is impossible to separate that decision from *Citizens United*.<sup>55</sup> In its *SpeechNow* decision, the D.C. Circuit relied heavily upon *Citizens United*'s narrowing of the grounds on which the government could justify restrictions on political spending, and the extent to which the government could rely upon an anti-corruption ratio-

<sup>51</sup> Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES MAG., July 22, 2012, at 14, [http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?\\_r=0](http://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html?_r=0) (“[I]n the era before *Citizens United*, while individuals and companies could still contribute huge sums to outside groups, they were to some extent deterred by the confusing web of rules and the liability they might incur for violations. What the new rulings did, as the experts like to put it, was to ‘lift the cloud of uncertainty’ that hung over such expenditures, and the effect of this psychological shift should not be underestimated. It almost certainly accounts for some rise in political money this year, both from individuals and companies.”).

<sup>52</sup> 134 S. Ct. 1434 (2014).

<sup>53</sup> See *id.* at 1442. The effects of *McCutcheon* have already been reported. A major newspaper reported that the elite fundraising dinners of the two major political parties had a ticket price of \$30,800, the most an individual could give to a national political party. This year, after *McCutcheon* has become the law, those prices are \$1.34 million and \$1.6 million for Republicans and Democrats, respectively. See *The Soaring Price of Political Access*, N.Y. TIMES (Sept. 27, 2015), <http://www.nytimes.com/2015/09/27/opinion/sunday/the-soaring-price-of-political-access.html>, archived at <https://perma.cc/6Z8D-DGZ3> (citing Matea Gold & Tom Hamburger, *Political Parties Go After Million-Dollar Donors in Wake of Looser Rules*, WASH. POST (Sept. 19, 2015), [https://www.washingtonpost.com/politics/political-parties-go-after-million-dollar-donors-in-wake-of-looser-rules/2015/09/19/728b43fe-5ede-11e5-8e9e-dce8a2a2a679\\_story.html](https://www.washingtonpost.com/politics/political-parties-go-after-million-dollar-donors-in-wake-of-looser-rules/2015/09/19/728b43fe-5ede-11e5-8e9e-dce8a2a2a679_story.html), archived at <https://perma.cc/3NWR-ZZ77>).

<sup>54</sup> 599 F.3d 686 (D.C. Cir. 2010).

<sup>55</sup> See Nicholas Confessore, et al., *The Families Funding the 2016 Presidential Election*, N.Y. TIMES (Oct. 10, 2015), [http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html?\\_r=0](http://www.nytimes.com/interactive/2015/10/11/us/politics/2016-presidential-election-super-pac-donors.html?_r=0) (“Just 158 families, along with companies they own or control, contributed \$176 million in the first phase of the campaign . . . . [T]he families investing the most in presidential politics overwhelmingly lean right, contributing tens of millions of dollars to support Republican candidates who have pledged to pare regulations; cut taxes on income, capital gains, and inheritances; and shrink entitlement programs.”).

nale to cabin independent expenditures.<sup>56</sup> In fact, because *Citizens United* overruled both *McConnell* and *Austin*, it pulled the legs out from under the government in *SpeechNow*, as the D.C. Circuit pointed out.<sup>57</sup> Furthermore, *Citizens United* has left the FEC without the tools to address a flood of so-called dark money—that is, undisclosed sources of political spending, many of which may be corporations themselves or funds from those who derive their wealth from corporate activity.<sup>58</sup>

<sup>56</sup> See *SpeechNow*, 599 F.3d at 694–696.

<sup>57</sup> See *id.* at 694 (“In its briefs in this case, the FEC relied heavily on *McConnell*, arguing that independent expenditures by groups like *SpeechNow* benefit candidates and that those candidates are accordingly grateful to the groups and to their donors. The FEC’s argument was that large contributions to independent expenditure groups lead to preferential access for donors and undue influence over officeholders. Whatever the merits of those arguments before *Citizens United*, they plainly have no merit after *Citizens United*.”).

<sup>58</sup> In this regard, it is important to understand that many large so-called “individual contributors” in fact control large private corporations from which they can pull resources for political spending, and it may be that some possess voting control over public companies. For example, Las Vegas Sands rose, in the wake of *Citizens United*, from being the twelfth largest organization contributor in federal elections in 2008 to being the largest such contributor in 2012. *Top Organization Contributors*, Center for Responsive Politics, <https://www.opensecrets.org/orgs/list.php>, archived at <https://perma.cc/MK6R-M8M2>. Its total contributions rose from less than \$5.5 million to nearly \$53 million. *Id.* Las Vegas Sands’s CEO is Sheldon Adelson, who together with his wife spent at least \$98 million on 34 different candidates during the 2012 election cycle. Theodoric Meyer, *How Much Did Sheldon Adelson Really Spend on Campaign 2012?*, PROPUBLICA (Dec. 20, 2012), <http://www.propublica.org/article/how-much-did-sheldon-adelson-really-spend-on-campaign-2012>, archived at <https://perma.cc/4EF8-DPGM>. Adelson Drug Clinic also made its way into the top 50 contributors in 2012, debuting as the second largest contributor, right behind Las Vegas Sands. See *Top Organization Contributors*, *supra*. Another example of corporate spending in elections is Chevron’s contributions to its favored candidate for mayor of Richmond, California after a pipe in a Chevron refinery exploded in 2012, sending 15,000 people to the hospital. Because the city wanted to impose new safety regulations on Chevron, Chevron responded by trying to buy Richmond’s city government, contributing nearly \$3 million to local campaigns. The \$1.3 million that Chevron gave to its preferred candidate for mayor dwarfed the \$22,000 total that his opponent raised. See Michael Hiltzik, *How Chevron Swamps a Small City with Campaign Money and Bogus News*, L.A. TIMES (Oct 13, 2014, 2:20 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-chevron-deluge-of-campaign-money-20141013-column.html>, archived at <https://perma.cc/5T9J-PFP7>; Anastasia Pansios, *Why is Chevron Trying to Buy the Government of this Northern California City?*, ALTERNET (Oct. 15, 2014), <http://www.alternet.org/news-amp-politics/why-chevron-trying-buy-government-northern-california-city>, archived at <https://perma.cc/R6UD-RH5Z>.

The rise of corporate spending and dark money can also be seen by observing the U.S. Chamber of Commerce’s spending, money that is derived in large part from corporate contributors. “The Chamber has reported spending during the odd-numbered years in the last three cycles, but the totals have exploded: from \$30,000 and \$100,000 over the full years of 2009 and 2011 to \$949,401 in all of 2013. Now, less than three-quarters of the way into 2015, the Chamber’s reported outlays come to \$3 million.” Robert Maguire & Will Tucker, *Five-Fold Upsurge: Super PACs, Dark Money Groups Spending Far More Than in ‘12 Cycle at Same Point in Campaign*, CTR. FOR RESPONSIVE POL. (Sept. 21, 2015), <https://www.opensecrets.org/news/2015/09/five-fold-upsurge-super-pacs-dark-money-groups-spending-far-more-than-in-12-cycle-at-same-point-in-campaign/>, archived at <https://perma.cc/H2MW-J5RA>; see also Rebecca Ballhaus, *New Path for Masking Super PAC Donors*, WALL ST. J., Feb. 3, 2016, at A4 (In 2015, over 200 LLCs—the owners of which are untraceable in many states—donated nearly \$11 million to PACs backing six Republican presidential candidates); Nicholas Confessore, *Koch Brothers’ Budget of \$889 Million for 2016 is on Par With Both Parties’ Spending*, N.Y. TIMES (Jan. 26, 2015), <http://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to->



The Court's analysis in *Citizens United* is at odds with traditional corporate legal theory on a variety of dimensions.<sup>59</sup> But for the purposes of this Article, I want to focus on just a few key aspects of the Court's decision. First, corporations, artificial entities that are legally separate from their investors or managers, have much more money at their disposal than even the wealthiest individuals.<sup>60</sup>

Second, corporations do not act like human beings because they cannot and because they are fundamentally unlike the human stockholders.<sup>61</sup> Al-

---

spend-900-million-on-2016-campaign.html?\_r=0, archived at <https://perma.cc/8H5K-M2A8> (“[The Kochs’ donation] network is constructed chiefly of nonprofit groups that are not required to reveal donors. That makes it almost impossible to tell how much of the money is provided by the Kochs . . . and how much by other donors.”); Confessore, et al., *supra* note 55 (“Like most of the ultrawealthy, the new donor elite is deeply private. . . . Many donations were made from business addresses or post office boxes, or wound through limited liability corporations or trusts, exploiting the new avenues opened up by *Citizens United*, which gave corporate entities far more leeway to spend money on behalf of candidates. Some contributors, for reasons of privacy or tax planning, are not listed as the owners of the homes where they live, further obscuring the family and social ties that bind them.”); Douglas Keith & Brent Ferguson, *Beyond ‘Citizens United’: How the Supreme Court Empowered the Very Wealthiest in Elections*, BRENNAN CTR. FOR JUSTICE, (Jan. 20, 2016), <https://www.brennancenter.org/analysis/beyond-citizens-united-how-supreme-court-empowered-very-wealthiest-elections>, archived at <https://perma.cc/4W2S-9TT9> (“For most of the 2000’s, these entities, known as ‘dark money’ groups, spent practically nothing on campaigns. But in the wake of the first Court decision in 2007, organizations that do not disclose their donors spent more than \$70 million. In 2012, after *Citizens United*, they spent more than \$300 million.”); Meyer, *supra* (“Because of dark money, we may never know how much casino magnate Sheldon Adelson spent on the 2012 election.”); Ian Vandewalker & Eric Petry, *Election Spending 2014: Outside Spending in Senate Races Since ‘Citizens United’*, BRENNAN CTR. FOR JUSTICE (Jan. 13, 2015), <http://www.brennancenter.org/publication/election-spending-2014-outside-spending-senate-races-citizens-united>, archived at <https://perma.cc/62BR-EDPS> (“Dark money in Senate elections has more than doubled since 2010, from \$105 million in inflation-adjusted dollars, to \$226 million in 2014. Almost half of the \$1 billion in 2014 dollars that outside spenders plowed into Senate elections over the last three cycles, \$485 million, was dark money.”); Daniel I. Weiner, *Citizens United Five Years Later*, BRENNAN CTR. FOR JUSTICE (Jan. 15, 2015), <http://www.brennancenter.org/publication/citizens-united-five-years-later>, <https://perma.cc/G4CW-RMBD>, archived at <https://perma.cc/G4CW-RMBD> (“[D]ark money from unknown donors has flooded into U.S. elections. Of the almost \$2 billion in outside spending in the wake of [*Citizens United*], at least \$618 million—almost one-third—has been dark. There is no way to tell how much of this money has come from for-profit corporations, unions, or others who wish to hide their activities.”) (internal quotations omitted).

<sup>59</sup> See *Citizens United*, 558 U.S. at 428 (Stevens, J., dissenting) (“The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.”); Joseph F. Morrissey, *A Contractarian Critique of Citizens United*, 15 U. PA. J. CONST. L. 765; 780–84 (2013); Strine & Walter, *Conservative Collision Course?*, *supra* note 33, at 345 n.14. See generally Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497 (2010–2011).

<sup>60</sup> As an illustration, the ten wealthiest corporations in America have total equity of \$1.7 trillion, or roughly four times the net worth of the top ten richest Americans (\$488.3 billion). *The World’s Billionaires*, FORBES, <http://www.forbes.com/billionaires/list> (last visited July 1, 2015); *Fortune 500 2014*, CNN MONEY, <http://fortune.com/fortune500/2013> (last visited July 1, 2015).

<sup>61</sup> See Greenwood, *supra* note 5, at 43–44 (“Corporate law . . . directs corporate managers to act in the interests of the corporation, regardless of their personal political views; this is the

though there are some respected scholars who make arguments to the contrary,<sup>62</sup> the leading corporate law in the United States, that of Delaware, requires corporate directors to manage the corporation in the best interests of the corporation's stockholders, within the limits defined by the substantive law constraining the corporation's conduct and its legal (e.g., contractual) obligations to other constituencies.<sup>63</sup> This, of course, does not mean that the board must always bend to the whims of any momentary stockholder majority, but it does mean that the directors must govern the corporation so as to

---

core of the fiduciary duties of care and loyalty. Accordingly, managers acting in conformity with corporate law will act in the interests of the corporation, not according to shareholder values, or, indeed, any human being's values. (I leave aside the issue of whether institutional shareholders even have values beyond the legally imposed and market enforced pursuit of private profit.) This alone, in my view, ought to disqualify corporations as First Amendment speakers: corporate managers are barred by corporate law from spending corporate money in pursuit of any real citizen's values or politics unless those values happen to coincide with the corporation's own interests as understood by management.") (footnotes omitted)).

<sup>62</sup> See, e.g., LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 30–31 (2012) (arguing that *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) is the "exception that proves the rule" and that "it is only when a public corporation is about to stop being a public corporation that directors lose the protection of the business judgment rule and must embrace shareholder wealth as their only goal"); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 165, 169–71 (2008) (arguing that the Michigan Supreme Court's statement that "[a] business corporation is organized and carried on primarily for the profit of the stockholders" is not a legal requirement under Delaware law nor is it normatively desirable).

<sup>63</sup> Distinguished scholars have long understood that *Revlon's* reasoning in this regard was based on a deeper insight into the focus of the duties of directors of Delaware corporations at all times in running the corporation. *Revlon*, as a practical matter, settled the question in Delaware, by making clear that other corporate constituencies may only be considered instrumentally in terms of their relationship to creating profits for stockholders. See *Revlon*, 506 A.2d at 182 (holding that a board may consider the interests of nonstockholder constituencies, but there must always be "rationally related benefits accruing to the stockholders"). Other decisions make this plain. See, e.g., *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 40–41 (Del. Ch. 2013); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010); *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007); see also William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 893, 896–97 (1997) ("[T]he proper orientation of corporation law is the protection of long-term value of capital committed indefinitely to the firm." (emphasis omitted)).

In this respect, Delaware law accords with the view taken by many distinguished scholars, who argue that within their legal discretion, corporate managers must focus on the best interests of the stockholders. See, e.g., STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 410 (2002) ("[L]ong-run shareholder wealth maximization is the only proper end of corporate governance."); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 574 (2003) (arguing that the "director primacy" means of corporate governance encompasses the stockholder wealth maximization end as a norm); see also ROBERT CHARLES CLARK, *CORPORATE LAW* 678 (1986) (observing that the "traditional" view of corporate governance is one by which corporations will attempt to maximize stockholder profits); MARK J. ROE, *POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE* 38–40 (2003) (observing that stockholder wealth maximization is the end American corporate law typically accepts); Jonathan R. Macey, *Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes*, 1989 DUKE L.J. 173, 185 ("[M]anagers have an overarching duty to maximize their firm's value for shareholders."); Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 113 (1987) (stating that the core goal of corporate law is maximizing equity share prices).

generate the most sustainable profitability for the corporation's equity owners. Even more important than the abundant case law reflecting that view<sup>64</sup> is the power structure established by the Delaware General Corporation Law and other American corporate law statutes. Under that structure, only stockholders are entitled to elect directors, vote on important transactions, sue to enforce fiduciary duties, and exercise other statutory rights.<sup>65</sup> Put simply, they are the only constituency given power over the board.

Consistent with that reality, it can be expected that corporations will focus any involvement in the political process on electing candidates who will support public policies favorable to corporate interests.<sup>66</sup> In general, this means that they will favor candidates who are inclined not to adopt externality regulations or tax increases. Moreover, because the underlying equity investors in corporations (the human beings whose money flows to the direct institutional investor stockholders) are diverse, their only common interest is in corporate profitability. Conservative corporate law theorists recognize that the only thing that is common to all stockholders who hold a pure long position in the corporation should be a desire to see the corporation increase its profits and stock price.<sup>67</sup>

As a result, whatever limited legitimacy corporate directors have to make political expenditures with corporate treasury funds is, at most, confined to expenditures in the corporation's interest.<sup>68</sup> Corporations are thus

<sup>64</sup> See, e.g., *In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 80 (Del. Ch. 2014) (noting the board's duty to "maximize Rural's value over the long-term for the benefit of its stockholders"); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013) ("[T]he duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital . . .").

<sup>65</sup> See 8 DEL. CODE ANN. tit. 8, §§ 211(b), 251(c), 271(a), 327 (2014).

<sup>66</sup> See, e.g., Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 990–91 (1984); Waheed Hussain & Jeffrey Moriarty, *Corporations, the Democratic Deficit, and Voting*, 12 GEO. J.L. & PUB. POL'Y 429, 432–33 (2014).

<sup>67</sup> See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 70 (1991) ("[W]hen voters hold dissimilar preferences it is not possible to aggregate their preferences into a consistent system of choices. . . . [S]ingle-objective firms are likely to prosper relative to others. This suggests . . . why the law makes no effort to require firms to adhere to any objective other than profit maximization (as constrained by particular legal rules)."); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 556–57 (8th ed. 2010) ("The typical shareholder . . . has only a casual . . . relationship with the firm. His interest, like that of a creditor, is a financial rather than managerial interest."); Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1224 (1999) ("[S]hareholders may have very different views on what is good for society. Even if they do not, there is no reason to channel non-profit-maximizing charity through the firm. The firm has no advantage—in greater benefits or lower costs—in making donations that profit-maximization does not justify."); see also Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1004 (1998) ("Both the law and the market force corporate actors to run the corporation on behalf of the interests of fictional shareholders. . . . Fictional shareholders, thus, will sacrifice almost anything in the interests of higher profit[:]. . . in contrast, the citizens behind the fiction can be expected to have far more diverse and conflicted opinions on these important political struggles.").

