

# JUDICIAL ACTIVISM IN THE FIRST DECADE OF THE ROBERTS COURT: SIX ACTIVISM MEASURES APPLIED

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*Political maneuvering and public controversy surrounding the choice of replacements for Justices Antonin Scalia and Anthony Kennedy highlights the flawed selection and retention practices for the United States Supreme Court. Those practices are linked to the Court's role as an activist law-making institution. I examine here the activism record in the first decade of the Roberts Court by analyzing seven key cases in which ideological voting blocks were evident. Activism is measured by six content-neutral measures, most of them frequently invoked by the Court itself. The six standards, taken as a whole, are a salient measure of objectionable judicial activism. The Roberts Court, like past activist Courts, was active in an identifiable ideological direction. Its activism may also be distinguished in its aggressive use of agenda manipulation, in its use of policy super precedents, and in ignoring or discounting the views of elected representatives at the local, state, or federal levels. Judicial activism can never be eliminated from a court that is an essential part of the governing process. To lessen its frequency and intensity, structural reforms of the Court are required, including an end to total Court control over its docket, constraints on the Court's use of policy super precedents, and changes in the appointment process that would create regular turnover in the Court's membership.*

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## I. INTRODUCTION

The U.S. Supreme Court has always been a political institution. Early in its history, Chief Justice Marshall’s opinion in *Marbury v. Madison*<sup>1</sup> was as overtly political as any decision in the Court’s history. While politics can never be neatly separated from key Court decisions, the Court has traditionally operated under constitutional and self-imposed restraints that limit its intrusion on the policy decisions of democratically elected legislators and officials.

The meaning of the term “judicial activism” is elusive. As former Senator Al Franken said, politicians who complain about judicial activism usually are speaking of a judge “who votes differently than [the politician] would like.”<sup>2</sup> Judicial activism is used here to describe a Court that acts in a

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1. 5 U.S. (1 Cranch) 137 (1803).

2. Naftali Bendavid, *Franken: ‘An Incredible Honor to Be Here’*, WALL ST. J. (July 13, 2009, 3:14 PM), <http://blogs.wsj.com/washwire/2009/07/13/franken-an-incredible-honor-to-be-here>.

way that unnecessarily infringes on the powers of the democratically elected coordinate branches—the Congress and the President—or elected state and local legislatures and officials. Members of the Court seem increasingly comfortable with activism provided it conforms to their own biases.<sup>3</sup> Such conduct is usually associated with particular social or political norms shared by a Supreme Court majority. During the *Lochner* era that ended in the 1930s,<sup>4</sup> it was the conviction that the Constitution, through the due process clause, protected freedom of contract (a form of “substantive due process”). During the Warren Court’s flirtation with populism in the 1960s, it was a strong conviction that the Constitution protected individual rights of criminal defendants and the relatively powerless.<sup>5</sup>

Subsequent Courts seem not to have constrained activism but simply to have changed the methods and direction of the activism.<sup>6</sup> Under the loose umbrella of a type of market theory, a majority of the Roberts Court has applied both the First Amendment (to election law cases) and the Sherman Antitrust Act in a manner that grants freedom of action to, and blocks efforts to constrain possible abuses by, powerful firms and individuals. The Roberts Court, in common with past activist Courts, has used judicial review as a platform for sweeping and consequential policy interpretations of constitutional or statutory provisions. These interpretations can be extremely difficult for democratically elected local, state, or federal institutions to correct.

When it practices activism, the Supreme Court becomes, in Judge Richard Posner’s words, a “superlegislature.”<sup>7</sup> Agreeing with this characterization, Carrington and Cramton observed that the Court has “largely forsaken the humble task of correcting errors of lower courts” unless those errors happen to be connected to “issues that it chooses to consider.”<sup>8</sup>

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3. Epstein and Landes found that liberal justices tended to vote to sustain the constitutionality of liberal statutes while striking down conservative statutes. For conservative justices, the opposite was true. Lee Epstein & William M. Landes, *Was There Ever Such a Thing as Judicial Self-Restraint?*, 100 CAL. L. REV. 557, 576 (2012).

4. *Lochner v. New York*, 198 U.S. 45 (1905); see also Stephen R. Alton, *From Marbury v. Madison to Bush v. Gore: 200 Years of Judicial Review in the United States*, 8 TEX. WESLEYAN L. REV. 7, 20-21 (2001).

5. See Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 8, 10 (1993).

6. See Epstein & Landes, *supra* note 3, at 563 (finding that the Burger Court was only slightly more restrained than the Warren Court before it and the Rehnquist and Roberts Courts that followed it).

7. Richard A. Posner, *The Supreme Court 2004 Term—Foreward: A Political Court*, 119 HARV. L. REV. 32, 35-39, 60 (2005).

8. Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 597 (2009).

The justices have become “the authors and sometimes amenders of a constitution that is an extension of the text written in 1787.”<sup>9</sup> “Cocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go,” Posner wrote, that the justices “are at risk of acquiring exaggerated opinions of their ability and character.”<sup>10</sup> This risk is enhanced because, with life tenure, relatively young ages of appointment, improved healthcare, and a comfortable schedule, justices are serving increasingly long terms.<sup>11</sup> Forty years ago, when the Court was deciding roughly twice the cases it decides today,<sup>12</sup> Justice Douglas remarked that the Court was “overstaffed and underworked” and could accomplish its relaxed workload in a four-day work week.<sup>13</sup> The lack of regular rotation in the Court’s membership may contribute to the Court’s lack of sensitivity to the views of democratically elected legislatures and executives. It also invites more intense confirmation battles and increased polarization.

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9. *Id.* at 595.

10. See Posner, *supra* note 7, at 77.

11. Life tenure is not a feature of state judicial systems, nor is it common outside the United States. Stephen G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, 15, 44-48 (Roger C. Cromton & Paul D. Carrington, eds., 2006).

Stras and Scott have challenged the analysis of the Calabresi article that found a “dramatic” increase in the length of a justice’s service since 1970, pointing out that length of service has varied widely over the past two centuries and that results can be skewed by picking shorter or longer periods to compare. David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*, 30 HARV. J. L. & PUB. POL’Y 791, 792-830 (2007). Stras and Scott concede, however, that the evidence is consistent with a “gradual long-term climb” in the years a justice stays on the bench. *Id.* at 797; see also Bernard Grofman & Reuben Kline, *A New Measure for Understanding the Tenure of U.S. Supreme Court Justices, 1789-2009*, 93 JUDICATURE 247, 252 (2010) (agreeing that the evidence shows no dramatic increase since 1970 but is consistent with current terms being “somewhat longer than average”).

Given the small sample size, any comparison of length of service can be skewed when one or two justices serve unusually long or short periods (such as Justice Stevens’ retirement after over thirty-four years on the Court). There is agreement, however, that duration of service has been increasing over the long haul and that the period beginning after 1970 shows longer tenure consistent with this increase. *Id.* This trend appears to be increasing. The last four justices to leave the Court (Souter, Stevens, Scalia, and Kennedy) had an average tenure of 28.3 years. As of December 2018, three sitting justices had tenures of 24 or more years (Thomas over 27 years, Ginsburg over 25 years, and Breyer over 24 years).

Any controversy over the increasing length of service, in any event, does not address issues of activism and gamesmanship in appointment and retirement.

12. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1229 (2012) (showing that the Court’s docket in the early 1970s ranged from 130 to 170 decisions each year, compared to the 2011-2012 term when the Court decided 73 cases).

13. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 119 (2006) (quoting Letter from William O. Douglas to Warren E. Burger (July 13, 1972)).

Whatever one's views on underlying policy issues decided by past Courts, there is reason for concern when an unelected Court imposes its will over elected local, state, or federal institutions. The Court's role in protecting and preserving the Constitution does require it occasionally to overturn legislation or place a preferred policy spin on a constitutional or statutory provision. Getting the balance right, however, is important. An unelected Court should not become a policy maker beyond the need to decide cases or controversies brought before it.<sup>14</sup>

## II. CONTENT-NEUTRAL MEASURES OF JUDICIAL ACTIVISM

United States constitutional democracy calls for the elected branches of government to make and enforce the laws. The Court's ability to check executive and legislative power can ensure the rule of law and protect minority interests against an overzealous majority. There is undeniable tension here. Democracy is premised on majority rule. Writing in 1957, Robert Dahl observed that the Court's role in protecting minority interests "is at odds with the traditional criteria for distinguishing a democracy from other political systems."<sup>15</sup>

Early on, the Court asserted its authority to overturn unconstitutional legislation, at least in cases in which unconstitutionality was clear,<sup>16</sup> but the judiciary was limited to deciding "cases" or "controversies,"<sup>17</sup> and had no express authority to legislate or enforce the laws. An unconstitutional law could be struck down, but Congress was free to rewrite the law; the President was free to name new justices to the Court that saw the Constitution in a light more conducive to favored policy goals. Based on his 1957 survey, Dahl concluded that the Court was seldom able to delay for more than a few years the implementation of a new policy favored by the President and Congress.<sup>18</sup>

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14. In *Marbury v. Madison*, Chief Justice John Marshall wrote that the Court was warranted in addressing the constitutionality of executive conduct because it was forced to do so by the case or controversy before it. 5 U.S. (1 Cranch) 137, 176-78 (1803).

15. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. OF PUB. L. 279, 283 (1957).

16. *Marbury*, 5 U.S. (1 Cranch) at 179. Kramer describes the early years after the Constitution in which the courts viewed their authority to intervene as limited "to laws whose unconstitutionality was clear." Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 18 (2001). Kramer subsequently amplified his analysis in *PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

17. The Constitution defines the Court's jurisdiction in terms of "cases" or "controversies." U.S. CONST., art. III, § 2.

18. Dahl, *supra* note 15, at 285. Dahl failed to address the numerous cases where a Court policy interpretation failed to meet the high threshold of concern required to move legislation through Congress.

Dahl's conclusion, however, was drawn at a time when more regular turnover on the Court readily allowed a President to influence the Court's membership.<sup>19</sup> Dahl's observation also predates the activism of the Warren, Rehnquist, and Roberts Courts. Writing in 2012, Larry Kramer observed that the "fall of judicial self-restraint has been less a fall than an accelerating slide of many years."<sup>20</sup> Kramer had earlier observed that the Rehnquist Court, when offering its interpretations of the Constitution, saw "no need to accommodate the political branches at all."<sup>21</sup> Moreover, as Carrington and Cramton have observed, when "political mistakes are embedded in proclamations of federal constitutional law, they are all but impossible to correct."<sup>22</sup>

A definition of judicial activism that turns on a Court role consistent with a democratic state<sup>23</sup> differs from a definition that turns on the original intent of a constitutional or statutory provision. Justice Scalia called "originalism" a "branch of 'textualism'" in which text is given "the meaning it had when it was adopted by Congress, or by the people, if it's a constitutional provision."<sup>24</sup>

The original intent of the drafters, as derived from the text, context, or ancillary materials, is a principled tool of interpretation for statutory or constitutional language. Failure to observe this intent should be a relevant measure of activism, albeit not to the exclusion of other indicators. Exclusive focus on original intent may at times lead to unreasonable restraint, or undue latitude, for an interpreting court. An interpretation consistent with original intent may, particularly if that intent is unclear or subject to ambiguity, lead to an inappropriately broad holding inconsistent with evolving community

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19. Dahl calculated that a President on average had an opportunity to appoint a new Justice every twenty-two months. *Id.* at 284. Since *Roe v. Wade*, 410 U.S. 113, was decided in 1973 (a period of 44 years), the turnover rate has slowed to one justice appointed every 41 months. *See* discussion *supra* note 11.

20. Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CAL. L. REV. 621, 622 (2012).

21. Kramer, *supra* note 16, at 14 ("The Rehnquist Court no longer views itself as first among equals, but has instead staked its claim to being the *only* institution empowered to speak with authority when it comes to the meaning of the Constitution.").

22. Carrington & Cramton, *supra* note 8, at 607.

23. Judge Posner has offered three possible definitions of judicial self-restraint, two of which are relevant to the definition of judicial activism offered here. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 520 (2012) (judicial self-restraint is evidenced when "judges defer to a very great extent to decisions by other officials"—including trial judges, administrative agencies or legislative and executive decisions—and "judges are highly reluctant to declare legislative or executive action unconstitutional.").

24. Margaret Warner, *Justice Scalia Writes How-to Read Guide for Interpreting the Law*, PBS NEWS HOUR (Aug. 9, 2012, 6:31 PM), [http://www.pbs.org/newshour/bb/law/july-dec12/scalia\\_08-09.html](http://www.pbs.org/newshour/bb/law/july-dec12/scalia_08-09.html).

standards and disrespectful of elected government. Such a decision can bring disapprobation on the Court and threaten its independence.

