

CHARLESTON LAW REVIEW

Volume 4 Fall 2009 Number 1



Supreme Court Preview

A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity

Malia Brink

The Breyer Project: "Why Couldn't You Work This Thing Out?"

Linda Greenhouse

Preview of *United States v. Stevens*: Animal Law, Obscenity, and the Limits of Government Censorship

*Cheryl Hanna &
Pamela Vesilind*

Breaching a Leaking Dam?: Corporate Money and Elections

Lloyd Hitoshi Mayer

New Supreme Court Justices and the "Freshman Effect"

Robert S. Peck

A Dysfunctional Supreme Court: Remedies and a Comparative Analysis

*John W. Whitehead &
John M. Beckett*

A PENDULUM SWUNG TOO FAR:
WHY THE SUPREME COURT MUST PLACE
LIMITS ON PROSECUTORIAL IMMUNITY

*Malia N. Brink**

I.	INTRODUCTION	2
II.	MODERN PROSECUTORIAL IMMUNITY	3
III.	NEW PRESSURES ON PROSECUTORS.....	8
	A. The Pressure of the Media.....	9
	B. Political Pressure	13
	1. Elected Prosecutors.....	13
	2. Appointed Prosecutors.....	15
	3. Assistant Prosecutors	16
	C. Win at All Costs: The Mentality of the Prosecutor’s Office	16
	D. A Rise in Prosecutorial Misconduct	18
	E. Rebalancing the Public Policy Analysis	24
IV.	CHANGES IN THE LEGAL LANDSCAPE	24
	A. Charging the Prosecutor	25
	B. Qualified Immunity.....	28
	C. Rebalancing the Legal Considerations	31
V.	DRAWING THE LINE	31
	A. The <i>Pottawattamie</i> Case	32
	B. Public Policy Considerations in Criminal Investigations	33
	C. Legal Considerations in the Investigative Context.....	34
VI.	CONCLUSION.....	36

* Ms. Brink serves as counsel for Special Projects for the National Association of Criminal Defense Lawyers and as a Lecturer in Law at the University of Pennsylvania Law School. The views expressed in this Essay are solely those of the author, and do not necessarily reflect the views or positions of any organization, office or entity.

I. INTRODUCTION

In the more than thirty years since the Supreme Court conferred absolute immunity on prosecutors,¹ a number of public policy factors have shifted. Chief among these factors are the nature of prosecutorial elections and the change in media coverage of criminal investigations and prosecutions. It further appears that prosecutorial misconduct is becoming more flagrant and more frequent. The legal landscape has also changed; evidence shows that prosecutorial misconduct is often not the subject of disciplinary proceedings or criminal charges, and the standards and procedures applicable to government officials raising claims of qualified immunity have been altered substantially.

In this changed context, this Term the Supreme Court will address prosecutorial immunity in the case of *Pottawattamie County, Iowa v. McGhee*.² The case concerns whether a prosecutor can be held liable for constitutional violations committed during the investigative phase of a case.³ This Essay examines how the changes in public policy and the law impact the judgment on whether absolute immunity is appropriate for prosecutors engaged in investigations and concludes that: (1) it is necessary to set some boundary on prosecutorial immunity and (2) because of the important distinction between investigating and prosecuting, the case before the Supreme Court is the right place to begin to draw this line.

1. *Imbler v. Pachtman*, 424 U.S. 409, 420–29 (1976).

2. 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 556 U.S. ___, 129 S. Ct. 2002 (U.S. Apr. 20, 2009) (No. 08-1065). *McGhee* is currently pending before the Supreme Court and argument in the case is scheduled for November 4, 2009. See <http://www.supremecourtus.gov/orders/09grantednotedlist.pdf>. The question presented is whether a prosecutor is subject to personal liability under 42 U.S.C. § 1983 for a wrongful conviction and incarceration where the prosecutor allegedly procured false testimony during the criminal investigation and then introduced that same testimony against the criminal defendant at trial to obtain a conviction. Petition for Writ of Certiorari, *Pottawattamie County, Iowa v. McGhee*, No. 08-1065 (U.S. Feb. 18, 2009).

3. *Id.*

II. MODERN PROSECUTORIAL IMMUNITY

Federal law 42 U.S.C. § 1983 states that every person who, under color of state law, deprives an individual of “any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.”⁴ In short, § 1983 allows those whose rights have been violated by a state or federal official to sue for damages. Originally passed as part of the Civil Rights Act of 1871, § 1983 was largely ineffectual for almost one hundred years. It was not until 1961 that the Supreme Court held: (1) Congress intended and had the power to protect individuals from infringements of their constitutional rights by state officials; (2) a cause of action exists not only when the violation is specifically authorized by state law, but where the official commits the violation in abuse of his or her position or power; and (3) the law creates a federal right enforceable in federal court.⁵

Traditionally, under common law, many types of state officials, including judges, legislators, and prosecutors, had immunity, which protected them against the leveling of certain claims in court. Having recognized the purpose of the right created by § 1983, the Supreme Court was next compelled to examine whether Congress intended the provision to supersede or abrogate these common law immunities.

The Court first addressed the specific issue of prosecutorial immunity in *Imbler v. Pachtman*⁶ and rejected the notion that Congress intended § 1983 to strip all officials of all previously existing immunities.⁷ Instead, the Court determined that previous immunities would persist provided they were “well grounded in history and reason.”⁸ The Court found that, historically, under common law, prosecutors had been afforded absolute immunity for prosecutorial acts.⁹ The majority then

4. 42 U.S.C. § 1983 (2006) (hereinafter § 1983).

5. *Monroe v. Pape*, 365 U.S. 167, 172, 180 (1961).

6. 424 U.S. 409 (1976).

7. *Id.* at 417.

8. *Id.* at 418 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

9. *Id.* at 422–24.

proceeded to analyze and weigh the public policies underlying this absolute immunity and concluded, albeit apologetically,¹⁰ that absolute immunity was appropriate.¹¹ Specifically, the Court found that any possibility that prosecutors may be held liable could take away from prosecutorial independence, causing “a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.”¹² Moreover, the Court found that there are ample other means of deterring prosecutorial overreaching and vindicating the constitutional rights of a defendant, including post-trial motions, professional discipline, and criminal sanctions against the prosecutor.¹³

The major question left open in the *Imbler* decision was whether a prosecutor could be liable for acts not “integral” to the “judicial process.”¹⁴ The *Imbler* Court held open the possibility that a prosecutor might be held liable for “those aspects of the prosecutor’s responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate.”¹⁵ In the years following the *Imbler* decision, the Court addressed what was integral to the judicial process in a number of cases. For example, the Court held that prosecutors are entitled to immunity for actions taken in preparation of the initiation of a judicial proceeding but not when speaking to the press.¹⁶

The Court also began to define when the prosecutor is acting as an investigator and therefore not entitled to absolute

10. The Court acknowledged that its decisions would leave victims of serious prosecutorial misconduct without redress, but concluded that doing so was a lesser evil than forcing all prosecutors to face the prospect of unfounded litigation and, potentially, have their decisions impacted by concerns about liability. *See id.* at 427–28. (“As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.”) (citation omitted).

11. *Id.* at 424–31.

12. *Id.* at 423.

13. *Id.* at 427–29.

14. *Id.* at 430 (quoting *Imbler v. Pachtman*, 500 F.2d 1301, 1302 (1974)).

15. *Id.* at 430–31.

16. *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997).

immunity—the issue the Court will revisit this Term in *Pottawattamie*. In *Burns v. Reed*,¹⁷ the Court held that prosecutors are not entitled to absolute immunity when participating in the investigative process by giving advice to the police.¹⁸ And, in *Buckley v. Fitzsimmons*,¹⁹ the Court held that “[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is ‘neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.’”²⁰

Burns and *Buckley* might appear to decide *Pottawattamie*; however, last Term the Court took up the issue of prosecutorial immunity in *Van de Kamp v. Goldstein*.²¹ The issue in *Van de Kamp* concerned whether supervisors in a prosecutor’s office could be held liable for administrative acts.²² The case was brought by Goldstein, who had been prosecuted and convicted of murder, in part based on the testimony of a jailhouse informant.²³ The informant was given favorable treatment for his information, but this fact was not disclosed to the defense attorney as required.²⁴ In the suit, Goldstein alleged that the supervisors in the prosecutor’s office had failed to establish proper training and procedures to ensure that information concerning informants was transmitted to line prosecutors and appropriately sent to defense counsel.²⁵

The Ninth Circuit Court of Appeals held that the supervising prosecutors were entitled to qualified immunity, rather than absolute immunity, because the acts alleged concerned their administrative roles in the prosecutor’s office, not direct involvement in a prosecution.²⁶ The Supreme Court reversed

17. 500 U.S. 478 (1991).

18. *Id.* at 492–93.

19. 509 U.S. 259 (1993).

20. *Id.* at 273 (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973)).

21. 555 U.S. ___, 129 S. Ct. 855 (2009).

22. *Id.* at 858–59.

23. *Id.* at 859.

24. *Id.*

25. *Id.*

26. *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1176 (9th Cir. 2007).

and, in a unanimous opinion, held that the administrative acts in question were “directly connected with the conduct of a trial.”²⁷ Specifically, the administrative decisions in question “necessarily require legal knowledge and the exercise of related discretion, e.g., in determining what information should be included in the training or the supervision or the information-system management.”²⁸

The *Van de Kamp* opinion is noteworthy for its unanimity and its brevity.²⁹ The treatment of prosecutorial immunity stands in stark contrast to the Court’s previous discussions of the subject, most notably in *Buckley*.³⁰ Rather than beginning with “[t]he presumption . . . that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties,”³¹ the Court presumed the absolute immunity of the prosecutor.³² Moreover, the Court accepted wholesale the public policy rationales for absolute immunity articulated more than thirty years ago in *Imbler*, specifically noting the concern that, if entitled to only qualified immunity, civil liability concerns might impact the discretionary decision-making of prosecutors.³³

The question at issue in *Pottawattamie* is whether

(“The allegations against Van De Kamp and Livesay, which involve their failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, bear a close connection only to how the District Attorney’s Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases. Consequently, the challenged conduct is not prosecutorial in function and does not warrant the protections of absolute immunity.”) (citation omitted).

27. *Van de Kamp*, 555 U.S. ___, 129 S. Ct. at 862.

28. *Id.*

29. See, e.g., Posting of Lyle Dennison to SCOTUSblog, <http://www.scotusblog.com/wp/analysis-more-power-for-police-more-immunity-for-prosecutors/> (Jan. 26, 2009 14:27 EST) (calling the *Van de Kamp* decision an “opinion[] so spare that the Supreme Court did not labor long to produce [it]”).

30. Compare *Van de Kamp*, 555 U.S. ___, 129 S. Ct. at 862, with *Buckley v. Fitzsimmons*, 509 U.S. 259, 273–74 (1993).

31. *Burns v. Reed*, 500 U.S. 478, 486–87 (1991); see also *Butz v. Economou*, 438 U.S. 478, 506–07 (1978).

32. *Van de Kamp*, 555 U.S. ___, 129 S. Ct. at 860.

33. *Id.*

prosecutors have absolute immunity when they allegedly coerced a witness to fabricate evidence and implicate particular suspects.³⁴ The case involves the claims of individuals whose convictions were overturned in part based on prosecutorial misconduct.³⁵ The individuals assert that the prosecutors led the initial investigation of the crime and coerced a witness to change his story and implicate the individuals.³⁶

The Eighth Circuit Court of Appeals concluded that “immunity does not extend to the actions of a [prosecutor] who violates a person’s substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not ‘a distinctly prosecutorial function.’”³⁷ The prosecutors have appealed to the Supreme Court noting that the use of falsified testimony at trial is a distinctly prosecutorial function and that, because the harm of falsifying evidence does not accrue until the introduction at trial, holding prosecutors potentially liable for the falsification effectively abrogates this absolute immunity.³⁸

Prior to the *Van de Kamp* decision, this case could have appeared to be a simple application of *Buckley*: Prosecutors are entitled to qualified immunity only when acting as investigators.³⁹ Following the *Van de Kamp* decision,⁴⁰ it might be fair to assume that, despite prevailing below, the respondents in *Pottawattamie* face an uphill battle in seeking to set some limit on prosecutorial immunity. Prosecutors have absolute immunity even for administrative acts if those acts meet any or all of the following criteria: concern “the conduct of a trial,” utilize “legal knowledge,” or involve “the exercise of related discretion.”⁴¹

The Court should follow neither of these tracks. Instead, the

34. Petition for a Writ of Certiorari, *supra* note 2, at i.

35. *McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922, 925 (8th Cir. 2008).

36. *Id.* at 926–27.

37. *Id.* at 933 (citation omitted).

38. Petition for a Writ of Certiorari, *supra* note 2, at 18.

39. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273–74 (1993).

40. *See Van de Kamp v. Goldstein*, 555 U.S. ___, 129 S. Ct. 855, 862 (2009).

41. *Id.*

Court should thoroughly examine the public policy underpinnings of the prosecutors' claim to absolute immunity in light of modern circumstances. The Court has repeatedly acknowledged that its review of whether common law immunities should continue to be enforced after the passage of § 1983 is, in part, a public policy analysis.⁴² Indeed, as noted above, the Court stated that immunities should continue only so long as they are "well grounded in history *and reason*."⁴³ It is only appropriate that the Court revisit that analysis to take into account significant changes in circumstance.⁴⁴ Undertaking such an analysis reveals that much indeed has changed, and that these changes are of particular importance during the investigative phase in a criminal case.

III. NEW PRESSURES ON PROSECUTORS

In *Van de Kamp*, the Court focused solely on the possible pressure that facing a civil rights claim might place on prosecutors in deciding whether and how to undertake a prosecution.⁴⁵ Taking the language directly from *Imbler*, the

42. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 424–25 (1976).

43. *Id.* at 418 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)) (emphasis added); see also *Buckley*, 509 U.S. at 268 (noting that § 1983 forbids the Court from creating new immunities but does not prohibit analysis to determine whether common law immunities ought to continue).

44. The Court recently demonstrated a willingness to revisit its previous jurisprudence based in common law and take into account new circumstances. In *Caperton v. A. T. Massey Coal Co.*, the Supreme Court considered how the political process of judicial elections altered the traditional analysis regarding recusal. 556 U.S. ___, 129 S. Ct. 2252, 2256–57 (2009). The case involved the CEO of a coal company expending considerable funds in a judicial election, after which the legitimacy of a major verdict against the coal company was brought before the Judge whom the CEO had supported. *Id.* at 2257. The Court ruled that Due Process required the Judge's recusal from the case. *Id.* at 2265–67. As in immunity cases, the recusal context requires the Court to look at common law to determine when recusal is necessary. *Id.* at 2259. But the Court was also willing to closely examine "the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed." *Id.* at 2262. As in *Caperton*, the issue here is the fundamental fairness of the justice system. It is imperative that the Court not simply rely on common law in a vacuum but look carefully at the considerations created by the modern context.

45. *Van de Kamp*, 555 U.S. ___, 129 S. Ct. at 859–61.

Court feared “that harassment by unfounded litigation’ could both ‘cause a deflection of the prosecutor’s energies from his public duties’ and also lead the prosecutor to ‘shade his decisions instead of exercising the independence of judgment required by his public trust.”⁴⁶ In the thirty-three years since *Imbler*, however, a variety of new pressures push prosecutors to move quickly to file charges and convict, mostly resulting from the twenty-four-hour news cycle and increased media coverage of criminal investigations and prosecutions. Compounding these circumstances is the increased political pressure placed on prosecutors, particularly at the state level where prosecutors must be elected. It is unsurprising, given these pressures, that prosecutorial misconduct is becoming increasingly common. Indeed, these pressures have led to a win-at-all-costs mentality in prosecutors’ offices—a mentality that encourages prosecutors to skirt, if not cross, the line of misconduct.

A. The Pressure of the Media

Media coverage of crime is not new. Heinous murders and crimes involving celebrities have long garnered media attention. However, in the time since the *Imbler* decision, there has been a dramatic rise both in the amount of news coverage generally, and the amount of that news coverage that is about crime and prosecution. This coverage is not limited merely to sensational cases, but to a wide range of criminal cases that the public follows with rapt attention. This rise in coverage and attention has placed prosecutors under enormous pressure to deliver arrests and convictions quickly.

Imbler was decided in 1976. Cable News Network (CNN), the first twenty-four hour news channel, was launched in 1980.⁴⁷ From 1991 to 2007, Court TV broadcasted court news and criminal trials live from around the country twenty-four hours a day.⁴⁸ Today, there are at least six twenty-four-hour news

46. *Id.* at 860 (quoting *Imbler*, 424 U.S. at 423).

47. Turner – About – Corporate History, http://www.turner.com/about/corporate_history.html (last visited Sept. 17, 2009).

48. David Bauder, *Court TV Exits, truTV Appears*, USA TODAY, Dec. 30, 2007, http://www.usatoday.com/life/television/2007-12-30-346923757_x.htm.

channels operating nationally.⁴⁹ Most of them have programs devoted exclusively to criminal justice news, such as Nancy Grace's program on CNN and Greta Van Susteren's program on Fox News.

As news coverage spread to cable, the networks similarly expanded their news offerings, most notably in the form of newsmagazines.⁵⁰ In 1968 *60 Minutes* began, two years after the *Imbler* decision, as did *20/20*. In the 1980s, *48 Hours* followed, and *Dateline NBC* began airing in 1992. Throughout the 1990s, these newsmagazines proliferated, at times running up to eleven shows per week.⁵¹

During the same period, the amount of news coverage devoted to crime and the justice system increased dramatically. "Crime stories appear to be a staple of cable television news, and critics have condemned the cable networks' drawn-out coverage of high-profile crime stories . . ." ⁵² The coverage of crime on the network evening news also dramatically increased throughout the 1990s:⁵³ crime was the number one topic covered on the

Court TV was renamed truTV in 2008. *See id.* Although it still features legal programming, it also airs its brand of reality TV, "tell[ing] real stories about real people." *Id.*

49. Twenty Four Hour News Networks – Television Tropes & Idioms, <http://tvtropes.org/pmwiki/pmwiki.php/Main/TwentyFourHourNewsNetworks> (last visited Sept. 18, 2009) (listing CNN, CNN *HLN*, MSNBC, CNBC, and Fox News as examples of the leading twenty-four hour news networks).

50. Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 427 (2006).

51. *Id.* at 427 n.114. For example, in 1997, ABC launched a second edition of *20/20*, which was soon followed by a third and fourth. 1 MUSEUM OF BROAD. COMM'NS, ENCYCLOPEDIA OF TELEVISION 2383 (Horace Newcomb ed., 2d ed. 2004) (1997). Similarly, CBS launched *60 Minutes II* in 1999. ENCYCLOPEDIA OF TELEVISION NEWS 238 (Michael D. Murray ed., 1999). *Dateline* also aired two editions for a period of time. 1 MUSEUM OF BROAD. COMM'NS, *supra* at 661. Although all three networks have cut their primary newsmagazines back to one night a week, other newsmagazines have been introduced, including *48 Hours* and *Primetime*. *See generally*, David Zurgwik & Chrisina Stoehr, *Eclipsing the Nightly News*, AM. JOURNALISM REV., Nov. 2004, <http://www.ajr.org/Article.asp?id=1706>.

52. Beale, *supra* note 50, at 439–40.

53. *Id.* at 422; *see also* *Network News in the Nineties: The Top Topics and Trends of the Decade*, MEDIA MONITOR (Ctr. for Media and Pub. Affairs, Washington, D.C.), July/August 1997, at 1, *available at*

evening news during that period.⁵⁴ Crime was similarly the number one topic on local television news.⁵⁵ “Between 2000 and 2003, crime remained the second or third most frequent topic on the network news There was, however, a significant reduction in crime stories in 2004, when crime news fell to fifth place, trailing the war in Iraq, the presidential election, the economy, and terrorism.”⁵⁶

At the same time, newsmagazines also increased their focus on crime. In 1997, over one-quarter of the segments on both *Dateline* and *60 Minutes* concerned crime and the areas of law and justice.⁵⁷ “A 1998 study examined the percent of news magazine broadcasts that contained a tabloid-style crime story and found it ranged from a low of 19% of programs on *20/20* to 47% of the airings of *48 Hours*.”⁵⁸ Indeed, *48 Hours* has become *48 Hours Mystery* and broadcasts almost exclusively crime stories.⁵⁹

This increase in time devoted to news coupled with the

http://www.cmpa.com/files/media_monitor/97julaug.pdf (“Crime has been by far the biggest topic of the decade, with 9,391 stories on the network evening news shows—an average of over 110 stories per month, or nearly four per day, during the past seven years.”).

54. Beale, *supra* note 50, at 422–23.

55. *Id.* at 430.

56. *Id.* at 424 (citations omitted).

57. *Id.* at 428.

58. *Id.* at 428–29 (citing RICHARD L. FOX & ROBERT W. VAN SICKEL, *TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY* 79 (2001)).

59. The amount of crime in dramatic television has also drastically increased during this period. *Law & Order* first began its run in 1990. It spurred no less than four spinoffs, including *Law & Order: Special Victims Unit*, which began in 1999, and *Law & Order: Criminal Intent*, which began in 2001. See Ginia Bellafante, *Back on the Beat, With a High Q Rating*, N.Y. TIMES, Apr. 24, 2009, at C25. *CSI* began its run in 2000, and its spinoffs *CSI Miami* and *CSI New York* also continue to run. See Jon Caramanica, *‘CSI’ Spinoffs Hit Milestones With Traits and Ties Intact*, L.A. TIMES, Nov. 16, 2008, at E17. Additional crime dramas on television this year included *Cold Case*, *Criminal Minds*, *The Mentalist*, *NCIS*, *NCIS Los Angeles*, and *Numb3rs*. See Lynette Rice, *CBS Announces Fall Schedule: ‘The Mentalist’ Jumps To Thursdays*, ENTERTAINMENT WEEKLY, May 20, 2009, <http://hollywoodinsider.ew.com/2009/05/20/cbs-announces-f/>. In the twenty-one hours of primetime television each week, last season no less than twelve hours of drama focused on major crime, in addition to the five hours of newsmagazines that often focused on crime.

increase in the amount of time news outlets devote to crime coverage have converged into a massive increase in the media coverage of crime and prosecution. This increase is likely to continue to grow with the rise of new forms of media. Already, new media outlets spend an extraordinary amount of time on crime coverage. For example, CNN has at least three “channels” of coverage that individuals can watch on the Internet.⁶⁰ Frequently, one of the channels broadcasts live trial coverage from a criminal courtroom. All across the country, interested lay persons, as well as journalists and criminal justice professionals, are blogging about criminal investigations and trials.⁶¹

As media coverage of crime has increased, and perhaps because of it, public opinion polls have shown that people had increased anxiety about crime. “National polls identified crime as the most important problem facing the nation each year from 1994 to 1998, and in 1999 and 2000 crime was selected as the second- or third-most important national problem.”⁶² The ranking dipped in the aftermath of the attacks of September 11, 2001, when concerns about the war and terrorism became priorities,⁶³ but in recent years, crime once again has become a foremost concern.⁶⁴

This marked increase in media coverage and public concern has inevitably subjected prosecutors to increased pressure to bring charges quickly and to win convictions. Indeed, the Supreme Court has noted the presence and impact of the media in individual cases. In *Buckley*, for example, the Court noted that the alleged prosecutorial misconduct occurred in the context

60. See, e.g., Video – Breaking News Videos from CNN.com, <http://www.cnn.com/video/> (follow link for “Live Video”) (last visited Sept. 23, 2009).

61. See, e.g., Bonnie’s Blog of Crime, <http://mylifeofcrime.wordpress.com/> (discussing crimes and criminal investigations that one particular woman finds interesting); The Dallas Morning News: CRIME Blog, <http://crimeblog.dallasnews.com/> (discussing local crimes); Memphis Trial Blog, <http://www.memphistrialblogger.com/> (following Memphis’s most important trials”).

62. Beale, *supra* note 50, at 418.

63. *Id.*

64. See David Hill, *Crime in Presidential Politics*, THE HILL, Apr. 17, 2007, <http://thehill.com/opinion/columnist/david-hill/8354-crime-in-presidential-politics> (noting that “crime is growing in its salience to many voters”).

of a “highly publicized” murder investigation during which the prosecutor made allegedly defamatory statements about the defendant during a press conference.⁶⁵

B. Political Pressure

In this climate of media saturation and public concern with crime, prosecutors also face enormous political pressure to bring and win cases.

1. Elected Prosecutors

Most chief prosecutors in the country are elected. Forty-seven states elect their prosecutors, and in the remaining three, an elected attorney general appoints the local chief prosecutors.⁶⁶ The rigors of the election process frequently place pressure on prosecutors to deliver convictions, not simply to seek justice.

In recent years, prosecutorial elections most often have revolved around assertions that one candidate is tougher on crime than his or her opponent.⁶⁷ “Prosecutorial candidates have favored broad, noncontroversial messages about public safety and their ability to maintain it, matters of concern to the vast majority of voters who see themselves primarily as prospective victims of crime rather than as potential defendants.”⁶⁸

A 2008 election in Cass County, Michigan typified the rhetoric of modern prosecutorial elections. The incumbent stated his first priority was to be tough on crime: “My agenda is simple and direct: Be tough on crime,’ . . . ‘My entire career has been tough on crime, particularly violent crime and drugs.”⁶⁹ The challenger articulated his top priority to be “[p]rotecting the

65. *Buckley v. Fitzsimmons*, 509 U.S. 259, 261–62 (1993).

66. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 589 (2009).

67. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 153 (2004).

68. *Id.*

69. Lynn Turner, *Challenger Thomas D. Swisher takes on Cass Prosecutor Victor A. Fitz*, KALAMAZOO GAZETTE, July 18, 2008, http://blog.mlive.com/kalamazoo_gazette_extra/2008/07/challenger_Thomas_d_swisher_ta.html.

safety and security of our communities.”⁷⁰ He further stated, “Right now there should be more focus on habitual criminals that are preying on the community.”⁷¹

Prosecutorial candidates frequently rely on their record of “wins,” either generally or in high profile cases, to support their general tough-on-crime claims.⁷² In the rare instances prosecutorial elections move beyond general rhetoric, they tend to focus on the outcome or conduct in one notorious case, or allegations that cases are not processed quickly enough, resulting in a backlog.⁷³ The lack of focus on whether the results are just is noteworthy. Indeed, a recent study of prosecutorial elections bluntly concluded that prosecutor “candidates believe that voters care more about the speed and quantity of work” than they do about whether the outcomes were just or unjust.⁷⁴ The rush to be able to claim the “tough on crime” mantle, along with the emphasis placed on winning and winning quickly, places undeniable pressure on elected prosecutors to win cases, regardless of whether a conviction is actually the just outcome.

The concern that election politics could affect the conduct of prosecutors in specific cases is not merely hypothetical. In the Duke lacrosse case, there was considerable evidence that District Attorney Michael Nifong engaged in misconduct in large part to ensure his reelection. Indeed, Chairman of the Disciplinary Panel that heard the *Nifong* case, issued the panel’s decision, she stated: “At that time he was facing a primary and yes he was politically naïve. But we can draw no other conclusion that that [sic] those initial statements that he made were to forward his

70. *Id.*

71. *Id.* Candidates for the chief prosecutor’s job in East Baton Rouge Parish, Louisiana similarly jostled for who could claim the tough-on-crime mantle. Two of the three candidates specifically claimed they would be tough on crime, while the third stated “there would be a whole lot less plea bargaining if [I] were elected.” Joe Gyan, Jr., *Prem Burns Enters Race for DA of EBR*, BATON ROUGE ADVOCATE, July 12, 2008, at A11.

72. Medwed, *supra* note 67, at 156 (“In running for election as a district attorney, candidates often convey tough-on-crime rhetoric sprinkled with references to their winning percentage and successes in high-profile cases.”) (citation omitted).

73. Wright, *supra* note 66, at 602–03.

74. *Id.* at 604.

political ambitions.”⁷⁵ Similarly, in *Buckley*, the petitioner claimed that the prosecutor’s misconduct was motivated by an impending election. “The theory of petitioner’s case is that in order to obtain an indictment in a case that had engendered ‘extensive publicity’ and ‘intense emotions in the community’ the prosecutor fabricated false evidence.”⁷⁶

2. Appointed Prosecutors

In contrast to local prosecutors, United States Attorneys—the chief prosecutors in each federal district—are appointed.⁷⁷ But they are appointed by the President and subject to confirmation by the Senate, an inherently political process.⁷⁸ Moreover, there is considerable evidence, particularly in recent years, of politics affecting the hiring and firing of U.S. attorneys.⁷⁹ Specifically, two U.S. attorneys appear to have been fired for failing to pursue investigations or bring indictments of certain political figures.⁸⁰ In the course of defending against the allegation that the firings were political, Department of Justice officials asserted that they had performance-based reasons for firing the prosecutors and cited insufficient prosecution rates as the legitimate cause.⁸¹ The defense is, in many ways, as telling as the allegations because it brings to light the organizational acceptance and propagation of the pressure on prosecutors to bring and win cases. The fact that the Department of Justice would view prosecution numbers alone as sufficient grounds for dismissal is breathtaking.

75. F. Lane Williamson, Chairman, Disciplinary Hearing Comm’n, Comments on Disbarment of Michael Nifong (June 17, 2007), *available at* <http://www.nytimes.com/2007/06/17/us/17duke-text.html?pagewanted=all>.

76. *Buckley v. Fitzsimmons*, 509 U.S. 259, 262 (1993).

77. Medwed, *supra* note 67, at 152.

78. *Id.*

79. See Adam Zagorin, *Why Were These U.S. Attorneys Fired?* TIME, Mar. 7, 2007, <http://www.time.com/time/printout/0,8816,1597085,00.html>.

80. *Id.*

81. *Id.*

3. Assistant Prosecutors

Assistant district attorneys generally serve at the pleasure of the chief prosecutor.⁸² Accordingly, chief prosecutors can, and often do, place pressure on others in the office to convict. “Prosecutors with the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally.”⁸³ Moreover, all prosecutors can feel pressure to deliver convictions or “wins” by legislative bodies on whom prosecutors must rely for funding. “[O]ffices may use conviction statistics as leverage in budget negotiations, trumpeting their records of success to support demands for greater resources.”⁸⁴ In this way, the pressure to produce convictions extends throughout the office.

C. Win at All Costs: The Mentality of the Prosecutor’s Office

The pressure to bring and win cases has infiltrated the very culture of the prosecutor’s office. Prosecutors may have once believed their role to be like that of a judge—to evaluate and determine when it is fair to bring criminal charges or pursue a conviction. Now the primary purpose of the prosecutor is to seek as many convictions as possible. In turn, the pressure to produce wins has led to a “win-at-all-costs” mentality, which pushes prosecutors toward misconduct as a means to an end.

There is an inherent conflict in the dual roles of the prosecutor—advocate and officer of justice. The Supreme Court has stated that the goal of a prosecutor in a criminal case “is not that [he or she] shall win a case, but that justice shall be done.”⁸⁵ In other words, the Court has said that the goal of justice should take priority over the role of advocate.⁸⁶ In practice, however, the

82. Medwed, *supra* note 67, at 151.

83. *Id.* at 134–35 (citing George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 112 (1975)).

84. *Id.* at 135 (citation omitted).

85. *Berger v. United States*, 295 U.S. 78, 88 (1935).

86. Some have argued that this dichotomy is a myth and that there is no tension between the two roles. As one former prosecutor pointed out, if we charge the right people, then seeking the win is seeking justice. Thomas A.

“realities of life in the prosecutorial workplace . . . have arguably led to . . . an environment where convictions are prized above all and the minister of justice concept becomes a myth.”⁸⁷

Contrary to the ideal articulated by the Supreme Court, in part because of the media and political pressures addressed above, the goal of winning often takes precedence over the ends of justice in key moments. Indeed, the primary objective of many prosecutor offices has become to get convictions and not simply to seek justice.⁸⁸ Offices compute “batting average[s]” of each prosecutor and publicly track wins and losses.⁸⁹ Defying “the conviction-seeking mentality . . . may, in certain circumstances and with certain bosses, serve as a death knell to career advancement within the office.”⁹⁰

The circuit attorney’s office in the City of St. Louis is an example of an office that had a culture of prosecutorial misconduct. A study by the Center for Public Integrity found that during the 1970s, 1980s, and 1990s, “there were 129 rulings by trial judges and appellate judges . . . that addressed alleged prosecutorial error by the circuit attorney’s office.”⁹¹ The conduct

Hagemann, *Confessions from a Scorekeeper: A Reply to Mr. Bresler*, 10 GEO. J. LEGAL ETHICS 151, 153–54 (1996). In many cases, however, things are not that simple. For example, there will be evidence tending to show that the defendant did not commit the crime, and often that evidence is not discovered or given to the prosecutor until after charges have been filed. The test of prosecutors is whether, in that moment, they choose to do as justice requires, by turning over the evidence, or they make a different choice, to delay or to hide the evidence in an effort to ensure victory.

87. Medwed, *supra* note 67, at 137.

88. See Kenneth Bresler, “*I Never Lost a Trial*”: *When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 542 (1996) (“[W]hat is counting ‘wins’ and ‘losses,’ if not an admission that a prosecutor is seeking convictions?”); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?* 14 GEO. J. LEGAL ETHICS 355, 388 (2001) (“In view of the institutional culture of prosecutor’s offices and the culture of the adversary system generally, it is perhaps inevitable that the overriding interest of prosecutors would be winning.”) (citations omitted).

89. Medwed, *supra* note 67, at 137.

90. *Id.*; see also Smith, *supra* note 88, at 391–93 (noting the problems faced by prosecutors who reject the win-at-all-costs culture).

91. Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, CTR. FOR PUBLIC INTEGRITY, June 26, 2003, <http://projects.publicintegrity.org/PM/default.aspx?act=main>.

of a single assistant prosecutor was challenged in an enormous number of cases.⁹² In twenty-four of those cases, prosecutorial error was found. In seven cases, the misconduct was found prejudicial and remedial action was taken.⁹³ Numerous other prosecutors in that office were also cited for error and misconduct several times.⁹⁴ The prosecutors involved in most of these incidents have since left the office, and the current elected circuit attorney “has instituted a number of reforms aimed at cleaning up the office culture of St. Louis.”⁹⁵

In offices with this focus on winning, it can become normal to bend the rules in pursuit of victory, if not break them.⁹⁶ “The desire to win inevitably wins out over matters of procedural fairness, such as disclosure.”⁹⁷ Soon, bending or breaking the rules can become habit. One ethics professor has observed that this has become the case with regard to the requirement that prosecutors turn over exculpatory evidence, noting that prosecutors violate the requirement “so often that [the *Brady* decision] stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice.”⁹⁸

D. A Rise in Prosecutorial Misconduct

Media and political pressures, as well as office culture, can push prosecutors to skirt ethical and constitutional norms in order to achieve victory. While prosecutorial conduct is not new, it is all but undeniable that instances of misconduct have become

92. *Id.*

93. *Id.* In the remaining seventeen cases, “appellate judges affirmed the conviction or trial judges allowed the proceeding to continue, despite finding [the prosecutor] committed prosecutorial error.” *Id.*

94. *Id.*

95. *Id.*

96. See Bresler, *supra* note 88, at 543–44 (“A prosecutor protective of a ‘win-loss’ record has an incentive to cut constitutional and ethical corners to secure a guilty verdict in a weak case – to win at all costs.”) (citation omitted).

97. Smith, *supra* note 88, at 390.

98. Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007); see also Smith, *supra* note 88, at 390 (“The concealment of exculpatory evidence by prosecutors remains a serious problem.”).

more common and more flagrant.

Prosecutorial misconduct has long been noted as a problem in the criminal justice system. According to the Innocence Project, prosecutorial misconduct was a factor in thirty-three of the first seventy-four cases (44.6% of the cases) in which DNA led to exonerations.⁹⁹ A recent study similarly found that almost 400 homicide cases have been reversed because prosecutors failed to turn over exculpatory evidence or presented falsified evidence.¹⁰⁰

Prosecutorial misconduct is not easily susceptible to empirical study. At least some, if not most, prosecutorial misconduct is never discovered. It is inherently difficult for defense lawyers and defendants to find out that exculpatory material was withheld, that an alternative lead was not investigated, or that the informant used in a case received a reward. It is, therefore, impossible to set a baseline or account for any rise or fall. However, the number of uncovered cases of misconduct seems to be growing, and the misconduct itself is increasingly brazen. Three examples from the first part of 2009 demonstrate these trends.

The first example, *United States v. Shaygan*,¹⁰¹ was a “pill mill” case, in which a doctor was accused of prescribing controlled substances for recreational, rather than medical, reasons.¹⁰² The case is noteworthy because it was not one that captured widespread media attention, yet the prosecutorial misconduct was egregious. The prosecutors, apparently motivated by ill-will toward defense counsel, began a collateral investigation into witness tampering without any evidence; improperly interfered with the collateral investigation; authorized two witnesses to tape their discussions with members of the defense team; filed a

99. Innocence Project, *Understand the Causes: Government Misconduct*, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Sept. 17, 2009).

100. Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 313 (2001) (citing Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHICAGO TRIBUNE, Jan. 10, 1999, at 3).

101. No. 08-20112-CR-GOLD-MCALILEY, 2009 WL 980289 (S.D. Fla. Apr. 9, 2009)

102. *Id.* at 6.

superseding indictment adding 115 counts, many without any evidentiary basis; and repeatedly violated discovery obligations.¹⁰³ In March of this year, the jury found the defendant not guilty on all 141 counts alleged.¹⁰⁴ The defense moved for sanctions against the prosecutors, and the judge held a two-day evidentiary hearing at which two of the prosecutors testified.¹⁰⁵ After hearing all of the evidence, the judge (1) issued public reprimands against the prosecutors involved in the case, as well as the U.S. Attorney and the head of the Narcotics Section for failure to supervise; (2) ordered the United States to pay more than \$600,000 in defense fees and costs; (3) enjoined the U.S. Attorneys' office from opening witness tampering investigations concerning any prosecution proceeding before authorization from the court; and (4) ordered the U.S. Attorney to report on efforts to correct problems in the office, including "enhanced supervision of his attorneys."¹⁰⁶ In sanctioning the head of the office, the Judge noted that, "it is the responsibility of the United States Attorney and his senior staff to create a culture where 'win-at-any-cost' prosecution is not permitted."¹⁰⁷

Second, in *United States v. W.R. Grace & Co.*, considered to be one of the most important environmental criminal prosecutions ever brought, the prosecutors were found to have violated their constitutional obligations to turn over exculpatory evidence to the defense by failing to provide the defense with evidence that could have been used to discredit a key prosecution witness.¹⁰⁸ The judge called the violations an "inexcusable dereliction of duty," and he instructed jurors not to consider that witness's testimony with regard to one defendant and use "great skepticism" in considering the testimony with regard to the

103. *Id.* at 7–27.

104. *Id.* at 2.

105. *Id.* at 2–3.

106. *Id.* at 4–6.

107. *Id.* at 5.

108. See Kirk Johnson, *Asbestos Prosecution Results in Acquittals*, N.Y. TIMES, May 9, 2009, at A10; Tristan Scott, *Stevens Case Haunts*, THE MISSOULIAN, Apr. 26, 2009, at A1; Ben Hallman, *W.R. Grace Acquittal in Asbestos Trial a Victory for Longtime Kirkland Counsel*, LAW.COM, May 11, 2009, <http://law.com/jsp/article.jsp?id=1202430591287>.

remaining defendants.¹⁰⁹ On May 8, 2009, after deliberating for less than two days, the jury acquitted all defendants of all charges.¹¹⁰

Third, in *United States v. Ted Stevens*, a corruption case against the former Senator from Alaska, allegations of misconduct became public in a motion to dismiss the indictment that was premised on the government's failure to comply with its statutory and constitutional discovery obligations.¹¹¹ The court held three prosecutors in contempt and the judge called their conduct "outrageous."¹¹² An FBI agent later filed a complaint with the Office of Professional Responsibility of the Department of Justice alleging, among other things, that the prosecutors: (1) schemed to relocate a witness to ensure the witness would not testify at trial, (2) redacted exculpatory information from a document provided to the defense, and (3) deliberately concealed other exculpatory information.¹¹³ The entire prosecution team was eventually replaced, and a review of evidence by the new team discovered additional exculpatory material that should have been turned over to the defense.¹¹⁴ As a result, in April of this year, the Attorney General announced that he had "had enough" and asked the court to dismiss the indictment.¹¹⁵

109. Jury Instruction, *United States v. W.R. Grace & Co.*, No. 05CR00007 (D. Mont. Apr. 8, 2009), 2009 WL 1160402.

110. Johnson, *supra* note 108.

111. Senator Stevens's Motion to Dismiss or for a New Trial, or in the Alternative, Motion to Hold Government in Contempt for Violating Court's January 21, 2009 Order, *United States v. Stevens*, No. 08-cr-231 (EGS) (D.D.C. Feb. 5, 2009).

112. Editorial, *The Ted Stevens Scandal: After Yesterday's Dismissal, Time to put Prosecutors in the Dock*, WALL ST. J., Apr. 2, 2009, at A18; see also Carrie Johnson & Del Quentin Wilber, *Holder Asks Judge to Drop Case Against Ex-Senator*, THE WASHINGTON POST, Apr. 2, 2009, at A1; Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES, Apr. 8, 2009, at A1; Editorial, *Justice for Ted Stevens*, WALL ST. J., Feb. 20, 2009, at A16.

113. Neil A. Lewis, *F.B.I. Agent Asserts that Prosecution Team Concealed Evidence at Stevens Trial*, N.Y. TIMES, Feb. 11, 2009, at A14; Gregory F. Linsin, "A Cancerous Effect on the Administration of Justice"—*What Can Be Done About the Rash of Flagrant DOJ Discovery Violations?* FOR THE DEFENSE (Summer 2009), available at <http://www.blankrome.com/index.cfm?contentID=37&itemID=2000> (last visited Sept. 13, 2009).

114. See Johnson & Wilber, *supra* note 112.

115. *Id.*

There is significant evidence to suggest that these are not isolated cases. The prosecutorial team involved in *Stevens* was involved in two almost identical cases of misconduct this year, which similarly required the Department of Justice to seek the release of the defendants involved.¹¹⁶ Similarly, in *Shaygan*, the Judge noted that the same prosecutors had previously filed a complaint alleging that a defendant engaged in witness tampering in a case involving the same defense attorneys.¹¹⁷ The complaint was “dropped without an indictment” after a meeting with “senior members of the United States Attorney’s Office.”¹¹⁸

In the District of Massachusetts, Federal Judge Mark Wolf has become so frustrated with the pattern of misconduct engaged in by United States attorneys in his jurisdiction that he made his concerns, and the failure of the Department of Justice to respond, a matter of public record.¹¹⁹ In January 2009, Judge Wolf issued a decision on a motion to suppress in *United States v. Jones*,¹²⁰ a felon in possession of a firearm case. Judge Wolf found the case “disturbing because of repeated government misconduct that, if not discovered, might have frustrated the court’s ability to find the facts reliably and might have deprived [the defendant] of his right to due process.”¹²¹ The misconduct in question involved the prosecutor’s failure to timely disclose inconsistent statements by a police officer concerning the facts giving rise to the stop of the defendant, which directly impacted the probable cause determination.¹²² Although the defense eventually got the information and was not prejudiced,¹²³ Judge Wolf noted: “The

116. See Linsin, *supra* note 113 (noting that in *United States v. Kohring* and *United States v. Kott*, as a result of uncovering information that should have been, but was not, disclosed to the defense, the Department of Justice “filed consent[ing] motions in two cases on appeal seeking the remand of the cases to the district court and requesting the immediate release of the appellants on personal recognizance”).

117. *Shaygan*, No. 08-20112-CR-GOLD-MCALILEY, Slip op. at 6 (S.D. Fla. Apr. 9, 2009).

118. *Id.*

119. See *United States v. Jones*, 609 F. Supp. 2d 113, 115 (D. Mass. 2009).

120. *Id.* at 115.

121. *Id.*

122. *Id.*

123. *Id.* at 118.

egregious failure of the government to disclose plainly material exculpatory evidence in this case extends a dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court."¹²⁴

Shortly after issuing the *Jones* decision, Judge Wolf wrote a letter to Attorney General Holder detailing the history of misconduct to which he was referring, as well as describing the Judge's longstanding efforts to bring these matters to the attention of past Attorneys General and their failures to respond.¹²⁵ The letter described various instances of misconduct, characterizing them, in turn, as "blatant," "deliberate," "outrageous," "extreme," and "intentional."¹²⁶ The letter further noted that Judge Wolf had raised the issue of pervasive prosecutorial misconduct with both Attorney General Gonzales and Attorney General Mukasey, among others, but received no response from the Department of Justice.

In May 2009, Judge Wolf revisited the misconduct in the *Jones* case to determine whether to sanction the government or the prosecutor or both.¹²⁷ Noting that "in the District of Massachusetts the government has had enduring difficulty in discharging its duty to disclose material exculpatory information to defendants in a timely manner," Judge Wolf reviewed numerous instances of documented prosecutorial misconduct from Massachusetts and elsewhere occurring since the mid-1990s.¹²⁸ Returning to the particular circumstances in the *Jones* case, the Judge found that the prosecutor's failure to timely produce the exculpatory evidence reflected either "a fundamentally flawed understanding of her obligations, or a reckless disregard of them."¹²⁹ In an effort to correct any misunderstanding that might exist amongst the prosecutors in the district and encourage them to take their discovery

124. *Id.* at 119 (footnote omitted).

125. Judge Wolf chose to file the letter as a matter of record in two cases; it is therefore a matter of public record. *See* *Barone v. United States*, 610 F. Supp. 2d 150, 151–53 (D. Mass. 2009).

126. *Id.* at 151.

127. *United States v. Jones*, 620 F. Supp. 2d 163, 165 (D. Mass. 2009).

128. *Id.* at 168–69.

129. *Id.* at 167.

obligations seriously, Judge Wolf decided to arrange “a program presented on discovery in criminal cases.”¹³⁰ The judge further decided to defer a decision on whether to sanction the office or the prosecutor for at least six months and ordered “the Department of Justice and [the prosecutor] to file additional affidavits in November, 2009, addressing whether their performance and progress have obviated the need to impose sanctions in this matter.”¹³¹

E. Rebalancing the Public Policy Analysis

In *Imbler*, the Court was primarily concerned with the pressure that a lack of absolute immunity might place on prosecutors, specifically that prosecutors might act more conservatively if they were aware that their decisions could expose them to possible civil liability if incorrect.¹³² The Court did not discuss what pressures, if any, the prosecutor might be under, particularly when shielded by immunity, to commit misconduct in order to achieve convictions. As demonstrated above, pressures from the media, the electorate, politicians, and supervisors are intense, and they have led to a situation where misconduct is a generally accepted part of prosecutorial practice. In the interest of justice, these considerations must be at least taken into account by the Court in its public policy discussions on when absolute immunity is appropriate for prosecutors.

IV. CHANGES IN THE LEGAL LANDSCAPE

In addition to the relevant changes in the public policy analysis, the legal landscape has changed dramatically since the *Imbler* decision. In *Imbler*, the Court relied on a lack of procedural protections in civil rights cases as well as the availability of alternative procedures for deterring and correcting prosecutorial misconduct in concluding that absolute immunity was appropriate for prosecutors.¹³³ However, in the years since

130. *Id.*

131. *Id.* at 168.

132. *See Imbler v. Pachtman*, 424 U.S. 409 (1976).

133. *Id.* at 424–31.

Imbler, a variety of factors have rendered the alternative procedures cited by the Court largely inapposite. Criminal charges against a prosecutor are almost unheard of, and independent studies show that prosecutors are rarely subjected to professional discipline. Moreover, the Court's concern that granting prosecutors only qualified immunity would require them to engage in substantial litigation before immunity might be found to apply has been significantly assuaged by intervening decisions on how claims of qualified immunity must be addressed.

A. Charging the Prosecutor

In 2001, a law professor published an empirical study to determine whether and how often, as compared with private counterparts, prosecutors are subject to professional discipline.¹³⁴ The study compared the rate of disciplinary cases brought against prosecutors and private attorneys who engaged in similar conduct.¹³⁵ The study demonstrated that although prosecutors are the subject of disciplinary charges, the number of cases is notably small, particularly “in light of the many prosecutors and criminal cases that exist.”¹³⁶ The study concluded that “prosecutors are disciplined rarely, both in the abstract and relative to private lawyers.”¹³⁷

These findings are consistent with a study conducted by the Center for Public Integrity, which analyzed cases of prosecutorial discipline going back to 1970. The Center found only 37 cases published between 1970 and 2002 in which a court had disciplined a prosecutor for misconduct relating to the “fundamental fairness of pending criminal proceedings” or “the constitutional rights of criminal defendants.”¹³⁸ The most

134. See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).

135. *Id.* at 725.

136. *Id.* at 744–45.

137. *Id.* at 755. It is noteworthy, though not relevant to the current topic, that the study also found that criminal defense lawyers are disciplined less often than their civil counterparts. *Id.* at 753–54.

138. Neil Gordon, *Misconduct and Punishment: State Disciplinary*

common punishment for the misconduct was an assessment of the costs of the disciplinary proceedings.¹³⁹ In only twelve cases, the prosecutor's license to practice law was suspended, and in two cases, the prosecutor was disbarred.¹⁴⁰

There are a variety of reasons cited for the absence of professional disciplinary proceedings against prosecutors. First, because prosecutors do not have specific clients, there is no obvious person to raise a claim of misconduct against them.¹⁴¹ "The bar cannot rely on aggrieved defendants as the instigators of complaints, because almost all defendants have antipathy toward their prosecutors."¹⁴² Defense attorneys frequently must work with the same prosecutors time and again and thus are understandably hesitant to file complaints.¹⁴³ Moreover, the types of misconduct prosecutors typically engage in, such as hiding or withholding information, are not the self-serving actions, like the stealing of client funds, that are commonly addressed by bar authorities.¹⁴⁴

Disciplinary authorities may also be hesitant to discipline prosecutors for behavior in the course of a criminal case for fear "of interfering with, or having an undue effect upon, the judicial process."¹⁴⁵ Specifically, the concern is that if the criminal or appeals courts understand that any finding of misconduct will automatically result in an disciplinary charge, the courts may be

Authorities Investigate Prosecutors Accused of Misconduct, in HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS (Center for Public Integrity ed., 2003), <http://projects.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=39>.

139. *Id.*

140. *Id.*

141. See Zacharias, *supra* note 134, at 758; Andrew Smith, *Note: Brady Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1953 (2008) ("Disciplinary complaints typically are initiated by individuals, and because prosecutors, unlike private attorneys, do not have individual clients, lodging a complaint falls to the defense attorney or the defendant, who often are more focused on the underlying case than on reporting the prosecutor.").

