Can the Supreme Court Be Fixed? Lessons From Judicial Activism in First Amendment and Sherman Act Jurisprudence

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The premier court in a branch of government that Alexander Hamilton saw as the “least dangerous,” the United States Supreme Court has attained power and status beyond anything Hamilton could have foreseen. Instead of a Court that decides “cases or controversies” to render justice to individual litigants, the Court has become an unelected policy tribunal that picks for review only cases that it wishes to hear. For every 675 cases accepted for review by the regional federal courts of appeal, only one will be reviewed by the Supreme Court — that’s roughly 80 cases a year.¹ These cases are selected not to remedy injustice to individual litigants but based on criteria that invite the Court to maximize its power and influence in interpreting the Constitution and the massive and growing body of federal statutes.

The Supreme Court has always been a political institution. Early in its history, Chief Justice John Marshall’s opinion in Moorberry v. Madison² was as overtly political as any decision in the Court’s history. The political nature of Court decisions can never be vanquished, but the Court has traditionally operated under constitutional and self-imposed restraints that limit its intrusion on the policy decisions of the democratically elected branches. In the 21st century, Supreme Court nominees continue offering pious pledges to decide cases narrowly — to be an interpreter, not a maker, of law. Once on the bench, however, there seems little in the way of meaningful constraint on an activist Court.

The term “judicial activism” can be elusive. As Senator Al Franked has said, politicians who complain about judicial activism usually are speaking of a judge “who votes differently than [the politician] would like.”³ Judicial activism is used here to describe a Court that acts in a 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. 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, it was the conviction that the Constitution, through the due process clause, protected freedom of contract (“substantive due process”). During the Warren Court’s flirtation with populism in the 1960s, it was a strong

¹ These statistics are derived from the 2011 Year-End Report of the Federal Judiciary.
² 5 U.S. (1 Cranch) 137 (1803).
conviction that the Constitution protected individual rights of criminal defendants and the relatively powerless. Some might see today’s Court as returning to the *Lochner* era. Under the loose umbrella of “market theory” – that societal behavior is best left to be determined by unconstrained market forces – a majority of today’s Court has applied both the free speech clause of the First Amendment and the Sherman Act in a manner that grants freedom of action to powerful firms and individuals and obstructs efforts to constrain abuses by those powerful interests. What each of these activist Courts has in common is a propensity to use the words of a statute or constitutional provision as a platform for sweeping and consequential policy pronouncements difficult or impossible for democratically selected local, state or federal institutions to correct.

The Supreme Court has become, in Judge Richard Posner’s words, a “superlegislature.” 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.” The justices have become “the authors and sometimes amenders of a constitution that is an extension of the text written in 1787.” “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.” These risks are manifested in the various ways, one of which is the Court’s propensity for activist policy decisions that undermine democratic process.

Whatever one’s views on the past or present judicial activism, 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 requires it occasionally to overturn legislation or place its preferred policy spin on an ambiguous constitutional or statutory mandate. Getting the balance right is important. An unelected Court should not become a policy maker beyond the need to decide cases or controversies brought before it. A judicially active Court risks imposing the rule of unelected generalist justices over more specialized and experienced officials that answer directly to democratically elected legislatures or officials at the federal, state, or local level. The result is loss of public confidence in the Court and its rulings and threats to judicial independence.

Part I of this paper describes content-neutral measures of judicial activism, most

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6 Id. at 595.
7 Posner, supra note 4, at 77.
8 In *Moorberry 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) at 176-78.
9 See Carrington & Cramton, supra note 5, at 588-89 (describing indications of the loss of public confidence in the Court and the concomitant threats to judicial independence).
repeatedly acknowledged by the Court. Part II addresses specific examples of judicial activism in Supreme Court decisions involving the Sherman Act and First Amendment election law cases. Part III concludes by urging a public debate on possible reforms of the Court, some easily implemented, others more involved, that could constrain judicial activism and restore the Court’s primary role as a judicial tribunal.

I. 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 an 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.”

The Court early on established its authority to overturn unconstitutional legislation, but the judiciary was limited to deciding “cases or controversies,” and had no express authority to legislate or enforce the laws. An unconstitutional law could be struck down, but the 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 the policy goals of the elected branches. 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. Dahl’s conclusion, however, failed to address the numerous cases where a Court policy interpretation failed to meet the high threshold required to move legislation through Congress. 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.”

With the proliferation in statutes and the continuing evolution of the regulatory state, the Court’s policy-making role is more important than ever. The Court continues to limit severely the number of cases reviewed, inflating the pressure and incentive to decide cases broadly. Over the past two centuries, the Court has increased its power and prominence relative to the other two branches of Government. The Court, and its individual justices, increasingly have taken on rock-star status. In the words of one critic, “The Court needs to be less exalted as an icon. . . . Congress has long neglected its duty implicit in the constitutional doctrine of separation of powers to constrain the tendency of the Court, the academy and the legal profession to inflate the Court’s status and power.”

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12 The Constitution defines the Court’s jurisdiction in terms of “cases” or “controversies.” U.S. CONSTIT., Art. III, § 2.
13 Dahl, supra note 10, at .
14 Carrington & Cramton, supra note 5, at 607.

-Paul D. Carrington, Checks and Balances: Congress and the Federal Courts, in
public scrutiny and debate.

A definition of judicial activism that turns on a Court role consistent with a democratic state differs from one that has been employed by some constitutional scholars. Under a widely discussed view, judicial activism occurs when the Court acts in a manner inconsistent with the original intent of the framers of the Constitution. Justice Scalia calls “originalism” a “branch of textualism” in which text is given “the meaning it had when it was adopted by the Congress, or by the people, if it’s a constitutional provision.” Proponents of this “originalist” view have, for example, directed criticism at decisions of the Court during the 1960s and early 1970s that expanded the criminal procedural rights of defendants.

If judicial activism is understood as undue displacement of the functions of coordinate and democratically elected branches, this definition is at once broader and narrower than the focus on original intent. Some of the criminal procedure decisions of the Warren Court may well constitute usurpations of coordinate branch powers; others may not. The point is that the Court, whether or not it adheres to originalism, should exercise its powers by deciding cases or controversies, not by issuing broad policy edicts on matters that go well beyond the text of the operative statutory or constitutional provision.

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 principles. The Court is the final arbiter of what is constitutional, but it should work with, and be sensitive to, the views of the President, the Congress, local and state governments, and the electorate in making its rulings. To be acceptable to a broad spectrum of political ideologies, constraints on the Court’s power should be as devoid as possible of normative content. Below I identify six such constraints on judicial decision-making, most widely acknowledged by scholars and the Court itself.

None of the activism indicators, in isolation or collectively, necessarily indicates unacceptable judicial activism. Indeed, some of the Court’s most enduring and courageous holdings – *Brown v. Board of Education* 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. If the number of decisions triggering these indicators is on the increase, this suggests the need for re-examining the Court’s role and how it reaches decisions.