The Supreme Court's power to overturn unconstitutional legislation, not questioned here, is a vital cornerstone in our tripartite government. The inquiry, then, is whether the Court, in carrying out its constitutional duties, is minimizing interference with democratic governance. The Court is the final arbiter of the Constitution but should work with, and be sensitive to, the views of the President, Congress, local and state governments, and the electorate in making its rulings.<sup>25</sup>

To be acceptable to a broad spectrum of political ideologies, measures of the Court's activism should be as devoid as possible of normative content. Below I identify six constraints on judicial decision-making, most widely acknowledged by scholars and the Court itself. As the survey of seven Roberts Court cases suggests, the Court continues to give lip service to these restraining doctrines. Frequently, they are more genuinely invoked by dissenting justices protesting a broad holding by the majority. By itself, the survey does not establish that the Roberts Court is quantitatively more activist than past courts. It focuses, however, on areas in which the activism has occurred and on the pernicious effects for our judicial system and democratic institutions.

The triggering of one or more activism indicators does not necessarily indicate unacceptable judicial activism. Indeed, some of the Court's most enduring and courageous holdings—*Brown v. Board of Education*<sup>26</sup> comes to mind—would have triggered multiple indicators. Yet, attention to the indicators is meaningful because their presence is a cautionary signal for the Court. As described below, depending on context, particular measures can carry greater or lesser weight in indicating objectionable activism.

#### *A. Agenda Control and Ignoring Justice to the Parties*

Since 1789, federal judges have taken an oath to “administer justice without respect to persons,” to “do equal right to the poor and to the rich,” and “to faithfully and impartially discharge and perform” the duties of

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25. This view is consistent with Kramer's position that constitutional interpretation has traditionally not been, and should not be, the exclusive province of the Court, but should be sensitive to the views of elected branches of Government. Kramer, *supra* note 20, at 622-34 (tracing the evolution of the Court's role as an interpreter of the Constitution). Segall argues that the Court should overturn legislation only if there is an irreconcilable variance with the language of the Constitution. ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES*, 176-77 (2012).

26. 347 U.S. 483 (1954).

judicial office.<sup>27</sup> The judge's task is to render justice in the case or controversy. Unfortunately, today's Supreme Court often disregards this duty. The interests of justice can be sacrificed in at least three ways: (1) when the Court declines to review cases in which an injustice has been done; (2) when the Court accepts review but enters a sweeping ruling that has little connection to the facts of the case before it; and (3) when, in a more aggressive form of agenda control, the Court reframes the issue on which certiorari was granted, ruling on an issue that was not fully briefed by the parties or developed by the courts below.<sup>28</sup>

A focus on the long-term implications of a ruling, or a strong ideological agenda, makes it easy for the Court to slide into a law-making role at the expense of fairness to the parties. When it does so, it disrespects the oath administered to each justice and, as described below, pushes the limits of the Constitution's grant of jurisdiction to cases and controversies.

#### B. *Confining Rulings to the Case or Controversy*

In *United States v. Windsor*,<sup>29</sup> Justice Scalia wrote eloquently in defense of the Court's narrow case or controversy jurisdiction. The specific issue confronting the Court was whether it had jurisdiction to hear a case in which the United States (the defendant) agreed with the plaintiff that the underlying statutory provision was unconstitutional.<sup>30</sup> Justice Scalia, however, framed the issue more broadly, protesting that the majority held "an exalted conception of the role of [the Court] in America."<sup>31</sup> Scalia condemned the majority's "assertion of judicial supremacy over the people's Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government, empowered to decide all constitutional questions, always and everywhere 'primary' in its role."<sup>32</sup>

These words could have been written by David Kramer, a prominent critic of the activism of some Rehnquist and Roberts Courts decisions.<sup>33</sup> Members of the Court have invoked these arguments opportunistically,

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27. Congress requires that every federal judge take this oath. 28 U.S.C. §453 (2012).

28. See *infra* Part III for examples of this agenda-shaping conduct.

29. 570 U.S. 744 (2013).

30. *Id.* at 754-58.

31. *Id.* at 778 (Scalia, J., dissenting).

32. *Id.* at 779. Justice Scalia cautioned against "primary" power of the Judiciary, citing the Federalist (James Madison) vision that the three branches of government would be "perfectly coordinate by the terms of their common commission," with no branch holding "an exclusive or superior right of settling the boundaries between their respective powers." *Id.* at 779-80 (quoting THE FEDERALIST NO. 49, 314 (James Madison) (C. Rossiter ed., 1961)).

33. See *supra* notes 18-23 and accompanying text.

usually in dissent from a broader holding, but they often ignore or discount them when holding legislative action unconstitutional.<sup>34</sup> Meanwhile, the limiting case or controversy language remains in the Constitution with no one but the Court itself to enforce it.

The issue is not whether the Court made a correct ruling on the merits, but whether the holding could have been made on reasonable and narrower grounds that are anchored to the facts of the case. As a rule, the Court should strive for a narrowly drawn decision, with careful attention to the facts and use of principled tools of interpretation.<sup>35</sup> Chief Justice Roberts, for example, has said that “boldness” is at the bottom of the list of judicial virtues: “The more justices that can agree on a particular decision, the more likely it is to be decided on a narrow basis, and I think that’s a good thing when you’re talking about the development of the law, that you proceed as cautiously as possible.”<sup>36</sup> This approach is said to be all the more relevant when a constitutional interpretation is at issue. In *McConnell v. Federal Election Commission*, the Court wrote that it has long “rigidly adhered” to the tenet “never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.”<sup>37</sup> Not everyone agrees with this approach. Justice Scalia, for example, wrote that broad rulings should be preferred over case-by-case analysis.<sup>38</sup> Because the Supreme Court reviews so few cases (only about 1 of every 2000 cases decided by the district courts),

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34. During the 2012 term, Justice Scalia and Justice Ginsburg traded sides and accusations of an extra-constitutional breach of the Court’s case or controversy jurisdiction on two cases decided on consecutive days. Justice Scalia’s protestations in *Windsor* are described in the text above. On the previous day, Justice Scalia joined a five-member majority in striking down the preclearance procedure in the Voting Rights Act, ignoring or discounting extensive congressional findings that led to reenactment of the provision. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). Justice Ginsburg had been in the majority in *Windsor*, but wrote the dissent in *Shelby County*, accusing the majority of ignoring the Constitution’s case or controversy limits. *Id.* at 581 (Ginsburg, J., dissenting). See *infra* Part III.C. for a discussion of the two cases.

35. Justice Stevens reflected this view in an interview, describing a conservative justice as one who is “deciding cases narrowly and paying attention to [precedent].” Joan Biskupic, *Supreme Court’s Stevens Keeps Cards Close to Robe*, USA TODAY, Oct. 19, 2009, at 2A.

36. Crawford Greenburg, *Interview With Chief Justice Roberts*, ABC NEWS NIGHTLINE (Nov. 28, 2006) <http://abcnews.go.com/Nightline/story?id=2661589&page=2>. Chief Justice Roberts continued: “Yes, I’m sure there are occasions when a bold decision is appropriate, but boldness is really kind of a virtue that you look for in the other branches and not in the Judicial Branch, I think.” *Id.*

37. 540 U.S. 93, 192 (2003) (citing *United States v. Raines*, 362 U.S. 17, 21 (1960)). Chief Justice Roberts also cited this language in his concurring opinion in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 373 (2010).

38. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176, 1182, 1185 (1989).

Scalia argued that broader rules were necessary to ensure uniformity and predictability in the law's application by the lower courts.<sup>39</sup>

A fundamental distinction between legislative and judicial decision-making is the scope of the decision's application. A court is charged with deciding cases on the factual record before it. Legislatures are unconstrained by the facts of a particular case and can establish broadly applicable norms. Legislatures can hold hearings and deliberate extensively, reacting to the views of a variety of groups who have an interest in the outcome.<sup>40</sup> Input can be offered at multiple points as legislation works its way through the subcommittee, full committee, and the plenary chamber of each house of the bicameral legislature. The Court, while it can invite amicus briefs from interested parties,<sup>41</sup> does not have the process, the staffing, or the democratic mandate to craft law in a multi-stage, deliberative fashion that fosters compromise.

The Court is also handicapped when it attempts to substitute its policy preferences for those of an expert agency. As Cass Sunstein wrote, "it is both inevitable and proper that the lasting solutions to the great questions of political morality will come from democratic politics, not the judiciary."<sup>42</sup> In agreement, Peter Strauss observed that "complicated fact-finding and . . . debatable social judgment are not wisely required of courts unless for some reason resort cannot be had to the legislative process, with its preferable forum for comprehensive investigations and judgments of social value."<sup>43</sup>

There are situations in which the Court is justified in establishing rules that go beyond the facts of the case before it. A broad holding can be beneficial when the legislative process has offered up ambiguous statutory language, the Court is confronted with fact patterns unanticipated by the legislature, or merely because such broad holdings will provide clarity and efficiency in understanding, complying with, and enforcing the law.

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39. *Id.* at 1179-80. Because of the need to strive for non-discriminatory and clear interpretations of the laws, Scalia suggested that "the value of perfection in judicial decisions should not be overrated." *Id.* at 1178.

40. ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 28 (3d ed. 2009) (describing the distinctions between the legislative and judicial processes and suggesting that the legislature "makes" law; the courts "find" law). It is clear that judges do make law, but the common law tradition has been for courts to act incrementally and, for the most part, without the sweeping policy changes that can be affected through landmark legislation.

41. The increasing number of amicus filings is itself an indicator of the Court's increasingly broad and activist decisions.

42. Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 101 (1996).

43. Peter L. Strauss, *2001 Daniel J. Meador Lecture: Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 923-24 (2002) (quoting language of Justice Kennedy's opinion in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665-66 (1994)).

A compelling case for a broad rule occurs when the legislative action is colored by self-interest. A prime example would be redistricting decisions made by state legislators. Members of the state legislature's majority party have a selfish interest in enhancing their numbers and ensuring themselves safe seats. When selfish interests drive state legislators to disregard the broader public interest, there is reason for the Supreme Court to set broadly applicable rules as it did in the 1960s.<sup>44</sup> Despite Supreme Court interventions, opportunistic partisan gerrymandering by both major political parties has continued and, with the aid of computer technology, may have reached a high point after the 2010 census.<sup>45</sup> States that have an initiative process potentially can, assuming their path is constitutional, curb selfish reapportionment decisions by legislators.<sup>46</sup> Many states, however, lack an initiative process. Short of a constitutional amendment (which would require ratification by conflicted state legislatures), the Supreme Court is the only actor capable of a national solution for gerrymandering issues.<sup>47</sup> As Justice

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44. In *Baker v. Carr*, 369 U.S. 186 (1962), a divided Supreme Court ruled that the constitutional issues surrounding legislative districting were justiciable. Two years later, the Court, now mustering eight votes, ruled that both bodies of state legislatures must adhere to the "one person, one vote" requirement. *Reynolds v. Sims*, 377 U.S. 533, 568 (1968). While litigation has continued about how to count persons in a legislative district, the *Baker* line of cases has now endured for over fifty years and provided urban and suburban dwellers greater equality in the voting booth with their rural or small-town cousins. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1143 (2016) (all persons must be counted in redistricting, regardless of their eligibility to vote).

45. One source estimated that the Democrats had a net gain of five seats in the U.S. House of Representatives based on gerrymandered reapportionments following the 1990 census. Sam Wang & Brian Remlinger, *A Solution to Partisan Gerrymandering: Math*, L.A. TIMES, May 7, 2017, at A23, col. 1. After the 2010 census, the same source estimated that the Republicans used gerrymandering to obtain a net gain of fourteen seats. *Id.*

46. California approved Proposition 20 in 2010, giving redistricting authority to a fourteen-member commission made up of members of both parties and independents. *Congressional Redistricting Proposition Qualifies for California's Nov Ballot*, BALLOTPEDIA (May 6, 2010), [https://ballotpedia.org/California\\_Proposition\\_20\\_Congressional\\_Redistricting\\_\(2010\)](https://ballotpedia.org/California_Proposition_20_Congressional_Redistricting_(2010)) (citing *Ballot Measure to Expand Proposition 11 to Congress OK'd*, SACRAMENTO BEE, May 5, 2010). The Arizona Citizens Commission survived a constitutional challenge in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). Justice Kennedy joined the Court's 5-4 decision. The outcome of future cases challenging such commissions is uncertain with Justice Kennedy's retirement.