142. Zacharias, *supra* note 134, at 758.

143. Smith, *supra* note 141, at 1953.

144. Zacharias, *supra* note 134, at 757.

145. *Id.* at 754.

less willing to note or address prosecutorial misconduct.¹⁴⁶ Timing heightens this issue. “Disciplinary authorities may be loath to review a prosecutor’s conduct while appellate proceedings are pending, for fear of interfering, or being perceived as interfering, in the appellate process. Yet if disciplinary proceedings are held in abeyance until the completion of the criminal proceedings, many years may pass.”¹⁴⁷

While disciplinary proceedings are rare, criminal charges against a prosecutor are rarer still. In *Imbler*, the Court noted that since “[e]ven judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U. S. C. § 242, . . . [t]he prosecutor would fare no better for his willful acts”¹⁴⁸ But, even if prosecutors were willing to charge other prosecutors to be successful in a criminal case, one would have to prove beyond a reasonable doubt that the prosecutor’s conduct was willful.¹⁴⁹ As a result, the leveling of criminal charges against a prosecutor for conduct occurring in the course of a prosecution is all but unheard of.¹⁵⁰

146. *Id.* The identical argument is made by the Court in the context of civil rights cases: if civil rights cases were likely to result from findings of misconduct, courts might be less willing to find and redress misconduct. In neither case is there any evidence that judges are willing to turn a blind eye to misconduct in order to protect the prosecutor from further scrutiny. To the contrary, it seems more likely that judges would turn a blind eye to misconduct because of the signal, created by the existence of immunity and the lack of professional disciplinary cases, that such conduct is tacitly accepted in the criminal justice system. At the very least, it is disconcerting to note that the various arenas in which prosecutorial conduct might be addressed may all be relying on another to address it—the Court relies on the professional disciplinary system, and the professional disciplinary system relies on the criminal court judges and the appeals process. The almost inevitable result is that the matter is not being addressed.

147. *Id.* at 762.

148. *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

149. Smith, *supra* note 141, at 1967–68; see Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 878–79 (1997).

150. See Smith, *supra* note 141, at 1966–71 (noting that criminal prosecution is rarely utilized and calling for its expanded use); see also Weeks, *supra* note 149, at 879. It is only slightly more common for criminal contempt charges to be brought against a prosecutor. Criminal contempt charges appear to be reserved for the most public, most egregious cases. By way of example,

Regardless of the reasons, the fact is that, despite the persisting problems of prosecutorial misconduct, prosecutors are rarely subject to professional discipline or criminal charges. In the absence of common use, the ability of these procedures to deter prosecutorial misconduct must be considered dubious, at best, which places into doubt the Court's assertion in *Imbler* that civil liability was not necessary to dissuade prosecutors from committing misconduct.¹⁵¹

B. Qualified Immunity

The *Imbler* Court also found that qualified immunity, as an alternative to absolute immunity, would not be sufficient to protect prosecutors. Since *Imbler*, the Court's decisions, with regard to qualified immunity, all but ensure that the standards

Michael Nifong, the prosecutor in the Duke lacrosse rape case, was found guilty of criminal contempt and required to spend one evening in jail. Associated Press, *Nifong Gets Day in Jail for Criminal Contempt in Duke Rape Case*, ESPN, Aug. 31, 2007, <http://sports.espn.go.com/espn/print?id+2999217&type=story>. But contempt of court seems not to have the dissuasive power of professional discipline, civil liability, or separate criminal charges, perhaps because the punishment for contempt is often slight—a contribution to a charity or an afternoon in jail. In addition, either rightfully or wrongfully, it is viewed as badge of honor because it most frequently happens to attorneys who are being incredibly zealous on behalf of their clients. See, e.g., Life at the Harris County Criminal Justice Center, <http://harriscountycriminaljustice.blogspot.com/2008/05/contempt.html> (May 6, 2008, 21:45 EST).

151. It is far from clear that the increased use of either professional discipline or criminal sanctions would be a sufficient solution to the problem of prosecutorial misconduct. First, neither professional discipline nor criminal convictions serve to vindicate the rights of the individual harmed by the misconduct, and providing such a vindication was the primary purpose of the enactment of § 1983. The criminal codes are narrower—requiring willfulness, not mere constructive knowledge. Second, in neither case do the standards for enforcement track constitutional norms. The ethical rules are broader, seeking not just to enforce constitutional requirements but, more generally, to define a lawyer's role. Indeed, a recent ABA ethics opinion sought to emphasize this point specifically with regard to prosecutors. In ABA Ethics Opinion 09-454, the Standing Committee on Ethics and Professional Responsibility held that, even though the language tracks the constitutional obligation, Rule 3.8(d) places a broader obligation on prosecutors to disclose not only exculpatory evidence that is material, but also “information known to the prosecutor [that] would be favorable to the defense.” ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

and procedures for addressing such claims are sufficient to protect even prosecutors.

At the time of the *Imbler* decision, the standard and procedures applicable in cases of qualified immunity were quite different than they are today. Qualified immunity was then thought of as good-faith immunity.¹⁵² The Court described the immunity as follows: “It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity.”¹⁵³ The test had both an objective and subjective component.¹⁵⁴ The action had to violate the individual’s constitutional rights, and the official had to reasonably know that the action was unconstitutional or act with the “malicious intention to cause a deprivation of constitutional rights or other injury.”¹⁵⁵

Good-faith immunity was intended to permit quick resolution of matters and therefore ensure immune officials were not burdened by prolonged litigation.¹⁵⁶ In practice, however, the standard proved incompatible with quick resolution because the issue of good faith and malice were found to be questions of fact, which the jury must decide.¹⁵⁷ It was in this context that the

152. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

153. *Id.* at 247–48.

154. *Wood v. Strickland*, 420 U.S. 308, 321 (1975) (holding that school officials were entitled to good-faith immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982).

155. *Wood*, 420 U.S. at 322.

156. *Butz v. Economou*, 438 U.S. 478, 507–08 (1978) (“Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss.”).

157. *Harlow v. Fitzgerald*, 457 U.S. 800, 815–16 (1982).

The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official’s subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

Id. (citations omitted).

Court determined that qualified immunity would provide insufficient protection to prosecutors.

Because of these problems, shortly after *Imbler*, the Court altered the qualified immunity standards, in large part to rectify the problem of immune officials having to engage in substantial litigation in order to prove their immunity.¹⁵⁸ In 1982, in *Harlow v. Fitzgerald*, the Court eliminated the subjective component of qualified immunity so that “bare allegations of malice [would] not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.”¹⁵⁹ The Court declared that qualified immunity would bar suit against government officials whenever “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁶⁰

Following *Harlow*, the Court emphasized that qualified immunity is “an *immunity from suit* rather than a mere defense to liability.”¹⁶¹ Lower courts were directed to resolve the issue of immunity “prior to discovery,”¹⁶² “at the earliest possible stage in litigation.”¹⁶³ To this end, the Court has repeatedly refined the procedure for determining qualified immunity to ensure that suits against immune officials are dismissed expediently.¹⁶⁴

The changes to the standards and procedures used to determine the applicability of qualified immunity in an

158. *See id.*

159. *Id.* at 817–18.

160. *Id.* at 818 (citations omitted).

161. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

162. *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987).

163. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (citations omitted).

164. For example, in *County of Sacramento v. Lewis*, the Court gave lower courts the authority to determine, at the outset of the case, whether the actions alleged, if true, would constitute a violation of a constitutional right. 523 U.S. 833, 841 n.5 (1998). In 2001, the Court made this procedure mandatory. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Last Term, the Court reversed *Saucier*, holding that courts “should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Pearson v. Callahan*, 555 U.S. ___, 129 S. Ct. 808, 818 (2009). In determining how to proceed, the Court advised that judges should continue to emphasize the quick resolution of immunity claims. *See id.*

individual case have significantly lessened the burdens of government officials claiming the immunity. The standard is now objective and easy to understand, and courts have flexibility and discretion in determining how best to evaluate qualified immunity claims.

C. Rebalancing the Legal Considerations

After thirty years, the Court's reliance on other procedures for the redress of harms caused by prosecutorial misconduct, as well as its concern that qualified immunity alone would provide insufficient protection to prosecutors, appear misplaced. Prosecutorial misconduct is not regularly redressed through criminal courts or bar disciplinary procedures. To the extent bar disciplinary proceedings exist, the punishments are frequently minor and never accrue to the benefit of the injured individual. In contrast, civil liability ensures that the person injured has some control over the process by which redress is sought and directly receives compensation for the harm. It was precisely for this reason that Congress passed § 1983. Moreover, the burden of allowing victims of misconduct to bring suit has been substantially lessened by intervening jurisprudence permitting judges to address claims of immunity in the most efficient way possible. Indeed, an official raising a claim of qualified immunity—where the claim is applicable—is likely to have the case resolved in equal time as an official raising a valid claim of absolute immunity. All of these factors weigh in favor of limiting the extent to which prosecutors can claim absolute immunity from civil suit.

V. DRAWING THE LINE

The appropriateness of absolute immunity for prosecutors cannot be evaluated by relying solely upon those public policy and legal factors that existed at the time of the *Imbler* decision. Indeed, a review of those factors demonstrates that much has changed with the public policy analysis and the legal factors. These changes strongly support the notion that some limit on the absolute immunity of prosecutors should be set. The case that

comes before the Supreme Court this Term is precisely the type of case that the Court can and should take these changes into account and draw a line in the sand with regard to the absolute immunity of prosecutors.

A. The *Pottawattamie* Case

In *Pottawattamie*, the prosecutors are alleged to have falsified evidence that was eventually used to convict two defendants—McGhee and Harrington—of murder.¹⁶⁵ The Iowa Supreme Court reversed Harrington’s conviction because the prosecutor failed to disclose exculpatory evidence.¹⁶⁶ The current prosecutor then determined that it would not be possible to retry Harrington and further agreed to release McGhee.¹⁶⁷ A civil rights action against the county, the prosecutors, and the police followed. Only the claims against the prosecutors remain before the Supreme Court.

The original line prosecutor, Joseph Hrvol, was involved in the investigation of the case from the beginning, “participating in witness interviews and canvassing the neighborhood near the crime scene.”¹⁶⁸ He acknowledged that he was “intensely involved in the investigation,” even before he was assigned any role in the prosecution of the case.¹⁶⁹ Hrvol was supervised by David Richter, the county attorney.¹⁷⁰ Richter also participated directly in the investigation, interviewing witnesses and even, with Hrvol, “consult[ing] an astrologer regarding their suspicions” about an initial suspect.¹⁷¹

Initially, McGhee and Harrington were not suspects; evidence pointed to another individual.¹⁷² McGhee and Harrington assert that the prosecutors and the police pressured a

165. McGhee v. Pottawattamie County, Iowa, 547 F.3d 922, 925 (8th Cir. 2008).

166. *Id.*

167. *Id.*

168. *Id.* at 926.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

young witness to change his story and implicate them.¹⁷³ The witness in question had a considerable criminal history, and the officials had evidence of additional crimes.¹⁷⁴ The officials also offered him a \$5000 reward for information.¹⁷⁵ Based on the testimony of this witness, Richter and Hrvol approved the arrest of McGhee and Harrington and filed charges against them for first degree murder.¹⁷⁶ The issue before the Court concerns only the alleged misconduct that occurred during the investigation of the case, i.e. the allegation that prosecutors coerced a witness to fabricate testimony and implicate the defendants. In this context, the changed public policy and legal circumstances have particular applicability.

B. Public Policy Considerations in Criminal Investigations

The consideration of the political and media pressure on prosecutors is particularly appropriate in the context of investigations, as these pressures are most acute early in a criminal case. In the typical case, it is society's idea of a criminal being at large in the public that creates the most political pressure for prosecutors. Similarly, the media appears most interested in the case after the crime has been committed but before the alleged perpetrator is arrested.

Many of the recent identified cases of misconduct bear this out. For example, in the Duke Lacrosse case, the prosecutor all but admitted that the pressure created by an upcoming election and the intense scrutiny of the media led to the egregious misconduct in that case. Indeed, in the *Pottawattamie* case itself, there is significant evidence that precisely these pressures played a role in the prosecutors' conduct. David Richter, the county attorney, had been appointed in 1976, but was scheduled to stand for election in 1978.¹⁷⁷ As the court of appeals noted, "Richter was campaigning in the face of [the] unsolved murder."¹⁷⁸

173. *Id.* at 927.

174. *Id.* at 926–27.

175. *Id.* at 927.

176. *Id.* at 927–28.

177. *Id.* at 926.

178. *Id.*

Moreover, the investigative phase of a criminal case is precisely the point at which the pressure of potential civil liability ought to be applied to dissuade misconduct by prosecutors. Specifically, the separation of the investigative and prosecutorial functions serves as a check on the police and the prosecutor's conduct. The police gather all available evidence, while the prosecutors review and evaluate that evidence to determine whether, in total, it provides a legal basis for charging and convicting an individual.

The person who investigates the case should have as his sole goal the intent to follow the appropriate leads and endeavor to determine what occurred. The investigator should not, outside of consultations to ensure that investigative tactics are lawful, be driven by legal considerations, such as whether the evidence gathered is sufficient to sustain proof beyond a reasonable doubt. Considering such issues during an investigation could, for example, lead to a decision not to follow an otherwise credible lead for fear that it will produce a second suspect or introduce some doubt into the developing case. Similarly, an investigator concerned primarily with the prosecutorial notion of proof beyond a reasonable doubt might also decide that it is necessary to "produce" more evidence to ensure a conviction or to stop pursuing evidence once he believes a sufficient case has been made.

The conflating of the prosecutorial and investigative roles creates a situation peculiarly ripe for misconduct. The investigative prosecutor has a powerful motive to ensure that he collects evidence solely supporting his theory of the case, while the lack of an independent evidentiary review ensures that no investigative misconduct will come to light. Nevertheless, the prospect of civil liability for prosecutors when they engage in misconduct during investigations would serve to appropriately counteract this immense opportunity for misconduct.

C. Legal Considerations in the Investigative Context

The Supreme Court has explicitly held that prosecutors are not entitled to absolute immunity for their misconduct during the

investigative phase of a case.¹⁷⁹ This holding is consistent with the fact that police officers investigating a case are entitled only to qualified immunity.¹⁸⁰ As the district court observed in *Pottawattamie*, “[i]t would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty.”¹⁸¹

Nonetheless, the prosecutors’ briefs argue that falsifying testimony is not a constitutional violation.¹⁸² It becomes a constitutional violation only when the evidence is introduced, a point at which, as prosecutors, they are entitled to absolute immunity.¹⁸³ This argument proves far too much. There is almost no violation that a prosecutor could commit during an investigation, other than physically abusing a suspect, which would cause substantial harm until and unless the information was used in the course of the prosecution. If successful, the argument would essentially insulate prosecutors from all liability. Indeed, under this theory, a prosecutor could open an investigation purely out of malice, fabricate the evidence, bring a completely innocent individual to trial and convict them, and the victim would be unable to obtain redress because the prosecutor would be entirely insulated from civil liability. In light of the inability of professional discipline and criminal liability to effectively deter misconduct, such a broad ruling would effectively give prosecutors a free pass. Such a holding would not only appear to contradict the Supreme Court’s decision in *Buckley*, which held that prosecutors could be held liable for

179. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273–74 (1993).

180. *See, e.g., Moran v. Clark*, 359 F.3d 1058, 1060 (8th Cir. 2004) (holding that police officers were entitled only to qualified immunity for allegations that they manufactured evidence).

181. *McGhee*, 475 F. Supp. 2d at 907 (quoting *Zahrey v. Coffey*, 221 F.3d 342, 353–54 (2d Cir. 2000)).

182. Petition for a Writ of Certiorari, *supra* note 38, at 9.

183. *Id.* In *Buckley v. Fitzsimmons*, following remand by the Supreme Court, the Seventh Circuit adopted this argument. *See Buckley v. Fitzsimmons*, 20 F.3d 789, 794–95 (7th Cir. 1994).

misconduct committed during investigations,¹⁸⁴ but would also contravene the general purpose of § 1983.

VI. CONCLUSION

Prosecutors are operating in a very different environment and legal context than that which existed thirty years ago. The pressure to bring and win cases quickly is undeniable and intense. Moreover, the evidence shows that this pressure is taking a toll on prosecutors and, with it, eroding the ability of our criminal courts to produce justice. Close scrutiny of the public policy and legal underpinnings of the Court's prosecutorial misconduct jurisprudence leads inevitably to the conclusion that a broad reexamination is warranted. Such a reexamination would weigh heavily in favor of permitting prosecutors to be held liable for acts of misconduct committed during the initial investigation of crimes, provided the law clearly established that the acts constituted misconduct. In other words, prosecutors should have qualified, not absolute, immunity when participating in the investigation of a case.

The Supreme Court could decide the *Pottawattamie* case in favor of the victims of prosecutorial misconduct without undertaking this type of reexamination. Relying on *Buckley* and distinguishing *Van de Kamp* on facts, the Court could simply hold that this issue was previously addressed. But, the Court's willingness to do more—to look at those pressures which motivate misconduct—would send an important signal that justice, not merely convictions, must be the goal of every prosecutor. Furthermore, it would correct the signal sent, perhaps inadvertently, in the *Van de Kamp* decision that prosecutors, no matter how egregiously they act, are beyond the reach of the law.

The pendulum on prosecutorial misconduct has swung too far. In the *Pottawattamie* case, the Supreme Court can and should draw a line in the sand.

184. *Buckley*, 509 U.S. at 279.

THE BREYER PROJECT: “WHY COULDN’T YOU WORK THIS THING OUT?”

*Linda Greenhouse**

I.	THE BURDEN OF ENLIGHTENMENT	37
II.	KEEPING FAITH	41
III.	A BALANCING ACT	47

I. THE BURDEN OF ENLIGHTENMENT

If Enlightenment as a stance toward the world is defined as “faith in the power of knowledge,”¹ then Justice Stephen G. Breyer is the quintessential Enlightenment Supreme Court Justice. He believes in evidence and in expertise and in the power of both facts and experts to persuade. More than any of his colleagues, he defers consistently to the determinations of “expert” administrative agencies; his high rate of upholding agency decisions (at 82%, with no other Justice hitting 80%) won him Cass Sunstein’s “award for Judicial Restraint” last year.² Justice Breyer’s skepticism toward jury-imposed punitive damages,³ and his roles as champion and eventual would-be savior of the federal sentencing guidelines⁴ can also be seen as

*Knight Distinguished Journalist in Residence and Joseph Goldstein Lecturer in Law, Yale Law School. An earlier version of this paper was presented at the Workshop on Judicial Behavior, Northwestern and University of Chicago Law Schools, April 3, 2009. Many thanks to Professor Lee Epstein of Northwestern Law.

1. Robert Darnton, *Google and the Future of Books*, N.Y. REVIEW OF BOOKS, Feb. 12, 2009, <http://www.nybooks.com/articles/22281>.

2. Cass R. Sunstein, *Judicial Partisanship Awards: Study of Over 20,000 Decisions Reveals How Politics Shapes Rulings*, WASH. INDEP., July 31, 2008, <http://www.washingtonindependent.com/view/judicial>; see also Paul Gewirtz & Chad Golder, Op-Ed., *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19.

3. See, e.g., *Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007).

4. See, e.g., *United States v. Booker*, 543 U.S. 220 (2005).

examples of his preference for bureaucratic expertise over the random behavior of juries and judges.

Justice Breyer's belief in the power of facts permeates his published opinions and is a notable aspect of his behavior on the bench. He frequently goes outside the record to check matters out for himself. Frederick Schauer and Virginia J. Wise note with evident bemusement Justice Breyer's citation to a book called *How to Buy and Care for Tires* in an opinion for the Court in a case concerning expert testimony; while the case had its origins in a tire blowout, neither that book nor two others that Justice Breyer cited had been called to the Court's attention by any of the briefs.⁵ During oral argument in a case concerning occupational injuries among railroad workers whose job it was to connect one rail car to another, Justice Breyer informed counsel for the railroad that there existed a simple device that could make the job safer.⁶ "Actually, my law clerk found one in the Car Locomotive Cyclopedia for 1974," the Justice said, adding helpfully, "They have four pictures."⁷

It is Justice Stephen Breyer's fundamental challenge—I am tempted to call it his tragedy, but I hesitate to ascribe dark

5. Frederick Schauer & Virginia J. Wise, *Nonlegal Information & the Delegalization of Law*, J. LEGAL. STUD. 495, 496 (2000) (discussing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the authors observe: "It is safe to conclude that *How to Buy and Care for Tires* is not part of the historically recognized canon of legal information.").

6. Transcript of Oral Argument at 12, *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400 (1996) (No. 95-6), 1996 WL 13955. The transcripts of this period did not identify individual Justices, but a law clerk who served in another Justice's chambers during the October Term 1995 confirmed to the author that it was Justice Breyer; evidently Justice Breyer's assignment to his law clerk to research railroad car couplings assumed legendary proportions within the law clerk network.

7. *Id.* Justice Breyer's style on the bench is easy to parody. Last year, the Supreme Court press corps produced a fake edition of the newspaper *Legal Times* to honor the retirement of one of its number. The *Supreme Court Times*, as it was called, contained this table of contents notation at the bottom of its single page: "Inside: Breyer in tenth hour of argument hypo; still going strong: D1, 2, 3 . . ." Supreme Court Press Corps, *Supreme Court Times* (Feb. 28, 2008) (on file with author). The serious point, of course, is that in contrast to Justice Scalia's posturing on the bench and Chief Justice Roberts's badgering of counsel with whose position he disagrees, Justice Breyer really wants information.

emotions to this optimistic man—to navigate as an Enlightenment Justice in an unenlightened period of Supreme Court history, a counter-factual age when ideology routinely trumps evidence-based decision-making. From the majority's reliance on the discredited fiction of a "post-abortion syndrome" to justify upholding the federal "partial-birth" abortion statute⁸ to the Chief Justice's embrace (his possession of a *summa cum laude* degree in history from Harvard notwithstanding) of the ahistorical proposition that the city of Louisville, Kentucky lacks a compelling interest in maintaining integration in its public schools,⁹ the present climate at the Court is one where the powers of fact-based persuasion that served Justice Breyer well in his high-achieving pre-Supreme Court life count for little—deflated currency in a polarized marketplace.¹⁰

Further, even in cases that do not prompt ideologically polarized responses, the Court approaches many important doctrinal areas through a priori labels, categories, and tiers of scrutiny—devices that shield the Court from direct encounters with the facts of many of the cases it decides, to Justice Breyer's evident frustration. If the Court views a case through the lens of rational basis review as a starting premise, for example, there is little institutional incentive to do the heavy lifting of uncovering

8. See *Gonzales v. Carhart*, 550 U.S. 124 (2007). See also Linda Greenhouse, *The Counter-Factual Court*, 47 U. LOUISVILLE L. REV. 1 (forthcoming 2009).

9. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (Louisville Schools Case)*, 551 U.S. ___, 127 S. Ct. 2738 (2007).

10. The polarization on the current Court is notable. Of 74 cases decided on the merits with published opinions during the 2008 Term, 23, or 31 percent, were decided by votes of 5 to 4. Seventeen of those 23 found the four most conservative Justices (Roberts, Scalia, Thomas, and Alito) on one side; the four most liberal Justices (Stevens, Souter, Ginsburg, and Breyer) on the other; and Justice Kennedy casting the deciding vote. It might bear observing that the Court might be a shade less polarized were Justice Breyer calling the shots for the liberal group; during the Term as a whole, he was the least likely among his three allies to cast a dissenting vote; in other words, among the liberal bloc, he was the closest to the center of the Court. He voted in dissent 18 times, compared to 23 for Justice Ginsburg, 24 for Justice Souter, and 27 for Justice Stevens. The number of dissenting votes cast by the other members of the Court were: Chief Justice Roberts, 10; Justice Alito, 13; Justice Thomas, 13; Justice Scalia, 14; Justice Kennedy, 5. (statistics compiled by the author.)

the facts and context; the challenged statute or government action will be upheld almost no matter what. Justice Breyer is not the only one to wonder whether these doctrinal approaches, developed over the years as an aid to sorting out fundamental interests from those less weighty, now serve instead to shield the Court from having to confront the ambiguities of life as seen through the lens of law.

“In general, I tend to disfavor absolute legal lines,” Justice Breyer told an audience at the American Enterprise Institute in 2003.¹¹ “Life is normally too complex for absolute rules.”¹² Courts should interpret statutes “with what I might call an open-textured approach—an approach that finds greater value in the consideration of underlying human purposes than in the proliferation of strict legal categories,” he added.¹³ He also used this speech to suggest that courts develop procedures for calling on disinterested experts in technical cases.¹⁴

“Law is not an exercise in mathematical logic,” Justice Breyer declared in his dissenting opinion in the Louisville Schools case, in response to the Chief Justice John Roberts opinion mentioned above.¹⁵

Concurring in a decision earlier last Term that concluded a Ten Commandments monument had become “government speech” upon a city’s willing receipt and decision to display it in a public park, Justice Breyer wrote that he was joining the opinion for the Court

on the understanding that the “government speech” doctrine is a rule of thumb, not a rigid category. . . .

In my view, courts must apply categories such as “government speech,” “public forums,” “limited public forums,”

11. Stephen Breyer, Assoc. Justice, Supreme Court of the United States, *Economic Reasoning and Judicial Review*, Address before the American Enterprise Institute (Dec. 4, 2003), in *AEI-Brookings Joint Center 2003 Distinguished Lecture*, 2004, at 7.

12. *Id.*

13. *Id.* at 17.

14. *Id.* at 13.

15. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. ___, 127 S. Ct. 2738, 2816 (2007) (Breyer, J., dissenting).

and “nonpublic forums” with an eye toward their purposes—lest we turn “free speech” doctrine into a jurisprudence of labels.¹⁶

Consigned to life on a Court enamored of formalism and uninterested in facts, what is Justice Stephen Breyer, or a Justice of his inclinations, to do?

II. KEEPING FAITH

As I see it, Justice Breyer has responded on two levels to the situation in which history has placed him. First, in his approach to deciding individual cases, he has retained the patterns and attitudes that he brought to the Supreme Court rather than yield to the institutional ethos that surrounds him. As in the opinion just noted, he keeps making his points—not, typically, in the obstructionist manner of withholding his vote and concurring only in the judgment, but in ascribing to his fully concurring vote the meaning that he chooses to give it, for whatever utility that explanation might have for the present or future.¹⁷ In another recent case, on a First Amendment question growing out of a dispute over union dues that had no evident international overtones, he wrote separately to reiterate his well-known view that illumination can be found in how foreign courts approach similar issues.¹⁸

He has continued to search for consensus and to hold out the possibility of solving legal problems through rational discourse. It is important to recall that when he was named to the Court, his reputation as a consensus builder on the First Circuit, where he spent fourteen years, the last four as chief judge, was the

16. *Pleasant Grove City v. Summum*, 555 U.S. ___, 129 S. Ct. 1125, 1140 (2009) (Breyer, J., concurring).

17. Justice Breyer is currently not the Court’s most active separate concurring-opinion-writer, a title that is held by Justice Alito with nine. See <http://www.scotusblog.com/wp/wp-content/uploads/2009/06/summary-tally.pdf>. In the 2004 October Term, however, Justice Breyer had the most concurring opinions with twelve. *The Supreme Court, 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 420 (2005).

18. *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. ___, 129 S. Ct. 1093, 1102–04 (2009) (Breyer, J., concurring in part and dissenting in part).

sound-bite that framed public discussion of his nomination.¹⁹ In introducing Justice Breyer to the country on May 16, 1994, President Clinton praised his “gift as a consensus builder.”²⁰ The headline on the profile that appeared in the following day’s *New York Times* was “Scholarly Consensus Builder.”²¹ The report by the American Bar Association’s Standing Committee on Federal Judiciary that evaluated his record and recommended his confirmation contained this sentence: “The Court of Appeals Judges in the First Circuit universally credit Chief Judge Breyer for the strong collegiality that exists in the Circuit, for his remarkable ability to build consensus, for his sensitivity and good grace, and for his outstanding leadership skills.”²² Hours after Justice Breyer was nominated, Senator Patrick Leahy, a Vermont democrat who served on the Judiciary Committee, appeared on a network newscast and praised the nominee, predicting that “he will have the ability to build consensus.”²³ Leahy added: “That’s probably the most important thing he can do in that [C]ourt.”²⁴

So without presuming to read Justice Stephen Breyer’s mind, it would not seem fanciful to imagine his dismay—despair?—at the realization, which must have come quickly, that the skills that had brought him such satisfaction and success were of very limited use in the venue where he proposed to spend the rest of his professional life. What to do? Keep trying.

An example from the Court’s last Term: an oral argument on conditions the Navy should have to meet to continue testing

19. See David Margolick, *Scholarly Consensus Builder: Stephen Gerald Breyer*, N.Y. TIMES, May 14, 1994.

20. Remarks on the Nomination of Stephen G. Breyer To Be a Supreme Court Associate Justice and an Exchange with Reporters, 1 PUB. PAPERS 925 (May 16, 1994).

21. Margolick, *supra* note 19.

22. Letter from Robert Watkins, Chair, American Bar Association Standing Committee on Federal Judiciary to Senator Joseph R. Biden, Chairman, Committee on the Judiciary (July 11, 1994), available at <http://www.abanet.org/scfedjud/SCpage/Breyerstatement.pdf>.

23. *NBC Nightly News* (NBC television broadcast May 13, 1994) (transcript available at <http://www.icue.com/portal/site/iCue/flatview/?cuecard=3769>).

24. *Id.*

sonar in areas of the ocean frequented by marine mammals.²⁵ In his colloquy with the lawyer representing the respondents, environmental groups that had obtained an injunction against the Navy's testing program, Justice Breyer emphasized that the two sides were not very far apart and that, with the testing due to end shortly, the dispute would not be relevant much longer in any event.²⁶ "I will express a little frustration," he said, "Not your fault. But why couldn't you work this thing out?"²⁷ The Navy won that case, with Chief Justice Roberts writing for five; Justices Ginsburg and Souter dissenting; and Justice Breyer, with Justice Stevens joining him in part, carving out a middle path, concurring in part and dissenting in part.²⁸

He has also retained, from his earlier career, a deep respect for Congress, as demonstrated by his record as the Justice least likely to vote to overturn a federal statute. Between 1994 and 2005, the Court invalidated sixty-four federal statutory provisions.²⁹ Justice Breyer voted to invalidate the fewest, 28% of the challenged provisions (the next lowest justice was Justice Ginsburg, with 39%, and the highest was Justice Thomas, at 66%).³⁰ He believes in the legislative process, in all its messiness and imprecision. This is the source of his running disagreement with Justice Scalia over the propriety of relying on legislative

25. See Transcript of Oral Argument, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. ___, 129 S. Ct. 365 (2008) (No. 07-1239), 2008 WL 4527982.

26. See *id.* at 41-42.

27. *Id.* at 41.

28. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. ___, 129 S. Ct. 365 (2008).

29. Gewirtz & Golder, *supra* note 2.

30. *Id.* Adding three more Terms (1994 through 2007) and examining voting patterns through a slightly different lens, Justice Breyer tied with Justice Ginsburg and they are just behind Justice Stevens as the Justice least likely to overturn a federal statute. Justice Breyer and Justice Ginsburg concurred in 48.39% of cases declaring federal legislation unconstitutional during this period (just behind Justice Stevens at 44.83%). Justice Breyer was, however, much more likely to vote with majorities declaring state and local laws unconstitutional. He and Justice Souter voted with the majority to overturn state and local laws in 81.08% of the cases, the second-highest voting rate, placing them just behind Justice Kennedy's 89.19%. LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* (7th ed. forthcoming 2009).

history, as demonstrated last Term by this exchange during oral argument:

Justice Scalia [to counsel for the United States in a case concerning the status of tribal lands]: Where—where was this interesting conversation? Was it even on the floor of the Congress? It couldn't have been, because one of the members wasn't a Congressman, right?

Deanne E. Maynard [assistant to the Solicitor General]: Well, I think it was at a hearing, Your Honor.

Justice Scalia: It was at a hearing, oh.

Justice Breyer: You learn a lot at hearings, actually.³¹

The young Justice Stephen Breyer did learn a lot at congressional hearings. More than that, he put on hearings and worked on a wide range of legislation during two stints as a lawyer for the Senate Judiciary Committee during the 1970's, first as special counsel to the Subcommittee on Administrative Practices and then as chief counsel to the Committee under its chairman, Edward M. Kennedy.³² He was involved in everything from judicial nominations to trucking deregulation to fair housing to the federal criminal code, often reaching successfully across the aisle.³³ His popularity on the Hill was bipartisan, as demonstrated by the unusual fact of his confirmation to the First Circuit in December 1980, after President Carter lost the presidential election and the Democrats lost the Senate.³⁴ By anything approaching partisan logic, his nomination, which had been pending on election day, should have died, but he was confirmed with bipartisan support and was sworn in on December 18, 1980.³⁵ He was the last Democratic nominee to be

31. Transcript of Oral Argument at 28, *Carcieri v. Kempthorne*, 555 U.S. ___, 129 S. Ct. 486 (2008) (No. 07-526), 2008 WL 6524408.

32. See Margolick, *supra* note 19, at A11; JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 80 (2007).

33. Margolick, *supra* note 19, at A11.

34. *Id.*

35. *Id.*

confirmed to an Article III judgeship for more than twelve years.

The decade of the 1970s was a period of bipartisan creativity in Congress that produced foundational domestic legislation on the environment, labor, education, and civil rights that still forms the core of the Supreme Court's statutory-interpretation docket a generation later—a reflection not only of the significance of this legislation but also of the relative paucity of substantial legislative initiatives in the decades that followed. The 1970s were, in their way, a golden age in Congress, which it is plausible to assume shaped Justice Stephen Breyer's understanding of the institution and contributed to his lasting appreciation of its possibilities, for all the flaws of which he is certainly aware.

Not surprisingly, then, among Justice Breyer's most passionate opinions are those dissenting from decisions by the Rehnquist Court majority of the mid-1990s to early 2000s that curbed the power of Congress under both the Commerce Clause and Section Five of the Fourteenth Amendment. He wrote the principal dissenting opinions in both *United States v. Lopez*,³⁶ complete with a thirteen page appendix of congressional and other material,³⁷ and in *Board of Trustees of the University of Alabama v. Garrett*.³⁸ *Garrett* was the case that held Congress lacked authority to abrogate the states' sovereign immunity from suit by their employees for violations of the Americans with Disabilities Act;³⁹ Congress had assembled only "minimal evidence of unconstitutional state discrimination in employment against the disabled," Chief Justice Rehnquist wrote for the five to four majority,⁴⁰ and thus applying the law to the states was not a "congruent and proportional" remedy for any identified constitutional violation.⁴¹ Justice Breyer responded with an astonishing thirty-five page appendix listing congressional

36. *United States v. Lopez*, 514 U.S. 549, 615 (1995) (Breyer, J., dissenting).

37. *Id.* at 631-644.

38. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 376 (2001) (Breyer, J., dissenting).

39. *Id.* at 370 (majority opinion).

40. *Id.*

41. *Id.* at 374.

hearings, prior federal statutes addressing disability discrimination, and evidence collected by a congressionally-appointed task force of disability discrimination in state facilities around the country.⁴² “[A] legislature is not a court of law,” he objected, “And Congress, unlike courts, must, and does, routinely draw general conclusions—for example, of likely motive or of likely relationship to legitimate need—from anecdotal and opinion-based evidence of this kind”⁴³

During the 2007 Term, he dissented vigorously and at length from the Court’s holding that a judgment of the International Court of Justice was not enforceable as domestic law because the treaty at issue, the Vienna Convention of Consular Relations, “was *not* self-executing” in the absence of affirmative congressional legislation.⁴⁴ There was no “simple test, let alone a magic formula” for determining whether a treaty provision was self-executing, Justice Breyer wrote.⁴⁵ Rather, the case law suggests “a practical, context-specific judicial approach, seeking to separate run-of-the-mill judicial matters from other matters, sometimes more politically charged, sometimes more clearly the responsibility of other branches”⁴⁶ It was unrealistic, he continued, to suppose that Congress would have “the time available, let alone the will, to legislate judgment-by-judgment enforcement of” provisions found in dozens of treaties.⁴⁷ In an appendix, he listed forty-five treaties, conventions, and economic cooperation agreements currently in force that could be unsettled by the Court’s rejection of the concept of self-executing dispute resolution provisions—a rejection based in substantial part, in his view, on a misunderstanding of how Congress works and can be expected to work.⁴⁸

Justice Breyer’s faith in Congress can appear naïve. His

42. *See id.* at 389-424 (Breyer, J., dissenting).

43. *Id.* at 379-80.

44. *Medellín v. Texas*, 552 U.S. ___, 128 S. Ct. 1346, 1375-96 (2008) (Breyer, J., dissenting).

45. *Id.* at 1382.

46. *Id.* at 1382-83.

47. *Id.* at 1388.

48. *Id.* at 1392-96.

concurring opinion in the 2006 Guantánamo detainee case, *Hamdan v. Rumsfeld*,⁴⁹ effectively declared that the unlawfulness the majority found in the military commissions the Bush Administration had unilaterally created could be cured by a simple act of Congress: “Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”⁵⁰

The President and Congress responded almost immediately; within four months, Congress had not only given statutory authorization for the military commissions⁵¹ but also stripped the federal courts of jurisdiction over habeas corpus petitions from any of the Guantánamo detainees.⁵² Obviously, Justice Breyer’s “over to you, Congress” invitation was not solely or even primarily responsible for this exercise in congressional overreaching. But as Owen Fiss points out in a critique of the Supreme Court’s performance in the detainee cases, a majoritarian determination of the rights of the detainees was not necessarily a desirable outcome, and a different, less minimalist-inclined Justice might have been “willing to subject the political branches to legal uncertainty in order to fully express deeply held beliefs.”⁵³ Justice Stephen Breyer’s most deeply held belief, at least as manifested in this extremely high-profile case about the allocation of governmental authority in a democracy, was that Congress would get it right if given a chance.

III. A BALANCING ACT

This brings me to the second level on which Justice Breyer has responded to his situation: he wrote a book. I do not mean to sound flip or dismissive. Quite the contrary; I think that *Active*

49. *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

50. *Id.*

51. Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3 § 948(b), 120 Stat. 2600, 2602 (2006), *invalidated by* *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008).

52. Military Commissions Act, sec. 7(e)(1), 120 Stat. at 2636.

53. Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQUIRIES IN L. 643, 662–63 (2008).

Liberty: Interpreting Our Democratic Constitution, published in 2005,⁵⁴ is a work of great significance. It is quite unusual for a sitting Supreme Court Justice to write a book explaining his judicial philosophy. Hardly any have attempted it. When I first heard about Justice Breyer's book project, I assumed it was his effort to match or counter his sparring partner, Justice Antonin Scalia, whose *A Matter of Interpretation: Federal Courts and the Law* appeared in 1997, and which, like Justice Breyer's book, had its immediate origins in the Tanner Lectures.⁵⁵ But I now think that *Active Liberty* represents something deeper than authorial one-upsmanship.

Beginning with his James Madison Lecture at New York University in 2001, which he called *Our Democratic Constitution*,⁵⁶ and elaborating on the themes of that presentation with his Tanner Lectures at Harvard three years later,⁵⁷ Justice Breyer dug deep to synthesize his thinking and put it before the public. In doing so, he made the pieces fit in a way that is scarcely possible when a judge's attention is fixed on the next case and the case after that. As a court of appeals judge, Justice Breyer had no need to get his arms around the whole of constitutional law; he matched the dispute at hand to the range of relevant precedents and proceeded accordingly within a wide comfort zone.

But at the Supreme Court, especially with colleagues to his right pressing for fundamental change and challenging the validity of many modern precedents, something more, something quite different was required if Justice Breyer was to leave a meaningful legacy of a time when his ideas were not prevailing

54. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

55. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, xii (1997).

56. Stephen Breyer, Assoc. Justice, Supreme Court of the United States, *Our Democratic Constitution*, Address at the 32nd Annual James Madison Lecture on Constitutional Law (Oct. 22, 2001), *in* 77 *N.Y.U. L. REV.* 245 (2002).

57. Stephen Breyer, Assoc. Justice, Supreme Court of the United States, *Our Democratic Constitution*, Address at the Harvard University Tanner Lectures on Human Values 2004-2005 (Nov. 17-19, 2004) (transcript available at http://www.supremecourt.us.gov/publicinfo/speeches/sp_11-17-04.html).

on a case-by-case basis. It would be presumptuous to assume, but not fanciful to imagine, that Justice Breyer decided to put his ideas between hard covers to leave something more substantial than a collection of interesting dissenting and concurring opinions. In the process, I believe, he became a better Justice. Writing the book, and the lectures that preceded it, gave him not only a framework into which to fit the cases he encountered on the job; it provided an intellectual outlet, a reminder to keep the big picture ever in view, an ongoing project. (And in fact, he is now at work on a second book, with the tentative title *The Workable Constitution*.)

Active Liberty has received substantial academic attention.⁵⁸ My purpose is not to analyze or appraise the book but rather to examine what Justice Breyer has made of it—how he has rendered theory into practice. Justice Stephen Breyer recently observed the fifteenth anniversary of his appointment to the Court; at a healthy age seventy-one, it is not unlikely that he will serve another fifteen years. I have titled this paper “The Breyer Project.” Halfway through Justice Breyer’s tenure, how is the project going?

To suggest a tentative answer, I don’t propose to survey his body of work. Rather, I will examine Justice Breyer’s approach to two current controversies: the display of religious monuments on government property and the rights of gun owners under the Second Amendment. Justice Breyer’s contribution in the first area has been the subject of considerable criticism, while his dissenting opinion in the 2007 Term’s Second Amendment case, *District of Columbia v. Heller*,⁵⁹ has been almost completely ignored.

Active Liberty’s basic argument is that an important purpose of law is to help “a community of individuals democratically find practical solutions to important contemporary social problems.”⁶⁰

58. See Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675 (2006); Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699 (2006); Cass Sunstein, *Justice Breyer’s Democratic Pragmatism*, 115 YALE L.J. 1719 (2006).

59. 554 U.S. ___, 128 S. Ct. 2783, 2847 (2008) (Breyer, J., dissenting).

60. BREYER, *supra* note 54, at 6.

Judges, consequently, must consider “practical consequences” when they interpret constitutional or statutory text, always aware that they must take account “of the Constitution’s democratic nature,” which Justice Breyer describes as “the active liberty of the ancients . . . the people’s right to ‘an active and constant participation in collective power.’”⁶¹ “Active liberty” thus stands as a necessary complement to the modern idea of liberty, which is freedom from government tyranny or restraint. Justice Breyer believes that the Framers well understood the democracy-enabling concept of active liberty, but that the modern Supreme Court is guilty of “too often underemphasizing or overlooking [its] contemporary importance.”⁶² by ignoring context, purpose, and consequences in favor of “literalism.”⁶³ After setting out his theory, Justice Breyer then applies it to six different kinds of problems: free speech, federalism, privacy, equal protection, statutory interpretation, and judicial review of administrative action.⁶⁴ These are only examples, he says, “[b]ut if one agrees that an examination of consequences can help us determine whether our interpretations promote specific democratic purposes and general constitutional objectives, I will have made my point.”⁶⁵

The opacity of the First Amendment’s Establishment Clause—“Congress shall make no law respecting an establishment of religion”⁶⁶—has, of course, led to constitutional disputes that appear to have no end; the Court has already added yet another religious-monument case to its plenary docket for October Term 2009.⁶⁷ Two Ten Commandments cases were

61. *Id.* at 5.

62. *Id.* at 11.

63. *Id.* at 131.

64. *Id.* at 37.

65. *Id.* at 131.

66. U.S. CONST. amend. I.

67. *Salazar v. Buono*, 555 U.S. ___, 129 S. Ct. 1313 (2009) (granting certiorari). In granting certiorari, the Supreme Court will hear a government appeal from a Ninth Circuit decision that declared unconstitutional the transfer to private hands of an acre of land in the Mojave National Preserve in California on which the Veterans of Foreign Wars have displayed a five- to eight-foot cross since 1934. The case, however, presents a threshold question of standing, so it is not certain that the Court intends to or will be able to reach

argued in tandem on March 2, 2005, at about the time that *Active Liberty* was going to press.⁶⁸ Both were decided on June 27, 2005.⁶⁹ *McCreary County v. American Civil Liberties Union of Kentucky*, with an opinion by Justice Souter, struck down a display by executives of two Kentucky counties of “large, gold-framed copies of an abridged text of the King James version of the Ten Commandments.”⁷⁰ Faced with a lawsuit after the installation of the displays in 1999, the counties had added framed copies of other documents, including the Magna Carta and the lyrics to the Star-Spangled Banner, and claimed that the purpose all along had been to celebrate the “Foundations of American Law and Government.”⁷¹ But the majority declared itself not fooled. Justice Souter chided:

The Counties would read the cases as if the purpose enquiry were so naïve that any transparent claim to secularity would satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances.⁷²

. . . .

We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.⁷³

The second decision, *Van Orden v. Perry*, with an opinion by Chief Justice Rehnquist, upheld the display of a six-foot-high Ten Commandments monument on the grounds of the Texas State Capitol, where it had been placed in 1961 by an organization

the merits. See Petition for Writ of Certiorari, *Kemphorne v. Buono*, No. 08-472 (U.S. Oct. 10, 2008).

68. *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

69. *McCreary County*, 545 U.S. 844; *Van Orden*, 545 U.S. 677.

70. *McCreary County*, 545 U.S. at 851.

71. *Id.* at 856.

72. *Id.* at 863-64.

73. *Id.* at 874.

called the Fraternal Order of Eagles.⁷⁴ Surrounded by various other sculptures and monuments, the Eagles' Ten Commandments had evidently stood without controversy for forty years until the filing of the lawsuit that led to the Supreme Court case.⁷⁵

Noting that depictions of the Ten Commandments were "common throughout America,"⁷⁶ including in the courtroom frieze and exterior façade of the Supreme Court itself, the Chief Justice declared the Ten Commandments to have "an undeniable historical meaning."⁷⁷ "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause," he wrote.⁷⁸

The vote in both cases was five to four. Justice Stephen Breyer was the only member of the Court on the winning side in both, leading Dahlia Lithwick to comment: "Government establishment of religion is only impermissible when it freaks out Justice Stephen Breyer."⁷⁹

Justice Breyer did not write separately in *McCreary County*.⁸⁰ He scarcely needed to: in its emphasis on purpose and context (if not in its idiosyncratic spelling of inquiry), Justice Souter's majority opinion could have served as a chapter in *Active Liberty*.⁸¹ However, he did write separately in *Van Orden*, concurring only in the judgment with an eight-page opinion that focused on what he described as the "basic purposes" of the Religion Clauses: both to assure religious liberty and to "avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."⁸²

If the Establishment Clause were read with "absolutism" to

74. *Van Orden*, 545 U.S. at 677.

75. *Id.* at 682.

76. *Id.* at 688.

77. *Id.* at 690.

78. *Id.*

79. Dahlia Lithwick, Editorial, *The Case of the Seven Aphorisms*, WASH. POST, Nov. 16, 2008, at B5.

80. *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

81. BREYER, *supra* note 54.

82. *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

“compel the government to purge from the public sphere all that in any way partakes of the religious,” Justice Breyer wrote, the result would be “the kind of social conflict the Establishment Clause seeks to avoid.”⁸³ The exercise of “legal judgment,”⁸⁴ rather than the application of any particular test or formula, led to his conclusion, he said. A contrary conclusion “would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions.”⁸⁵ He continued: “Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”⁸⁶ This, surely, was a judge with an eye on consequences. Was it an eye on the right consequences? After all, there are consequences as well to upholding the monument, not all of them necessarily positive.

Martha Nussbaum, for one, is scathing in her criticism of Justice Breyer’s analysis of *Van Orden* (while praising Justice Souter’s opinion in *McCreary County*).⁸⁷ In her recent book on the Religion Clauses, she casts Justice Breyer’s approach as “a test of constitutionality is whether deciding the other way would threaten civil peace,” an approach she calls “unfortunately ad hoc, favoring majority beliefs and making a virtue of convenience.”⁸⁸ Nussbaum adds:

Should we really say that a display that everyone likes and that isn’t stirring up trouble, because the offended minorities are too powerless to make trouble, is for that reason constitutional? This seems to be a very bad theory for an egalitarian nation to adopt.

....

83. *Id.* at 699.

84. *Id.* at 700.

85. *Id.* at 704.

86. *Id.*

87. MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008).

88. *Id.* at 314.

If what Justice Breyer really means to say is that the Court should not say that a violation is a violation when so doing would lead to violence, that is a different claim, but is it correct? *Brown v. Board of Education* could have been expected to lead to violence, and it did. Should the Court therefore have maintained silence?⁸⁹

This seems an unfair reading of Justice Breyer's analysis, ignoring an important factor that his theory requires him to consider: context. Justice Breyer's opinion emphasizes the "context of the display:"⁹⁰ a textual message that can be seen as secular as well as religious; a donor organization that was civic and not primarily religious in its focus; a physical setting in which the Ten Commandments monument shared space with thirty-eight other monuments and historical markers; and the lack of controversy during nearly all of its history on the Capitol grounds.⁹¹ Nothing in this context-based analysis suggests that Justice Breyer would not have voted to desegregate the nation's public schools. In fact, his opinion in the Texas case does exactly what his interpretive theory requires him to do: to weigh the benefits and the burdens, the desirability of judicial intervention against its dangers, the consequences of action or inaction, and of change versus the status quo.

Justice Breyer's undertaking of the task of burden-weighting, of course, leaves him open to charges of elitism of the sort leveled recently by Professors Carrington and Cramton:

He sees himself as a member of a small elite commissioned by the people to interpret the Constitution as a guide to the best practical solutions for the problems of the day. He does not acknowledge, and perhaps does not recognize, that his assessments of problems and their solutions necessarily reflect unarticulated value choices that many citizens may and do vigorously dispute.⁹²

89. *Id.* at 263.

90. *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring).

91. *Id.* at 701–02.

92. Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 605 (2009).

A strength of Justice Breyer's approach, however, as well as one of its most admirable qualities, is its transparency. He labels what he is doing and explains it to the reader. Compare Justice Breyer's concurrence in *Van Orden* with the *ipse dixit* of Chief Justice Rehnquist's majority opinion, which at twelve pages is scarcely longer.⁹³ It is essentially devoid of analysis: The Ten Commandments are everywhere. "There are, of course, limits to the display of religious messages or symbols,"⁹⁴ but this particular symbolic message does not transgress whatever those limits may be.⁹⁵

Four years later, Justice Breyer was still more explicit and transparent in his balancing in his dissenting opinion in *Heller*, the Second Amendment case that found a constitutional right for the private possession of firearms in the home for the purpose of self-defense.⁹⁶ Both Justice Scalia's majority opinion and the principal dissent by Justice Stevens fought the Second Amendment battle on the common ground of originalism. Justice Breyer dissected the question through the lens of *Active Liberty*: What was the context in which the Framers granted "the right of the people to keep and bear Arms"?⁹⁷ He reviews the manner in which the storing of gunpowder was regulated at the time of the

93. See generally *Van Orden*, 545 U.S. 677.

94. *Id.* at 690.

95. Lani Guinier has commented favorably on Justice Breyer's transparency in the context of his oral dissent in the Louisville Schools case, delivered on June 28, 2007:

His dissent made conflict on the Court transparent to nonlegal actors and opened a new window on pathways toward 'subformal' democratic accountability. To the extent he spoke in a voice that nonlegal actors understood, he made the work of judicial interpretation accessible to a larger audience. And through that interaction he played an important role, consistent with his theory of 'active liberty,' in increasing public understanding of, and participation in, the evolution of constitutional jurisprudence.

Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 13 (2008).

96. See *District of Columbia v. Heller*, 554 U.S. ____, 128 S. Ct. 2783, 2847 (2008) (Breyer, J., dissenting).

97. See generally U.S. CONST. amend. II.

founding.⁹⁸ The city of Boston, for fire-safety reasons, prohibited keeping gunpowder in the home, a regulation that had public safety as its purpose and the practical inability to keep weapons at the ready inside one's house as the effect.⁹⁹ So the need for public-safety regulation coexisted from the beginning with society's interest in gun ownership, Justice Breyer concludes from his reading of history.