<sup>68</sup> Many corporate law and economic scholars have long argued that corporations have no legitimacy to spend corporate funds on political ends because there is no basis to conclude that

likely to focus their spending on electing and influencing elected officials who will adopt favorable anti-regulatory policies, or defeating those who do not.<sup>69</sup>

This is not to say that every corporation will support the same politicians, or that one party will necessarily win the race for all the corporate dollars. As an example, existing companies in an industry might support regulations because they reduce the risk of competition from new entrants.<sup>70</sup> But the reality of political campaigning in the wake of *Citizens United* means that politicians need to be more responsive to corporate interests in general, at least if they want enough funds to be elected or reelected.<sup>71</sup>

---

stockholders have common political beliefs, and that the only thing they have in common is their desire for the corporation to be profitable. For example, Professor Fisch has argued: “First, management cannot spend corporate funds on political issues that further its political objectives rather than those of the corporation. Such spending constitutes self-dealing and waste . . . . Second, management cannot cause the corporation to engage in political speech unless management believes in good faith that such speech will further the corporation’s interests.” Jill E. Fisch, *Frankenstein’s Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 636 (1991); see also Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 2 (advocating against corporations “spending someone else’s money for a general social interest.”); see generally EASTERBROOK & FISCHER, *supra* note 67, at 15–22. And that is even more so now when most stock is held not by human beings, but by intermediaries like mutual funds. These intermediaries have no rational basis on which to reconcile the diverse and unknown political views of their investors, many of whom are forced by practical operation of the tax code and our society’s new emphasis on defined contribution plans to provide for retirement to give their funds over until retirement to investment funds selected by their employers to participate in the company’s 401(k) plan. See James Kwak, *Improving Retirement Savings Options for Employees*, 15 U. PA. J. BUS. L. 483, 491–92 (2013). Reflecting this inability, two of the most respected mutual fund companies have taken the position that they will abstain from non-economic proposals by stockholders to have a stockholder vote, on the grounds that it is the board’s job, not theirs, to vote on social proposals. *Vanguard’s Proxy Voting Guidelines*, VANGUARD, <https://investor.vanguard.com/about/vanguards-proxy-voting-guidelines>, archived at <https://perma.cc/Y49Y-5J8C> (last visited Aug. 18, 2015); *Corporate Governance and Proxy Guidelines*, FIDELITY, <http://personal.fidelity.com/myfidelity/InsideFidelity/InvestExpertise/governance.shtml>, archived at <https://perma.cc/H2FY-CMK3> (last visited Aug. 18, 2015).

<sup>69</sup> See Strine & Walter, *Conservative Collision Course*, *supra* note 33, at 349–50.

<sup>70</sup> See, e.g., Philip J. Weiser, *Innovation, Entrepreneurship, and the Information Age*, 9 J. TELECOMM. & HIGH TECH. L. 1, 6 (2011) (“In particular, regulated firms frequently develop a comfort level with their regulator, use government to raise barriers to entry, and, in some cases, remain protected from competition.”).

<sup>71</sup> See Taren Kingser & Patrick Schmidt, *Business in the Bulls-Eye? Target Corp. and the Limits of Campaign Finance Disclosure*, 11 ELECTION L.J. 21, 22 (2012); Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 19 YALE L.J. F. 53, 58 (2009). “In the five years since [*Citizens United*], super PACs, corporations, labor unions, and other outside groups have spent almost \$2 billion targeting federal elections. That is about two-and-a-half times the total for the 18 years between 1990 and 2008.” Weiner, *supra* note 58, at 4. Notably, “individual mega-donors” may have benefitted most from *Citizens United*, because 195 individual donors contributed \$600 million to Super PACs between 2010 and 2014, as compared with \$113 million by corporations. *Id.* at 5 n.29.

There is a perception that the Republican Party will benefit most from spending set loose by *Citizens United* and its progeny, such as *SpeechNow*. One poll found that 23% of respondents believed the Republican Party stands to benefit more from “the amount of money in political campaigns today,” compared to 14% who believe the Democratic Party stands to benefit more and 58% who believe both will equally benefit. *A New York Times/CBS News Poll on Money*

Third, the Court's decision also ignored the reality of how ordinary human citizens invest in corporations. Justice Kennedy posited that stockholders can correct any errors by corporate managers who mispend corporate funds on political activities "through the procedures of corporate democracy."<sup>72</sup> That is, Justice Kennedy assumed that if stockholders were unhappy with how corporate managers spent the money the stockholders had invested, they could simply replace the managers or sell their stock. But this analysis misses a crucial point: most stockholders own stock through intermediaries, not directly,<sup>73</sup> and do not choose which stocks the intermediary invests in or even which intermediary manages their funds.<sup>74</sup>

Even more critically, the practical realities of stock market ownership have changed in ways that deprive most stockholders of both their right to voice and their right of exit.<sup>75</sup> There is now less reason to conclude that investors have materially more ability to avoid subsidizing corporate speech that they do not favor than workers have in subsidizing union speech.<sup>76</sup> Most of the stock of American public corporations is no longer owned di-

---

*and Politics*, N.Y. TIMES (June 2, 2015), <http://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html>. According to another, "Democratic party committees raised \$873,500 in January from PACs associated with [the 200 largest corporate influencers], compared to \$1,263,000 pulled in by their Republican counterparts. The Republican edge is not surprising given that the GOP now controls both chambers of Congress." Peter Olsen-Phillips, 'Fixed Fortunes' Companies Investing Heavily on Both Sides of the Aisle, SUNLIGHT FOUNDATION (Feb. 23, 2015, 3:12 PM), <http://sunlightfoundation.com/blog/2015/02/23/fixed-fortunes-companies-investing-heavily-on-both-sides-of-the-aisle/>, archived at <https://perma.cc/D95E-AC6N>. It is true that more financial support to candidates who are already inclined to vote against social welfare legislation or other important regulations could assist the Republican Party in claiming electoral victories, but unrestrained corporate contributions might also dissuade Democratic politicians from proposing and supporting such legislation. That is, the greater influence of moneyed interests could influence both parties to be more likely than they would otherwise to support policies corporate elites favor, or at least not to view proposed policies they do not favor.

<sup>72</sup> *Citizens United*, 558 U.S. at 362 (citations omitted).

<sup>73</sup> I have referred to this phenomenon as the "separation of ownership from ownership." See Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1765 (2006); see also Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 6–7 (2007).

<sup>74</sup> See Strine & Walter, *Conservative Collision Course*, *supra* note 33, at 372 (explaining that most American workers save for retirement through a 401(k) plan, and "[t]ypically, such plans do not give workers the option to use their funds to buy the stock of particular public companies directly; instead, workers must invest their money in one of the mutual fund options chosen by their employer").

<sup>75</sup> See *id.* at 369–70 (discussing in detail why this is so); see also Leo E. Strine, Jr., *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward*, 63 BUS. LAW. 1079, 1081–82 (2008) [hereinafter *Breaking the Logjam*].

<sup>76</sup> Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 839–40 (2012); see also Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 268 (1981) (suggesting that the state has a compelling interest "in the need to protect individual stockholders against being forced to choose between contributing to political or social expressions with which they disagree or foregoing opportunities for profitable investment").

rectly by human beings, but is instead owned by institutional investors such as mutual or pension funds.<sup>77</sup> Most Americans have become “forced capitalists” who must—by virtue of government tax and retirement polices—give over a large portion of their wealth to the stock market to fund their retirements and their children’s educations.<sup>78</sup> As a result, the actual human beings whose capital is invested by these intermediaries do not directly vote on who sits on corporate boards,<sup>79</sup> do not have the option to buy and sell the securities of particular companies in their 401(k) programs, and retain only very limited rights of exit from the market without facing expropriatory levels of taxation.<sup>80</sup> Scholars have argued that the logic from labor cases like *Abood* and *Beck* should extend to permit laws regulating political spending by corporations because investors have little control over the day-to-day business decisions of corporations and little choice but to invest.<sup>81</sup>

Even those who own stock directly in a corporation have little practical influence in how management chooses to spend corporate dollars on political activities.<sup>82</sup> And the direct stockholders of most corporations—institutional investors—have no rational way to vote on political spending because they have no way to reconcile the diverse political views of their own invest-

<sup>77</sup> See, e.g., MATTEO TONELLO & STEPHAN RABIMOV, THE 2010 INSTITUTIONAL INVESTMENT REPORT: TRENDS IN ASSET ALLOCATION AND PORTFOLIO COMPOSITION 27 (2009), [http://www.shareholderforum.com/e-mtg/Library/20101111\\_ConferenceBoard.pdf](http://www.shareholderforum.com/e-mtg/Library/20101111_ConferenceBoard.pdf), archived at <https://perma.cc/YT39-7JKL> (institutional ownership of equities in the 1,000 largest U.S. companies increased from 57.1% in 1994 to 68.6% in 2008); Marshall E. Blume & Donald B. Keim, *Institutional Investors and Stock Market Liquidity: Trends and Relationships*, draft at \*4 (Aug. 21, 2012), [http://finance.wharton.upenn.edu/~keim/research/ChangingInstitutionPreferences\\_21Aug2012.pdf](http://finance.wharton.upenn.edu/~keim/research/ChangingInstitutionPreferences_21Aug2012.pdf), archived at <https://perma.cc/3UY6-GTGY> (institutional investors held 67% of equities by the end of 2010, compared with only about 5% in 1945).

<sup>78</sup> Strine, *Breaking the Logjam*, *supra* note 75, at 1081–82.

<sup>79</sup> See, e.g., Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 MINN. L. REV. 1822, 1826–38 (2011).

<sup>80</sup> Strine & Walter, *Conservative Collision Course*, *supra* note 33, at 369–71 (explaining in detail the legal, economic, political, and practical reasons why these are the realities).

<sup>81</sup> Because stockholders lack the ability to protect themselves against corporate expenditures that they do not support, various scholars have argued for corporate law statutes such as requiring that corporations get stockholder approval for spending or disclose all spending. See Sachs, *supra* note 76, at 868; Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 113–14 (2010); Brudney, *supra* note 76, at 294; Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 202–10 (1998). By contrast, Catherine Fisk and Erwin Chemerinsky address *Citizens United* by asking that unions be given the same freedom to spend treasury funds as competitors. Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023, 1087 (2013).

<sup>82</sup> “It is unlikely that stockholders would ever take advantage of their rights of voice or exit to express their disagreement with corporate political spending that they disapproved of: even conservative commentators who support eliminating limits on corporate political spending, acknowledge that voting is usually irrational, and selling stock may leave the stockholders with a loss, particularly if the market as a whole also does not care for the corporation’s political speech. But, even more important, the practical realities of stock market ownership have changed in ways that deprive most stockholders of both their right to voice and their right of exit.” Strine & Walter, *Conservative Collision Course*, *supra* note 33, at 369–70; see also *id.* at 363–65 (explaining in detail the reasons for this).

tors.<sup>83</sup> Moreover, mutual funds are poorly designed to monitor corporate political spending by the institutional investor, as is reflected by the decision of leading mutual funds to take no position on stockholder proposals relating to political spending.<sup>84</sup> Thus, stockholder democracy provides little restraint on management's political spending.<sup>85</sup> The result is that corporations can spend freely on political campaigns, with no external constraint from regulation and little internal constraint from their own stockholders. And the effects of spending by corporations and other managed interests in the wake of *Citizens United* are already being felt: the 2014 election was the most expensive midterm election in history, at a total cost of \$3.67 billion.<sup>86</sup> Empirical evidence suggests that money mattered, as the candidates who spent more were the most likely winners.<sup>87</sup> But there is another underestimated concern.

When money matters, candidates must find it to win. And that raises a critical point, which is not just about who gets elected, but about how money is likely to effect the agenda pursued by both parties in a system where both must look to moneyed interests for their political survival. In other words, the influence of money is not just in who gets elected, but also in how candidates of both major parties and in all regions perceive it to be critical to pacify certain moneyed interests in order to secure enough funding to get elected or to avoid being the target of an effort by them to unseat incumbents. These incentives can have a rather natural effect on the agendas that elected officials are willing to pursue or, as important, on the ones that they choose not to, not because they do not believe those agendas would be good for the public, but because they view those agendas as not feasible to achieve because of the power of money or because the pursuit of those agen-

---

<sup>83</sup> Institutional investors already have difficulties adequately representing the investors in areas of corporate governance related to profit. As a distinguished executive of the industry notes: "Over 30% of US stock assets under management are now held in index mutual funds or exchange-traded funds that are based on indexes. Although large and diversified managers, such as State Street Global Advisors, may follow most of the stocks in the S&P 500 Index, many managers of index funds have no analysts with in-depth knowledge of most stocks in the particular index. Hence, such index funds are not in a good position to analyze an activist's program for a specific company." Robert C. Pozen, *The Role of Institutional Investors in Curbing Corporate Short-Termism*, FINANCIAL ANALYSTS J., SEPT.-OCT. 2015, at 10, 10. Given this apt description of reality, what reasonable expectation can there be that this important segment of the market representing individual investors can monitor corporate political spending?

<sup>84</sup> See *supra* note 68 and accompanying text (explaining that Vanguard and Fidelity abstain from proposals by stockholders to have a stockholder vote).

<sup>85</sup> See Bebchuk & Jackson, *supra* note 81, at 97–101.

<sup>86</sup> Russ Choma, *Money Won on Tuesday, But Rules of the Game Changed*, CTR. FOR RESPONSIVE POL. (Nov. 5, 2014), <https://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed/>, archived at <https://perma.cc/68LV-5H3X>.

<sup>87</sup> In 2014, the candidate who spent the most won in 94.2% of House races, and 81.8% of Senate races. *Id.*; see also Chris Cillizza, *How Citizens United Changed Politics, in 7 Charts*, WASH. POST (Jan. 22, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/01/21/how-citizens-united-changed-politics-in-6-charts/>, archived at <https://perma.cc/XL3Q-THE5> (reporting that campaign expenditures rapidly increased after the Court's decision, driven primarily by outside spending).

das would risk blowback from wealthy interests that could endanger their own political lives.<sup>88</sup> Taking the effect in totality, it is difficult to see how *Citizens United* and its progeny can do anything other than enhance the political power of corporations and moneyed elites with similar interests.

*B. Meanwhile, Federal Decisions Have The Likely Effect Of Diminishing The Political Power Of Less Affluent Americans*

*1. The Supreme Court Overrides Congress's Bipartisan Determination That The Voting Rights Act's Special Provisions Were Still Needed To Protect Minority Voters*

At the same time that the Supreme Court's decision in *Citizens United* has increased the power of the corporate voice, the Court has also issued decisions that have the likely effect of turning down the volume of the voices of ordinary Americans.

For example, the Supreme Court has overruled laws designed to ensure equal access to the ballot in a number of voting rights cases. In particular, asserting that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"<sup>89</sup> the Roberts Court has been less receptive to claims by minority voters alleging voting discrimination than in the past.

In *Shelby County v. Holder*,<sup>90</sup> the Court effectively held that a critical section of the Voting Rights Act, the preclearance requirement for changing voting procedures in certain jurisdictions with a history of racial discrimination, was unconstitutional.<sup>91</sup> The result is that the jurisdictions in the United States that Congress had deemed most likely to discriminate against voters on the basis of race are free to change their voting rules without supervision from the Justice Department. And many of those jurisdictions took the opportunity to do just that: "In 2013 and 2014, at least 10 of the 15 states that had been covered in whole or in part by [the preclearance requirement of the

---

<sup>88</sup> See DAN CLAWSON, ET AL., *DOLLARS AND VOTES: HOW BUSINESS CAMPAIGN CONTRIBUTIONS SUBVERT DEMOCRACY* 1–2 (1998) ("To make it through, candidates don't have to come in first, but they do need to raise enough money to be credible contenders. Although having the most money is no guarantee of victory, candidates who don't do well in the money primary are no longer serious contenders.").

<sup>89</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>90</sup> 133 S. Ct. 2612 (2013).

<sup>91</sup> *Id.* at 2615. More specifically, the Court held that the formula to determine which districts were covered by the preclearance requirement was unconstitutional. At the time that the case was decided, the preclearance requirement applied to "Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia in their entirety; and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota." Tomas Lopez, '*Shelby County*': *One Year Later*, BRENNAN CTR. FOR JUSTICE (June 24, 2014), <http://www.brennancenter.org/analysis/shelby-county-one-year-later>, archived at <https://perma.cc/DHG6-W9SM>.



Voting Rights Act] introduced new restrictive legislation that would make it harder for minority voters to cast a ballot.”<sup>92</sup> The Supreme Court itself vacated two circuit court decisions denying preclearance to proposed changes in Texas’s voting law in the days following *Shelby County*, thereby permitting Texas to put in place plans that the courts had found would suppress minority turnout.<sup>93</sup>

2. *Federal Courts Refuse To Issue Relief Against Voter Identification Laws Restricting Access To The Ballot And Extreme Gerrymandering Diluting The Influence Of Specific Classes of Voters*

The Roberts Court has also opted not to intervene to scrutinize strict voter identification laws that disproportionately affect poor, elderly, and minority citizens, and thus are likely to have the effect of diminishing their voting power.<sup>94</sup> The Court has either denied petitions for *certiorari* or stayed remedial measures until after the next election in a series of challenges to strict voter ID laws in a number of states, on the ground that these laws are necessary to combat voter fraud.<sup>95</sup> But, as Judge Posner and others have noted, there is little empirical evidence that voter fraud is occurring that

---

<sup>92</sup> Lopez, *supra* note 75, at 91. Lopez also notes that “Section 5’s loss will perhaps be felt most acutely at the local level. The great majority of voting law changes that were blocked as discriminatory under the Voting Rights Act were local: counties, municipalities, and other places that operate below the state level.” *Id.*

<sup>93</sup> In *Texas v. Holder*, 888 F. Supp. 2d 113 (D.C.C. 2012), *vacated and remanded*, 133 S. Ct. 2886 (2013), the U.S. District Court for the District of Columbia denied preclearance to Texas’s strict voter-ID law, finding that Texas’s proposal would likely have a “retrogressive effect,” that is, suppress minority turnout. 888 F. Supp. 2d at 115. Similarly, in *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013), another three-judge panel from the D.C. Circuit denied preclearance to Texas’s redistricting plans, holding that Texas’s redistricting plans would diminish the voting power of African Americans and Hispanics, and that the plans were drafted with that discriminatory purpose in mind. 887 F. Supp. 2d at 139, 160–61.