47. The Court had an opportunity to rule on political gerrymandering in two 2017-2018 term cases, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) and *Benisek v. Lamone*, 138 S. Ct. 1942 (2018). The Court disposed of these cases on narrow grounds without reaching the core issue. With the increasing use of computer technology to seek partisan advantage, the Court has agreed to hear appeals in two cases during the current term: *Rucho v. Common Cause*, No. 18-422, 2019 WL 98539 (M.D. N.C. Sept. 4, 2018); *Lamone v. Benisek*, No. 19-726, 2019 WL 98540 (D. Md. Nov. 7, 2018). The Pennsylvania Supreme Court has struck down gerrymandered districts for the U.S. House of Representatives based on state constitutional grounds. *League of Women Voters v. Commonwealth*

Kagan put it, “the need for judicial review is at its most urgent” because “politicians’ incentives conflict with voter’s interests, leaving citizens without any political remedy for their constitutional harms.”<sup>48</sup>

Accepting the need for the occasional broad holding, Sunstein nonetheless has argued that “decisional minimalism,” or “saying no more than necessary to justify an outcome, and leaving as much as possible undecided,” is desirable under a range of circumstances, because it often lowers decision costs, lessens the risk of error, and promotes democratic deliberation and decision by other branches of government.<sup>49</sup>

A broad Court holding becomes less palatable if credible and readily accessible grounds would allow a narrower decision. An unnecessarily broad decision may also run up against *stare decisis* and common law tradition to make incremental—not sweeping—changes through court decisions. When a decision is narrowly crafted and confined to the facts, the decision is more likely to fall within the Court’s constitutional mandate to decide cases and not to make laws. If the Court has ignored the plain meaning of a statute, even a narrowly crafted decision is an objectionable form of judicial activism, but the impact of such a decision will be less than with a broader construction of the statute.

### C. Ignoring, Discounting, or Overruling Relevant Precedent

The Court has the power to overturn its own precedents, and does so on occasion.<sup>50</sup> Respect for its prior rulings, however, dictates that the Court make such rulings only in response to a compelling showing. *Stare decisis* is a primary tool for principled interpretation.<sup>51</sup> It serves a number of purposes, among them promoting certainty and clarity in the law. Past decisions inform the bar and make it easier to channel future behavior within legal limits. Precedent also constrains the judiciary, discouraging *ad hoc* decisions based on an individual jurist’s policy predilections. The constraining influence of precedent is particularly important when the Court is functioning as a common law court, without the benefit of statute, or when

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of Pennsylvania, 178 A.3d 737 (Pa. 2018), *application for stay denied*, *Turzai v. League of Women Voters*, 138 S. Ct. 1916, 1941 (2018).

48. *Gill*, 138 S. Ct. 1916, 1941 (2018) (Kagan J., concurring).

49. Sunstein, *supra* note 42, at 6-7. The Sunstein analysis still left room for a broad decision, which he found most appropriate when the court has the information that would justify confidence in a comprehensive ruling, when incremental decision-making would undercut planning, and when minimalist decisions might raise the risk of unequal treatment. *Id.* at 99-100.

50. One study showed that since 1953, the Court has overturned precedent in 134 cases, or 2% of the total cases decided. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L. J. 1439, 1467 (2009).

51. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

a statute is written in general terms that place a jurist in a common-law setting. Karl Llewellyn wrote that a judge reshaping the common law “must so move as to hold the degree of movement down to the degree to which need truly presses.”<sup>52</sup> Justice Holmes wrote in a famous dissent that “judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.”<sup>53</sup> Stare decisis is a constraining force for gradual, incremental steps that discourages abrupt or fundamental change that, consistent with a democratic state, should be the province of elected branches of the government.

In principle, members of the Roberts Court agree. In his majority opinion in *Citizens United*, Justice Kennedy quoted from a prior decision: “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”<sup>54</sup>

#### *D. Failing to Address the Intent of the Constitution or Statute*

Following drafters’ intent, as reflected in the text of an underlying statutory or constitutional provision, is key to Justice Scalia’s originalism.<sup>55</sup> As described above, by itself, this indicator will operate too crudely in constraining judicial activism, at times unduly handcuffing the Court and, at other times, according the Court undue latitude. Drafters’ intent, whether evident in the text or discernable from legislative history, is nonetheless an important measure of and potential constraint on judicial activism. Notwithstanding the generic language in provisions of the Constitution and statutes such as the Sherman Antitrust Act, intent typically can be at least roughly discerned and should be a guide to Supreme Court interpretations. The failure to address or give weight to intent was an issue in several of the Roberts Court antitrust cases addressed in Part III.B.

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52. K. N. LLEWELLYN, *THE BRAMBLE BUSH* 156 (1960). Llewellyn elsewhere explained that a series of cases, in order to be a part of a common law system, must “move with care and slowly increasing grasp into a rule which can guide and which so can decrease the flow of litigation or turn it into those other channels natural to new developments out of a point now settled.” KARL N. LLEWELLYN, *THE COMMON LAW TRADITION - DECIDING APPEALS* 223 (1960).

53. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

54. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 370 (2010) (quoting with approval from *Payne*, 501 U.S. at 827). After offering this quote, Justice Kennedy and the majority overturned past precedent involving application of the First Amendment to federal election law.

55. See *supra* notes 25-27 and accompanying text for a description and critique of Scalia’s originalism.

*E. Invoking Stare Decisis Inappropriately—Policy Super Precedents*

A key measure of the Court's slide from a judicial into a policy-making body is its expanded use of precedent as a proxy for empirically based policy analysis. Use of a past case in this manner creates a "super precedent."<sup>56</sup> It proclaims that the policy premise is part of the fabric of the Constitution or a statute because it has said so in the past. The term "super precedent" has been used to describe a foundational constitutional decision that is embedded into the law and has generated a body of application decisions.<sup>57</sup> Here, the term is used in a slightly different sense—to describe a policy-based holding, often associated with an ideological view, employed as precedent to preempt an empirical or case-specific analysis of an issue confronting the Court. In this sense, a policy super precedent is both narrower (because it is limited to policy centric holdings) and broader (because it is not limited to constitutional holdings) than some uses of the term super precedent.

While it is necessary and proper to address policy issues in interpreting the Constitution and federal statutes, the Court's role as a decider of policy carries with it a stark risk of inappropriate activism—deciding matters that are properly left for the elected branches. In many cases, the Court lacks the depth of policy expertise of its coordinate branches—Congress, through its specialized committees and professional staff, or the President, with the benefit of the executive branch's even greater resources of expert agency staff. In other cases, the expertise may lie with state or local governments whose actions are being challenged. More fundamentally, the Court lacks the constitutional mandate for such overt policy making when it is unnecessary to resolve a case or controversy.

In the context of election law regulation, the Court has opined that the expenditure of funds on behalf of a candidate is directly linked to that candidate's free speech rights under the First Amendment.<sup>58</sup> The "money is speech" formula may be a helpful metric for modern elections in which the ability to purchase television advertising can be crucial for a candidate's success.<sup>59</sup> This rigid formula, however, was not the view of a unanimous

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56. See Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1206-07 (2006) (describing the term "super precedent").

57. *Id.*

58. This is a reasonable interpretation of language in the Court's per curiam opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976).

59. J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001, 1004 (1976).

Court in *Buckley v. Valeo*.<sup>60</sup> Indeed, the correlation between money and election speech would have been far less compelling for an election held in 1800, in 1900, or even in 1950 (when television advertising was non-existent or inconsequential). Nor is it clear that expensive television ads will continue to be the dominant method of communicating with voters. The emergence of the internet as a relatively inexpensive tool for reaching a targeted audience may lessen the impact of broadcast television. Access to key events such as public debates may be more important than television ads. Flexibility in dealing with campaign issues is necessary. The Court is neither the most expert nor the most flexible branch of Government for dealing with these issues. Contemporary Supreme Court justices typically have not run for office, have not studied election issues in detail, and lack the expert staff of a specialized agency.

Ultimately, the question is whether a policy judgment of the Court, whether by 5-4 vote or a 9-0 vote, should govern future election law cases, regardless of varying factual context, regardless of the weight that the Congress or state legislature places on the anticorruption concern, and regardless of the degree of restraint placed on electioneering speech. There are a number of reasons why a particular Court's policy choice may need to be adjusted or corrected. Executive agencies frequently reassess, amend, or even withdraw rules or interpretations. Just as an agency, the Court may get it wrong because it does not have all the facts, misapprehends their import, or doesn't understand or misapplies underlying economic or political theory. Or, even if the Court's analysis was correct when decided, changing developments may quickly render its decision out-of-date or misguided. Facts may change, economic learning may change, or community values or voter tolerance for certain behavior may change. For all of these reasons, citing a policy super precedent to curtail a careful and case-specific policy analysis invites judicial activism and unwarranted Court forays into creating, extending, or confining statutory or constitutional law. It chisels into precedent a policy that a more expert and flexible agency would have the freedom to amend, distinguish or abandon.

The Court's treatment of these policy-driven choices becomes more problematic when it is mixed with stare decisis doctrine in a manner that severely handicaps the Court itself in correcting a dubious policy choice underlying a past decision. If the Court is to venture into complex regulatory issues that involve changing public opinion, changing economic learning,

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60. Justice White dissented from this part of the Court's holding, arguing that restraints on campaign expenditures should be treated in the same manner as restraints on the time and place of protected speech. 424 U.S. at 257.

and richly varied fact patterns, it is not clear why it should have less flexibility than an administrative agency dealing with the same issues. *Stare decisis* should not have the same restraining force in policy analysis that it has in the fabric of narrowly crafted holdings associated with common law development and statutory interpretation.

*F. Disrespecting the Views of Democratically Elected Government*

A final measure of judicial activism—and a measure of whether a judicial precedent will be enduring—is whether a decision is respectful of the views of elected officials at the federal, state, and local levels, and of the electorate at large. Preserving and protecting the Constitution, and protecting the rights of non-conforming minorities, may occasionally require the Court to render an unpopular decision. At the same time, the Supreme Court is a part of the United States Government and must be respectful of the democratic polity. Reflecting this respect for the governing process, Justice Stevens, who considered himself a “judicial conservative,” defined this term as someone “who submerges his or her own views of sound policy to respect those decisions by the people who have to make them.”<sup>61</sup>

In criticizing the Court’s abortion jurisprudence, Justice Scalia wrote that “[v]alue judgments . . . should be voted on, not dictated.”<sup>62</sup> What is true for abortion issues should apply in other policy areas as well.<sup>63</sup> Segall concluded that the Court “has repeatedly overturned the policy decisions of the elected branches and the states when constitutional text and history were vague, and no reasonable person could argue that the decision was at an ‘irreconcilable variance’ with the Constitution.”<sup>64</sup>

Some scholars suggest that the Court should be more aggressive when challenging suspect behavior of state or local government, and more deferential when confronting actions of its coordinate branches of the federal government.<sup>65</sup> The Union is more threatened, it may be argued, when states

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61. Biskupic, *supra* note 35. Justice Stevens authored the Court’s opinion in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), an opinion which recognized a presumption of validity for a reasonable interpretation of a statute offered by an agency authorized to enforce the statute. Stevens wrote that policy arguments not resolved by a statute “are more properly addressed to legislators or administrators, not to judges.” *Id.* at 864.

62. *Planned Parenthood v. Casey*, 505 U.S. 833, 1000-01 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

63. SEGALL, *supra* note 25, at 91-93.

64. *Id.* at 177 (quoting ALEXANDER HAMILTON, THE FEDERALIST NO. 78 (1788)).

65. Strauss, *supra* note 43, at 891 (“I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.”) (quoting OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920)); *see also* Kramer, *supra* note 16, at 126-27

undermine powers constitutionally delegated to the Federal Government. All Court decisions, however, are troublesome when they trample the democratic polity, regardless of the level of government.

The Court has an established political question doctrine that calls for deference to the elected branches on certain matters.<sup>66</sup> Respecting the role of the elected branches will seldom require an outright refusal to exercise jurisdiction. Instead, in deciding cases that involve policies set by federal, state or local government, the Court can preserve its jurisdiction while respecting the policy choices made by democratically elected officials. The Court has not consistently done so. Kramer found that the Rehnquist Court did not honor congressional fact finding in interpreting the Commerce Clause of the Constitution.<sup>67</sup> In *Shelby County v. Holder*,<sup>68</sup> the Roberts Court majority ignored the extensive congressional record to make its own factual predicate concerning the need for preclearance procedures under the Voting Rights Act.<sup>69</sup>

Consider the Court's now discredited holding in *Lochner v. New York* (striking down New York legislation that established a sixty-hour work week).<sup>70</sup> Had it enjoyed the support of informed public opinion, this decision might still be valid constitutional law today. Instead, it has been condemned as a classic example of unacceptable judicial activism. Compare *Lochner* with other broad and pivotal Court decisions that have endured. *Marbury v. Madison* (asserting the Court's right to strike down unconstitutional legislative action),<sup>71</sup> *Brown v. Board of Education* (declaring segregated public schools to be unconstitutional)<sup>72</sup>, *Reynolds v. Sims* (establishing the one man-one vote standard)<sup>73</sup> and *Standard Oil Co. v. United States* (declaring that only *unreasonable* restraints of trade were prohibited by the Sherman Antitrust Act)<sup>74</sup> were each groundbreaking decisions that triggered one or more of the activism indicators described here. Yet each of these decisions is venerated today, primarily because the Court got it right—the

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(drawing a distinction between the Court's role in policing unconstitutional state laws and the Court's historically more modest role in limiting federal power).