A. Doing Justice to the Parties to the Dispute -

Since 1789, federal judges have taken an oath to “administer justice without respect to

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persons,” to “do equal right to the poor and to the rich,” and “to faithfully and impartially discharge and perform” the duties of judicial office. The judge’s task is to render justice in the case or controversy before it. Unfortunately, the pressures on today’s Supreme Court often push it to disregard this duty. The Court is highly sensitized to its role in setting a precedent that will be followed in all judicial circuits. The pressure of that role often pushes the Court toward broader holdings that have little connection with the facts in the case or controversy to be decided.

Despite its institutional deficiencies in acting as a legislature, the Supreme Court has often handed down sweeping decisions, doing what legislatures do by acting well beyond the facts of the case before it. When the Court grants certiorari in a case it deems important, the Court may focus not on justice to the parties but rather on whether its ruling will have the desired long term policy effects. Because the Court reviews so few cases, there may be additional pressure on the justices to reach a broad holding, even if the record facts suggest a contrary outcome. A focus on the long term implications of a ruling makes it easy for the Court to slide into a law-making role at the expense of justice to the parties. When it does so, it acts contrary to the oath administered to each justice and beyond the Constitution’s grant of jurisdiction limited to cases and controversies.

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 record facts before it. Legislatures are unconstrained by the facts of a particular case and can establish broadly applicable norms. Legislatures are in a position to hold hearings and deliberate extensively, reacting to the views of a variety of groups who have an interest in the outcome. Input can be offered at multiple points as legislation works its way through 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, does not have the process, the staffing, or the democratic mandate to craft law in a multi-stage, deliberative fashion that fosters compromise. As Professor 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.”

B. Deciding Cases Narrowly -

For purposes of this analysis, 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. This

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18 Congress requires that every federal judge take this oath. 28 U.S.C. §453.
19 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).
21 Justice Stevens reflected this view in an interview, describing a conservative justice as
view draws strong support from many who have sat, or currently sit, on the Court. 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.”22 Not everyone on the Court, however, agrees with this approach. Justice Scalia, for example, has written that broad rulings should be preferred over case-by-case analysis. Because the Supreme Court reviews so few cases (only about 1 of every 2000 cases decided by the district courts), Scalia argues that broader rules are necessary to ensure uniformity and predictability in the law’s application by the lower courts.23

There are to be sure situations in which the Court is justified in establishing rules that go beyond the facts of the case before it. A broader 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 broader holdings will provide clarity and efficiency in understanding, complying with, and enforcing the law. Accepting the need for the occasional broad holding, Sunstein nonetheless has concluded 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.24

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 decision 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 objectionable form of judicial activism, but the impact of such a decision will be less than with a broader construct. The intrusion into the legislature’s role will be more clearly highlighted and susceptible to correction by the legislature.

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22 Interview with Chief Justice Roberts, ABC News Night Line, available at http://abcnews.go.com/Nightline/story?id=2661589&page=2. Chief Justice Roberts continued: “Yes, I’m sure there are occasions when a bold decisions 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.

23 Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989). Because of the need to strive for non-discriminatory and clear interpretations of the laws, Scalia suggests that “the value of perfection in judicial decisions should not be overrated.” Id.

24 Sunstein, supra note 20, at 6-7. The Sunstein analysis still leaves room for a broad decision, which he finds 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.
C. The Court Ignores, Discounts, or Overrules Relevant Precedent

The Court has the power to overturn its own precedents, and does so on occasion. 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. 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 may be seen as particularly important when the Court is functioning as a common law court, without the benefit of statute, or when a statute such as the Sherman Act 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.”

At least in principle, the Supreme Court agrees. In his majority opinion in *Citizens United*, Justice Kennedy quoted with approval this passage from an earlier Court 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.

D. The Court Fails to Address the Intent of the Constitutional or Statutory Provision

Notwithstanding the generic language in provisions of the Constitution and statutes such as the Sherman Act, the intent of these provisions can be at least roughly discerned and should be a guide to Supreme Court interpretations. For example, despite the Sherman Act’s generic common law language, there is sufficient consensus about antitrust goals to provide the Court with a solid foundation for antitrust analysis in cases that come before it. In *National Society of Professional Engineers v. United States*, 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 not only produce 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

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25 KARL 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 LLEWELLYN, *THE COMMON LAW TRADITION - DECIDING APPEALS* 223 (1960).

elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.\(^{27}\)

The language of the free speech clause of the First Amendment also is generic, but the general intent behind the clause also seems reasonably settled. “Discussion of public issues and debate on the qualifications of candidates are integral to the operation” of our system of governance. “There is practically universal agreement that a major purpose of” the First Amendment “was to protect the free discussion of governmental affairs” “including discussions of candidates.” *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2816-17, 2828 (2011)(quoting with approval *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Writing for four dissenters in *Arizona Free Enterprise*, Justice Kagan added that the “core purpose” of the free speech clause is fostering “a healthy, vibrant political system full of robust discussion and debate.”\(^{28}\)

E. Inappropriate Invocation of Stare Decisis – Superprecedents

A key measure of the Court’s transmogrification from a judicial to a policy-making body is its expanded use of precedent as a proxy for policy analysis. When the Court uses past precedent in this manner, the Court is invoking a “superprecedent.” It is telling the world: this policy premise is part of the fabric of the law (or the Constitution) because we have said so in the past. While it is necessary and proper for the Court 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 elected officials. 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.

Examples of the Court’s use of its own policy precedents abound. In *Arizona Free


\(^{28}\) In election law cases, however, the contemporary Court is starkly divided on how to attain these goals. The Roberts’ Court majority has employed the “money is speech” paradigm to judge harshly Government restraints on private expenditures while pushing for strict limits on government subsidized election-based speech. In contrast, a strong minority of the Court, with varying support of the Executive branch, Congress, and some state legislatures, would tolerate more Government restraints on private expenditures while urging more tolerance of government-subsidized election speech. The two sides do not agree on the importance of discouraging corruption or the appearance of corruption in political debate, nor do they agree on the degree to which campaign expenditures should be equated with free speech. These disagreements notwithstanding, attentiveness to the intent behind a constitutional or statutory provision remains an important restraint on judicial activism.
Enterprise, the divided Court’s majority opinion (Roberts, C.J.) offered the following explanation of why expenditures by independent political groups were not a concern in a first amendment analysis:

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. [citing Citizens United, 130 S. Ct. at 909-911] Including independent expenditures in the matching funds provision cannot be supported by any anticorruption interest. (Second emphasis supplied).29

The reference in Chief Justice Roberts’ opinion is to a portion of Citizens United in which the Court majority took the position that the sole quid pro quo that could justify a restraint on election speech would be outright bribery – conduct already a criminal offense under federal and state law. This citation is not a traditional invocation of stare decisis, but an effort to quiet a substantive policy debate by invoking a prior Court ruling. The holding in Citizens United (which struck down a restraint on corporate and union election spending) cannot be a binding precedent because it involved starkly different conduct. The State of Arizona’s public finance legislation provided a subsidy for election spending for candidates opting for public financing, quite a different animal than the issue in Citizens United: the constitutionality of restrictions on expenditures of corporate funds for election speech. Nonetheless, the Court cited the earlier case to support its preferred policy outcome. 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 the same conclusion must hold because of this precedent, regardless of the strikingly different factual context of the two cases.