Having shown that public safety is a historically legitimate consideration within the Second Amendment, he then asks what the modern analog might be to the fire-safety concerns of the eighteenth century.¹⁰⁰ It is the link between guns and violent crime, he concludes, a concern as significant today as it was in 1976, when the District of Columbia City Council banned the private ownership of handguns.¹⁰¹ The judicial task is to "ask how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests," Justice Breyer writes.¹⁰² "The ultimate question is whether the statute imposes burdens that, when viewed in light of the statute's legitimate objectives, are disproportionate."¹⁰³

The handgun prohibition places no burden on the use of guns for sporting activities such as hunting, he notes.¹⁰⁴ He acknowledges the obvious, that the statute does place a burden on individuals who want to keep a handgun at home.¹⁰⁵ Is there a practical, less restrictive alternative to the outright ban? That is a question that must be asked at this point, Justice Breyer says, and his answer is no; less burdensome forms of regulation, such as licensing, would not serve the government's legitimate interest in public safety as well as the ban.¹⁰⁶ So, finally, Justice

98. *Heller*, 128 S. Ct. at 2849.

99. *Id.*

100. *Id.*

101. *Id.* at 2854–56.

102. *Id.* at 2854.

103. *Id.*

104. *Id.* at 2863.

105. *Id.*

106. *Id.* at 2864.

Breyer reaches his proportionality test: Is the law's burden on would-be handgun owners proportionate or disproportionate to the interests it serves?¹⁰⁷ It is proportionate, he concludes, serving public-safety interests that the Framers recognized while leaving the citizens of the District of Columbia free to re-evaluate the issue through democratic deliberation.¹⁰⁸ By contrast,

the majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems. . . . I cannot understand how one can take from the elected branches of government the right to decide whether to insist upon a handgun-free urban populace in a city now facing a serious crime problem and which, in the future, could well face environmental or other emergencies that threaten the breakdown of law and order.¹⁰⁹

One can quarrel with aspects of Justice Breyer's analysis, specifically with the particular balances he strikes as he goes through his checklist. I have commented elsewhere that his consideration and rejection of potentially less burdensome alternatives, such as licensing, appears a bit conclusory.¹¹⁰ But that is not the point here. Rather, it is this: halfway (or more) into his Supreme Court tenure, Justice Stephen Breyer is himself a Justice in the midst of an exquisite balancing act, visible to all, up on the high wire without the safety net of unacknowledged premises that hide behind bright-line rules. I see his project as at once boldly public and deeply personal, a serious and sustained effort by a man who, finding himself in the wrong place at the wrong time, is performing for himself, for history and—on the occasions when fortune smiles, as perhaps it will do more often in the future—for the votes of four others.

107. *Id.* at 2852.

108. *Id.* at 2861.

109. *Id.* at 2868.

110. Linda Greenhouse, "Weighing Needs and Burdens:" Justice Breyer's *Heller Dissent*, 59 SYRACUSE L. REV. 299, 307 (2008).

PREVIEW OF *UNITED STATES v. STEVENS*:
ANIMAL LAW, OBSCENITY, AND THE LIMITS
OF GOVERNMENT CENSORSHIP

Cheryl Hanna & Pamela Vesilind***

I.	INTRODUCTION	59
II.	FACTUAL BACKGROUND	60
III.	ISSUES BEFORE THE COURT.....	65
	A. Animal Cruelty as a Compelling Government Interest	67
	1. Option One: Animal Cruelty is Closely Associated with Human Cruelty	68
	2. Option Two: Commercial Depictions of Animal Cruelty Are Categorically Exempt Under <i>New York v. Ferber</i>	70
	3. Option Three: Depictions of Animal Cruelty Erode Public Morality	74
IV.	LURKING ISSUES: OBSCENITY AND ANIMAL LAW ...	76
	A. Obscenity	76
	B. Animal Law	81
V.	CONCLUSION.....	89

I. INTRODUCTION

Of those cases on the Supreme Court of the United States 2009–2010 docket, the one likely to generate the most media attention is *United States v. Stevens*.¹ The case pits free speech against animal welfare and, like many First Amendment cases, is creating some otherwise unlikely allies. As of this writing, twenty-two amicus briefs have been filed in the case, with

* Professor of Law, Vermont Law School.

** Instructor in Law & Assistant Director, Academic Success Program, Vermont Law School. Both authors thank Amanda George for her assistance on this article. The views and opinions expressed here are the authors' own.

1. 533 F.3d 218 (3d Cir. 2008), *cert. granted*, 556 U.S. ___, 129 S. Ct. 1984 (2009).

hunters and publishers joining forces against animal protection advocates and law enforcement. *Stevens* is also legally significant because the United States argues that the interstate commercial use of depictions of animal cruelty may be banned because they cause social harms and lack any significant value.² If the Court agrees, it could create a new category of unprotected speech, which is something the court has not done since 1982 when it found child pornography to be unprotected speech in *New York v. Ferber*.³ This outcome would mark a significant shift in the Court's recent trend to expand, not narrow, First Amendment protections. Ultimately, this case comes down to what the Court values more—protecting animals or protecting free expression. No matter what the Court's decision, this case will fuel debate over the appropriate role of the Court in refereeing the culture wars.

II. FACTUAL BACKGROUND

Stevens involves the prosecution of Robert Stevens, who operated a business in Virginia called “Dogs of Velvet and Steel” and a website called Pitbull.com, on which he sold videotapes of pit bull fights and various pit bull fighting paraphernalia.⁴ “[He] advertised these videos in *Sporting Dog Journal*, an underground publication featuring articles on illegal dogfighting.”⁵ State and federal agents in the Western District of Pennsylvania ordered

2. *Id.* at 220, 229–31.

3. 458 U.S. 747, 763–64 (1982).

4. In addition to the videotapes, the agents “ordered a parting or ‘break stick’ which is used to pry apart the jaws of a pit bull so that they will release the hold or bite they have on something.” Brief for the United States at 9, *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008) (No. 05-2497).

5. *Stevens*, 533 F.3d at 221. Although this was not yet the case in 2005, it is now a felony to engage in the interstate distribution of magazines such as *Sporting Dog Journal* if they include, for example, the results of dogfights and information about how to train fighting dogs. In May 2007, Congress amended the Animal Welfare Act, 7 U.S.C. § 2156 (2006), to prohibit the use of interstate commercial instrumentalities, including the mail, to promote animal fighting activities. Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88. The law also prohibits exhibiting or sponsoring animals used for fighting events, and purchasing, selling, or conducting other interstate commercial activities involving animals used for fighting ventures.

three of Stevens's videos, which contained vintage footage of organized dog fights in the United States from the 1960s and '70s, as well as more recent footage of dog fights in Japan, where dogfighting is legal.⁶ Another video included footage of "a gruesome depiction of a pit bull attacking the lower jaw of a domestic farm pig"⁷ and of hunting excursions in which pit bulls were used to catch wild boar.⁸ The footage in all three videos was accompanied by audio introductions, narration, and commentary by Stevens, as well as accompanying literature he authored. Stevens contends that he does not advocate illegal dogfighting and that his videos were intended to "educate the public about the beneficial uses of Pit Bulls for 'the legal activities'" such as hunting, breeding, and training.⁹

Stevens was the first person convicted under a 1999 federal law that controls the interstate use of depictions of animal cruelty. Title 18, § 48 states, in pertinent part:

Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both . . . [provided that this statute] does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.¹⁰

To be covered under the law, the "depiction of animal cruelty" must be something done to a living animal, and the abuse must be both intentional and "illegal [either] under Federal law or the law of the State in which the creation, sale, or possession takes

6. *Stevens*, 533 F.3d at 221.

7. *Id.*; see also Brief of Amicus Curiae The Humane Society of the United States (hereinafter "The HSUS") in support of Petitioner at 10, *United States v. Stevens*, No. 08-769 (U.S. June 15, 2009) (describing hog-dogfighting events wherein "[o]rganizers unleash brutalized dogs to fight feral or domestic hogs. Trainers render the hogs defenseless by removing their tusks with makeshift tools such as bolt cutters. They use cattle prods to force the hogs into small pens where dogs corner and attack, ripping their ears, snout, and body until 'victorious.'" (citation omitted)).

8. *Stevens*, 533 F.3d at 221.

9. Brief for the Respondent at 2, *United States v. Stevens*, No. 08-769 (U.S. July 20, 2009).

10. 18 U.S.C. § 48 (2006).

place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State.”¹¹ Section 48, therefore, does not criminalize the acts of cruelty to animals. Such activity, including dogfighting and cockfighting, is already illegal in all fifty states and under federal law.¹² Rather, § 48 criminalizes the commercial trafficking of such images, with the Government alleging that its intent was to dry up the market demand for the images by preventing and deterring their creation.

Even though the language of § 48 technically applies to the footage in Stevens’s videos, the original impetus behind this law was law enforcement reports about the growing market for a type of fetish pornography known as “crush videos.”¹³ Typical crush videos show a woman in high heels or bare feet, piercing and trampling on small animals, such as kittens, puppies and small dogs, and hamsters, until they die.¹⁴ The videos rarely show the faces of the women, who often speak to the animals in a “dominatrix patter.”¹⁵ A House Report described such depictions as “appeal[ing] to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting.”¹⁶ When President Clinton signed the bill into law, he issued a statement instructing the Justice Department to “broadly construe the Act’s exception[s]” so as to “avoid constitutional challenge[s].”¹⁷ In that way, according to the President, the crush videos discussed in the House Report, which demonstrated “wanton cruelty to animals designed to appeal to a prurient interest in sex,” would

11. *Id.*

12. Brief for The HSUS, *supra* note 7, at 14–15; Brief for the United States at 26–27, *United States v. Stevens*, No. 08-769 (U.S. June 8, 2009).

13. *Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 18 (1999) (statement of Rep. Robert C. Scott, Member, H. Subcomm. on Crime).

14. *Id.*

15. H.R. REP. NO. 106-397, at 2 (1999).

16. *Id.* at 2–3.

17. Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty, 2 PUB. PAPERS 2245 (Dec. 9, 1999).

certainly be covered under the law.¹⁸ Thus, while it is clear that § 48 was intended to target crush videos, it is less than clear whether it was intended to be limited to only those depictions that appeal to prurient interests.

Although the statute's exceptions clause is modeled after the *Miller v. California* test for lesser-protected obscenity speech, read in its express terms, the statute does not mention pornography, sex, or "prurient interest."¹⁹ The legislative record reflects not only the lawmakers' disgust at the crush video industry, but also includes commentary indicating a desire to address animal cruelty in a broader sense for a variety of reasons.²⁰ This record suggests a broader application of § 48 beyond those images that appeal to the prurient interest. In contrast to § 48's original focus, while Stevens's videos were violent, the Government does not suggest that there was anything prurient about them.

A jury convicted Stevens, and he received a thirty-seven month sentence.²¹ On appeal, the United States Court of Appeals for the Third Circuit, sitting en banc, found § 48 facially invalid and vacated Stevens's conviction.²² In a 10-3 opinion authored by Judge D. Brooks Smith, the Third Circuit expressed a reluctance to carve out a new area of unprotected speech without express

18. *Id.*

19. *Miller v. California*, 413 U.S. 15, 24 (1973).

20. H.R. REP. NO. 106-397, at 4.

The committee is of the view that the great majority of Americans believe that all animals, even those used for mere utilitarian purposes, should be treated in ways that do not cause them to experience excessive physical pain or suffering. The committee recognizes the widespread belief that animals, as living things, are entitled to certain minimal standards of treatment by humans. And so, it is proper for our nation's laws [to] reflect society's desire that animals be treated appropriately.

Id.; *cf. id.* at 13 (dissenting view of Cong. Bob Barr) (objecting on the record that § 48 was unnecessary because existing federal anti-pornography laws already regulated interstate commercial activity that could include crush videos).

21. *United States v. Stevens*, 533 F.3d 218, 221 (3d Cir. 2008), *cert. granted*, 556 U.S. ___, 129 S. Ct. 1984 (2009).

22. *Id.* at 235.

guidance from the Supreme Court.²³ The court then proceeded to analyze the Government's argument and concluded that the Government's interest in barring depictions of animal cruelty did not rise to the level of a compelling governmental interest necessary to justify the regulation of First Amendment protected expression.²⁴ Judge Smith wrote,

[W]hile the Supreme Court has not always been crystal clear as to what constitutes a compelling interest in free speech cases, it rarely finds such an interest for content-based restrictions. When it has done so, the interest has—without exception—related to the well-being of human beings, not animals.²⁵

The court drew primarily on its reading of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*²⁶ in determining that “[w]hile animals are sentient creatures worthy of human kindness and human care, one cannot seriously contend that the animals themselves suffer continuing harm by having their images out in the marketplace.”²⁷ There, the Supreme Court struck down a Florida city ordinance prohibiting the slaughter of animals because the Court determined that the City's stated interest—protecting animals from cruelty—was merely a pretext for religious discrimination against its Santeria population.²⁸ In addition, the Third Circuit in *Stevens* found that the Government had not shown that bans of depictions of animal cruelty would actually do much to prevent the underlying crimes.²⁹ Since every state already has laws banning animal cruelty, the court ruled that the statute was not narrowly tailored to achieve its intended purpose.³⁰

The dissent, authored by Judge Robert E. Cowen, argued

23. *Id.* at 220, 225 (“Without guidance from the Supreme Court, a lower federal court should hesitate before extending the logic of *Ferber* to other types of speech.”).

24. *Id.* at 227.

25. *Id.*

26. 508 U.S. 520 (1993).

27. *Stevens*, 533 F.3d at 230.

28. *Lukumi*, 508 U.S. at 539.

29. *Stevens*, 533 F.3d at 235.

30. *Id.* at 232; *see also Lukumi*, 508 U.S. at 546.

that the majority had essentially afforded constitutional protection to depictions of animal cruelty.³¹ The dissent rejected the argument that animal cruelty and child pornography were so dissimilar as to prevent § 48 from prevailing under the same analysis used to prohibit interstate commercial use of child pornography.³² Instead, child pornography and depictions of animal cruelty are both related to underlying criminal acts, and prohibiting commercial use of depictions of the acts dries up the market for such images.³³ Moreover, the dissent observed, “the market for videos of animal cruelty incentivizes the commission of acts of animal cruelty, and such depictions are of *de minimis* value.”³⁴ The dissent preferred a case-by-case analysis to a facial invalidation of the statute.³⁵

III. ISSUES BEFORE THE COURT

The parties, along with various amici, have proffered a range of strategies for testing the constitutionality of § 48 and Stevens’s conviction under the law. If the Court chooses to submit the law to a facial challenge, it must first decide whether the prevention of animal cruelty is a compelling interest, and if so, whether § 48 is narrowly tailored to serve that interest. Or the Court could strike down § 48 for being vague or overbroad. Even if the Court does facially preserve § 48, it could reverse Stevens’s conviction under an as-applied challenge, perhaps finding that Stevens’s videos have some socially redeeming value, or instead, that § 48 does not apply to dogfighting videos. In making their decisions, the Justices and their clerks will have access to the actual videos and can choose whether or not to view them.³⁶

In arguing that the Court should reverse the Third Circuit and find that the prevention of animal cruelty is a compelling

31. *Stevens*, 533 F.3d at 236 (Cowen, J., dissenting).

32. *Id.* at 247.

33. *Id.* at 245.

34. *Id.*

35. *Id.* at 249.

36. The HSUS has requested permission to submit an additional DVD to the Court containing depictions of animal cruelty described in its amicus brief. Brief for The HSUS, *supra* note 7, at 2 n.2.

government interest, the United States primarily relies on the balancing test in *Chaplinsky v. New Hampshire*,³⁷ in which the Court held that where the First Amendment value of the speech is “clearly outweighed” by its societal costs, content-based prohibition is constitutional.³⁸ The Government points to the long-standing history of social condemnation of animal cruelty, plus the accelerated adoption of state and federal animal protection laws and stiffer penalties.³⁹ It further argues that § 48 is necessary to prevent gratuitous harm to animals.⁴⁰ The Government and its amici claim that prosecuting the type of animal cruelty depicted in Stevens’s videos is often difficult because the abuser, the jurisdiction, and the date of the offense are impossible to discern.⁴¹ Thus, § 48 offers law enforcement an alternative vehicle for identifying the original perpetrators of state and federal cruelty statutes and serves to hinder animal cruelty by removing the commercial profit structure—just as outlawing the possession and distribution of child pornography decreases actual child exploitation and abuse.⁴² The Government rejects allegations that § 48 is vague or overbroad and argues that concerns about the law’s applicability to isolated incidents of otherwise protected speech, such as educational documentaries, are not substantial enough to invalidate § 48 in its entirety.⁴³

Stevens responds that Congress has no authority to strip First Amendment protections from speech that, while controversial, is not obscene, pornographic, inflammatory, defamatory, or untruthful.⁴⁴ He also challenges the use of the balancing test in determining the law’s constitutionality.⁴⁵

37. 315 U.S. 568 (1942).

38. *Id.* at 571–72.

39. Brief for the United States, *supra* note 12, at 27–28.

40. *Id.*

41. *See, e.g.*, Brief of Florida et al. as Amici Curiae in Support of Petitioner at 10–11, *United States v. Stevens*, No. 08-769 (U.S. June 15, 2009) (arguing that the prosecution of animal cruelty in commercial videos is difficult from an evidentiary perspective).

42. Brief for the United States, *supra* note 12, at 36–37.

43. *Id.* at 38–41.

44. Brief for the Respondent, *supra* note 9, at 11.

45. *Id.* at 14.

Congress may enact new laws based only on clearly recognized content-based restrictions; it cannot create new categories of unprotected speech.⁴⁶ Stevens further contends that § 48 does not ban speech based on its *content* but rather on its *viewpoint* or speaker identity, rendering a type of speech restriction that the Supreme Court has found impermissible.⁴⁷ Stevens observes that the fact that Michael Vick's federal sentence for dogfighting was fourteen months shorter than Stevens's sentence calls into question whether the Government's motive is really to prevent animal cruelty and not to suppress certain speakers or ideas.⁴⁸ Stevens challenges the Government's conclusion that images of animals being intentionally wounded or killed are categorically valueless and harmful; he points to the fact that many of the Government's amici show depictions of animal cruelty on their websites to raise money and awareness.⁴⁹ Furthermore, Stevens maintains that relying on *Miller*-type exceptions⁵⁰ for films, like *Conan the Barbarian* or documentaries on the Discovery Channel, will not secure First Amendment freedoms or prevent a chilling effect on speech. All § 48 accomplishes, Stevens submits, is the suppression of an important perspective in the debate over animals and their treatment, and he challenges the claim that banning such depictions will, in fact, prevent animal cruelty, citing a lack of empirical evidence.⁵¹

A. Animal Cruelty as a Compelling Government Interest

If the Court were to agree the prevention of illegal animal

46. *Id.* at 14–15.

47. *Id.* at 12.

48. *Id.* at 41–42.

49. *Id.* at 11–12. Stevens's argument appears to be borrowed liberally from the House Report's discussion about the statute's exceptions clause. *See* H.R. REP. NO. 106-397, at 8 (1999) ("Examples of material to which the statute does not apply would include television documentaries about [bullfighting in] Spain . . . or which show poachers killing elephants for their tusks . . . [or] information packets sent by animal rights organizations to community and political leaders urging them to act to combat the problem of cruelty to animals.").

50. *See generally* *Miller v. California*, 413 U.S. 15 (1973).

51. Brief for the Respondent, *supra* note 9, at 13.

cruelty is a compelling government interest, upon what rationale it bases that decision becomes of particular importance for both this case and beyond. Here, the Court has essentially three options. It could adopt a more pragmatic rationale that animal cruelty is closely intertwined with, or even causes, human cruelty. Or, it could find that preventing animal suffering in and of itself justifies the law. Finally, the Court could find that such depictions are essentially immoral. Each of these rationales has implications for future First Amendment cases and will signal the direction the Roberts Court intends to take when deciding the constitutionality of other governmental attempts to regulate speech.

1. Option One: Animal Cruelty is Closely Associated with Human Cruelty

In a pragmatic approach, the Court could find that needless animal cruelty has detrimental social consequences. For example, the Government's brief on the merits argues that in enacting § 48, Congress noted the growing body of research "suggest[ing] that violent acts committed by humans may be the result of a long pattern of perpetrating abuse, which often begins with the torture and killing of animals."⁵²

That body of evidence is substantial. There is a strong correlation, for example, between domestic violence and abuse of family pets. Some gangs use participation in dogfighting to desensitize younger gang members. Notorious killers, such as Jeffrey Dahmer, Ted Bundy, and David Berkowitz (the "Son of Sam" killer), all committed acts of violence against animals before moving on to human victims. Because animal cruelty is a kind of antisocial behavior that often leads to violence against humans, the government has an additional substantial interest in preventing it.⁵³

Such empirically-based arguments are appealing and are

52. Brief for the United States, *supra* note 4, at 31–32 (internal quotations omitted).

53. Brief for the United States, *supra* note 12, at 32–33.

consistent with the Court's holding in *R.A.V. v. City of St. Paul*⁵⁴ that speech is proscribable based on the secondary effects of that speech, without reference to the speech's content.⁵⁵ There is indeed a growing concern that those who abuse animals also abuse humans, as animal cruelty is particularly correlated to domestic violence and child abuse.⁵⁶ The Government further cites additional policy reasons for shutting down the dogfighting industry such as the subculture connection between animal breeding and fighting and other gang- or mafia-related crimes (drug trafficking, gambling rings), public health concerns (avian flu, dog attacks), and the financial costs of dealing with the consequences of animal abuse (maintaining shelters and staffing animal control officers).⁵⁷ Indeed, the amicus brief for a Group of American Law Professors in Support of Neither Party, which urges the Court to find this a compelling interest, focuses primarily on the human interests implicated in preventing animal cruelty.⁵⁸

While the correlation between animal abuse and other anti-social behavior is overwhelming, evidence of a causal relationship remains somewhat tenuous. Most of the studies cited by the Government and its amici show only a link between animal cruelty and other social problems.⁵⁹ This distinction is important as the Court has been reluctant to accept the argument that *viewing* certain depictions *causes* a particular behavior. For example, in *Ashcroft v. Free Speech Coalition*,⁶⁰ the Court rejected the Government's argument that because virtual child pornography (such as simulated depictions of children or actors portraying underage children) could lead to child abuse and other unlawful acts, a compelling reason existed for banning the

54. 505 U.S. 377 (1992).

55. *Id.* at 389.

56. Brief for the United States, *supra* note 12, at 32–33.

57. *Id.* at 33 (citations omitted).

58. *See, e.g.*, Brief for a Group of American Law Professors as Amicus Curiae in Support of Neither Party at 20–23, *United States v. Stevens*, No. 08-769 (U.S. June 12, 2009).

59. *Id.* at 18–30.

60. 535 U.S. 234 (2002).

simulations.⁶¹ Instead, the Court found that the virtual depictions were “not ‘intrinsically related’ to the sexual abuse of children”⁶² and that the alleged causal link was not in itself a sufficient enough reason for banning simulated child pornography.⁶³

The Government’s causal argument in *Stevens* suffers from the same lack of empirical proof (although, as the Third Circuit dissent noted, depictions covered by § 48 involve only live animals, not simulations).⁶⁴ Thus, while the alleged connection between viewing depictions of animal cruelty and anti-social or violent behavior towards humans may be intuitively convincing to the general public, the Court is likely to view this argument with skepticism. This explains why the Government devotes little attention to it in its brief on the merits.

2. Option Two: Commercial Depictions of Animal Cruelty Are Categorically Exempt Under *New York v. Ferber*

As an alternative to the *Chaplinsky* balancing analysis, the Court could uphold § 48 under the rubric used in *New York v. Ferber* to categorize child pornography as categorically exempt from First Amendment protection.⁶⁵ Here, the Government is essentially asking the Court to recognize that child pornography and animal cruelty are so analogous as to warrant an expansion of *Ferber* to animals. Were the Court to do so, the protection of animals, for their own sake, would be the primary rationale for upholding the law.

The five-factor test for unprotected speech described in *Ferber* begins with the determination of a compelling interest in preventing a certain behavior.⁶⁶ In weighing the importance of

61. *Id.* at 250.

62. *Id.*

63. *Id.* at 253 (“The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse.”).

64. *United States v. Stevens*, 533 F.3d 218, 244 (3d Cir. 2008) (Cowen, J., dissenting), *cert. granted*, 556 U.S. ___, 129 S. Ct. 1984 (2009).

65. *New York v. Ferber*, 458 U.S. 747, 763–64 (1982).

66. *Id.* at 756–57.

the Government's stated compelling reason for § 48—preventing needless animal cruelty—the Court does not need to recognize new legal or intrinsic values in animals to find the Government's interest compelling.⁶⁷ Instead, it could turn its gaze to the expansive adoption of state and federal animal welfare laws. Such legislative conformity evidences the existence of a compelling reason, as the *Ferber* Court found.⁶⁸

Assuming there is a compelling interest, the second *Ferber* factor is that the restricted speech and the acts the government seeks to prevent must be closely intertwined. The *Ferber* Court found two ways in which child pornography was intertwined with child abuse: first, the pornography created a “permanent record” that exacerbated the harm done to the child (and later, the adult); second, the only way to “effectively contro[l]” child pornography was to shut down the distribution network that relied on its creation.⁶⁹ The Government maintains that there are sufficient parallels between the child pornography industry and the various industries that abuse animals in the creation of products for sale in interstate commerce, because both of these business models feature “low profile, clandestine” organizations that easily elude state and local law enforcement.⁷⁰

As to the first example of how an industry and the act itself can be intertwined, the Third Circuit distinguished animal cruelty depictions from child pornography by observing that an animal suffers equally whether or not the abuse is filmed, because “the fact that the act of cruelty was captured on film in no way exacerbates or prolongs the harm suffered by that animal.”⁷¹ The dissent countered that this distinction is

67. See Statement on Signing Legislation to Establish Federal Criminal Penalties for Commerce in Depiction of Animal Cruelty, *supra* note 17, at 104 (discussing this idea more at length).

68. *Ferber*, 458 U.S. at 758. The *Ferber* Court also deferred somewhat to Congressional findings, and this might be a point of departure for § 48. As discussed *supra*, the legislative record has received an inordinate amount of attention, with Stevens asserting that Congress intended to regulate only crush videos. Brief for the Respondent, *supra* note 9, at 38–39.

69. *Ferber*, 458 U.S. at 759–60.

70. Brief for the United States, *supra* note 12, at 36–37 (citing *Ferber*, 458 U.S. at 759).

71. *United States v. Stevens*, 533 F.3d 218, 230 (3d Cir. 2008), *cert.*

distorted, stating:

[E]ven a cursory consideration of well-documented circumstances surrounding animal abuse . . . counsels toward the conclusion that the harms suffered by abused animals also extend far beyond that directly resulting from the single abusive act depicted. Indeed, dogs that are forced to fight are commonly the subjects of brutality and cruelty for the entire span of their lives⁷²

The third *Ferber* factor is that the commercial use of the depictions creates an economic incentive for committing the underlying criminal acts.⁷³ Here, the Government must convince the Court that dogfighting videos, like those sold by Stevens, are integrally linked to the dogfighting business. Stevens contests this point in spite of the fact that he also sold the paraphernalia used to train and fight dogs.⁷⁴ With respect to crush videos, the link is more obvious—the abuse is performed so that it may be filmed. Nevertheless, the Government does not need to show that *every* dogfight is staged in order for it to be filmed for interstate commercial transactions, just as the *Ferber* Court did not suggest that every incidence of sexual abuse of a minor must be filmed and distributed in order to find the necessary link between the depiction and the underlying crime.⁷⁵ This could prove to be an important distinction.

The fourth factor is that the underlying activity, engaging a child in sexual acts or torturing an animal, must have very little or no actual value.⁷⁶ The *Ferber* Court found that depictions of underage sexual activity could almost never have social value.⁷⁷ Such is not the case with all depictions of animal abuse, as is demonstrated by § 48's broad exceptions clause.⁷⁸ The Third

granted, 556 U.S. ___, 129 S. Ct. 1984 (2009).

72. *Id.* at 244–45 (Cowen, J., dissenting).

73. *Ferber*, 458 U.S. at 761.

74. Brief for the Respondent, *supra* note 9, at 45–46.

75. *See generally Ferber*, 458 U.S. at 761–62.

76. *Id.* at 762.

77. *Id.* at 762–63.

78. 18 U.S.C. § 48(b) (2006) (excluding depictions that have “serious religious, political, scientific, educational, journalistic, historical, or artistic value”).

Circuit seized on the breadth of this clause as evidence that Congress was improperly using it as a “catch-all” filter rather than a narrow tailoring device.⁷⁹

Finally, *Ferber* evaluated the proposed suppression of speech within the wider scope of established First Amendment jurisprudence.⁸⁰ Analysis under the fifth factor in *Stevens* will turn on what basis the Court determines that the Government’s interest is sufficiently compelling. If the reasoning is based on how acts of animal cruelty affect humankind or social morality, for example, this would comport with established doctrine. If, on the other hand, the Court recognizes animal-centric grounds for finding a compelling reason, this could represent a departure. Here, the Third Circuit had the benefit of reviewing last Term’s *United States v. Williams*,⁸¹ which upheld a federal law prohibiting the “collateral speech that introduces such material into the child-pornography distribution network.”⁸² The Third Circuit distinguished this case from *Stevens* by noting that *Ferber* had already established child pornography as unprotected and proscribable speech.⁸³ Such is not the case with depictions of animal cruelty. While some members of the Court may be persuaded that the same concerns about child welfare apply to animals, it is unlikely that a majority would find § 48

79. *United States v. Stevens*, 533 F.3d 218, 230–31 (3d Cir. 2008), *cert. granted*, 556 U.S. ___, 129 S. Ct. 1984 (2009); see H.R. REP. NO. 106-397, at 4 (1999) (“While the exclusion described in the statute is expressed in seven different categories, the committee believes that any material depicting animal cruelty which society would find to be of at least some minimal value, falls within one of these broad, general categories.”).

80. *Ferber*, 458 U.S. at 763–64. The Third Circuit did not discuss this fifth *Ferber* factor, but it impliedly addressed the factor in its observation that “[w]ithout guidance from the Supreme Court, a lower federal court should hesitate before extending the logic of *Ferber* to other types of speech” and that “*Ferber* appears to be on the margin of the Supreme Court’s unprotected speech jurisprudence.” *Stevens*, 533 F.3d at 225.

81. 553 U.S. ___, 128 S. Ct. 1830 (2008).

82. *Id.* at 1838–39. The “collateral speech” included the interstate advertisement or solicitation of “any material or purported material” that contains “an obscene visual depiction” or a “depiction of an actual minor engag[ed] in sexually explicit conduct.” *Id.* at 1836–37 (quoting 18 U.S.C. § 2252A(a)(3)(B) (2000 & Supp. 2003)).

83. *Stevens*, 533 F.3d at 225–26.

unconstitutional based solely on non-human concerns.

3. Option Three: Depictions of Animal Cruelty Erode Public Morality

An alternative to the *Ferber* approach would be to find that depictions of animal cruelty should be categorized as lesser-protected speech. This conclusion could be based on recognizing a compelling governmental interest in preventing the erosion of public morality, holding that, similar to obscenity and low-value speech, harming animals without a legitimate purpose is immoral. The Government, relying on *Miller* and those cases involving sexually-oriented speech, argues that “[a]cts of animal cruelty are considered offenses against public morality because they debase the persons who engage in them and coarsen the broader society.”⁸⁴ This argument is likely to be the one most persuasive to the Court because it avoids having to grant animals anything that could be construed as rights and circumvents an empirical analysis about whether acts of animal cruelty cause human cruelty and other social problems.

What is interesting about the morality argument is that it directly addresses the Third Circuit’s concern that in all the categories of banned speech—fighting words, speech inciting imminent lawlessness, threats, libel, obscenity, and child pornography—the intent is to protect people, not animals.⁸⁵ Preserving the public morality is entirely about protecting people from coercive social practices. Thus, basing the compelling government interest on concerns about public morals would be consistent with other rationales for banning categories of speech, particularly obscenity. This argument is supported by the number of state animal welfare laws that justify their existence by citing societal norms and preserving moral standards.⁸⁶ It is

84. Brief for the United States, *supra* note 12, at 34.

85. *Stevens*, 533 F.3d at 224.

86. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (“Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, ‘*contra bonos mores*,’ *i.e.*, immoral. In American society, such

notable that a number of amici in support of Stevens reject the morality argument, perhaps most cogently in the Brief by Constitutional Law Scholars, including Bruce Ackerman, Geoffrey Stone, and Erwin Chemerinsky.⁸⁷ Curiously, however, neither conservative “family values” organizations, such as Morality in Media and the National Law Center for Children and Families, nor organizations concerned about violence against women and children, such as the National Center for Missing and Exploited Children and the National Network to End Domestic Violence, added their voices to the fray, arguably missing an opportunity to further their broader agendas.

The Court has rejected the preservation of public morality argument in the context of the Fourteenth Amendment, most recently in *Lawrence v. Texas*.⁸⁸ Consequently, there could be hesitation by some Justices to find the Government’s interest in moral preservation alone justifies suppressing depictions of animal cruelty. Of course, the major difference between *Lawrence* and *Stevens* is that the conduct in *Lawrence* was private and consensual; the distribution of images in *Stevens* is public and the objects of the action are unable to render consent.⁸⁹ Congress did not ban the possession of such images, as it has with child pornography, and neither the United States nor its amici advance this position.⁹⁰ Thus, one way the Court could avoid inconsistency relative to compelling government interests based on moral outrage alone is to reinforce a distinction between private and public morality, reaffirming the government’s right

prohibitions have included, for example, . . . cockfighting [and] bestiality . . .”) (Scalia, J., concurring).

87. Brief of Constitutional Law Scholars Bruce Ackerman et al. as Amici Curiae in Support of Respondent at 8–9, *United States v. Stevens*, No. 08-769 (U.S. July 27, 2009).

88. *Lawrence v. Texas*, 539 U.S. 558, 582–83 (2003).

89. Compare *Stevens*, 533 F.3d 218, with *Lawrence*, 539 U.S. 558. This distinction is reinforced by bestiality laws in over thirty states, over half of which classify the prohibited behavior as a felony. See Rebecca F. Wisch, *Overview of Bestiality Laws*, Mich. State Univ. Coll. of Law Animal Legal & Historical Ctr., 2008, available at <http://www.animallaw.info/articles/ovuszoophilia.htm> (noting that “those states without specific bestiality laws do usually include some reference to bestiality in their child protection laws”).

90. Brief for the United States, *supra* note 12, at 34; see also Brief of Constitutional Law Scholars Bruce Ackerman et al., *supra* note 87, at 8–9.

to regulate the public sphere but leaving intact the right to view such images in the privacy of one's home.⁹¹

The fundamental question is whether any of these reasons justify creating a new category of low-value speech subject to government regulation. This is a far more difficult question than either side ultimately acknowledges. It is undeniable that some depictions of animal cruelty intended solely for commercial gain, such as crush videos, have slight value and cause needless and inhumane harm to animals. To the extent that such videos are made solely for human pleasure, few could argue that they should enjoy full First Amendment protection. At the same time, § 48 is written broadly and invites a case-by-case analysis, and thus, many images that should otherwise be protected may get ensnared in the law's reach. That is why hunters and booksellers, as well as First Amendment advocates like the ACLU, fear the long-term implications if the law is upheld.

IV. LURKING ISSUES: OBSCENITY AND ANIMAL LAW

A. Obscenity

Should the Court find a compelling government interest in banning animal cruelty based on the preservation of public morals and uphold Stevens's conviction, it would essentially be extending the obscenity doctrine to include non-sexual speech. Thus, even though *Stevens* is not about sex per se, the case has the potential to expand the government's regulation of speech that is gruesome and offensive, albeit not overtly pornographic material. Gratuitous violence against women and children and other material that appeals to human instincts beyond those which are prurient in nature could end up subject to state regulation if § 48 is upheld.⁹²

91. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); see also David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 132–39 (1994).

92. This theory was advanced by Alan Dershowitz on behalf of his client in *United States v. Guglielmi*, 819 F.2d 451, 452, 454 (4th Cir. 1987). The defendant challenged his conviction on the theory that his videos were so offensive and depraved that they could not possibly be considered sexual in nature, and thus were outside the scope of lesser-protected speech as defined by

That is why it is important to understand *Stevens* within the context of a larger federal government agenda to crack down on internet-fueled obscenity. Both the legislative history and wording of § 48, which is modeled on *Miller's* obscenity test, suggest that the government's primary concern when passing and invoking § 48 was regulating humans, not protecting animals.⁹³ It is not random that *Stevens* originated in the Western District of Pennsylvania. The U.S. Attorney for that district, Mary Beth Buchanan, has been very aggressive in prosecuting obscenity.⁹⁴ In 2003, she brought obscenity charges against a couple who owned Extreme Associates, a Los Angeles-based producer and distributor of pornography.⁹⁵ This was the first federal obscenity prosecution in more than a decade. A grand jury indicted the couple for distributing five videos which included scenes of virtual child pornography, rapes and murders of women, and other grotesque depictions.⁹⁶ The couple appealed, arguing that the right to privacy, then recently strengthened by the Court's opinion in *Lawrence v. Texas*, gave individuals the right to view such material.⁹⁷ That right could not be meaningfully exercised, they argued, without the corresponding rights of companies to distribute such material.⁹⁸

The district court agreed, declaring that the federal anti-obscenity laws were unconstitutional.⁹⁹ However, the Third Circuit reversed, holding that because only the Supreme Court

Miller. Id. at 454 (discussing the test prescribed by *Miller v. California*, 413 U.S. 15, 24 (1973)). The appeals court was not persuaded by this argument and upheld Guglielmi's extensive prison sentence. *Id.* at 455 ("We simply cannot accept the proposition that the First Amendment lends no protection to offensive material but envelops the most offensive within its protective wings.").

93. *Stevens*, 533 F.3d at 222–34.

94. See Mary Beth Buchanan, U.S. Attorney, <http://www.usdoj.gov/usao/paw/bio.html>.

95. *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578, 580 (W.D. Pa. 2005).

96. Press Release, Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania (Aug. 7, 2003), available at http://www.usdoj.gov/criminal/ceos/Press%20Releases/WDPa%20Zicari%20indict%20PR_080703.pdf.

97. *Extreme Assocs.*, 352 F. Supp. 2d at 585.

98. *Id.* at 586.

99. *Id.* at 591–92.

itself could overrule precedent, it could not extend the right of privacy under *Lawrence* to include the distribution of obscenities.¹⁰⁰ The Supreme Court denied the couple's petition for certiorari.¹⁰¹ The couple pled guilty and recently each received a sentence of a year and a day.¹⁰² Buchanan's office and the Justice Department's Anti-Obscenity Task Force, established in 2005, have pursued a number of such prosecutions against those who distribute obscene material via the Internet.¹⁰³ Stevens's prosecution was part of Buchanan's larger priority to promote public decency.

The fact that Stevens's videos have nothing to do with sex presents an opportunity for the Government to urge the Court to expand *Miller* to include non-sexual speech. It is unclear whether crush videos would have been found to be obscene as a matter of law under *Miller*. The Court has confined obscenity to "hardcore" sexual depictions, not gruesome acts of violence intended to appeal to the prurient interests.¹⁰⁴ The Court might uphold the suppression of crush videos under the rationale that merely appealing to prurient interests suffices under *Miller* even if the depictions themselves lack explicit sexual content, although how one draws those lines can be tricky, as a matter of both law and fact. *Stevens* alleviates the need for the Court to define what is truly prurient in nature and what is not. Thus, for example, websites featuring sadomasochism, those that cater to other sexual fetishes like acrotomophilia (sexual attraction to amputees), as well as websites devoted to the promotion of suicide or eating disorders could also be subject to government regulation if the Court broadens the applicability of *Miller* to those images which conflate sex and violence, as well as those

100. *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 161 (3d Cir. 2005).

101. *Extreme Assocs., Inc. v. United States*, 547 U.S. 1143, 1143 (2005) (denying certiorari).

102. Grant Gross, *Couple Gets Prison Time for Internet Obscenity*, IDG News Service, Mar. 7, 2009, available at http://www.pcworld.idg.com.au/article/309771/couple_gets_prison_time_internet_obscenity.

103. United States Dept. of Justice—Obscenity Prosecution Task Force, <http://www.usdoj.gov/criminal/optf/> (last visited Aug. 12, 2009).

104. See Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 198 (2001).

which are non-sexual but are arguably patently offensive and lack serious social value.

Herein lays the Government's dilemma and Stevens's greatest potential to have his conviction reversed. A major criticism of *Miller* is that its case-by-case approach fosters uncertainty, making obscenity prosecutions subject to political fancy, thereby chilling speech.¹⁰⁵ Arguably, such was the case with the owners of Extreme Associates, who had been making hardcore pornography without government interference until they were interviewed for a PBS Frontline documentary, *American Porn*.¹⁰⁶ The PBS producers were so repulsed by scenes that Extreme Associates were filming, including those which showed women being raped, that they walked off the set.¹⁰⁷ In an interview which aired on the documentary, owner Rob Zicari challenged then-Attorney General John Ashcroft to prosecute him, and the Justice Department answered the call.¹⁰⁸ In doing so, Buchanan complained that the lack of obscenity prosecutions under the Clinton administration had led to a proliferation of increasingly degrading and violent images on the Internet.¹⁰⁹ Because Zicari and his wife pled guilty, admitting the images at issue were obscene, we do not know the extent to which either juries or the Court would be willing to provide First Amendment protection to consensual conduct depicting extremely violent and degrading images of women being harmed. Yet, the mere threat of prosecution arguably forced many producers who distribute via the Internet to shut down for fear of who would be next.

In another case prosecuted by Buchanan, a woman named

105. Cole, *supra* note 91; see generally John Tehranian, *Sanitizing Cyberspace: Obscenity, Miller, and the Future of Public Discourse on the Internet*, 11 J. INTELL. PROP. 1 (2003).

106. *Frontline: American Porn* (PBS television broadcast 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/porn/>.

107. *Id.*

108. Interview by Frontline with Rob Black, Owner, Extreme Associates, Inc. (May 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/porn/interviews/black.html>.

109. Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES, Sept. 28, 2007, at A27.

Karen Fletcher pled guilty to distributing obscenity in 2008, based on her “Red Rose” website, on which she posted fictional stories about the rape and torture of children, including infants.¹¹⁰ Fletcher claimed her writings were cathartic as she had been abused as a child. Because Fletcher was agoraphobic and frightened of the consequences of a public trial, she, like the owners of Extreme Associates, admitted that her writings constituted obscenity to avoid prison.¹¹¹ This left open the question of whether written words without images could be considered obscene. Similarly, even if the Court finds that § 48 does not apply to Stevens, significant questions will remain about the scope of the law’s constitutionally-permissible reach in a modern, digital age in which violence against women, children, and animal is less and less tolerated.

This persecution is, of course, precisely what gives § 48, as well as obscenity laws, their power. The mere threat of prosecution is enough to dry up the commercial market. The government needs only to selectively prosecute cases to make its point. According to the Humane Society, the passage of § 48 was enough to dry up the market for crush videos, but the Third Circuit’s decision has allegedly prompted the return of some videos.¹¹²

The other problem posed by *Miller*, and thus by § 48, is the exception for material having “serious religious, political, scientific, educational, journalistic, historical, or artistic value.”¹¹³ Unlike actual child pornography, both obscenity laws and § 48 have exceptions. Just as Fletcher argued that her writings served as an emotional outlet for her and others who had been abused, Stevens argues that his videos serve “to educate the public about” pit bulls as well as to historically document their limits and potential.¹¹⁴ Stevens’s argument suggests indirectly that the exceptions clause in § 48, and by

110. *Id.*

111. Paula Reed Ward, *Afraid of Public Trial, Author to Plead Guilty in Online Obscenity Case*, PITTSBURGH POST-GAZETTE, May 17, 2008, at A1.

112. Brief for The HSUS, *supra* note 7, at 5.

113. 18 U.S.C. § 48(b) (2006).

114. Brief for the Respondent, *supra* note 9, at 2.

analogy, the third prong of *Miller*, should be reviewed de novo by the Court in an as applied challenge. It is less than clear whether the Court should defer to the jury's determination, or whether it should substitute its own judgment that the evidence supports Stevens's contention that the videos have serious social value. Given that the Justices can view the videos, at least some are likely to decide the case based on their own perceptions as they did in *Scott v. Harris*.¹¹⁵ If members of the Court do so, they will essentially be inviting de novo review on every obscenity and animal-cruelty prosecution, leaving society with the same kind of judicial uncertainty of "[you] know it when [you] see it."¹¹⁶ In fact, the Humane Society not only hopes that the Court views the videos in question, but it has also requested that the Court allow it to submit additional DVD content of depictions of animal cruelty described in its amicus brief.¹¹⁷

Then again, the outcome of *Stevens* may be moot if the current Obama Administration does not prioritize obscenity prosecutions to the same extent that the Bush Administration did. It remains unclear whether Attorney General Eric Holder believes that targeting distributors of adult obscenity, however broadly defined, is part of the Justice Department's greater mission. A win in *Stevens* may give the Justice Department incentive to continue to shut down commercial distributors of obscenity and animal cruelty; a loss may give it incentive—or an excuse—to focus its prosecutorial efforts elsewhere.

B. Animal Law

Irrespective of whether Stevens's conviction is overturned, it is imperative to animal advocates that the Court recognize the Government's compelling interest in preventing cruelty to animals. As in 2007's school desegregation case, *Parents Involved in Community Schools v. Seattle School District No. 1*,¹¹⁸

115. *Scott v. Harris*, 550 U.S. 372, 378–79 (2007) (basing its decision to reverse the trial court's denial of qualified immunity on what the Court viewed in the video footage filmed from the officer's patrol car).

116. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

117. Brief for The HSUS, *supra* note 7, at 2 n.2.

118. 551 U.S. ___, 127 S. Ct. 2738 (2007).

the recognition that public schools still have a compelling interest in promoting racial diversity, albeit preserved by the narrowest of margins, leaves the door open for crafting narrowly tailored school assignment plans.¹¹⁹ Similarly, if § 48 is struck down as overbroad, impermissibly vague, or improperly tailored, the ability to revisit the proper method for addressing this compelling concern is preserved. On the other hand, if the Court refuses to recognize the interest as compelling, not only will § 48 be overturned, but the efficacy of other animal-related federal criminal statutes drawing on Congress's Commerce Clause authority, such as the Animal Fighting Prohibition Enforcement Act, could be jeopardized.¹²⁰

That is why the amicus curiae Group of American Law Professors in Support of Neither Party urges the Court to view this question as one of first impression.¹²¹ The Third Circuit, the professors argue, entirely misinterpreted *Lukumi's* holding and overlooked more than a century of American jurisprudence recognizing the interrelatedness of violence towards animals and violence towards humans.¹²² Furthermore, they continue, the circuit court overlooked myriad research linking animal cruelty with human-to-human violence.¹²³ The professors specifically object to the circuit court's disregard for these commonalities in its *Ferber* analysis as well as the way in which the court preempted the discussion by rejecting out-of-hand the "Government attempt[] to analogize between the depiction of animal cruelty and the depiction of child pornography."¹²⁴

The Third Circuit majority's distaste for comparing children to animals—whether this is the Government's argument or not—could be the Government's greatest hurdle in convincing the Supreme Court that its interest is compelling. If the Court agrees with the Third Circuit's reasoning that compelling

119. *Id.* at 2791–92 (Kennedy, J., concurring).

120. Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88.

121. Brief for a Group of American Law Professors, *supra* note 58, at 11.

122. *Id.* at 6–7.

123. *Id.* at 7, 23–34.

124. *United States v. Stevens*, 533 F.3d 218, 224 (3d Cir. 2008), *cert. granted*, 556 U.S. ___, 129 S. Ct. 1984 (2009).

interests in free speech jurisprudence have always addressed “a grave threat to human beings,”¹²⁵ the test for a compelling reason could thus effectively be read as “compelling interest plus” if the *objects* of the reason are the animals themselves. This is because the Court would begin with the presuppositions that animals are traditionally unworthy of protection *on their own* and that only human-centric concerns can validate restrictions of free expression.¹²⁶ It is unlikely that a majority of the current Court would consider the suffering of animals as legally relevant in determining the weight of Congress’s stated reasons for passing § 48, particularly considering the free speech concerns in this case.

Of the members on the 2009–2010 Court, only Justice Ginsburg has recognized the potentially intrinsic values of animals in *Winter v. Natural Resources Defense Council*.¹²⁷ In

125. *Id.* The Third Circuit’s statement appears only partially true. The Government’s brief on the merits offers a list of compelling interests recognized by the Supreme Court, including the interest in: “regulating advertisements that expressly advocate the election or defeat of a candidate for federal office,” *McConnell v. FEC*, 540 U.S. 93, 205 (2003), “[m]aintaining a stable political system,” *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989), and “preventing [governmental] corruption,” *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985). Brief for the United States, *supra* at 12, at 31 n.13. These interests are arguably tangentially related to human experiences but not the “grave threat to human beings” described by the Third Circuit.

126. From a strictly legal perspective, if not from a policy perspective, this is appropriate. Animals, though sentient and more valued in American society than inanimate objects, have no more express legal rights than a child’s toy. See Lauren Magnotti, *Pawing Open the Courthouse Door: Why Animals’ Interests Should Matter When Courts Grant Standing*, 80 ST. JOHN’S L. REV. 455, 455 (2006); see also, e.g., Rebecca J. Huss, *The Pervasive Nature of Animal Law: How the Law Impacts the Lives of People and Their Animal Companions*, 43 VAL. U. L. REV. 1131, 1136 (2009) (“Surveys indicate that 71% of people with dogs and 64% of people with cats consider their companion animals to be like a child or family member, and 93% of these people agree that the benefits of having a pet are companionship, love, company, and affection.”); Jayson L. Lusk & F. Bailey Norwood, *A Survey to Determine Public Opinion About the Ethics and Governance of Farm Animal Welfare*, 233 J. AM. VET. MED. ASSOC. 1121, 1124 (2008) (finding that more than two-thirds of the Americans polled agreed with the statement that government intervention is necessary in setting and maintaining farm animal welfare standards).

127. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. ___, 129 S. Ct. 365, 393 (2008) (Ginsburg, J. dissenting).

that case, the Court overturned the Ninth Circuit's grant of a temporary injunction against certain U.S. Navy sonar exercises off the coast of California, which the plaintiffs claimed caused physical harm to the whales in the area.¹²⁸ Writing for the majority, Chief Justice Roberts recognized only the NRDC plaintiffs' personal "ecological, scientific, and recreational interests" in protecting the whales, calling them "legitimately before [the] Court" but entirely outweighed by national security interests.¹²⁹ This recitation of the plaintiffs' concerns overlooked, probably intentionally, the argument that the allegations of whale suffering were also worthy of being submitted to the balancing test. Justice Ginsburg, joined by Justice Souter, dissented and noted that the evidence of "hemorrhaging around the brain and ears, acute spongiotic changes in the central nervous system, and lesions in vital organs" of the beaked whales could not be "lightly dismissed."¹³⁰ In a separate opinion, Justice Breyer, joined by Justice Stevens, indicated he could be persuaded to recognize the whales' needs for protection, but procedural and evidentiary deficiencies required him to join the majority.¹³¹ The Government's chances of even partially substantiating a compelling interest with concerns for the animals' well-being, therefore, seems unlikely when one considers that Justice Ginsburg is the least likely to support an expansion of speech outside of First Amendment protection, given her position in *Ashcroft v. Free Speech Coalition*,¹³² *United States v. Williams*,¹³³ and *Ashcroft v. ACLU*.¹³⁴ If *Winters* is any

128. *Id.* at 382 (majority opinion).