<sup>94</sup> The Court has declined to hear these cases despite the Constitutional prohibition against gerrymandering. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 461 (2006) (Stevens, J., dissenting) (“The requirements of the Federal Constitution that limit the State’s power to rely exclusively on partisan preferences in drawing district lines are the Fourteenth Amendment’s prohibition against invidious discrimination, and the First Amendment’s protection of citizens from official retaliation based on their political affiliation.”).

<sup>95</sup> See, e.g., *Frank v. Walker*, 135 S. Ct. 1551 (2015) (denying petition for writ of *certiorari* challenging Wisconsin’s strict voter ID laws; despite extensive factual findings by the District Court, the U.S. Court of Appeals for the Seventh Circuit reversed its decision and upheld the laws as constitutional); *Husted v. Ohio State Conference of NAACP*, 135 S. Ct. 42 (2014) (staying the injunction entered into by a District Court ordering Ohio to restore early voting, which the U.S. Court of Appeals for the Sixth Circuit had affirmed); *Veasey v. Perry*, 135 S. Ct. 9 (2014) (denying applications to vacate the stay entered by the U.S. Court of Appeals for the Fifth Circuit against enforcing the District Court’s judgment holding Texas’ strict voter ID law unconstitutional, expressed in a detailed, 143 page opinion, following a nine-day bench trial); *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (staying a preliminary injunction against prohibitions on voting entered by the U.S. Court of Appeals for the 4th Circuit several weeks before the 2014 election).

justifies the need for these laws.<sup>96</sup> By contrast, there is empirical evidence that these voter ID laws depress turnout,<sup>97</sup> especially among less affluent and minority voters who tend to vote for candidates more likely to favor expansions of the social welfare state and stricter regulations of corporate behavior.<sup>98</sup>

During this period, the federal courts have continued their historical unwillingness to intervene in cases involving gerrymandering, so long as the one-person, one-vote standard is honored.<sup>99</sup> The federal courts have continued this unwillingness to intervene despite the very aggressive approach that some states have taken to partisan line-drawing, which has recently resulted in state congressional delegations where the percentage of the delegation that is Republican is markedly higher than the percentage of the state electorate who voted Republican.<sup>100</sup>

---

<sup>96</sup> See, e.g., *Veasey*, 135 S. Ct. at 11 (Ginsburg, J., dissenting from denial of application to vacate stay) (“Between 2002 and 2011, there were only two in-person voter fraud cases prosecuted to conviction in Texas.”); *Frank v. Walker*, 773 F.3d 783, 788 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing *en banc*) (“An expert witness who studied Wisconsin elections that took place in 2004, 2008, 2010, and 2012 found zero cases of in-person voter-impersonation fraud.”).

<sup>97</sup> See *Issues Related to State Voter Identification Laws*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, (Sept. 2014), <http://www.gao.gov/assets/670/665966.pdf>, archived at <https://perma.cc/6ST4-ZPM4> (“GAO found that turnout among eligible and registered voters declined more in Kansas and Tennessee [which enacted strict voter ID laws] than it declined in comparison states—by an estimated 1.9 to 2.2 percentage points more in Kansas and 2.2 to 3.2 percentage points more in Tennessee—and the results were consistent across the different data sources and voter populations used in the analysis.”).

<sup>98</sup> See *Frank*, 773 F.3d at 791 (Posner, J., dissenting from denial of rehearing *en banc*) (concluding based on empirical evidence that “[t]he data imply that a number of conservative states try to make it difficult for people who are outside the mainstream, whether because of poverty or race or problems with the English language, or who are unlikely to have a driver’s license or feel comfortable dealing with officialdom, to vote, and that liberal states try to make it easy for such people to vote because if they do vote they are likely to vote for Democratic candidates. Were matters as simple as this there would [*sic*] no compelling reason for judicial intervention; it would be politics as usual. But actually there’s an asymmetry. There is evidence both that voter-impersonation fraud is extremely rare and that photo ID requirements for voting, especially of the strict variety found in Wisconsin, are likely to discourage voting. This implies that the net effect of such requirements is to impede voting by people easily discouraged from voting, most of whom probably lean Democratic.”).

<sup>99</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (“We . . . decline to adjudicate these political gerrymandering claims.”); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001); Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 558 (2011) (“[W]hile the Supreme Court has refused to rule out the possibility that egregious gerrymanders might themselves violate the Constitution, it has rejected every such claim that has come before it over the past twenty-five years.”); Stephanopoulos & McGhee, *supra* note 12, at 899 (“What are the odds, then, that the courts will finally put some teeth into gerrymandering claims? Certainly the need for a more potent doctrine has never been greater. . . . At the Supreme Court level, however, we doubt that the currently sitting justices are eager to launch another redistricting revolution.”).

<sup>100</sup> Stephanopoulos & McGhee, *supra* note 12, at 876. Analysis of redistricting suggests that gerrymandering is so aggressive now that “Democrats would need to get 55% of the adjusted vote to win a majority of the seats [in the House of Representatives], and that may not include any additional vote that would be necessary to overcome the larger number of Republican incumbents.” Arrington, *supra* note 12. Gerrymandering is, of course, not a tactic

This gerrymandering combines with techniques like voter identification laws to diminish the political power of the portion of this electorate most likely to favor stronger regulation of corporations and an expansion of the social welfare state.<sup>101</sup>

---

that has been used exclusively by one party. Although many scholars have found that gerrymandering has favored Republicans in recent decades, *see, e.g.*, Joshua Butera, *Partisan Gerrymandering and the Qualifications Clause*, 95 B.U. L. REV. 303, 306–09 (2015); Franita Tolson, *Benign Partisanship*, 88 NOTRE DAME L. REV. 395, 441–42 (2012), a deep look at gerrymandering by Stephanopoulos and McGhee finds that both parties have used this tactic to their advantage in recent decades and finds a less pronounced Republican advantage: “Contrary to claims that Republicans benefit from redistricting because of their more efficient spatial allocation, the typical plan in recent decades has not been notably skewed in either party’s favor.” Stephanopoulos & McGhee, *supra* note 12, at 836. This study also found that “while a Republican advantage is more common, there are numerous examples of plans that strongly favor Democrats as well.” *Id.* at 875. Nonetheless, this same study shows that the Republican advantage derived from gerrymanders has been growing in recent decades and become very pronounced in the current one, with a particularly strong effect in 2012. *Id.* at 876. From my perspective, the question is not whether any particular party is compromising the voting power of Americans, but whether extreme gerrymanders pose a larger threat to our republic. In other words, regardless whose voting power is unfairly diminished, there is a cognizable danger to a system of government that depends on its citizens’ belief that each citizen’s vote about who will represent them in important offices is equal when the reality is that gerrymandering is so extreme that one cannot say that equality in any rough sense exists. Stephanopoulos and McGhee find that extreme gerrymandering of that kind existed in many states in 2012. *Id.* at 867. As a matter of logic, however, practices such as voter identification laws that have a particular effect on minority and less affluent voters are likely to have an interactive effect with gerrymandering in states with Republican legislatures that will make the combined effects of those policies even more likely to dilute those voters’ impact.

Stephanopoulos and McGhee advocate for the use of a different methodology to test for the presence of presumptively unfair gerrymandering, to find what they call the “efficiency gap,” which is the total of both parties’ wasted votes (both “cracked” and “packed” votes in the nomenclature of gerrymandering). *Id.* at 849–50. Using this measure, they contend, will give courts a more reliable metric of whether a gerrymander has gone beyond the permissible (itself a contested proposition) to reach an extreme. They advocate that when a gerrymandering plan either results in a party obtaining two more members of congress than the party’s voting popularity (as measured using their efficiency gap methodology) or 8% more of state legislative seats, the plan should be presumptively unconstitutional and the burden on the plan’s proponents to explain in non-discriminatory terms why it should stand. *Id.* at 887–91. Stephanopoulos and McGhee argue that in the Supreme Court’s last major opinion on gerrymandering, *League of United Latin American Citizens*, a majority of the Justices expressed interest in an effective approach to addressing excessive gerrymandering that grossly diluted the voting power of voters by party. *Id.* at 843–44. Despite being doctrinally optimistic, Stephanopoulos and McGhee essentially concede that they harbor no optimism that the current conservative coalition on the Roberts Court will be inclined to take more gerrymandering cases, much less grant remedies, but that lower federal courts might begin to be more receptive. *Id.* at 899–900.

<sup>101</sup> As one incisive commentator noted to me: “It’s curious. The various Supreme Court decisions on voting rights and gerrymandering are pro-legislative, while the decisions on the rights of corporations are anti-legislative. The consistency lies in the court’s embrace of the current power structure . . . .”

3. *A Different Rule For Labor Unions?: While Corporations Are Freed To Use Treasury Funds Without Restriction, The Federal Courts Subject Labor Unions To More Restrictions*

At the same time that the Roberts Court and other federal courts have been less receptive to claims of disenfranchisement and unfair gerrymandering by human citizens, especially those who are more inclined to vote for politicians who support corporate regulation, the Supreme Court's decisions have the likely effect of diminishing the already eroded power of labor unions, which have traditionally not only protected workers, but also acted as a counterweight to business influence in the political and regulatory process more generally.<sup>102</sup>

Even before *Citizens United*, there was a tension between the Court's treatment of corporate spending and its treatment of union spending.<sup>103</sup> In *Abood v. Detroit Board of Education*,<sup>104</sup> the Supreme Court held that it violated the First Amendment rights of employees to be forced to pay union dues, other than for activities related to collective bargaining.<sup>105</sup> The logic of this decision in the corporate context would be that stockholders should not be forced to have their invested dollars spent on political speech with which

---

<sup>102</sup> See Charlotte Garden, *Citizens United and the First Amendment of Labor Law*, 43 STETSON L. REV. 571, 551–54, 581–84 (2014).

<sup>103</sup> See Brudney, *supra* note 76, at 263; Fisk & Chemerinsky, *supra* note 81, at 1085; Sachs, *supra* note 76, at 868; see also Strine & Walter, *Conservative Collision Course*, *supra* note 33, at 365–68.

<sup>104</sup> 431 U.S. 209 (1977).

<sup>105</sup> In stating this premise, *Abood*, of course, drew on prior decisions of the Court in the labor area. In an important decision in *Railway Emp. Dep't v. Hanson*, 351 U.S. 225 (1956), the Supreme Court had expressed serious concern about allowing unions to spend money on political purposes without the consent of non-union members they represented and even of union members themselves. *Hanson*, 351 U.S. at 238. The Supreme Court resolved those concerns in *Street* by interpreting the Railway Labor Act to make unlawful unions supporting political activities “against the expressed wishes of a dissenting employee, with his exacted money.” *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 770 (1961). For economy of expression, I refer to *Abood* generally as a decision drawing a line between the use by a union of funds for collective bargaining purposes and for political purposes, and reflecting the view of the Court that it was constitutionally suspect for a union to use general funds of the union from dues for political purposes unless those funds were segregated and were comprised only of funds derived from contributions by members who voluntarily chose to allow their dues to be used for that purpose. See *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014) (“Instead of drawing a line between the private and public sectors, the *Abood* Court drew a line between, on the one hand, a union’s expenditures for collective-bargaining, contract administration, and grievance-adjustment, and on the other, expenditures for political and ideological purposes.”); *Abood*, 431 U.S. at 235–36 (“We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.”).

they disagree, as the Court acknowledged in *Abood*.<sup>106</sup> In McCain-Feingold, Congress actually took an approach to corporate political activity that was consistent with the Supreme Court's own reasoning in *Abood*. As was discussed, Congress left corporations free to spend their funds creating a PAC, which was then free to raise funds voluntarily from managers, employees, and stockholders.<sup>107</sup> By this means, Congress left corporations free to act as "associations" for the voluntary expression of speech, but recognized the reality that almost all stockholders invest for reasons having nothing to do with a desire to have the corporation spend corporate funds in the political process, have diverse, actual human concerns that the corporations they invest in do not share and that their fellow stockholders and the corporate managers may not agree with, have few tools to constrain corporate political spending, and have little time or incentive to monitor corporate political spending. In other words, McCain-Feingold gave strong consideration to the expressive rights of stockholders not to have corporations use corporate funds for political purposes without their consent, just as the Supreme Court had given primacy in *Abood* and other cases to the right of workers not to have their dues used for political purposes without their consent.<sup>108</sup>

As distinguished scholars have long pointed out, the Supreme Court's distinct treatment of stockholders and workers in this context has been difficult to justify.<sup>109</sup> In prior cases, the Court distinguished corporate stockholders from non-union employees on the theory that stockholders had a greater ability to make themselves heard, or to sell their stock and exit the corporation.<sup>110</sup> As noted, those assumptions are no longer realistic as most Americans are compelled as a practical matter to invest in the stock market to fund their own retirement and their children's education, but they still seem to underlie the Court's approach to stockholder power. Likewise, the Court's

---

<sup>106</sup> See *Abood*, 431 U.S. at 234–35 ("One of the principles underlying the Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '(m)aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals,' the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interests.' The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.").

<sup>107</sup> See *supra* notes 43–44 and accompanying text.

<sup>108</sup> See Garden, *supra* note 102, at 576–77. As the Supreme Court later explained, it had "assumed without any focused analysis" in *Abood* that union members had the right to opt out of the portion of union dues spent on political activities. *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2290 (2012).

<sup>109</sup> See Brudney, *supra* note 76, at 267–74 (analyzing the difference in union and corporation political spending in the context of the First Amendment); Sachs, *supra* note 76, at 819–27 (describing the asymmetrical treatment of stockholders and workers regarding political contributions of corporations and unions, respectively).

<sup>110</sup> See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 793–94 (1978) ("[S]hareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues.").

assumptions about the comparatively lesser ability of individual employees also seem inaccurate: For starters, the majority of jobs in the United States are not unionized, so it is now relatively easier for an employee who objects to union activities to find a non-union job than it is for an employee to find a job that will permit her to invest her retirement savings in the stock of her choice rather than through a 401(k) plan or § 529 account.<sup>111</sup> Moreover, employees have long had the right to vote against union representation altogether,<sup>112</sup> or to speak out against union activities they dislike,<sup>113</sup> even in the 25 states that have not enacted so-called “right to work” legislation.<sup>114</sup>

Notwithstanding the less than stable foundation for the Supreme Court’s differing treatment of corporate and union speech, recent decisions by the Roberts Court have, if anything, widened the gap and made it more difficult for unions to exercise voice. *Citizens United* and its predecessors freed corporations to spend their investors’ entrusted capital using treasury funds without any requirement to get stockholder consent. By contrast, in the 2014 decision *Harris v. Quinn*,<sup>115</sup> a five-justice majority held that the First Amendment prohibits a state from compelling personal care providers to pay their “fair share” of actual collective managing costs when a union bargains on their behalf.<sup>116</sup> In doing so, the Court also cast doubt on the continuing viability of *Abood*’s holding that the government may “require public em-

---

<sup>111</sup> See Economic News Release: Union Members Summary, BUREAU OF LABOR STATS., at 1 (Jan. 23, 2015), <http://www.bls.gov/news.release/union2.nr0.htm>, archived at <https://perma.cc/C492-Y2J4> (reporting that the percentage of wage and salary workers who were members of unions was 11.1%; among private sector workers, only 6.7% are in unions); see also Strine & Walter, *Conservative Collision Course*, *supra* note 33, at 375–76 (discussing the prevalence of employment-sponsored retirement plans which do not permit investors any choice in funds).

<sup>112</sup> See, e.g., *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (“The conditions for collective bargaining may not exist; thus a majority of the employees may refuse to join a union or to agree upon or designate bargaining representatives, or the majority may not be demonstrable by the means prescribed by the statute, or a previously existent majority may have been lost without unlawful interference by the employer and no new majority have been formed. As the employer in these circumstances may be under no legal obligation to bargain collectively, he may be free to enter into individual contracts.”).

<sup>113</sup> See *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 806 (1961) (Frankfurter, J., dissenting) (“No one’s desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues. Federal taxes also may diminish the vigor with which a citizen can give partisan support to a political belief, but as yet no one would place such an impediment to making one’s views effective within the reach of constitutionally protected ‘free speech.’”).

<sup>114</sup> National Conference of State Legislatures, *Right-to-Work Resources*, <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx>, archived at <https://perma.cc/2ZT9-QZVR> (last visited Jul. 28, 2015). See generally William B. Gould IV, *Organized Labor, the Supreme Court, and Harris v. Quinn: Déjà Vu All Over Again?*, 2014 SUP. CT. REV. 133 (discussing the interplay between the Court’s approach to labor law and recent legislative efforts to reduce unions’ power).

<sup>115</sup> 134 S. Ct. 2618 (2014).