66. *Baker v. Carr*, 369 U.S. 186, 210-11, 215-17 (1962) (defining but declining to apply political question doctrine).

67. Kramer, *supra* note 16, at 138-43.

68. 570 U.S. 529 (2013).

69. See discussion of *Shelby County* *infra* notes 195-204 and accompanying text.

70. 198 U.S. 45, 73-74 (1905).

71. 5 U.S. (1 Cranch) 137, 175-80 (1803).

72. 347 U.S. 483, 495-96 (1954).

73. 377 U.S. 533, 551, 572-75, 584 (1964).

74. 221 U.S. 1, 56-58, 61-62 (1911).

Court's decision was principled and an accurate read of the then evolving and future values of the nation.

The Court cannot know in advance whether its decisions will endure. What it can discern is whether a decision is one which enjoys contemporary support as reflected in the actions of state and federal legislatures and elected executive officials. If it does not, modesty in granting review or in rendering a decision is appropriate.

### III. SELECTIVE JUDICIAL ACTIVISM IN SEVEN ROBERTS COURT DECISIONS

The seven cases analyzed below were selected because the Court was divided (often 5-4) along ideological lines in areas in which the Roberts Court has shown activist colors (attempts to address perceived abuses of political and economic power). I begin with the First Amendment election law and Sherman Antitrust Act cases. This allows a brief look at both constitutional and statutory interpretation. There are, however, common threads running through these two types of cases. Both the Free Speech clause of the First Amendment and the Sherman Act are written in general terms that invite a strong-willed Court majority to shape interpretation. Relevant election law statutes, like the Sherman Act, are directed at abuses of economic power or at leveling the playing field. The Roberts Court has been active in both of these areas, with the Court majority pressing its view that in the marketplace for political speech, just as in the marketplace for goods and services, all players should be subject to minimal regulation, discounting or disregarding concerns that powerful players are exploiting advantages over the less powerful.

One response to the populist activism of the 1960s and 1970s was support for the original intent approach for construing a constitutional or statutory provision. Although this approach has proponents on the Roberts Court, it has not ended activist decisions. Indeed, activism has evolved to employ heretofore seldom used methods. Prominent among these tools are: (1) increased use of policy-based super precedent to expand or limit the reach of the Constitution and statutory provisions; and (2) agenda shaping conduct allowing a Court majority to reach and shape the issue it wishes to decide, regardless of whether it was raised by the parties or addressed in lower court rulings.<sup>75</sup>

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75. Epstein and Landes measured activism by examining cases that challenged the constitutionality of federal statutes beginning with the Hughes Court in 1937. Epstein & Landes, *supra* note 3. Based on their survey, the Rehnquist/Roberts Court was the most activist (the authors did not distinguish between the Rehnquist and Roberts Courts). *Id.* The data does not include cases challenging the constitutionality of executive action or state or local legislation. The authors made no effort to measure the political impact of individual rulings.

*A. First Amendment Election Law Cases*

In *Citizens United v. Federal Election Commission*,<sup>76</sup> the Roberts Court majority invoked the Free Speech Clause of the First Amendment to strike down provisions of federal election law that limit general treasury expenditures by corporations and unions within thirty days of a primary or general election. The decision of a five-member majority provoked a vigorous dissent from Justice Stevens (joined by three other justices) and a firestorm of public criticism, including a caustic reference in President Barack Obama's 2010 State of the Union Address.<sup>77</sup>

*Citizens United* was a non-profit group that had produced a pejorative movie about Hillary Clinton, a presidential candidate in 2008.<sup>78</sup> The group planned to use its general treasury funds to promote the film and make it available through video on demand.<sup>79</sup> The district court held that this effort contravened 2 U.S.C. § 441(b), which prohibited corporations or unions from using general treasury funds to support "electioneering communications,"<sup>80</sup> elsewhere defined as "any broadcast, cable, or satellite communication which promotes or supports," or "attacks or opposes" a candidate running for federal office.<sup>81</sup>

In concluding that this provision violated the First Amendment, the Court overruled two past decisions that had upheld § 441(b)'s restraints on direct treasury expenditures: *Austin v. Michigan Chamber of Commerce*<sup>82</sup> and *McConnell v. Federal Election Commission*.<sup>83</sup> The majority held that the source of speech was not a valid basis for distinguishing campaign-related speech and that the First Amendment protected corporate speech related to an election equally with the speech of natural persons.<sup>84</sup> Justice Kennedy's majority opinion echoed dissenting or concurring opinions that he and Justices Scalia and Thomas had filed in earlier election law cases.<sup>85</sup> When

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76. 558 U.S. 310 (2010).

77. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS, 75, 81 (Jan. 27, 2010) ("With all due deference to separation of powers, last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.")

78. *Citizens United*, 558 U.S. at 319.

79. *Id.* at 320.

80. 52 U.S.C. § 30118 (Supp. IV 2016) (formerly codified at 2 U.S.C. § 441b (2012)).

81. 52 U.S.C. § 30104 (2012) (formerly codified at 2 U.S.C. § 434 (2012)).

82. 494 U.S. 652, 654-55, 667-68 (1990), *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

83. 540 U.S. 93, 202-03 (2003), *overruled by* *Citizens United*, 558 U.S. 310 (2010).

84. *Citizens United*, 558 U.S. at 342-43.

85. *See, e.g., Austin*, 494 U.S. at 678-83 (Stevens, J., concurring and Scalia, J., dissenting).

*McConnell* was decided in 2003, Chief Justice Rehnquist and Justice O'Connor did not join in these minority opinions.<sup>86</sup> With these two justices replaced by Chief Justice Roberts and Justice Alito, five members of the Court now favored overturning *McConnell* and *Austin*.<sup>87</sup>

*Citizens United* has generated extensive commentary, much of it critical.<sup>88</sup> Justice Stevens castigated the majority for “mischaracterizing both the reach and rationale” of prior decisions, and “bypassing or ignoring rules of judicial restraint used to cabin the Court’s lawmaking power.”<sup>89</sup>

The manner in which the constitutionality of § 441(b) came before the Court is instructive. In the district court, *Citizens United* had challenged the constitutionality of the provision, but abandoned this claim prior to a summary decision by the district court.<sup>90</sup> Instead, *Citizens United* pressed arguments concerning the proper interpretation of that provision.<sup>91</sup> The Supreme Court majority was dissatisfied with the manner in which the case was presented to it, and ordered new briefing and reargument to address the constitutional issue.<sup>92</sup> This procedural history suggests that the majority resolutely sought a vehicle for a broad constitutional holding and pushed aside avenues for a narrow resolution of the litigants’ case.

There were a number of interpretation issues that could have allowed for a principled holding favorable to the defendant. Among them was a ruling

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86. See *McConnell*, 540 U.S. at 114.

87. In dissent, Justice Stevens wrote that the “only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court.” *Citizens United*, 558 U.S. at 414.

88. Justice Stevens anticipated much of this criticism in a short passage at the close of his lengthy dissent: “Today’s decision is backwards in many senses. It elevates the majority’s agenda over the litigants’ submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality.” *Id.* at 478-79.

For critical commentary, see Richard L. Hazen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011) (arguing that incoherence in the holding will cause difficulties for judges and counselors); Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 732-33 (2012). Other commentary, although critical of some aspects of the decision, suggests that the impact of *Citizens United* will be less than many critics fear. Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL’Y 643 (2011) (arguing that the decision is unlikely to result in substantial additional corporate spending because corporations were already free to spend on elections); see also Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want*, 34 HARV. J.L. & PUB. POL’Y 639 (2011) (defending the majority’s holding but suggesting that corporations are unlikely to increase spending substantially because they have a natural incentive to keep a low profile on general election issues).

89. *Citizens United*, 558 U.S. at 478-79. This paper does not catalogue the arguments and counter arguments involved in the merits of this case. The analysis focuses on the extent to which the Court’s opinion triggers activism indicators.

90. *Id.* at 396-97.

91. *Id.* at 397.

92. The procedural history is detailed in Justice Stevens’ dissent. *Id.* at 396-405.

that because the contributions from the corporate treasury were likely to be de minimis compared to contributions from individuals, the conduct was validly excepted from the general proscription on support from the corporate treasury; and because the film was to be offered to the public only on an on-demand basis, the conduct was distinguishable from conventional broadcasting that seemed the primary focus of § 441(b) (the viewer receives the programming unless the viewer switches off the channel).

Justice Kennedy's majority opinion, and Chief Justice Roberts' concurring opinion, both addressed these procedural points at length.<sup>93</sup> Both contended that the narrower grounds were not a valid basis for disposing of this case.<sup>94</sup> Justice Stevens was unconvinced, suggesting that even if none of these alternative grounds were "ideal," "there were principled, narrower paths that a Court that was serious about judicial restraint could have taken."<sup>95</sup> If this case did not present an opportune setting for addressing the broad constitutional issue, the Court, consistent with its case or controversy jurisdiction, could have denied review or dismissed certiorari as improvidently granted. As Justice Stevens put it, "the only thing preventing the majority from affirming the District Court, or adopting a narrower ground that would retain *Austin*, is its disdain for *Austin*."<sup>96</sup>

*Citizens United* is indicative of a corruption of stare decisis that has crept into the Court's jurisprudence in the last half century. Cases are cited as super precedents, not because they are squarely on point to the issue to be decided, but because they state a policy preference the Court (or litigants arguing before the Court) wishes to support. More often than not, these cases are offered in lieu of empirical or hard economic or factual analysis that should buttress the Court's holding. On this point, Justice Stevens took the majority to task for not offering empirical evidence to support the majority's repeated but unsupported contention that § 441(b)'s limitations would substantially dampen campaign speech supported by corporate interests.<sup>97</sup> As the dissent pointed out, § 441(b) in no way limited corporate officers or shareholders from making their individual views known; it in no way limited the corporation's ability to speak through a PAC organized by the corporation; and it in no way limited campaign expenditures from the

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93. *Id.* at 318-72 (majority opinion); *id.* at 373-74 (Roberts, J., concurring).

94. The Chief Justice argued that the broad constitutional holding was a last resort when narrower grounds for disposition were wanting. *Id.* at 373-76 (Roberts, J., concurring).

95. *Id.* at 408 (Stevens, J., concurring and dissenting in part).

96. *Id.*

97. *Id.* at 416.

corporate treasury if the speech were broadcast more than thirty days in advance of a primary or general election.<sup>98</sup>

Finally, the Court's cavalier treatment of precedent is another activism indicator. The majority opinion and Chief Justice Roberts concurring opinion dutifully saluted the flag of *stare decisis*.<sup>99</sup> That accomplished, the Court majority turned the other direction, supporting its holding by citing the dissenting or concurring opinions of a number of current or former Court members. These non-binding minority opinions were given weight over valid precedents that either directly or indirectly upheld the validity of § 441(b).<sup>100</sup>

In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,<sup>101</sup> another 5-4 decision, the Court ruled that an Arizona law that subsidized publicly financed candidates for state office violated the First Amendment. The operative formula gave the publicly financed candidate slightly less than one dollar for each additional dollar spent by a privately funded candidate.<sup>102</sup> The majority opinion of Chief Justice Roberts concluded that the scheme "substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment."<sup>103</sup> Relying on *Davis v. Federal Election Commission*,<sup>104</sup> the Court ruled that this provision discouraged independent expenditures by both privately funded candidates and independent groups because their additional expenditures would increase the funds available to publicly funded opponents.<sup>105</sup> Even if the government subsidies resulted in "more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burden (and thus reducing) the speech of privately financed candidates and independent expenditure groups."<sup>106</sup>

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98. *Id.* at 415-16. See post-*Citizens* commentary of Briffault, *supra* note 88.

99. *Citizens United*, 558 U.S. at 362 ("Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error."). Chief Justice Roberts cited with approval language from *Payne v. Tennessee*, 501 U.S. 808, 827 (1991): "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring).

100. Multiple examples of the Court's reliance on dissenting and concurring opinions are to be found. See *id.* at 349-56 (majority opinion).

101. 564 U.S. 721 (2011).

102. *Id.* at 728-30.

103. *Id.* at 728.

104. 554 U.S. 724 (2008).

105. *Arizona Free Enter.*, 564 U.S. at 736-37.

106. *Id.* at 741.