129. *Id.* at 377.

130. *Id.* at 392–93 (Ginsburg, J., dissenting).

131. *Id.* at 383–87 (Breyer, J., concurring in part and dissenting in part).

132. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002). Justice Ginsburg joined Justice Kennedy's majority opinion holding that the federal Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 (2000), was an unconstitutional restriction of speech because it was overbroad. *Id.* at 238.

133. *United States v. Williams*, 553 U.S. ___, 128 S. Ct. 1830, 1848 (Souter, J., dissenting). Justice Ginsburg joined Justice Souter's opinion dissenting from the majority's holding that the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act provision criminalizing the pandering or solicitation of child pornography is neither overbroad under the First Amendment nor impermissibly vague under the Due Process Clause. *Id.*

indication, Justices Thomas and Alito, who joined the Chief Justice in the *Winters* majority, will be reluctant to recognize concerns beyond those experienced by humans.¹³⁵

In the final analysis, therefore, animal advocates should not look to *Stevens* as an opportunity for the Court to set a new course for animals in modern jurisprudence. Even if a majority of the Justices were to advance any discussion about the intrinsic value of animals, it would likely be accompanied by extensive dicta designed to cabin this supposition so as not to disrupt the trend towards protecting the types of industries that rely on animals.¹³⁶ Such a discussion might, for example, caution that § 48 should apply only to depictions of “abuse” as defined under then-current standards. Under this example, prohibiting the interstate commercial use of a dogfighting video is justifiable because dogfighting is currently a felony according to federal law and nearly all state laws.¹³⁷ Now consider that a state decides to include certain industrial farming practices in its statutory definition of “animal abuse” (such as bulldozing “downed” cattle unable to stand up on their own or the modern industrial farming practice of confining chickens together in battery cages). If a person creates a video depiction of these acts and attempts to sell them to the same audience who appreciates “traditional”

134. *Ashcroft v. ACLU*, 542 U.S. 656, 674 (2004) (“I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption”) (citation omitted) (Stevens, J., joined by Ginsburg, J., concurring). Justice Kennedy authored the 5-4 majority opinion in *Ashcroft v. ACLU*, holding that the federal Child Online Protection Act, 47 U.S.C. § 231 (2000), was an unconstitutional restriction of speech because it was not narrowly tailored. *Id.* at 666–68.

135. *Winter*, 555 U.S. ___, 129 S. Ct. at 369.

136. A coincidental example of this trend is the Animal Enterprise Terrorism Act, 18 U.S.C. § 43, a federal law that criminalizes traveling in or utilizing instrumentalities of interstate commerce in furtherance of activities intended to “damag[e] or interfer[e] with the operations of an animal enterprise.” 18 U.S.C. § 43(a)(1) (2006). Critics of the Act maintain that it is unconstitutionally overbroad and vague, and serves to chill speech directed at industries that use animals in the development of food, pharmaceuticals, and consumer products. See, e.g., Dane E. Johnson, *Cages, Clinics, and Consequences: The Chilling Problems of Controlling Special-Interest Extremism*, 86 OR. L. REV. 249, 275–78 (2007).

137. See Brief for The HSUS, *supra* note 7, at 14–15.

crush videos, § 48 could have the effect of casting a criminal shadow on these farming practices employed beyond the borders of the state in which the practices *are* illegal. This is not a far-fetched example, as several states have begun to redefine what should be considered “acceptable” farming practices.¹³⁸ The continued adoption of improved animal welfare standards will ultimately force industrial agriculture giants, such as Smithfield Foods, Tyson Foods, and Perdue Farms, to fundamentally alter their modern containment facility business models.¹³⁹

It is, therefore, strategic and intentional that the Group of American Law Professors—all of whom have taught animal law courses—emphasize the extensive research underscoring the human interests in reducing incidents of animal cruelty.¹⁴⁰ They do not mention the animals’ interests. As discussed above, because enough human interests exist for supporting the Government’s goals, the Court does not need to contemplate altering animals’ legal values to find the Government’s interest compelling.

Even if the Court were to uphold § 48, it could still overturn Stevens’s conviction under an *as applied* challenge. While Stevens himself would certainly be happy with this outcome, it could have the effect of over-emphasizing the relevance and importance of legislative records, particularly as a vehicle for

138. See, e.g., FLA. CONST. art. X, § 21 (prohibiting the use of hog gestation crates); Prevention of Farm Animal Cruelty Act, CAL. HEALTH & SAFETY CODE §§ 25990–25994; N.J. Soc’y for the Prevention of Cruelty to Animals v. N.J. Dep’t of Agric., 955 A.2d 886, 905–07 (2008) (ruling that the Department of Agriculture could not exempt “routine husbandry practices” from the state law requiring humane treatment of domestic livestock).

139. See, e.g., New Jersey Soc’y for the Prevention of Cruelty to Animals v. New Jersey Dep’t of Agric., 955 A.2d 886, 889–90, 907–08, 912 (N.J. 2008) (determining that the state Department of Agriculture had improperly condoned certain factory farming practices, including tail docking and de-beaking, as “humane” and acceptable practices under state animal cruelty laws).

140. Brief for a Group of American Law Professors, *supra* note 58, at 1, 18–30; see also Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 28 (2009) (arguing that rather than awarding legal rights to animals, the humane treatment of animals is best “attain[ed] through focusing on human responsibility for animal welfare under social contract principles”).

interpreting laws related to the welfare of animals. This is because the *language* of § 48, construed expressly and without any consideration of the legislative record, includes video depictions of dogfighting events, because they are prohibited under federal, Pennsylvania, and Virginia law.¹⁴¹ If the Court strikes down Stevens's conviction on as applied grounds, it must do so based on its interpretation of the legislative record, not of its reading of the statutory language. The resulting subtextual message could be that either animal-related statutes or "morality-inspired" criminal laws should be subjected to additional analysis.

In addition, an as-applied outcome could leave animal advocates pondering the pitfalls of its most successful method for promoting the adoption of new animal protection laws. The strategy is to inspire legislative will through shock and disgust. This begins with finding a visual example of some shocking treatment of animals, whether it involves animals used in industrial farming or in medical or consumer product research. A video is often obtained through an undercover investigation because the type of animal abuse the organization seeks to be regulated or prevented is nearly always well-hidden from consumer view.¹⁴² In unveiling the video, the animal organization begins to create public ire and media attention.¹⁴³ The organization provides communication avenues to help these people create political will in Congress, or in a state legislature, to introduce some type of legislation to address the problem.¹⁴⁴

141. Animal Fighting Prohibition Enforcement Act of 2007, Pub. L. No. 110-22, 121 Stat. 88; 18 PA. CONS. STAT. ANN. § 5511 (West 2009); VA. CODE ANN. § 3.2-6571 (West 2009).

142. The Humane Society, *Undercover Investigation Reveals Rampant Animal Cruelty at California Slaughter Plant – A Major Beef Supplier to America's School Lunch Program*, Jan. 30, 2008, http://www.hsus.org/farm/news/ournews/undercover_investigation.html.

143. CBS News, *Undercover Video Shows Abuse of Sick Cows*, Jan. 30, 2008, http://www.cbsnews.com/8618-100_162-3773183.html?assetTypeId=30&messageId=6281767; see also Mark Huffman, *Lawmakers Call for Slaughterhouse Probe*, Feb. 15, 2008, http://www.consumeraffairs.com/news04/2008/02/downer_cow3.html.

144. The Humane Society followed up the launch of this undercover video with a call for advocates to support the Farm Animal Stewardship Purchasing Act, H.R. 1726, 110th Cong. (2007) ("set[ting] modest animal welfare standards

Once a bill has been introduced, sponsors and supporters must engage in extreme rhetoric on the record to attempt to win support. Speeches entered into the legislative record did not suggest that animals have rights or that animals should not have to needlessly suffer. Instead, because some legislators fear being labeled as liberal, emotional, or anti-business on animal-related issues, the rhetoric needs to focus on just how *shocking* the activity is—such that no decent human being should stand for it.

In this manner, crush videos were the subject matter used to generate support for § 48, a law which, on its face, clearly covers more than only the depictions of kittens having their skulls pierced with a woman's stiletto heel. As crush videos are so shocking, it is nearly politically impossible to defend their value. One would be hard-pressed to find an elected official willing to go on the record to support the making of these videos. However, had Congressional testimony focused on the broader compelling reasons offered by the Government in its brief today, it is quite possible that § 48 would have been defeated. The adoption of any type of animal welfare legislation at the local, state, or federal level is nearly always opposed by extraordinarily effective lobbying efforts of seemingly unrelated or disinterested organizations. These organizations may have only one thing in common: an interest in preventing *any* change to animals' legal statuses. This necessitates that animal advocates rely on the most heinous cruelties to garner legislative support. Therefore, whereas the creation of a legislative record usually serves to *reinforce* the validity of a law under scrutiny,¹⁴⁵ as applied

. . . for producers who sell food to federal government programs”) and the Downed Animal and Food Safety Protection Act, H.R. 661, 110th Cong. (2007) (“ban[ning] any slaughtering of downed animals for human consumption”). The Humane Society, *Undercover Investigation Reveals Rampant Animal Cruelty at California Slaughter Plant*, Jan. 30, 2008, http://www.hsus.org/farm/news/ournews/undercover_investigation.html.

145. In *Lukumi*, for example, four of the five Justices in the majority reasoned that the minutes and recordings from city council meetings revealed that the ordinance was enacted “because of, not merely in spite of” a desire to suppress the Santeria religious practices. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–41 (1993) (internal quotations omitted). Thus, the plurality’s reliance on the legislative history was not integral to the holding.

outcome in *Stevens* could serve to threaten the historical record's usefulness and turn some animal protection legislation on its head.

V. CONCLUSION

No matter what the outcome of *Stevens*, the public will once again be reminded that the Court remains the ultimate arbiter of the limits of the First Amendment and, to a great extent, the ultimate arbiter of the culture wars as we now battle them. Rather than split the decision, as it often does in these culture war cases, perhaps the Court will split the difference, finding that the prevention of animal cruelty can be a compelling Government interest but that § 48 is unconstitutional on its face. This would give animal advocates a reasonable win while at the same time maintaining the current status of free speech doctrine. It would also give Congress the opportunity to revise the law to specifically target crush videos without significantly expanding the obscenity doctrine. Of course, if Stevens's conviction is reversed for any reason, the videos in question will likely find their way to YouTube, and then each one of us can be the judge.

BREACHING A LEAKING DAM?: CORPORATE MONEY AND ELECTIONS

*Lloyd Hitoshi Mayer**

I.	INTRODUCTION	92
II.	A BRIEF HISTORY OF CORPORATE MONEY & ELECTIONS	95
	A. Election-Related Spending by Corporations	95
	B. Prohibiting Corporate Campaign Contributions	96
	C. Prohibiting Independent Expenditures	98
	D. Prohibiting Soft Money Contributions to Political Parties and Expenditures for “Electioneering Communications”	107
III.	<i>CITIZENS UNITED V. FEC</i>	110
IV.	WILL THE COURT OVERRULE <i>AUSTIN</i> OR (IN PART) <i>MCCONNELL</i> ?	113
	A. Avoiding the Issue	114
	B. The Known and Possible Views of the Justices	115
	C. Grounds for Upholding <i>Austin</i> and <i>McConnell</i>	119
	D. Stare Decisis	126
	E. Conclusion	131
V.	RAMIFICATIONS IF THE COURT OVERRULES <i>MCCONNELL</i> (IN PART) OR <i>AUSTIN</i>	133
	A. Ramifications for Elections	134
	B. Ramifications for Election Law	137
	C. Possible Ramifications for Federal Tax Law	142
VI.	CONCLUSION	146

* Associate Professor, Notre Dame Law School; Of Counsel, Caplin & Drysdale, Chartered. A.B., Stanford University, 1989; J.D., Yale Law School, 1994. I am very grateful for the comments of Richard Garnett, Elizabeth Kingsley, and John Nagle, and for the research assistance of Benjamin Anderson, Katherine Anne Sebastiano, and the Notre Dame Kresge Law Library staff. I also want to acknowledge the extensive and very helpful discussions of the *Citizens United* case on the Election Law list-serv managed by Daniel Lowenstein and Richard Hasen. All opinions and errors are my own.

I. INTRODUCTION

Before March 24, 2009, *Citizens United v. FEC*¹ seemed to be on its way to becoming nothing more than a footnote in election law casebooks. While observers carefully noted that the case could be a vehicle for overturning key campaign finance precedents, most commentators focused on the various ways the Court could instead decide the case on narrow statutory interpretation grounds.² Apparently agreeing that the Court would probably not revisit those precedents, groups supporting the existing laws filed only two amicus curiae briefs defending the existing laws as applied by the government to *Citizens United*.³

A lengthy exchange during the March 2009 oral argument raised concerns, however, that a majority of the Court might take a different approach to the case.⁴ In that exchange, the

1. 530 F. Supp. 2d 274 (D.D.C. 2008).

2. See, e.g., Richard L. Hasen, *Can McCain-Feingold Restrict a Corporation's "Video-on-Demand" Candidate Documentary and Advertising?*, 36 PREVIEW U.S. SUP. CT. CAS. 349, 353 (2009) (concluding that it is unlikely the Court would overrule existing precedent especially given the many ways to rule in favor of *Citizens United* without doing so); Isaac Lindbloom & Kelly Terranova, *Citizens United v. Federal Election Commission* (Docket No. 08-205), LEGAL INFO. INST BULL. (2009), <http://topics.law.cornell.edu/supct/cert/08-205> (concluding that the Court would focus on whether the movie at issue in the case would qualify for exemption from various campaign finance rules and not raising the possibility that the Court could overrule existing precedent); Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/preview-movies-as-political-messages/> (Mar. 22, 2009, 06:04 EDT) (concluding that while it is not unrealistic to believe the Court could overturn long-standing precedent, the Court has a variety of other ways to resolve the case on narrower grounds).

3. See Docket, *Citizens United v. FEC*, No. 08-205 (U.S. Aug. 18, 2009) <http://origin.www.supremecourtus.gov/docket108-205.htm> (briefs filed on Feb. 23 & 24, 2009). This compares to fourteen amicus curiae briefs filed in support of the government after the Court scheduled re-argument. *Id.* (briefs filed on July 29-31, 2009).

4. See, e.g., Bob Bauer, *Something Distinctive About the Speech*, MORE SOFT MONEY HARD LAW, Mar. 28, 2009, <http://www.moresoftmoneyhardlaw.com> (commenting that “[t]he Court in this case, on these facts, could well be moved to keep the campaign finance laws out of the regulation of books and films”); Citizens United: Of Book Banning, Kindles, and the Corporate PAC Requirement, <http://electionlawblog.org> (Mar. 24, 2009, 13:16 PDT) (concluding that this exchange made “it more likely that a majority on the Court . . . will want to say something about the Constitution”); Posting of Lyle Denniston to

government took the position that Congress could, constitutionally, prohibit corporations from paying for a broad range of speech if that speech expressly advocated for the election or defeat of a particular candidate or was the functional equivalent of express advocacy.⁵ In one particularly striking example, the government maintained this position even with respect to a 500-page book that contained a single instance of express advocacy.⁶

Whether triggered by this exchange or by already existing concerns, the Court decided at the end of its Term to shift the focus of the case. In a brief order issued on June 29, 2009, the Court scheduled re-argument and ordered supplemental briefing on the following issue:

For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002 2 U.S.C. §441b.⁷

To understand why this one sentence could lead to a significant change in the flow of corporate money affecting federal and state elections, a brief review of the shifting—but for almost all of the past 100 years—gradually tightening laws governing the use of corporate funds in elections is necessary. Part II of this Article covers this history, including the key decision in *Austin v. Michigan Chamber of Commerce* to uphold a

SCOTUSblog, <http://www.scotusblog.com/wp/analysis-campaign-films-may-get-ok/> (Mar. 24, 2009, 10:43 EDT) (leading off with “[b]ecause a government lawyer pushed his argument as far as logic would carry it, an alarmed Supreme Court on Tuesday seemed poised to create a new exception to federal power to regulate what advocacy groups can say during national political campaigns” but then noting there appeared to be little support for a dramatic overruling of existing campaign finance laws).

5. See Transcript of Oral Argument at 26–38, *Citizens United*, No. 08-205 (U.S. Mar. 24, 2009). The Government also made this argument with respect to unions paying for such speech, as the same provisions that apply to unions also apply to corporations. *Id.*

6. *Id.* at 29–30.

7. Order in Pending Case, *Citizens United*, No. 08-205 (U.S. June 29, 2009), <http://www.supremecourtus.gov/orders/courtorders/062909zr.pdf>.

state election law ban on corporations making certain election-related expenditures even though that ban burdened speech.⁸ Part III reviews the specific facts and issues raised in *Citizens United*. Part IV addresses how the Court is likely to answer the new question it has posed. That part concludes that, given the stated and likely positions of the current nine Justices, it is likely that a majority of the current Court believes the Court decided both *Austin* and the relevant part of *McConnell* incorrectly. Given this likely result, the argument that is most likely to convince a majority of the Court not to overturn *Austin* is the doctrine of stare decisis, although that result is far from assured. As detailed in that part, even stare decisis is unlikely to preserve the relevant portion of *McConnell*, however. Finally, Part V addresses the potential ramifications if the Court overrules either or both of the precedents it cited, including the new pressure an overruling of *Austin* would place on seemingly unrelated federal tax laws governing tax-exempt, nonprofit corporations.

As the title of this Article indicates and the discussion below will make clear, the existing prohibitions on corporate money in elections do not prevent all corporate spending that may influence who is elected. That said, a significant amount of corporate expenditures that might otherwise occur is currently barred. The question now effectively posed by the Court in raising the continued viability of the *Austin* and *McConnell* precedents is what will be the results of breaching the dam holding back much of this spending. In one view, such a breach will result in a flood of corporate money that will drown out the influence of individual voters, unduly influence candidates when they reach public office, and undermine our democracy to such an extent that the infringement on speech by the current prohibitions on corporate spending are justified constitutionally.⁹ Another view is that such a breach will allow speech to flow that should never have been barred in the first place and that will enrich the electoral process, and that the harm to free speech of

8. 494 U.S. 652, 658–61 (1990).

9. See, e.g., *FEC v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. ___, 127 S.Ct. 2652, 2688–89 (2007) (Souter, J., dissenting).

allowing the current prohibitions to remain intact more than justifies overturning these precedents, even taking stare decisis into account.¹⁰ This Article explores these sharply different views as they come to bear on the *Citizens United* case.

II. A BRIEF HISTORY OF CORPORATE MONEY & ELECTIONS

Both the public and politicians have long been uneasy with spending by corporations to influence elections, and not without reason.¹¹ This uneasiness has led to a series of attempts to limit this influence, which have increasingly blocked the flow of corporate funds over time. At the same time, the Supreme Court has had to address numerous constitutional challenges to these restrictions, of which the *Citizens United* case is the most recent. The litigants bringing these challenges have primarily argued that these restrictions restrict speech without sufficient justification, thereby violating the Constitution's speech protections, denying the public important information about candidates, and unduly protecting incumbent politicians.¹²

A. Election-Related Spending by Corporations

To understand this history, it is necessary to distinguish the three primary ways that corporations—or other types of organizations or individuals—can spend money to influence the election of candidates. One way is to make campaign

10. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 273–75 (2003) (Thomas, J., dissenting); *Id.* at 322–23 (Kennedy, J., dissenting).

11. See generally ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 1-52* (1988) (describing the pre-Watergate influence of corporations on federal elections and the concerns it raised with members of both the public and Congress).

12. See, e.g., Brief for Appellants at 7–14, *Nat'l Rifle Ass'n v. FEC*, 540 U.S. 93 (2003) (No. 02-1675) (arguing in a case consolidated with *McConnell v. FEC*, that BCRA § 203 is unconstitutional on these grounds); Brief of Appellee at 8–9, *Austin*, 494 U.S. 652 (1990) (No. 88-1569) (arguing that the ban on corporate independent expenditures is unconstitutional on these grounds, except not mentioning incumbent politicians); Reply Brief of the Appellants at 30-31, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437) (arguing that expenditure limits are unconstitutional on these grounds).

contributions, i.e., to contribute funds to a candidate's campaign. Such contributions can be made either directly by simply writing a check to the candidate's campaign committee or indirectly by following the candidate's instructions with respect to spending money. For example, a candidate could ask a corporation interested in supporting the candidate to write a check to a television station to pay for one of the candidate's ads. Such indirect contributions have come to be known as *coordinated expenditures*, and under current law, such expenditures are treated the same as direct contributions.¹³

Second, a corporation can contribute to an entity that is closely tied to a candidate and will support that candidate or other candidates. The most obvious such entity would be the candidate's political party. Another common entity of this type is a *leadership PAC*, which is an entity formed and controlled by a current or former politician to support the election of candidates other than the founding individual, thereby garnering favor with the candidates supported.¹⁴

Third and finally, a corporation can spend money on activities that support (or oppose) a candidate independently of the candidate, i.e., without any previous agreement with or direction from the candidate. In other words, instead of *contributing* to the candidate or an entity closely tied to a candidate, the corporation is making its own *independent expenditures*. Such independent expenditures could be made directly or by contributing to another organization, not affiliated with a candidate, that then makes the expenditures.

B. Prohibiting Corporate Campaign Contributions

The first major limitation enacted by Congress was the 1907 prohibition on corporations making campaign contributions to

13. See 11 C.F.R. §§ 100.52(a), (d)(1), 109.20(b), 109.21(b)(1) (2009). The FEC is currently revising 11 C.F.R. § 109.21 in light of a court holding that portions of that section violated the Administrative Procedure Act. See *Shays v. FEC*, 528 F.3d 914, 924–29 (D.C. Cir. 2008).

14. See Trevor Potter, *The Current State of Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 48, 52 (2005) (describing leadership PACs).

federal candidates.¹⁵ Stung by public revelations of substantial corporate contributions to the Republican National Committee during congressional hearings, President Theodore Roosevelt in 1905 called for such a prohibition during his annual address to Congress.¹⁶ After much political maneuvering, and another call for action by President Roosevelt in his 1906 annual address, Congress passed the prohibition.¹⁷ The limited history available indicates that only two members of Congress raised free speech objections, claiming that corporations had the same rights as individuals.¹⁸ And in contrast to more recent campaign finance laws, the issue of the prohibition's constitutionality did not reach the Supreme Court for many decades (and was upheld when it did).¹⁹

The corporation campaign contribution prohibition still exists today, and almost all states either prohibit or limit contributions by corporations to state and local candidates.²⁰ This campaign contribution prohibition did not, however, prevent corporations

15. See Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (codified at 2 U.S.C. § 441b(a) (2006)). Congress extended this prohibition to unions in 1943, see War Labor Disputes Act, ch. 144, sec. 9, § 313, 57 Stat. 163, 167–68 (1943), and similar prohibitions now apply to government contractors, 2 U.S.C. § 441c(a)(1) (2006), and foreign nationals who are not permanent residents, *id.* § 441e.

16. MUTCH, *supra* note 11, at 2–4; Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 10–12 (2005).

17. MUTCH, *supra* note 11, at 5–7; Corrado, *supra* note 16, at 12; see also *United States v. Int'l. Union United Auto., Aircraft, & Agric. Implement Workers of Am.*, 352 U.S. 567, 570–75 (1957) (describing this history); Brief of Campaign Finance Scholars as Amicus Curiae at 7–10, *Citizens United v. FEC*, No. 08-205 (U.S. July 31, 2009) (criticizing certain aspects of this Supreme Court case's account of this history).

18. MUTCH, *supra* note 11, at 7.

19. See *FEC v. Beaumont*, 539 U.S. 146 (2003) (finding the prohibition on corporate campaign contributions to be constitutional even as applied to nonprofit corporations and citing previous decisions as strongly suggesting this result); see also *Mariani v. United States*, 212 F.3d 761, 771–73 (3d Cir. 2000) (concluding, before *Beaumont*, that no Supreme Court precedent has directly addressed the constitutionality of the corporate campaign contributions prohibition, but finding that prohibition constitutional and citing other federal appellate court decisions to the same effect).

20. See *supra* note 15; National Conference of State Legislatures, *State Limits on Contributions to Candidates* (2009), available at http://www.ncsl.org/Portals/1/documents/legismgt/limits_candidates.pdf.

from making contributions to political parties or other candidate-affiliated entities. It also left corporations free to make independent expenditures.

C. Prohibiting Independent Expenditures

Forty years later, Congress sought to close off the latter of these alternate channels by prohibiting independent expenditures by corporations (and unions).²¹ That prohibition proved largely ineffective, however, because there were no effective disclosure or enforcement mechanisms.²² It was not until the post-Watergate amendments to the Federal Election Campaign Act (FECA) that Congress made serious efforts to address both of these problems.²³ FECA, as amended, strengthened the prohibition on corporations making independent expenditures both by eliminating loopholes and by establishing a dedicated enforcement agency in the form of the Federal Election Commission (FEC).²⁴ In contrast to the ban on corporate contributions, however, a majority of states do not prohibit corporations (or unions) from making independent expenditure, although they do generally require public disclosure of such expenditures.²⁵

21. See Labor-Management Relations (Taft-Hartley) Act, 1947 § 304, 61 Stat. 136, 159–60 (1947) (codified at 2 U.S.C. § 441b(a) (2006)); MUTCH, *supra* note 11, at 155–57.

22. MUTCH, *supra* note 11, at 40–42, 165–66; FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 32–33 (1988).

23. MUTCH, *supra* note 11, at 42, 49.

24. See *Buckley v. Valeo*, 519 F.2d 821, 836–37, 904–07 (D.C. Cir. 1975) (briefly summarizing the history of federal election law and the reasons for the FECA amendments), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976); MUTCH, *supra* note 11, at 87–88 (describing the creation of the FEC). That is not to say that the FEC has been unanimously viewed as a model regulatory or enforcement agency; far from it. See, e.g., BROOKS JACKSON, BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED (1990); Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1895–96 (1999) (summarizing the concerns of FEC critics); Trevor Potter & Glen Shor, *Lessons on Enforcement from McConnell v. FEC*, 3 ELECTION L.J. 325, 330–32 (2004) (citing *McConnell* as an indictment of the FEC's performance in interpreting the election laws).

25. See Supplemental Brief of Senator John McCain et al. as Amici Curiae Supporting Appellee at 1a–8a, *Citizens United v. FEC*, No. 08-205 (U.S. July

The effectiveness of the federal prohibition was, however, reduced by the results of litigation challenging FECA, primarily on First Amendment grounds. Unlike the corporate campaign contribution prohibition, which did not result in a constitutional challenge for many years,²⁶ the FECA amendments immediately triggered far-ranging litigation that culminated in the Supreme Court's decision in *Buckley v. Valeo*.²⁷ While that decision focused primarily on the restrictions imposed on individuals, it had two important ramifications for corporate spending.

First, *Buckley* created a fundamental divide between how *contributions* to candidates are treated and how *expenditures* by candidates, political parties, and individuals are treated.²⁸ The Court found that the government had a weighty interest in preventing corruption and the appearance of corruption, and that the FECA-imposed limits on the amount that any given individual could contribute to a candidate per election were sufficiently tailored to that interest to justify the resulting burden on speech under the First Amendment.²⁹ The Court also concluded, however, that FECA's limits on the total amount of

31, 2009) (listing state statutes prohibiting corporate independent expenditures); Public Citizen, *State Prohibitions on Campaign Spending from Corporate And Union Treasuries for State Candidates*, 2009, http://www.citizen.org/documents/Corporate_spending_on_state_candidates.pdf (last visited Sept. 18, 2009); National Conference of State Legislatures, *State Campaign Finance Laws: An Overview 3* (2009), available at <http://www.ilga.gov> (follow "Joint Committee on Government Reform" hyperlink; then follow "Documents" hyperlink; then follow "State Campaign Finance Laws, An Overview" hyperlink under "Submitted March 17, 2009") (summarizing state independent expenditure disclosure laws).

26. See *FEC v. Beaumont*, 539 U.S. 146 (2003) (finding the prohibition on corporate campaign contributions to be constitutional even as applied to nonprofit corporations and citing previous decisions as strongly suggesting this result); see also *Mariani v. United States*, 212 F.3d 761, 771–73 (3d Cir. 2000) (concluding, before *Beaumont*, that no Supreme Court precedent has directly addressed the constitutionality of the corporate campaign contributions prohibition, but finding that prohibition constitutional and citing other federal appellate court decisions to the same effect).

27. 424 U.S. 1 (1976).

28. See *id.* at 58–59 (summarizing the Court's contrasting conclusions with respect to contribution limits and expenditure limits).

29. *Id.* at 26–29; see also *id.* at 35–36 (finding constitutional the limits on contributions to political committees); *id.* at 38 (finding constitutional the limit on total contributions by a single individual during any calendar year).

expenditures by a candidate, political committee, political party, or individual in a given election cycle were not sufficiently tailored to serve this interest, and therefore found those limits to be an unconstitutional restriction of speech.³⁰ In doing so, the Court rejected the view that limits on contributions and expenditures should be viewed primarily as limitations on conduct (i.e., spending money) and only incidentally as restrictions on speech and so outside the protection of the First Amendment (as the appellate court had reasoned).³¹

In other words, while Congress could constitutionally prohibit an individual from giving more than \$1,000 per election, primary or general, to a candidate for federal office, Congress could not constitutionally limit the amount that the candidate could spend.³² Moreover, Congress also could not limit how much any individual could spend of his or her own funds on independent expenditures, including expenditures to support his or her own candidacy—hence the existence of self-funded political campaigns by candidates such as Ross Perot and Mitt Romney.³³

In reaching this conclusion, the Court explicitly rejected the assertion that ensuring some level of financial equality among candidates or other electoral voices was a legitimate ground for overcoming First Amendment protections, much less a sufficiently strong governmental interest to justify FECA's expenditure limitations.³⁴ It stated:

But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which

30. *Id.* at 55–56.

31. *Id.* at 16–17. *But see* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976).

32. *See Buckley*, 424 U.S. at 23–24 (describing the limit on contributions to candidates).

33. *See id.* at 45, 46 n.53, 47, 53; FEC, Presidential Pre-Nomination Campaign Receipts Through December 31, 2008 (2009), http://www.fec.gov/pres/pres2009/20090608Pres/2_2008PresPrimaryCmpgnRcpts.pdf (reporting that Perot contributed over \$63 million to his own presidential campaign and listing Romney as having provided over \$44 million in contributions and loans to his own presidential campaign); HERBERT E. ALEXANDER & ANTHONY CORRADO, FINANCING THE 1992 ELECTION 128 (1995).

34. *Buckley*, 424 U.S. at 48–49, 54, 56.

was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.³⁵

The ironic aspect of *Buckley's* contribution-expenditure divide is that it appears a majority of Supreme Court Justices now agree it is wrong, but they disagree over whether limits on contributions and on expenditures are both constitutional or both unconstitutionally infringe on speech.³⁶ The effect of this disagreement is that it leaves the contributions-expenditure divide in place, at least for now.

Second, to avoid unconstitutional vagueness the Court narrowed the definition of what qualified as an independent expenditure to include only communications that *expressly advocated* for the election or defeat of a clearly identified candidate.³⁷ It arguably further narrowed this definition by listing examples of what came to be known as the "magic words" that would trigger express advocacy treatment.³⁸ While the FEC

35. *Id.* at 48–49 (citations omitted).

36. *See* *Randall v. Sorrell*, 548 U.S. 230, 265 (2006) (Kennedy, J., concurring) (expressing skepticism regarding *Buckley*); *id.* at 266–67 (Thomas, J., concurring) (reiterating his view that the Court erred in *Buckley* by not also holding contribution limits unconstitutional) (joined by Scalia, J.); *id.* at 274 (Stevens, J., dissenting) (disagreeing with *Buckley's* holding on expenditure limits); *id.* at 283–84 (Souter, J., dissenting) (while not explicitly disagreeing with *Buckley's* rationale, suggesting that three decades of experience might provide sufficient grounds for upholding at least some expenditure limits as constitutional) (joined by Ginsburg, J.); *see also* *Davis v. FEC*, 554 U.S. ____, 128 S. Ct. 2759, 2782–83 (2008) (Ginsburg, J., concurring in part and dissenting in part) (choosing not to join Justice Stevens criticism of *Buckley* because she "would leave reconsideration of *Buckley* for a later day and case") (joined by Breyer, J.); *Randall*, 548 U.S. at 264 (Alito, J., concurring) (neither endorsing nor criticizing *Buckley*); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409–10 (2000) (Kennedy, J., dissenting) (stating that he would overrule *Buckley* but would not necessarily find all campaign finance limitations to be unconstitutional as a result). *Cf.* Eugene Volokh, *Why Buckley v. Valeo Is Basically Right*, 34 ARIZ. ST. L.J. 1095 (2002).

37. *Buckley*, 424 U.S. at 43–44, 80.

38. *Id.* at 44 n.52 ("This construction would restrict the application of

has repeatedly sought to push the boundaries of this latter limitation, those attempts have generally been unsuccessful.³⁹ *Buckley* did not expressly apply this holding to the prohibition on independent expenditures by corporations (and unions), but the Supreme Court later made it clear that this narrowed definition of such expenditures also applies to that prohibition.⁴⁰

While *Buckley* did not directly address the FECA-imposed limits on corporate spending, two later Supreme Court decisions did. The first was *FEC v. Massachusetts Citizens for Life, Inc.*⁴¹ (*MCFL*), where a nonprofit corporation brought an as applied challenge to the application of the corporate independent expenditure prohibition.⁴² Recognizing a difference between for-profit corporations and at least some nonprofit corporations, the Court determined that the Constitution required a limited exception to the prohibition.⁴³ It concluded that a nonprofit organization like Massachusetts Citizens for Life, which was not established by and does not accept funds from business corporations and unions, does not have shareholders or other persons with a claim on its assets or earnings, does not engage in business activities, and has an explicit political agenda, had to be permitted to make independent expenditures as a constitutional matter.⁴⁴ The Court also held, however, that such corporations

[FECA] § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”).

39. See, e.g., 11 C.F.R. § 100.22(b) (2009) (defining express advocacy as including communications that “[w]hen taken as a whole and with limited reference to external events . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)”; *N.C. Right to Life v. Leake, Inc.*, 344 F.3d 418, 426 (4th Cir. 2003) (rejecting this broader definition of express advocacy as adopted by one federal appellate court and listing other federal appellate court decisions also rejecting a broader definition), *vacated on other grounds*, 541 US. 1007 (2004); see generally Trevor Potter & Kirk L. Jowers, *Speech Governed by Federal Election Laws* in THE NEW CAMPAIGN FINANCE SOURCEBOOK, 205, 213–17 (2005).

40. *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 249 (1986).

41. 479 U.S. 238 (1986).

42. *Id.* at 238.

43. *Id.* at 263–64.

44. *Id.*

are still subject to the FECA-imposed disclosure requirements imposed on those who make independent expenditures, including the filing of publicly available reports detailing both their significant sources of contributions and their expenditures.⁴⁵

These so-called MCFL corporations are likely a relatively small group in practice both because of the Supreme Court-imposed requirements and the additional requirements imposed by the FEC in its interpretation of the case. Under current FEC-issued regulations, not only must a nonprofit corporation meet the requirements described by the Supreme Court, but it must also meet two additional, arguably more stringent requirements (both of which MCFL itself apparently met).⁴⁶ First, to fall within this exception the nonprofit corporation must be tax-exempt under Internal Revenue Code section 501(c)(4), which provides exemptions for “social welfare” organizations and covers many advocacy groups such as the National Rifle Association and the Sierra Club.⁴⁷ Second, the corporation must not offer or provide any benefit, such as insurance or training programs not necessary to promoting the corporation’s political ideas, that is a disincentive to persons disassociating themselves from the organization.⁴⁸ It is therefore relatively easy to be disqualified from this status; for example, Citizens United does not fall within this status because it receives a relatively small amount of its support from business corporations.⁴⁹

Second, the Court squarely faced the issue of whether the

45. *Id.* at 262.

46. *See* 11 C.F.R. § 114.10(c) (2009).

47. *See id.* § 114.10(c)(5); PUBLIC CITIZEN, THE NEW STEALTH PACS: TRACKING 501(C) NON-PROFIT GROUPS ACTIVE IN ELECTIONS 109, 118 (2004) (identifying the National Rifle Association and the Sierra Club as Internal Revenue Code section 501(c)(4) organizations), *available at* <http://www.stealthpacs.org/documents/StealthPACs.pdf>.

48. 11 C.F.R. § 114.10(c)(3).

49. *See* Brief for the Appellee at 30, *Citizens United v. FEC*, No. 08-205 (U.S. Feb. 17, 2009) (noting that in its complaint Citizens United stated it was not an MCFL corporation because it received corporate donations and engaged in business activities); Brief for Appellant at 32–33, *Citizens United*, No. 08-205 (U.S. Jan. 8, 2009) (while arguing for application of the MCFL exception, admitting that a very small (less than one percent) of the funding for the movie at issue came from for-profit corporations and not stating to what extent for-profit corporations provided financial support to Citizens United generally).

prohibition on corporate, as opposed to individual, independent expenditures is constitutional in the first case mentioned in the Court's recent order: *Austin v. Michigan Chamber of Commerce*.⁵⁰ That case involved whether a state law prohibition on such expenditures, modeled on FECA, could survive scrutiny under the First Amendment's Freedom of Speech Clause.⁵¹ The case was further complicated by the fact that the Court had, in the interim, decided that a state law prohibition on certain corporate paid speech in connection with ballot initiative elections was unconstitutional.⁵²

In *First National Bank v. Bellotti*,⁵³ the Court held that the fact the speaker is a corporation instead of an individual was irrelevant to the constitutional free speech analysis.⁵⁴ In doing so, it took the position that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual,"⁵⁵ and that the government could not limit a corporation's speech to speech the corporation could prove had a material effect on its business or property.⁵⁶ Having found that corporate-funded speech was as deserving, at least in the ballot initiative context, as individual speech, the Court then went on to conclude that the prohibition did not sufficiently serve an important governmental interest to justify the speech restriction, because it found that there was no risk of corruption present in a vote on a public issue as opposed to a vote on candidates.⁵⁷ Only then-Justice Rehnquist disagreed with the Court's position that the type of speaker was irrelevant, and he appears to have later abandoned that position.⁵⁸

50. 494 U.S. 652 (1990).

51. *Id.* at 654–55 & n.1.

52. *Id.* at 699–700.

53. 435 U.S. 765 (1978).

54. *Id.* at 776–77.

55. *Id.* at 777.

56. *Id.* at 784.

57. *Id.* at 790.

58. *See* *McConnell v. FEC*, 540 U.S. 93, 328 (2003) (Kennedy, J., concurring in part and dissenting in part) ("Continued adherence to *Austin*, of course, cannot be justified by the corporate identity of the speaker.") (joined by

Nevertheless, in *Austin* the Court upheld the state law prohibition on corporate independent expenditures. It did so by applying what is now commonly referred to as the “non-distortion” theory: that the government has a strong interest in preventing the large accumulations of wealth made possible by the special legal benefits available to corporations—separate legal status, limited liability for owners, etc.—from distorting elections for public office.⁵⁹ The Court further supported this rationale by noting corporations generally accumulated wealth for reasons unrelated to their political positions.⁶⁰ The Court distinguished *Bellotti* on the grounds that in that case the Court only considered quid pro quo corruption and not the distorting corruption accepted as a governmental interest in *Austin*.⁶¹ Several of the Justices felt, however, that the non-distortion theory was a stretch from the prevention of corruption and the appearance of corruption rationale applied in *Buckley* and dangerously close to the equalization of speakers rationale rejected in that case.⁶² Despite these concerns, *Austin* has remained the controlling precedent for almost twenty years, subject only to the previously created *MCFL* exception.

It should be noted that corporations were, and still are, also permitted to create political committees or PACs of their own and to pay the administrative and fundraising costs of those PACs, but those PACs can only receive contributions from individuals who have certain connections to the corporation and only up to certain dollar limits per individual per election cycle.⁶³ (A

Rehnquist, C.J.); *Bellotti*, 594 U.S. at 828.

59. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). For a fascinating account of the *Austin* opinion drafting process, written by the “clerk with primary responsibility to work with Justice Marshall on this opinion,” see Elizabeth Garrett, *New Voices in Politics: Justice Marshall’s Jurisprudence on Law and Politics*, 52 HOWARD L.J. 655, 669–78 & n.70 (2009).

60. *Austin*, 494 U.S. at 659–60.

61. *Id.*

62. *Id.* at 684 (Scalia, J., dissenting) (criticizing the majority for expanding the concept of corruption); *id.* at 705–06 (Kennedy, J., dissenting) (criticizing the majority for apparently accepting that government has a legitimate interest in equalizing the relative influence of speakers) (joined by O’Connor, J. and Scalia, J.).

63. See generally FEC, CAMPAIGN GUIDE FOR CORPORATIONS AND LABOR

political committee, commonly known as a PAC, is generally an entity formed for the major purpose of influencing federal elections and that either receives at least a \$1,000 of contributions for that purpose or makes at least a \$1,000 of expenditures for that purpose.⁶⁴) This means that the funds these PACs can spend to influence federal elections, whether by making contributions to candidates or by paying for independent expenditures, cannot come from the general treasury of their affiliated corporations, but only from individuals related to the relevant corporation, such as senior executives, shareholders, and, for nonprofit corporations, members.⁶⁵

FECA, as interpreted by the Court, therefore left two significant ways for corporations to spend their general treasury funds to influence elections. First, while FECA prohibited corporate contributions to candidates and PACs, including leadership PACs, it did not reach some types of contributions to political parties: funds not raised specifically to influence federal elections.⁶⁶ Such funds, along with all other funds not subject to FECA's limitations on sources and amounts of contributions, are commonly known as "soft money;" "hard money," in contrast, is subject to those limitations and so is harder to raise.⁶⁷ The parties eventually realized they could use these soft money contributions for non-express advocacy advertising and other activities relating to federal elections but that did not fall under FECA, and that corporations generally remained free to provide these soft money contributions.⁶⁸ Second, because of the Court's

ORGANIZATIONS (2007), available at <http://www.fec.gov/pdf/colagui.pdf>.

64. See 11 C.F.R. § 100.5 (2009) (establishing the contribution and expenditure thresholds); Buckley v. Valeo, 424 U.S. 1, 79 (1976) (adding the requirement that to be classified as a political committee, an entity must either be controlled by a candidate or have "the major purpose" of nominating or electing a candidate).

65. FEC, *supra* note 63, at 5, 20–23.

66. See Corrado, *supra* note 16, at 32–33 (describing the growth of such contributions and expenditures).

67. See *id.* at 29.

68. *Id.* at 32–33; Diana Dwyre & Robin Kolodny, *National Political Parties After BCRA*, in LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 83, 84 (Michael J. Malbin ed., 2003); see also Robert G. Boatright et al., *BCRA's Impact on Interest Groups and Advocacy*

narrow express advocacy definition, corporations also remained free to spend money independently as long as such spending did not fall within that definition.⁶⁹ For example, an oft-repeated example of a communication that did not constitute express advocacy but certainly left the listener with few doubts about whether to vote for the candidate mentioned is this ad that aired shortly before a 1996 Montana congressional election:

Who is Bill Yellowtail? He preaches family values, but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks of law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.⁷⁰

While it took almost twenty years for candidates, political parties, and corporations to identify and begin to significantly utilize these channels, substantial funds eventually began to flow through these holes in the corporate spending dam, leading Congress to try to block them.⁷¹

D. Prohibiting Soft Money Contributions to Political Parties and Expenditures for "Electioneering Communications"

In 2002, six years of concerted efforts by members of Congress to place tighter restrictions on these two remaining flows of corporate money into federal elections finally bore fruit.⁷² The Bipartisan Campaign Reform Act (BCRA) prohibited corporate contributions to political parties for federal election activities (now defined broadly) and prohibited corporate funding

Organizations, in *LIFE AFTER REFORM*, *supra*, at 43, 49–51 (describing the scale and sources of soft money contributions to political parties).

69. See Boatright, *supra* note 68, at 52–56 (describing such "issue advertising" efforts).

70. *McConnell v. FEC*, 540 U.S. 93, 194 n.78 (2003).

71. See Michael J. Malbin, *Thinking about Reform*, in *LIFE AFTER REFORM*, *supra* note 68, at 3, 4–6.

72. See Anthony Corrado, *The Legislative Odyssey of BCRA*, in *LIFE AFTER REFORM*, *supra* note 68, at 21.

of some, but not all, communications relating to candidates in the days shortly before an election.⁷³ More specifically, § 203 of BCRA prohibited corporations from paying for so-called “electioneering communications”: broadcast, cable, or satellite communications that clearly identified a candidate, which aired within sixty days of the general election (thirty days for primary elections), and which reached at least 50,000 people in the relevant electorate.⁷⁴ BCRA also required disclaimers on such communications which identified the party paying for them, and public disclosure of contributions to that party and expenditures by it relating to such communications above certain dollar thresholds.⁷⁵ BCRA did not, however, reach other forms of communication, such as newspaper ads, telephone phone banks, direct mail, or Internet communications, although its supporters had originally hoped for a broader scope.⁷⁶

Numerous plaintiffs, including Citizens United, challenged the BCRA-imposed restrictions on constitutional grounds, including as violations of the First Amendment’s speech protection.⁷⁷ In *McConnell v. FEC*,⁷⁸ however, the Supreme Court upheld all of BCRA’s major provisions, including the ban on corporate contributions to political parties for federal election activity and on corporate funding of electioneering

73. Bipartisan Campaign Reform Act (BCRA) of 2002 §§ 101, 203, 116 Stat. 81, 82–86, 91–92 (codified at 2 U.S.C. §§ 431, 441b, 441i (2006)).

74. See BCRA § 201, 116 Stat. at 89-90 (codified at 2 U.S.C. § 434(f)(3) (2006)) (defining “electioneering communication”).

75. See BCRA §§ 201, 311, 116 Stat. at 88–89, 105–06 (codified at 2 U.S.C. §§ 434(f) (disclosure provisions covering contributors who contribute \$1,000 or more in aggregate and disbursements of more than \$200), 441d(a) (disclaimer provisions) (2006)).

76. See, e.g., Bipartisan Campaign Finance Reform Act of 1999, H.R. 417, 106th Cong. § 201(b)(20)(A)(iii) (1999) (expanding the definition of express advocacy to include any communication “expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events”).

77. *McConnell v. FEC*, 251 F. Supp. 2d 176, 220–21 n.55 (D.D.C. 2003) (listing the seventy-seven plaintiffs, including Citizens United), *aff’d in part, rev’d in part*, 540 U.S. 93 (2003); Supplemental Brief for the Appellee at 5, *Citizens United v. FEC*, No. 08-205 (U.S. July 24, 2009).

78. 540 U.S. 93 (2003).

communications, albeit by five-to-four votes with respect to these holdings.⁷⁹ The majority opinion finding BCRA § 203 constitutional on its face explicitly relied on *Austin* for its conclusion and *Austin*'s anti-distortion rationale.⁸⁰

As was the case with *Buckley*, *McConnell* has not been the last word with respect to the constitutionality of BCRA's provisions, and BCRA's opponents have scored two partial victories in later decisions on free speech grounds. In an as applied challenge to the § 203 corporate funding ban for electioneering communications, a nonprofit corporation convinced the Court that the First Amendment required that the definition of electioneering communications be limited. In *FEC v. Wisconsin Right to Life, Inc.*⁸¹ (*WRTL*), the principal opinion, authored by Chief Justice Roberts, held that for these purposes the prohibition could apply only to electioneering communications that were the "functional equivalent" of express advocacy in that they were not susceptible to any reasonable interpretation except as an appeal to vote for or against a specific candidate.⁸² The opinion, which Justice Alito joined, rejected a broader definition of electioneering communications, concluding that "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor."⁸³ Commentators and seven of the nine Justices have taken the view that this narrowing of the constitutionally permitted definition for electioneering communications effectively overruled *McConnell* with respect to its BCRA § 203 holding, although the principal opinion did not explicitly do so.⁸⁴ The Court did not,

79. *Id.* at 93, 142–89 (2003) (upholding the constitutionality of the soft money provisions), 203–09 (upholding the prohibition on corporate (and union) funding of electioneering communications).

80. *Id.* at 205 (quoting the non-distortion theory as stated in *Austin*).

81. 551 U.S. ___, 127 S. Ct. 2652 (2007).

82. *Id.* at 2667, 2674.

83. *Id.* at 2669 (citation omitted).

84. *Id.* at 2684 (Scalia, J., concurring) (asserting that the principal opinion effectively overrules *McConnell* without saying so) (joined by Kennedy, J. and Thomas, J.); *Id.* at 2699 (Souter, J., dissenting) (concluding that the principal opinion reaches the "unacknowledged" result of overruling *McConnell*'s holding that BCRA § 203 is facially constitutional) (joined by Stevens, J., Ginsburg, J.,

however, reach the issue of whether this narrowed definition also applied for purposes of the disclaimer and disclosure requirements imposed on persons who pay for electioneering communications, as the plaintiff had not apparently raised this issue.⁸⁵

Second, the Court struck down as unconstitutional BCRA's so-called "millionaire's amendment" that had raised the contribution limits for donations to candidates facing certain self-funded opponents.⁸⁶ In reaching this latter conclusion in *Davis v. FEC*, the Court, in an opinion written by Justice Alito, reiterated the position taken over thirty-five years earlier in *Buckley*: Equalizing the financial position of election voices is not sufficiently important to justify infringement on speech.⁸⁷ This reasoning is important, as it could be critical in the *Citizens United* case, which is the next challenge to the limitations on corporate spending with respect to federal elections to be considered by the Court.

III. *CITIZENS UNITED V. FEC*

Citizens United is a nonprofit membership corporation that is tax-exempt under Internal Revenue Code § 501(c)(4).⁸⁸ As mentioned previously, while it receives the bulk of its funding from individual donors, it also receives a relatively small amount of contributions from for-profit corporations and so does not qualify as a MCFL corporation under the existing FEC-issued regulations implementing the *MCFL* decision.⁸⁹ In 2007, Citizens United produced a 90-minute movie titled *Hillary: The Movie*, that to put it mildly, was not supportive of then-Senator

and Breyer, J.); Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in FEC v. Wis. Right to Life*, 92 MINN. L. REV. 1064, 1096–1103 (2008) (explaining why, as a practical matter, *WRTL* effectively overruled *McConnell* with respect to BCRA § 203).

85. *WRTL*, 551 U.S. ___, 127 S. Ct. at 2661 (2007).

86. *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759, 2765 (2008).

87. *Id.* at 2773–74.

88. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008) (denying motion for preliminary injunction).

89. *See supra* note 49.

Clinton's candidacy for the presidency.⁹⁰ The movie apparently did not constitute "express advocacy," however, and so could generally be funded by corporate funds.⁹¹

What brought Citizens United to court was a proposed use of the movie and planned advertisements. The proposed use was making the movie available nationwide through on-demand cable television at a time that would fall within the thirty-day pre-primary election electioneering communications window in many states.⁹² The planned advertisements, which would be broadcast on television, would also fall within one or more of the electioneering communications windows, but the FEC did not assert that these advertisements were functionally equivalent to express advocacy.⁹³ It therefore did not object to Citizens United paying for such ads, but only to Citizens United refusing to attach a disclaimer to those ads and disclosing its donors.⁹⁴ This objection arises from the FEC's position that *WRTL* did not narrow the definition of "electioneering communications" for purposes of either the disclaimer requirement or disclosure requirements.⁹⁵

A three-judge district court panel first heard Citizens United's motion for preliminary injunction—which it denied⁹⁶—

90. *Citizens United*, 530 F. Supp. 2d at 279–80 & n.12 (describing the movie's contents, quoting various excerpts, and ultimately concluding that it could not be reasonably interpreted as anything other than an appeal to vote against presidential candidate Clinton); see also Brief for Appellant, *supra* note 49, at 35–38 (arguing that the movie is not an appeal to vote, not contesting that it is critical of Hillary Clinton and noting it contains comments that are highly critical of her qualifications for the presidency).