<sup>116</sup> *Id.* at 2644. *Harris* followed *Knox*, 132 S. Ct. 2277 (2012), also authored by Justice Alito on behalf of a five-justice majority, in which the Supreme Court determined that non-members must affirmatively consent to have special assessment funds used for political purposes; previous precedent had held that an opt-out approach was acceptable.

ployees to pay a fair share of the cost that a union incurs negotiating on their behalf for better terms of employment.”<sup>117</sup>

Many commentators expected the Supreme Court to overrule that aspect of *Abood*—which held it was constitutional to force workers who choose not to associate with a union to pay “agency shop” fees to unions—completely in *Friedrichs v. California Teachers Association*,<sup>118</sup> a case brought by 10 public school teachers from California.<sup>119</sup> Had the Court had done so, the result would have been that those employees who do not want to pay for the collective bargaining services of the union would no longer have to pay for them. This would have put financial strain on the labor movement by encouraging “free riding” and have the obvious spill-over effect of hampering all union activities, including political advocacy. But, after the passing of Justice Scalia, *Friedrichs* was affirmed by an equally divided Court, suggesting that *Abood* would have been overturned had Justice Scalia been able to participate in the case’s resolution.<sup>120</sup> Despite this narrow escape, labor unions have continued reason for concern. The Chief Justice and three other members of the Court simultaneously take the position that corporations are vehicles for political expression over which dissenting stockholders have no say, while embracing an entirely different conception of the role of labor unions. If their view becomes law, the likely result is that corporations will increase their relative influence in the political process at the further expense of labor.

\* \* \* \*

Taken as a whole, the net effect of all these judicial decisions is that elected officials will likely become more responsive to corporate and other moneyed interests, and less responsive to ordinary Americans.<sup>121</sup> Even if

---

<sup>117</sup> *Id.* at 2645 (Kagan, J., dissenting) (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

<sup>118</sup> 136 S.Ct. 1083 (2016).

<sup>119</sup> See, e.g., Steven D. Schwinn, *Court Puts Union Fair Share on the Chopping Block*, CONST. L. PROF. BLOG (June 30, 2015), <http://lawprofessors.typepad.com/conlaw/2015/06/court-puts-union-fair-share-on-the-chopping-block.html>, archived at <https://perma.cc/F56T-SYM5> (“The Supreme Court today agreed to hear *Friedrichs v. Cal. Teachers Association*, and certified the first question as ‘Should *Abood* be overruled?’ The case is just the latest foray into the First Amendment challenges to union fair share dues requirements. The Court has been chipping away at this in its last few rulings. This case will likely mean the end of union fair share requirements under the First Amendment.”).

<sup>120</sup> See Adam Liptak, *Victory for Unions as Supreme Court, Scalia Gone, Ties 4-4*, N.Y. TIMES (Mar. 29, 2016), [http://www.nytimes.com/2016/03/30/us/politics/friedrichs-v-california-teachers-association-union-fees-supreme-court-ruling.html?\\_r=0](http://www.nytimes.com/2016/03/30/us/politics/friedrichs-v-california-teachers-association-union-fees-supreme-court-ruling.html?_r=0).

<sup>121</sup> An incisive commentator noted her skepticism that unions that represent public employees are representative of working people and ordinary Americans generally, and she cited examples of certain public employee unions who have extracted contracts that have destabilized state and local government finances. One can concede the point that certain public employee unions in certain states have perhaps secured contracts overly generous to their members and disadvantageous to the citizens of the government they serve without concluding that on average public employee unions are less likely to reflect the concerns of ordinary workers than corporations. Given the reality that most public employees make salaries much

corporations themselves remain ineligible to vote, the Roberts Court's decision in *Citizens United* greatly increased their already high-volume voice in American politics.<sup>122</sup> On the other hand, by upholding or refusing to restrict onerous laws that limit access to the ballot for, and reduce the representation of, poor and minority voters, and by subjecting unions to different rules than corporations, recent decisions of the federal courts have the likely effect of eroding the already less-than-ideal ability of typical American voters to have their preferences fairly reflected in the electoral, legislative, and regulatory processes.

### III. CONSTRAINING CONGRESS'S ABILITY TO ENACT REGULATORY AND SOCIAL WELFARE LEGISLATION

Just as federal decisions have the likely effect of making elected officials more responsive to moneyed interests and reducing the influence of less affluent interests, the recent decisions have also made it more difficult and more expensive for those same elected legislators to adopt regulatory and social welfare legislation that would otherwise restrain corporate activities.

Chief Justice Roberts was heralded by the political left<sup>123</sup>—and

---

closer to what the median American family earns in a year, it seems likely that the agenda of their elected bargaining representatives is more likely to reflect the interests of typical American workers than the agenda set by CEOs who often earn more than 100 times that of what the median American family does. See Lawrence Mishel & Natalie Sabadish, *CEO Pay and the Top 1%: How Executive Compensation and Financial-Sector Pay Have Fueled Income Inequality*, ECON. POL'Y INST. (May 2, 2012), <http://www.goiam.org/images/EPI%20CEO%20Pay%20and%20Top%201%20Percent%205-2012.pdf>, archived at <https://perma.cc/FZ95-4UHB> (“Using a measure of CEO compensation that includes the value of stock options granted to an executive, the CEO-to-worker compensation ratio was 18.3-to-1 in 1965, peaked at 411.3-to-1 in 2000, and sits at 209.4-to-1 in 2011.”).

<sup>122</sup> And recent data shows that because of *Citizens United*, “employers now have broad legal rights to campaign for political candidates inside their firms as well as in the public arena,” and that one in four American employees “have been contacted by their managers about voting, political candidates, or public policies and political issues.” Alexander Hertel-Fernandez, *Employer Political Coercion: A Growing Threat*, AM. PROSPECT, Fall 2015, at 12.

<sup>123</sup> See, e.g., Gregory P. Magarian, *Chief Justice Roberts's Individual Mandate: The Lawless Medicine of NFIB v. Sebelius*, 108 NW. U. L. REV. COLLOQUY 15, 15 (2013) (“Chief Justice Roberts's leadership in upholding the individual mandate left conservatives fuming, liberals beaming, and commentators falling over one another to praise the Chief Justice's courage, resistance to partisanship, and embrace of judicial restraint.”); Martha Minow, *Affordable Convergence: “Reasonable Interpretation” and the Affordable Care Act*, 126 HARV. L. REV. 117, 148 (2012) (referring to *NFIB v. Sebelius* as “a work of legal craftsmanship” [sic] that “signaled a commitment to separating the judiciary from politics in method, tone, and results”); Jonathan Chait, *John Roberts Saves Us All*, N.Y. MAG. (June 28, 2012), <http://nymag.com/daily/intelligencer/2012/06/john-roberts-saves-us-all.html>, archived at <https://perma.cc/CWR3-D23A>; David Horsey, *John Roberts Saves ‘Obamacare,’ Enrages Tea Party Conservatives*, L.A. TIMES (June 29, 2012), <http://articles.latimes.com/2012/jun/29/nation/la-na-tt-john-roberts-20120628>, archived at <https://perma.cc/TBB7-RYM3> (“Until this week, his critics on the left dismissed Roberts as just one more predictable, partisan vote in the Republican faction of the high court. But, having joined in striking down much of Arizona's immigration law on Monday and siding with the court's four liberals on the healthcare law on Thursday, that caricature has been erased.”).



denounced by the right<sup>124</sup>—for voting to uphold President Obama’s signature political initiative, the Patient Protection and Affordable Care Act,<sup>125</sup> in *National Federation of Independent Business v. Sebelius*.<sup>126</sup> But less critical attention has been paid to another part of that decision. Even as Chief Justice Roberts supposedly “saved Obamacare” by calling the mandate to purchase health insurance a tax,<sup>127</sup> his opinion struck down the Act’s expansion of the Medicaid program to all adults with incomes under 133% of the

<sup>124</sup> David Hinkle, Note, *Cynical Realism and Judicial Fantasy*, 5 WASH. U. JURISPRUDENCE REV. 289, 313 n.135 (2013) (recognizing the political right’s criticism of Chief Justice Roberts’s decision in *Sebelius*); Joel Alicea, *Chief Justice Roberts and the Changing Conservative Legal Movement*, PUB. DISCOURSE (July 10, 2012), <http://www.thepublicdiscourse.com/2012/07/5889/>, archived at <https://perma.cc/8EDH-6D7H> (“The reaction among legal conservatives to the Roberts opinion in [*Sebelius*] has been brutal. Many have accused the [C]hief [J]ustice of exchanging the black robes of the jurist for the trappings of the politician. The [C]hief [J]ustice is said to have blinked and failed his most basic responsibility.”).

<sup>125</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>126</sup> 132 S. Ct. 2566 (2012).

<sup>127</sup> As someone who went to law school in the 1980s, I did not understand the difficulty of this aspect of the case at all. I was taught that it did not matter what Congress called something it enacted. If in fact what Congress did fell within one of its powers, the courts were supposed to defer. *E.g., Sebelius*, 132 S. Ct. at 2598 (“Our precedent demonstrates that Congress had the power to impose the exaction in § 5000A under the taxing power . . . [and t]hat is sufficient to sustain it.”); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (explaining that because “Congress has acted indirectly under its spending power,” the Court did not need to decide whether Congress properly exercised another of its powers); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (“In passing on the constitutionality of a tax law ‘we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.’ (quoting *Lawrence v. State Tax Comm’n*, 286 U.S. 276, 280 (1932))).

The part of Chief Justice Roberts’s decision upholding this part of the Act could have been written in less than three pages. And, because the individual insurance mandate was clearly within Congress’s taxing authority, there was no need for the Chief Justice’s extended dilation on his view that the mandate could not be justified as an exercise of the Congress’s authority to regulate interstate commerce. *Sebelius*, 132 S. Ct. at 2585–93. Of course, that dilation signaled to Congress and others the Chief Justice’s willingness to constrict Congress’s ability to regulate economic activity, especially as the Affordable Care Act dealt with a subject — health care—that is by any measure material to the nation’s economic vitality. See Marea B. Tumber, Note, *The ACA’s 2017 State Innovation Waiver: Is ERISA a Roadblock to Meaningful Healthcare Reform?*, 10 MASS. L. REV. 388, 392 (2015) (“In the United States, . . . the share of Gross Domestic Product (GDP) devoted to healthcare spending grew from nine percent of GDP in 1980 to sixteen percent of GDP in 2008. Healthcare costs are increasing at a faster rate than inflation. Actuaries project that healthcare spending will grow an average of 5.8 percent per year between 2012 and 2022. By 2022, annual healthcare spending will reach \$2.4 trillion, or 19.9 percent of U.S. GDP . . . .”); Jeffrey H. Kahn, *The Individual Mandate Tax Penalty*, 47 U. MICH. J.L. REFORM 319, 344–45 (2015) (examining the problem of healthcare free riders and whether this problem necessitates healthcare reform); *Introducing the New BEA Health Care Satellite Account*, U.S. DEP’T OF COMMERCE BUREAU OF ECONOMIC ANALYSIS BLOG (Jan. 22, 2015), <http://blog.bea.gov/2015/01/>, archived at <https://perma.cc/HW3P-QMKE/> (“Total health care spending reached 17.4 percent of [GDP] in 2013, and that share is expected to continue to grow significantly, according to the Centers for Medicare and Medicaid Services.”). Chief Justice Roberts’s holding that the individual insurance mandate exceeded Congress’s power under the Commerce Clause was also a notable deviation from the Court’s precedent, which will likely also hamper Congress’s ability to regulate in the public interest. *Cf. Sebelius*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The Chief Justice’s crabbed reading of the Commerce Clause

federal poverty level.<sup>128</sup> In doing so, the Roberts Court not only invalidated a reform designed to provide millions of low-income Americans with health insurance coverage, but also made it harder for Congress to expand the social safety net going forward.

When Congress enacted Medicaid in 1965 as a federal-state partnership to provide basic health insurance to the poor, it expressly did two things relevant to this discussion. First, it made clear that Congress reserved the right to amend Medicaid at any time in the future.<sup>129</sup> Second, Congress gave the Secretary of Health and Human Services the power to withdraw some or all of a state's federal matching funds if the state failed to comply with any provision of the program.<sup>130</sup> Although the program initially covered only poor families receiving cash assistance and the elderly, Congress has since expanded it multiple times, including adding coverage for the blind, disabled, other low-income children, and pregnant women.<sup>131</sup> Each time, states have been required to expand their own definitions of eligible individuals accordingly.<sup>132</sup> By 2008, Medicaid was thus an important piece of the social safety net, but one that was limited in scope; only one-third of Americans below the poverty level (approximately \$21,000 for a family of four when the Affordable Care Act was enacted<sup>133</sup>) were covered by the program.<sup>134</sup>

The purpose of the Affordable Care Act was to expand health insurance coverage to all Americans, and it did so in part by expanding the number of Americans eligible for the Medicaid program. The Act required participating states to cover nearly all individuals, regardless of pregnancy status or age, below 133% of the federal poverty level, which would be \$20,000 for a family of three.<sup>135</sup> The Act also provided that the money for this expansion would be borne fully by the federal government for the first three years, with phased-in decreases in the years following, to a minimum level of 90% federal funding starting in 2020.<sup>136</sup>

But the Supreme Court worried that requiring the additional 10% from states' own pockets, several years later, crossed the line: "Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."<sup>137</sup> Al-

---

harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it.").

<sup>128</sup> *Sebelius*, 132 S. Ct. at 2601.

<sup>129</sup> 42 U.S.C. § 1304.

<sup>130</sup> 42 U.S.C. § 1396c.

<sup>131</sup> See COUNSEL OF STATE GOVERNMENTS, MEDICAID 101: A PRIMER FOR STATE LEGISLATORS 2 (Jan. 2009), [http://www.csg.org/knowledgecenter/docs/Medicaid\\_Primer\\_final\\_screen.pdf](http://www.csg.org/knowledgecenter/docs/Medicaid_Primer_final_screen.pdf), archived at <https://perma.cc/LR82-97RR>.

<sup>132</sup> *Id.* at 5.

<sup>133</sup> IN THE 48 CONTIGUOUS STATES AND D.C. DEP'T. OF HEALTH & HUMAN SERVICES, 2008 HHS POVERTY GUIDELINES, <http://aspe.hhs.gov/poverty/08poverty.shtml>, archived at <https://perma.cc/F8TX-QWJT>.

<sup>134</sup> See COUNSEL OF STATE GOVERNMENTS, *supra* note 131, at 9.

<sup>135</sup> 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

<sup>136</sup> 42 U.S.C. § 1396d(y)(1).

<sup>137</sup> *Sebelius*, 132 S. Ct. at 2602.

though Congress had expressly reserved the right to amend the Medicaid program,<sup>138</sup> the Court determined that Congress could not do so in this way. As Justice Ginsburg's dissent emphasizes, it was the first time that the Court had found an exercise of Congress' spending power "unconstitutionally coercive,"<sup>139</sup> despite the fact that states were not required to participate in the program at all. Under the inconsistent reasoning of the majority, states could not be expected to live without Medicaid as it existed, even though they could choose to do so, but should be given the right to keep all of Medicaid's current benefits but not to have to honor a congressional decision to alter the program on the grounds that their sovereignty as states would be overridden.<sup>140</sup> Thus, under this model, states have the protected legal status of which many American children dream: reaching adulthood and living under their parent's roofs without adhering to any new rules or paying any rent.

According to the Congressional Budget Office, the Court's decision directly prevented 6 million Americans from being able to use Medicaid.<sup>141</sup> But the Court's decision also had a material indirect effect. There are more than 2,000 programs through which the federal government provides assistance to states and local governments.<sup>142</sup> If Congress can no longer use its spending power to require states to comply with the new requirements it establishes for entitlement programs, it may be prevented from expanding existing programs, or hesitate to create new programs in the first place. And, as others have observed, because the *Sebelius* decision provides almost no context for courts in deciding whether a particular Congressional grant of money is coercive, "[f]or every federal spending program since the Great Society, this case signals the beginning of a new era of litigation challenges."<sup>143</sup>

---

<sup>138</sup> 42 U.S.C. § 1304 ("The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress.")

<sup>139</sup> *Sebelius*, 132 S. Ct. at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>140</sup> *See Sebelius*, 132 S. Ct. at 2601–06.

<sup>141</sup> CONGRESSIONAL BUDGET OFFICE, ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION, (July 2012), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf>, archived at <https://perma.cc/FR5T-Z49N>.

<sup>142</sup> The Catalog of Federal Domestic Assistance contains 2,328 programs in which "a Federal agency . . . provides assistance or benefits for a State or States, territorial possession, county, city, other political subdivision, grouping, or instrumentality thereof; any domestic profit or nonprofit corporation, institution, or individual, other than an agency of the Federal government." Catalog of Federal Domestic Assistance, <https://www.cfda.gov>, archived at <https://perma.cc/6QTM-5KP6>.

<sup>143</sup> Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1, 6 (2013); see also Erin Ryan, *The Spending Power and Environmental Law After Sebelius*, 85 U. COLO. L. REV. 1003, 1025–26 (2014) ("The *Sebelius* decision leaves much uncertainty in its wake. The array of concurring and dissenting opinions complicates efforts to determine exactly how the decision will bind future courts, as no rationale was supported by a majority of the court. . . .