*Davis*, another 5-4 decision, addressed the First Amendment compatibility of the millionaire's amendment to federal election law.<sup>107</sup> The amendment, intended to level the playing field, raised by three times the limits on individual campaign contributions for rivals of candidates who spent more than \$350,000 of their own funds on an election campaign for the U.S. House of Representatives.<sup>108</sup> A New York Democrat running for the House successfully sued to enjoin enforcement of the provision.<sup>109</sup> Because the increased limits did not apply to the wealthy candidate, the majority found that it chilled the free speech rights of that candidate.<sup>110</sup>

Writing for the four dissenters in *Arizona Free Enterprise*, Justice Kagan did not question the holding in *Davis*, but thought the millionaire's amendment distinguishable because it restricted in a discriminatory fashion the individual campaign contribution limits for candidates running for the same office.<sup>111</sup> The Arizona law did not restrict anyone's contribution limits, but instead provided a subsidy for election speech for those who voluntarily opted for public financing.<sup>112</sup> This, the dissent wrote, was consistent with the First Amendment's core purpose "to foster a healthy, vibrant political system full of robust discussion and debate."<sup>113</sup> Justice Kagan saw the Arizona law as a valid effort by the state legislature to address the perception of corruption associated with large financial contributions to a candidate.<sup>114</sup> The dissent pinpointed a critical issue for public financing schemes: the subsidy must be large enough to make public financing an attractive option for a candidate.<sup>115</sup> At the same time, the taxpayer should not be paying out large amounts unnecessary for a successful campaign. The formula adopted by Arizona was a rational scheme for finding the right balance. By eliminating this implementing mechanism, Justice Kagan wrote, the Court may have effectively rendered public financing either too expensive for the taxpayer or too inadequate to be attractive to a candidate.<sup>116</sup>

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107. 554 U.S. at 728-29.

108. *Id.* at 729.

109. *Id.* at 731.

110. *Id.* at 739-40, 743-44. Justice Stevens wrote separately for four justices that the provision "does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard; this amplification in no way mutes the voice of the millionaire." *Id.* at 753 (Stevens, J., concurring and dissenting in part).

111. *Ariz. Free Enter.*, 564 U.S. at 773-74, 776 (Kagan, J., dissenting).

112. *Id.* at 758.

113. *Id.* at 757.

114. *Id.*

115. *Id.* at 759-60.

116. *Id.* at 760.

The majority's opinion in *Arizona Enterprise* triggered a number of judicial activism indicators, including the tenuous use of precedent (the Court relied on *Davis*, a case markedly distinguishable on its facts). The Roberts majority also aggressively invoked policy super precedent, offering the following explanation of why expenditures by independent political groups were not a concern: "The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case law is concerned."<sup>117</sup>

The reference in Chief Justice Roberts' opinion is to a portion of *Citizens United* in which the Court majority concluded that the sole *quid pro quo* that could justify a restraint on election speech would be outright bribery – conduct constituting a criminal offense under federal and state law.<sup>118</sup> This citation is not a traditional invocation of stare decisis, but an effort to sidestep a substantive policy analysis by invoking a prior Court ruling. In effect, the Court is saying, we said in a past case that the anti-corruption interest must be limited to bribery or its equivalent and are precluded from revisiting this conclusion, regardless of the strikingly different factual context of the two cases.

The most disturbing aspect of both *Citizens United* and *Arizona Free Enterprise*, however, is their failure to give proper weight to societal interest (as reflected in legislative action by Congress and the Arizona legislature) in lessening the corrupting influence, or appearance of influence, of money in political campaigns. The five-member majority in both of these cases took the position that this societal interest was insufficient to justify what seemed to many relatively minor restraints on the expenditure of money in campaigns. Arrayed against the five justices who took this position in *Citizens United* (and followed in *Arizona Free Enterprise*) were the four dissenting justices in the two cases,<sup>119</sup> the Executive branch (as represented by the Solicitor General's briefs in both cases), the Congress of the United States (which enacted the legislation that was invalidated in part in *Citizens United*) and the legislature of Arizona (which enacted the public finance scheme struck down in *Arizona Free Enterprise*).

The controversial nature of the Court's holdings matters because the Court is a part of the governing process. The Court's role as final arbiter of the Constitution is not well-served if it is inattentive to the policy concerns

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117. *Id.* at 759 (citing *Citizens United*, 558 U.S. at 359).

118. 558 U.S. at 359-61.

119. Justice Stevens wrote for the four dissenting justices in *Citizens United*. *Id.* at 393. His replacement, Justice Kagan, wrote for the four dissenters in *Arizona Free Enterprise*. 564 U.S. 721, 755.

of the democratically elected branches of federal, state, or local government. Strong or consistent opposition from the democratically elected officials is, at a minimum, a reason for the Court to proceed cautiously and narrowly.

These campaign finance decisions relied on policy super precedent while disrespecting on-point prior holdings. Their long-term survival, however, may turn on their insensitivity to the strong public concern with actual and apparent corruption of the election process.<sup>120</sup> Rather than the staying power of *Marbury v. Madison*, in the longer term, the two cases may await the fate of *Lochner v. New York*,<sup>121</sup> a decision out of step with public views and ultimately rejected by the Court. But policy preferences, once clothed in the mantle of constitutional law, may be extremely difficult to change in the short term.

### B. *Sherman Antitrust Act Cases*

Beginning in the late 1970s, the Supreme Court substantially curtailed the reach of the Sherman Antitrust Act through a series of decisions that ruled for the defendants in private enforcement actions.<sup>122</sup> During the Burger and Rehnquist Courts, some of these decisions were narrow rulings that left most of the prevailing law in place<sup>123</sup> or enjoyed the support of a unanimous Court.<sup>124</sup> The pace of these curtailing decisions increased during the Roberts

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120. According to a September 2012 Associated Press National Constitution Center poll, 83% of respondents believed that there should be at least some limits on the amount unions and corporations are permitted to contribute to groups seeking to influence the outcome of presidential and congressional races; 67% of the respondents thought some limits should be imposed on individual contributions. Morgan Little, *Poll: Americans Largely in Favor of Campaign Spending Limitations*, L.A. TIMES (Sept. 16, 2012), <http://articles.latimes.com/print/2012/sep/16/news/la-pn-poll-citizens-united-20120916>.

121. 198 U.S. 45 (1905).

122. A long string of pro-defendant decisions was interrupted by *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010), a result that was favorable to the plaintiff. Since then, the string of rulings against private plaintiffs has continued. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) was a 5-3 decision enforcing a contractual waiver of class action rights as a bar to Sherman Act class action notwithstanding individual costs of arbitration that would exceed any possible recovery. Another pro-defendant ruling came in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), discussed *infra* this section. Government plaintiffs have done slightly better, prevailing in part in *Federal Trade Commission v. Actavis, Inc.*, 570 U.S. 136 (2013), but losing in *Ohio v. American Express Co.* 138 S. Ct. 2274 (2018).

123. See, e.g., *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (narrowing but not overturning the per se rule against vertical minimum price fixing); *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2 (1984) (ruling for the defendant but leaving the law governing tying conduct largely in place).

124. See *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (a unanimous Court overturned the per se rule against maximum vertical price fixing).

Court, and sweeping changes were effected by a highly fractured Court.<sup>125</sup> Because of the importance of economic analysis and the general wording of the Sherman Act, the Court has an opportunity to effect sweeping “legislative” changes in the law. I examine here three antitrust decisions during the first decade of the Roberts Court.

In *Leegin Creative Products, Inc. v. PSKS, Inc.*,<sup>126</sup> the Court overturned a line of cases that had construed vertical minimum price fixing, or resale price maintenance, to be per se unlawful.<sup>127</sup> The *Dr. Miles* decision in 1911,<sup>128</sup> although never mentioning a per se rule, is often seen as the progenitor of this line.<sup>129</sup> The rule received indirect endorsement from Congress in 1975 when it repealed legislation that had allowed state legislatures to create exceptions to per se treatment<sup>130</sup> and in 1984 and subsequent years when riders to Justice Department appropriations prohibited the expenditure of appropriated funds to argue for repeal of the per se rule.<sup>131</sup>

Leegin was a leather goods manufacturer that sold its Brighton line of purses and other leather products to its retailers.<sup>132</sup> KCFS was an independent retailer that had sold large quantities of Leegin’s products.<sup>133</sup> KCFS was terminated after it repeatedly sold Brighton products at a retail price that Leegin considered too low.<sup>134</sup> Instead of addressing these facts, Justice Kennedy argued generally that resale price maintenance can be procompetitive because: (1) it discourages discounting retailers from free riding on presale services provided by full price retailers,<sup>135</sup> (2) it may provide an incentive for high profile retailers to carry the brand, thereby

125. Each of the three Roberts Court decisions discussed in this section was a 5-4 decision.

126. 551 U.S. 877 (2007).

127. Vertical minimum price fixing occurs when a manufacturer or other upstream provider dictates to downstream sellers (most often retailers) the minimum price at which they may resell the upstream provider’s product. See generally Warren S. Grimes, *The Path Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints*, 75 ANTITRUST L. J. 467, 469-471 (2008).

128. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

129. *Dr. Miles* is more accurately construed not as a per se case but as a declaration that resale price maintenance is unlawful when it is a naked restraint, not ancillary to an arrangement with net procompetitive effects. For a description of the evolution of the law governing resale price maintenance, see Grimes, *supra* note 126, at 469-471. The direct genesis of the per se rule is probably more recent decisions such as *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

130. 15 U.S.C. §§ 1, 45(a), amended by Consumer Goods Pricing Act of 1975, 89 Stat. 801.

131. This history is detailed in *Leegin*, 551 U.S. at 906.

132. *Id.* at 882.

133. *Id.* at 882-83.

134. *Id.* at 884.

135. *Id.* at 890-91.

“certifying” the brand’s quality;<sup>136</sup> and (3) it may provide retailers an incentive to carry a larger inventory consistent with the manufacturer’s wishes.<sup>137</sup> None of these justifications were obviously connected to the facts in *Leegin*.<sup>138</sup> The terminated retailer was not free riding on services provided by others and had actively promoted the Brighton line, relying on these sales for a majority of its revenues.<sup>139</sup>

The *Leegin* majority cited the Court’s past Sherman Act overrulings as super precedents justifying overturning *Dr. Miles*.<sup>140</sup> The Court justified its cavalier treatment of precedent as a part of a broader trend, begun with *Continental TV Inc. v. GTE Sylvania, Inc.*,<sup>141</sup> to treat vertical restraints under a defendant friendly standard—the rule of reason. The *Leegin* majority cited *Sylvania* five times and *Business Electronics Corporation v. Sharp Electronics Corporation*<sup>142</sup> four times to establish economic premises that are not otherwise analyzed or discussed.<sup>143</sup> *Sylvania* involved a location clause imposed on the retailer, a relatively weak vertical restraint easily distinguishable from a required minimum retail price.<sup>144</sup> *Sylvania* also expressly excepted resale price maintenance from its holding.<sup>145</sup> Thus, under traditional stare decisis doctrine, *Sylvania* was not binding precedent. If the policy rationales of *Sylvania* are valid in the differing factual context of *Leegin*, that should be established by a careful competitive analysis, not by a rote citation to *Sylvania* as a policy super precedent.

Independent of one’s views on resale price maintenance, the *Leegin* decision stands as objectionable judicial activism. If the Court believed the facts of this case warranted an exception to the existing rule, it could have moved cautiously and narrowly to recognize such an exception. Instead it announced a broad holding that removed the per se rule in its entirety, even to fact patterns that one proponent of RPM finds differ markedly from those

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136. *Id.* at 891.

137. *Id.* at 892. Justice Kennedy’s majority opinion follows the general outline offered by the Solicitor General’s amicus brief.

138. Addressing this issue, economist Benjamin Klein has concluded that none of these three procompetitive rationales for resale price maintenance explain *Leegin*’s use of the pricing limits. Klein argued that *Leegin*’s intent was to maintain a large specialty dealer network that might be threatened by retail discount competition. Benjamin Klein, *Competitive Resale Price Maintenance in the Absence of Free-Riding*, 76 ANTITRUST L. J. 431, 433-34, 451-53 (2009).

139. *Leegin*, 551 U.S. at 882-83.

140. *Id.* at 900-02.

141. 433 U.S. 36 (1977).

142. 485 U.S. 717 (1988).

143. *Leegin*, 551 U.S. at 890-96.

144. 433 U.S. at 37-38.

145. *Id.* at 51 n.18.

confronting the Court in *Leegin*.<sup>146</sup> With the support of the Government's amicus brief, the Court majority was resolute in its mission to set a new policy direction, regardless of the underlying facts.