Ultimately, the question is whether a policy judgment of the Court, whether by 5-4 vote or a 9-0 vote, should ever become a binding precedent governing 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 even corrected. Executive agencies frequently reassess, amend, or even repeal rules or interpretations. Just as occurs in an agency decision, the Court may get it wrong because it misunderstands the facts, misapprehends their import, or doesn’t understand or misapplies underlying economic theory. Or, even if the Court’s analysis was correct when decided, changing developments may 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 “superprecedent” as a reason to curtail a careful and case-specific policy analysis invites judicial activism and unwarranted Court forays into creating or amending statutory or constitutional law. It chisels into stone a policy assessment that a more expert and flexible agency would have the freedom to amend, adjust or abandon.

To take a second example, suppose the Court decides that the expenditure of funds on

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29 131 S. Ct. at 2826-2827.
behalf of a candidate is directly linked to that candidate’s free speech rights under the First Amendment.\textsuperscript{30} The “money is speech” formula can be a helpful metric for modern elections in which the ability to purchase television advertising can be crucial for a candidate’s success in many races for federal or state office. This rigid formula, however, was not the view of a unanimous Court in \textit{Buckley v. Valeo}.\textsuperscript{31} Indeed, the correlation between money and election speech may 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 mode of communicating with voters. The emergence of the Internet as a less expensive mode of communicating may be lessening the impact of broadcast television. Access to key events such as public debates may become more of an issue than television ads. So 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. Most Supreme Court justices have never run for office, have not studied election issues in detail, and lack the expert staff of an agency such as the Federal Election Commission.

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 economic learning and richly varied fact patterns, why should it 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 common law development. The traditional and proper role for stare decisis is simply stated: a case is controlling if it is on point, or sufficiently on point to be persuasive in the logic of its application. Conversely, a case is not persuasive precedent if it is meaningfully distinguished on its facts or in the legal analysis that it employs. In the first 50 years of Sherman Act jurisprudence, one study showed that the Court was quite rigorous in adhering to this model.\textsuperscript{32} Contemporary Sherman Act decisions, however, show that precedents are being misused to establish a policy or economic premise. A prior case should be controlling if it is on point, but it cannot substitute for the discipline of empirical evidence or economic learning. This use of superprecedent is simply “boot-strapping” -- a circular argument. The Court is citing its own past holding as proof of the validity of an economic premise or policy conclusion that should be empirically rooted to an analysis of the unique facts of the case before it.

F. Respectful of the Views of the Coordinate Branches and Democratic Polity

A final measure of judicial activism – and a test that may ultimately determine whether a

\footnotesize{\textsuperscript{30} This is a reasonable interpretation of language in the Court’s per curiam opinion in \textit{Buckley v. Valeo}, 424 U.S. 1 (1976).}\\
\footnotesize{\textsuperscript{31} 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. Id. at 257}\\
seemingly activist decision is an appropriate exercise of judicial power – is whether a decision is respectful of the views of the coordinate branches of government. More broadly, this measure also requires the Court to take the pulse of state and local governments and of the electorate at large. The point here is not to suggest that the Court should never act when its decision is unpopular. Preserving and protecting the Constitution, and protecting the rights of non-conforming minorities, may not infrequently 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, recently retired 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.”

The Court has an established political question doctrine that calls for deference to the elected branches on certain matters. Respecting the role of the elected branches will seldom require an outright refusal to exercise jurisdiction. Instead, in deciding matters 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. Consider the Court’s now discredited holding in *Lochner v. New York* (striking down New York legislation that established a 60-hour work week). This decision might still be valid constitutional law today if it had enjoyed the support of informed public opinion. It did not and has been condemned as a classic example of unacceptable judicial activism. Compare *Lochner* with other seemingly activist Court decisions that have endured. *Moorberry v. Madison* (recognizing the Court’s right to strike down unconstitutional legislative action), *Brown v. Board of Education* (declaring segregated public schools to be unconstitutional), and *Standard Oil Co. v. United States* (declaring that only unreasonable restraints of trade to be prohibited by the Sherman Antitrust Act) 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 Court’s decision was centrist -- an accurate read of the current and future values of the nation.

II. Judicial Activism Indicators Applied

I examine here a sampling of cases involving the First Amendment’s application to federal election law and cases involving application of the Sherman Act. Including the two relatively disparate areas may add depth to the analysis. There are, however, several

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33 Interview with Justice Stevens, supra note 21. Chief Justice Roberts has suggested similar concerns when he suggested that a unanimous Court ruling is preferable to a divided Court opinion. Supra note 15.

35 198 U.S. 45 (1905).
36 5 U.S. (1 Cranch) 137 (1803).
38 221 U.S. 1 (1911).
commonalities. Both the Free Speech clause of the First Amendment and the Sherman Act are written in general terms that invite the exercise of judicial discretion. There is, in short, ample opportunity for a strong-willed Court majority to be active in shaping interpretation of that law. There are other similarities. Election law statutes that have been assessed under recent first Amendment decisions, like the Sherman Act, are directed at abuses of private economic power or leveling the playing field. The Roberts Court has been active in both of these areas, with the Court majority pressing its view that the marketplace of ideas, just as in the marketplace for goods and services, the powerful should be subject to minimal federal regulation.

A. Sherman Act Cases

There is nothing new about judicial activism in Supreme Court antitrust cases. United States v. Socony Vacuum Oil Co. was a criminal case brought during the second term of President Franklin Roosevelt. After struggling with the Court during his first term, Roosevelt had a majority of Supreme Court justices sympathetic to his agenda by 1937. But that agenda itself had changed. Roosevelt’s first term administration had worked with industry groups, including the petroleum industry, to encourage cooperative conduct. That view had changed after Roosevelt’s reelection in 1936. New leadership – Robert Jackson had just taken over leadership of the Antitrust Division — now strongly favored vigorous prosecution of cartel conduct. The Department’s decision to bring the criminal case against 27 oil companies and 56 of their employees provoked dissent within the administration, in large part because Secretary of Interior Harold Ickes and his Department had earlier worked with the industry and some of the indicted individuals to address unstable, depressed crude oil prices. Some thought that the Government had turned against the very officials who had sought to implement Government policies during the President’s first term.