A litany of legal challenges, and restrictions on Congress' ability to expand the social safety net, has also resulted from the Court's decision in *Burwell v. Hobby Lobby*.<sup>144</sup> As in *Sebelius*, the *Hobby Lobby* majority thwarted Congress's ability to address problems of a national scale, by holding that a corporation can, for religious reasons, deny its employees the full range of medical options that Congress set as the Affordable Care Act's "minimum essential coverage."<sup>145</sup>

The problem for those who seek to expand the social welfare state is two-fold: first, *Hobby Lobby*, like *Sebelius*, invalidated a critical part of a social welfare program that Congress had already enacted. The *Hobby Lobby* Court determined that the federal government could not require employers to pay funds into insurance pools to cover medical devices or products for their employees if the corporate employer has a religious objection. Instead, secular taxpayers, and religious taxpayers whose religions do not conflict with the health care at issue, must pay to make up the difference.<sup>146</sup> Despite the fact that the benefit at issue was essentially a part of the employee's compensation package—a "minimum essential" guarantee in the parlance of the Affordable Care Act<sup>147</sup>—the religious beliefs of the employees themselves were deemed irrelevant and subordinate to the corporation's religious beliefs, as determined by those who controlled its board at the time.<sup>148</sup>

Secondly, and perhaps more importantly, the Court's decision represented a warning to Congress that any future programs—or expansions of existing programs—will need to account for carve-outs and work-arounds.<sup>149</sup> This kind of complexity in federal programming has already been blamed

---

*Sebelius* interpreters must make sense of the new constitutional limit with precious little direction.").

<sup>144</sup> 134 S. Ct. 2751 (2014).

<sup>145</sup> *Id.*

<sup>146</sup> See Avik Roy, *According to the Supreme Court, Corporations Have More Religious Freedom Than Taxpayers*, FORBES (July 1, 2014), <http://www.forbes.com/sites/theapothecary/2014/07/01/the-supreme-courts-hobby-lobby-decision-didnt-overturn-a-single-word-of-obama-care/>, archived at <https://perma.cc/U5CM-2Y6Y> (addressing Justice Alito's suggestion that "taxpayers could pick up the tab for contraceptive coverage, instead of religious employers" and suggesting that requiring taxpayers rather than Hobby Lobby to fund contraceptives is "a distinction without a difference").

<sup>147</sup> 42 U.S.C. §§ 18001–18121 (2012).

<sup>148</sup> See Jessica L. Waters & Leandra N. Carrasco, 26 YALE J.L. & FEMINISM 217, 220 (2014) (arguing that courts accepting employers' religious beliefs "results in female employees' personal reproductive choices (which may be grounded in the employees' own religious beliefs) being improperly subject to religious and moral scrutiny by their employers").

<sup>149</sup> See Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 105 (2015) ("*Hobby Lobby* provides a wide-ranging basis for employers to object to participating in secular programs designed to provide a basic guarantee of living standards to workers. It also gives rise to arguments against adopting new protections because opponents can argue they must be designed to accommodate expensive work-arounds by employers with religious objections.").

for increasing the cost of government by billions of dollars a year, as well as leading to less effective governance and obscured lines of accountability.<sup>150</sup>

Taken together, the Court's decisions in *Hobby Lobby* and *Sebelius* constrain Congress' ability to provide security for working Americans and to regulate corporations in the public interest.

#### IV. NO COUNTERVAILING TREND TO GIVE MORE DEFERENCE TO REGULATING DECISIONS OF THE EXECUTIVE BRANCH

The Roberts Court's willingness to change the law in other areas might be seen to have a silver lining for those concerned about the ability of corporations to externalize costs at the expense of society. After all, many members of the Court's conservative majority have in the past expressed vocal support for a strong executive, and judicial doctrines, such as *Chevron*,<sup>151</sup> that are designed to accord substantial deference to executive branch regulatory agencies.<sup>152</sup> Thus, it could be expected that the Roberts Court and judges whose jurisprudential views tracked that of the conservative majority might take a more hands-off approach when there are challenges by corporations to regulatory actions of the Executive Branch. In other words, if despite the predominance of corporate and high-income interests in the political and regulatory process, a regulation was issued by an Executive Branch agency, at the very least, the regulation might have a very high chance of not being overturned by judicial action.

But, there is little ground for optimism left on that front. Rather, in the administrative law context, the Court has left in place decisions by the U.S. Circuit Court for the District of Columbia, the most important court in the country for federal agencies, that overturn regulations of corporations adopted by the executive branch, despite the fact that the D.C. Circuit's review of agency decision-making is inconsistent with the APA and the Supreme Court's own precedent.<sup>153</sup> There is, of course, a piquancy about this,

---

<sup>150</sup> See Steven M. Teles, *Kludgeocracy: The American Way of Policy*, NEW AM. FOUND. (Dec. 2012), [http://newamerica.net/sites/newamerica.net/files/policydocs/Teles\\_Steven\\_Kludgeocracy\\_NAF\\_Dec2012.pdf](http://newamerica.net/sites/newamerica.net/files/policydocs/Teles_Steven_Kludgeocracy_NAF_Dec2012.pdf), archived at <https://perma.cc/R6YH-HVHK>.

<sup>151</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>152</sup> See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting) ("*Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive."); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996) (Scalia, J.) ("We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

<sup>153</sup> See Jeffrey S. Lubbers, *Is the U.S. Supreme Court Becoming Hostile to the Administrative State?* 8 (Aug. 15, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2645036](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2645036), archived at <https://perma.cc/M792-Y65U> ("Overall, the great majority of the Supreme Court's post World War II administrative law cases, until the last few years, have favored executive

because the jurisprudence of a very conservative D.C. Circuit in this regard emanates from an earlier era of liberal prevalence on that Court, in which judges concerned that regulated interests had captured the agencies supposed to regulate them applied a more intensive form of review, skeptical that the agencies had faithfully implemented Congress's mandate to address certain conduct of public concern.<sup>154</sup> As the D.C. Circuit's composition has changed, the use of that intensive form of review has presented an opportunity for business litigants, and judges receptive to them, to override regulation of corporate conduct adopted by agencies such as the SEC and the EPA.

As a Delaware judge who has spent most of his career deciding corporate law cases, and has also served in the executive branch of government, I confess to viewing the judicial review required by the APA as similar in spirit to that used under the business judgment rule.<sup>155</sup> I was told in law school that when an executive branch agency acts in good faith to address a matter within its constitutional and statutory authority, courts would be very reluctant to second-guess its actions.<sup>156</sup> As the Supreme Court explained in a 1983 case, the "narrow" scope of court review requires overturning agency action as "arbitrary and capricious" only if:

[T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that

---

agency power and discretion. But this long-standing trend appears to be experiencing an undertow, at least judging by some recent opinions signed at various times by five Justices of the current Court."); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 397 (2015) (noting that "the Court has not roused itself to police the [D.C.] Circuit in any systemic way, apart from ad hoc and relatively small-bore interventions").

<sup>154</sup> See Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1065–66 (1997) (observing the D.C. Circuit judges' discussions of agency capture in the late 1960s and early 1970s); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1999 DUKE L.J. 984, 1021 n.89 ("Since the D.C. Circuit was widely regarded as perhaps the most 'liberal' or 'activist' circuit—at least during the 1965 and 1975 periods covered by the study—one might expect that court to use judicial review as a way to reverse the process of agency 'capture' that was prominent during those periods and that occasionally surfaced in opinions of that court.").

<sup>155</sup> Compare 5 U.S.C. § 706 (describing the scope of judicial review for agency actions under the Administrative Procedure Act as limited to setting aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"), with *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (describing the scope of judicial review for corporation actions under the business judgment rule, *i.e.*, that "[a]bsent an abuse of discretion, [the board's] judgment will be respected by the courts").

<sup>156</sup> See, *e.g.*, *Chevron*, 467 U.S. at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'"); *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 546 (1978) (Rehnquist, J.) ("In short, all of this leaves little doubt that Congress intended that the discretion of the agencies and not that of the courts be exercised in determining when extra procedural devices should be employed.").

runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>157</sup>

That level of deference is similar to the deference to board actions taken in good faith under the business judgment rule.<sup>158</sup> In both cases, the deference afforded by courts accords with the presumption that specialized administrative agencies and boards of directors are better suited to make decisions than generalist judges reviewing actions after the fact.<sup>159</sup>

But the D.C. Circuit has moved away from that traditional deference during the past three decades, in the process creating a “feedback loop” where those opposed to agency actions are more likely to bring their claims

<sup>157</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>158</sup> For example, the Delaware Supreme Court explained in *Unitrin* that “[t]he business judgment rule is a ‘presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’ An application of the traditional business judgment rule places the burden on the ‘party challenging the [board’s] decision to establish facts rebutting the presumption.’ If the business judgment rule is not rebutted, a ‘court will not substitute its judgment for that of the board if the [board’s] decision can be ‘attributed to any rational business purpose.’” *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (citing *Aronson*, 473 A.2d at 812; *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985)). This analogy to the business judgment rule is suggested by the support of two scholars for what they call “thin rationality review.” Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016). In their incisive new article, Professors Gersen and Vermeule argue that federal courts on balance show deference to agency decisionmaking and give agencies more credit than is sometimes apparent for the unique expertise they possess, the difficult choices they must make whereby inaction or action poses risks, and the dangers of judicial interference: “Prescriptively, we urge that rationality is a much thinner notion than some commentators seem to think, and rational decisionmaking requires far less from agencies than lawyers tend to realize. Courts have sometimes adopted an excessively intrusive approach because, acting in the best of faith, they have misunderstood what rationality requires.” *Id.* at 1356. The reasons they advocate this form of review are very similar to those that counsel in favor of the business judgment rule. *See id.* (“Under Section 706(2)(A) of the Administrative Procedure Act (APA), courts ‘shall’ set aside agency action that is ‘arbitrary [and] capricious . . .’ The conventional antonym of ‘arbitrary and capricious’ is ‘rational’; as the D.C. Circuit puts it, ‘[t]he “arbitrary and capricious” standard deems the agency action presumptively valid provided the action meets a minimum rationality standard.’ Hence, courts applying the arbitrary-and-capricious test review the rationality of agency decisions.”); *see also* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 548 (2009) (emphasis in original) (“The law has also recognized that it is not so much a particular set of substantive commands but rather it is a *process*, a process of learning through reasoned argument, that is the antithesis of the ‘arbitrary.’ This means agencies must follow a ‘logical and rational’ decisionmaking ‘process.’”).

<sup>159</sup> *See, e.g.*, *In re MFW S’holders Litig.*, 67 A.3d 496, 526 (Del. Ch. 2013) (“Under Delaware law, it has long been thought beneficial to investors for courts, which are not experts in business, to defer to the disinterested decisions of directors, who are expert, and stockholders, whose money is at stake.”), *aff’d sub nom. Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); Cass R. Sunstein, *The Most Knowledgeable Branch*, U. PA. L. REV. (forthcoming), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2630726](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2630726) (arguing that the executive branch should be given more, not less, deference because “[i]n the modern era, the executive branch has extraordinary information-gathering advantages over the legislative and judicial branches. As a result, it will often know immeasurably more than they do, both on domestic issues and on foreign affairs.”).

before that court.<sup>160</sup> Although the Supreme Court has itself applied a more restrained approach to reviewing agency action under the APA,<sup>161</sup> the D.C. Circuit uses a more intensive standard of its own invention, its own version of so-called “hard look” review, to scrutinize agency action. As judges on that court admit, the term “hard look” has been transformed from what the court looks for in the agency’s own decision-making process to now describe the court’s painstaking review of agency action.<sup>162</sup> As an incisive D.C. Circuit judge acknowledged,

Courts have incrementally expanded those APA procedural requirements well beyond what the text provides. And courts simultaneously have grown *State Farm’s* “narrow” § 706 arbitrary-and-capricious review into a far more demanding test. Application of the beefed-up arbitrary-and-capricious test is inevitably if not inherently unpredictable—so much so that, on occasion, the courts’ arbitrary-and-capricious review itself appears arbitrary and capricious.<sup>163</sup>

---

<sup>160</sup> According to Senior Judge Douglas Ginsburg, of the D.C. Circuit, “[T]he D.C. Circuit has become a relatively specialized court in the area of administrative law. *Perhaps an explanation for our increasing ‘market share’ lies in the rate at which the D.C. Circuit has reversed the decisions of administrative agencies and hence attracted challenges to agency decisions.* Since the Supreme Court in *Chevron v. NRDC* called for greater judicial deference to an agency’s interpretation of the statutes it administers, the D.C. Circuit has remained more likely than the other circuits to reverse an agency decision. Before *Chevron*, we reversed in a lower percentage of agency cases than did the other circuits. The trend since *Chevron* has been for an ever-increasing reversal rate in the D.C. Circuit even as the national reversal rate has declined. To wit, the reversal rate in D.C. from 1980 through 1985 was 14.22% but has been 22.93% in the years since; the national reversal rate from 1980 through 1985 was 19.22%, but has been only slightly above 15% since then. A party filing a petition for review of an agency decision usually may choose between the D.C. Circuit and at least one other circuit; other things being equal, it is likely to choose the forum it believes offers a greater probability of reversing the agency.” Hon. Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter Georgetown University Law Center, April 26, 2011*, 10 GEO. J.L. & PUB. POL’Y 1, 3–4 (2012) (emphasis added).

<sup>161</sup> See, e.g., *Fox Television Stations*, 556 U.S. at 513–14 (Scalia, J.) (citations omitted) (“We have made clear, however, that a court is not to substitute its judgment for that of the agency, and should uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”).

<sup>162</sup> See Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 525–26 (1985) (“At birth, the doctrine was quasi-procedural: a set of requirements intended to ensure that the agency itself had taken a hard look at the relevant issues before reaching its decision. Courts reviewing deregulation for the first time at the start of the 1980s endorsed this approach, ratifying the hard look doctrine as an accepted weapon in the arsenal of judicial review. But the deregulation cases did more than simply adopt the quasi-procedural elements of hard look review. By seizing upon the doctrine’s nascent substantive elements, they transformed it into one that required a hard look not just by the agency, but by the court as well.”); Sunstein & Vermeule, *supra* note 153, at 400 (“Across a number of doctrinal contexts, panels of the [D.C.] Circuit have acted aggressively to reshape administrative law in ways that are not easy to square with the APA or Supreme Court precedent.”).

<sup>163</sup> *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, and dissenting in part).



Under that standard, the D.C. Circuit has issued a number of decisions striking down regulatory actions that were intended to constrain corporate externalities.<sup>164</sup> For example, in *Business Roundtable v. SEC*,<sup>165</sup> the D.C. Circuit struck down a rule adopted by the Securities and Exchange Commission that authorized stockholders to obtain access to a corporation's proxy statement for the purpose of nominating director candidates. Federal proxy access was a matter of intense policy debate within the corporate governance community.<sup>166</sup> Personally, I believed it was not a good step to take, because the primary problem for stockholders was not that they lacked access to the company's proxy statement by federal fiat, but that the SEC had not allowed stockholders to propose election reforms of their own choosing, by exercising their rights under Rule 14a-8<sup>167</sup> and state law.<sup>168</sup> Even though I objected to the proxy access rule on policy grounds, I had no doubt that the SEC was authorized to enact it. Congress plainly gave the SEC the statutory authority to adopt a rule providing for federal proxy access in § 971 of Dodd-Frank:

The Commission *may issue rules* permitting the use by a shareholder of proxy solicitation materials supplied by an issuer of securities for the purpose of nominating individuals to membership on the board of directors of the issuer, under such terms and conditions as the Commission determines are in the interests of shareholders and for the protection of investors.<sup>169</sup>

Despite the clear statement by Congress that the SEC “may” issue a proxy access rule, the D.C. Circuit, through a unanimous panel of three conservative judges,<sup>170</sup> said the SEC “may not.”<sup>171</sup> When Congress has legislated so specifically, judicial deference to agency action should be at its

<sup>164</sup> See, e.g., *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1221–22 (D.C. Cir. 2012); *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *Fin. Planning Ass’n v. SEC*, 482 F.3d 481 (D.C. Cir. 2007); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059 (D.C. Cir. 2007), *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010); *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006).

<sup>165</sup> *Bus. Roundtable*, 647 F.3d 1144 (D.C. Cir. 2011).

<sup>166</sup> See, e.g., Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 *BUS. LAW.* 329 (2010); Joseph A. Grundfest, *The SEC’s Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 *BUS. LAW.* 380 (2010); Lucian A. Bebchuk, *Symposium on Corporate Elections*, Harvard Law and Economics Discussion Paper No. 448 (Oct. 3, 2003), <http://ssrn.com/abstract=471640>; see also *Towards a True Corporate Republic Strine*, *supra* note 73.

<sup>167</sup> 17 CFR § 240.14a–8 (2010).

<sup>168</sup> See generally Leo E. Strine, Jr., *Breaking the Corporate Governance Logjam in Washington*, 63 *BUS. LAW.* 1079, 1102–03 (2008).

<sup>169</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, title IX, §971(b), 124 Stat. 1915 (2010) (emphasis added).

<sup>170</sup> Then-Chief Judge David Sentelle and Judge Douglas Ginsburg (who authored the decision) were both appointed by President Reagan; Judge Janice Rogers Brown was appointed by President George W. Bush.

<sup>171</sup> *Bus. Roundtable*, 647 F.3d at 1148 (“We agree with the petitioners and hold the Commission acted arbitrarily and capriciously . . .”).

zenith, whatever the substantive merits of the agency's decision.<sup>172</sup> Instead, the persnickety examination of the SEC's deliberative process by the D.C. Circuit evinced none of the deference traditional under APA review,<sup>173</sup> and held the SEC to a standard that the D.C. Circuit's own decision could never meet. The D.C. Circuit's decision muses through a series of questions that the SEC supposedly did not consider deeply enough, most of which reflected issues that the interests opposing federal proxy access had argued to the SEC in the extensive record before it.<sup>174</sup> For instance, the Court determined that "the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."<sup>175</sup> But the court then reviewed the factual findings that the SEC did make in crafting its final rule, and observed that "[t]he Commission acknowledged the numerous studies submitted by commenters" arguing against the rule it eventually implemented.<sup>176</sup> The Court also recognized that the SEC revised its original proposal in response to the problems raised by commentators.<sup>177</sup>

The decision never acknowledges that the underlying question was not one susceptible to a mathematical answer, and thus seems more indicative of judges whose underlying view of the policy matter was different from that of the SEC. For example, rather than defer to the SEC's expertise in evaluating the evidence for and against the rule, the D.C. Circuit opined that, in its view, the studies that the SEC relied upon were "relatively unpersuasive."<sup>178</sup>

---

<sup>172</sup> See *Chevron*, 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."); see also *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (restating this principle from *Chevron* and explaining that "any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute"); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 448 (1987) ("In that process of filling 'any gap left, implicitly or explicitly, by Congress,' the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program.") (quoting *Chevron*, 467 U.S. at 843)).