91. While the Government has not completely conceded this point, its choice to focus solely on the argument that the movie is the functional equivalent of express advocacy under the *WRTL* test as opposed to actual express advocacy under the *Buckley* test strongly suggests the Government believes proving the movie was express advocacy would be difficult at best. See Brief for the Appellee, *supra* note 49, at 16–22 & n.6.

92. *Citizens United*, 530 F. Supp. 2d at 275.

93. *Id.* at 280.

94. *Id.*

95. Electioneering Communications, 72 Fed. Reg. 72,899, 72,901 (Dec. 26, 2007) (to be codified at 11 C.F.R. pts. 104, 114).

96. *Citizens United*, 530 F. Supp. 2d at 282 (denying Citizen United's motion for preliminary injunction).

and then cross motions for summary judgment, which it decided by granting the FEC's motion and denying Citizen United's.⁹⁷ While the timing of the summary judgment decision—July 2008—made the on-demand use and ads at issue in the case moot given then-Senator Barack Obama's nomination, the panel apparently recognized that the issues raised by Citizens United were capable of repetition and so should be addressed.⁹⁸ The panel concluded, based on its reasoning in its opinion denying the motion for preliminary injunction, that the FEC should prevail, finding that the movie was the functional equivalent of express advocacy, concluding that on-demand cable distribution was within the “broadcast, cable or satellite” communications definition of electioneering communications in BCRA as interpreted by the FEC, and agreeing with the FEC that *WRTL* did not control with respect to the disclaimer and disclosure requirements.⁹⁹ Citizens United then exercised its right to appeal the decision to the Supreme Court.¹⁰⁰

Both the parties' briefs and the briefs of the numerous amicae curiae assumed for the most part that the Court would decide the appeal on relatively narrow grounds. For example, Citizens United stated the questions presented as whether the corporate funding prohibition for electioneering communication *as applied* to the movie was constitutional and whether the disclaimer and disclosure requirements *as applied* to the advertisements were constitutional.¹⁰¹ That is, Citizens United did not explicitly challenge either the prohibition or the requirements on their face but only with respect to these specific applications. And while Citizens United did attack *Austin*, it did so using only slightly

97. *Citizens United v. FEC*, No. 07-2240, Mem. Op. at 1 (D.D.C. July 18, 2008) (granting FEC's motion for summary judgment).

98. See Brief for Appellee, *supra* note 49, at 14 n.3 (agreeing that the appeal is not moot); see also *WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2662–64 (2007) (discussing why the Court concluded the case fell within the disputes capable of repetition exception to mootness).

99. See *Citizens United*, No. 07-2240, *supra* note 97, at 1 (incorporating the reasoning of its prior opinion denying Citizens United's motion for preliminary injunction); *Citizens United v. FEC*, 530 F. Supp. 2d 274, 277 n.6, 280–81 (D.D.C. 2008).

100. See BCRA § 403(a)(3), 116 Stat. 81, 114 (2002).

101. Brief for Appellant, *supra* note 49, at i.

more than a page of its opening brief.¹⁰² The Government's brief was similarly limited, only briefly responding to the attack on *Austin* and taking the *McConnell* decision with respect to corporate funding of electioneering communications as a given, while focusing primarily on the as applied challenges to BCRA's applicability in this specific context.¹⁰³ As for the thirteen amici curiae briefs, eleven of which supported one or more aspects of Citizens United's case, only two criticized the holding in *Austin* and then did so only in passing.¹⁰⁴

It was therefore reasonable for most observers to conclude that while *Austin* was in theory on the table, even a decision in Citizens United's favor would likely turn on narrower issues.¹⁰⁵ In the wake of the oral argument, however, the Court had a different view, ordering re-argument and supplemental briefing on the continued validity of both *McConnell's* holding with respect to BCRA § 203 and *Austin*. Thus, the Court set the stage for striking down on free speech grounds the over sixty-year-old ban on corporate funding of independent expenditures or, less dramatically but still significantly, striking down the more recent ban on corporate funding of electioneering communications that the Court had found constitutional only six years earlier.¹⁰⁶ The next part discusses what the Court may in fact choose to do.

IV. WILL THE COURT OVERRULE *AUSTIN* OR (IN PART) *MCCONNELL*?

As the above summary indicates, *Citizens United* presents a host of legal issues and a similarly large number of paths that the Court could take to resolve the question it posed on June

102. *Id.* at 30–31.

103. *See* Brief for the Appellee, *supra* note 49, at 33–36.

104. *See* Brief of the American Civil Rights Union as Amicus Curiae Supporting Appellant at 19, *Citizens United v. FEC*, No. 08-205 (U.S. Jan. 15, 2009) (criticizing the holding in *Austin* in a single paragraph); Brief of Chamber of Commerce of the United States as Amicus Curiae Supporting Appellant at 24–25, *Citizens United*, No. 08-205 (U.S. Jan. 15, 2009) (arguing, in a little over a page and in its second-to-last point, that *Austin* should be overruled or at least not extended).

105. *See supra* note 2.

106. *See* Order in Pending Case, *supra* note 7.

29th. It therefore is helpful to first set aside the possible but, given its actions to date and the known positions of its various members with respect to campaign finance issues, unlikely ways that the Court could rule.

A. Avoiding the Issue

First, the Court could decide the case—whether for appellant Citizens United or appellee FEC—on relatively narrow, technical grounds that leave the fundamental structure of the nation’s campaign finance laws unchanged. For example, the Court could conclude that a ninety-minute long movie that is only available on demand is not the kind of cable communication that Congress intended to bar corporations from funding under BCRA § 203. Such a result would be consistent with the general statutory interpretation canon of constitutional avoidance.¹⁰⁷ Alternatively, the Court could conclude that regardless of Congress’s intent, BCRA § 203 cannot constitutionally be applied to this type of communication.¹⁰⁸ Or the Court could instead incrementally expand the *MCFL* exception to include ideological nonprofit corporations that receive only a relatively small portion of their support from business corporations or to permit such entities to pay for such communications up to the amount of their donations from individuals and leave the larger question of *Austin*’s continued viability with respect to for-profit corporations for another day, as urged by several amici and commentators.¹⁰⁹

107. See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. ___, 129 S. Ct. 2504, 2513 (2009) (relying on the principle of constitutional avoidance); see generally Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance on the Roberts Court*, 4–10 (Loyola-LA Legal Studies Paper, Working Paper No. 2009-23, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1436669.

108. See Brief for Appellant, *supra* note 49, at 22–29 (arguing that BCRA § 203 is unconstitutional as applied to a feature-length movie that is only available on demand).

109. Supplemental Brief for The American Civil Rights Union as Amicus Curiae Supporting Appellant at 2–3, *Citizens United*, No. 08-205 (U.S. July 31, 2009); Brief of California First Amendment Coalition as Amicus Curiae Supporting Appellant at 2, *Citizens United*, No. 08-205 (U.S. July 31, 2009); Brief of Independent Sector as Amicus Curiae Supporting Neither Party at 11–13, *Citizens United*, No. 08-205 (U.S. July 31, 2009); Brief of National Rifle

The Government in fact argues that the Court must decide the case on one of these narrow grounds because, even with supplemental briefing, the validity of these precedents is not properly before the Court at this time because of the limited scope of the questions Citizens United presented in both its jurisdictional statement and initial brief.¹¹⁰ This result seems unlikely since the Court could have decided the case on such narrow grounds without ordering re-argument and supplemental briefing if it was so inclined or felt it had no choice but to do so.¹¹¹ That conclusion is reinforced by the fact that it appears such an order required the support of a majority of the Court, indicating that a majority of the Court is interested in reaching the more foundational issues raised by the precedents listed in the order.¹¹²

B. The Known and Possible Views of the Justices

It is therefore more likely that the Court will choose to address the continuing validity of *Austin* and the applicable part

Association as Amicus Curiae Supporting Appellant at 2–3, *Citizens United*, No. 08-205 (U.S. July 31, 2009); Stuart Taylor Jr., *The Justices Should Excise the Unconstitutional Wellstone Amendment While Leaving the Restrictions on Business Corporations and Unions Intact*, THE NATIONAL JOURNAL, July 11, 2009; Kausfiles Blog, <http://www.slate.com/blogs/blogs/kausfiles> (June 30, 2009, 19:17 EDT); see also Brief of the American Civil Liberties Union as Amicus Curiae in Support of Appellant at 18–19, *Citizens United*, No. 08-205 (U.S. July 31, 2009) (urging the Court, in the alternative, to expand the *MCFL* exception if the Court does not overrule *Austin* entirely).

110. Supplemental Brief for Appellee at 3–5, *Citizens United*, No. 08-205 (U.S. July 24, 2009); see also *supra* note 101 and accompanying text (describing the questions presented by *Citizens United*).

111. See Richard L. Hasen, *Free Speech v. Campaign Finance Laws: The Reargument*, 36 PREVIEW U. S. SUP. CT. CAS. 472 (2009) (making this point).

112. This conclusion is based on the assumption that unless otherwise stated in the Rules of the Supreme Court, consent of a majority of the Court is needed to issue orders. There is, however, apparently a confidential internal handbook of procedures that could provide a different rule. See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 272–73 (2009) (stating that the number of votes at conference required to call for the views of the Solicitor General is reportedly listed in this handbook, and public reports state that only four or possibly three votes are required).

of *McConnell* directly. With respect to these two topics, we have strong evidence regarding the views of most, but not all, of the Justices. Three Justices—Stevens, Ginsburg, and Breyer—continue to agree with the reasoning of *Austin* and that the existing limitations on corporate spending are constitutional.¹¹³ Three other Justices—Scalia, Kennedy, and Thomas—have flatly and repeatedly stated that the Court incorrectly decided both *Austin* and the relevant portion *McConnell*.¹¹⁴ Unless one or more of these Justices change their views, the views of the three most recently appointed Justices will likely decide this case.

Starting with Chief Justice Roberts, in *WRTL* he discussed the rationales that supported the conclusions in *Austin* and *McConnell* relating to corporate funding of express advocacy and the functional equivalent of express advocacy, but appeared only to accept those rationales as a given while refusing to extend them to communications that fall outside of these categories because such communications could be reasonably interpreted as having a purpose other than to influence the election of the identified candidate.¹¹⁵ He also carefully noted in *WRTL* that the

113. See, e.g., *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759, 2781 (2008) (Stevens, J., concurring) (citing *Austin* with approval) (joined by Souter, J., Ginsburg, J., and Breyer, J.); *WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2689 (2007) (Souter, J., dissenting) (citing *Austin* with approval) (joined by Stevens, J., Ginsburg, J., and Breyer, J.); *id.* at 2692 (distinguishing *Austin* from *Bellotti*); *McConnell v. FEC*, 540 U.S. 93, 205 (2003) (opinion by Stevens, J. and O'Connor, J.) (citing *Austin* with approval and in support of finding BCRA § 203 constitutional on its face) (joined by Souter, J., Ginsburg, J., and Breyer, J.); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring).

114. *WRTL*, 551 U.S. ___, 127 S. Ct. at 2679 (“*Austin* was a significant departure from ancient First Amendment principles. In my view, it was wrongly decided.”); *id.* at 2684 (Scalia, J., concurring) (“Today’s cases make it apparent . . . that *McConnell*’s holding concerning § 203 was wrong.”) (joined by Kennedy, J., and Thomas, J.); *McConnell*, 540 U.S. at 273–75 (Thomas, J., concurring in part and dissenting in part) (arguing BCRA § 203 is unconstitutional and that “I would overturn *Austin*”) (joined by Scalia, J.); *id.* at 323 (Kennedy, J., concurring in part and dissenting in part) (arguing BCRA § 203 is unconstitutional and stating “[i]nstead of extending *Austin* . . . I would overrule it”) (joined by Scalia, J.); *Austin*, 494 U.S. at 695–713 (Kennedy, J., dissenting) (joined by O’Connor, J. and Scalia, J.).

115. *WRTL*, 551 U.S. ___, 127 S. Ct. at 2071–74.

Court had “no occasion to revisit” the *McConnell* holding.¹¹⁶ Similarly, Justice Alito, while also being careful not to speak directly to the correctness of *Austin* or *McConnell*, raised in his *WRTL* concurrence the possibility that even the relatively narrow definition of electioneering communications established in that case might “impermissibly chill[] political speech” which would lead to the Court “presumably be[ing] asked in a future case to reconsider the holding in [*McConnell*] that [BCRA] § 203 is facially constitutional.”¹¹⁷ Justice Alito further stated, in the opinion for the Court in the *Davis* “millionaire’s amendment” case joined by Chief Justice Roberts, that providing “level electoral opportunities for candidates of different personal wealth” and reducing “*the natural advantage* that wealthy individuals possess in campaigns for federal office” are not legitimate government objectives, much less ones sufficiently important to justify restricting speech.¹¹⁸ The care taken to avoid commenting on the correctness of the *Austin* and *McConnell* decisions, combined with the skepticism of Justice Alito’s opinion in *Davis* about reducing wealth-driven inequalities in politics being even a legitimate government interest, suggest that both these members of the Court would be skeptical of claims based upon the reasoning in *Austin* and the portion of *McConnell* addressing BCRA § 203.

The position of Justice Sotomayor is less clear. She, not surprisingly, refused to address specific campaign finance issues, particularly relating to the *Citizens United* case, during her recent confirmation hearings.¹¹⁹ As a judge, she was involved in relatively few election law cases, only one of which squarely involved campaign finance issues, and in that case only as one of

116. *Id.* at 2674.

117. *Id.* (Alito, J., concurring).

118. *Davis*, 554 U.S. ___, 128 S. Ct. at 2773.

119. *See, e.g.*, The Nomination of Sonia Sotomayor to be an Associate of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (2009), available at <http://www.nytimes.com/2009/07/15/us/politics/15confirm-text.html> (follow “Russ Feingold” hyperlink) (exchange with Senator Russ Feingold in which Judge Sotomayor declined to answer questions about the *Citizens United* case).

many judges voting to refuse en banc consideration.¹²⁰ While the effect of that vote was to leave in place Vermont's relatively strict campaign finance law limitations—limitations the Supreme Court ultimately ruled were unconstitutional infringements on speech¹²¹—it would be unwise to read too much into what was on its face a procedural, not a substantive, vote.¹²² Judge Sotomayor also served on the New York City Campaign Finance Board from 1988 through 1992, but since the opinions issued by that body were both highly dependent on local law and, for the most part, issued by the Board as a whole, little can be drawn from the Board's materials.¹²³ Perhaps the most telling piece of evidence is her questioning of whether the amount of private money in election campaigns is unduly influencing elected officials in a speech later published in a law review, but even that statement is from more than a dozen years ago and was a small part of a much broader discussion.¹²⁴ So while it appears, as most observers predict, that she will in general be to the "center-left" when it comes to election law issues, i.e., not necessarily dissimilar from now retired Justice Souter, that prediction is in

120. See Election Law Blog, <http://electionlawblog.org> (May 27, 2009, 22:05 PDT) (analyzing these cases).

121. *Randall v. Sorrell*, 548 U.S. 230 (2006).

122. See *Landell v. Sorrell*, 406 F.3d 159, 165–67 (2d Cir. 2005) (Sack, J. and Katzmann, J., concurring in decision to deny rehearing en banc) (stating the issue is not whether the panel majority or the dissent was right but whether the decision was of "exceptional importance" that justified the extraordinary step of an en banc rehearing, and whether such a rehearing would be a significant aid to the Supreme Court in the event it decided to consider the case) (joined by Sotomayor, J. and Parker, J.).

123. At least some commentators have tried with mixed results. Compare Charlie Savage, *A Long Record on Campaign Finance, Often in Support of Regulations*, N.Y. TIMES, May 30, 2009, at A8 (analyzing her views on campaign finance laws and attempting to draw conclusions from the limited public information about her role on the Board), and Posting of Kenneth P. Vogel to POLITICO, <http://dyn.politico.com> (May 28, 2009, 19:40 EDT) (same in post titled "Sotomayor no fan of campaign cash"), with Posting of Charlie Savage to The Caucus, <http://thecaucus.blogs.nytimes.com> (July 13, 2009, 21:15 EDT) (based on additional materials from the Board, noting that Sotomayor defended an interpretation of the law based on its plain meaning even in the face of objections that it would undermine campaign spending limits).

124. See Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 42 (1996).

many ways an educated guess.¹²⁵

So that leaves the Court with three *Austin* and *McConnell* supporters, three *Austin* and *McConnell* opponents, one possible additional supporter, and two probable additional opponents. Does this necessarily mean that both *Austin* and the relevant portion of *McConnell* are doomed? The answer to that question depends on whether one of the probable opponents, who have not as of yet flatly stated they would overrule *Austin* or *McConnell*, can be convinced there is a valid rationale for supporting the continued validity of those cases. There are several candidates for such a rationale, but the most persuasive for the probable opponents is ironically at risk of being undermined by some *Austin* and *McConnell* supporters: the doctrine of stare decisis. But first I will consider the other rationales.

C. Grounds for Upholding *Austin* and *McConnell*

The most obvious candidate, but also probably the least convincing one for the probable opponents, is the non-distortion theory asserted in *Austin* and relied upon in *McConnell*.¹²⁶ Both Chief Justice Roberts and Justice Alito have been careful not to directly criticize this theory, but both have limited its application and given other indications that they do not favor it.¹²⁷ In *WRTL*, Chief Justice Roberts, joined by Justice Alito, acknowledged this theory but refused to apply it to communications that were not considered either express advocacy or the functional equivalent of express advocacy under

125. See *supra* notes 120 & 123.

126. See *supra* notes 59, 80 and accompanying text.

127. In contrast, Justices Stevens, Ginsburg, and Breyer have not only endorsed it but indicated support for its extension. See *supra* note 113; *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759, 2781 (Stevens, J., dissenting) (“There is no reason that . . . concerns about the corrosive and distorting effects of wealth on our political process . . . is not equally applicable in the context of individual wealth.”) (joined by Souter, J., Ginsburg, J., and Breyer, J.) (2007); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (Breyer, J., concurring) (citing the goal of “democratiz[ing] the influence that money itself may bring to bear upon the electoral process” as justifying contribution limits that infringed on speech) (joined by Ginsburg, J.) (2000).

that decision's relatively narrow definition of the latter term.¹²⁸ Similarly, Justice Alito, writing for the Court in *Davis*, refused to accept equalization of financial influence as a legitimate, much less compelling, governmental interest, citing Justice Kennedy's dissent in *Austin* as supporting that conclusion.¹²⁹ Moreover, both Justices also appear favorably inclined to the view that "corruption" for these purposes refers only to a quid pro quo arrangement, which is certainly the view of Justices Kennedy, Scalia, and Thomas.¹³⁰ In the *Davis* opinion joined by Chief Justice Roberts, Justice Alito cited with approval the earlier statement of Justice Thomas that "[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."¹³¹ Finally, Justice Alito has indicated a reluctance to permit relatively vague governmental interests to be the grounds for infringing on speech even in the special context of public schools.¹³² Likely for some or all of these reasons, the Government has chosen not to rely on the non-distortion theory in its supplemental brief but to instead argue that corporate spending on election-related communications in fact creates a significant risk of actual or perceived quid pro quo corruption.¹³³

The problem with the quid pro quo corruption approach is that it requires accepting the proposition that even truly independent activity—assuming that the new coordination rules enacted in the wake of BCRA in fact ensure that such activity is

128. *FEC v. WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2672–73 (2007).

129. *Davis*, 554 U.S. at ___, 128 S. Ct. at 2773.

130. *See WRTL*, 551 U.S. ___, 127 S. Ct. at 2671–72 (principal opinion) (characterizing this interest as "the quid-pro-quo corruption interest"); *id.* at 2676 (Scalia, J., concurring) (taking the position that the corruption referred to in *Buckley* "was of the 'quid pro quo' variety, whereby an individual or entity makes a contribution or expenditure in exchange for some action by an official") (joined by Kennedy, J., and Thomas, J.).

131. *Davis*, 554 U.S. at ___, 128 S. Ct. at 2773 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 428 (2008) (Thomas, J., dissenting)).

132. *Morse v. Frederick*, 551 U.S. ___, 127 S. Ct. 2618, 2636–37 (2007) (Alito, J., concurring).

133. Supplemental Brief for the Appellee, *supra* note 110, at 8–12; *see also* Supplemental Reply Brief for Appellant at 1, *Citizens United v. FEC*, No. 08-205 (U.S. Aug. 19, 2009) (highlighting this aspect of the Government's brief).

not coordinated in any way with candidates or political parties¹³⁴—raises a sufficient risk of actual or perceived quid pro quo arrangements. This is an argument that appears only to have been explicitly agreed to by one Justice to date, Justice Stevens.¹³⁵ There is, however, some evidence of such a risk in the legislative history of BCRA, at least with respect to corporate independent activities.¹³⁶ The certain opponents implicitly rejected the sufficiency of this evidence, however, when they dissented in *McConnell*, and there is no indication that the probable opponents will be more open to it.¹³⁷ The Government recognizes this concern in its brief by suggesting that if the Court finds that previously gathered evidence insufficient, the proper resolution is a remand to the district court for discovery on this point.¹³⁸ Such a result seems unlikely, however, given the apparent interest of a majority of the Court in resolving these constitutional issues now (i.e., before the start of the next federal election primary season), as indicated by the scheduling of reargument for September 9, 2009, before the usual October start date for the Supreme Court's Term.¹³⁹

The quid pro quo approach also, like the non-distortion approach in *Austin*, requires that the Court be willing to distinguish between individual speakers—whom *Buckley* held Congress could not limit even with respect to their independent

134. See *supra* note 13 and accompanying text.

135. See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring); see also *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (stating that independent expenditures are significantly less likely than contributions to be provided as a quid pro quo for improper commitments from a candidate); Supplemental Reply Brief for the Appellee 8–9, *Citizens United*, No. 08-205 (U.S. Aug. 2009) (arguing this statement from *Buckley* does not apply to “modern business corporations”).

136. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 555–60, 622–24 (D.D.C. 2003) (Kollar-Kotelly, J., concurring in part and dissenting in part) (reviewing this legislative history), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003).

137. *McConnell*, 540 U.S. at 259 (Scalia, J., concurring in part and dissenting in part); *id.* at 273–75 (Thomas, J., concurring in part and dissenting in part); *id.* at 323 (Kennedy, J., concurring in part and dissenting in part).

138. Supplemental Brief for the Appellee, *supra* note 110, at 11–12.

139. See Order in Pending Case, *supra* note 7 (scheduling reargument for Sept. 9, 2009).

expenditures for express advocacy¹⁴⁰—and corporate speakers. In other words, as Richard Pildes has commented, perhaps the way to resolve this case is to reject applying to the candidate-election context *Bellotti's* conclusion that the identity of the speaker is irrelevant.¹⁴¹ Pildes notes that existing law already makes this distinction in another way: foreign nationals who are not permanent residents cannot make contributions to candidates or fund their own independent expenditures.¹⁴² While these restrictions on foreign nationals have not been subject to constitutional challenge, if it is assumed they would be upheld the most likely rationale for doing so would be that the identity of the speaker does matter for constitutional purposes in the candidate-election context, even if it does not in *Bellotti's* ballot initiative election context.¹⁴³ If that is the case, then it is plausible to at least consider whether the fact that the speaker is an individual or a corporation should also matter, given the different characteristics inherent in these two types of entities.¹⁴⁴

In *Austin*, the Court found that the legal advantages corporations enjoy—"limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets"—give corporations a political advantage over individuals, particularly since the accumulation of wealth aided by these advantages is "not an indication of popular support for the corporation's political idea."¹⁴⁵ In the Court's view, it was this

140. See *supra* note 33 and accompanying text. Despite the skepticism of perhaps a majority of the Court toward the *Buckley* contribution-expenditure divide, see *supra* note 36, *Buckley's* continued viability is not at issue in *Citizens United*.

141. See Posting of Rick Pildes to Election Law Blog, http://electionlawblog.org/archives/2009_07.html (July 8, 2009, 8:25 PDT) (guest post by Rick Pildes, cited with permission).

142. *Id.*; see also 2 U.S.C. § 441e (2006).

143. See 2 U.S.C.A. § 441e (West 2009), Notes of Decisions (not listing any constitutional challenges to the prohibition on campaign contributions and independent expenditures by non-resident foreign nationals).

144. See *infra* notes 145–46, 154 and accompanying text; *supra* note 44 and accompanying text.

145. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658–59 (1990) (citation omitted). For a discussion of the more fundamental views of corporations that are arguably implicit in the positions of the various Justices in *Bellotti* and *Austin*, see Charles D. Watts, Jr., *Corporate Legal Theory Under*

aspect of corporations that lead to the risk of “a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth,” the prevention of which provides a sufficiently important governmental interest to justify the prohibition on corporate independent expenditures.¹⁴⁶ It could similarly be argued the same distinctive, corporate characteristics create a risk of quid pro quo corruption or appearance of such corruption that does not exist with individuals who pay for express advocacy or its functional equivalent. While it would be hyperbole to say *all* for-profit corporations share this risk—there are, of course, many unsuccessful corporations—it is a plausible argument that the tendency for such corruption or at least the appearance of such corruption is significantly greater for corporations as compared to for individuals generally. As for nonprofit corporations that likely do not share these for-profit corporation characteristics, the Court has already exempted some of them in the *MCFL* case and could, as some have urged, expand that exemption at least for nonprofit corporations that create little risk of serving as conduits for for-profit corporation spending.¹⁴⁷

If the Court were writing on a blank slate, this is a potentially convincing rationale that might sway one or both of the probable opponents. Any hope *Austin* supporters might have for this result is foreclosed, however, by the continued vitality of *Bellotti*. Neither Chief Justice Roberts nor Justice Alito seems inclined to question *Bellotti*. In *WRTL*, Roberts stated “[a]ccepting the notion that a ban on campaign speech could also embrace issue advocacy would call into question our holding in *Bellotti* that the corporate identity of a speaker does not strip corporations of all free speech rights.”¹⁴⁸ And in *Davis*, Justice Alito cited *Bellotti* favorably with respect to its statements

the First Amendment: Bellotti and Austin, 46 U. MIAMI L. REV. 317, 362 (1991). For the sake of brevity, this Article does not discuss the related but separate issue of the exception for news stories and other media communications, including such communications paid for by media corporations. See 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i) (2006).

146. *Austin*, 494 U.S. at 660.

147. See *supra* note 109 and accompanying text.

148. *WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2673 (2007).

holding that the government generally cannot choose what speakers are permissible and what speakers are not.¹⁴⁹

It is true that the Court in *Bellotti* carefully noted that its decision did not reach the prohibition on both corporate campaign contributions and corporate independent expenditures also contained in the statute at issue but not challenged by the appellants.¹⁵⁰ The Court's basis for distinguishing that prohibition was, however, merely that

our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.¹⁵¹

For reasons already discussed, the evidence Congress has been able to muster is unlikely to be persuasive to a majority of the Court, nor is that majority likely to be open to waiting on the accumulation of more such evidence.¹⁵²

While it could also be argued—and the Government does in fact argue¹⁵³—that investors in for-profit corporations do not, at least usually, invest because of the political stands of a for-profit corporation and so are at risk of having their funds “hijacked” for a political activity not of their choosing, the Court in *Bellotti*

149. *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759, 2773–74 (2008).

150. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 787–88 & n.26 (1978). *But see* JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* 185–88 (2003) (supporting limits on corporate spending with respect to elections but concluding that *Bellotti* is probably inconsistent with such limits even for candidate elections).

151. *Bellotti*, 435 U.S. at 788 n.26 (citations omitted).

152. *See supra* notes 136–39 and accompanying text; *WRTL*, 551 U.S. ___, 127 S. Ct. at 2678 n.4 (Scalia, J., dissenting) (rejecting reliance on this footnote in *Bellotti* by stating “[n]o one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as *coordinated* expenditures”). It appears, however, that Justice Stevens does seriously believe exactly this. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring).

153. Supplemental Reply Brief for the Appellee, *supra* note 135, at 7–8; Supplemental Brief for the Appellee, *supra* note 110, at 12–13.

rejected such concerns because it found the prohibition at issue in that case both under- and over-protected shareholders.¹⁵⁴ The same criticism applies to the prohibitions at issue in the current case: many potentially objectionable political expenditures are not covered by the prohibitions—e.g., communications that are the functional equivalent of express advocacy but are not covered by BCRA § 203 because they are made through media other than broadcast, cable, or satellite communications—while a corporation with politically united shareholders who authorized the corporate electioneering communication or express advocacy would still be prohibited from paying for such communications.¹⁵⁵ Finally as noted previously, the different treatment of foreign nationals who are not permanent residents has never been tested in court (and may be constitutionally permitted for reasons that are not applicable to corporations even if it were so tested), and the sole dissenter from *Bellotti*'s reasoning that the identity of the speaker is irrelevant appears to have later abandoned that view (and is no longer on the Court).¹⁵⁶ And unlike *Austin*, none of the current Justices appears to have ever questioned the reasoning of *Bellotti*, only whether that reasoning applies in the candidate-election context.¹⁵⁷ For all of these reasons, therefore, it appears unlikely that this argument will win the day.

Is there another rationale that has not yet been considered by the Court for distinguishing corporations from individuals that could support the holdings if not the reasoning in *McConnell*

154. *Bellotti*, 435 U.S. at 793–94. *But see* *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (citing this reason as supporting the ban on corporate campaign contributions).

155. This reasoning parallels the reasoning provided in *Bellotti*.

156. *See supra* note 58 and accompanying text; *supra* notes 142–43.

157. *See, e.g., WRTL*, 551 U.S. at ___, 127 S. Ct. at 2673; *see also* *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2759, 2773–74 (2008) (showing instances where Chief Justice Roberts and Justice Alito cited *Bellotti* favorably); *WRTL*, 551 U.S. ___, 128 S. Ct. at 2677 (Scalia, J., dissenting) (citing *Bellotti* favorably); *id.* at 2692 n.7 (Souter, J., dissenting) (distinguishing *Bellotti* from *Austin* on the grounds that *Austin* applied to the candidate-election, but not suggesting that the Court wrongly decided *Bellotti*). Some scholars have, however, asserted that *Bellotti* is out-of-line with both the First Amendment and the Court's previous cases and so should be overruled. *See, e.g.,* RASKIN, *supra* note 150, at 186–94; Adam Winkler, *McConnell v. FEC, Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 *ELECTION L.J.* 361 (2004).

and *Austin*? It could be argued that another ground for making this distinction is that, unlike individuals, corporations are not voters and so have no inherent right to influence elections. The main problems with this argument are that it both runs contrary to the holding in *Bellotti* given that corporations have no more right to vote for ballot initiatives than for candidates. It thus appears unlikely that this voter-based argument would be persuasive to a majority of the Court.

Even if, as it appears likely, there are five Justices who reject the non-distortion rationale for treating corporate speakers differently from individual speakers, the Government's quid pro quo corruption rationale for doing the same, and other grounds for treating corporate speakers differently from individual speakers, there is one remaining argument for at least leaving *Austin*, however. That rationale is the doctrine of stare decisis.

D. Stare Decisis

Stated briefly, the doctrine of stare decisis provides that courts should follow their own, previous decisions unless there are sufficient reasons to do otherwise.¹⁵⁸ Reasons for the doctrine include that it “promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”¹⁵⁹ Relevant considerations include not only the correctness of the previous case's reasoning, but its age, the reliance interests at stake, and the workability of the decision in practice.¹⁶⁰ Other valid considerations include whether there has been an important change in circumstances, whether the decision has been undermined by later decisions, and whether constitutional issues are at stake.¹⁶¹ Applying the

158. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), stating that even when constitutional rights are at issue a departure from precedent requires some “special justification” (citation omitted)).

159. See *Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (citations omitted) (2006).

160. See *Montejo v. Louisiana*, 556 U.S. ___, 129 S. Ct. 2079, 2088–89 (2009).

161. See *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct. 1710, 1728 (2009) (Alito,

doctrine can be difficult, however, because, perhaps not surprisingly, not only do the Justices often disagree over the strength of the underlying facts relating to each of these considerations in a given case but also with respect to the relative weight to be accorded each of the considerations.¹⁶² Furthermore, none of the three certain opponents is likely to be swayed by a stare decisis argument given each has already clearly taken the position that *Austin* and the relevant portion of *McConnell* should be overruled.¹⁶³

That said, there is reason to believe that at least Justice Alito could be swayed by a stare decisis argument. In a recent search and seizure case, Justice Alito wrote an extensive dissent chiding the majority for failing to respect past precedent and carefully walking through the relevant factors for applying stare decisis.¹⁶⁴ He also criticized some of his colleagues for their alleged selective use of stare decisis when they chose to rely on it in a later case (involving criminal procedure) even though they had rejected its application in the earlier search and seizure case.¹⁶⁵ At the same time, he criticized Justice Scalia's "narrow view" of stare decisis in the earlier case.¹⁶⁶ That view was essentially that bad reasoning leading to incorrect results is by itself sufficient grounds for overruling precedent.¹⁶⁷ Assuming, as these opinions

J., dissenting).

162. For the most recent examples of sharp disagreements between the Justices regarding the applicability of stare decisis, see the various opinions in *Montejo*, 556 U.S. ___, 129 S. Ct. 2079, and *Gant*, 556 U.S. ___, 129 S.Ct. 1710.

163. *Supra* note 114; *see also* *WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2685-86 (2007) (Scalia, J., concurring) (concluding that stare decisis considerations are not sufficient to justify leaving *McConnell's* holding with respect to BCRA § 203 in place) (joined by Kennedy, J., and Thomas, J.).

164. *Gant*, 556 U.S. ___, 129 S. Ct. at 1726-32 (Alito, J., dissenting).

165. *Montejo*, 556 U.S. ___, 129 S. Ct. at 2093-94 (Alito, J., concurring). Justice Alito's position in this case appears to be that contrary to the dissent's assertions, the Court did in fact correctly determine that stare decisis should not control. *See id.* at 2088-91 (majority opinion) (explaining why stare decisis does not require upholding the precedent under discussion) (joined by Alito, J.).

166. *Id.* at 2093.

167. *Gant*, 556 U.S. ___, 129 S. Ct. at 1725 (Scalia, J., concurring) (stating in the face of Justice Alito's appeal to stare decisis, stating that there is "ample reason" to abandon prior precedent when "the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results"); *see also* *Morse v. Frederick*, 551 U.S. ___, 127 S. Ct. 2618, 2634-36 (2007) (Thomas, J.,

indicate, that Justice Alito is likely to give serious consideration to stare decisis and not likely to accept the position that poor reasoning is by itself sufficient grounds to overrule a precedent, the question is then whether application of that doctrine will garner his critical fifth vote to uphold either *Austin* or *McConnell*.¹⁶⁸

With respect to overturning *Austin*, four factors militate towards upholding it: (1) the age of *Austin* and the law it supports, which is traceable back over 60 years; (2) the fact that political actors have adjusted their behavior due to the law in *Austin*;¹⁶⁹ (3) the fact that *Bellotti*, which seemingly cuts against *Austin*, was decided prior to *Austin* and therefore does not impact *Austin*'s authority; and (4) the fact that there have been no changes in the relevant circumstances that would warrant a review of *Austin*'s justification even if one believes its reasoning is correct (as Justice Alito likely does¹⁷⁰). The other commonly considered stare decisis factor is reliance, and it is less clear how that factor cuts. It could be argued that given the ever-changing political (and indeed campaign finance law) landscape election-participants and corporations could easily adjust their activities in the next round of elections to reflect an overruling of *Austin*. It could and in fact has been argued, however, that not only have election-participants made plans based on the continued viability of *Austin* but both Congress and the state legislatures that have enacted bans on corporate funding of independent expenditures have structured their campaign finance laws at least in part in reliance on *Austin* being good

concurring) (appearing to suggest that the longstanding student free speech precedent of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) should be overruled simply because it is wrong).

168. Assuming Justice Sotomayor votes to uphold these decisions, as seems likely. *See supra* note 120, 123 and accompanying text. Such serious consideration does not, of course, guarantee that precedent will be upheld. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. ___, 129 S. Ct. 808, 816–18 (2009) (Justice Alito, writing for a unanimous Court, concluding after consideration of stare decisis that a precedent should be overruled because of a lack of reliance, inconsistent application by the lower courts, and repeated criticism from members of the Court.).

169. *See infra* note 175.

170. *See supra* note 118 and accompanying text.

law.¹⁷¹ Given this at least modest amount of reliance, as well as the other considerations already cited, there therefore appears to be a reasonably strong argument for upholding *Austin* on stare decisis grounds.

As Ned Foley has pointed out, however, the application of the doctrine to defend *Austin* is complicated not only by the fact that a constitutional interpretation is at issue—which tends to weaken the case for observing stare decisis¹⁷²—but also by the fact that unlike many other Supreme Court precedents that affect only a relatively narrow range of activities, campaign finance precedents such as *Austin* potentially implicate the very functioning of our democratic system.¹⁷³ The constitutional harm from leaving an erroneous *Austin* decision in place is therefore, at least potentially, substantial in way that leaving other erroneous precedents in place may not be.¹⁷⁴ But there are strong reasons to conclude that potential has not been realized.

First, it is important to remember that the existing prohibition on corporate funding of independent expenditures and electioneering communications only reaches a relatively narrow range of election-related activities (although the potential amount of affected speech may be large in an absolute sense). As Congress documented while considering BCRA, many apparently effective election-related communications are not considered express advocacy and so, prior to BCRA, could still be funded by corporations.¹⁷⁵ While BCRA forbids corporate (and union)

171. Several of the amicus curiae briefs supporting *Austin* make similar points. See, e.g., Brief of Campaign Legal Center et al. as Amici Curiae at 19-22, *Citizens United v. FEC*, No. 08-205 (U.S. July 31, 2009); Supplemental Brief of Senator John McCain, *supra* note 25, at 4-7.; Brief of the States of Montana, et al. at 5-13, *Citizens United*, No. 08-205 (U.S. July 31, 2009). But see Suppl. Brief of Cato Institute as Amicus Curiae at 17-20, *Citizens United*, No. 08-205 (U.S. July 31, 2009) (arguing against the application of stare decisis).

172. See *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

173. See Edward B. Foley, *Citizens United, Stare Decisis, and Democracy*, FREE & FAIR, July 31, 2009, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=6631>.

174. Some might disagree with Foley's use of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), as one example of upholding precedent that only relates to a narrow field of social policy. See Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003).

175. See *McConnell v. FEC*, 251 F. Supp. 2d 176, 526-32 (D.D.C. 2003)

funding of some of those communications, it only reached certain specific broadcast, cable, and satellite communications, not communications through other media, and not communications outside of the relevant time windows.¹⁷⁶ And the reach of BCRA was further limited by the *WRTL* decision.¹⁷⁷ Therefore, there appears to still be a relatively broad range of election-related communications that corporations can, and in fact have, funded even with the *Austin*- and *McConnell*-backed prohibitions in place.

Some of the supporters of *Austin*, however, risk undermining this argument by predicting an electoral meltdown if the Court overrules *Austin*. For example, various amici curiae predict that “[o]verturning *Austin* [w]ould [r]adically [a]lter [h]ow [e]lections [a]re [c]onducted and [f]inanced,”¹⁷⁸ “will dramatically alter the campaign finance landscape,”¹⁷⁹ and will “transform the conduct of elections in this country.”¹⁸⁰ If I am correct that the stare decisis argument is the most likely one to garner a fifth vote to uphold *Austin* given that a majority of the Court probably believes *Austin* was wrongly decided, such statements only serve to make a case for how big an effect *Austin* had on speech and so on First Amendment rights. Such “sky is falling” statements also appear to be wrong, for reasons described in Part V below based on both the pre-BCRA environment and the situation in states which do not prohibit corporate-funded independent

(reviewing this legislative history) (Kollar-Kotelly, J.), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003).

176. *See supra* notes 74, 76 and accompanying text.

177. *See supra* notes 81–84 and accompanying text.

178. Brief of Campaign Legal Center et al. as Amici Curiae, *supra* note 171, at 6; *see also id.* at 7 (comparing the total net worth of U.S. corporations and their total annual profits to the amount of campaign funds raised by the Democratic presidential nominee, implying that a substantial portion of the former amounts would find their way into the electoral process if the Court overruled *Austin*).

179. Supplemental Brief of the Center for Political Accountability et al. as Amici Curiae in Support of Appellee at 4, *Citizens United v. FEC*, No. 08-205 (U.S. July 30, 2009); *see also id.* at 8 (citing ExxonMobil’s profits).

180. Supplemental Brief of Representatives Chris Van Hollen et al. as Amici Curiae in Support of Appellee at 3, *Citizens United*, No. 08-205 (U.S. July 31, 2009).

expenditures.¹⁸¹ If these statements are in fact wrong, that fact provides further support for the application of stare decisis to preserve *Austin* even if, as a majority Court seems likely to conclude, it was wrongly decided.

The stare decisis argument is less compelling with respect to the relevant portion of *McConnell*, however. Both the decision itself and BCRA § 203 have only been in place for three federal election cycles, and the Court has already significantly limited the effect reach of this portion of *McConnell* in the subsequent *WRTL* decision.¹⁸² Furthermore, there are arguably significant questions regarding the workability of the *WRTL*-adopted definition of electioneering communications in the minds of at least several of the Justices including, most critically, Justice Alito.¹⁸³ So even though the constitutional harm caused by leaving *McConnell*, and therefore § 203, in place is probably relatively minimal, it appears likely that if a majority of the Court believes the Court incorrectly decided this part of *McConnell*, the doctrine of stare decisis will not provide much support for nevertheless leaving that holding intact.

E. Conclusion

If, however, both Chief Justice Roberts and Justice Alito reject this stare decisis argument, then it appears likely that a

181. See *infra* notes 192–94 and accompanying text.

182. See *supra* notes 81–84 and accompanying text.

183. In his *WRTL* concurrence, Justice Alito suggested he might be willing to revisit *McConnell* if the *WRTL* standard could be shown to “impermissibly chill[] political speech.” *WRTL*, 551 U.S. ___, 127 S. Ct. 2652, 2674 (2007) (Alito, J., concurring); see also *id.* at 2679–84 (Scalia, J., concurring) (arguing that the *WRTL* standard and indeed any definition of “functional equivalent of express advocacy” is unworkable). For this reason, if a majority of the Court concludes that the Court wrongly decided *McConnell* with respect to BCRA § 203, it is also highly unlikely to uphold that statute based on a “backup” definition for electioneering communications provided by Congress that in fact is very similar to the *WRTL* definition except it lacks the time limits contained in the primary definition. See 2 U.S.C. § 434(f)(3)(ii) (2006) (“If clause (i) is held to be constitutionally insufficient . . . then the term ‘electioneering communication’ means any broadcast, cable, or satellite communication which promotes or supports a candidate . . . or attacks or opposes a candidate . . . and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.”).

majority of the Court will choose to reject either or both of the cited precedents.¹⁸⁴ Rejection of only the *McConnell* holding relating to corporate funding of electioneering communications is all that is necessary to resolve the issue of whether Citizens United can distribute the movie through video on-demand, and the careful attempts by Chief Justice Roberts and Justice Alito to avoid explicitly overruling precedents in the campaign finance area would suggest that a limited overruling may be more likely if—and this is a big if—they continue to follow this approach.¹⁸⁵ The fact that they presumably supported the re-argument and supplemental briefing on these precedents does not necessarily mean that they will completely abandon this approach by supporting the overruling of *Austin* as well, as it may simply be that the narrow, technical ways of resolving this case implicitly rejected by the Court were not attractive particularly after the March 2009 oral argument.¹⁸⁶ Such a result also does not necessarily require defending *Austin* or the distinction between express advocacy and the functional equivalent of express advocacy, since only the later is at issue in this case. Rather, the Court could simply leave re-visiting *Austin* for another day, although almost certainly over the objections of Justices Scalia, Kennedy, and Thomas.¹⁸⁷ It is certainly possible, however, that Chief Justice Roberts and Justice Alito will join the three certain opponents in abandoning this cautious approach to overrule *Austin* as well. The next part considers the possible ramifications if the Court does in fact overrule one or both of these precedents.

184. Nothing in the oral re-argument of the case, held on September 9, 2009, would indicate a different conclusion; in fact, neither Chief Justice Roberts nor Justice Alito gave any indication they would be particularly open to a stare decisis argument.

185. See *supra* notes 116–17 and accompanying text.

186. To be fair to the government's attorney, the statements at oral argument were consistent with statements in its brief regarding the constitutional scope of Congress' authority in this area. See Brief for the Appellee, at 14–16, *Citizens United v. FEC*, No. 08-205 (U.S. Feb. 17, 2009).

187. See *WRTL*, 551 U.S. ___, 127 S. Ct. at 2678–79 (Scalia, J., concurring).

V. RAMIFICATIONS IF THE COURT OVERRULES
MCCONNELL (IN PART) OR *AUSTIN*

If the Court overrules only the relevant part of *McConnell*, it is not clear that it will have a significant effect on elections given the Court's earlier *WRTL* decision that significantly limited the reach of BCRA § 203.¹⁸⁸ Such a decision would also likely leave BCRA's electioneering communication disclaimer and disclosure provisions unscathed for reasons discussed below.¹⁸⁹ Furthermore, a decision that only overruled *McConnell* but stopped short of overruling *Austin* might signal an end to the current Court's revisiting of constitutional decisions relating to campaign finance, thereby leaving the bulk of federal (and state) election law intact, although it also might only be a way station on the road to further limitations on Congress's authority in this area.¹⁹⁰

Overruling *Austin* would have a far greater immediate effect, as not only would it have the effect of overruling *McConnell* with respect to BCRA § 203, but it would free corporations (and likely unions) to make unlimited independent expenditures. I argue below, however, that the impact on elections would not be as dramatic as some have asserted, as it is far from clear how much new corporate (and likely union) spending would result as opposed to simply shifting such spending from currently unregulated, election-related activity.¹⁹¹ More significantly, such a step could foreshadow even more dramatic decisions with respect to campaign finance laws relating to both limitations on contributions to political committees engaged in independent expenditures and with respect to corporate contributions to both political parties and candidates' campaigns. Such further steps are not inevitable, however. Third and finally, overruling *Austin* would likely place substantial pressure on a separate body of law: the federal tax rules governing the political activities of tax-

188. See *supra* notes 81–84 and accompanying text.

189. See *infra* notes 219–23 and accompanying text.

190. See Hasen, *supra* note 84, at 1066–67 (predicting that the current Court will be favorably disposed to numerous campaign finance law challenges).

191. See *infra* notes 195–204 and accompanying text.

exempt organizations—the vast majority of which are nonprofit corporations—particularly if the Court also strikes down the disclosure provisions currently applicable to independent expenditures and electioneering communications.

A. Ramifications for Elections

If the Court only overrules the part of *McConnell* relating to BCRA § 203, it will return campaign finance laws for independent activities to their pre-BCRA state. That will presumably mean a return to at least the volume of election-related communications that stopped short of express advocacy which existed prior to BCRA. The amount of spending on communications reached by BCRA even pre-*WRTL* was probably in the neighborhood of \$100 million per two-year election cycle, based on spending on political advertising by groups acting independently of candidates and political parties.¹⁹² That figure compares to total contributions in each of the 2000 and 2002 federal election cycles reported to the FEC, not including soft money contributions to political parties or permitted contributions for independent expenditures of over a billion dollars.¹⁹³ And presumably at least some of those funds have been spent in other ways even after BCRA, such as on election-

192. See David B. Magleby & J. Quin Monson, *The Last Hurrah?: Soft Money and Issue Advocacy in the 2002 Congressional Elections*, in *THE LAST HURRAH?: SOFT MONEY AND ISSUE ADVOCACY IN THE 2002 CONGRESSIONAL ELECTION 1*, 2–3 (David B. Magleby & J. Quin Monson, eds., 2003), available at <http://csed.byu.edu/Assets/Pew/2002%20Monograph.pdf> (describing issue advocacy, *i.e.* non-express advocacy, in the last federal election before BCRA that appeared to be at or slightly above the levels during the 2000 election); Craig B. Holman & Luke P. McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections: Executive Summary* 13 (2001), available at http://brennan.3cdn.net/efd37f417f16ee6341_4dm6iid9c.pdf (reporting television spending by special interest groups, which would presumably include both permitted independent expenditures by MCFL corporations and advertising outside of the BCRA time windows as well as BCRA-covered electioneering communications, at just under \$100 million).

193. See FED. ELECTION COMM'N, ANNUAL REPORT 2002, 50–51, 55 (2003) (reporting candidate and political party “hard money” receipts for the 2002 election cycle); FED. ELECTION COMM'N, ANNUAL REPORT 2000, 58, 62, 65–66 (2001) (reporting candidate and political party “hard money” receipts for the 2000 election cycle).

related communications that used avenues other than broadcast, cable, or satellite or avoided the BCRA time windows.¹⁹⁴ So while a determination by the Court that *McConnell* was incorrect in that BCRA § 203 is unconstitutional will widen the already existing cracks in the corporate spending dam, it will do so only marginally.

If, on the other hand, the Court overrules *Austin* then a broader range of communications will now be fundable with corporate—and presumably union—moneys.¹⁹⁵ It is unrealistic, however, to expect that ExxonMobil or GE or Microsoft, or for-profit corporations collectively, will suddenly start pumping billions of dollars into election-related ads in this situation. Even when corporate funding of election-related activities was subject to much fewer restrictions, business corporations did not demonstrate anywhere near this level of spending. As already noted, pre-BCRA levels of independent spending that was not for express advocacy—and so not prohibited—were significant but still relatively modest compared to overall spending.¹⁹⁶ Furthermore, even under current law, corporations can both inform the public, in a limited way, that they have endorsed a particular candidate and communicate freely about that endorsement with their shareholders and senior employees, but the vast majority of corporations appear not to have taken advantage of this freedom.¹⁹⁷ Perhaps most telling is the evidence

194. See Robert G. Boatright et al., *Interest Groups and Advocacy Organizations After BCRA*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT* 112, 113–14 (Michael J. Malbin ed., 2006) (concluding that BCRA’s electioneering communication rules had “marginal effects” on interest group advertising in 2004 because many groups shifted their ads to before the BCRA 60-day general election time windows and also to voter mobilization as opposed to television ads).

195. If the Court concludes that the First Amendment prohibits limits on corporate independent expenditures, thereby rejecting the various rationales previously discussed, it is difficult to see how it could reach a different conclusion with respect to unions. See *supra* Part II.C; see also *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 665–66 (1990) (upholding Michigan’s decision to bar independent expenditures by corporations but not unions by concluding that unions do not have all of the characteristics of corporations that raise distortion concerns).