Socony Vacuum was a case in which the Government sought to change the law, notwithstanding underlying facts that might suggest some injustice to the individual defendants. Justice Douglas’ opinion in Socony Vacuum was a reversal of course. Douglas wrote that “for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se . . . and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.” This statement is difficult to reconcile with Appalachian Coals v. United States, and Chicago Board of Trade v. United States, two earlier Court cases involving alleged cartel conduct. Justice Douglas sought to distinguish these cases, but some

39 310 U.S. 150 (1940)
41 Id., at 92, 107 (“Newspaper sentiment generally expressed sympathy for the convicted defendants”).
42 310 U.S. at 218.
43 288 U.S. 344 (1933).
44 246 U.S. 231 (1918).
have found his efforts unconvincing. The Court also had to deal with record evidence that the defendant firms buying oil from the “spot” market had not agreed on a common price and more often than not bought oil on the same day for different prices. The marginal factual support for anticompetitive price fixing may have made for a more unqualified per se rule, and Socony Vacuum became a superprecedent. The case was followed largely without qualification for the next 40 years.

The per se rule allowed for the efficient prosecution of hard core cartel conduct. Yet, Socony Vacuum is an early example of objectionable judicial activism produced when an activist Justice Department partnered with a compliant Supreme Court majority. The Department aggressively prosecuted a criminal case notwithstanding facts that caused contemporary observers to question its fairness. The Antitrust Division had a number of options for implementing its reinvigorated policy against cartel conduct. The Assistant Attorney General could, for example, have given a speech announcing the new policy; have launched an investigation of the oil firms (sending a signal short of bringing a criminal case against them); or have proceeded with a civil suit to enjoin future objectionable cooperative conduct. It chose, however, the strongest possible response: a criminal indictment and prosecution.

The Court, when faced with the criminal case, could have signaled its support for a per se rule while still setting aside the criminal conviction. The history of Government support for industry cooperation and the record of questionable conduct by a government attorney during the trial might have allowed the Court to void the conviction. The Court abjured these options, instead writing a sweeping opinion in seeming disregard of past rule of reason precedents and a rich common law history that allowed for restraints ancillary to a legitimate business goal. Although it took four decades for the Court squarely to address the excessive reach of the Socony per se rule, it finally did so in 1979 in Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., a decision which can fairly be said to have returned the law to something more closely resembling the common law distinction between naked and ancillary restraints recognized by Judge Taft in 1898.

Socony Vacuum triggered four of the six judicial activism indicators. The Court opinion was distant from the facts and arguably did not do justice to the defendants; the opinion announced a broad per se rule that was not required for resolution of the case; the opinion did not carefully match the facts with the goals of the Sherman Act; and the opinion ignored or insufficiently distinguished prior precedent. Nor is Socony Vacuum alone among mid twentieth century antitrust holdings to trigger a number of activism indicators. In a separate analysis of Sherman Act cases, I found that United States v. Arnold Schwinn & Co. and United States v.

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45 Crane, supra note 40, at 111-112 (describing Justice Douglas’ efforts to distinguish the cases as “extraordinarily weak”).
46 Id. at 113.
47 Id. at 106-07.
49 United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), modif’d and aff’d, 175 US. 211 (1899).
The pace of activist Sherman Act decisions, however, has picked up substantially during the Rehnquist and Roberts Courts. My survey identified seven Sherman Act cases, beginning with *Monsanto v. Spray-Rite* in 1984, in which 3 or more activism indicators were triggered. Two of these cases decided by the Roberts’ Court are addressed below. These cases, like *Socony Vacuum*, were instruments for making broad changes in the law, with little attention paid to doing justice to the parties.

In *Leegin Creative Products, Inc. v. PSKS, Inc.*, the Court overturned a line of cases that had construed vertical minimum price fixing, or resale price maintenance, to be per se unlawful. The *Dr. Miles* decision in 1911, although never mentioning a per se rule, is often seen as the progenitor of this line. The direct genesis of the per se rule is probably more recent decisions such as *United States v. Parke, Davis & Co.* The rule received indirect endorsement from the Congress in 1975 when it repealed legislation that had allowed state legislatures to create exceptions to per se treatment 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.

*Leegin* was a leather goods manufacturer that sold the Brighton line of ladies’ purses and other leather products to its retailers. KCFS was an independent retailer that had sold large quantities of Leegin’s products. KCFS was terminated after it repeatedly sold Brighton products at a retail price that Leegin considered too low. Instead of addressing these facts, Justice Kennedy argued generally that RPM can be procompetitive because (1) it discourages discounting retailers from free riding on presale services provided by full price retailers; (2) it may provide an incentive for high profile retailers to carry the brand, thereby “certifying” the brand’s quality; and (3) it may provide retailers an incentive to carry a larger inventory consistent with the manufacturer’s wishes. None of these justifications were obviously

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50 Grimes, A Century of Supreme Court Antitrust Jurisprudence, supra note 32.
52 551 U.S. 877 (2007)
53 *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. See footnote and accompanying text.
56 551 U.S. at 890-91
57 Id. at 891.
58 Id. at 892. Justice Kennedy’s majority opinion follows the general outline offered by the Solicitor General’s amicus brief.
connected to the facts in *Leegin*.

The *Leegin* majority cited the Court’s past Sherman Act overrulings as authority for overturning *Doctor Miles*. Presumably, the Court majority would not approve citing *Leegin* as authority for overturning *Leegin*. The Court justified its cavalier treatment of precedent as a part of a broader trend, begun with *Continental TV Inc. v. GTE Sylvania, Inc.*, to treat vertical restraints under the rule of reason. But this portion of the Court’s opinion must rise or fall based on the integrity of its economic underpinnings and policy analysis. Citing the Court’s own past holdings as superprecedents does nothing to vindicate the soundness of the economic precepts it is embracing. The *Leegin* majority cited *Sylvania* five times and *Business Electronics v. Sharp* four times to establish economic premises that are not otherwise analyzed or discussed. *Sylvania* involved a location clause imposed on the retailer, a relatively weak vertical restraint easily distinguishable from a required minimum retail price. *Sylvania* also expressly excepted resale price maintenance from its holding. Thus, under traditional stare decisis doctrine, *Sylvania* was easily distinguishable from the resale price maintenance at issue in *Leegin*. 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 superprecedent.

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 confronting the Court in *Leegin*. 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 of the case before it.

In 2009, the Supreme Court decided *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 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

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59 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 argues 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).

60 *Leegin*, 551 U.S. at 900-902.
62 551 U.S. at 890-896.
63 477 U.S. at 51 n. 18.
64 See n. 59, supra.
the Internet at a high price to wholesalers such as plaintiffs and at a lower price directly to consumers. The high wholesale price made it impossible for wholesalers to compete 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 a number of justices had conflicts of interest that precluded Supreme Court review), Judge Learned Hand wrote for the panel that a price squeeze by an integrated firm with monopoly power was unlawful. That decision, United States v. Aluminum Co. of America (Alcoa), had, over a 63-year period, gained traction as a controlling precedent for price squeeze claims.67

The majority opinion of Justice Roberts treats Alcoa dismissively, embracing Verizon v. Trinko and Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. as persuasive authority.70 As in Leegin, the problem with the use of these superprecedents is that neither is directly on point – 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’ majority argued that any competitive harm in a price squeeze is fully encompassed by a plaintiff’s ability to bring separate duty to deal or predatory pricing claims.