<sup>173</sup> See Sunstein & Vermeule, *supra* note 153, at 441 ("*Business Roundtable* represents an excessively aggressive exercise of the power of judicial review, with undue second-guessing of the complex administrative record.")

<sup>174</sup> See *Bus. Roundtable*, 647 F.3d at 1150 ("The petitioners also maintain, and we agree, the Commission relied upon insufficient empirical data when it concluded that Rule 14a-11 will improve board performance and increase shareholder value by facilitating the election of dissident shareholder nominees."); *id.* at 1151 ("[T]he Commission discounted the costs of Rule 14a-11—but not the benefits—as a mere artifact of the state law right of shareholders to elect directors.")

<sup>175</sup> *Id.* at 1148–49.

<sup>176</sup> See *id.* at 1150.

<sup>177</sup> *Id.* at 1153.

<sup>178</sup> *Id.* at 1151.

As someone who disagreed with the SEC's policy judgment, I found the decision to be a guilty pleasure. I did not think federal proxy access was a good idea and, on that level, I suppose I was pleased. But I felt guilty because the decision made no sense to me as a matter of administrative law, or of judicial restraint. Anyone involved in the proxy access debate would have to concede that the road to the rule's adoption involved no short cuts, no lack of public input, and no arbitrary or capricious decision-making.<sup>179</sup> As much as I did not think federal proxy access was a worthwhile reform, I could not in good faith suggest that those who advocated it, much less the SEC Commissioners who voted to approve it, were acting irrationally in the sense required by the APA.

The D.C. Circuit's decision to strike down the SEC's proxy access rule is just one example. As the *Business Roundtable* court itself emphasized,<sup>180</sup>

---

<sup>179</sup> The SEC's briefing to the D.C. Circuit details the extensive process undertaken by the agency in formulating its final rule. To wit, the SEC received approximately 600 comment letters for and against the proposed rule. Brief of Respondent at 7, *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (No. 10-1305). The SEC then took into account the commenters' concerns, and made several modifications to its proposal before enacting the final rule. *Id.* at 9. The SEC's brief also clarifies that the agency evaluated a number of studies regarding the effect of the rule, and ultimately determined that the benefits of the proposal outweighed the costs along a variety of dimensions. *Id.* at 10–21. For that reason, a number of distinguished scholars who do not necessarily find favor with the SEC's approach to proxy access share the view that the D.C. Circuit showed too little deference in striking it down. See, e.g., John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 *YALE L.J.* 882, 919 (2015) (explaining that the D.C. Circuit in *Business Roundtable* "ignored precedents establishing a 'deferential' standard of review under the APA and substituted its own judgment for that of the SEC in evaluating the existing research to proxy contests"); James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 *TEX. L. REV.* 1811, 1836 (2012) ("Stunningly, *Business Roundtable* makes no reference whatsoever to the Dodd-Frank Act's express authorization for a rule providing proxy access or note that the SEC acted pursuant to that authority. The grant of authority to the SEC was not only unqualified, but clearly anticipated that the SEC would adopt a rule that provided terms and conditions for what the agency believed was appropriate proxy access."); Jill E. Fisch, *The Long Road Back: Business Roundtable and the Future of SEC Rulemaking*, 36 *SEATTLE U. L. REV.* 695, 697–98 (2013) ("Bad rules make bad law, and Rule 14a-11 was arguably a bad rule. But the flaws in SEC rulemaking are quite different from those identified by the D.C. Circuit. At the same time, the *Business Roundtable* decision was itself flawed. In evaluating the SEC's decision to adopt a proxy access rule, the D.C. Circuit completely disregarded the congressional policy judgments reflected in Dodd-Frank. Congress played a critical role by explicitly authorizing the SEC to adopt a proxy access rule. By substituting its own policy judgment for that of Congress, the D.C. Circuit threatens not just the ability of administrative agencies to formulate regulatory policy, but also the ability of Congress to direct agency policymaking."); *id.* at 700 ("[The D.C. Circuit] did not simply fault the SEC's rulemaking procedures, it characterized the SEC as acting 'inconsistently and opportunistically' and its reasons for action as 'unutterably mindless.'" (quoting *Bus. Roundtable*, 647 F.3d at 1148, 1156)).

<sup>180</sup> *Bus. Roundtable*, 647 F.3d at 1148 ("We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again—as it did most recently in *American Equity Investment Life Insurance Company v. SEC*, 613 F.3d 166, 167–68 (D.C. Cir. 2010), and before that in *Chamber of Commerce*, 412 F.3d at 136—adequately to assess the economic effects of a new rule."). Professor Fisch contends that these two cases, along with several others, "suggest[ ] some degree of distrust of the SEC's policymaking judgments." Fisch, *supra* note 179, at 701–704; see also *NetCoalition v. SEC*, 615 F.3d 525, 544 (D.C. Cir. 2010) (invalidating an SEC rule approving a requested fee change by a registered

the D.C. Circuit had previously invalidated SEC action in two other recent cases, *American Equity Investment Life Insurance Company v. SEC*<sup>181</sup> and *Chamber of Commerce v. SEC*.<sup>182</sup> Although the U.S. Supreme Court has not hesitated to rein in circuit courts in other areas,<sup>183</sup> and has reversed the D.C. Circuit in some important cases,<sup>184</sup> the Court has never repudiated the D.C. Circuit's intensive "hard look" approach, at least not as applied to the substance of agency decision-making.<sup>185</sup> This leaves financial regulators knowing that their regulations will face withering scrutiny, a reality that can only enhance the clout of the industrial opponents of regulation.<sup>186</sup>

---

self-regulatory organization); *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 492 (D.C. Cir. 2007) (invalidating an SEC rule broadening an exemption for broker-dealers from regulation under the Investment Advisers Act); *Goldstein v. SEC*, 451 F.3d 873, 884 (D.C. Cir. 2005) (invalidating an SEC rule requiring hedge fund registration); Coates, *supra* note 179, at 915 ("Yet [*Chamber of Commerce*] was only the first of a rash of judicial interventions into the financial regulatory process, each opinion growing steadily less deferential, culminating in the 2011 case *Business Roundtable v. SEC*.").

<sup>181</sup> 613 F.3d 166, 168 (D.C. Cir. 2010).

<sup>182</sup> 412 F.3d 133, 136 (D.C. Cir. 2005).

<sup>183</sup> The Supreme Court reviews very few cases per year, but the majority of those from Circuit Courts represent reversals; for the years 1999 to 2008, the median Supreme Court reversal rate for all circuits was 68.29%. Cases from the D.C. Circuit were most likely to be reviewed (0.235% of cases, compared to a 0.108% median rate of review for all circuits), but the Circuit enjoys one of the lowest reversal rates (64.52%). Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, 2 LANDSLIDE 5 (Jan.–Feb. 2010), [http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010\\_Hofer.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010_Hofer.authcheckdam.pdf), archived at <https://perma.cc/23D2-SZS9>; see also *supra* note 18 (discussing the Ninth Circuit being scolded by the Supreme Court).

<sup>184</sup> See, e.g., *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012) (the D.C. Circuit held that the EPA exceeded its statutory authority in implementing its Transport Rule related to inter-state air pollution; the U.S. Supreme Court reversed, holding that the D.C. Circuit placed requirements on the EPA not imposed by Congress), *rev'd and remanded*, 134 S. Ct. 1584 (2014).

<sup>185</sup> See Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 441–50 (2009) (discussing the "three iterations" of the hard look doctrine, including procedural hard look, quasi-procedural hard look, and substantive hard look, and noting that although the Supreme Court rejected procedural hard look in *Vermont Yankee*, it has not "definitively addressed" quasi-procedural or substantive hard look review).

<sup>186</sup> In a penetrating and thorough consideration of the influence judicial decisions have had on the ability of federal regulators to adopt regulations of the financial markets, Professor Coates marshals arguments and evidence suggesting, among other things, that having judges require agencies to engage in necessarily imprecise forms of cost-benefit analysis, and then subjecting the agencies to generalist judicial review of the arbitrariness of the resulting product multiplies the possibility for arbitrary results and other adverse effects such as: (1) dissuading agencies from proceeding with regulatory action they believe to be in the public interest, but fear will be overturned by litigation or, at the very least, enmesh the agency in costly and time-consuming court battles; (2) increasing the influence of moneyed interests more likely to engage in regulatory and litigation battles than ordinary citizens; and (3) enhancing the possibility that judges of various political inclinations can overturn agency action not on neutral principles of administrative law, but on the basis of their own view of public policy. Coates, *supra* note 179, at 954–55, 1006–07. For that reason, Professor Coates argues for greater judicial restraint, and for allowing more democratic means of accountability such as elections and legislative action, to discipline agencies that may have overreached in arguable ways. *Id.* at 1007.

Demonstrating yet another interactive effect of the recent federal decisions, a corporate law scholar opposed to a petition to the SEC asking that agency to require that corporations dis-

The U.S. Supreme Court has itself moved away from its traditional deference to agency action in several key cases, many involving environmental regulations.<sup>187</sup> In *Rapanos v. United States*,<sup>188</sup> for instance, a plurality of the Court determined that the U.S. Army Corps of Engineers' interpretation of the Clean Water Act<sup>189</sup> was not entitled to deference, on the important subject of whether the agency could require permits for the development of wetlands that were connected by drains and eventually flowed into Lake Huron.<sup>190</sup> Similarly, in *Utility Air Regulatory Group v. EPA*,<sup>191</sup> the Supreme Court determined that the EPA's attempt to regulate greenhouse gas emissions went beyond its statutory authority.<sup>192</sup> The Court's approach in these cases is at odds with many of the Justices' professed desire to defer to agency interpretations,<sup>193</sup> although, as scholars have noted, the level of deference afforded by any individual Justice in practice appears to differ depending on the nature of the agency rule at stake, as much as on the standard of judicial review applied.<sup>194</sup>

---

close their political contributions has argued that if the agency adopts the rule requested by the petition, the D.C. Circuit should and likely will use its precedent from *Business Roundtable v. SEC* to strike it down. See J.W. Verret, *The Securities Exchange Act is a Material Girl, Living in a Material World: A Response to Bebchuk and Jackson's "Shining Light on Corporate Political Spending"*, 3 HARV. BUS. L. REV. 453, 470–71 (2013) ("If the SEC moves forward with their rulemaking petition, it is highly likely that petition will be either vacated or remanded by the D.C. Circuit and face the same fate as the proxy access proposal remanded in *Business Roundtable*.").

<sup>187</sup> See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (discussing the degrees of deference afforded by the Court, including based on subject matter and agency).

<sup>188</sup> 547 U.S. 715, 739 (2006).

<sup>189</sup> 33 U.S.C. §§ 1251–1387 (2012).

<sup>190</sup> See *Rapanos*, 547 U.S. at 715 (2006); see also *id.* at 809–10 (Stevens, J., dissenting) ("By curtailing the Corps' jurisdiction of more than 30 years, the plurality needlessly jeopardizes the quality of our waters. In doing so, the plurality disregards the deference it owes the Executive, the congressional acquiescence in the Executive's position that we recognized in *Riverside Bayview*, and its own obligation to interpret laws rather than to make them.").

<sup>191</sup> 134 S. Ct. 2427 (2014).

<sup>192</sup> *Id.* at 2445–49; see also *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (holding that the EPA unreasonably deemed cost irrelevant when it decided to regulate power plants under the Clean Air Act); *Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 486 (2001) (holding in part that the Clean Air Act barred the EPA from considering implementation costs in setting its air quality standards and that the agency's interpretation of the Act was not reasonable).

<sup>193</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) ("Ambiguity means Congress intended agency discretion. Any resolution of the ambiguity by the administering agency that is authoritative—that represents the official position of the agency—must be accepted by the courts if it is reasonable."); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring) ("[C]ourts must give effect to a reasonable agency interpretation of a statute unless that interpretation is inconsistent with a clearly expressed congressional intent.").

<sup>194</sup> Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 826 (2006) ("The most conservative justices are 30 percentage points more likely to vote to validate agency interpretations that are coded as conservative than to validate agency interpretations coded as liberal. By contrast, the more liberal justices are 27 percentage points more likely to vote to validate agency interpreta-

But even on a doctrinal level, there is room for concern.<sup>195</sup> In an important recent case,<sup>196</sup> a majority of the Supreme Court adhered to the deferential approach taken in *Chevron*, *Vermont Yankee*,<sup>197</sup> and *Auer*,<sup>198</sup> but influential members of the Court's conservative majority have openly signaled their break with those precedents,<sup>199</sup> or their inclination to do so.<sup>200</sup> For

---

tions coded as liberal than to validate those coded as conservative . . . . Consider also a remarkable fact: Justice Breyer, the Court's most vocal critic of a strong reading of *Chevron*, is the most deferential justice in practice, while Justice Scalia, the Court's most vocal *Chevron* enthusiast, is the least deferential.”)

<sup>195</sup> During the Roberts Court era, the Court itself has issued decisions that overturn agency action in a spirit more like that of the liberal era of hard look review on the D.C. Circuit. For an incisive argument that the Court's decision in *Massachusetts v. EPA*, 547 U.S. 497 (2007), which held that the EPA had improperly failed to make a determination whether greenhouse gases endangered the public health and welfare, was erroneous because the statute gave the agency discretion to make a reasoned decision about when it should grapple with certain issues and had done so, see Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. 565, 615 (2014).

<sup>196</sup> *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015).

<sup>197</sup> *Vt. Yankee v. NRDC*, 435 U.S. 519 (1978).

<sup>198</sup> *Auer v. Robbins*, 519 U.S. 452 (1997).

<sup>199</sup> See *Perez*, 135 S. Ct. at 1225 (Thomas, J., concurring) (“By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case.”); *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring) (“I write separately to note that [the EPA's] request for deference raises serious questions about the constitutionality of our broader practice [under *Chevron*] of deferring to agency interpretations of federal statutes.”); Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law* 25 (July 16, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2631873](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631873), archived at <https://perma.cc/4HZM-XXEE>) (“Justice Thomas offers the somewhat different theory that Congress may not delegate ‘binding’ interpretive power to agencies construing their own regulations, because as a constitutional matter Congress does not possess the ‘judicial power’ in the first place, and therefore cannot give it away. The theory does have the virtue of novelty. But the problems that afflict it are so many, and so transparent, that one stares puzzled at Thomas’ opinion—can it really be saying what it seems to be saying?”).

<sup>200</sup> See *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring) (“I would therefore restore the balance originally struck by the APA with respect to an agency’s interpretation of its own regulations, not by rewriting the Act in order to make up for *Auer*, but by abandoning *Auer* and applying the Act as written.”); *id.* at 1210–11 (Alito, J., concurring) (“The opinions of Justice Scalia and Justice Thomas offer substantial reasons why the *Seminole Rock* doctrine may be incorrect . . . . I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument.”); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1341–42 (2013) (Scalia, J., dissenting) (“*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power . . . . In any case, however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers.”); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (“We have not been asked to reconsider *Auer* in the present case. When we are, I will be receptive to doing so.”); see also Miles & Sunstein, *supra* note 194, at 831 (“Justice Thomas and Scalia, at 52.2 percent and 53.6 percent, respectively, have the lowest validation rates in *Chevron* cases.”). See generally Leandra Lederman & Joseph C. Dugan, *King v. Burwell, What Does it Portend for Chevron's Domain?*, 2015 PEPP. L. REV. 72 (suggesting that the Supreme Court's decision to uphold regulations extending the Premium Tax Credit to qualifying taxpayers, but expressly on grounds other than *Chevron*, may signal an intent on the part of the Chief Justice and Justices Alito, Kennedy, and Thomas to abandon it, and waning support for *Chevron* by Justice Scalia, its previously passionate supporter).

For a thorough discussion of the recent decisions in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito “have expressed, or joined expressions of, strong opposition to

present purposes, my point is not that the influence of political and ideological views of judges solely manifests itself in decisions of judges who call themselves conservative. Rather, it is that the proclaimed adherence to principles of restraint and deference to the political branches among such judges might have provided the prospect for a more restrained approach to administrative law that would have diminished the influence of the subjective political views of judges over such cases, and left the political process, rather than judicial process, as the primary avenue for recourse available to those who disagree with the policy judgment underlying agency action.

As to the topic of administrative law, it is especially important to emphasize the grey. Numerically, it is possible to characterize the Supreme Court's recent decisions applying the APA as quite deferential as an overall matter.<sup>201</sup> And, to date, the Court has hewed at a level of stated jurispru-

---

several of the key pillars of the modern administrative state," see Lubbers, *supra* note 153, at 20. As Professor Lubbers puts it: "We will see where this may end. Will *Chevron* and *Auer* survive? Will the non-delegation doctrine be revived? Will arbitrary-and-capricious review become a harder look? Will agency adjudicative power be curtailed? Will even *Vermont Yankee* eventually come to be questioned? There are some inconsistencies among these opinions, and I may be reading too much into them, since most of them are not (yet?) majority opinions, but the signals of opposition are becoming too strong to ignore." *Id.* at 20–22; see also Kevin O. Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 234–35 (2013) (discussing Chief Justice Roberts and Justices Scalia and Alito's interest in reconsidering *Auer* deference); Lederman & Dugan, *supra*, at 4 ("The fact that the Court's failure to accord *Chevron* deference was unnecessary to the result in [*King v. Burwell*, 135 S. Ct. 2480 (2015)] may say something about the future of *Chevron*: the deference doctrine may not be as bedrock as it once seemed.").