In 2009, the Supreme Court decided *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*,<sup>147</sup> another 5-4 decision that overturned a venerable antitrust precedent. The issue here was a price squeeze claim: the plaintiff alleged that Pacific Bell, a powerful and vertically integrated telecommunications firm, sold digital subscriber lines (DSL) for access to the Internet at a high price to wholesalers such as plaintiffs and at a lower price directly to consumers.<sup>148</sup> The high wholesale price made it impossible for wholesalers to compete with Pacific Bell in the retail market. The Supreme Court had never directly ruled on a price squeeze claim, but in a venerable 1945 case referred to the Second Circuit (because conflicts of interest precluded Supreme Court review), Judge Learned Hand wrote for the panel that a price squeeze by an integrated firm with monopoly power was unlawful.<sup>149</sup> That decision, *United States v. Aluminum Co. of America (Alcoa)*,<sup>150</sup> had, over a sixty-three-year period, gained traction as a controlling precedent for price squeeze claims.<sup>151</sup>

The majority opinion of Justice Roberts treated *Alcoa*, an on-point decision, dismissively, embracing *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*<sup>152</sup> and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*<sup>153</sup> as persuasive authority.<sup>154</sup> As in *Leegin*, the problem with the use of these policy super precedents is that they were cited not because they were on point, but because they reflected a policy that the Court majority wished to embrace. Neither case involved a vertically integrated firm imposing a price squeeze. *Verizon* had addressed, among other issues, a duty to deal claim; *Brooke Group* had addressed predatory pricing. The Roberts'

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146. See Klein, *supra* note 137.

147. 555 U.S. 438 (2009).

148. *Id.* at 442.

149. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

150. *Id.*

151. Decisions that recognized or applied a price squeeze test included: *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802 (3d Cir. 1984); *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373 (9th Cir. 1992).

152. 540 U.S. 398 (2004).

153. 509 U.S. 209 (1993).

154. *Pac. Bell Tel. Co. v. Linkline Commc'n*, 555 U.S. at 452 n.3 ("Given developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us").

majority argued that any competitive harm in a price squeeze is fully addressed in duty to deal or predatory pricing claims.<sup>155</sup>

The Court's logic was deficient. Price squeeze claims are a unique cause of action that can only lie when a powerful seller is vertically integrated, selling on two distribution levels (for example, wholesale and retail levels). Duty to deal claims<sup>156</sup> and predatory pricing claims, in contrast, can be brought against a monopolist under a much broader range of circumstances, regardless of vertical integration. Because of the monopolist's vertical integration, price squeezes can be implemented at little or no cost to the monopolist and are more likely to occur than predatory pricing. A vertically integrated monopolist, without charging prices below its costs (a requirement for predatory pricing), may force its competitors out of business, leaving them with no viable remedy. All the integrated monopolist need do is raise its wholesale price to a level near to or above its retail price (both of these prices can be set well above the monopolist's cost).<sup>157</sup>

The *Pacific Telephone* Court never squarely addressed the goals of the Sherman Act. Like many constitutional provisions, the Sherman Act contains generic common law language, yet there is sufficient consensus about antitrust goals to provide the Court with a solid foundation for antitrust analysis in cases that come before it.<sup>158</sup>

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155. *Id.* at 452.

156. The Court would have been correct to see a duty to deal as a core element of a price squeeze claim. If the monopolist has no duty to deal with a rival, a price squeeze claim lacks a foundation. But the Court in past cases has found a duty to deal, for example, when past cooperative dealings result in an improved product that consumers demand, *see Aspen Skiing Co. v. Aspen Highlands Corp.*, 472 U.S. 585 (1985), when the refusal to deal has exaggerated exclusionary effects on rivals because the monopolist operates an essential facility or a business in which high fixed costs make entry very difficult, *see generally* *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Aspen Skiing*, 472 U.S. 585, or when the refusal to deal requires the monopolist to sacrifice profits. *See Lorain Journal Co. v. United States*, 342 U.S. 142 (1951). On the facts of *Pacific Bell*, it appears that at least one of these elements was present (high fixed costs for building a network to provide DSL service). There was also an agency ruling that, as a condition for approving a merger, Pacific Telephone sell DSL to wholesalers. *See infra* note 160 and accompanying text.

157. A price squeeze is also easier for courts to identify and remedy. Under lower court rulings that pre-dated *Pacific Telephone*, a court could have found an unlawful price squeeze if the vertically integrated monopolist could not make a profit selling at its retail price, assuming that its costs were equivalent to the price charged its wholesale customers. *Ray v. Ind. & Mich. Elec. Co.*, 606 F. Supp. 757, 776-77 (D. Ind. 1984); *Ill. Cities of Bethany v. FERC*, 670 F.2d 187, 189 (D.C. Cir. 1981); *see also* John Vickers, *Abuse of Market Power*, 115 *ECON. J.* 244, 251 (2005).

158. In *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) writing for a unanimous Court, Justice Stevens provided a succinct overview of the Sherman Act's purposes:

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services . . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a

Instead of directly confronting the question whether Pacific Telephone's actions were harmful to competition, the Court addressed a variety of policy questions ranging from the efficacy of administering a price squeeze claim to the interaction between agency and antitrust law.<sup>159</sup> In a merger decision, the Federal Communications Commission had required, as a condition of agency approval, that Pacific Bell sell its DSL lines to wholesalers.<sup>160</sup> Enforcing the price squeeze claim would have been consistent with and complementary to the agency's ruling.<sup>161</sup>

Justice for the wholesalers that brought the price squeeze claim was not on the majority's radar screen. These firms invested their own funds in the DSL retail business after the FCC entered an order requiring Pacific Telephone to sell DSL lines at wholesale.<sup>162</sup> By making this investment, the firms provided competition that the FCC thought beneficial to the public interest. Plaintiff relied on well established precedent.<sup>163</sup> On its facts, this was a strong price squeeze claim—one in which the integrated monopolist charged wholesalers more than it charged its retail customers. The Pacific Bell pricing strategy made a mockery of the FCC's requirement that DSL lines be offered at wholesale.

*Leegin* and *Pacific Telephone* trigger a number of judicial activism indicators. Each overturned a venerable precedent, and did so in a sweeping manner when a narrower holding would have been more consistent with case or controversy jurisdiction. Each should have included a careful analysis of whether the conduct was consistent with Sherman Act goals. Each made inappropriate use of policy super precedents as a substitute for careful, empirically based policy analysis. And each wandered freely from the facts to make a sweeping holding that will apply in factual contexts distant to the case actually decided by the Court. At a minimum, the collection of these

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bargain-quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

159. *Id.* at 697.

160. *Pac. Bell*, 555 U.S. at 442-43.

161. The Roberts majority's comment that high-speed internet service is available from other non-DSL providers suggests disagreement with the FCC's regulatory requirement. *Id.* at 448 n.2 (according to the Court, the FCC itself had agreed that there was ample competition in the provision of high-speed internet service). It seems odd for the Court to second guess a regulatory requirement without a full record on that issue. Many experts believe there is woefully inadequate competition in providing high speed internet service. See SUSAN CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY IN THE NEW GILDED AGE 1-13 (2013) (describing the monopoly risks arising from control of the internet pipeline by large, vertically integrated firms).

Even if the Court found that there was no legitimate duty to deal on the facts before it, and therefore no harm to competition or the consumer, the Court could have made this narrow ruling, without a sweeping pronouncement that no price squeeze claim can ever lie under the Sherman Act.

162. *Pac. Bell*, 555 U.S. at 443.

163. *Id.* at 444.

indicators should have been a strong signal to the Court to move cautiously and incrementally, not by sweeping decree.

A final Sherman Act case, *Comcast Corp. v. Behrend*, was a class action suit brought on behalf of Philadelphia area pay television consumers.<sup>164</sup> The complaint alleged that Comcast had violated the Sherman Act through a series of clustering transactions that raised its market share from 23.9% to 69.5% in the sixteen-county Philadelphia area.<sup>165</sup> The complaint offered four theories as to how Comcast's conduct had produced antitrust injury, the last of which was that Comcast's anticompetitive conduct deterred "overbuilders" (rival firms that were considering installing their own cable systems in various neighborhoods) from proceeding with expansion plans.<sup>166</sup> Plaintiffs introduced an econometric study that concluded that pay television rates were 13% higher in the market area than in nearby benchmark counties where Comcast did not enjoy the high market share.<sup>167</sup> In deciding the propriety of the class action, the district court concluded that only the overbuilder theory satisfied class action requirements under Federal Rule of Civil Procedure 23(b)(3).<sup>168</sup> After further briefing, the district court concluded that the econometric study provided a sufficient basis for concluding that damages could be calculated on a class wide basis.<sup>169</sup> The Third Circuit affirmed.<sup>170</sup>

In its petition for certiorari, Comcast sought review on Rule 23 issues, "including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)."<sup>171</sup> The Supreme Court granted review on a modified question: "whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."<sup>172</sup> Responsively, the parties devoted much of their briefing to the question of admissibility of expert testimony.<sup>173</sup>

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164. 569 U.S. 27 (2013).

165. *Id.* at 29.

166. *Id.* at 31. The dissent states these theories slightly differently. *Id.* at 45-46 (Ginsburg, J., dissenting).

167. *Id.* at 45-46.

168. *Id.* at 31.

169. *Id.* at 46 (Ginsburg, J., dissenting).

170. *Behrend v. Comcast Corp.*, 655 F. 3d 182, 207 (3d Cir. 2011).

171. *Comcast Corp. v. Behrend*, 569 U.S. 27, 39 (2013) (Ginsburg and Breyer, JJ., dissenting).

172. *Id.* at 39 n.5.

173. *Id.* at 39 (citing pages of the briefs dealing with the admissibility question).

Justice Scalia wrote for a divided Court (5-4) reversing the decision of the Third Circuit.<sup>174</sup> The Court ruled that plaintiffs had failed to meet the Rule 23(b)(3) requirement to establish that damages could be determined on a class-wide basis.<sup>175</sup> The Court held that the econometric study offered by plaintiffs was responsive to all four theories of antitrust injury, not solely to the one theory found suitable for class action treatment—the deterrence of overbuilders.<sup>176</sup>

Writing for the four dissenters, Justices Ginsburg and Breyer objected to the shifting ground on which the case was briefed, concluding the Court's disposition was "unfair to respondents and the courts below."<sup>177</sup> They would have dismissed the writ of certiorari as improvidently granted.<sup>178</sup> The dissent also addressed the purposes and framework of Sherman Act litigation, something the majority deemed unnecessary because the lower courts' holdings were "'obvious[ly] and exceptional[ly]' erroneous."<sup>179</sup> Breyer and Ginsburg argued that determination of whether the econometric study could establish Rule 23(b)(3) requirements for class-wide damages was a question of fact determined favorably to the plaintiffs by both lower courts.<sup>180</sup> That factual determination was bolstered by Comcast's own argument below that the remaining three theories of anticompetitive harm rejected by the district court could not have resulted in damages to the plaintiff class.<sup>181</sup> In the dissenters' view, without full and fair briefing, the Court should not have reshaped the question to allow an overturning of factual determinations found and affirmed in the two lower courts.<sup>182</sup>

The majority's decision in *Comcast* triggers two activism indicators: (1) the extreme agenda-shaping conduct of the majority and the related unfairness to the parties; and (2) failure to address the underlying purposes of the Sherman Act. There is also concern with the Court's disregard of the factual holdings that underlay the lower courts' ruling. There is an argument that because the holding here was an interpretation of Rule 23(b)(3), there was no need for the Court to look at the Sherman Act itself. This argument, however, is difficult to sustain because the nature of anticompetitive damages (and their applicability to the entire class) requires some understanding of

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174. *Id.* at 31.

175. *Id.* at 37.

176. Justice Scalia pointed out that the author of econometric study conceded in testimony that his study measured "the alleged anticompetitive conduct as a whole." *Id.* at 36.

177. *Id.* at 49 (Ginsburg and Breyer, JJ., dissenting).

178. *Id.* at 38-39.

179. *Id.* at 36 n.5 (majority opinion).

180. *Id.*

181. *Id.* at 47 (Ginsburg and Breyer, JJ., dissenting).

182. *Id.* at 40.

how the Sherman Act protects competition. These issues were part of the lower courts combined fact-finding and interpretations of law. At a minimum, there are factual questions concerning whether the deterrence of overbuilders could, on its own, have produced the entire 13% overcharge identified in the econometrics study. However, one assesses the majority's failure to address Sherman Act issues, *Comcast* is remarkable primarily because of the cavalier way in which the majority first restated the question for review, and then further altered their own restatement to rule on a related but not forthrightly identified issue of class-action damages. This suggests a Court aggressively shaping the issue to reach a desired ruling, regardless of fairness to the litigating parties.

### *C. Polarization and Pressure for Activist Decisions*

Two cases decided in the last days of the Court's 2012-2013 term highlight that activism can affect causes on any side of the political spectrum. Both seem apt illustrations that when an interest group is dissatisfied with democratic outcomes, it seeks an activist court to overturn that outcome by judicial fiat.