The Court’s logic is 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 and predatory pricing claims, in

67 Decisions recognizing or applying a price squeeze test include: Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990); Bonjorno v. Kaiser Alum. & Chem. Corp., 752 F.2d 802 (3rd Cir. 1984); City of Mishawaka v. American Elec. Power Co., Inc., 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. Southern California Edison Co., 955 F.2d 1373 (9th Cir. 1992).
70 555 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”).
71 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 comparative dealings result in an improved product that consumers demand (Aspen Skiing Corp. 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 (Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Aspen, supra), or when the refusal to deal requires the monopolist to sacrifice profits (Lorain Journal Co. v. United States, 342 U.S. 142 (1951)). On the facts of Pacific Tel, 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 involving the firm, Pacific Telephone sell DSL to wholesalers. See the text
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 lower cost, often at no cost, to the monopolist and are more likely to occur than predatory pricing. A vertically integrated monopolist, without charging prices below the monopolist’s costs (a requirement for predatory pricing), may force its competitors out of business. All the 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). A price squeeze is also easier for courts to identify. Predatory pricing claims, under current law, require a court to find below-cost pricing and an ability of the predator to recoup its losses. In contrast, under pre-existing lower court rulings, a court could find an unlawful price squeeze if the vertically integrated monopolist could not make a profit selling at its retail price, assuming that its costs are equivalent to the price charged its wholesale customers.72

The Pacific Telephone Court never squarely addressed the goals of the Sherman Act. 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, but never directly confronted the question whether Pacific Telephone’s actions were harmful to competition. The Federal Communications Commission had addressed this issue in the course of a merger decision that required, as a condition of agency approval, that Pacific Bell sell its DSL lines to wholesalers. Enforcing the price squeeze claim would have been consistent with and complementary to the agency’s ruling. 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.73 It seems odd for the Court to second guess a regulatory requirement without a full record on that issue, but 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.

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. By making this investment, the firms provided competition that the FCC thought beneficial to the public interest. In bringing the price squeeze claim, plaintiffs relied on preexisting precedent established since the Alcoa decision of 1945. Nothing is certain in litigation, and plaintiffs and their attorneys should have been aware of shifts in antitrust law that accord monopolists more freedom of action. Still, plaintiffs’ claims were solidly grounded in law. On its facts, this was a strong price

accompanying note 73, infra.

73 555 U.S. at 448 n.2 (discounting the FCC regulatory requirement because, according to the Court, the FCC itself had agreed that there was ample competition in the provision of high speed Internet service).
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 large number of judicial activism indicators. Each case could have been decided much more narrowly. Each should have included a careful analysis of whether the conduct was consistent with Sherman Act goals. Each made inappropriate use of superprecedents as a substitute for that careful 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. A fifth activism indicator - whether the decision was respectful of coordinate branches – seems also to have been triggered. The Court majority in each case enjoyed strong support from the Justice Department, but a record of past opposition from the Congress (in *Leegin*) and an apparent contrary finding by the FCC (in *Pacific Telephone*). At a minimum, the collection of these indicators should have been a strong signal to the Court to move cautiously and incrementally, not by sweeping decree.

**B. First Amendment Election Law Cases**

In *Citizens United v. Federal Election Commission*, 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 30 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 Obama’s 2010 State of the Union Speech.

Citizens United was a non-profit group that had produced a pejorative movie about Hillary Clinton, then a candidate for President of the United States. The group planned to use its general treasury funds to promote the film and make it available through video on demand. The district court held that this effort contravened 2 U.S.C. § 441(b), which prohibits corporations or unions from using general treasury funds to support “electioneering communications,” elsewhere defined as “any broadcast, cable, or satellite communication which promotes or supports,” or “attacks or opposes” a candidate running for federal office.

In concluding that this provision violates the First Amendment, the Court overruled two past decisions that had upheld Section 441b’s restraints on direct treasury expenditures: *Austin v. Michigan Chamber of Commerce* and *McConnell v. Federal Election Commission*. The

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74 130 S.Ct. 876 (2010).
75 President Barack Obama, 2010 State of the Union Address, available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (“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.”)
76 2 U.S.C. §441b.
majority held that the source of speech is not a valid basis for distinguishing campaign-related speech and that the First Amendment protects corporate speech related to an election equally with the speech of natural persons. Justice Kennedy’s majority opinion echoes dissenting or concurring opinions that he and Justices Scalia and Thomas had filed in earlier election law cases. When *McConnell* was decided in 2003, Chief Justice Rehnquist and Justice O’Connor did not join in these opinions. With those two justices replaced by Chief Justice Roberts and Justice Alito, five members of the Court now favored overturning *McConnell* and *Austin*.80

*Citizens United* has generated extensive commentary, much of it critical.81 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. Our colleagues have arrived at the conclusion that Austin must be overruled and that [§ 441b] is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court’s lawmaking power. 130 S. Ct. at 979.

This paper does not address all of 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 the content-neutral activism indicators.

The manner in which the constitutionality of § 441b 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. Instead, Citizens was pressing arguments concerning the proper interpretation of that provision. The Supreme Court majority was dissatisfied with the manner in which the case was presented to it, and ordered new briefing and reargument to specifically address the constitutional issue. This procedural history is consistent with the view that the majority of the Court was primarily interested in generating a vehicle that would allow its broad constitutional holding, not in resolving the case or controversy before it as presented by the litigants.

There were a number of interpretation issues that could have allowed for a principled holding favorable to Citizens United. Among them were a possible ruling that because the contributions from the corporate treasury were likely to be de minibus 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 television in which the viewer

80 In dissent, Justice Stevens wrote that the “only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court.” 130 S. Ct. at 942.
81
receives the programming unless the viewer switches off the channel, the type of broadcasting that seemed the primary focus of § 441b.

Justice Kennedy’s majority opinion, and Chief Justice Roberts concurring opinion, both addressed these procedural points at length. Both opinions contend that the narrower grounds were not a valid basis for disposing of this case. The Chief Justice argued that the broad constitutional holding was a last resort when narrower grounds for disposition were wanting. Justice Stevens was unconvincled, 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.” If this case did not present an opportune setting for addressing the broad constitutional issue, the Court could have denied review or dismissed certiorari as improvidently granted. It was clear that the majority was using this case to overturn Austin, not to render justice in this case or controversy. To reach the constitutional issue, the majority reasoned that “Citizen’s United’s claim implicates the validity of Austin, which in turn implicates the facial validity of § 441b.” 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.”