<sup>201</sup> In a provocative article, Professors Gersen and Vermeule take the comparably sunny view that the Supreme Court has set a deferential tone that should not be lost in the loud debate about high-profile losses by regulatory agencies. They note that "agencies almost never lose" at the Supreme Court and that they have won 92% of arbitrary and capricious challenges since 1982. Gersen & Vermeule, *Thin Rationality Review*, *supra* note 158, at 1358. According to Gersen and Vermeule, "[s]o long as agencies comply with some minimal rationality requirements, they usually win the litigation." *Id.* at 13. Even Professors Gersen and Vermeule, however, temper their optimistic view with a few caveats. First, they concede that although the Supreme Court itself has sided largely with the agencies whose regulations are under challenge, that has not been so true of the lower federal courts. Although they attribute some of this to an ideological bias of federal judges against pro-labor rulings of the NLRB, *id.* at 9, that bias actually tends to confirm some of the effects of federal judicial decisionmaking on the balance of power in society between corporations, on the one hand, and more ordinary workers, on the other. From that perspective, the fact that the regulatory agency that enforces labor rights faces a high risk of judicial intervention is not comforting. Second, although Professors Gersen and Vermeule argue for a more deferential reading of key Supreme Court cases, they acknowledge that other scholars they respect, like Professor Sunstein, read the cases a bit differently. *Id.* at 16–17. Finally, perception matters in this context. When agencies understand that litigation has a non-frivolous chance of success and may also be time-consuming and expensive, agencies may fail to take action they otherwise would. From the standpoint of corporations and those whose operations they affect, this may mean that agencies tend to be less than optimally willing to adopt new regulations that address corporate externalities. Professors Gersen and Vermeule seem to understand this risk, and to be encouraging agencies to ignore certain high profile reversals of agency action and understand that the federal courts remain likely to uphold agency action. *Id.* at 11; see also Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 110 (2011) (noting "the agency's own incentives to mollify litigious stakeholders in order to get their rule promulgated in a reasonable period of time").

dence to an approach that requires circuit courts to be deferential.<sup>202</sup> But, both the reality of very high salience regulatory action that has been overturned—on topics of major societal importance like greenhouse gas emissions and of intense interest group concern like proxy access—and the perception that regulations can suffer death by judicial edict, has the effect of increasing corporate influence in an arena in which there was already strong reason to believe that moneyed interests' views were too influential, when compared to those of more ordinary Americans.<sup>203</sup>

So, too, does another related development. Alongside the seemingly more intensive administrative review of regulators of corporations, there has been an emerging willingness on the part of the federal judiciary to strike down economic regulations as violations of corporate First Amendment rights. Dean Robert Post and Amanda Shanor have argued that one of the techniques now being deployed by judges inclined to overrule economic regulation is giving a newly expansive reading of the First Amendment, so expansive as even to strike down a county's prohibition on firearms sales at the county fairs on free speech grounds.<sup>204</sup> They point to that Ninth Circuit decision and a decision of the D.C. Circuit striking down a tourist guide licensing scheme as reflecting a turn away from the long-accepted rationality standard of review for economic regulation and toward a *Lochner*-era substantive due process type of review, now justified in the guise of vindicating the free speech rights of listeners of commercial speech.<sup>205</sup>

---

<sup>202</sup> See Sunstein & Vermeule, *supra* note 199, at 6 ("In [the recent cases of *Dep't of Transp. v. Ass'n of Am. R.R.* and *Perez v. Mortgage Bankers Ass'n*], adventurism by the D.C. Circuit was overturned . . . . In both, Justice Thomas wrote separately to express views that are pure expressions of New Coke. And in both, the Court as a whole showed no enthusiasm for what Thomas was offering.").

<sup>203</sup> See Wagner, et al., *supra* note 201, at 117 ("Thus, for highly complex and technical rules, the comment activity may be skewed in favor of industry, with the resulting rulemakings operating at least in partial shade, free of oversight and input from the full range of affected groups, particularly those representing the public interest."); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 575 (2014) ("The advantage of business-oriented groups in shaping policy outcomes reflects their numerical advantage with the interest-group universe in Washington, and also the infrequency with which business groups are found on simultaneously on both sides of a proposed policy change."); *supra* note 58 and accompanying text (explaining industry's material spending advantage on lobbying and political activity as compared with labor unions and individuals).

<sup>204</sup> Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 173–74 (2015) (citing *Nordyke v. Santa Clara Cty.*, 110 F.3d 707 (9th Cir. 1997)); see also Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 181 ("If banning sales—because they involve the communicative elements of offer and acceptance—triggers First Amendment review, little if any commercial activity falls outside of the First Amendment's ambit." (citing *Nordyke*)).

<sup>205</sup> Post & Shanor, *supra* note 204, at 177–78, 181–82 (citing *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014)); Shanor, *supra* note 204, at 18 ("[S]ome circuits have implied or assumed that the First Amendment grants commercial speakers an autonomy right. Exemplars are the D.C. Circuit's *Edwards v. District of Columbia*, a case in which the court invalidated the District of Columbia's business licensing scheme for tour guides as violating the First Amendment, and *R.J. Reynolds Tobacco Co. v. FDA*, in which the same court held the FDA's graphic cigarette warning labels unconstitutional.").



What may therefore be a genuine increase in the likelihood that regulatory action will be struck down also has a natural effect on all prior periods relevant to regulatory decision-making. From the crafting of the regulation itself through the decision whether to settle litigation challenging it,<sup>206</sup> the viability of the litigation tool in the hands of wealthy opponents of regulatory action<sup>207</sup> may inhibit an agency from taking or adhering to the regula-

---

In another notable instance of the D.C. Circuit telling the SEC that it “may not” do what Congress said it “may” do, the D.C. Circuit struck down an SEC rule requiring public companies to make truthful disclosures regarding their involvement in the trade in minerals mined in certain nations (so-called “conflict minerals”). See *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015). In Dodd-Frank, Congress explicitly authorized the SEC to issue regulations requiring that businesses using “conflict minerals” investigate and disclose the minerals’ origin. 15 U.S.C. § 78m (p)(1)(A) (2012). When the SEC, however, adopted an implementing regulation, the D.C. Circuit ruled that the regulation was invalid as an unconstitutional requirement of compelled speech. As in *Business Roundtable* where I did not personally think federal proxy access was good public policy, I was not a fan of using the securities laws as a method of addressing the legitimate concerns about the exploitation of workers in the mining industry in certain nations. But I, frankly, do not grasp how Congress or the SEC is infringing on any First Amendment right by requiring public companies to make accurate disclosures about their activities for the benefit of the investing public and others. As Judge Srinivasan in dissent noted: “Issuers of securities must make all sorts of disclosures about their products for the benefit of the investing public. No one thinks that garden-variety disclosure obligations of that ilk raise a significant First Amendment problem. So here, there should be no viable First Amendment objection to a requirement . . . to disclose the country of origin of a product’s minerals—including, say, whether the product contains specified minerals from . . . the site of a longstanding conflict financed in part by trade in those minerals.” *Nat’l Ass’n of Mfrs.*, 800 F.3d at 531 (Srinivasan, J., dissenting). As with the other First Amendment cases cited striking down economic regulations, this decision involves an intensive regulation of economic activity that would have been virtually unthinkable a generation ago. Judge Srinivasan observed that: “Until 1976, commercial speech received no constitutional protection at all. When the Supreme Court eventually extended ‘First Amendment protection to commercial speech,’ it did so primarily because of the ‘value to consumers of the information such speech provides.’” *Id.*

<sup>206</sup> See Wagner et al., *supra* note 203, at 118 (observing an agency’s willingness “to make changes roughly proportional to the number of comments” when a “detailed and well-supported comment raises a litigation risk”); Coates, *supra* note 179, at 955 (recognizing that agencies may hesitate to propose reform because of “the ongoing threat of litigation” and the “risk [of] another morale-draining, resource-depleting court loss”); Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & Soc’y REV. 735, 756 (1996) (“With so much settlement activity, interest groups sometimes file an action against the EPA just to maintain a seat at the bargaining table.”).

<sup>207</sup> As business interests challenging regulatory action have found federal courts more receptive to their arguments in litigation, some would contend that that the federal courts have also made it harder for other plaintiffs to use the litigation process to hold corporations accountable for adhering to the law through the courts. In a series of decisions, the Court has tightened restrictions on standing and otherwise raised the bar on the claims that the Court will hear that are brought by human plaintiffs (or public interest groups). See, e.g., *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013) (narrowing the definition of a supervisor to make it harder for employees to sue their employers for workplace harassment under Title VII); *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013) (holding that human rights, labor, legal, and media organizations lacked standing to challenge a provision of the Foreign Intelligence Surveillance Act that permitted surveillance of non-American individuals); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) (holding that taxpayers lacked standing to challenge tax credits given for contributions to school tuition organizations, which could be used to pay for private schools, including religious schools, notwithstanding the Court’s holding in *Flast v. Cohen*, 392 U.S. 83 (1942), that taxpayers do have standing to challenge government expenditures in

tory action that it may deem optimal, and encourage it to compromise the public interest on the view that it can do only the suboptimal given the reasonable possibility that a court may throw out everything the agency seeks to accomplish.<sup>208</sup>

---

violation of the Establishment Clause); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *overturned due to legislative action* (Jan. 29, 2009) (holding that a plaintiff's Title VII claim of pay discrimination was time-barred because her employer's first decision to pay her a discriminatory wage set the clock, not each year that her employer failed to give her raises in line with her male colleagues); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006) (holding that taxpayer standing was insufficient to challenge Ohio's plan to give DaimlerChrysler tax breaks worth \$280M); *see also Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (rejecting standing of an organization dedicated to protecting the environment to challenge U.S. Forest Service regulations).

At the same time, the Court has heightened the requirements to gain class status. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (increasing the requirements necessary to gain class action status, and reversing the certification of the plaintiffs' class because the plaintiffs' proposed methodology of damages was not sufficiently rigorous); *id.* at 1435–36 (Ginsburg and Breyer, JJ., dissenting) (pointing out that the Court spontaneously rephrased the appellant's question to make its broad ruling); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2563 (2011) (holding that plaintiffs' claims were not sufficiently "common" to support a class action suit because corporation's policy was to give discretion to local managers, despite evidence suggesting that "gender bias suffused Wal-Mart's company culture," to quote Justice Ginsburg's dissent); *see also AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts; thus, such waivers are enforceable).

Some commentators fear that as a result of these developments fewer cases will be brought against corporations, especially by those with relatively small claims, as is frequently true for consumers or employees alleging wrongdoing by corporations. *See* Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1740 (2014); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 322 (2013). Likewise, there is concern among many that decisions of the Roberts Court tightening up the pleading requirements applicable under Rules 12(b)(6) of the Federal Rules of Civil Procedure, *e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), will have a disproportionate impact on litigants attempting to sue corporate interests, because, unlike corporations suing to advance their interests, these litigants are less likely to have access to the information that this interpretation given to these heightened standards by some courts arguably requires without access to the discovery available only if their complaint passes muster in the first place. Although these topics are beyond the scope of this Article, it is important to note that there is plausibility to the argument that the sum total of these decisions also has the likely effect of increasing corporate power and discretion by diminishing the ability of litigants to use the litigation process as a tool to constrain corporate externalities.

<sup>208</sup> *See, e.g., Silla Brush, U.S. Regulators 'Paralyzed' by Cost-Benefit Suits, Chilton Says*, BLOOMBERG BUS. (Mar. 8, 2012, 6:00 AM), <http://www.bloomberg.com/news/articles/2012-03-08/u-s-regulators-paralyzed-by-cost-benefit-suits-chilton-says>, *archived at* <https://perma.cc/7ER6-W8X4> ("Wall Street banks are using the threat of lawsuits to prevent regulators from writing rules mandated by the Dodd-Frank Act . . . . 'Some regulators live in constant fear and are virtually paralyzed by the threat' that they will face 'spuriously' filed suits alleging that the costs and benefits of their rules weren't adequately considered." (quoting Bart Chilton, former Commissioner of the CFTC)). In the aftermath of the 2011 *Business Roundtable* decision, the SEC's rulemaking pursuant to the Dodd-Frank Act "slowed by about half." Jesse Hamilton, *Dodd-Frank Rules Slow at SEC After Court Cost-Benefit Challenge*, BLOOMBERG BUS. (Mar. 6, 2012, 12:01 AM), <http://www.bloomberg.com/news/articles/2012-03-06/dodd-frank-rules-slow-at-sec-after-court-cost-benefit-challenge>, *archived at* <https://perma.cc/PK7X-RQW5>. SEC officials cited the D.C. Circuit's decision as "[t]he most important factor" in the slowdown. *Id.* Chairman Mary Shapiro observed that the agency is "clearly taking more time on

And it must be remembered that the administrative process is often the last part of an arduous gantlet that must be run by advocates of regulatory action. That gantlet often starts with the electoral process itself, runs through the congressional process and presidential approval, and concludes with the implementation of important legislation through administrative action.<sup>209</sup> In a system that was designed long ago to have more than a few natural brakes,<sup>210</sup> judicial action that provides additional opportunities for interest groups to impede regulatory action is likely to have the practical

---

cost-benefit analysis.” *Id.* “The court decision was ‘like sticking a two-by-four in the spokes’ of SEC rulemaking.” *Id.* (quoting Lynn E. Turner, former Chief Accountant of the SEC).

<sup>209</sup> In an important paper, Professors Gilens and Page generated new empirical evidence illustrating just how influential money is to public policy outcomes in our nation. Gilens & Page, *supra* note 203, at 564. In a detailed empirical study of policy cases from 1981 to 2002—before *Citizens United* was decided—they analyze how much influence over public policy different groups, such as average citizens, economic elites, and organized interest groups of various types, have over the likelihood that their preferred policies will in fact become policy of the polity. They find that the influence of business-oriented groups is “nearly twice as large as that” for what they call “mass-based groups,” or groups representing interests such as workers or retirees. *Id.* at 574. They also find that policies preferred by economic elites and business interests are far more likely to become adopted government policy than policies supported by a much larger segment of the entire population, what they call “average citizens,” and, critically, that when economic elites and business interests oppose a new policy, that policy is very unlikely to be adopted even if it has strong support among average citizens. *Id.* at 572. Gilens and Page are careful to point out that our system of government is biased toward the status quo, and that economic elites and business interests themselves face difficulties when advocating the adoption of new policies. But they find that these moneyed interests have profound advantages on both offense and defense in the policy game, and that average Americans are severely hampered in playing offense. *Id.* at 573. They summarize their findings this way: “[O]ur analyses suggest that majorities of the American public actually have little influence over the policies our government adopts. . . . [W]e believe that if policymaking is dominated by powerful business organizations and a small number of affluent Americans, then America’s claim to being a democratic society are seriously threatened. *Id.* at 577. *But see* MARK A. SMITH, *AMERICAN BUSINESS AND POLITICAL POWER: PUBLIC OPINION, ELECTIONS, AND DEMOCRACY* 207–08 (2010) (finding that policymaking “is highly responsive to public opinion” and that businesses can best influence legislation by working to change public opinion); FRANK R. BAUMGARTNER, ET AL., *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* 201 (2009) (“Taken as a group, corporations, trade associations, and professional associations are well endowed compared to others. Labor unions have substantial resources of certain kinds, and they play a major role in electoral politics, as reflected in their large average campaign contributions.”); *id.* at 204 (arguing that there is “close to zero” correlation between resources spent on lobbying and lobbying success).

<sup>210</sup> *See* James Fallows, *How America Can Rise Again*, ATLANTIC (Jan./Feb. 2010), <http://www.theatlantic.com/magazine/archive/2010/01/how-america-can-rise-again/307839/> archived at <https://perma.cc/CE9G-NTEP> (“When the U.S. Senate was created, the most populous state, Virginia, had 10 times as many people as the least populous, Delaware. Giving them the same two votes in the Senate was part of the intricate compromise over regional, economic, and slave-state/free-state interests that went into the Constitution. Now the most populous state, California, has 69 times as many people as the least populous, Wyoming, yet they have the same two votes in the Senate. A similarly inflexible business organization would still have a major Whale Oil Division; a military unit would be mainly fusiliers and cavalry. No one would propose such a system in a constitution written today, but without a revolution, it’s unchangeable. Similarly, since it takes 60 votes in the Senate to break a filibuster on controversial legislation, 41 votes is in effect a blocking minority. States that together hold about 12 percent of the U.S. population can provide that many Senate votes. This converts the Senate from the ‘saucer’ George Washington called it, in which scalding ideas from the more temperamental House might ‘cool,’ into a deep freeze and a dead weight.”).

effect of increasing the power of corporations, whose narrow self-interest, rather than a conception of the broader public interest, is the principal motivation for their involvement in the regulatory process.<sup>211</sup>

#### V. THE RECENT DIRECTION OF FEDERAL CASES AFFECTING CORPORATE INFLUENCE IS NOT DICTATED BY PRIOR PRECEDENTS

A final consideration must be addressed. Namely, is this trend toward increasing the power of corporations and moneyed interests one that is primarily driven by the application of settled legal doctrine, or does it present a willingness of federal judges to themselves change the law? The answer is that many of the decisions this Article addresses involve a departure from accepted principles of judicial restraint. For example, in both *Citizens United* and *Shelby County*, the majority bypassed the typically rigorous prerequisites necessary for the Court to even consider, much less uphold, a challenge to the facial invalidity of a statute.<sup>212</sup> The sum total of these judicial actions, which have the likely effect of increasing the comparative power of corporations over the society that authorizes their creations, is notable for another reason; these actions can be seen as involving a deviation from judicial restraint in two key respects. First, the Supreme Court has moved away from its traditional deference to the political branches. At the same time, the Court has also moved away from its traditional deference to its own decisions under the principle of *stare decisis*. The result in a number of high-profile decisions has been to overturn congressional action and long-standing precedent that served to protect individuals and limit the role of corporations. To quote Justice Breyer's departing message from the 2006 term of the Court: "It is not often in the law that so few have so quickly changed so much."<sup>213</sup>

As the Court recently remarked,

---

<sup>211</sup> See, e.g., Fisch, *supra* note 179, at 722 ("Because regulated entities generally bear the costs of new regulation, the rulemaking process creates incentives for them to highlight and overestimate those costs. The SEC does not receive comparable assistance in evaluating the benefits of its new regulations, which typically inure to the benefit of dispersed and less politically effective investors, consumers, or capital markets. Accordingly, industry groups dominate both the public and private mechanisms for provision of information and influence. They are represented disproportionately in the comment letters and private meetings, and they provide the overwhelming majority of comments that include data, statistics, or alternatives to the proposed rulemakings.")