In *United States v. Windsor*,<sup>183</sup> Justice Kennedy joined less conservative justices in a 5-4 holding that the federal Defense of Marriage Act (DOMA) violated the Fifth Amendment by defining marriage to exclude same sex marriages lawful under state law.<sup>184</sup> The definition governed interpretation of over one thousand federal laws and, in the case at hand, would have denied the plaintiff, a surviving same sex spouse, the benefit of the federal estate tax marriage exemption. The district court ruled that the definition was unconstitutional.<sup>185</sup> Before appellate proceedings began, the Justice Department announced that it would no longer defend the constitutionality of the definition; the Bipartisan Legal Advisory Group intervened on behalf of the House of Representatives to defend DOMA's constitutionality.<sup>186</sup> After the Second Circuit affirmed, the Supreme Court granted certiorari and, in a 5-4 ruling, affirmed.<sup>187</sup>

The Court could easily have sidestepped this case. Justice Kennedy's majority opinion concluded that the Court had jurisdiction to hear the case, notwithstanding that both the Government and the plaintiff agreed that

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183. 570 U.S. 744 (2013).

184. *Id.* at 775 (Roberts, C.J., dissenting).

185. *Id.* at 769 (majority opinion).

186. *Id.* at 754.

187. *Id.*

DOMA's definition of marriage was unconstitutional.<sup>188</sup> On the merits, the Kennedy majority agreed that the definition contravened the Fifth Amendment, but focused on the federalism issue, stressing that the States have traditionally been allowed to determine what does or does not constitute a lawful marriage.<sup>189</sup>

The decision generated passionate dissents signed by the remaining four justices.<sup>190</sup> Justice Scalia's dissent included a strong statement in support of the "cases and controversies" limit on the Court's jurisdiction.<sup>191</sup> Was *Windsor* an inappropriate activist decision? To be sure, the majority stopped short of a far broader result: that all state marriage laws declining to recognize same sex marriage are unconstitutional.<sup>192</sup> Public opinion had changed since DOMA's 1996 enactment. The decision nonetheless was disrespectful of a congressional enactment that enjoyed very strong support (DOMA was enacted with strong majorities in both houses).<sup>193</sup> There were other readily available means for the elected branches to deal with the issue without the Supreme Court's intervention, particularly given that there was no disagreement between the litigating parties. The President could have declined to enforce the provision on constitutional grounds, following the ruling of the district court. Congress, although polarized and unable to act in the short term, could ultimately have amended DOMA in response to a strong shift in public opinion. Alternatively, if Congress disagreed with the President, it could have wielded its budgetary control to force the President to reconsider. The Court majority may have felt more comfortable making the constitutional ruling because it was urged to do so by the Solicitor General, but that does not remove the activist tinge from *Windsor*. As Justice Scalia put it, the Court could "have let the people decide" through the actions of their elected representatives.<sup>194</sup>

Those who liked the outcome of *Windsor* may not have welcomed the Court's activist decision, issued one day earlier, striking down the preclearance procedure in the Voting Rights Act. In *Shelby County v.*

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188. *Id.* at 755-56. Perhaps the four dissenters were among the justices who voted to grant certiorari (on the false expectation that they could muster a majority to overturn the lower courts' rulings). If so, their disappointment may have fired the stridency of their dissent.

189. *Id.* at 768.

190. *Id.*

191. *See supra* notes 29-34 and accompanying text.

192. "This opinion and its holding are confined to . . . lawful marriages [recognized by state law]." 570 U.S. at 775.

193. DOMA was enacted in 1996 with the support of 85 Senators and 342 Representatives. *Id.* at 775-76 (Roberts, C.J., dissenting).

194. *Id.* at 802 (Scalia, J., dissenting).

*Holder*,<sup>195</sup> Justice Scalia was part of a five-member majority that followed the activism pattern of the Roberts Court in narrowing or invalidating statutes seeking to protect against abuses by powerful political and economic interests. Leaving aside the merits, there are at least two striking features of this activist decision. The first is that the Court majority once again manipulated the agenda in order to reach the constitutional issue. This time, the Court had the assistance and support of Shelby County, which had ignored the Voting Rights Act's preclearance procedure in order to invite a Supreme Court ruling on constitutionality.

That Shelby County succeeded was due not to any finding that it was unjustly subject to preclearance. Quite the contrary, Justice Ginsburg's dissent cited extensive congressional findings that political jurisdictions within Alabama, including one in Shelby County, had a record of noncompliance with the Voting Rights Act.<sup>196</sup> Chief Justice Roberts majority opinion did not disagree.<sup>197</sup> This aspect of the Court's broad holding is typical of agenda manipulation in which the Court ignores the facts of an individual dispute in order to reach a desired broad holding. This was the very sort of institutional aggrandizement that Justice Scalia passionately condemned a day later in his dissent in *Windsor*.

The Roberts majority opinion argued that the procedure was based on stale factual findings in the original 1965 Voting Rights Act<sup>198</sup> and violated a principle of "equal sovereignty" for the states.<sup>199</sup> To support a conclusion that preclearance was no longer needed, the Roberts opinion included a table that showed a vast improvement in minority turnout for elections in many of the jurisdictions subject to preclearance. Without a measure of causation, the increased voter turnout could have been the result of multiple causes, including the remedial effect of the preclearance procedure itself. The Ginsburg dissent argued that exhaustive congressional factfinding that led to renewal of the Voting Rights Act in 2006 demonstrated that the preclearance procedure was a primary factor in the increased minority participation.<sup>200</sup>

This leads directly to the second activist feature of *Holder*. The Roberts opinion was disrespectful of this extensive congressional fact-finding. Justice Ginsburg, calling the majority opinion an act of "hubris,"

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195. 570 U.S. 529 (2013)

196. *Id.* at 582-83 (Ginsburg, J., dissenting).

197. *Id.* at 554-55 (majority opinion) (arguing that Shelby County's record of discrimination is irrelevant because the formula for selecting preclearance jurisdictions is "unconstitutional in all its applications.")

198. *Id.* at 550, 553.

199. *Id.* at 544-45.

200. *Id.* at 565-66 (Ginsburg, J., dissenting).

documented this fact-finding in some detail, suggesting that the majority made “no genuine attempt to engage with the massive legislative record that Congress assembled”<sup>201</sup> During oral argument, Justice Scalia remarked that it might be necessary for the Court to “fix” the preclearance formula because this was the sort of thing that Congress was unlikely to fix on its own.<sup>202</sup> The remark’s palpable disrespect for a coordinate branch is strikingly at odds with what Justice Scalia passionately advocated one day later in his *Windsor* dissent. There are multiple reasons why Congress may not jump to correct an outdated policy prescription. If any of these reasons is a sufficient rationale for the Court to impose its opinion for that of a democratically elected legislature or executive, the invitation for judicial activism is even more expansive than past Court practice would suggest. Chiseling a policy view into the stone of constitutional precedent is an inflexible and undemocratic way of addressing the need for change. By contrast, the Voting Rights’ Act formula for preclearance was not a static one. As the Ginsburg dissent documented, a significant number of jurisdictions had petitioned for and received release from preclearance requirements, while other jurisdictions whose compliance record was questionable were added to the list subject to preclearance.<sup>203</sup>

*Windsor* and *Shelby County* were activist decisions that demonstrated the continuing selective judicial activism of the Roberts Court, but also its ability to turn in opposite ideological directions. In two decisions issued on consecutive days, all nine justices joined in overturning parts of recent federal legislation enacted by strong congressional majorities.<sup>204</sup> The two decisions show how litigants themselves quickly adjust to the Court’s activist tendencies. The Solicitor General and *Shelby County* did not hesitate to exploit the Court’s proclivity to reach broad holdings with a disconnect to the facts. Future litigants will continue to ask the Court to do precisely that.

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201. *Id.* at 580, 587.

202. Transcript of Oral Argument at 47-48, *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (“[I]t’s a concern that this is not the kind of a question you can leave to Congress. There are certain districts in the House that are black districts by law just about now. And even the Virginia Senators, they have no interest in voting against this. The State government is not their government, and they are going to lose -- they are going to lose votes if they do not reenact the Voting Rights Act.”). Justice Scalia’s argument could be invoked any time a polarized or lethargic Congress does not respond to a perceived injustice.

203. *Holder*, 570 U.S. at 579 (Ginsburg, J., dissenting) (noting that nearly 200 jurisdictions had successfully petitioned to be released from preclearance requirements in the years following 1984).

204. DOMA was enacted in 1996 with the support of 85 Senators and 342 Representatives. *Windsor*, 570 U.S. at 775-76 (Roberts, C.J., dissenting). The Voting Rights Act was reenacted in 2006 with the support of all 98 voting Senators and 390 representatives. *Holder*, 570 U.S. at 565 (Ginsburg, J., dissenting). Justice Kennedy voted for the activist result in both cases. The other 8 justices traded places in the two cases, in one case voting for overturning the federal legislation; in the other dissenting.

*D. Lessons from the Cases*

The cases assessed here by no means demonstrate that all or even a high percentage of the contemporary Court's holdings are activist decisions. Pamela Karlin has documented two areas (habeas corpus petitions and damage actions against government officials) in which the Roberts Court has continued to decide constitutional issues narrowly and with deference to elected governments.<sup>205</sup> Even in highly politicized cases such as the Court's June 2012 opinion on the national healthcare legislation,<sup>206</sup> the pattern of activism is not without exceptions. Whether one agrees or disagrees with that holding, the Court majority avoided overturning a major regulatory initiative enacted by Congress and strongly supported by the President. In its result, the decision avoided a direct challenge to the elected branches.

In more recent decisions, the Roberts Court's selective activism continues to disfavor attempts to reign in abuses by the politically and economically powerful. In the 2017 term, the Court split (5-4) along ideological lines in striking down a union's collection of an agency fee from nonmembers, overruling a controlling past precedent that upheld this right.<sup>207</sup> The same ideological division occurred in the dismissal of an antitrust case challenging what the Department of Justice and a number of states alleged was anticompetitive conduct in the marketing of credit cards.<sup>208</sup> In two other controversial cases, the Court ruled narrowly (dismissing an action challenging a Colorado baker's refusal to sell a wedding cake to a gay couple<sup>209</sup> and disposing on narrow grounds two challenges to political gerrymandering<sup>210</sup>). These narrowly crafted decisions required the vote of now retired Justice Anthony Kennedy. With Kennedy's replacement, an ideological majority may find an open door to issue broad activist decisions in areas where Kennedy had provided the deciding vote.

The Roberts Court's selective activism is distinguished by aggressive agenda shaping and heavy reliance on policy super precedents. Neither of

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205. Pamela Karlin, *The Transformation of Judicial Self-Restraint*, 100 CALIF. L. REV. 607 (2012).

206. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 590 (2012). The Court was badly split and one vote away from an aggressive holding that would have struck down the politically charged legislation. Chief Justice Roberts agreed with his dissenting colleagues that the legislation was beyond any power conferred by the Commerce Clause but joined his other four colleagues in upholding the law under the Government's power to tax.

207. *Janus v. Am. Fed'n of State, Cty, and Mun. Emps.*, 138 S. Ct. 2448 (2018).

208. *Ohio v. Am. Express*, 138 S. Ct. 2274 (2018).

209. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

210. *Gill v. Whitford*, 138 S. Ct. 1916 (2018); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (per curiam).

these tools is new. They were occasionally used in the Rehnquist Court or earlier. In the 1994 decision in *Central Bank of Denver v. First Interstate Bank of Denver*,<sup>211</sup> a divided Rehnquist Court addressed the issue of aider and abettor liability under federal securities law. Although all eleven judicial circuits had allowed such suits aimed at aiders and abettors, and the certiorari papers did not focus on this issue, the Court asked for additional argument on the question and ruled that Congress, when it enacted the underlying statute in 1934, did not authorize such suits.<sup>212</sup> Correct or not, the aggressive reformulation of the issue signaled activist agenda control.<sup>213</sup>

The use of policy super precedents is, in one sense, more objectionable than the natural law extensions of the Warren Court because it disguises judicial activism as legitimate use of precedent. It opens the door for special interest groups and future Courts to aggressively employ similar activist techniques in any area of the law in any political direction. Policy super precedents and aggressive agenda shaping are powerful tools in the continuing transformation of a court of law into an unelected policy board.

#### IV. REFORMING THE COURT AND CONSTRAINING JUDICIAL ACTIVISM

The Supreme Court is unlikely to reform itself. The Court's incumbent members have total control over their agenda, enjoy a comfortable schedule with life tenure, and are treated with reverence by members of the Bar and the public. It is unlikely that these members will rally around a reform that would create a less exalted and more traditional judicial institution required to work hard to decide a large number of cases.<sup>214</sup>

When state legislators refused to face up to redistricting rules that threatened their job security, the Supreme Court ultimately was forced to intervene in the *Baker v. Carr*<sup>215</sup> line of cases. Within the Judiciary, there is, however, no superior tribunal to intervene when parochial interests of sitting

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211. 511 U.S. 164 (1994), *superseded by statute*, Private Securities Litigation Reform Act of 1995, Pub.L. No. 104-67, 109 Stat. 737, *as recognized in* *In re Kingate Management Ltd. Litigation*, 748 F.3d 128, 155 n.22 (2015).