Another sweeping aspect of the Court’s holding was its reaching out to declare that express advocacy for a candidate, when funded by corporate treasury, could not be constitutionally limited by federal election law. Justice Stevens noted that Citizens United did not claim that the film constituted express advocacy of a candidate. To reach and decide this issue, the majority had to find that “the film qualifies as the functional equivalent of express advocacy.” Whether the record provided an adequate basis for this sweeping holding is open to question. As the dissent also pointed out, this holding left a strange patchwork of campaign laws in which political parties cannot, but corporations and unions can, expressly advocate for or against a candidate.

This case, like the Sherman Act decisions addressed here, raises the issue of superprecedent. The Government had defended Section 441b as serving two broad societal interests: the need to prevent actual or apparent quid pro quo corruption in the election process and the need to protect corporate shareholders. While the Chief Justice agreed that these arguments could be considered, he found them less worthy because they had not been advanced and considered by the Court in Austin.

[T]he Government’s new arguments must stand or fall on their own; they are not entitled to receive the special deference we accord to precedent. They are, as

82 130 S. Ct. at 917-919.
83 Id. at 938.
84 Id. at 893.
85 Id.
86 Id. at 935 n.8.
87 Id. at 890.
88 Id. at 940.
grounds to support Austin, literally un preceded. 89

The Chief Justice’s comments are indicative of a corruption of the stare decisis system that has crept into the Court’s jurisprudence in the last half century. Cases are cited not because they are on point to the issue to be decided, but because they state a policy preference the Court (or litigants arguing before the Court) wish 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. The Government’s arguments in support of the need for campaign law restrictions on corporate spending should stand or fall on their merits; but so too should other policy points, regardless of whether they were found persuasive in past decisions of the Court involving distinguishable factual contexts. 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 Section 441b’s limitations would substantially dampen campaign speech supported by corporate interests. As the dissent pointed out, Section 441b in no way limits corporate officers or shareholders from making their individual views known; it in no way limits the corporation’s ability to speak through a PAC organized by the corporation; and it in no way limits campaign expenditures from the corporate treasury if the speech is broadcast more than 30 days in advance of a primary or general election. 90

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. 91 That accomplished, the Court majority turned its back on the flag, 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 § 441b. 92

The Supreme Court’s apparently intractable split over election law issues was on display again in Arizona Free Enterprise Club’s Freedom Club Pac, et al. v. Bennett. 93 In 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. The majority opinion of Chief Justice Roberts concluded that the scheme “substantially burdens protected political speech without serving a compelling state interest and

89 Id. at 924.
90 Id. at 942-43.
91 Id. at 911-12 (Justice Kennedy wrote that “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.”). Id. at 920 (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.”)
92 Multiple examples of the Court’s reliance on dissenting and concurring opinions are to be found, id. at 904-908.
93 131 S. Ct. 2806 (2011).
therefore violates the First Amendment.” Relying on *Davis v. Federal Election Commission*, 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. 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 burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups.”

*Davis*, another 5-4 decision, addressed the First Amendment compatibility of the millionaire’s amendment to federal election law. 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 US House of Representatives. A Democrat running for the House from New York successfully sued to enjoin enforcement of the provision. Because the increased limits did not apply to the wealthy candidate, the majority found that it chilled the free speech rights of that candidate. 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.”

Writing for the four dissenters in *Arizona Free Enterprise*, Justice Elena 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. 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. 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.” 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. The dissent pinpointed a critical issue for statutes that provide for publicly financed campaigns: the subsidy must be large enough to make public financing an attractive option for a candidate. 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, the majority opinion may effectively render public financing either too expensive for the taxpayer or too inadequate to be attractive to a candidate.

The majority’s opinion in *Arizona Enterprise* triggers a number of judicial activism indicators, including the misuse of precedent (the Court relied on *Davis*, a case easily distinguishable on its facts) and the use of superprecedents (as noted previously, the majority

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94 Id. at 2813.
96 131 S. Ct. at 2831.
97 554 U.S. at 740, 743-44.
98 Id. at 753.
99 131 S. Ct. at 2830.
The controversial nature of the Court’s holding 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 of the democratically elected branches of federal, state, or local government. Strong or consistent opposition from the democratically elected officials is, at a minimum, grounds for the Court to proceed cautiously and narrowly.

These campaign finance decisions, because they appear disrespectful of precedent and insensitive to legitimate corruption concerns that underlie both federal and state campaign finance legislation,\(^1\) seem unlikely to have the staying power of *Marbury v. Madison*. Instead, in the longer term, they seem more likely to await the fate of *Lochner v. New York*,\(^2\) a decision doomed to be overturned once the membership of the Court had changed. But policy preferences, once clothed in the mantel of constitutional law, will be well neigh impossible to change in the short term.

III. Controlling Supreme Court Judicial Activism

A. The Supreme Court - Two Centuries of Evolution

When established in the 1790s, the Court had 6 part-time justices who, in addition to hearing cases on the high Court’s docket, were required to “ride the circuit” to try cases outside of Washington. Today the Court has 9 full-time justices. During this same period, the United

\(^{100}\) Justice Stevens wrote for the four dissenting justices in *Citizens United*. His replacement, Justice Kagan, wrote for the four dissenters in *Arizona Free Enterprise*.

\(^{101}\) 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. *Election Spending Caps Backed in Poll*, LA Times, p. 7, col. 1, Sept. 17, 2012.

\(^{102}\) 198 U.S. 45 (1905).
States population grew from roughly 4 million in 1790 to an estimated 314 million by September of 2012. That’s a 79-fold increase. The Court’s capacity to hear cases has arguably not increased at all over the last 2 centuries. The Court’s increased size (from 6 to 9 justices) may not allow the hearing of more cases – a larger tribunal that insists on hearing all cases in plenary may complicate and slow the Court’s deliberations.

Another obvious change is the length of the term that each justice serves. During the first 180 years (1790 to 1970), the average tenure of a justice was 14.9 years; during the period 1970 to 2005, the average term was much longer -- 26.1 years.103 Moreover, justices are serving to a

103 Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, in REFORMING THE COURT, supra note 15, at 15, 24. Justices departing the Court since 2005 show this trend continuing. Justice O’Connor served for 25 years, Justice Souter for 19 years, and Justice Stevens for 35 years. The average term length for these three justices is 26.3 years.
much more advanced age. From 1941 to 1971, justices left the Court (because of death or resignation) at the average age of 67.6 years. From 1971 to 2005, the average age of departure rose to 79.5 years. One of the consequences of this gerontocracy has been that, more often than publicly recognized, justices who are physically or mentally compromised have continued to serve.

The increasing length of terms and the increase in the average age of justices is the result of a number of developments, including the advances in medicine that increase life expectancy, the reduced case load of the Court, and the expanded number of law clerks that justices may hire. When Justices Holmes and Brandeis were on the Court, each wrote 20 or more opinions a year with the help of a single law clerk; today, each justice writes an average of 8 or 9 opinions a year with four law clerks to assist.