<sup>212</sup> See *supra* notes 6, 91–93 and accompanying text (explaining how the Court broke from precedent in these decisions); see also *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) ("[T]he cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.")

<sup>213</sup> See Linda Greenhouse, *Justices Limit the Use of Race in School Plans for Integration*, N.Y. TIMES (June 29, 2007), <http://www.nytimes.com/2007/06/29/washington/29scotus.html> (quoting Justice Breyer's speech from the bench while reading his dissent in *Parents Involved*).

Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today’s Court should stand by yesterday’s decisions—is ‘a foundation stone of the rule of law.’ . . . What is more, *stare decisis* carries enhanced force when a decision . . . interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.<sup>214</sup>

Chief Justice Roberts agreed with that sentiment during his confirmation hearing, observing that “a statutory decision is much more likely to be overturned than a constitutional decision just because Congress can address those issues themselves.”<sup>215</sup>

But the current Supreme Court has not always adhered to these principles. As an example, the Court’s decision in *Shelby County* represented both a break with precedent and with the Court’s traditional deference to Congress. The Supreme Court had upheld the same provision of the Voting Rights Act in at least four previous decisions, three of them written by Republican justices.<sup>216</sup> But in *Shelby County*, Chief Justice Roberts and his majority colleagues made their own factual determination that “things have changed [so] dramatically” since the Voting Rights Act was first enacted in 1965, such that the protections of the Act were no longer required,<sup>217</sup> notwithstanding that an overwhelmingly bipartisan group of legislators had made a different determination<sup>218</sup> based on the “voluminous record”<sup>219</sup> before it. This lack of deference may be especially surprising given the con-

---

<sup>214</sup> *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015) (Kagan, J.).

<sup>215</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 270–71 (2005) (statement of John G. Roberts, Jr.), <https://www.gpo.gov/fdsys/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf>, archived at <https://perma.cc/492A-2KGG>; see also *id.* at 55 (“My personal appreciation that I owe a great debt to others reinforces my view that a certain humility should characterize the judicial role. Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire. Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath, and judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.”).

<sup>216</sup> See *Lopez v. Monterey Cty.*, 525 U.S. 266 (1999) (O’Connor, J.); *City of Rome v. United States*, 446 U.S. 156 (1980); *Georgia v. United States*, 411 U.S. 526 (1973) (Stewart, J.); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (Warren, C.J.).

<sup>217</sup> *Shelby Cty.*, 133 S. Ct. at 2616; see also *id.* (“[V]oter turnout and registration rates’ in covered jurisdictions ‘now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.’ The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.” (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009))).

<sup>218</sup> The Voting Rights Act was extended for an additional 25 years in 2006. The extension was approved by a vote of 98-0 in the Senate, and 390-33 in the House. 152 CONG. REC. H5207 (July 13, 2006); 152 CONG. REC. S8012 (July 20, 2006). Quite obviously, these huge supermajorities included many members of Congress from the states subject to the preclearance under the Act.

<sup>219</sup> *Shelby Cty.*, 133 S. Ct. at 2632 (Ginsburg, J. dissenting).

text. As Justice Ginsburg's dissent points out, "When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height."<sup>220</sup>

Likewise, in *Citizens United*, the five-justice majority overturned a law sponsored by a prominent Democratic senator and the Republican presidential nominee in 2008, and passed by a bipartisan group of legislators,<sup>221</sup> a law that continues to be supported by the vast majority of Americans.<sup>222</sup> The Supreme Court thus gave no deference to the judgment of Congress in enacting legislation to deal with an issue that the legislators voting on it surely understood: campaign financing.<sup>223</sup>

The Supreme Court's holding—a facial invalidation that was broader in scope than even the plaintiff *Citizens United* had asked for<sup>224</sup>—also lacked

<sup>220</sup> *Id.* at 2636; see also *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993) (Thomas, J.) ("Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.' This standard of review is a paradigm of judicial restraint. 'The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" (citations omitted)).

<sup>221</sup> H.R. 2356, (107th Cong. (2002)): Bipartisan Campaign Reform Act of 2002 was passed by a vote of 240-189 in the House, and 60-40 in the Senate. See <https://www.govtrack.us/congress/bills/107/hr2356>.

<sup>222</sup> See, e.g., *A New York Times/CBS News Poll on Money and Politics*, N.Y. TIMES (June 2, 2015), <http://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html> (finding that 84% of respondents agree that money has too much influence in American political campaigns; 85% believe that political campaign funding needs either fundamental changes or to be completely rebuilt; and 77% think there should be caps on the amount individual contributors can donate to campaigns); Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 150 n.248 (2012) ("*Citizens United* appears to be a genuinely countermajoritarian decision, albeit not a particularly surprising one given the majority Justices' policy preferences."); Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 105–06 ("*Citizens United* appears to be the most countermajoritarian act of the Court in many decades. Indeed, *Citizens United* is perhaps the most visible such act on an issue of high public salience since the Court's brief encounter with the symbolic issue of flag burning in the late 1980s or the Court's more substantive engagement with the death penalty in its decisions of the 1970s."); Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG POLITICS (Sept. 28, 2015, 5:00 a.m.), <http://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot>, archived at <https://perma.cc/CS4T-V4J8> (finding that 78% of poll respondents "said the *Citizens United* ruling should be overturned, compared with 17 percent who called it a good decision").

<sup>223</sup> *McConnell*, 540 U.S. at 94–95 ("In evaluating § 323, the Court applies the less rigorous standard of review applicable to campaign contribution limits under *Buckley* and its progeny. . . . The less rigorous review standard shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise, and provides it with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the political process' integrity. Finally, because Congress, in its lengthy deliberations leading to BCRA's enactment, properly relied on *Buckley* and its progeny, *stare decisis* considerations, buttressed by the respect that the Legislative and Judicial Branches owe one another, provide additional powerful reasons for adhering to the analysis of contribution limits the Court has consistently followed since *Buckley*.").

<sup>224</sup> "In the District Court, *Citizens United* initially raised a facial challenge to the constitutionality of § 203. In its motion for summary judgment, however, *Citizens United* expressly abandoned its facial challenge, and the parties stipulated to the dismissal of that claim. The District Court therefore resolved the case on alternative grounds, and in its jurisdictional state-

deference to its own precedent; *Citizens United* overturned the Court's ruling on the same issue less than ten years before, in *McConnell v. FEC*.<sup>225</sup> In that 2003 decision, two Justices appointed by Republican presidents, Justices Stevens and O'Connor, upheld restrictions on soft-money contributions by corporations, based in part on the distinctions between corporations and individual citizens.<sup>226</sup>

Another example is *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>227</sup> in which the Supreme Court overruled a nearly 100-year-old precedent to hold that a manufacturer could agree with its distributor to set a minimum price for the manufacturer's goods.<sup>228</sup> The net effect was to make it harder to prove that corporations had colluded.

Combined with these tendencies to stray from two supposedly core principles of judicial restraint, another theme has emerged that has been favorable to corporate interests. Since 1938, when the Supreme Court issued

---

ment to this Court, *Citizens United* properly advised us that it was raising only 'an as-applied challenge to the constitutionality of . . . BCRA § 203.' The jurisdictional statement never so much as cited *Austin*, the key case the majority today overrules." *Citizens United v. FEC*, 558 U.S. 310, 396–97 (2010) (Stevens, J., dissenting) (internal citations omitted). As Chief Justice Roberts observed in his concurrence, "the Court generally does not consider constitutional arguments that have not properly been raised," arguing that such judicial restraint was the reason that the Court had not previously overruled *Austin*. *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring); see also Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, *NEW YORKER* (May 21, 2012), <http://www.newyorker.com/magazine/2012/05/21/money-unlimited>, archived at <https://perma.cc/54TA-7J53> (detailing how the case was one of "modest importance" about a "narrow" issue until the majority of justices decided to take the case "in an entirely new direction").

The Court similarly reached out to decide an issue that was not presented or briefed in *Knox*, in which five justices held that workers could not be compelled to pay union fees under the First Amendment. See 132 S. Ct. at 2297 (Sotomayor, J., concurring) ("The majority agrees that SEIU's actions were at odds with the First Amendment. Yet it proceeds, quite unnecessarily, to reach significant constitutional issues not contained in the questions presented, briefed, or argued. Petitioners did not question the validity of our precedents, which consistently have recognized that an opt-out system of fee collection comports with the Constitution. They did not argue that the Constitution requires an opt-in system of fee collection in the context of special assessments or dues increases or, indeed, in any context. Not surprisingly, respondents did not address such a prospect.") (citations omitted).

<sup>225</sup> 540 U.S. 93 (2003).

<sup>226</sup> See *id.* at 136 ("Our treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits—interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'") (citations omitted); *id.* at 205 ("The latter question—whether the state interest is compelling—is easily answered by our prior decisions regarding campaign finance regulation, which 'represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.' We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against 'circumvention of [valid] contribution limits,") (citations omitted).

<sup>227</sup> 551 U.S. 877 (2007).

<sup>228</sup> See *id.* at 881–882.

its decision in *U.S. v. Carolene Products*,<sup>229</sup> the Court has given special consideration to challenges to legislation targeting specific groups, whose ability to protect themselves through the political process was compromised by virtue of factors such as discrimination, disenfranchisement, or minority status.<sup>230</sup> That approach was reflected in the more intense scrutiny courts gave to government actions that drew lines disadvantageous to “discrete and insular minorities.”<sup>231</sup> The stricter scrutiny given to legislative or regulatory action that had disparate effects on minority groups starkly contrasted with the far more deferential review given to legislative or regulatory action regulating the conduct of economic actors. In that circumstance, the Court typically upheld regulation unless it could not pass mere rationality review.<sup>232</sup>

As the Roberts Court era has proceeded, though, *stare decisis* in this area has eroded.<sup>233</sup> The stricter judicial review that has characterized cases involving governmental decisions that arguably violate the constitutional and legal rights of racial minorities and women has seemed to relax.<sup>234</sup> At the same time, the deferential review traditionally given to economic regulation has intensified.<sup>235</sup> The Supreme Court’s declining deference to the political branches has even generated comparisons to the Court’s much-derided decision in *Lochner v. New York*,<sup>236</sup> by some observers who argue that the current Court’s trajectory raises similar concerns to those that emerge from *Lochner*.<sup>237</sup> And because the Supreme Court’s decisions in certain areas like

<sup>229</sup> 304 U.S. 144 (1938).

<sup>230</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214, 218–20 (1944) (applying strict scrutiny to government discrimination against a racial minority).

<sup>231</sup> *Carolene Prods.*, 304 U.S. at 153 n.4.

<sup>232</sup> See *supra* note 27 and accompanying text.

<sup>233</sup> See Erwin Chemerinsky, *Supreme Court – October Term 2009 Foreword: Conservative Judicial Activism*, 44 *LOY. L.A. L. REV.* 863, 866 (2011) (“[O]ne can use the conservative justices’ definition of judicial activism to see how much the Roberts Court is a conservative, activist Court. Justice Scalia, for example, has indicated that the Court is activist when it overrules elected branches’ decisions and restrained when it upholds them. It is restrained when it follows precedent and activist when it overrules it. It is restrained when it rules narrowly and activist when it rules broadly.”).

<sup>234</sup> See, e.g., *Shelby Cty v. Holder*, 133 S. Ct. 2612, 2612 (2013); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 621 (2007) (holding that even if an employer made a decision to pay men more than women and the employee did not know this at the time the decision was made, the 180-day time period in which the employee could file a charge with the EEOC began running at the time the decision was made, not with the issuance of each paycheck); *Texas v. Holder*, 133 S. Ct. 2886 (2013) (vacating and remanding U.S. District Court for the District of Columbia’s opinion denying preclearance to Texas voter-ID law); *Frank v. Walker*, 135 S. Ct. 1551 (2015) (denying petition for writ of certiorari challenging Wisconsin’s strict voter ID laws).

<sup>235</sup> See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2014); *Rapanos v. United States*, 547 U.S. 715 (2006); *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014).

<sup>236</sup> 198 U.S. 45 (1905).

<sup>237</sup> Some scholars have contended that the Supreme Court’s recent jurisprudence suggests a return to that of the *Lochner* era, during which the Court was unwilling to acknowledge the legitimacy of Congress to legislate in the public interest. See, e.g., Thomas Colby & Peter J. Smith, *The Return of Lochner*, 100 *CORNELL L. REV.* 527, 536 (2015). Colby and Smith quote Professor Howard Gillman’s characterization of *Lochner* as “the symbol of judges usurping



*Citizens United* have put important subjects like campaign finance beyond the power of Congress to even address, like *Lochner*, the Court's decisions have engendered movements to amend the Constitution, or even other bodies of law,<sup>238</sup> to address the problems some feel the decisions have created.<sup>239</sup>

But, whatever might be said about the totality of these decisions and their wisdom, it seems to be difficult for an objective mind to contest two propositions. First, recent federal jurisprudence has enhanced the influence corporations and other moneyed interests have over the electoral, legislative, and administrative processes in comparison to ordinary Americans, and diminished the ability of society to constrain corporate externalities and expand the social welfare state. Second, that jurisprudence was not dictated by

---

legislative authority by basing decisions on policy preferences rather than law." *Id.* at 536 (quoting Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859, 861 (2005)); see also Post & Shanor, *supra* note 204, at 165–66 (asserting that the D.C. Circuit's opinion in *Edwards v. District of Columbia* "effectively revives *Lochnerian* substantive due process"); Ellen D. Katz, *Election Law's Lochnerian Turn*, 94 B.U. L. REV. 697, 706 (2014) ("Critics predictably invoke *Lochner* whenever the Court strikes down legislation they favor, and the charge has been lodged in the election law context with some frequency. Nevertheless, recent work from the Roberts Court differs both in degree and in kind from the types of cases that have provoked the charge previously."); Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 1001 (2006) ("The modern Court, just like the *Lochner* Court, appears to be substituting its judgment about good policy for that of the legislature, and just like the *Lochner* Court, it has been unable to explain why."); Shanor, *supra* note 204, at 4 (observing that "a growing number of scholars, commentators, and judges have likened aspects of recent First Amendment jurisprudence to *Lochner v. New York's* anticonventional liberty of contract").

According to Chief Justice Roberts, in response to questions during his confirmation hearings, the problem with the *Lochner* Court was its usurpation of the role of the legislature: "You go to a case like the *Lochner* case. You can read that opinion today and it's quite clear that they're not interpreting the law, they're making the law. The judgment is right there. They say: We don't think it's too much for a baker to work whatever it was, 13 hours a day. We think the legislature made a mistake in saying they should regulate this for their health. We don't think it hurts their health at all. It's right there in the opinion. You can look at that and see that they are substituting their judgment on a policy matter for what the legislature had said." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 162 (2005), <http://purl.access.gpo.gov/GPO/LPS65331>, archived at <https://perma.cc/W2BA-FZDM>; see also *id.* at 144, 270, 408; Ronald Kahn, *The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in National Federation of Independent Business v. Sebelius*, 73 MD. L. REV. 133, 134 n.6 (2014) (suggesting that Chief Justice Roberts's *Sebelius* opinion was motivated, at least in part, by avoiding "his Court being viewed as a new '*Lochner* Court'").

<sup>238</sup> Such other bodies of law include corporate and securities law. David A. Westbrook, *If Not a Commercial Republic? Political Economy in the United States After Citizens United*, 50 U. LOUISVILLE L. REV. 35, 49 (2011).

<sup>239</sup> See Richard L. Hasen, *Three Wrong Progressive Approaches (And One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21, 22 (2014) ("One of the immediate responses to the Supreme Court's controversial *Citizens United* decision has been a call to amend the Constitution to 'reverse' *Citizens United*."); James A. Kahl, *Citizens United, Super PACs, and Corporate Spending on Political Campaigns: How Did We Get Here and Where Are We Going?*, 59 FED. LAW. 40, 43 (2012) ("Efforts to overturn *Citizens United* have been underway since the day the ruling was handed down. No fewer than 19 resolutions have been introduced in the 111th and 112th Congresses to amend the Constitution to reverse the *Citizens United* decision. . . . In addition, resolutions to amend the Constitution have been proposed at the state and local government levels and by local political organizations in 23 states.").

the Supreme Court's disciplined adherence to deference to the political branches or *stare decisis*. To the contrary, that jurisprudence reflected a voluntary, personal choice of judges, who displayed a willingness to override the decisions of the legislative and executive branches, and of the Court's own precedent.