212. *Id.* at 183.

213. See the discussion of this issue in Strauss, *supra* note 43, at 900-01.

214. The reforms described here for the most part have been proposed and discussed by other scholars. Docket control, for example, has been identified as a major problem in a number of prior writings. Carrington & Cramton, *supra* note 8, at 590 ("A significant element in the Court's role as superlegislature is legislation allowing Justices to decide only those few legal and political issues that they choose to decide"); see also Owens & Simon, *supra* note 12, at 1278-79 (confirming a statistically significant correlation between the 1988 statute that was the final step in granting the Court complete control over its own agenda and the Court's shrinking docket). Increasing the size of the Court and moving to panel decisions was addressed extensively in George & Guthrie, *supra* note 50.

215. 369 U.S. 186 (1962). See discussion *supra* Part II.B.

Supreme Court justices stand in the way of reform. Sitting justices have a conflict of interest that will take outside pressure to resolve.<sup>216</sup>

The Court could be prodded in various ways by the President and Congress. The President could facilitate reform by appointing justices that favor reform. Congress has deferred to the Court's leaders in shaping the institution, but that need not be so. Congress can and should be an active participant in the debate—and ultimately in passing legislation— that could institute necessary reforms. Confirmation hearings offer Senators an opportunity to push for reform.

A less bold but still useful step would be to appoint centrist justices whose votes are required to decide critical cases, pushing the Court toward narrowly crafted decisions. Unfortunately, the President has little incentive to lean to the center for judicial appointments when the Senate majority is in the control of the same political party. Centrist appointments are a positive step but are unlikely to occur on a consistent basis.

#### A. *Restoring Mandatory Jurisdiction to Review Cases*

Congress has given the Court total control over its agenda, in large part because that is what members of the Court wanted. Agenda control invites the Court to maintain a case load that is well below levels in the early and mid-twentieth century and grossly disproportionate to the case loads in the lower federal courts. In addition to an ability to select cases based on policy preferences, agenda control has led to sweeping rulings and to intrusion into the policy making decisions of democratically elected officials at all levels of government. These effects contribute to the fierce political gamesmanship that surrounds the appointment of a justice. Ultimately, increasing judicial activism threatens the Court's independence. As Posner has written, "unrestrained courts produce unrestrained backlash."<sup>217</sup> Kramer has suggested "an equilibrium point beyond which the Court cannot go without undermining its institutional authority and capacity."<sup>218</sup>

One approach favored by Carrington and Cramton would be to create a panel of court of appeals judges, with rotating membership, to select which

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216. Writing in 2012, Judge Posner was skeptical of the possibility of reform of the Court, suggesting that it was "quixotic to try to reverse the trend" of constitutional rulings that ignore the views of elected governments. Posner, *supra* note 23, at 555. Yet, as Posner also admitted, judicial activism runs in cycles, suggesting that outside factors can and have had an impact on activism. See Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579 (2012) (tracing the history of the Court's judicial activism back at least as far as the post-Civil War era). Posner did not address the structural issues that encourage activism.

217. Posner, *supra* note 23, at 554.

218. Kramer, *supra* note 20, at 634.

cases should be reviewed by the Supreme Court.<sup>219</sup> The panel could have a permanent administrator heading a staff of experienced lawyers to make recommendations, subject to input from state or federal government agencies or outside groups. A panel decision to require review would be binding on the Court, although the Court might retain its discretionary role in hearing additional cases. Congress could provide input on the requirements for granting review, including a reaffirmation of the commitment that justice be available to all litigants.

Under any responsive reform, the Court likely must hear more cases, perhaps increasing its workload by a substantial multiplier. There are a number of ways this could be done, including more extensive use of summary rulings. Following the example of the European Court of Justice, the Court could also sit in panels of three justices each, with or without an expansion of the Court's size.<sup>220</sup> By hearing substantially more cases, pressure on the Court to issue broadly applicable rulings will be lessened. Some judicial activism is inevitable, but incentives for it could be significantly reduced.<sup>221</sup>

#### *B. Mitigating the Court's Use of Policy Super Precedent*

The use of past cases as a proxy for careful and fact-based policy analysis now permeates Supreme Court culture. The Court and the Solicitor General's Office, however, could spark a change in this culture. Supreme Court briefs filed in cases involving economic or political theory could have a separate section for policy-based analysis. Indeed, much of the current difficulty with policy super precedents could be alleviated if the Court would treat theories of economics or issues of public policy narrowly, in a manner consistent with the factual record, not with immutable principles of law or constitutional doctrine. This would give the Court much of the flexibility that administrative agencies have to reconsider economic principles or public

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219. Carrington & Cramton, *supra* note 8, at 630-36. Arguments against this proposal were marshaled by J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 YALE L. J. ONLINE 67 (2009).

220. This is essentially the proposal of George & Guthrie, *supra* note 50. The authors suggest that the Supreme Court could hear some cases en banc, such as those involving constitutional interpretation or those involving reversal of a Supreme Court precedent.

221. Of course, any expansion in the Court's size should be crafted to avoid the political turmoil created by President Franklin Roosevelt's "court-packing" proposal. Frustrated with the Supreme Court's rejection of key legislative provisions during his first term, Roosevelt proposed to add six additional justices that he would nominate. The scheme was highly controversial, unsuccessful and, as it turned out, unnecessary to President Roosevelt's objective (an existing member of the Court switched sides and other members of the Court were replaced with Roosevelt nominees). See the description of these events in PETER CHARLES HOFFER ET AL., *THE SUPREME COURT, AN ESSENTIAL HISTORY* 252-53, 263-65 (2007). Replacing one President's judicially active Court with another's is not a long-term solution to the structural issues confronting today's Court. The Court's membership could be increased gradually over a period of years to lessen the political concerns.

policy approaches in light of the specific factual context or evolving theory and public sentiment. Litigants, and the Court itself, would continue to use past cases in support of policy premises, but it would be done in a format that highlights this use and highlights as well that such use of a past case in support of a policy conclusion is not to be equated with stare decisis.<sup>222</sup>

### C. Rules for Systematic Appointment and Tenure

One critic has called granting life tenure to federal judges “the stupidest provision of the 1787 Constitution that has any impact today.”<sup>223</sup> Neither states within the United States nor developed countries throughout the world give life tenure to judicial officers. Life tenure is also not the rule for large businesses, where CEOs, while enjoying autocratic powers, serve at the discretion of a corporation’s board of directors. In short, life tenure is an illogical way to run an efficient and competent court system. The issue deserves careful and prompt attention for judges at all levels of the federal court system. At the Supreme Court level, one commendable reform proposal, sensitive to the Court’s tradition, is to create eighteen-year terms under a schedule that assured a new justice would be selected regularly at two-year intervals. Terms staggered in this manner would guarantee every President the opportunity to appoint two justices during a four-year term.<sup>224</sup>

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222. In place of reliance on super precedent, the Court ought to be making more direct reference to the policy analysis of government agencies with expertise and delegated authority from elected officials. The Court has set a foundation for this process. The Court’s decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), recognized a presumption of validity for an agency’s reasonable interpretation of its enabling legislation. This presumption should be directly applied to interpretations of the Sherman Act and other antitrust statutes by the Department of Justice and the Federal Trade Commission. Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 84 TEX. L. REV. 1247 (2011) (proposing a presumption of validity for rules adopted by an antitrust agency). In the election law area, the Court should give weight to the views of the Federal Elections Commission and to legislatures that, with the benefit of hands-on experience that the Court lacks, deal directly with election law issues.

223. L.A. Powe, Jr., “*Marble Palace, We’ve Got a Problem—With You*”, in REFORMING THE COURT: TERM LIMITS FOR THE SUPREME COURT JUSTICES, 99, 113 (Roger C. Cramton & Paul D. Carrington, eds. 2006).

224. Calabresi & Lindgren, *Term Limits for the Supreme Court*, in REFORMING THE COURT: TERM LIMITS FOR THE SUPREME COURT JUSTICES, *supra* note 11, at 50-66. The eighteen-year term proposal, or proposals for terms of other lengths, received the endorsement of 2012 Republican Presidential candidate Governor Rick Perry, as described in Hendrik Hertzberg, *Perry’s Good Idea*, THE NEW YORKER, Jan. 30, 2012, at 17, and from SEGALL, *supra* note 25, at 170. The controversy surrounding the unsuccessful nomination of Judge Garland and the subsequent confirmation of Justices Gorsuch and Kavanaugh generated additional editorial support for term limits. David Leonhardt, Opinion, *The Supreme Court Needs Term Limits*, N.Y. TIMES, (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/opinion/columnists/brett-kavanaugh-supreme-court-term-limits.html>; Lee Drutman, *It’s Time for Term Limits for Supreme Court Justices*, VOX: POLYARCHY

On the other hand, the size of the Court may change (as it has in the past), forcing reconsideration of appointment frequency (but not of the regular rotation) that this proposal would occasion. Such a reform may require a constitutional amendment, but the Senate could begin this process by extracting a non-binding commitment from each nominee to step down no later than on completion of eighteen full years (or such other term as the Senators felt relevant).<sup>225</sup>

Discussion should also include other proposals, such as putting an age limit on the service of all federal judges. Along with the proposal that would give each justice a staggered term of ten or more years, a proposal to allow the Court to select its own chief justice should be considered.<sup>226</sup> A Republican President has appointed each of the last four chief justices spanning a sixty-five-year period. By timing a resignation to occur when the sitting President is from the preferred political party, the chief justice, just as any other justice, can increase the chances of a replacement having similar political or jurisprudential views. It is quite possible that a long tenure by Chief Justice Roberts could extend the string of Republican-appointed chief justices to eighty years or more. If the eighteen-year term proposal were implemented, a chief justice's tenure would be limited to eighteen years. There is, in any event, a strong argument that the President should not determine the leader of a co-ordinate branch of government. A rotating assignment scheme—for example, preventing a chief justice from serving consecutive terms (the length of a term also to be set by Congress) could lessen the politicization of a chief justice's appointment.

## V. CONCLUSION

During the first decade of the Roberts Court, a conservative majority was selectively aggressive in cases of potentially abusive conduct by

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(June 27, 2018, 3:57 PM), <https://www.vox.com/polyarchy/2018/6/27/17511030/supreme-court-term-limits-retirement>; Michael McGough, Opinion, *If Our Partisan Supreme Court Terrifies You, Fixed terms for justices is a safer bet than #RibsForRuth*, *Tribune News Services*, L.A. TIMES (Nov. 8, 2018, 3:48 PM), <https://www.latimes.com/opinion/la-ol-enter-the-fray-ribsforruth-and-the-case-for-limited-1541715613-htmstory.html>.

225. Professor Akhil Amar has made a similar suggestion. Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASHINGTON POST, Aug. 2, 2002, at A23, 2002 WLNR 15853571.

226. Todd E. Pettys, *Choosing a Chief Justice, Presidential Prerogative or a Job for the Court?*, 22 J. L. & POL. 231, 236 (2006). For additional background, see Judith Resnick, *Democratic Responses to the Breadth of Power of the Chief Justice*, in REFORMING THE COURT: TERM LIMITS FOR THE SUPREME COURT JUSTICES 181 (Roger C. Cramton & Paul D. Carrington, eds. 2006); Alan B. Morrison, *Opting for Change in Supreme Court Selection, and for the Chief Justice, Too*, in REFORMING THE COURT: TERM LIMITS FOR THE SUPREME COURT JUSTICES 203 (Roger C. Cramton & Paul D. Carrington, eds. 2006).

powerful political and economic actors. Indeed, aggressive forms of activism, including agenda manipulation and invocation of policy super precedent, characterized many of these decisions. In response, controversy and political maneuvering was never more evident than during the Senate proceedings to replace Justices Scalia and Kennedy. Reform of the Court is needed to lessen the incentives and opportunities for such activism. As a secondary benefit, reform can reduce the incentive for political maneuvering in the appointment process.

Sitting justices will not rush to support reform proposals. Many may perceive proposed reform as a threat to perquisites associated with a revered position on a life-tenured Court. For such reforms to be adopted, there must be an open discussion involving the Executive branch, Congress, current and former members of the Court, members of the bar, scholars, and interested members of the public. Inbred reluctance to change a highly respected and venerated institution must be tempered by knowledge that a failure to act could result in a continued erosion of our democratic institutions at all levels of government, a loss of respect for the Court, and a further undermining of its independence.