Collectively, these changes have contributed to escalating strategic decisions by the President in nominating future justices, by the Senate in deciding whether to confirm nominations, and by the Justices themselves in deciding when to retire. To maximize their influence, Presidents have an incentive to appoint younger justices to the Court. The confirmation hearings have been drawn out and contentious. Once on the Court, many justices have sought to time their resignations for political reasons. Justices Brennan and Marshall, for example, are reported to have stayed on the Court additional years in the hope of having their replacement nominated by a Democratic President. Neither succeeded, but others have apparently timed resignation to give a particular President the appointment.

B. Judicial Activism Linked to the Court’s Limited Discretionary Docket

The Court has changed from a court of last resort that routinely reviewed a large sample of lower court cases to a policy-oriented tribunal that picks roughly 80 cases each year from the much larger number for which review is sought. The vote of four of the nine justices is required in order for the Court to grant certiorari and hear the case. For the 2010 term, the Court decided just 83 cases while receiving over 1558 fee-paying petitions for certiorari. As one source puts

104 Id.
105 David J. Garrow, Protecting and Enhancing the Supreme Court, in REFORMING THE COURT, supra note 15, at 271, 273 (describing examples of post 1970 justices who continued to serve despite physical or medical impairment, including Justices Black, Blackmun, Douglas, Marshall and Powell). Garrow does not include in his descriptions the difficulties of Chief Justice Rehnquist who died of cancer while still serving as Chief Justice.
107 Calabresi & Lindgren, supra note 103, at 33.
108 Id. (Reporting that 35 of 54 who resigned did so during the term of a President from the same political party as the President who appointed them).
109 2008 End of Year Report of the Federal Judiciary. The Court receives a much larger number of in pauperis petitions for review, largely from criminal defendants. The number of certiorari petitions that the Court receives may well be reduced because litigants understand that
it, “If the Court hears your case, it is because the Court wants to hear your case.”\textsuperscript{110} The Court is said to accept review for a variety of reasons, among them the need to resolve inconsistent holdings among the various circuits and the perception of the importance of the issue. An egregious lower court error that does not meet these criteria may be left untouched by the Court.\textsuperscript{111} As Justice Scalia has said, “We don’t take cases because we think they were decided wrong[ly].”\textsuperscript{112} Taken at face value, the Scalia statement means that, except in the unusual case, the United States lacks a second level of review to correct unjust or erroneous results, or even inconsistencies among the circuits.

When the Court selects its own cases to review, it has a free hand to pursue a favored policy agenda. Cases with facts unattractive to pursuit of that agenda, for example, can be shunned by simply denying certiorari. In a more extreme form of activism illustrated by \textit{Pacific Telephone} and \textit{Citizens United}, the Court can use a case to overturn an interpretation notwithstanding facts or pleadings that are poorly suited to that ruling. As the Court decides fewer cases, individual holdings tend to take on greater importance, further pushing the Court in the direction of announcing broad rules instead of deciding cases narrowly. Broad rulings have

\footnotesize{\textsuperscript{110} PETER CHARLES \textsc{hoffer ET AL.}, THE \textsc{supreme} \textsc{court}, AN \textsc{essential} \textsc{history} 446 (2007).}

\footnotesize{\textsuperscript{111} The Court has the power to summarily reverse such a decision without argument but this power is selectively exercised by the Court.}

\footnotesize{\textsuperscript{112} Justice Antonin Scalia, C-Span Interview with Susan Swain, June 19, 2009, available at <...>. Justice Scalia went on to say that the Court would take “a death case” that was wrongly decided. “But usually we take cases because the analysis of the courts below reflect a disagreement on the meaning of federal law and you can’t have two different federal laws in different parts of the country, so we will take one or both of those cases.” Id.}
consequences. One of those consequences is to increase the stakes of each individual case that is heard and, inevitably, the political interest when new appointees are nominated to the bench. The politicization of the Court, something that will be unavoidable in the best of circumstances, is heightened, a circumstance that may undercut the Court’s credibility with the citizenry at large and ultimately undermine the enforceability of its decisions.

The Court’s evolution from a judicial tribunal to superlegislature may have begun in earnest in 1891 with a Judiciary Act that created the courts of appeal to lessen the burden on an overloaded Supreme Court. That Act also carved out an area of discretionary Supreme Court review of decisions of the appellate courts. The move to discretionary jurisdiction was amplified in legislation enacted in 1925, and largely completed in 1988, when the Congress gave the Court virtual total control over its docket. For each of these legislative initiatives, the Congress was guided by views of sitting Supreme Court justices.

With its mandatory jurisdiction all but eliminated in 1988, the Court had the opportunity to increase substantially the number of discretionary cases it reviewed. Instead, the Court responded by reducing the number of reviewed cases to record low levels. A number of possible reasons for the Court’s response have been suggested, including: (1) the more polarized views among sitting justices; (2) the 1988 legislation that largely removed the last portion of the Court’s mandatory jurisdiction; (3) the departure of Justice White from the Court (Justice White had been active in promoting review of cases in which inconsistencies in the circuits were present); and (4) the impact of the certiorari “pool” that assigns a single law clerk to review cert petitions for most of the justices. Owens & Simon used available data to study each of these hypotheses and concluded that each of the first three circumstances (but not the use of the cert pool) correlate positively with the decrease in docketed cases.

115 The 1988 legislation was known as the Judicial Improvement and Access to Justice Act, 102 Stat. 662. “How this increased access to justice was unclear, except if one thought that the High Court was an unlikely fount of justice and thus best avoided.” Hoffer, supra note 109, at 445.

116 For example, prior to enactment of the 1988 legislation, each of the sitting nine justices signed a letter to Congressman Kastenmeier (Chairman of the House Judiciary Committee’s Courts Subcommittee) stating that mandatory jurisdiction took up too much of the justices’ time. See Ryan J. Owens & David A. Simon, Explaining the Supreme Court’s Shrinking Docket, 53 William & Mary L. Rev. 1219, 1268 n. 246 (2012) (the authors erroneously identify Congressman Kastenmeier as a senator).

117 Owens and Simon concluded that the decrease in number of cases correlates positively with a more polarized Court membership, id. at 1277-78, with the enactment of the 1988 legislation largely ending mandatory jurisdiction, id. at 1278-79, and with the resignation of Justice White, id. at 1280-81. They were unable to establish a statistically significant connection.
The finding that an ideologically polarized court results in a smaller docket is consistent with the thesis offered here – that the Court is issuing sweeping decisions beyond the facts of the case being decided, and that these decisions create statutory and constitutional interpretations difficult to amend. If particular justices expect a polarized court may rule in a manner inconsistent with their views, and that the ruling is likely to have sweeping implications that are difficult or impossible to correct, those justices would be most unlikely to accept review of the case. If the Court were moving cautiously, in small steps, and consistently with existing precedent, the concerns of these justices with an adverse decision would be substantially abated.

C. Reforming the Court

The Court’s role as a policy board that each year hears only a tiny percentage of the cases for which review is sought was not within the constitutional vision of the framers. This role, and the Court’s tendency to decide cases in sweeping language, sorely test the constitution’s language that limits the Court’s jurisdiction to cases and controversies.