196. See *supra* notes 192–94 and accompanying text.

197. See *FEC*, *supra* note 63, at 87–88.

of corporate independent expenditure relating to state and local elections in states that do not prohibit such spending.¹⁹⁸

A 2008 report by the California Fair Political Practices Commission (FPPC), provocatively titled *Independent Expenditures: The Giant Gorilla in Campaign Finance*, found that from 2001 through 2006, or during three election cycles, total independent expenditures were \$88 million.¹⁹⁹ It should be noted that approximately ten percent of this figure included spending traceable to individuals, as opposed to corporations, unions, or other entities.²⁰⁰ Assuming this report's figures are accurate—and its title certainly suggests a bias toward, if anything, inflating these figures—this spending pales in comparison to the over \$750 million dollars raised by state and legislative candidates during the same three election cycles.²⁰¹ So even in the most populous state, with unlimited corporate and union funding of independent expenditures permitted, such expenditures do not dominate the campaign finance landscape. The data that is readily available from other states indicates similar patterns; independent expenditures (some of which may

198. *See supra* note 25. There do not appear to be any studies regarding whether corporate and union funded independent expenditures result in increased corruption at the state and local level or change public perceptions of government, although there is at least one study testing whether there was a correlation between views of government and some common campaign finance laws (public disclosure of campaign contributions, limits on contributions by organizations, limits on contributions by organizations and individuals, public subsidies to candidates that abide by expenditure limits, and mandatory expenditures limits (pre-*Buckley*)); it found at most a minor correlation for some but not all of the laws. *See* David M. Primo & Jeff Milyo, *Campaign Finance and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23, 34–35 (2006).

199. CAL. FAIR POL. PRACTICES COMM'N (FPPC), INDEPENDENT EXPENDITURES: THE GIANT GORILLA IN CAMPAIGN FINANCE 3 (2008), *available at* <http://www.fppc.ca.gov/ie/IEReport2.pdf>.

200. *Id.* at 22.

201. FPPC, THE BILLION DOLLAR MONEY TRAIN: FUNDRAISING BY CANDIDATES FOR STATE OFFICE SINCE VOTERS ENACTED CONTRIBUTION LIMITS 34 (2009), *available at* http://www.fppc.ca.gov/reports/billion_dollar_money_train.pdf. The billion dollars referred to in the title is the total amount raised during the past four election cycles (2001 through 2008). *Id.* at 3. The report also states that there were \$110 million in independent expenditures during those four election cycles, but does not provide information regarding how much of such expenditures can be traced back to individuals. *Id.* at 24.

originate with individual donors) are generally much less than candidate contributions.²⁰² That said, it is true that careful targeting of such expenditures can lead to them representing a significant proportion of the spending in a given race.²⁰³ But the reality appears to be there is less water behind the already leaking corporate (and union) independent expenditure dam than some suggest.²⁰⁴

There are a number of likely reasons for these limited contributions: the ever increasing but still limited amount of money that can be spent effectively during the election season, the negative ramifications for both a business corporation and the candidates it would like to see elected if it is perceived as having “bought” the election, and so on. (For the reasons detailed in the next section, the disclaimer and disclosure provisions of both BCRA and applying to independent expenditures are likely to survive even an overruling of *Austin*.²⁰⁵) But whatever the reasons, this limited past involvement argues against a sudden ten-figure flood of corporate funds into federal elections.

B. Ramifications for Election Law

The Supreme Court’s decision in *Citizens United* potentially could have a much more fundamental effect on election law generally and so on elections in the long-term. Whether this potential is realized turns in part on whether the Court limits itself to overruling *McConnell* or also overrules *Austin*. The overruling of *McConnell* would represent the rejection of a relatively new precedent—less than eight years old—and one that has already been sharply curtailed by the subsequent *WRTL*

202. See NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, INDEPENDENT EXPENDITURES, 2006 5–6 (summarizing data from five states, including California) (2007), available at <http://www.followthemoney.org/press/ReportView.phtml?r=333>.

203. See *id.* at 27 (noting that in Washington state independent expenditures relating to three Supreme Court races totaled more than the total amount of contributions to the six candidates in those races); FPPC, *supra* note 199, at 4 (noting that in some California state legislative races independent expenditures totaled up to half of the funds available in each race).

204. See *supra* notes 178–80 and accompanying text.

205. See *infra* notes 219–23.

decision.²⁰⁶ Furthermore, a choice by the Court to step back from overruling *Austin* might suggest that a majority of the Court is willing to accept the pre-*McConnell* legal landscape as in fact constitutional or, at least, that *Austin* is due respect as established precedent. Certainly much of the parsing of the opinions under this scenario would be to see whether Chief Justice Roberts and Justice Alito either write or join opinions that support *Austin* or simply, as they did with respect to *McConnell* in *WRTL*, carefully avoid opining on *Austin*.²⁰⁷

If the Court were to overrule *Austin*, the likely election law ramifications are much more significant. First, such an overruling would necessarily also overrule the BCRA § 203 prohibition on corporate (and union) funding of electioneering communications, as that ruling explicitly relied on *Austin*.²⁰⁸ Second and more importantly, if the Court overruled *Austin* there would also be significant ramifications for the definition of what is a political committee or PAC.²⁰⁹ Briefly, an entity becomes a PAC if its major purpose is to influence federal elections and it solicits contributions of over \$1,000 or makes expenditures of over \$1,000, with these terms limited to contributions given to influence elections (e.g., evidenced by a fundraising appeal that makes it clear that is the planned use of the funds) and expenditures made to influence elections.²¹⁰ For these purposes, as interpreted by the FEC, influencing elections includes making independent expenditures.²¹¹ Being classified as a PAC has significant ramifications, as a PAC is prohibited from receiving corporate or union contributions, contributions from individuals are limited in amount, and PACs must also file detailed disclosure reports regarding contributions and expenditures.²¹²

206. See *supra* notes 81–84 and accompanying text.

207. See *supra* notes 116–17 and accompanying text.

208. See *supra* note 80; see also *supra* note 195 (discussing why a decision reaching corporate spending would likely also apply to union spending).

209. See *supra* note 64 and accompanying text.

210. See 2 U.S.C. § 431(4) (2006); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

211. See Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 957–58 (2005).

212. 2 U.S.C. § 434 (2006).

The overruling of *Austin* would, however, lead almost inevitably to the question of whether entities that solely engage in independent expenditures can, constitutionally, be subject to the existing PAC limitations. If both individuals and corporations must, constitutionally, be permitted to engage in unlimited independent expenditures on speech, can an entity that only engages in such expenditures (i.e., does not make contributions to candidates or political parties) be subject to at least the contribution limits imposed on a PAC? It would seem the answer would be no. This issue is already making its way through the federal courts in the form of two cases, where the plaintiffs are challenging certain limits on individual contributions used by entities to make independent expenditures: *EMILY's List v. FEC* and *SpeechNow.org v. FEC*.²¹³

Third and probably most importantly, the overruling of *Austin* might foreshadow one further step with respect to finding existing campaign finance laws unconstitutional. This step would be a determination that the total prohibition on corporate contributions to candidates—while individuals are still permitted to make such contributions, albeit subject to limits—cannot be sustained constitutionally.²¹⁴ That is, if corporations cannot be treated differently from individuals for independent expenditure purposes under the First Amendment, what justification is there for treating corporations differently than individuals for campaign contribution purposes? While there are some plausible counter-arguments, such as the potential use of corporations by individuals to evade the limits on individual contributions (assuming the entire *Buckley* contribution/expenditure divide,

213. See *EMILY's List v. FEC*, No. 08-5422 (D.C. Cir. Sept. 18, 2009) (holding unconstitutional FEC regulations requiring nonprofit corporations that make both independent expenditures and, through a PAC, campaign contributions to pay for a portion of their independent expenditures with hard money, i.e., funds raised subject to per individual donor contribution limits); *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008) (denying motion for preliminary injunction that would have enjoined the FEC from imposing hard money contribution limits on funds raised by a PAC engaged solely in making independent expenditures), *appeal docketed*, No. 08-5223 (D.C. Cir. July 23, 2008).

214. See 2 U.S.C. §§ 441a(a)(1), 441b(a).

and therefore those limits, are not also vulnerable²¹⁵), an overruling of *Austin* at least raises this question. The same rationale would also support a challenge to the BCRA prohibition on corporate contributions to political parties, an element in the pending case of *Republican National Committee v. FEC* in which the RNC is challenging various applications of the prohibition on soft money contributions to national political party committees.²¹⁶

The one element of the existing campaign finance laws that should survive even an overruling of *Austin* is the disclaimer and disclosure provisions that apply not only to electioneering communications but to express advocacy as well.²¹⁷ It is true that one of the governmental interests furthered by these provisions is to aid in the enforcement of the prohibitions and limits on the funding for such communications.²¹⁸ Even if, however, the Court eliminates these prohibitions and limits by overruling *Austin*, two other important governmental interests would still be furthered by these provisions.²¹⁹ First, they serve the independent purpose of providing the electorate with additional information about a candidate by disclosing who supports and who opposes that candidate.²²⁰ Second, they also help to prevent corruption and the appearance of corruption—even if “corruption” is defined in a strict quid pro quo sense—by exposing to public view the sources of electoral support so that any “bought” official’s actions may be more easily traced to the

215. See *supra* note 36 and accompanying text (noting that at least some of the Justices believe limits on both contributions and expenditures are, or may be, unconstitutional).

216. *Republican Nat’l Comm. v. FEC*, No. 08-1953 (D.D.C. filed Nov. 13, 2008).

217. See 2 U.S.C. § 434(c), (f) (2006).

218. See *McConnell v. FEC*, 540 U.S. 93, 196 (2003); *MCFL*, 479 U.S. 238, 262 (1986); *Buckley v. Valeo*, 424 U.S. 1, 67–68 (1976).

219. This is in contrast to the extra disclosure provisions relating to BCRA’s millionaire’s amendment that the Court struck down in *Davis*, as those provisions only apparently served to aid the enforcement of the unconstitutional millionaire’s amendment and so were not justified by any governmental interest absent that amendment. *Davis v. FEC*, 554 U.S. ___, 128 S. Ct. 2459, at 2774–75 (2008).

220. See *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 66–67.

provision of this support.²²¹ These interests are particularly well served by disclosure provisions in the Internet age, when such information is readily and speedily available.²²² Indeed, in *McConnell* the Justices considered these reasons so compelling with respect to the BCRA-imposed electioneering communications disclosure provisions that only one member of the Court found them unconstitutional, as compared to the four Justices who objected to the corporate and union funding prohibition with respect to such communications.²²³

The bottom line is that a decision in *Citizens United* that only overruled *McConnell* in part *might* signal that in the Court's view Congress has only gone slightly past the outer boundary of constitutionally permissible campaign finance regulations with respect to corporations and so would not either have seismic effects on such laws immediately or foreshadow future fundamental changes. Of course, such a decision might only represent a way station on the path to more fundamental change, as *WRTL* appears to have been, but it is at least possible it would represent a terminus instead. A decision that overruled *Austin* could, however, easily foreshadow even more significant election law changes with respect to the definition of political committees and the limit on corporate contributions to candidates and parties, thereby foreshadowing a breaching of not only the corporate expenditure dam but possibly of the corporate spending dam almost in its entirety.²²⁴

221. See *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 67.

222. See, e.g., FEC, CAMPAIGN FINANCE REPORTS AND DATA, <http://www.fec.gov/disclosure.shtml>. Cf. Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743 (2003) (describing how courts have increasingly cited the availability of self-help technology as demonstrating a less restrictive means for serving an inserted governmental interest, particularly with respect to governmental restrictions on speech).

223. See *McConnell*, 540 U.S. at 258 (Scalia, J., concurring in part and dissenting in part) (citing the availability of disclosure requirements as one of the reasons why the non-distortion theory is not sufficient to support the prohibition on corporate funding of independent communications); *id.* at 275–76 (Thomas, J., concurring in part and dissenting in part) (noting he differed from all of his colleagues in concluding that the BCRA electioneering communications disclosure provisions are unconstitutional).

224. Unless and until *Buckley* is overruled, however, both the federal

C. Possible Ramifications for Federal Tax Law

There is one other significant ramification if the Supreme Court were to overrule *Austin*, particularly if my prediction that the Court would still uphold the disclaimer and disclosure provisions is incorrect. That ramification is for federal tax law and the ways it currently classifies nonprofit organizations that seek to be tax-exempt.

Federal tax law divides tax-exempt nonprofit organizations into effectively three categories with respect to candidate-related activities: organizations that are prohibited from supporting or opposing candidates for elected office; organizations that are permitted to support or oppose candidates but not as their “primary” activity; and organizations that have as their primary activity supporting or opposing candidates.²²⁵ The first category is principally charities—organizations that are eligible to receive tax deductible contributions as well as being exempt from income tax.²²⁶ The second category includes social welfare groups such as Citizens United, labor unions, and business and trade associations such as chambers of commerce and industry groups.²²⁷ The third category is so-called “527” organizations, named after the Internal Revenue Code section that provides them with exemption from federal income tax but also generally requires extensive public disclosure of their contributors and expenditures.²²⁸ While all of these entities file public reports of their finances with the IRS, generally only 527 organizations are

government and the various states will presumably be able to place limits on corporate campaign contributions comparable to the limits already in place for individuals. See *supra* notes 29, 32 and accompanying text; see also National Conference of State Legislatures, *supra* note 20 (listing state limits on campaign contributions, including states that permit corporate campaign contributions but subject to limits).

225. See Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625, 637–40 (2007) (describing these categories).

226. See 26 U.S.C. §§ 170(c)(2)(D), 501(c)(3) (2006).

227. See 26 U.S.C. §§ 501(c)(4)–(6)(2006); John Francis Reilly & Barbara A. Braig Allen, *Political Campaigns and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, EXEMPT ORGANIZATIONS—TECHNICAL INSTRUCTION PROGRAM FOR FY 2003, at L-1 to L-3 (2002), available at <http://www.irs.gov/pub/irs-tege/eotopic103.pdf>.

228. See 26 U.S.C. § 527 (2006).

required to disclose publicly the identities of their donors.²²⁹ Finally, it is important to recognize that whether a given activity supports or opposes a candidate for federal tax purposes is determined based on all the relevant facts and circumstances. For example, whether a communication supports or opposes a candidate does not depend solely on the presence or absence of “magic words” or other narrowing test as, is the case with election law, but instead looks at the full context and content of the communication.²³⁰

For numerous reasons, even if business corporations are freed to pay directly for electioneering communications or express advocacy, they are for the most part not likely to do so. For example, most businesses have no desire to possibly offend a significant part of their customer base by becoming so directly connected with candidate-related messages. It is therefore much more attractive to contribute to a group—such as a Citizens United, a union, or an industry group—that offers both a separation from the message and the ability to collect funds from numerous sources and so achieve economies of scale. While disclaimer and disclosure requirements, if they survive the Court’s scrutiny, would still allow some tracing back to the business corporation funders, that connection would be much more indirect (and those requirements might not survive the overruling of *Austin* under any conditions, although I believe they will). The attractiveness of this approach is demonstrated by the fact that even for candidate-related communications that business corporations can currently legally fund, those communications were primarily paid for by intermediate tax-exempt organizations, whether well known ones such as the U.S. Chamber of Commerce or innocuously named obscure ones such as the Senior Coalition.²³¹

229. See 26 U.S.C. §§ 527(j)(3)(B) (contributor information reporting for 527 organizations), 6104(d)(3)(A) (2006) (exempting tax-exempt organizations other than private foundations and 527 organizations from having to publicly disclose their donors).

230. See Rev. Rul. 2007-41, 2007-25 I.R.B. (June 18, 2007); Mayer, *supra* note 225, at 641–44.

231. See PUBLIC CITIZEN, *supra* note 47, at 27–30 (while lacking specific donor information, identifying business-favoring groups, including the U.S.

Assuming this pattern continues to hold in the wake of an overruling of *Austin*, there will likely be a surge in candidate-related communications by these intermediary tax-exempt organizations. Even under a *McConnell*-only overrule scenario, with disclaimer and disclosure requirements still in place, there would still be a preference to use organizations other than 527s because of the FEC's recent successful enforcement efforts to require 527s to be treated as PACs (and so subject to contribution limits)—an obvious step given that 527s by definition must have influencing elections as their major purpose.²³² Under an *Austin* overrule scenario, especially if the disclaimer and disclosure requirements did not survive, the relative anonymity of giving to tax-exempt organizations other than 527s would make them particularly attractive and so sharply increase the use of such entities.

The pressure such a turn to the middle category of tax-exempt organizations would create is on two aspects of the federal tax rules and enforcement of those rules. First, there is the issue of how much candidate-related activity is too much, i.e., how much makes that activity “primary” and so pushes the organization into the 527 category.²³³ For decades the IRS has failed to clarify this term, which appears to have led many groups—particularly in the wake of the 527 disclosure rules enacted by Congress in 2000—to confidently assert they qualify

Chamber of Commerce and the Seniors Coalition, that spent significant funds on election-related communications, probably mostly provided by corporations); see also FPPC, *supra* note 199, at 48 (listing the numerous entities through which even the largest supporters of independent expenditures relating to California state and legislative candidates funneled their support); STEPHEN R. WEISSMAN & KARA D. RYAN, *SOFT MONEY IN THE 2006 ELECTION AND THE OUTLOOK FOR 2008: THE CHANGING NONPROFITS LANDSCAPE* (2007) (documenting some of the largest nonprofit and, usually, tax-exempt organizations that were active in 2006 federal elections), available at http://www.cfinst.org/books_report_s/pdf/NP_SoftMoney_0608.pdf.

232. See WEISSMAN & RYAN, *supra* note 231, at 3–6 (describing the FEC's recent enforcement efforts in this area); Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. ON LEGIS. 471, 491–96 (2008).

233. See *ABA Members Comment on Exempt Organizations and Politics*, 45 EXEMPT ORG. TAX REV. 136, 152–54 (2004) (describing the uncertain definition of “primary” in this context).

for this middle category despite extensive candidate-related activities.²³⁴ Second, there is the relatively vague facts and circumstance test for determining whether a given activity actually supports or opposes a candidate.²³⁵ Apparently anticipating the pressure on this second aspect of the tax laws, the same election lawyer who initially brought the Citizens United case, Jim Bopp, along with the James Madison Center for Free Speech, has already launched two cases attacking this federal tax standard as being unconstitutionally vague.²³⁶ If successful, these cases could lead to a significant narrowing of what constitutes support of or opposition of a candidate for federal tax purposes and so open the door for groups to qualify for the middle category even though they engage in many activities that likely have an election-related effect.²³⁷

The demonstrated inability of the IRS to apply these two standards also does not bode well for maintaining the proper categorization of nonprofit corporations that are tax-exempt organizations. Because it relies on filed tax returns, the IRS has a backward-looking enforcement process that often does not address potential violations until many years after the fact. While that backward looking and delayed approach may be appropriate with respect to tax collection—where the passage of time can be recognized through requiring the payment of interest on unpaid but owed taxes—it is poorly suited for policing political activity that is aimed solely at a soon-to-occur election.²³⁸ The IRS is further hindered by a lack of enforcement resources; as I have documented elsewhere, audits of tax-exempt organizations

234. See PUBLIC CITIZEN, *supra* note 47, at 8, 49–52 (listing possible violators of the “primary” limitation).

235. See *supra* note 230 and accompanying text.

236. See *Catholic Answers, Ltd. v. United States*, No. 2009-00670 (S.D. Cal. filed Apr. 3, 2009); *Christian Coal. of Fla., Inc. v. United States*, No. 2009-000144 (M.D. Fla. filed Apr. 3, 2009). Bopp has also successfully represented parties challenging campaign finance laws before the Supreme Court in numerous other cases including, most recently, *WRTL*, 551 U.S. ___, 127 S.Ct. 2652 (2007) and *Randall v. Sorrell*, 548 U.S. 230 (2006).

237. See, e.g., *WRTL*, 551 U.S. ___, 127 S. Ct. at 2660–61 (describing the ads found not to be the functional equivalent of express advocacy); *id.* at 2697–99 (Souter, J., dissenting) (explaining why these ads likely had an electoral effect).

238. See *Mayer*, *supra* note 225, at 673.

are few and far between, and even the staff dedicated to such organizations have many issues to pursue other than candidate-related activity.²³⁹

It is therefore reasonable to predict that if the Court overrules *McConnell* in part, and especially if it overrules *Austin*, there will be a surge of corporate funds flowing to this middle category of tax-exempt organizations to fund candidate-related communications. Furthermore, in a post-*Austin* world, that flow may be hidden from public view if, contrary to my prediction, the election law disclosure requirements are also struck down because such entities are not required to publicly disclose their donors under federal tax law.²⁴⁰ The IRS is ill-equipped to deal with such a surge, even if it presses or exceeds the legal limits for such organizations. Supporters of stricter campaign finance laws would therefore be wise to anticipate issues arising under this separate but related body of law.

VI. CONCLUSION

The *Citizens United* case will likely be the vehicle for a shift in campaign finance law, although how significant a shift remains to be seen. Up until now, the addition of Chief Justice Roberts and Justice Alito to the Supreme Court has led to what, at least on their face, were only marginal changes in the Court's campaign finance jurisprudence.²⁴¹ The explicit request by the Court for the parties in this case to address the continued viability of two precedents, when the Court could easily have disposed of the case on relatively narrow grounds, appears to signal a more radical shift, especially when combined with statements of both Chief Justice Roberts and Justice Alito in earlier campaign finance cases. The strongest argument for securing a fifth vote against such a change, at least with respect to the *Austin* case, is one based on *stare decisis*, but it is far from clear whether that argument would be persuasive to one or both

239. *See id.* at 672–73.

240. *See* Reilly & Allen *supra* note 229 and accompanying text.

241. *See* Davis v. FEC, 554 U.S. ___, 128 S. Ct. 2769 (2008); WRTL, 551 U.S. ___, 127 S. Ct. 2652 (2007); Randall v. Sorrell, 548 U.S. 230 (2006).

of these Justices.

The Court could still choose to make a relatively incremental, although significant, change by only reversing the relevant portion of the *McConnell* decision. Such a decision would still strike down a significant campaign finance law and major part of BCRA, but one that has already been undermined by the Court's previous *WRTL* decision, and it would leave in place the differing treatment of corporate-funded communications—albeit limited to express advocacy—as well as almost certainly the disclaimer and disclosure requirements for a broader range of communications. It might also signal that further shifts would be unlikely. The effect of such a decision on elections, therefore, would be relatively limited, and its effect on election law might also be relatively small.

The Court could instead, however, choose to overrule *Austin* as well. If it does so, not only would a much more significant part of campaign finance law be eliminated, but such a ruling could easily foreshadow even more dramatic changes with respect to how political committees can constitutionally be defined and with respect to the over century-old prohibition on corporate campaign contributions. It also likely could create significantly more pressure on the federal tax law rules governing politically active nonprofit corporations that are also tax-exempt, pressure the IRS is ill-equipped to address. If those predications are correct even in part, such a decision could therefore usher in an era of not only increasing corporate funding of election-related communications but potentially of significantly less disclosure regarding the role of corporations in elections. The volume of such corporate spending almost surely will not be as large as some have suggested, if both the pre-BCRA history and the amount of corporate spending in states that permit corporate funding of independent expenditures with respect to state and local elections are any indication. There is little doubt, however, that corporate leaders will continue to care about who is elected; candidates will continue to care about corporate-paid election-related communications, and if corporations have substantially greater freedom to pay for such communications, those communications will undoubtedly occur. And we all will experience the effects, whether they are greater information

about candidates and a more robust public debate or an outpouring of corporate funded communications that drown out other voices and unduly influence elected officials to favor corporate interests over the public interest.

NEW SUPREME COURT JUSTICES AND THE “FRESHMAN EFFECT”

*Robert S. Peck**

I.	INTRODUCTION	149
II.	THE NEWEST JUSTICE MAY CAST THE DECISIVE VOTE ON A CASE.....	151
III.	THE DRAW OF STARE DECISIS.....	154
IV.	THE “FRESHMAN EFFECT”.....	158
V.	THE WINDS OF CHANGE.....	161
VI.	CONCLUSION.....	170

I. INTRODUCTION

With Judge Sonia Sotomayor’s appointment as the 111th Justice to serve on the Supreme Court of the United States,¹ America’s courtwatchers have a new parlor game to occupy their time. In blogs and other venues, they will examine every utterance, each expression, and even any discernible tic that the new Justice displays during oral argument for clues about her views while awaiting the results of her votes in those matters. Popular wisdom—that herd-like means of traveling down a seemingly congenial trail only to shift directions suddenly when those widely expressed instincts prove an unreliable barometer—assumes that the present precariously balanced Court will not

* Robert S. Peck is President of the Center for Constitutional Litigation, P.C., a Washington, D.C. law firm devoted to appellate practice and constitutional litigation. Mr. Peck also serves as a member of the adjunct law faculties at both American University and George Washington University, where he teaches an advanced constitutional law seminar, alternating semesters between the two schools. He has argued cases before the U.S. Supreme Court, most recently in *Philip Morris USA v. Williams* (2007 & 2009), as well as the supreme courts of a number of states. Mr. Peck is a member of the Board of Overseers of the RAND Corporation’s Institute for Civil Justice and the Board of Directors of the National Center for State Courts. He is a past president of the U.S. Supreme Court Fellows Alumni Association.

1. *111th Justice Joins Supreme Court*, THE THIRD BRANCH, Aug. 2009 (U.S. Courts Office of Pub. Affairs), <http://www.uscourts.gov/ttb>.

change greatly.² After all, Justice Sotomayor replaces Justice David Souter, who despite a traditionally conservative record was adjudged by movement-conservatives as “so liberal, his departure is unlikely to change the makeup of the court.”³

To be sure, Justice Sotomayor’s nomination engendered a virulent opposition by conservative politicians convinced that she is a liberal who has supported “some very radical legal theories percolating in the faculty lounges of our nation’s law schools.”⁴ Yet, joining with their more liberal Senate colleagues, however, other conservatives still found her legal reasoning was within the mainstream, even if they regarded her as “left-of-center.”⁵ To those most critical of the Sotomayor nomination, it was an even trade because they viewed Justice Souter as of a similar ilk.⁶

As the nomination debate made plain, the stakes are high when a life-tenured Supreme Court seat is under consideration. Certainly, the arrival of a new Justice can affect the results in an individual case; in recent terms, the Court has issued a slew of closely divided decisions that appear vulnerable to the smallest shift in voting patterns. History confirms that frequent impact as well. Yet, much more is at stake than particular results in particular cases. The course of constitutional law can change in profound ways when one Justice replaces another. In fact, one scholar has found that a “study of the evolution of constitutional doctrines leads me to the conclusion that change in membership has been the dominant cause of change in constitutional law.”⁷

2. See, e.g., Rich Galen, *Sotomayor Replaces Souter... So What? One Liberal In, One Liberal Out*, U.S. NEWS & WORLD REP., May 27, 2009, <http://www.usnews.com/articles/opinion/2009/05/27/sotomayor-replaces-souter-so-what-one-liberal-in-one-liberal-out.html>.

3. Matt Lewis, *Supreme Court Justice Souter to Retire (Legacy Will be as a Liberal, Despite Republican Appointment)*, POLITICS DAILY, Apr. 30, 2009, <http://www.politicsdaily.com/2009/04/30/supreme-court-justice-souter-to-retire/>.

4. 155 CONG. REC. S8799 (daily ed. Aug. 5, 2009) (statement of Sen. Cornyn).

5. 155 CONG. REC. S7829 (daily ed. July 22, 2009) (statement of Sen. Graham).

6. See Editorial, *No More Souters*, WALL ST. J., July 19, 2005, available at <http://www.opinionjournal.com/editorial/feature.html?id=110006984> (decrying Justice Souter as “arguably more of a liberal activist than either of Bill Clinton’s two justices (Ruth Bader Ginsburg and Stephen Breyer)”).

7. David M. Levitan, *The Effect of the Appointment of a Supreme Court*

This essay will examine one such instance that took place nearly seven decades ago for what it reveals about the Court as an institution that can absorb new members, value continuity, and yet decide issues that can affect profound changes central to our society at both the micro and macro levels.

II. THE NEWEST JUSTICE MAY CAST THE DECISIVE VOTE ON A CASE

Some prominent Court scholars have suggested that there is nothing untoward in the expectation that a changing membership will reexamine some of the underlying assumptions that proved decisive for earlier majorities. For example, Professor Gerald Gunther considered it “entirely appropriate that changes in Supreme Court personnel should yield changed assessments of constitutional values,” particularly “when the appointing authority is alert to constitutional issues.”⁸

Chief Justice William Rehnquist appeared to agree with that outlook, at least in one instance where he found himself in dissent on an issue that had repeatedly confounded the Court. In *Garcia v. San Antonio Metropolitan Transit Authority*,⁹ the Court, for the third time in less than two decades, examined the reach of the Tenth Amendment in protecting state and local governmental functions from federal regulation.¹⁰ In 1968, in *Maryland v. Wirtz*,¹¹ the Court had ruled that federal minimum wage requirements could be applied to certain state employees engaged in economic activity without violating a state’s sovereignty.¹² Some eight years later, however, then-Justice Rehnquist authored an opinion overruling *Wirtz* and held that the minimum wage requirement invaded an essential attribute of state sovereignty: the “power to determine the wages which shall

Justice, 28 U. TOL. L. REV. 37, 37–38 (1996).

8. Gerald Gunther, *The Supreme Court, 1971 Term - Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 5 (1972).

9. 469 U.S. 528 (1985).

10. *See generally id.*

11. 392 U.S. 183 (1968).

12. *Id.*

be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.”¹³ Still, nine years later, *Garcia* overruled *National League of Cities v. Usery*, upholding the applicability of minimum wage rules to state employees and requiring states to rely on political representation in Congress rather than the courts to avoid federally imposed regulatory burdens.¹⁴

Protesting this second reversal of direction, then-Justice Rehnquist dissented and predicted that his position “will, I am confident, in time again command the support of a majority of this Court.”¹⁵ Although, after becoming Chief Justice, Rehnquist is generally credited with leading a revival of the Tenth Amendment’s power and authority in defense of federalism;¹⁶ the Chief Justice’s confidence that *Garcia* would hold sway for only a brief period of time has not been rewarded with yet another reversal by the Court. Nonetheless, it is safe to say that Chief Justice Rehnquist’s prediction assumed a change in membership on the Court and treated that as a legitimate basis for a change in constitutional doctrine.

A few illustrations demonstrate that a change in membership can bring a change in results. For example, Justice Ruth Bader Ginsburg’s vote, in place of her predecessor Justice Byron White, is credited with making the difference in two 5–4 decisions during her first year on the Court.¹⁷ When Justice Souter joined the Court, he was the decisive vote in eleven cases in which the

13. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

14. *Garcia*, 469 U.S. at 528.

15. *Id.* at 580 (Rehnquist, J., dissenting). The issue in *Garcia* was the reach of the Tenth Amendment in protecting state and local governmental functions from federal regulation. *Id.* at 536 (majority opinion). The majority ruled that states must rely on political representation in Congress, rather than the courts, to avoid federally imposed regulatory burdens. *Garcia* overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968). *Id.*

16. See Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U. L. REV. 843, 844 (2000).

17. See Levitan, *supra* note 7, at 78–79 (discussing *Ratzlaf v. United States*, 510 U.S. 135 (1994), and *McFarland v. Scott*, 512 U.S. 849 (1994)).

Court was otherwise evenly split, and two scholars have suggested that the cases "would have been decided the other way if his predecessor, Justice Brennan, had remained on the Court."¹⁸

In one case, the change that occurred appears self-evident. In *South Carolina v. Gathers*,¹⁹ the Supreme Court reaffirmed, 5-4, its recent prior holding in *Booth v. Maryland*²⁰ that victim-impact evidence was too potentially prejudicial to be considered in capital cases.²¹ Two years later, after the addition of Justice Souter in place of Justice William Brennan, *Booth* and *Gathers* were overruled. Writing for the majority, Chief Justice William Rehnquist justified the reversal by noting that the two newly overruled decisions were "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later decisions, and have defied consistent application by the lower courts."²² The new 6-3 decision also benefited from Justice White's defection from the prior majority.²³ However, because a single Justice switching sides rarely is sufficient to overcome stare decisis, it appears logical to assume that Justice Souter's arrival in place of Justice Brennan, who had written the majority opinion in *Gathers*, explains the decision that Justice White then joined.

Theories abound about the impact that a new Justice can have on the Court's decisions. Reflecting one school of thought based on his own long service on the Court, Justice White observed that "[e]very time a new justice arrives on the Court, the Court's a different instrument."²⁴ Still, as Professor Harry

18. Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115, 132 (1993).

19. 490 U. S. 805 (1989).

20. 482 U.S. 496 (1987).

21. *Gathers*, 490 U.S. at 811.

22. *Payne v. Tennessee*, 501 U.S. 808, 829-30 (1991).

23. Justice White joined in the Court's holding in *Gathers* and then joined in the Court's overruling of *Gathers* in *Payne v. Tennessee*.

24. DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 408 (1998). Long-serving Wisconsin Chief Justice Shirley Abrahamson made a similar observation: "Every time you get a

Kalven pointed out, “a ‘new’ Court never starts from scratch with a fresh batch of Justices—that might really produce striking changes.”²⁵ Instead, new Justices join a “larger group, who have been working together for years,” face both the existing “decisional precedent” and “the framework of concepts and vocabulary” that defined that precedent, adapt to a preexisting process that brings the same array of cases to the Court as before, and confront “the objective logic of many problems, which must be perceived the same way no matter who happens to be on the Court.”²⁶

III. THE DRAW OF STARE DECISIS

These structural limits on change coincide with the idea that judicial decisions are supposed to reflect a rule of law rather than a rule of individuals who might serve on a court. As Justice Potter Stewart once lamented, “A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government.”²⁷ That sentiment was further echoed by Justice John Harlan, who wrote, “It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.”²⁸

Stare decisis exerts great gravitational pull to assure that a greater justification than the appointment of a new Justice who

new justice; it’s a new court in terms of how you work together.” Bill Lueders, *Under Fire*, MILWAUKEE MAGAZINE, Dec. 1, 2005, available at http://www.milwaukeeemagazine.com/currentIssue/full_feature_story.asp?NewMessageID=13177.

25. Harry Kalven, Jr., *The Supreme Court, 1970 Term – Foreword: Even When a Nation is at War*, 85 HARV. L. REV. 3, 5 (1971).

26. *Id.* at 5–6.

27. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting).

28. *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting); see also *Illinois ex rel. Hunt v. Ill. Cent. R.R.*, 184 U.S. 77, 92 (1902) (“[T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members.”).

would not have voted with the prior majority now occupies the bench.²⁹ Thus, for example, the sentiment expressed by Justice Tom C. Clark is typical. In joining an opinion that refused to apply the exclusionary rule to the states, a position he did not share, Clark wrote:

Had I been here in 1949 when *Wolf* [*v. Colorado*³⁰] was decided, I would have applied the doctrine of *Weeks v. United States*, 232 U.S. 383 (1914), to the states. But the Court refused to do so then, and it still refuses today. . . . [I]t is with great reluctance that I follow *Wolf*. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction.³¹

The doctrine of stare decisis is considered “of fundamental importance to the rule of law,”³² for it helps “ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion.”³³ The doctrine holds that previous decisions are considered binding precedent on the points of law settled by those decisions in order to impart consistency, predictability, legitimacy, and continuity to the law.³⁴ In doing so, it permits society to presume that bedrock principles are “founded in the law rather than in the proclivities of individuals.”³⁵

Even so, stare decisis commands a lesser degree of adherence in the field of constitutional law. In writing on the role of the Supreme Court in the creation of controlling authority, Justice Robert H. Jackson noted, “We are not final because we are

29. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“Whether or not we would agree with *Miranda’s* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”).

30. 338 U.S. 25 (1949).

31. *Irvine v. California*, 347 U.S. 128, 138–39 (1954) (Clark, J., concurring). Justice Clark later authored the Court’s opinion overturning *Wolf* and applying the exclusionary rule to the States in *Mapp v. Ohio*, 367 U.S. at 655.

32. *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987).

33. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

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

35. *Id.* at 853 (Marshall, J., dissenting) (quoting *Vazquez*, 474 U.S. at 265).

infallible, but we are infallible only because we are final.”³⁶ Justice Jackson’s statement recognizes the difficulty that exists in correcting a constitutional error by a court of last resort. Unlike the situation when the Court has construed a statute at odds with congressional sentiment, the Legislature cannot simply check judicial error of a constitutional dimension by passing a new statute with more explicit and definitive language that will assure a different interpretation. To use the amendment process for this purpose is a complex and uncertain process that, in many instances, may be “practically impossible.”³⁷ Even when possible, “the period of gestation of a constitutional amendment, or of any law reform, is reckoned in decades usually, in years, at least.”³⁸ It is for this reason that *stare decisis* applies with a lesser degree of finality in constitutional cases than it does in other actions.³⁹

Yet, because “in most matters it is more important that the applicable rule of law be settled than that it be settled right,”⁴⁰ *stare decisis* is not without force in constitutional cases. Though it is not regarded as “an inexorable command, particularly when [the Court is] interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some ‘special justification.’”⁴¹ Thus, Justice Harlan wrote:

[I]f the principle of *stare decisis* means anything in the law, it

36. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

37. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

38. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 297 (1941).

39. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (stating *stare decisis* “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decision”); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518 (1989); see also *Burnet*, 285 U.S. at 406–08 (Brandeis, J., dissenting), quoted in *United States v. Scott*, 437 U.S. 82, 101 (1978) and *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974).

40. *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting), quoted with approval in *Agostini*, 521 U.S. at 235.

41. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal citations and quotations omitted).

means that precedent should not be jettisoned when the rule of yesterday remains viable, creates no injustice, and can reasonably be said to be no less sound than the rule sponsored by those who seek change, let alone incapable of being demonstrated wrong.⁴²

While Justice Harlan’s description of *stare decisis* suggests the difficult obstacles that should be placed before a precedent is abandoned, it is clear that the door to judicial revision is left open, provided that the change is accompanied by “special justification.”⁴³ Such justification has taken various forms. Most frequently, and quite properly, subsequent Courts have asserted that a prior Court has erred in making its decision.⁴⁴ Even so, it takes a “courageous and realistic Court to correct” such an error.⁴⁵

A new Justice adjusting to new surroundings, new authority to decide matters, and the unyielding complexity that cases often entail may not have the courage to assault prior precedent, particularly when that Justice’s vote is determinative because the more senior Justices have split evenly. Certainly, Justice Sotomayor’s statements at her confirmation hearings⁴⁶ and her lengthy judicial record support the assumption that *stare decisis* will play a role in her jurisprudence. Still, even when precedent survives, a change in membership can bring “subtle shifts in style, direction, and momentum,”⁴⁷ as well as broader, more momentous transformations as previously undervalued

42. *Williams v. Florida*, 399 U.S. 78, 128–29 (1969) (Harlan, J., concurring) (opinion was also dissent for *Baldwin v. New York*, 399 U.S. 66 (1969)).

43. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

44. Finding error as the rationale for abandoning precedent obviously conflicts with the Brandeisian notion, endorsed by the Court, that it is generally better that a question be settled rather than be right. Yet, Chief Justice Roger Taney asserted that the Court’s “construction of the Constitution is always open to discussion when it is supposed to have been founded in error.” *The Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849).

45. JACKSON, *supra* note 38, at 294.

46. See generally Robert Barnes, Amy Goldstein & Paul Kane, *Sotomayor Pledges ‘Fidelity to the Law,’* WASH. POST, Jul. 14, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/13/AR2009071301154.html> (describing testimony at Justice Sotomayor’s confirmation hearing).

47. Kalven, *supra* note 25, at 5.

considerations gain a cognizable footing that will affect decisions down the road.

IV. THE “FRESHMAN EFFECT”

Justices have often expressed difficulty, regardless of prior experience on the bench, in undertaking their tasks as a new member of the Supreme Court. Justice Brennan, for example, explained:

One enters a new and wholly unfamiliar world when he joins the Supreme Court of the United States, and this is as true of a Justice who comes from the federal court of appeals as it is of a Justice, like me, who came from a state supreme court. I say categorically that no prior experience, including prior judicial experience, prepares one for the work of the Supreme Court. . . . The initial confrontation on the United States Supreme Court with the astounding differences in function and character of role, and the necessity for learning entirely new criteria for decisions, can be a traumatic experience for the neophyte.⁴⁸

The insular world of the Supreme Court can be intimidating. Justice Harry Blackmun recalled his first day at the Court as one that was more than a little daunting. After he was sworn in as a member of the Court in 1970, he was directed to the conference room, and stated, “there was Hugo Black, William O. Douglas, William J. Brennan, Jr., John Marshall Harlan—and I said to myself ‘What am I doing here?’”⁴⁹

The Court’s procedures enhance that daunting effect. The junior Justice must take notes during the conference, answer any knocks at the door because no one other than the Justices may attend conference, and be the last to speak when the Justices indicate their votes on an argued case. Reflecting on the nature of the substantive legal discussions, Justice Samuel A. Alito Jr., who has now relinquished the junior Justice role to Justice

48. William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 484 (1973).

49. Paul R. Baier, *Mr. Justice Blackmun: Reflections from the Courts Mirabeau*, 43 AM. U. L. REV. 707, 712 (1994).

Sotomayor, remarked, “By the time they got to me, I was either irrelevant or I was very important, depending on how the vote had come out.”⁵⁰ Junior Justices who may be less certain of their own positions will find the certitude and experience of Justices they admire easy to follow rather than buck when they vote at the tail end of the conference.

It is no knock on the abilities of a new Justice that a certain amount of acclimation is necessary before the Justice achieves a surer footing. Justice Felix Frankfurter attributed to Chief Justice Charles Evans Hughes the statement that “it takes three or four years to get the hang of it, and that so extraordinary an intellect as Brandeis said that it took him four or five years to feel that he understood the jurisprudential problems of the Court.”⁵¹ Justice Douglas claimed that it took about twelve years for a new Justice’s judicial philosophy to mature.⁵²

In fact, experienced Justices can be surprisingly curt about the issues in a case or, alternatively, loquacious and forceful in indicating their position. A junior Justice, still seeking to achieve equilibrium within the cloistered world of the Court, may question his or her own judicial instincts and cede an unspoken concern or position to a more surefooted and long-admired colleague who has generally voted as the junior member of the Court assumes he or she might have voted as a Justice back then. That phenomenon whereby more senior Justices exert an unintentional degree of influence over newer Court members has been dubbed the “freshman effect.” The effect was first identified in a 1958 study by Eloise C. Snyder, who found new Justices often join the Court’s centrist coalition before trying the more adventuresome alignment of one of the Court’s wings.⁵³ Snyder

50. Robert Barnes, *Justices Discuss a Changing Supreme Court*, WASH. POST, Sept. 4, 2009, at A21.

51. Robert S. Peck, *The Role of Personality, Stare Decisis, and Liberty in Constitutional Construction*, 33 PERSP. ON POL. SCI. 150, 151 (Summer 2004) (quoting from Letter from Felix Frankfurter, Associate Justice, United States Supreme Court, to Harold Burton, Associate Justice, United States Supreme Court (Nov. 5, 1946) (on file with Library of Congress, The Harold Burton Papers, Container 101, Manuscript div.)).

52. JAMES F. SIMON, *INDEPENDENT JOURNEY* 250 (1980).

53. Eloise C. Snyder, *The Supreme Court as a Small Group*, 36 SOC. FORCES 232, 237 (1958).

attributed the effect to the less-hardened ideological cast that a new Justice is likely to have, a greater insecurity about the validity of his or her views when undertaking a task from which there is no further appeal, and a timidity that comes from joining a tradition-bound operating group as the new addition.⁵⁴

More recently, however, studies have found less evidence of a “freshman effect” and a far greater tendency of recent Justices to enroll in a voting bloc within the Court rather quickly.⁵⁵ Yet, at least anecdotally, the effect appears to be present. When Justice Souter joined the Court, he appeared well prepared to assume the role of a Justice. During his confirmation hearing, the *New York Times* reported that “Judge Souter displayed an easy familiarity with both legal history and current Supreme Court cases.”⁵⁶ Yet, early reports on his tenure as a Justice indicated that he struggled to keep up with the work and produced opinions at a particularly slow pace.⁵⁷ Justice Souter admitted the work at the Supreme Court, at least to a new Justice, was the equivalent of “walking through a tidal wave.”⁵⁸

Some scholars who have examined Justice Souter’s record assert that he “evolved from a conservative state judge and Supreme Court justice—who initially voted with Chief Justice Rehnquist and Justices Scalia and Thomas—into a jurist who currently aligns more frequently with the liberal bloc comprised of Justices Stevens, Ginsburg, and Breyer.”⁵⁹ That evolution would be consistent with Snyder’s thesis. Like Justice Souter,

54. *See id.* at 237–38.

55. *See* Albert P. Melone, *Revisiting the Freshman Effect Hypothesis: The First Two Terms of Justice Anthony Kennedy*, 74 JUDICATURE 6, 6 (1990); Thea F. Rubin & Albert P. Melone, *Justice Antonin Scalia: A First Year Freshman Effect?*, 72 JUDICATURE 98, 98 (1988); John M. Scheb, II & Lee W. Ailshie, *Justice Sandra Day O'Connor and the “Freshman Effect,”* 69 JUDICATURE 9, 12 (1985).

56. Linda Greenhouse, *Souter Tacks Over Shoals; Bork’s Defeat Echoes as Questioning Starts*, N.Y. TIMES, Sept. 14, 1990, at A1.

57. *See* Tony Mauro, *Souter’s Slow Pen Earns Him Dubious Distinction*, USA TODAY, June 18, 1991, at 11A; Ned Zeman & Lucy Howard, *Souter: Slow Off the Mark*, NEWSWEEK, May 27, 1991, at 4.

58. Mauro, *supra* note 57.

59. Scott P. Johnson, *The Judicial Behavior of Justice Souter in Criminal Cases and the Denial of a Conservative Counterrevolution*, 7 PIERCE L. REV. 1, 33-34 (2008).

Justice Sotomayor is widely assumed to be aligned with the latter voting bloc.

V. THE WINDS OF CHANGE

Certainly, Presidents attempt to appoint Justices who reflect their own ideas about the role of the Court and the results they wish the Court to reach. Still, there is a long history of Justices disappointing their patrons.⁶⁰ President Harry Truman, who appointed four longstanding friends and advisors to the Court,⁶¹ argued: “[P]acking the Supreme Court simply can’t be done. . . . I’ve tried and it won’t work. . . . Whenever you put a man on the Supreme Court he ceases to be your friend.”⁶² Yet, when appointing Justices with a preexisting judicial record, Presidents of late have found greater predictability in what they have wrought. The wild card in that predictability is that Presidents often appoint a Justice with certain issues in mind only to find that entirely different ones begin to form the Court’s docket.

Perhaps no more dramatic example of the impact of the freshman effect exists than the Flag-Salute Cases.⁶³ The cases were one of a series of civil liberties matters that confronted the New Deal Court, a court appointed with the idea that national power needed protection from a hostile Supreme Court.⁶⁴ Many of these cases were brought by the Jehovah’s Witnesses⁶⁵ (the

60. See 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 22 (rev. ed. 1926).

61. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* 3 (5th ed. 2008). Truman appointed Harold H. Burton, Fred M. Vinson, Tom C. Clark, and Sherman Minton. *Id.*

62. President Harry Truman, Lecture at Columbia University, New York (Apr. 28, 1959), *quoted in* ABRAHAM, *id.* at 55.

63. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

64. See ABRAHAM, *supra* note 61, at 164–67 (describing President Franklin Roosevelt’s frustration with a Court that had struck down many of his efforts to address the economic depression facing the nation and his attempts to replace the most hostile justices with New Dealers).

65. See SHAWN F. PETERS, *JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE CIVIL RIGHTS REVOLUTION* (2000); Edward F. Waite, *The Debt of Constitutional Law to Jehovah’s Witnesses*, 28 MINN. L. REV. 209 (1944). Harlan Fiske Stone described the Witnesses as “pests” who

Witnesses), a religious group that had rebelled against other organized religions and whose controversial approach to issues had earned a description as being “distinguished by great religious zeal and astonishing powers of annoyance.”⁶⁶ At least in 1940, when the first flag-salute case came before the Court, the group hated “war, Fascism, Big Business, the American Legion, the DAR, the Catholic Church (and, as a matter of fact, all organized religions), financiers, politicians, the League of Nations, and all governments.”⁶⁷ Their positions led the less charitable to label them an “impressively organized hierarchy with totalitarian overtones”⁶⁸ and an intolerant sect.⁶⁹

The controversy began after an address by the Jehovah’s Witness leader Joseph Rutherford that compared saluting the flag with worshipping graven images.⁷⁰ Witness children began to refuse participation in the morning public school flag-salute ceremonies, leading to their expulsion from school.⁷¹ Among those expelled were twelve-year-old Lillian Gobitis⁷² and her ten-year-old brother, William.

Their case reached the Court in 1940, during a period of substantial transition. Membership on the Court consisted of four relatively senior Justices and five recent appointees of

deserved an endowment for their contribution to the law of religious liberty. PETERS, *supra*, at 186.

66. ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 399 (1941). Professor Chafee was one of the principals who wrote the American Bar Association’s amicus curiae brief in support of the Witnesses in both flag-salute cases.

67. *CURRENT BIOGRAPHY: WHO’S NEWS AND WHY: 1940* 703 (Maxine Block ed. Reissued 1971) (1940).

68. HENRY J. ABRAHAM, *FREEDOM AND THE COURT* 205 (3d ed. 1977).

69. *Minersville Sch. Dist. v. Gobitis*, 108 F.2d 683, 686 (3d Cir. 1939), *rev’d on other grounds*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

70. PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 16 (1988).

71. *See, e.g., Nicholls v. Mayor & Sch. Comm. of Lynn*, 7 N.E.2d 577 (Mass. 1937).

72. A clerical error is responsible for misspelling the plaintiffs’s name, which is properly spelled “Gobitas.” IRONS, *supra* note 70, at 15. History repeated itself in the second flag-salute case, where “Barnett” was misspelled as “Barnette.” David Margolick, *Pledge Dispute Evokes Bitter Memories*, N.Y. TIMES, Sept. 11, 1988, at 1 col. 1.

President Roosevelt. Chief Justice Charles Evans Hughes was described by fellow Justice Stone as so authoritative in demeanor that he conducted the Justices’ conference “much like a drill sergeant.”⁷³ Justice Stone himself boasted a background as a former Columbia Law School dean and U.S. Attorney General. Justice James McReynolds was the only remaining member of the group of Justices known as the “Four Horsemen,” who had consistently opposed New Deal-era regulation.⁷⁴ Justice Owen J. Roberts had served on the Court for a decade and cast the decisive vote that were known as the “switch in time that saved nine” in 1937.⁷⁵

The new appointees were Hugo Black (appointed in 1937), Stanley F. Reed (1938), Felix Frankfurter (1939), William O. Douglas (1939), and Frank Murphy (1940). Not only were each of these Justices new to the Court, they were well aware of the imminence of war and thus reluctant to inhibit national unity. Every day, banner headlines called attention to the war in Europe.⁷⁶ Spies reportedly had infiltrated this country, and Attorney General Robert H. Jackson proposed registering 3,500,000 aliens to help combat “fifth column” activities.⁷⁷

The new Justices were predisposed to help the war effort. Justice Frankfurter had served in the Department of War and reportedly played a “powerful” role in the development of FDR’s

73. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 186–87* (1986).

74. *Id.* at 68.

75. *Id.* Though the phrase implies that fear of enactment of FDR’s court-packing plan triggered the change, Justice Roberts had actually voted in the key cases two months before the President announced his plan. *Id.* The cases were *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding the constitutionality of a state minimum wage law) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the constitutionality of the National Labor Relations Act).