Fundamental reform of any of the three branches of government faces enormous obstacles. That is surely true of the Supreme Court. Yet the Court may also be the easiest of the of our venerable institutions to reform, in part because that reform could be directed to restoring the Court’s traditional role. The Court has the power to reform itself, assuming (a major assumption) that it has the will to do so. Of course, the Court could be prodded, if not mandated, by the President or Congress. The President could facilitate reform by appointing justices that favor reform. The Congress has often deferred to the Court’s leaders in shaping the institution, but that need not be so. The Congress can and should be an active participant in the debate – and ultimately in passing legislation – that could institute necessary reforms.

Restoring mandatory jurisdiction to decide cases or controversies - Reform initiatives should focus on reinforcing the Constitutional mandate for the Court to decide cases or controversies and the Court’s healthy – but too often disregarded – instincts to decide cases narrowly and with incremental rather than elephantine shifts in the law. The Court should be

between expanded use of the certiorari pool and the reduction in the size of the Court’s docket.

Id. at 1282. Currently, petitions of certiorari are reviewed initially by a Supreme Court law clerk assigned this task from a pool of clerks of the justices. Most of the justices participate in this pool. However gifted and well trained, many young Supreme Court clerks lack extensive experience and may act tepidly in the face of pressure to conform with the reality that 19 of every 20 fee-paying petitions that come before the Court are denied. Some analysts believe that the widespread use of the pool contributes to the low number of petitions for certiorari that are granted. See David R. Stras, Book Review Essay, The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process, 85 Tex. L. Rev. 947, 950 (2007)(concluding that earlier studies may have “too quickly dismissed the potential impact of law clerks and the cert pool on the size of the Court’s plenary docket.”)
restored as a judicial tribunal that assures justice, not just in death penalty cases, but in any case that has been erroneously decided at the court of appeals level. Incorrectly decided decisions do affect lives (in matters involving safety or medical regulations, for example) and fundamentally touch our nation’s commitment to the rule of law. At a minimum, a nation of over 300 million people ought to have a readily available second level of appeal from decisions of its federal courts. This objective could be attained by creating an intermediate national appellate court to play this role. While this option is worth considering, it would do little to address the underlying concerns with Supreme Court judicial activism.

Giving the Court total control over its agenda was doubtless well-intended. Agenda control, however, invites the Court to maintain what some may see as a country-club work load, to select cases based on policy preferences, to issue sweeping rulings, and to intrude unnecessarily on the policy making functions of democratically elected officials at all levels of government. All of these effects contribute to the fierce political gamesmanship that surrounds the appointment and resignation of a justice.

Removing total control of its agenda from the Court would be a constructive and essential step toward restoring the Court as a preeminent court of law; the Court would take a giant step away from its tendency to act as a policy board that picks and chooses its own cases based on policy predilections. That control could be limited, for example, by creating an external filter to control the flow of cases to the Court. Such a filter could take a variety of forms. One approach favored by Carrington and Cramton would be to create a panel of court of appeals judges, with rotating membership, to select which cases should be reviewed by the Supreme Court. 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, to the panel. A panel decision to require review would be binding on the Court, but 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 is likely to have to 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, or the Court could be expanded in size. By hearing substantially more cases, pressure on the Court to issue broadly applicable rulings will be lessened. The possibility of judicial activism will always be there, but the incentives for it could, by hearing more cases, be significantly reduced.

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118 Carrington & Cramton, supra note 5, at 630-636.
119 Of course, any expansion in the Court’s size should be carefully 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 unsuccessful.
Addressing the Court’s Use of Superprecedent - This use of past cases as a proxy for careful and fact-based policy analysis now permeates the American legal culture. The Court and the Solicitor General’s Office, however, are in a position to take a leading position in changing this culture. I have suggested elsewhere that Supreme Court briefs filed in antitrust cases should have a separate section for economics and policy based factual analysis.\textsuperscript{120} Indeed, much of the current difficulty with superprecedents could be alleviated if the Court would treat theories of economics or 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 the same flexibility that administrative agencies have – to reconsider economic principles or public policy approaches in light of the specific factual context. Just as an agency, the Court would be free to adjust its view in light of new learning, changed circumstances, or simply because public views or the views of those deciding the issues have changed. Litigants, and the Court itself, might 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 a stare decisis.

Although the practice of citing past cases to support policy premises is likely to continue, 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 to some extent begun this process. The Court’s decision in \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.} recognized a presumption of validity for an agency’s interpretation of its enabling legislation.\textsuperscript{121} 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.\textsuperscript{122} 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.

Reforms Directed to Reducing Politicization of the Court - The Court is a powerful institution – a coordinate branch that shares power with the President and the Congress in governing the United States. As such, it will always be a political institution subject to criticism and, as it turned out, unnecessary when an existing member of the Court switched sides and other members of the Court were replaced with Roosevelt nominees. 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 repercussions.

\textsuperscript{120} Grimes, A Century of Supreme Court Antitrust Jurisprudence, supra note 32, at .
\textsuperscript{121} 467 U.S. 837 (1984).
and pressures from interest groups of all types. To the extent the Court’s propensity for judicial activism can be controlled, external pressures on the Court would be reduced and its independence better protected.

The analysis that correlates an ideologically polarized Court with the reduced docket suggests the importance of ensuring a centrist majority on the Court. The President and the United States Senate that control nomination and confirmation of new justices can take immediate steps to restore a strong centrist voice on the Court. This might be done, for example, if the President conferred not only with the Senate majority leader but also the minority leader before nominating future justices. This convention, although not consistently followed, is not all that distant from past practices in nominating judges at all levels of the federal court system.

Other reform initiatives ought to address the appointment process in an effort to create more regularity and reduce avenues for political opportunism. One proposal that makes a great deal of sense is to create 18 year terms so that a new justice would be selected regularly at two year intervals. This would guarantee every President the opportunity to appoint 2 justices during a four year term. Discussion of such reform proposals might also include other proposals, such as putting an age limit on the service of all federal judges. Life tenure of federal justices is unique to the Federal Constitution. It promotes a gerontocracy that disserves an efficient and well-run court system; it is not needed to protect judicial independence and is not used to protect the independence of state court judges or judges in developed countries throughout the world.

Conclusion

For any of these reforms to be adopted, there must be an open discussion involving the the Executive branch, Congress, current and former members of the Court, members of the bar, scholars, and interested members of the public. It seems highly unlikely that meaningful reform can occur without the direct involvement of the justices themselves. The current justices are said to be unanimous in their support for discretionary jurisdiction. Yet, any inbred reluctance to change a highly respected and venerated institution must be tempered by knowledge that a failure to act will result in a continued erosion of our democratic institutions at all levels of government, a loss of respect for the Court and serious threats to the Court’s independence.

124 Carrington & Cramton, supra note 5, at 636 & n. 271.