76. See, e.g., Otto D. Tolischus, *Reich Looks to New Air Weapons, Holding Deadlock is Temporary*, N.Y. TIMES, Jan. 1, 1940, at 1. Roosevelt had warned the nation that the war imperiled the whole world and sought more than a billion dollars for preparedness to supplement a prior request to Congress for \$3.3 billion. *Id.*

77. Lewis Wood, *Alien Registry Asked In Defense*, N.Y. TIMES, May 24, 1940, at 1.

war policies.⁷⁸ Muckraking journalists Drew Pearson and Robert S. Allen claimed “it is a fact that second only to the President himself, Justice Felix Frankfurter has more to do with guiding our destinies of war than anyone in Washington.”⁷⁹ In fact, the night before the *Gobitis* decision was announced, Justice Frankfurter spoke so vigorously about the upcoming war that Harold Ickes observed that the Justice “is really not rational these days on the European situation.”⁸⁰

Even as a new Justice, Justice Reed spoke at a rally sponsored by the Council on Democracy on July 29, 1938, noting the European war and warning “against national apathy or domestic wrangling” and urging aid to “all who war against the aggressors.”⁸¹ Newspapers took note of the unusual bid for defense unity and support of the President’s war policy that came from a Justice of the Supreme Court.⁸²

Justice Black, still the politician he once was, spoke frequently on behalf of the war effort. As his biographer noted, “World War Two had no more zealous prosecutor on the Supreme Court than Hugo Black.”⁸³ After reading *Mein Kampf*, Black recognized that Hitler “wants to take over the world and we must do everything to stop him.”⁸⁴ In June 1942, at President Roosevelt’s request, Black went to Birmingham to check on production in war-related industries and investigate slowdowns resulting from racial issues, and one month later he spoke at a Southern “Win-the-War” Rally.⁸⁵

Justice Murphy had originally resisted appointment to the Supreme Court, “probably in part because he wanted to be Secretary of War.”⁸⁶ Even after ascending to the bench, Justice

78. Robert S. Peck, *A Wrenching Reversal*, CONSTITUTION, Winter 1993, at 51, 53.

79. *Id.*

80. HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD ICKES 199* (1954).

81. JOHN D. FASSETT, *NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY 306–07* (1994).

82. *Id.* at 307–08.

83. ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY 313* (2d ed. 1997).

84. *Id.* at 312.

85. *Id.* at 313.

86. John Frank, *Frank Murphy*, in 4 *THE JUSTICES OF THE UNITED STATES*

Murphy continued to seek a job in the war effort.⁸⁷ During the summer of 1940, he wrote the President asking once again for a war-related appointment.⁸⁸ Two years later, he succeeded in becoming a lieutenant colonel in the infantry training program at Fort Benning, Georgia, during the Court’s 1942 summer recess.⁸⁹

While many of these extracurricular activities would be unthinkable by today’s Justices, their influence on the decision in *Gobitis* was palpable. Justice Frankfurter wrote the opinion for an 8-1 majority. The one-time celebrated civil libertarian who had tried to rally support for accused anarchists Nicola Sacco and Bartolomeo Vanzetti now saw the liberty of conscience asserted by the Witnesses as secondary to the “authority to safeguard the nation’s fellowship.”⁹⁰ Thus, he concluded for the Court that the “promotion of national cohesion” was “an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.”⁹¹

The opinion drew great immediate praise from two of the Justices who later abandoned it. Justice Douglas wrote that it was “a powerful moving document of incalculable contemporary and (I believe) historic value[,] . . . a truly statesmanlike job.”⁹² Justice Murphy sent a note declaring the opinion “beautifully expressed,”⁹³ even as he privately called it an “officious and unnecessary” abridgment of religious liberty that lacked even the

SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1789-1969, at 2493, 2499 (Leon Friedman & Fred L. Israel, 1969). After he had lost his reelection bid for the Governor’s seat in Michigan, Justice Murphy unsuccessfully sought the War Department post but was rewarded instead with the position of Attorney General. Philip Kurland, *Robert H. Jackson*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS, *supra*, at 2572, 2558.

87. Frank, *supra* note 86, at 2500.

88. *Id.*

89. *Lieutenant Colonel, He Takes a Summer Leave to Train, and May Change Plans to Return to the Bench in the Fall*, N.Y. TIMES, June 11, 1942, at 25.

90. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

91. *Id.* at 595.

92. H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 150 (1981).

93. *Id.*

justification of a dire national emergency.⁹⁴ Justice Murphy apparently had begun drafting a dissent, but he abandoned the effort because he could not find a legal theory that spoke to his reaction to the case.⁹⁵

The decision was greeted with widespread derision. Newspaper editorials numbering some 170 and law review articles joined in a chorus of disapproval.⁹⁶ Justice Frankfurter reported that he was flooded with letters criticizing his opinion.⁹⁷ Still, within two weeks of the *Gobitis* decision, the Justice Department reported “hundreds of attacks on Witnesses,” whom mobs accused of being unpatriotic because of their refusal to salute the flag.⁹⁸ A later report stated that, “in the two years following the decision, the files of the Department of Justice reflect an uninterrupted record of violence and persecution of the Witnesses. Almost without exception, the flag and the flag salute can be found as the percussion cap that sets off these acts.”⁹⁹

It was in this atmosphere that another Witness case came before the Court. In *Jones v. Opelika*,¹⁰⁰ issued on June 8, 1942, the Court upheld a municipal ordinance that required a license for the sale of printed material, finding no exemption for religious tracts.¹⁰¹ Justice Reed’s opinion for a 5-4 majority denied that *Gobitis* was relevant because no “religious symbolism” was involved.¹⁰² Justice Stone, now Chief Justice, dissented, joined by Justices Black, Douglas, and Murphy. The latter three wrote a special joint dissent, decrying the majority opinion as “another step in the direction which [*Gobitis*] took

94. J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 250-51 (1968). After reading Stone’s dissent, Murphy pronounced that opinion “sensible.” *Id.* at 251.

95. SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 185 (1984).

96. Irving Dilliard, *The Flag-Salute Cases, in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 298 (John A. Garraty ed., First Perennial Library 1987) (1962).

97. FROM THE DIARIES OF FELIX FRANKFURTER 254 (Joseph P. Lash ed., 1975).

98. IRONS, *supra* note 70, at 22-23.

99. *Id.* at 23.

100. 316 U.S. 584 (1942), *vacated*, 319 U.S. 103 (1943).

101. *Id.* at 597-98.

102. *Id.* at 598.

against the same religious minority, and . . . a logical extension of the principles upon which that decision rested.”¹⁰³ The three Justices then made an extraordinary statement: “Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it also was wrongly decided.”¹⁰⁴ The dissent clearly signaled that the Court was one vote away from overturning *Gobitis*.

That vote came after Justice James Byrnes resigned his seat to join the FDR administration and Judge Wiley B. Rutledge took his seat on February 15, 1943.¹⁰⁵ The announcement of Rutledge’s nomination received an enthusiastic endorsement from critics of the *Gobitis* decision. The *St. Louis Post-Dispatch*, for example, declared that the appointment “leaves little question as to a reversal, in this term, of the 1940 compulsory flag salute decision.”¹⁰⁶ Rutledge’s position on the issue was well-known because of a recent dissent he had authored in another Witness case.¹⁰⁷ Rutledge had expressed concern about the “steady legal erosion wearing down broad principle into thin right. Jehovah’s Witnesses have [wrongly] had to choose between their consciences and public education for their children.”¹⁰⁸

On the day of Rutledge’s investiture, the Court granted rehearing in *Jones*.¹⁰⁹ Less than three months later, in a per curiam decision, the Court, 5-4, reversed its earlier decision in *Jones* in what can be considered Exhibit A on the difference an appointment to the Court can make.¹¹⁰

The flag-salute issue then returned to the Court in *Barnette*. In addition to Rutledge, the Court was now joined by former Attorney General Robert H. Jackson, who had ambiguously signaled his position on the issue. Still, in a footnote to his book,

103. *Id.* at 623 (Black, Douglas, & Murphy, JJ., dissenting).

104. *Id.* at 623–24.

105. Fred Israel, *Wiley Rutledge*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, *supra* note 86, at 2593.

106. Peck, *supra* note 78, at 57.

107. See *Busey v. District of Columbia*, 129 F.2d 24, 29 (D.C. Cir. 1942) (Rutledge, J., dissenting).

108. *Id.* at 38.

109. In Memory of Mr. Justice Rutledge, 341 U.S. v, x-xi (1951).

110. *Id.* at xi.

The Struggle for Judicial Supremacy, Justice Jackson suggested that *Gobitis* was out of step with developing doctrine in other recent cases,¹¹¹ but he had nonetheless joined the dissenters in the second *Jones* decision in a separate case.¹¹²

The Court announced its decision overturning *Gobitis* symbolically on Flag Day, June 14, 1943. Writing for a 6-3 Court,¹¹³ Justice Jackson characterized the issue as whether the Constitution permits the “compulsion of students to declare a belief.”¹¹⁴ Justice Jackson stated that the Court’s reconsideration of its position in *Gobitis* was justified because the earlier case did not consider whether the “power exists in the State to impose the flag salute discipline upon school children.”¹¹⁵ Instead, Justice Jackson asserted, the *Gobitis* “Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule.”¹¹⁶ In lyrical language, the Court upheld the right to refuse participation in an exercise in coercive allegiance.¹¹⁷ It is noteworthy that the wave of terrorism against Witnesses dropped off dramatically after the Court’s decision.

The impact of the “freshman effect” on the junior Justices in *Gobitis* appears undeniable. Justice Murphy, a dedicated civil libertarian, not only abandoned an attempted dissent but did not want to stand alone after none of the others he would have assumed would be troubled by the decision had spoken out at conference.¹¹⁸ Moreover, Justice Murphy felt at sea among the

111. JACKSON, *supra* note 38, at 284 n.48.

112. Because of the offensive nature of the Witness literature, Jackson asserted that the “real question is where [Witness] rights end and the rights of others begin.” *Douglas v. City of Jeannette*, 319 U.S. 157, 178 (1943) (Jackson, J., concurring in part and dissenting in part).

113. The majority consisted of *Gobitis* dissenter in part Justice Stone, switch-voters Justices Black, Douglas, and Murphy, as well as newcomers Justices Jackson and Rutledge. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

114. *Id.* at 631.

115. *Id.* at 635.

116. *Id.*

117. *Id.* at 642.

118. FINE, *supra* note 95, at 185. Stone, who dissented, originally reserved his vote at conference. *See ALPHEUS THOMAS MASON, HARLAN FISKE STONE* 525 (1956). He later decided to dissent without writing an opinion. *See id.* at 527. When he did decide to write a dissent, the other Justices had already joined

brethren, fearing his work would be “mediocre” and feeling “very much a freshman” who “looked for leadership to some of his fellow justices.”¹¹⁹

Like Justice Murphy, Justice Douglas ascribed his vote, as well as his colleagues, in *Gobitis* to the “freshman effect:”

Every Justice I have known feels in retrospect that he made mistakes in his early years. The problems sometimes come so fast that the uninitiated is drawn into channels from which he later wants to retreat. That happened to . . . Hugo Black, Frank Murphy and me when the first flag-salute case was argued on April 25, 1940. In those days, Felix Frankfurter was our hero. He was indeed learned in constitutional law and we were inclined to take him at face value.¹²⁰

By the time the trio who later switched saw Justice Stone’s dissent, it was too late. Douglas explained, “It is always difficult, and especially so for a newcomer, to withdraw his agreement to one opinion at the last minute and cast his vote for the opposed view. A mature Justice may do just that; a junior usually is too unsure to make a last-minute major shift.”¹²¹

Also like Justice Murphy, Justice Black was deeply conflicted. At lunch following announcement of the *Barnette* decision, Justice Black said he voted against the majority position at conference in *Gobitis*, but then finally suppressed his doubts.¹²²

In *Barnette*, Justices Black and Douglas jointly concurred to explain their “change of view.”¹²³ *Gobitis*, rested on the principle that the state may regulate “conduct thought inimical to the public welfare,” they wrote. “Long reflection convinced us that

Frankfurter’s majority opinion. See *id.* at 532–33. He did not circulate his dissent until after the decision was announced. IRVING BRANT, *THE BILL OF RIGHTS* 511 (1965). Justices Black, Douglas, and Murphy regretted Justice Stone’s late decision, telling him that they agreed with him and would stand with him at the first opportunity. *Id.*

119. Frank, *supra* note 86, at 2499.

120. WILLIAM O. DOUGLAS, *THE COURT YEARS: 1939-1975* 43–44 (1980).

121. *Id.* at 45.

122. FROM THE DIARIES OF FELIX FRANKFURTER, *supra* note 97, at 254–55.

123. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 643 (1943) (Black & Douglas, JJ., concurring).

although the principle is sound, its application in the particular case was wrong.”¹²⁴ Justice Murphy wrote a separate concurrence, explaining that “[r]eflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom [protected by the Constitution] to its farthest reaches.”¹²⁵

VI. CONCLUSION

The Court’s quick reversal in the flag-salute cases can be explained by the change in personnel on the bench, the Court’s relative inexperience as a court, the novelty of the constitutional doctrines at issue, and the unexpected public ramifications of the first decision. Despite broad accomplishments before coming to the Court, Justices Black, Douglas, and Murphy had sufficient doubt about their instincts to defer to the wisdom they ascribed to more certain colleagues who they could not imagine would give individual liberty short shrift. Having publicly repudiated their position and having had the support of opinion leaders in the press and the academy, they made it much easier for the next set of newcomers, Justices Jackson and Rutledge, to join in reversing the first decision.

Professor Philip Kurland noted that “great justices are made not born; that experience on the Supreme Court is itself a necessary . . . condition for judicial eminence; that it takes time for any new appointee, however vast his prior judicial experience, to meet the extraordinary challenges that inhere in the job.”¹²⁶

It is not a profitable undertaking to assay a prediction about how Justice Sotomayor adjusts to her new tasks, whether she will find comfort in following the lead of a colleague, and when she will define herself as a Justice. It is sufficient at this early stage of the new phase in her judicial career to acknowledge that her early years may not define her entire tenure.

124. *Id.*

125. *Id.* at 645 (Murphy, J., concurring).

126. Philip Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265, 320 (1971).

A DYSFUNCTIONAL SUPREME COURT: REMEDIES AND A COMPARATIVE ANALYSIS

John W. Whitehead & John M. Beckett***

I.	INTRODUCTION	171
II.	THE ROLE OF THE SUPREME COURT.....	173
III.	RIPE FOR REFORM	189
	A. Certiorari Granted: The Dwindling Docket Issue	189
	B. A Representative Judiciary: Judicial Diversity & Expansion Examined	194
	C. Confirmation of Appointees: The Appointment Process	200
	D. A European Perspective: The Judicial Appointments Commission.....	206
	E. Diversity: An Alternative Means to Achieving a Representative Judiciary.....	210
	F. Term Limits: The Question of Tenure.....	212
IV.	OUR PROPOSAL.....	216
	A. Term Limits for Justices.....	216
	B. An Independent Judicial Commission for the United States.....	218
V.	CONCLUSION.....	220

I. INTRODUCTION

Numerous articles and books have been published concerning, variously, the role and composition of the Supreme Court, the appointments process, the drop in cases on the Court's docket, the tenure of Justices, and the potential reforms in one or more of these areas. In this article, not only will we examine these issues, each ripe for review, offering a précis of current scholarly thinking, but we will also move a step further. Unlike

* President, The Rutherford Institute, Charlottesville, Virginia. B.A., 1969; J.D., 1974, University of Arkansas.

** John M. Beckett, M.A. (Edin), M.Phil (Cantab), LL.B. (City), LL.M. (Virginia); Member of the Bar of England & Wales.

other commentators, we propose radical reforms to the appointments process, basing our suggestions on the model of an independent judicial appointments commission akin to the one created recently for the United Kingdom.

The aim of such a proposal is essentially two-fold: First, to broaden the Court by making it more diverse in a number of respects, allowing it to better represent a wide range and make-up of citizens for whose benefit it exists. Second, we wish to see a more meritocratic, less politically-oriented appointments process—and by extension a less partisan Court—whose members will not be appointed predominantly because they agree with the incumbent administration on issues such as abortion or free speech, but because they have attained pre-eminent status in their field as legal scholars, lawyers, or judges.

The question of tenure will also be discussed at some length, drawing on and expanding existing scholarship and propounding the idea of fixed terms for members of the Court. The idea itself may not be novel, but our proposal of fixed, non-renewable terms of twelve years, based on the model laid out by European constitutional courts, provides a new view on a much-discussed issue. A faster turnover of members of the Court would also provide for a frequent re-balancing of the Court's political leaning and would make it more likely that a wider range of cases would be heard.

Diversity of membership of the Court may also be one of the informing factors when it considers which cases to hear. A Court that is heterogeneous is more likely to be motivated—because of a wide range of factors pertaining to its members' backgrounds and origins, as well as their convictions—to grant certiorari to cases that a homogenous Court would consider too politically, socially, or racially contentious or divisive. We offer a detailed treatment of this issue below.

This article begins by examining the purpose and functions of the Supreme Court, from its founding through the way the present members of the Court perceive their roles. This section will also look at how the Justices' varying jurisprudential views translate into concrete rulings. We then progress onto a discussion of a number of areas we believe are ripe for reform, ranging from the decreasing docket to the reform of the presently

homogenous Court. The final section, while recognizing the difficulties inherent in the reformation of the Supreme Court, lays out proposals which will at least provide a practical starting point for change.

II. THE ROLE OF THE SUPREME COURT

In *Anti-Federalist 78*, the author (probably Robert Yates), writing as Brutus, interpreted the role of the Court as thus:

The supreme court then have [sic] a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature.¹

This gloss on the function of the Court—not to mention the frank assessment of its power—may not seem objectionable today, but when seen in the context of the prevailing views of the Judiciary among the Founding Fathers (in particular the views of Alexander Hamilton), such a belief stands out as atypical.

It was Hamilton's belief that the Judiciary was the weakest of the three branches, a point he enumerated repeatedly in *The Federalist Papers*. In his eyes, since the Judiciary regulated neither the sword nor the purse, it was able to take “no active resolution whatever” without the “aid of the executive arm even for the efficacy of its judgments.”² Hamilton, of course, was writing before Chief Justice John Marshall's judgment in *Marbury v. Madison* made the federal Judiciary—in particular, the United States Supreme Court—heady with power, and he could not easily have anticipated the present situation wherein “the institution has come to exercise powers over the lives of citizens that in important respects exceed those of the other

1. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION 307 (Ralph Ketcham ed., 2003).

2. THE FEDERALIST NO. 78, at 291 (Alexander Hamilton) (John Tiebout ed., 1799).

branches of the federal government and even more those of the states.”³

Marshall’s assertion that judicial review is a power inherent to the federal courts is now beyond question or debate. The discourse of checks and rights, as enforced by the courts, has become increasingly charged and powerful, and the position of the Judiciary as arbiter of the boundaries of political power “has attained near-sacred status in public discussion,” making the tribunals of which the Constitution speaks “increasingly important, even crucial, political decision-making bodies.”⁴

Today, the power of the courts has grown so great that some have observed a “fundamental tension” between a republic ruled by the people and “an elitist public law—in which the only checks on judges’ (mis)constructions of the law are their imaginations and a seemingly weak sense of shame.”⁵ Others have gone so far as to question the reliance—common among liberals today—on the Court, perceived as the sole upholder of all civil rights, as being indicative of an overly-cynical view of our democracy. As President Barack Obama wrote in *The Audacity of Hope*, in reference to the confirmation fights over President George W. Bush’s nominees, it was as if “in our reliance on the courts to vindicate not only our rights but also our values, progressives had lost too much faith in democracy.”⁶

Yet some political scientists have contested the view that the Supreme Court’s apparent lack of accountability to the other branches has made it the final arbiter on matters of constitutional interpretation, meaning that “it does not stray

3. Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles* (July 5, 2005), <http://paulcarrington.com/Supreme%20Court%20Renewal%20Act.htm>.

4. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 1 (2004).

5. Saikrishna B. Prakash, *America’s Aristocracy*, 109 *YALE L.J.* 541, 571 (1999) (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)).

6. BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 83 (1st ed. 2006), *quoted in* Jeffrey Rosen, *What’s a Liberal Justice Now?*, *N.Y. TIMES*, May 26, 2009, *available at* http://www.nytimes.com/2009/05/31/magazine/31court-t.html?_r=1&hp.

very far or for very long from what the majority wants.”⁷

The Supreme Court has supported this suggestion in cases such as *West Virginia State Board of Education v. Barnette*,⁸ in which the Justices held that “responsibility for legislation lies with legislatures, answerable as they are directly to the people,” meaning the Court’s “only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.”⁹

Such narrow interpretations of the role of the Supreme Court have been accorded credence by other members of the Court over the years. In 1973, Chief Justice Warren Burger, writing for the Court, held that the function of the Court was not “to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner.”¹⁰ In more recent years, Justice Anthony Kennedy has echoed this sentiment, reiterating that “when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”¹¹ These understandings of the role of the courts underline the point that the Supreme Court does not generally like to portray itself as a political body, and that several of the Justices regard the enforcement of congressional intent as their ultimate goal. As Justice Powell wrote, “[I]t is not the role of this Court to reconsider the wisdom of a policy choice that Congress has already made.”¹²

The courts, including the Supreme Court, may review legislation, but they have a different place in the scheme of government process to Congress. Congress consists of a body of

7. Stephen B. Burbank, *An Interdisciplinary Perspective on the Tenure of Supreme Court Justice*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 317, 325 (Roger C. Cramton & Paul D. Carrington eds., 2006).

8. 319 U.S. 624 (1943).

9. *Id.* at 649 (Frankfurter, J., dissenting).

10. *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 378 (1973).

11. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

12. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 240 (1986) (Powell, J., dissenting in part and concurring in part).

elected representatives, appointed to carry out the will of the people. The constitutional role of the courts, as Chief Justice John Roberts has written, is “to decide concrete cases—not to serve as a convenient forum for policy debates.”¹³ However great the temptation to behave otherwise, the role of the Judiciary at all levels, from federal district courts to the United States Supreme Court, “does not extend to imposing procedures that merely displace congressional choices of policy.”¹⁴

That said, the role of the Supreme Court has altered significantly since the days of the Framers, and there can be little doubt that Alexis de Tocqueville’s observation that “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question,”¹⁵ holds as true today as ever. Others have concurred. For example, Aharon Barak, former President of the Supreme Court of Israel, has stated that “[n]othing falls beyond the purview of judicial review,”¹⁶ a fact that must be regarded as “a prerequisite of viable democratic governance in multilayered federalist countries.”¹⁷ It is perhaps when those different layers come together that the law, politics, and society are most benefited. We should be mindful of the fact that the Warren Court, for example, was responsive to the change society demanded to an extent previous Courts had not been. It was through that Court’s authentic articulation of the national mood that civil liberties were promoted and change finally wrought in the field of equal rights.¹⁸

Perhaps unsurprisingly, the Supreme Court functions most effectively as a harbinger and agent of change when it successfully manages to read the mood of the times in a manner

13. *Massachusetts v. EPA*, 549 U.S. 497, 547 (2007) (Roberts, C.J., dissenting).

14. *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2293 (2008) (Roberts, C.J., dissenting) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34–35 (1982)).

15. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Vintage Books ed. 1990) (1835).

16. HIRSCHL, *supra* note 4, at 169.

17. *Id.* at 32.

18. Jack M. Balkin & Reva B. Siegel, *Introduction* to *THE CONSTITUTION IN 2020* 5 (Jack M. Balkin & Reva B. Siegel eds., 2009).

similar to that of the Warren Court. Courts cannot act alone in effecting social change, as *Brown v. Board of Education*¹⁹ demonstrated: without the consent of the governed and the governors alike, the ruling in that landmark case could not have been manifested as reality. Although not democratically elected by the people, Justices do not act without some understanding of the laws they judge, nor are they unaware of the cultural and political currents that inform society:

In a democratic society, courts best perform their institutional role as partners in a larger dialogue: They respond to popular visions of the Constitution's values and help to translate these values into law. Constitutional ideas usually emerge from the bottom, not the top. Constitutional values come from political mobilizations, from political and cultural struggles over long periods of time. Courts do not lead these mobilizations, though they can give them new and distinctive articulation.²⁰

The Supreme Court may consist of “nine fallible men,” but its functions “impact the daily lives even of politically inconspicuous citizens” to a far greater extent than any of the Founding Fathers could have imagined.²¹ Whether or not Justice Felix Frankfurter's adage that the “Court is the Constitution”²² still holds true today, it should not be forgotten that in public policy, “the sovereign prerogative’ of choice should always rest with *elected* compromisers and the people to whom they answer.”²³

Interpretations of the Court's role are many and varied. President Obama has expressed the view that the “special role” of the Court is to protect “the vulnerable, the minority, the outcast, the person with the unpopular idea.”²⁴ This perspective

19. 347 U.S. 483 (1954).

20. Balkin & Siegel, *supra* note 18, at 6.

21. CHRISTOPHER C. FAILLE, *THE DECLINE AND FALL OF THE SUPREME COURT: LIVING OUT THE NIGHTMARES OF THE FEDERALISTS* 8 (1995).

22. *The Supreme Court: The Passionate Restrainer*, TIME, Mar. 5, 1965, available at <http://www.time.com/time/magazine/article/0,9171,839325,00.html>.

23. *Id.* (emphasis added).

24. David G. Savage, *Supreme Chance to Alter the Court*, L.A. TIMES, Nov. 17, 2008, available at <http://articles.latimes.com/2008/nov/17/nation/na-courtobama17>.

contrasts powerfully with, for example, the view set forward by Chief Justice John Roberts at his confirmation hearings that judges should be nothing more than umpires.²⁵

Since assuming the role as Chief Justice, Roberts's tenure has been increasingly "not that of a humble moderate but, rather, that of a doctrinaire conservative . . . [who] reflects a view that the Court should almost always defer to the existing power relationships in society."²⁶ This characterization of Roberts's views stands in stark contrast to the position consistently taken repeatedly by Obama, who in 2007 opined that he wanted Justices "who have enough empathy, enough feeling, for what ordinary people are going through," and who held up Chief Justice Warren's position in *Brown* as illustrative of a wisdom which recognized "that segregation was wrong less because of precise sociological effects and more so because it was immoral and stigmatized blacks."²⁷ What the two views—those of Obama and Roberts—have in common is their insistence that the law is a powerful tool which should be used to effect social change where necessary: for Chief Justice Roberts, that often means upholding the status quo and maintaining the balance of power in favor of government and state institutions; for Obama, it means using the law to redress social inequalities that elected representatives either ignore or cannot change due to uncompromising political realities.

Since they have the task of interpreting laws in conformity with the Constitution, one of the main difficulties for judges, particularly Supreme Court Justices, is that their job is inherently political to a certain and unavoidable extent. The Constitution does not address many of the issues commonly thought to be compelling to a significant portion of society today, from abortion and equal rights for those of every color and creed, to the rights of the state to take away land from private owners,

25. Jeffrey Toobin, *No More Mr. Nice Guy: The Supreme Court's Stealth Hard-Liner*, THE NEW YORKER, May 25, 2009, available at http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin.

26. *Id.*

27. Neil A. Lewis, *Stark Contrasts Between McCain and Obama in Judicial Wars*, N.Y. TIMES, May 28, 2008, available at <http://www.nytimes.com/2008/05/28/US/politics/28judges.html>.

and the to rights of suspected terrorist detainees. As such, judges—in particular those in the higher courts, as theirs is the responsibility of interpreting and determining the validity of law and policy in a broad sense—cannot escape from appearing (and in fact being) political. Since almost the genesis of the United States, this fact has been recognized, as the drafters of the Ninth Amendment expressly acknowledged in stipulating that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²⁸

Even issues which do not superficially appear controversial or political by nature later turn out to have been clearly ideologically-driven, such as the question of standing requirements addressed by the Rehnquist Court in *Lujan v. Defenders of Wildlife*.²⁹ Liberals favor broad standing requirements so that a wide range of parties can bring legal challenges; conservatives advocate narrower ones so that the status quo—particularly with regard to the government—can be maintained. In *Lujan*, the Court made it more difficult for plaintiffs to meet standing requirements, holding that simply having an interest in an issue did not necessarily mean that a party could bring a lawsuit.

Chief Justice Roberts himself echoed this doctrine in *DaimlerChrysler Corp. v. Cuno*,³⁰ when he wrote for the majority:

[A]ffording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as “virtually continuing monitors of the wisdom and soundness” of state fiscal administration, contrary to the more modest role Article III envisions for federal courts.³¹

Issues such as these, no less than the questions addressed by the Supreme Court in cases such as *Brown*, not only require judges to espouse a definite moral and political philosophy, but also often demand that they enumerate their views on the role of the federal judiciary itself—either openly or tacitly—as Chief

28. U.S. CONST. amend. IX.

29. 504 U.S. 555 (1992).

30. 547 U.S. 332 (2006).

31. *Id.* at 346 (internal quotations omitted).

Justice Roberts did in *Cuno*. Sometimes, judicial pronouncements are shunned. At other times, they are welcomed, often depending on which side of the aisle a commentator happens to be standing.

For the liberal wing of the Court—Justices Sotomayor, Stevens, Ginsburg, Breyer, and sometimes Kennedy—rulings should be as narrowly confined to the specific facts of the case as possible, a belief based partly on the principle that judicial restraint is the route to not racing ahead and risking misunderstanding the nation’s mood or inclination to affect sweeping social change. This doctrine, known as judicial minimalism, has been a natural reaction to what many perceive as “a strategic and defensive response to the fact that conservative activists on the Supreme Court were aggressively striking down progressive legislation”³² in the period following the Warren Court’s demise.

There are numerous definitions of minimalism. According to Cass Sunstein, adherents to the doctrine “believe that by leaving central issues undecided, they can maintain ample space for self-governance while also demonstrating respect to people who disagree on fundamental matters.”³³ Although his recent work has called minimalism into question somewhat, and has been increasingly critical of the justifications of this principle,³⁴ Sunstein was instrumental in calling for “a distinctive form of judicial decision-making” in which a court “settles the case before it, but it leaves many things undecided.”³⁵ The “many things” to which this suggested definition refers may be understood to mean, broadly speaking, policy-related or social issues.

Yet minimalism, judicial restraint by another name, is not a new doctrine. Its chief proponent in the past century was undoubtedly Alexander Bickel, whose plea for judicial self-control was set forth in his 1962 book *The Least Dangerous Branch*.³⁶

32. Rosen, *supra* note 6.

33. Cass R. Sunstein, *Beyond Judicial Minimalism* 1–2 (Harv. Univ. Pub. Law & Legal Theory, Working Paper No. 08-40, 2008).

34. *Id.*

35. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* ix (1999).

36. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986) (1962).

However, there are a number of significant differences between minimalism as advocated by Sunstein and judicial self-control as articulated by Bickel, foremost among them being:

While Bickel's project might be described as *juricentric* – it counselled minimalism chiefly as a method of protecting the judiciary's own place in the constitutional system – the projects of Sunstein and the other new minimalists are, if you will, *polycentric* – they defend minimalism almost solely as a way of deferring to and bolstering the legitimacy and efficacy of the political branches.³⁷

Whichever view we take as being most representative of the ideology of the current Supreme Court Justices who favor minimalism—Anthony Kennedy, Ruth Bader Ginsburg, John Paul Stevens, and Stephen Breyer—it is interesting to note that “judicial minimalism paradoxically maximizes judicial power” since it “provides no clear standards to guide future decisions, and hence leaves the justices themselves free to decide each case as they see fit.”³⁸

The crucial justification for advocating that the Supreme Court should not go further than necessary in deciding cases is based on the belief that the Court as a body lacks the legitimacy possessed by the Legislature. This view is often propounded by academics and is frequently accompanied by calls for “substantive minimalism,”³⁹ which holds that because of its unelected position and lack of democratic legitimacy, the Court should avoid invalidating decisions and actions by the government as much as possible.

This argument has some merit. For one thing, the terms served by Supreme Court Justices are considerably longer than those served by political appointees: in 2008, the average terms of service in the House and Senate were about 10 years and 12.8 years respectively for members of the 110th Congress;⁴⁰ in

37. Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1457 (2000) (citation omitted).

38. THOMAS MOYLAN KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 292 (2004).

39. Peters, *supra* note 37, at 1459.

40. CONG. RESEARCH SERV., 110TH CONG. CRS REPORT FOR CONGRESS,

contrast, of the present members of the Supreme Court, six have served for 15 years or more.⁴¹

Second, Justices of the Court are not politically accountable, and there is no means of testing whether the people, broadly speaking, approve of the job they are doing.

Third, unlike the broader electorate, which is made up of a socially, culturally and economically diverse citizenry, Supreme Court Justices tend to come from extremely homogenous backgrounds.⁴² This fact strongly supports the argument that judgments issued by such a uniform composite of individuals lack the authority and legitimacy of laws made by representatives elected by the people on a regular basis. This legitimacy is important, for as Justice Oliver Wendell Holmes famously said, the Constitution “is made for people of fundamentally different views,”⁴³ and as such must be reconciled to the heterogeneous (and often divergent) interests underpinning society at any given time—a legitimacy that only will be undermined by “conservative judges appointed by conservative politicians [who] have generally followed the views of conservative elites.”⁴⁴

The Supreme Court’s holdings are undermined to some extent by the lack of diversity on the Court, and to suggest that judges and Justices are not influenced by where they come from—educationally, socially, economically and culturally—is ludicrous. It implies, highly implausibly, that there is something which can be considered an objective standard, and that “an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation.”⁴⁵ Such objective interpretation—according to which the notion of impersonality informs judicial decision-making and judges restrain their beliefs—is plainly incredible.

As Justice Sonia Sotomayor has stated in the context of being

MEMBERSHIP OF THE 110TH CONGRESS: A PROFILE (2008), *available at* <http://www.corzine.senate.gov/reference/resources/pdf/RS22555.pdf>

41. As of the time of writing in July 2009.

42. *See infra* Part III.B.

43. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

44. Balkin & Siegel, *supra* note 18, at 4–5.

45. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982).

a minority member of the Judiciary (both in the sense of being a woman and having come from a Hispanic background), whatever explanation is proffered for the different perspectives held among the Judiciary “either as some theorists suggest because of our cultural experiences or as others postulate because we have basic differences in logic and reasoning,” those differences “are in many respects a small part of a larger practical question we as women and minority judges in society in general must address.”⁴⁶ While judges are undoubtedly capable of thinking and reasoning for themselves, they are nonetheless “members of a political community” and as such, “[t]heir decisions draw on contemporary values and respond to complex currents in public opinion”;⁴⁷ the only unclear point is to which trends judges are responding and whose opinions they represent.

However, being able to understand the perspective of a diverse range of parties to Supreme Court cases is no simple matter because

to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Others simply do not care. Hence, one must accept the proposition that a difference there will be [sic] by the presence of women and people of color on the bench. *Personal experiences affect the facts that judges choose to see.*⁴⁸

At the other end of the interpretative spectrum lies strict constructionism, also known as positivism, a doctrine often associated with Justice Antonin Scalia. Yet strict constructionism—a dogma which has its roots in the idea that judges should seek to apply the principles set forth in the Constitution just as the Founding Fathers would have done—is a nonsense that its adherents use as a convenient device for substituting their own doctrine for that of the Framers where it

46. Judge Sonia Sotomayor, Judge Mario G. Olmos Memorial Lecture at the University of California, Berkeley, School of Law: A Latina Judge’s Voice (2001) (transcript available at <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=1&r=1>).

47. Balkin & Siegel, *supra* note 18, at 5.

48. Sotomayor, *supra* note 46 (emphasis added).

suits their political ends to do so (since the Constitution is strong on values yet weak on interpretation, this is a convenient device) and finds them employing its tenets as a smoke-screen to avoid pronouncements on issues they find too contentious or on which they are likely not to be able to command a feasible majority of the Court's Justices.

The idea that judges can separate the social and legal mores of our time from those that dominated at the time the Constitution was written, and somehow interpret that document in accordance with the latter by stressing "factors like the use of particular words or the intent or beliefs of the framers" brings the argument to bear on factors which have "little or no moral relevance."⁴⁹ It attempts to separate the interpretation of a document from the lens through which judges see it—a morally, socially, and legally tinted glass—thus creating a false bifurcation between the two.

Originalism also demands that modern-day judges find some justification for the morality possessed by the Framers of the Constitution, something that is not always easy when one recalls the tacit approval that document embodies for slavery or the view held by the majority of its authors that inequality between rich and poor was not a source of concern. All men may have been created equal, but that does not mean that they possess an equality of means or equal opportunities.

Somewhere in between judicial minimalism and strict constructionism, democratic constitutionalism can be found, a doctrine which holds that Courts, working hand in hand with political movements, should correct imbalances in social justice. This position has been predominantly associated with Yale academics, and in particular, has been honed by Jack Balkin, Reva Siegel, and Robert Post.⁵⁰ Operating under democratic constitutionalism, judges, taking their cues from prevailing moral, social, and cultural trends, seek to frame the discussion using legal paradigms; through jurisprudential frameworks, they attempt to give voice to those (usually) bottom-up trends in a way

49. Fiss, *supra* note 45, at 753.

50. See Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, *supra* note 18, at 25, 34.

that may then be implemented top-down.

According to this theory, for example, the Supreme Court would resist expounding its views on issues such as gay marriage, on which the American people are apparently undecided, until the point comes at which a prevailing national consensus becomes perceptible. Such an approach strongly resembles that of the Warren Court and the timing of its pronouncements on equal rights. When the Court felt the issue of equal rights was ripe for adjudication, it handed down its judgment—one which was highly critical of the status quo but broadly in keeping with the views of the majority of society.

Judicial activism per se is hardly a new development. Samuel Issacharoff writes that there were two periods in twentieth century constitutional law during which the role of the judiciary in enforcing the Constitution was most contentious: the period from *Lochner* to the New Deal, and then again from *Brown* to *Roe*.⁵¹ Whether or not one agrees with the views propounded by the Supreme Court during these periods, there can be little doubt that the Court “staked itself firmly in the great disputes of the time.”⁵² According to Issacharoff, challenges to the power of the Court periodically arise but ultimately end in naught, or perhaps in stalemate. He has written:

At least once a generation, a new movement proposes to curb the role of the imperial judiciary, whether claiming the mantle of democracy, or popular constitutionalism, or departmentalism or whatever the passing term might be. Occasionally, political frustration with the judiciary leads to proposals to pack the Supreme Court, or alter the forms of judicial selection, or surgically restrict the jurisdiction of the courts or of their injunctive powers. These efforts tend to fade as well, as somehow the courts and our political culture achieve if not a reconciliation, at least some form of stasis.⁵³

On reflection, one of the most convincing arguments is that

51. Samuel Issacharoff, *Meriwether Lewis, the Air Force, and the Surge: The Problem of Constitutional Settlement* 1 (N.Y. Univ. Sch. of Law, Working Paper No. 08-40, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113611.

52. *Id.*

53. *Id.*

the presence on the Court of the same group of actors for ten, twenty or even thirty years is something of a thorn in the side of democracy. Justice John Paul Stevens, for example, was appointed by President Ford and has now held his seat on the Court for thirty-four years; Justice Antonin Scalia has been there over twenty years.

There is a powerful argument, as the above quote from Issacharoff suggests, that inaction (stasis) is perhaps the default stance of all of the branches when it comes to challenging or attempting to reform the role of the Supreme Court. After all, undoing Chief Justice Marshall's dictum in *Marbury v. Madison*,⁵⁴ that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"⁵⁵ is scarcely possible now. Marshall's confidence in propounding the view that the federal judiciary is responsible for making the final determination in situations where a law is in opposition to the Constitution was revelatory. He believed that:

[I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.⁵⁶

Yet this view of the Supreme Court gives one judge (or one Supreme Court, depending on its composition) a power unrivalled by any of the other branches of government. In reality what it means is that one member of the Court acts as the swing vote on a wide range of far-reaching and potentially era-defining issues: Justice Sandra Day O'Connor held that position on the Rehnquist Court; Justice Anthony Kennedy frequently exercises the deciding vote in the Roberts Court era. This has resulted in a profoundly undemocratic status quo, in which the Supreme Court wields a power grossly disproportionate to that of either the legislature or the executive—even if senators do remain for many years, they must still seek and obtain re-election from the people,

54. 5 U.S. 137 (1803).

55. *Id.* at 177.

56. *Id.* at 178 (emphasis added).

something alien to the Justices of the United States Supreme Court.

Whether the Supreme Court should be an umpire, somehow attempting to interpret the Constitution while perpetually trapped in a jurisprudential time warp, or whether it should view the law as an organic entity constantly in a state of flux, one thing is clear: members of the Court must rotate with a greater frequency than they have done thus far in the Court's history (but most pronouncedly since 1970⁵⁷), if they are to be accorded democratic legitimacy. Of course, the very notion of legitimacy with regard to a body such as the Supreme Court may seem to be close to a non sequitur (a merely irrelevant or most likely redundant consideration), but as we have discussed in this Article, a body that exercises so much power must have a greater sense of responsibility and degree of accountability to the people. A reformed selection process, combined with Justices who serve shorter terms and who reflect the democratic reality embodied in the executive and legislative wings, is likely the most efficacious way to achieve this.

Under our proposal, as outlined herein, the power of one Supreme Court (and most likely one or two Justices) to effect enduring social change would be limited through the imposition of fixed terms and the introduction of an impartial judicial appointments commission. Although senators and governors can theoretically hold their seats for indefinite periods, the reality is that few do so, and of course the President and his executive body must relinquish power every two terms under the twenty-second Amendment to the Constitution. It is time the highest court within the federal judiciary, the Supreme Court, came to mirror this political reality more closely.

During their long terms on the bench, Justices may become increasingly politically entrenched in their views and correspondingly more vocal in support of their own ideology—ideology that received no electoral mandate from the people. This is a far cry from Aristotle's declamation that "the law is reason without passion and it is therefore preferable to any

57. See Steven Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 771 (2006).

individual.”⁵⁸

There can be no doubt that the law can both precipitate wider social change and also be receptive to that change. Yet without question, the law—and this is no less true of the Supreme Court—is at its best when it works within the context of a changing society, not against it. As Sotomayor opined in 1996, “[C]hange—sometimes radical change—can and does occur in a legal system that serves a society whose social policy itself changes.”⁵⁹ When the Supreme Court in particular falls out-of-step with society, it becomes unable to provide guidance or explanation through its judgments that adequately expresses where society is and what those changes mean.

Accordingly, there can be little doubt that a diverse judiciary is also a more meritorious one, and this matters to public perceptions of the justice system, which are as crucial to the continued legitimacy of the legal process as to the administration of justice. While we do not advocate that judges should regard themselves as policy-makers—they have no real mandate to devise laws according to their own unelected whims—neither do we suggest that judges should be immutable puppets who may be manipulated by executive edict, congressional fiat, or both.

The answer, surely, is a middle ground, an unexplored territory somewhere between the minimalist approach advocated by the Court’s liberal wing and the strict constructionist approach proposed by its conservative Justices, in which judges are able to interpret a living Constitution without fear of the executive or political branches of government. In this landscape, Justices would be free to expound their own interpretations of the Constitution, based on their own views and backgrounds, while remaining aware of the pervasive social, cultural, and economic undercurrents informing our society—not only the majority, but also minority culture. For this reason, President Obama’s words during his announcement of Justice Sotomayor to fill the seat vacated by Justice Souter ring true: “Experience being tested by obstacles and barriers, by hardship and

58. ARISTOTLE, POLITICS, bk. III, at 15–16 (J.E.C. Welldon trans. 1905).

59. Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 38 (1996).

misfortune; experience insisting, persisting, and ultimately overcoming those barriers . . . is a necessary ingredient in the kind of justice we need on the Supreme Court.”⁶⁰

III. RIPE FOR REFORM

A. Certiorari Granted: The Dwindling Docket Issue

The number of cases filed with the Court has steadily increased over the past century: 386 cases were filed in 1895, and that number had arisen to 6,597 by the 1995 Term.⁶¹ However, the rise in the number of cases filed has not yielded a corresponding increase in the number of cases accepted for plenary review; although the Court regularly issued approximately 150 decisions per term in the 1970s and ‘80s⁶² (the high watermark came with the 158 cases selected for review in 1972), that figure has dropped as low as sixty-eight cases recently in the 2007 Term, illustrating a trend that “during the period when the Court was cutting its decisional output in half, the input came close to doubling.”⁶³

There are a number of questions that the Court’s declining docket provokes: Are a sufficient number of cases being decided each year to reconcile conflicting interpretations of law among the courts of appeals and reflect changing social and cultural mores? Is the Court avoiding certain cases that address politically divisive issues which Justices feel are beyond their

60. Barack Obama, President of the United States, Introduction of Supreme Court nominee Sonia Sotomayor (May 26, 2009), *quoted in* Robert Barnes & Michael A. Fletcher, *Riskiest Choice on Obama’s List Embodies His Criteria: President and Judge Cite Her Life Experience*, WASH. POST, May 27, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052600889.html>.

61. Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 740 (2001) [hereinafter Cordray, *Plenary*].

62. Margaret Cordray & Richard Cordray, *Numbers That Don’t Benefit the Court*, WASH. POST, July 11, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/07/10/AR2006071001105_pf.html [hereinafter Cordray, *Numbers*].

63. Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 404 (1996).

remit as partisan political appointees? If any of these things are happening, the dwindling docket must be regarded as a source of concern.

Commentators and academics have advanced a number of reasons why the Court's docket has decreased steadily since the 1980s. One reason may be that in 1988, in response to pressure from the Justices, Congress enacted legislation that eliminated almost all mandatory appeals—long out of favor with the Justices⁶⁴—handing the Court almost complete discretion in deciding which cases to accept. The Court's docket began to drop suddenly in the Term following the enactment of this legislation, and by 1990, the Court was issuing only 116 plenary decisions per year—down from 145 in 1988.⁶⁵

Changes in the composition of the Court are another possible reason for the diminishing docket. For example, one critic has suggested that Justices Byron White and Harry Blackmun, who left the Court in 1993 and 1994, respectively, were considerably more likely than their contemporaries to grant certiorari.⁶⁶ This theory has been lent support elsewhere, with one article referring to the “dramatic effect on the recent decline in the plenary docket” the appointments of Justices Scalia and Kennedy to replace Chief Justice Burger and Justice Powell had, as well as the decreasing number of votes to hear cases made by William Rehnquist following his appointment as Chief Justice.⁶⁷

One explanation for the change in voting numbers to grant certiorari by Justices who joined the Court between 1986 and 1996—Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer—is that they have taken “a substantially different view of the Court's role in the American legal system” to those Justices who sat on the Court in the 1980s. This later group Justices have also shown themselves less concerned about unifying

64. Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, N.Y. TIMES, Dec. 7, 2006, available at <http://www.nytimes.com/2006/12/07/washington/07scotus.html>.

65. Cordray, *Plenary*, *supra* note 61, at 743.

66. Robert Barnes, *Justices Continue Trend of Hearing Fewer Cases*, WASH. POST, Jan. 7, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/06/AR2007010601094.html>.

67. Cordray, *Plenary*, *supra* note 61, at 784.

conflicting decisions and correcting errors made by the courts below, believing instead that “a relatively small number of nationally binding precedents is sufficient to provide doctrinal guidance for the resolution of recurring issues.”⁶⁸

Another possibility is that the current Court is overcautious. Since the appointment of Justice Samuel Alito and Chief Justice Roberts, the Court has divided 5-4 along conservative/liberal lines, with Justice Anthony Kennedy holding the swing vote on a plethora of issues. One observer has suggested that Justices are recalcitrant about casting their vote for a case which may not be able to garner a majority following, since four votes are required for a case to be granted certiorari.⁶⁹ Justices, in short, “withhold their vote to take a case unless they can be sure their ‘side’ would prevail”⁷⁰—such risk-averse behavior has been characterized as “defensive denial”.⁷¹

It is also worth noting that although the total number of petitions for certiorari has risen steadily over the past century, the number of appeals filed on behalf of the federal government by the solicitor general has been falling recently. This fact is significant because the Court has readily and frequently granted review to cases filed by the solicitor general. The solicitor general is not only by far the most frequent litigant before the Court,⁷² he is also the most successful applicant at obtaining plenary review; the Court grants more than 50% of his petitions, as compared with about 3% for other parties.⁷³

A survey of the number of petitions sought by the solicitor general since the mid-1980s reveals a sharply-declining trend. During the 1984-1987 Terms, the solicitor general sought review in 231 cases, a number which dropped to 137 in the proceeding four terms and declined further to only thirty-one cases per term

68. Hellman, *supra* note 63, at 430–31.

69. Particularly if the contention that “judges pool their law clerks and have one clerk make the initial recommendation for each case” is true, since clerks will not want to risk “their judge” losing face on an issue the judge cannot get a majority to agree with him. See Greenhouse, *supra* note 64.

70. Barnes, *supra* note 66.

71. Greenhouse, *supra* note 64.

72. Cordray, *Plenary*, *supra* note 61, at 763.

73. *Id.* at 763.

between 1995 and 1998.⁷⁴ In 2000, he filed 24 cases, and in 2006, his office filed only ten cases for review by the Court.⁷⁵

The reduction in the number of petitions filed by the solicitor general has resulted in a drop of some fifteen cases each term on the Court's plenary docket.⁷⁶ Furthermore, the solicitor general has been less active recently in cases before the Court as an amicus, which accounts for an additional ten cases or so being lost from the docket.⁷⁷ When studied closely, it becomes clear that the decreasing number of cases filed by the solicitor general has made a "substantial contribution to the decline"⁷⁸ in the total number of cases heard by the Court.⁷⁹

Several theories may be advanced as to why the government appears to be petitioning the Court for review less often than in the past. One hypothesis holds that the government may be losing less often at the court of appeals level,⁸⁰ and though this is impossible to determine (as win-lose statistics are not available), some observers have accorded credence to this argument.⁸¹ However, one commentator suggests that, over the past two decades, "there is no doubt that the ranks of the federal judiciary have become more conservative and thus probably, on the whole, more pro-government"—a "broad judicial realignment"⁸² which may account for up to a third of the drop in the number of cases on the Court's docket.⁸³

Yet this explanation fails to completely convince. As Margaret and Richard Cordray point out, if such a philosophical realignment, either toward the left or right, were the reason for the shrinking docket, it would be reasonable to expect that the

74. *Id.* at 764.

75. Greenhouse, *supra* note 64.

76. Cordray, *Plenary*, *supra* note 61, at 764.

77. *Id.* at 764.

78. *Id.* at 764–65.

79. However, the drop in petitions filed by the solicitor general does not alone explain the shrinking docket. A closer look at the number of cases heard reveals that there was an even more substantial reduction in cases in which the Court was petitioned by other litigants. *See* Hellman, *supra* note 63, at 418–19.

80. *Id.* at 418.

81. Barnes, *supra* note 66.

82. Cordray, *Plenary*, *supra* note 61, at 770–71.

83. *Id.* at 771.

Court's caseload would have begun to swell again, for example, "after several years of a Democratic President."⁸⁴ No such corollary has occurred. This fact rubs uncomfortably up against claims that an "increasingly homogeneous appellate judiciary appointed by Republican administrations is producing fewer conflicting opinions among circuits."⁸⁵

Most likely, the diminishing Supreme Court docket is due, in part, to each of the explanations offered above. It is also possible that the Court is simply being asked to decide fewer landmark cases (in the *Brown v. Board of Education* or *Plessy v. Ferguson* mold), and as a consequence, its role as a constitutional arbiter has become less pronounced than in the past.

The question is what should be done about the shrinking docket, if anything. Some commentators have suggested that the Justices "should frankly consider whether 71 plenary decisions in a given year are really enough to carry out the court's constitutional function of ensuring the supremacy and uniformity of federal law," a process that would require "self-conscious reflection and discussion."⁸⁶

Our concern is that because Justices are appointed on the basis of their political beliefs, they will be reticent to take cases which challenge the views of the administration that appointed them. With the obvious exception of former Justice David Souter, Justices tend to vote in a demonstrably loyal manner to the views of the party that appointed them. This is clearly an undesirable situation: Justices ought to be able to adopt a range of free-thinking positions based on their jurisprudential philosophies and interpretations of the law—which are hopefully informed by factors other than political considerations—rather than voting consistently along party-political lines. The present status quo reduces the Supreme Court to a partisan political entity that frequently appears to exist simply to enforce the views of the administration that happens to command the greatest majority of Justices, based on whether there is a Democratic or Republican leaning to the Court at a given time.

84. *Id.* at 772.

85. Barnes, *supra* note 66.

86. Cordray, *Numbers*, *supra* note 62.

As outlined below, Justices appointed according to merit, within a less politicized appointments process, would feel less compunction about accepting or rejecting cases based on the ideological conflict potentially engendered with the incumbent administration. In such a system, the docket may well once again begin to swell, and certiorari could be granted more commonly and freely.

B. A Representative Judiciary: Judicial Diversity & Expansion Examined

The confirmation of Sonya Sotomayor as an Associate Justice on August 6, 2009, is a useful point from which to examine the present makeup of the United States Supreme Court. Of the nine members of the current Court, all but one—Justice John Paul Stevens—graduated from Ivy League law schools, and all sat on the United States Courts of Appeals before being appointed to the Supreme Court bench.⁸⁷ In addition, seven are white and seven male.

It may appear from the foregoing brief description that Justices come from uniform backgrounds. This is not entirely true. For example, not all Supreme Court Justices have had a background in the Judiciary,⁸⁸ and in fact this is the first Supreme Court in history to be entirely comprised of former appellate court judges. In the twentieth century alone, a number of distinguished Justices were appointed without having had any judicial experience whatsoever: among them Justices Louis Brandeis, Harlan Fiske Stone, Hugo Black, Felix Frankfurter, Robert Jackson, Earl Warren, and William Rehnquist.⁸⁹

In addition, diversity of one kind or another has been a preoccupation of Presidents since almost the founding days of the

87. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Sept. 12, 2009).

88. See Supreme Court Justices Without Prior Judicial Experience Before Becoming Justices, http://supreme.lp.findlaw.com/supreme_court/Justices/nopriorex.html (last visited Sept. 12, 2009), for a complete list of Justices appointed to the Supreme Court without any prior judicial experience.

89. Louis H. Pollak, *Our New Supreme Court: Any Lessons from the United States?*, 10 JUD. REV. 188, 190 (2005).

Court. In those days, regional conflicts predominated, and identity was closely tied to where a judge came from or resided: there would traditionally have been New England, Virginia, Pennsylvania, and New York seats on the Court.⁹⁰ Later, with Woodrow Wilson's nomination of Louis D. Brandeis, the so-called Jewish seat of the Court was established and was subsequently occupied by Justices Benjamin N. Cardozo, Felix Frankfurter, and Abe Fortas.⁹¹

Since then, times have changed substantially. For one thing, religious tensions in the country at large and on the judicial bench are not the hotbed of contention they once were, and the reality that there are now six Catholics on the Court⁹² has raised few eyebrows. The fact that Justice Ginsburg and Breyer are Jewish⁹³ is also discussed infrequently and shows how religious affiliation of the Justices matters far less than it once did.

That said, it is also inaccurate to portray Justices as coming from a wide range of backgrounds and being representative of a wide-cross section of society. This is not to question the ability of the present Court. However, while excellence must be an indispensable and non-negotiable characteristic of a Justice, there are other important points to bear in mind. For example, it is vital to have an element of variety on the bench and to search out

judges who are intelligent and learned, judges who are practical and down-to-earth, judges of austere intellectual independence and judges skilled at compromise, judges who have led worldly and those who have lead sheltered lives, judges who are realistic and judges who are idealistic, judges who are passionate about liberty and judges who are passionate about order and civility,

for the simple reason that each makes a different and valuable

90. Jeffrey Toobin, *Diverse Opinions*, THE NEW YORKER, June 8, 2009, available at http://www.newyorker.com/talk/comment/2009/06/08/090608taco_talk_toobin [hereinafter Toobin, *Diverse Opinions*].

91. *Id.*

92. Laurie Goodstein, *Sotomayor Would Be Sixth Catholic Justice, but the Pigeonholing Ends There*, N.Y. TIMES, May 30, 2009, at A20, available at <http://www.nytimes.com/2009/05/31/us/politics/31catholics.html#>

93. Toobin, *Diverse Opinions*, *supra* note 90.

contribution to the Court.⁹⁴

The problem with a substantially homogenous Supreme Court is that it tends to produce uniformity of opinion. There is certainly something problematic about a Court which is divided only by party political allegiances and occasionally differing gender perspectives (although there are only two women on the Court despite the fact that women make up roughly half of the population of this country). A more diverse bench will make the justice system “richer for the diversity of background and experience of its participants,”⁹⁵ and ensure that no one value-set informs judicial decisions.⁹⁶

The benefit of a range of differing perspectives on the Court cannot be overstated: It can be presumed not only that an ideologically diverse bench could be a more accurate representation of the myriad views espoused by members of society as a whole, but also that this would, by extension, improve the representative quality of decisions made. In addition, more diversity would lead to “greater appreciation and acceptance during the appointment process of the full range of voices that may exist within different marginalized communities.”⁹⁷ This point was well illustrated by the nomination of Sonia Sotomayor to the Court, which “stirred some old-fashioned ugliness”⁹⁸ questioning her intelligence in patronizing critiques, and focusing scrutiny of her nomination “not on what she has done but who she is,”⁹⁹ a process which, even when taken alone, “serves as a reminder of the value of a diverse bench and society.”¹⁰⁰

94. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 119 (2003).

95. Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 SW. U. L. REV. 189, 190 (2003).

96. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 411 (2000).

97. Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252, 1273 (2006).

98. Toobin, *Diverse Opinions*, *supra* note 90.

99. Gary Younge, *U.S. Conservatives are Fighting for the Rights of a Minority—White Men*, THE GUARDIAN, June 7, 2009, available at <http://www.guardian.co.uk/commentisfree/2009/jun/07/sotomayor-racism-supreme-court>.

100. Toobin, *Diverse Opinions*, *supra* note 90.

Where such voices have no representation in judicial, governmental, and administrative bodies, the narrow viewpoint espoused by a homogenous Court lacks true credibility simply because “a majority of the members of the political community would be unrepresented.”¹⁰¹ It can be anticipated that a more diverse Court would allow the Court to divide less rigidly along Democrat and Republican party lines—one of our foremost goals. In addition, one of the most important facets of a diverse Court is the way in which Justices interact and affect one another’s thinking. As Justice David Souter has opined: “[A]nyone who has ever sat on a bench with other judges knows that judges are supposed to influence each other, and they do. One may see something the others did not see, and then they all take another look.”¹⁰²

This point was also emphasized by Justice Sandra Day O’Connor, who writes of Justice Marshall:

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counsellor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.

. . . Justice Marshall imparted not only his legal acumen, but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.¹⁰³

A court comprised of members from diverse ethnic, religious, socio-cultural, and professional backgrounds is desirable because it represents those whom it purports to serve: A broad range of citizens from across the United States. Europe’s constitutional courts provide an apposite point of comparison: one of the unique

101. POSNER, *supra* note 94, at 120.

102. *Calderon v. Thompson*, 523 U.S. 538, 570 (1998) (Souter, J., dissenting).

103. Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

features of those courts that distinguishes them from the United States Supreme Court is that they “are not drawn solely from the judiciary but from a wider population including lawyers and prominent legal scholars.”¹⁰⁴

If the Supreme Court is seen to be representative of the population as a whole, its decisions will “command greater acceptance in a diverse society than would the decisions of a mandarin court.”¹⁰⁵ Judge Richard Posner has written that a diverse judiciary is important because “many cases cannot be decided by reasoning from shared premises of fact and value,”¹⁰⁶ and, further, it is a diversity and plurality of viewpoints that ensures that no one viewpoint or set of values informs judicial decisions.¹⁰⁷

The value of having a range of backgrounds representative of the population at large is reflected not only at the judicial level, as Justice Ruth Bader Ginsburg has pointed out, but also with regard to lawyers, jurors, and judges. It is clear that justice is “the poor[er], in terms of evaluating what is at stake and the impact of its judgments, if its members . . . are all cast from the same mold”¹⁰⁸—what Posner terms cultural “homogeneity.”¹⁰⁹

One of the difficulties associated with increasing minority—including women—Justices on the Supreme Court is that there is a preconceived notion of how seats should be allocated. In the wake of Justice Sandra Day O’Connor’s announcement on July 1, 2005, that she would retire as soon as the President found her successor, calls could be heard for the President to fill her seat with another woman, some emanating from the First Lady,¹¹⁰ others from some Republican Senators.¹¹¹

104. John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1678 (2004).

105. POSNER, *supra* note 94, at 120.

106. *Id.*

107. Ifill, *supra* note 96, at 411.

108. Ginsburg, *supra* note 95, at 190.

109. POSNER, *supra* note 94, at 120.

110. See *First Lady Wants New Female Justice*, WASH. POST, July 13, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/12/AR2005071200456.html>.

111. See Peter Baker & Jo Becker, *Bush Pledges Wide Search for Court Seat*, WASH. POST, Sept. 7, 2005, available at <http://www.washingtonpost.com/w>

However, calls for a woman to replace Chief Justice Rehnquist were seldom heard, with conventional political wisdom in Washington seemingly wedded to the idea that only a seat occupied by a woman should be filled by a woman. Likewise, calls for a minority to be appointed to the Court came thick and fast following the retirement of Justice Thurgood Marshall in 1991, but have been much less frequent after other retirements from the Court. The reason is that “it is hard for politicians to envision seats other than those already filled by women and minorities as seats suitable for minority or female nominees.”¹¹² It is important, however, for all concerned to move past “token appointments of minority judges” if we are to achieve “a critical mass of minority judges”¹¹³—something which should be regarded as desirable if the Supreme Court is ever to broaden its perspective and faithfully and accurately narrate the interests of non-majority individuals and groups.

A step in this direction was made with the appointment of a second female Justice to the Court in 2009. To date, however, Sotomayor is only the third woman appointed to the Court in its relatively long history, and there is no doubt that the male-domination of the federal judiciary, starting with the Supreme Court, has led to a situation in which “masculinity is already a tacit criterion of judicial merit,”¹¹⁴ and “the fundamental or objective criterion associated with *hoi aristoi* (the best people) has informally come to include masculinity.”¹¹⁵

To add a more representative group of Justices to the Court at the earliest possible opportunity, we propose increasing the number of Justices on the court to fifteen (the number of judges on the International Court of Justice), as others have suggested.¹¹⁶ At present, having only nine Justices means that it

p-dyn/content/article/2005/09/06/AR2005090601728.html.

112. Onwuachi-Willig, *supra* note 97, at 1268.

113. Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 109 (2004).

114. See Margaret Thornton, ‘Otherness’ on the Bench: How Merit Is Gendered, 29 SYDNEY L. REV. 391, 402 (2007).

115. *Id.* at 404.

116. Onwuachi-Willig, *supra* note 97, at 1265.

is “difficult to cultivate any meaningful type of demographic and substantive representation on the Court,”¹¹⁷ and because appointments are for life, confirmation battles in the Senate are political battles by nature.

By increasing the number of Justices on the Court to fifteen, the entire confirmation process would be revitalized in such a way as to “create more room and fewer excuses for politicians to fail to truly account for and value diversity in their nominations and votes.”¹¹⁸ It would also allow minority Justices to be appointed immediately, rather than having to wait years for another opportunity to arise upon the retirement or death of one of the present members of the Court.

Expansion of the Court would also mean that eight Justices would be required to form a majority, probably encouraging Justices to win over their colleagues and learn to persuade and negotiate with their colleagues better in order to amass votes. Such a process of negotiation, leading to dialogue is undoubtedly a desirable feature of the nation’s highest court and could lead to more discussion and flexibility among the Justices, thus ushering the Court away from its present, rigid party-political approach to voting.

C. Confirmation of Appointees: The Appointment Process

During his Senate confirmation hearings, Chief Justice John Roberts likened judges to umpires, stating, “Umpires don’t make the rules; they apply them.”¹¹⁹ This comment epitomizes the general tenor of Chief Justice Roberts’s testimony before the Senate. He went on to state that he had no preformed agenda or political platform, assuring the committee that he would not be a radical reformer, on the basis that “[j]udges are not politicians.”¹²⁰

The problem with this representation of judges as neutral arbiters, merely reading the Constitution letter-by-letter, is that

117. *Id.* at 1265-66.

118. *Id.* at 1267-68.

119. CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE* 17 (2007).

120. *Id.*

it is an unrealistic representation of the role of judges. Inevitably, they must, and will, use their political values and personal convictions when interpreting the law. This is an obvious reality given that the Constitution is not a manual that provides for a step-by-step application of the Constitution, but rather speaks in an abstract manner that cannot be deciphered “without making politically controversial judgments.”¹²¹

Chief Justice John Roberts provides a good case in point. On his appointment to the Court, the new Chief Justice showed that he was anything but an umpire.¹²² Yet Roberts’s judicial philosophy, like that of Justice Samuel Alito (who was confirmed shortly after him), was not a secret, nor was the fact that “each of the past three Republican administrations had put a premium on judicial philosophy as an indispensable element of their nominees’ qualifications.”¹²³ What has changed in confirmation hearings is the extent to which senators are able to elicit information from nominees during their testimony regarding their judicial philosophy or method of constitutional interpretation.

The confirmation hearings of Justice Sotomayor provide another example of how Supreme Court nominees perpetuate what Ronald Dworkin has termed “the silly and democratically harmful fiction that a judge can interpret the key abstract clauses of the United States Constitution without making controversial judgments of political morality in the light of his or her own political principles.”¹²⁴ Instead of offering a much-needed means to educe the nominee’s judicial philosophy, the Sotomayor hearings instead quickly descended into another opportunity for members of the Senate Judiciary Committee and the nominee herself—who had every incentive *not* to express her opinions for

121. *Id.* at 8.

122. Posting of Jason Harrow to SCOTUSblog, <http://www.scotusblog.com/wp/ask-the-author-christopher-eisgruber-and-the-next-justice-part-i/> (Nov. 14, 2007 10:11 EST).

123. Michael J. Gerhardt, *What’s Old Is New Again*, 86 B.U. L. REV. 1267, 1275 (2006).

124. Ronald Dworkin, *Justice Soyomayor: The Unjust Hearings*, N.Y. REV. OF BOOKS, Vol. 56, No. 14 (Sept. 14, 2009), <http://www.nybooks.com/articles/23052>.

fear of incurring the wrath and subsequent disapproval of the Committee—to perpetuate the legal fiction of judicial neutrality and fidelity to a set of principles that are devoid of meaning when interpreted without the aid of extrinsic tools.

Nominees have developed a number of techniques to evade difficult or contentious questions in recent years. One tactic is to distance themselves from any past comments or opinions by stating that such views might not be representative of their present stance, “in light of changed circumstances.”¹²⁵ Perhaps nominees believed such an opinion once, but it is unclear whether they still agree with it now. When Justice Alito was asked about statements he had made pertaining to *Roe v. Wade* some twenty years earlier, his tactic was evasion. Chief Justice Roberts, likewise, took the same approach. Both men simply stated that when they made statements in the course of their previous work, they were “expressing the official views, policies, or perspectives of the administration for which they worked.”¹²⁶

Another reason nominees are able to evade questioning so effectively is that they are able to claim that answering politically or constitutionally sensitive inquiries interferes with their judicial independence. As such, it is the nominees, ironically, who have “the authority to define and enforce the limits of such questioning.”¹²⁷ By shifting questioning away from their philosophy on any contentious matters which might affect their successful confirmation, nominees in recent years have ensured that nothing short of a major scandal—and sometimes not even that¹²⁸—will block their appointment to the Court.

Indeed, the lack of transparency of a candidate’s views during Senate hearings has led one observer to suggest that because hearings “almost inevitably prove an embarrassing spectacle that yields minimal information,”¹²⁹ the Senate ought to

125. EISGRUBER, *supra* note 119, at 158.

126. *Id.*

127. Gerhardt, *supra* note 123, at 1277; see also Jeffrey Toobin, *Answers to Questions*, THE NEW YORKER, July 27, 2009, available at http://www.newyorker.com/talk/comment/2009/07/27/090727taco_talk_toobin.

128. As the confirmation of Clarence Thomas amid accusations of sexual harassment proved.

129. BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT

take a vote on a nominee from his or her record and after interviewing other witnesses, eschewing public hearings altogether.

Yet it was not always such. In the years following the Founding Fathers' demise, the role of the Senate was integral to the decision as to whether nominees would be confirmed: "[T]he Senate viewed the nominee's judicial ideology—to say nothing of overt partisan political considerations—as relevant."¹³⁰ This was perhaps an inevitable development, unforeseen by the Founding Fathers, in light of the growing social and political division which "first generated and then legitimated political parties."¹³¹

The Senate's role in and ability to affect the confirmation process has continued to morph over time, but for many years the shifts in power between Congress and the President—first one way and then the other—represented a decisive factor in the former's ability to control events. Congress's dominance of nineteenth-century politics, for example, was reflected in its powerful role in confirmation proceedings. In the modern era, the President holds a much stronger position. Presently, "even a lame-duck President facing a Senate controlled by the opposite party, has enormous resources for mobilizing support and for disciplining those senators who refuse to go along."¹³²

Today, senators rarely press nominees on their views on seminal legal issues, a tradition established by the confirmation hearings of Judge Robert Bork. Since the fitful Bork hearings, senators have preferred to undertake "a peculiar ritual dance, in which they propound their own views on constitutional law, but neither hope nor expect the nominee to respond in like manner."¹³³ This situation reached almost farcical heights during the Justice Alito hearings when senators allegedly instructed the nominee that answering questions pertaining to his legal views

COURTS IN ANGRY TIMES 13 (Peter Berkowitz & Tod Lindberg eds., 2006).

130. Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1206 (1988).

131. *Id.*

132. *Id.* at 1209.

133. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 930 (1995).

would “not only be inappropriate but perhaps unethical.”¹³⁴

However, the above developments did not occur for the last time during Alito’s hearings before the Senate Judiciary Committee. The relatively recent confirmation hearings of Justices Kennedy, Souter, Thomas, Ginsburg, and Breyer all “lacked seriousness and substance” due to the candidates’ unwillingness to answer questions relating to their judicial philosophy, as well as their determination to rebuff any questions which would have exposed their opinions, principles, and views of major cases.¹³⁵

The problem is that senators have their backs to the wall during confirmation hearings. On the one hand, if they do not explore a nominee’s judicial philosophy and legal views at all, they risk imbuing the confirmation process with “an air of vacuity and farce,” preventing the Senate from accurately evaluating a nominee.¹³⁶ Perhaps even more importantly, they risk being perceived as weak on or uncommitted to issues their constituents are likely to consider closely when the next election arises. On the other hand, where senators compel a nominee to take a firm position on contentious ideological or political issues, they risk making nominees look “outcome-orientated,” which in turn places the integrity of the Judiciary at risk and puts it in a potentially negative light before the court of public opinion.¹³⁷

Much of this discussion centers around what one regards as the purpose of confirmation hearings. As suggested above, if the purpose of confirmation proceedings is for senators to discover a nominee’s judicial philosophy and track record, they can do so through examination of a candidate’s writings, rulings, or both, as well as through questioning of informed third parties with less of a vested interest in the outcome—although of course nominees are often careful to minimize their paper trail for fear it may wed them to positions they would rather later eschew. However, if hearings are to be considered “an opportunity to gain knowledge

134. Dawn Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-first Century*, 1 HARV. L. & POL’Y REV. 239, 243 (2007).

135. Kagan, *supra* note 133, at 920.

136. *Id.*

137. EISGRUBER, *supra* note 119, at 168.

of and promote public understanding of what the nominee believes the Court should do and how she would affect its conduct” through “[o]pen exploration of the nominee’s substantive views,”¹³⁸ then the present arrangement must be regarded as unsatisfactory.

Elena Kagan contends that the last informative and engaged confirmation hearing was that of Robert Bork. She writes that it was his discussion with the Senate that “educated the public and allowed it to determine whether the nominee would move the Court in the proper direction.”¹³⁹ However, this misses the important point that neither the public—who makes no contribution whatsoever to the hearings and absolutely does not affect the outcome—nor even the Senate are “equipped to proffer or register constitutional judgments of such magnitude.”¹⁴⁰

The real problem is not the process used to confirm the President’s nominees to the Supreme Court but rather that appointments to the Court are subject solely to Senate approval. As stated above, senators cannot easily out-manuever jurists of the level of potential Supreme Court Justices when it comes to linguistic contrivances or the ability to avoid questions altogether. They are simply not equipped to give the nominees a jurisprudential run for their money.

As such, it is hardly surprising that the entire confirmation process has become a “vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis.”¹⁴¹ Kagan believes that this development has taken place only since the Bork hearings. Whatever the reason, however, the process of political appointees confirming members of the Judiciary based solely on their systems of political beliefs (whether they are willing to overtly place them on show or not) has become nothing more than an outdated pageant.

Christopher Eisgruber rightly points out that “Americans have struggled for two decades to find a good way to discuss

138. Kagan, *supra* note 133, at 935.

139. *Id.* at 941.

140. Monaghan, *supra* note 130, at 1210.

141. Kagan, *supra* note 133, at 941.

whether [nominees] should be confirmed.”¹⁴² Eisgruber believes that it is because nominees do not answer senators’ questions on their judicial philosophy that a confirmation mess has arisen,¹⁴³ but in truth that is only part of the problem.

The time has surely come for an independent judicial appointments commission to be established in the mold of the one that exists in the United Kingdom, and to take Supreme Court appointments out of the hands of politicians and beyond the reach of the political process to the greatest extent permissible under the Constitution.

D. A European Perspective: The Judicial Appointments Commission

The Judicial Appointments Commission (hereinafter the JAC or the Commission) was established by the Constitutional Reform Act of 2005¹⁴⁴ and began operating in the spring of 2006. Its chairman, Baroness Prashar, declared its mission to be “diversity in the field; merit in the selection” the following year.¹⁴⁵ The JAC is an independent Executive Non-Departmental Body.¹⁴⁶ The Commission appoints members of the judiciary, including tribunals, in England and Wales¹⁴⁷ and is instrumental in selecting members for the new supreme court for

142. EISGRUBER, *supra* note 119, at 186.

143. *See id.*

144. Constitutional Reform Act, 2005, c. 4, sched. 12 (Eng.).

145. Margaret Prosser, Baroness, Address Delivered at 10 Upper Bank Street, Canary Wharf, London: A Judiciary for the 21st Century (Mar. 11, 2009), *available at* <http://www.judiciary.gov.uk/docs/speeches/bp-speech-diversity-conf.pdf>.

146. DEPT FOR CONSTITUTIONAL AFFAIRS, JUDICIAL APPOINTMENTS COMMISSION FRAMEWORK DOCUMENT, 2006, at 6, *available at* http://www.judicialappointments.gov.uk/static/documents/JAC_Framework_Document.pdf.

147. And, of course, Scotland and Northern Ireland in the case of Justices of the Supreme Court, which has jurisdiction over the entire United Kingdom in certain cases, and those countries in which the “advice” of the Privy Council held sway, including British Overseas Territories, Sovereign Base Areas, Crown Dependencies and some Commonwealth Countries. *See* Privy Council Office—Jurisdiction, <http://www.privy-council.org.uk/output/Page32.asp>. Scotland and Northern Ireland have their own bodies—the Judicial Appointments Board for Scotland and the Northern Ireland Judicial Appointments Commission, respectively—to appoint judges at other levels.

the United Kingdom, the body which assumed the functions of the House of Lords Judicial Committee at the start of the 2009 legal year in October.¹⁴⁸

The members of this court comprise the twelve justices of the supreme court, and have now replaced the Lords of Appeal in Ordinary, who were often formerly known colloquially as “law lords”. All decisions concerning selection of members for the UK’s supreme court will be made by the JAC, a committee of five, made up of the Commission’s president and deputy president, along with one member from each of the English, Scottish, and Northern Irish Judicial Appointments Commissions.¹⁴⁹ The composition of the court, however, is structured by statute: there will be twelve members, of which eight will be English, two Scottish, and two Northern Irish.¹⁵⁰

Lord Bingham of Cornhill, the former senior law lord, equivalent to the Chief Justice of the United States, has opined that separation of the three branches of government is “a cardinal feature of a modern, liberal, democratic state governed by the rule of law.”¹⁵¹ As such, establishment of the JAC was one of the most significant changes realized by the Constitutional Reform Act of 2005.¹⁵² The Commission was established in response to “increasing pressure for more transparency,”¹⁵³ and to ensure the continued independence of the judiciary. Such transparency was achieved in part through moving the law lords out of their present setting of the House of Lords and into a location away from Parliament, thereby removing any appearance of patronage between the branches.

The composition of the Commission is laid out in Schedule 12

148. See Ministry of Justice—Supreme Court, <http://www.justice.gov.uk/wh-atwedo/supremecourt.htm>.

149. Jonathan Mance, *Constitutional Reforms, The Supreme Court and the Law Lords*, 25 CIV. JUST. Q. 155, 161 (2006).

150. *Id.*

151. HOUSE OF LORDS, THE LAW LORDS’ RESPONSE TO THE GOVERNMENT’S CONSULTATION PAPER ON CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM, 2003, at 1.

152. A.W. Bradley, *Relations Between Executive, Judiciary and Parliament: An Evolving Saga*, PUB. L. AUT. 2008, at 470, 477.

153. Mance, *supra* note 149, at 155.

of the Constitutional Reform Act.¹⁵⁴ One commentator has described the balance among its members as “more nuanced and subtle than any found in any other European jurisdiction.”¹⁵⁵ A move toward an independent system of appointments was an essential step toward ensuring the independence of the judiciary, something that was believed necessary to the public interest.¹⁵⁶

The JAC consists of a chairperson and fourteen commissioners appointed by the Lord Chancellor.¹⁵⁷ The Lord Chancellor is a historically complex figure who used to bestride the three branches of government and whose functions have been somewhat simplified in recent years. The position is currently held by the Secretary of State for Justice. Of those appointed to the Commission, membership must be comprised as follows: five judicial members; two professional members (lawyers); five lay members (people who have never held judicial office or been lawyers); one member drawn from a list of pre-approved panels; one lay justice member (someone who holds no judicial office, has not practiced law and does not hold any office except that of General Commissioner).¹⁵⁸

The role of the Commission is to “select[] candidates for judicial office and recommend[] them to the Lord Chancellor for appointment.”¹⁵⁹ Before the founding of the JAC, appointments had been made on the direct advice of the Prime Minister, but a majority¹⁶⁰ of those who voiced their opinions prior to the JAC’s

154. Constitutional Reform Act, 2005, c. 4, § 61, sched. 12 (Eng.).

155. Mance, *supra* note 149, at 159.

156. Lord Windlesham, *The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change: Part 1*, PUB. L. WIN. 2005 at 806, 816.

157. Constitutional Reform Act, 2005, c. 4, § 61(1), sched. 12 (Eng.).

158. *Id.* at § 61(2).

159. DEP’T FOR CONSTITUTIONAL AFFAIRS, JUDICIAL APPOINTMENTS COMMISSION FRAMEWORK DOCUMENT, 2006, at 6, *available at* http://www.judicialappointments.gov.uk/static/documents/JAC_Framework_Document.pdf.

160. Sixty-nine percent of respondees being 39 judges or bodies representing the judiciary, 59 from other members of the legal profession, 43 from members of the public, academics and 13 from representative groups, as well as 2 members of the House of Commons, and 9 non-departmental public bodies, local and/or regional organizations—to a consultation paper distributed according to the DEPARTMENT OF CONSTITUTIONAL AFFAIRS, SUMMARY OF RESPONSES TO THE CONSULTATION PAPER ‘CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM,’ 2004, at 2, *available at* <http://www.dca.gov.uk/consult/supre>

establishment¹⁶¹ appeared to agree with the sentiment of what was then the Equal Opportunities Commission¹⁶² that:

[S]uch a procedure [of the Prime Minister selecting members of the judiciary] gives rise to question[s] about the degree of political influence in respect of appointment to the most powerful court. The independence, and the appearance of independence, of the judiciary from the Executive is paramount and therefore this practice cannot continue.¹⁶³

Under the newly introduced JAC system, the appointments process works in such a way that, for each judicial vacancy that opens up, the Commission makes one recommendation to the Lord Chancellor, which he may then either accept or reject.¹⁶⁴ However, if the Lord Chancellor rejects the proposed candidate, he must provide his reasons to the Commission and cannot select an alternative candidate.¹⁶⁵ In practice, this means that the Commission selects the candidates to be appointed provided there is no overriding reason for them to be disqualified by the Lord Chancellor.¹⁶⁶

Such a system “avoids any suggestion that judges could by themselves control the process”¹⁶⁷ and, furthermore, finally eradicates much of the “remaining ‘patronage’ element of the government’s powers”¹⁶⁸ by ensuring that only candidates who

mecourt/scresp.htm.

161. In response to the consultation paper published by the government in July 2003, “a total of 174 responses to the consultation paper were received. Of these 39 were from the judges or bodies representing the judiciary, 59 from other members of the legal professions. There were also 43 responses from members of the public, academics and 13 responses from representative groups. Two Members of the House of Commons responded as did nine non-departmental public bodies, local and/or regional organisations.” *Id.*

162. Now the Equalities and Human Rights Commission.

163. EQUAL OPPORTUNITIES COMM’N, RESPONSE TO THE DEPARTMENT OF CONSTITUTIONAL AFFAIRS CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM 2003, at 7, available at http://83.137.212.42/sitearchive/eoc/PDF/cons_reform_supreme_court.pdf?page=16041.

164. Judicial Appointments Commission: Selection Policy, <http://www.judicialappointments.gov.uk/about-jac/9.htm>.

165. *Id.*

166. *Id.*

167. Mance, *supra* note 149, at 159.

168. Bradley, *supra* note 152, at 477.

have been put forward by the JAC may be considered for judicial office.¹⁶⁹

In short, an independent appointments commission guarantees that judges continue to be appointed on the basis of merit and not along partisan lines. It preserves judicial independence from politics, promoting the theory that the branches of government should be irreconcilably divorced. As Lord Bingham has pointed out, this can best be achieved where judges are “devoid of any known political leanings or affiliation[s] of any kind whatever.”¹⁷⁰

The separation of the judicial branch from the political process has long been a distinguishing feature of the division of power in Great Britain. Since the Act of Settlement was enacted into law in 1701, judges have enjoyed tenure “during good behavior rather than at the pleasure of the Crown.”¹⁷¹ The Constitutional Reform Act of 2005 ensured “for the first time in almost 900 years, judicial independence is now officially enshrined in law,”¹⁷² something one eminent commentator has described as “an essential safeguard of individual liberty.”¹⁷³

E. Diversity: An Alternative Means to Achieving a Representative Judiciary

The Constitutional Reform Act of 2005 establishes the role of the JAC as promoting diversity when considering candidates for judicial offices.¹⁷⁴ Section 64 requires that the Commission “must have regard to the need to encourage diversity in the range of

169. Windlesham, *supra* note 156, at 821.

170. Francis Gibb, *Shake-Up in Appointing Judges 'Risks Standards,'* THE TIMES (LONDON), Nov. 20, 2007, available at <http://www.timesonline.co.uk/tol/news/politics/article2903687.ece>.

171. Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth-Century England*, 7 AM. L. & ECON. REV. 1, 3 (2005).

172. See Judiciary of England and Wales: The Constitutional Reform Act 2005, http://www.judiciary.gov.uk/about_judiciary/judges_and_the_constitution/constitutional_reform/index.htm.

173. Lord Windlesham, *supra* note 156, at 816.

174. Constitutional Reform, Act 2005, pt. 4, ch. 2, § 64 (Eng.).

persons available for selection for appointments.”¹⁷⁵ Furthermore, the JAC Framework Document makes clear that “the JAC is committed to increasing the diversity of the judiciary in courts and tribunals at all levels” through ensuring “the widest possible choice of candidates . . . [and] fair and open processes for selection.”¹⁷⁶ This clarion call for diversity may be contrasted with the opaque approach to selecting candidates for the United States Supreme Court and provides one means to achieve a more representative senior judiciary.

The effectiveness of this novel policy will be difficult to gauge for some time since the JAC completed selection exercises filled a total of only sixty-two vacancies in 2006–2007.¹⁷⁷ However, in 2007–2008, women made up 34%, black and minority ethnic origin applicants made up 8%, and people with disabilities made up 7% of the total number selected for non-legal and legal appointments.¹⁷⁸ This suggests JAC’s remit to increase diversity is yielding more than minimal results and will likely have a similar impact on nominations to the Supreme Court for the United Kingdom.

Given “[t]he broad range of social issues with which the modern House [of Lords Judicial Committee] engages”¹⁷⁹ on “questions of rights and liberties . . . both of those who are citizens and those who are not,”¹⁸⁰ this move toward drawing a broader range of judges onto the bench seems to be a necessary one if courts are to be perceived as “valid instruments of a democratic legal order.”¹⁸¹ This statement may resonate even more strongly in the United Kingdom—at present there are no ethnic minorities among the members of the supreme court (and

175. *Id.*

176. DEP’T FOR CONSTITUTIONAL AFFAIRS, JUDICIAL APPOINTMENTS COMMISSION FRAMEWORK DOCUMENT, 2006, at 6, *available at* http://www.judicialappointments.gov.uk/static/documents/JAC_Framework_Document.pdf.

177. *See* JUDICIAL APPOINTMENTS COMM’N, JAC COMPLETED SELECTION EXERCISE DATA, APRIL 2007 – MARCH 2008, *available at* http://www.judicialappointments.gov.uk/static/documents/JAC_Data_Completed_Selection_Exercise_Data_March07-April08.pdf.

178. *Id.*

179. Mance, *supra* note 149, at 161.

180. Pollak, *supra* note 89, at 190.

181. *Id.*

never have been) and only one woman amongst its number.¹⁸²

Diversity, however, does not refer only to racial, ethnic, and gender diversity. It pertains also to the professional background of candidates. For example, an advertisement for supreme court justices that appeared in the *Times* on October 30, 2008, called for candidates to have held “judicial office for at least two years or to have been a qualifying practitioner [a lawyer or a legal academic] for a period of at least 15 years.”¹⁸³

Such wording widens the selection exercise beyond its traditional remit—all of the present Justices were judges prior to their appointment to the Supreme Court¹⁸⁴—and allows senior lawyers (presumably predominantly barristers) and senior academics to apply. Since the Court presently lacks any members who have not risen via the High Court (the well-trodden, traditional route to the highest courts), broadening the class of persons eligible for appointment to the Court may be seen as a step towards increasing diversity.

F. Term Limits: The Question of Tenure

When Alexander Hamilton wrote in *The Federalist 78* that the judiciary “will always be the least dangerous to the political rights of the Constitution,”¹⁸⁵ he was describing the court in the days before *Marbury v. Madison* reshaped the constitutional landscape of government in the United States and granted the court the power to review legislation for compatibility with the Constitution. When *Marbury* was decided, the Supreme Court had “no influence over either the sword or the purse” and could take “no active resolution whatever”; it was sufficiently enervated as to have to “depend upon the aid of the executive

182. See Parliament—The Law Lords, http://www.parliament.uk/about_lords/the_law_lords.cfm.

183. Frances Gibb, *The £60 Million Makeover: New Building, New Law Lords, New Postcode*, THE TIMES (LONDON), Nov. 20, 2008, available at <http://business.timesonline.co.uk/tol/business/law/article5192058.ece?EMC-Bln=DAMDV9>.

184. Biographies of the United Kingdom Supreme Court Justices, <http://www.supremecourt.gov.uk/about/biographies.html>.

185. THE FEDERALIST NO. 78, at 291 (Alexander Hamilton) (John Tiebout ed., 1799).

arm even for the efficacy of its judgments.”¹⁸⁶

In sum, the Supreme Court at the time of the Founders was very different from the modern Court, which has reshaped the social, cultural, and political milieu of America. In Hamilton’s day, the Supreme Court was the weakest of the branches. Additionally, with an average life expectancy of less than forty years,¹⁸⁷ life tenure for its Justices must have been regarded as a much less daunting prospect than it appears now.¹⁸⁸ It is unlikely that the Founders envisioned Justices sitting on the Court for twenty-six years—the average tenure for Justices who have retired since 1970¹⁸⁹—particularly given their well-known dislike of “unaccountable autocrats out of touch with the typical citizen’s concerns; who cling to power long after they have sufficient health to perform their duties.”¹⁹⁰

The danger, probably not foreseen by Hamilton, is that the Court loses any appearance of accountability to the system of government on which the Republic was founded.¹⁹¹ Indeed, some commentators have suggested that the Supreme Court’s exercise of its own power has demonstrated “a tendency to produce a degree of hubris and arrogance.”¹⁹² If this is true, there is little that can be done to remedy the situation once a Justice is installed on the Court. As the Constitution was promulgated in 1789, no Justice has been stripped of his position through impeachment—the only way a Justice, who holds life tenure during good behavior, can be removed.¹⁹³

Some have argued that life tenure guarantees that the Judiciary remains independent and not subject to pressure—either from the other branches of government or the populace at

186. *Id.*

187. Carrington & Cramton, *supra* note 3.

188. See LARRY J. SABATO, *A MORE PERFECT CONSTITUTION* (2007), for further discussion on life tenure.

189. Calabresi & Lindgren, *supra* note 57, at 770–71.

190. *Id.* at 788.

191. See Carrington & Cramton, *supra* note 3.

192. *Id.*

193. Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 800 (1986).

large—though, at the same time, it “invites abuse because it eliminates any penalty for shirking.”¹⁹⁴ However, there is nothing to indicate that countries which do not have a system of life tenure for their highest judges have any problem with fostering judicial independence.

Of all the democratic nations in the world, America stands alone in offering the Justices on its highest constitutional court life tenure—such a system “has been rejected by all other major democratic nations.”¹⁹⁵ In all cases, drafters of constitutions outside the United States have, for approximately the past 150 years, concluded that there must be “periodic movement of persons through offices in which so much power is vested”¹⁹⁶ and a check of some variety on the holder of such a powerful office. Some countries have imposed term limits, age limits, a mechanism of removal by the legislative branch, or the need for Justices to be re-elected.¹⁹⁷ Every democratic country, except the United States, uses at least one of these measures.¹⁹⁸

In Austria, for example, the Constitutional Court has an age limit of seventy years; in Italy, terms are nine years; in Germany, they are twelve years.¹⁹⁹ In addition, France, Spain, Portugal, and Russia “all have fixed, limited terms of between six and twelve years.”²⁰⁰ In comparison to other democratic systems, then, the United States Supreme Court’s continuation of appointing its justices for life may be regarded as “truly an anomaly,”²⁰¹ one that “provides the President with a motivation to make sure that Justices sympathetic to his favored positions are appointed to the Court”²⁰² because as life expectancies get

194. RICHARD J. POSNER, *HOW JUDGES THINK* 158 (2008) [hereinafter POSNER, THINK].

195. Calabresi & Lindgren, *supra* note 57, at 819.

196. Carrington & Cramton, *supra* note 3.

197. *Id.*

198. Daniel J. Meador, *Thinking About Age and Supreme Court Tenure*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 115, 120 (Roger C. Cramton & Paul D. Carrington eds., 2006).

199. *Id.*

200. Calabresi & Lindgren, *supra* note 57, at 820.

201. *Id.* at 821.

202. John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 *TEX. L. REV.* 1671, 1702 (2004).

longer, Justices will most likely be serving ever-longer terms.²⁰³

It should be pointed out, moreover, that fixed terms would not act as a foil to Hamilton's insistence that the Judiciary remain independent, instead making judges aware that "their continuation in office does not depend on securing the continuing approval of the political branches,"²⁰⁴ "or the public."²⁰⁵ At the end of their term or at a certain age, Justices would be required to leave judicial office altogether (and would not be allowed senior status on the federal bench), and no currying of political favor could remove this requirement.

In addition, unlike in Hamilton's day, there is no danger today that judges find their decisions influenced or dominated by one of the other branches.²⁰⁶ In reality, the power of today's Supreme Court dwarfs the one Hamilton knew, and as a result, "the other branches must guard against being dazzled and overwhelmed by the courts."²⁰⁷ In short, the Supreme Court is now able to operate without any protection from the President and Congress, making Hamilton's ardent advocacy of life tenure ring hollow today.²⁰⁸

The idea of life tenure was not unanimously shared by all of the Founders of the Republic. It was Jefferson who wrote that appointment of judges should be for terms of four or six years and ought to be "renewable by the President and the Senate" in order to "bring their conduct, at regular periods, under revision and probation" and to "keep them in equipoise between the general and special governments."²⁰⁹

Jefferson regarded the fact that one branch could be wholly independent as anathema, calling it "the error in our Constitution."²¹⁰ Other scholars have concurred, one observing

203. POSNER, THINK, *supra* note 194, at 160.

204. Monaghan, *supra* note 130, at 1211.

205. Calabresi & Lindgren, *supra* note 57, at 843.

206. Prakash, *supra* note 5, at 574.

207. *Id.* at 574–75.

208. Calabresi & Lindgren, *supra* note 57, at 822–23.

209. Letter from Thomas Jefferson to William T. Barry (July 2, 1822), in 15 THE WRITINGS OF THOMAS JEFFERSON 388, 389 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

210. Letter from Thomas Jefferson to William Brand Giles (Apr. 20, 1807),

the “truly odd and perverse” fact that while the Constitution “promises a republican government to the peoples of the several states,” it also “implicitly denies such a right to the people” through a system in which “the only checks on judges’ (mis)constructions of the law are their imaginations and a seemingly weak sense of shame.”²¹¹

Many academics have suggested fixed-term limits of eighteen years. Philip Oliver, for example, advocates staggered eighteen-year terms with no opportunity for reappointment.²¹² Steven Calabresi and James Lindgren concur, adding that fixed terms would provide for “a substantial measure of judicial independence, combined with some degree of democratic check on the Court.”²¹³ We are inclined to agree.

IV. OUR PROPOSAL

A. Term Limits for Justices

Our proposal is fundamentally different from other major Supreme Court reforms that have been advanced.²¹⁴ We propose twelve year fixed, non-renewable terms modeled on the example of most European constitutional courts (which, as mentioned above, have fixed nine to twelve year terms that are usually non-renewable). Further, unlike most other proposals that we have seen, we believe that once a Justice’s term of twelve years is over, he or she should be required to leave the ranks of the Judiciary altogether rather than being allowed to return to the ranks of the lower federal courts as some have suggested.²¹⁵

The reason for advocating a twelve year term rather than, for

in 11 THE WRITINGS OF THOMAS JEFFERSON 187, 190–91 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

211. Prakash, *supra* note 5, at 571.

212. Oliver, *supra* note 193, at 800.

213. Calabresi & Lindgren, *supra* note 57, at 813.

214. See Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 435, 440 (Roger C. Cramton & Paul D. Carrington eds., 2006); Calabresi & Lindgren, *supra* note 57; Oliver, *supra* note 193; Ferejohn & Pasquino, *supra* note 202, for most commonly discussed potential reforms.

215. See, e.g., Calabresi & Lindgren, *supra* note 57, at 775.

example, an eighteen year term—as others have done²¹⁶—is that it encourages a quicker turn-over among members of the Judiciary. We believe, further, that concerns that judges would be “distracted by having to make arrangements for another job” and that their decisions “might be distorted by the desire to curry favor with potential future employers”²¹⁷ are overstated and unlikely to bear out given the overriding desire most Justices are likely to have to leave behind a lasting jurisprudential legacy.

Furthermore, as will be clear from the foregoing proposals, our aim is to de-politicize the Judiciary to the greatest extent possible and to move judicial appointments away from the politically-motivated, partisan exercises they have become. To this end, we are against allowing each occupant of the Oval Office a set number of appointments to the Court and do not seek to “spread nominations to the Court evenly among presidents.”²¹⁸ In addition, we cannot agree with the suggestion that allowing appointments to the Court to be made on an un-fixed basis, rather than allowing each President one or more appointments, “undermines [the] ideal of democratic control characterized by significance, consistency, and proportionality.”²¹⁹

Under our proposal, appointments would be more concerned with merit and with promoting a diverse range of Justices who reflect the composition and varying beliefs of members of society. Justices would be appointed as vacancies arose at the end of each twelve-year term, allowing each of the present Justices to serve out their life tenure (and ensuring that future appointments would take place at staggered intervals as present Justices will not retire en masse); consequently, sometimes Republicans would be in power at the time of an appointment, and at other times, Democrats would hold office.

Under our proposed appointment process, however, the partisan political effect of one President nominating a candidate

216. *Id.*

217. POSNER, THINK, *supra* note 194, at 159.

218. Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 435 (2005).

219. Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 198, at 435, 440.

for the Court over another would be less significant than at present because the President's nominees would be subject to a far greater degree of scrutiny. In effect, a more meaningful degree of supervision would be given to an independent judicial appointments commission, whose decisions would still be subject to oversight by the Senate in the form of a final confirmation process.

Our proposal would have many of the benefits common to other reform-related suggestions. For one thing, a fixed, non-renewable term would put an end to the common practice of Justices timing their resignations in such a way as to coincide with the advent of a particular administration whose political leanings they favor, a tendency that "embroils Justices in unseemly political calculations that undermine judicial independence and that cause the public to view the Court as a more nakedly political institution than it ought to be."²²⁰

B. An Independent Judicial Commission for the United States

Our proposal is to establish an independent judicial confirmation commission for the United States. Because Article II of the Constitution vests authority in the President to appoint Justices of the Supreme Court²²¹—with the "advice and consent" of the Senate²²²—it is impossible to envision an independent commission for the United States along the exact lines of the United Kingdom model.

However, our proposal invites the establishment of a judicial appointments advisory committee, which would, in essence, act as an advisory body to the present Senate Judiciary Committee. Such an advisory committee would examine the President's nominee and make a recommendation to the Judiciary Committee (and by extension to the Senate) on whether a

220. Calabresi & Lindgren, *supra* note 57, at 841.

221. "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court." U.S. CONST. art. 2, § 2.

222. *Id.*

nominee should be approved or refused based on his or her merit and perceived ability to undertake the work of a United States Supreme Court Justice. The advisory committee would also be required to take diversity (in all its various forms) into account when making its recommendations.

The advisory committee would be comprised of seventeen members, drawn from the following professions: five would be legal academics; five would be lawyers with considerable experience (a minimum of seven years); five would be non-lawyers and would be taken from the ranks of business or government (excluding senators and governors). The final two members would be members of the Senate or the House of Representatives, one drawn from each party and appointed by the leadership of each party.

The aim of such a proposal is to de-politicize the confirmation process to the greatest extent possible. By having a committee of expert jurists, academics, and thinkers in place, the Senate would receive a far more informed evaluation of the pros and cons of a nominee than is currently possible—the members of the Senate Judiciary Committee all being politicians, they are neither particularly well-equipped to thoroughly examine a nominee (on paper or in person), nor sufficiently unbiased to provide an informed view as to whether a nominee would likely be a suitable Supreme Court Justice.

Another option would be to require a super-majority in the Senate for confirmation of a nominee. This would have the benefit of perhaps allowing “a more homogenous Court” to evolve, disabling to a significant extent a party’s majority in the Senate may have under the present system. In other words, if a super-majority—we propose a three-fourths majority—were required, cross-party allegiances would be required to place a Justice on the Court. Given the present, highly partisan atmosphere of the Senate, this idea would clearly be extremely difficult to enact.

The obvious down-side of the super-majority option is that the senators would rely on the results of the same ineffective hearings as are in place now, and the advice of the same Judiciary Committee’s recommendation. Further, the super-majority system may promote political cliques to form and deals to be made, motivated not by a desire to appoint the best Justice,

but by other, political considerations and vested interests.

Our proposal works in a more apolitical manner and has an effectiveness that is strengthened by the non-political independent members of the committee who have no vested interest in the outcome of the appointment and nothing to gain from it. This must be seen as a desirable step in light of the ineffectual nature of recent confirmation hearings, hearings that have involved a ritual dance between senators and nominees, hearings that have yielded no new or useful information concerning a candidate's judicial philosophy or interpretation of the law, the outcome of which has been established in advance.

An advisory committee as proposed would allow members of the Senate Judiciary Committee and Senate to gain an informed perspective on nominees and would remove the expectation on them to engage in a non-productive game of cat-and-mouse with nominees. However, the process would retain its present degree of transparency: nominees and witnesses would be interviewed by the advisory committee in public hearings, recommendations to the Judiciary Committee would be made publicly, and reasons for approving or disproving a nominee would be published publicly. In short, the open nature of the scrutiny given to nominees would remain undiminished by our proposals.

V. CONCLUSION

There can be little doubt that reform of the Supreme Court will be extremely difficult. As one academic has pointed out, the more extreme the reform and the higher the stakes, "the more opposition it will tend to provoke," which consequently means that most of those reforms that are successful are no more than "marginal accomplishments."²²³ The result is that "almost all ideas for Supreme Court reform die in committee, literally or metaphorically,"²²⁴ which explains why the only significant changes to the Court to have occurred since Reconstruction have "uniformly expanded the Justices' power and discretion."²²⁵

223. Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1161 (2006).

224. *Id.* at 1155.

225. *Id.* at 1161.

Various ideas have been advanced as to how changes to the Supreme Court's make-up or jurisdiction could be effectively promulgated. However, the general consensus among scholars is that changes to the Court such as the introduction of life tenure "can only be limited by means of a constitutional amendment,"²²⁶ pursuant to Article V or legislation (depending on the nature and extent of the changes proposed), something that "would face the usual and perhaps insuperable obstacles that all such proposals face."²²⁷

Yet irrespective of obstacles, the time for change is ripe. As this article avers, the democratic legitimacy of the Court is paramount, a fact that emphasizes the importance of a wider public understanding of the role of the Court. The Court's democratic legitimacy would also be significantly strengthened if it was comprised of a diverse range of individuals who were more representative of the society they served.

Our proposal aims to fundamentally revise and rethink both of these aspects of the Court's legitimacy. The first step toward the realization of our ideas is the creation of a judicial appointments commission in the United States to oversee not only the selection of future Justices but also the means of their confirmation. Such a move would facilitate the introduction of certain aspects of the Judicial Appointments Commission of England & Wales and would incorporate the unique features of the present constitutional arrangement in the United States. Changes to the number of Justices and their tenure, along with a reformed confirmation process, could then be far more easily initiated and may even follow naturally from the creation of such a commission.

Moreover, the effect of our proposed reforms would be to weaken the extent to which the partisan political process impacts the nomination process, which we consider to be of the utmost importance if the Supreme Court is to become a less overtly political judicial body. If combined with our proposals on broadening the representation of Justices on the Court beyond

226. Calabresi & Lindgren, *supra* note 57, at 824; *see also* Ferejohn & Pasquino, *supra* note 202, at 1703.

227. Ferejohn & Pasquino, *supra* note 202, at 1703.

the presently limited ethnic make-up, we believe that the Court can become a diverse, representative body united by meritocracy, not divided by politics, religion, education, or background. It is our hope that the Supreme Court can be restored to its position as “one of the great co-ordinate branches of the government.”²²⁸

²²⁸. Letter from Thomas Jefferson to William Brand Giles, *supra* note 210, at 191.