

Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts

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A troubling and unmistakable trend has developed over several decades, and accelerated in recent years, of extreme judicial activism within the conservative bloc of Justices on the Supreme Court—reaching a new pinnacle under Chief Justice John Roberts.

The Court's recent activism has advanced a pro-corporate agenda at the expense not only of injured Americans, but also of fundamental democratic institutions. The Court has exposed our elections to corruption and eroded fundamental protections, such as access to the ballot box. It has weakened the role of the civil jury, a constitutional institution intended to ensure equality before the law and an important check in our unique American system of separated powers. The price of the Court's corporate agenda has been high.

Concern over the Court's activism is not limited to lawyers, advocacy groups, and the partisan fray in Washington. Recent polling shows that less than one-third of Americans have confidence in the Supreme Court.¹ By two to one, Americans think the Justices often let political considerations and personal views influence their decisions.² Americans massively oppose the *Citizens United* decision (eighty percent against, with seventy-one percent “strongly” opposed).³ And, most tellingly, by a ratio of nine to one, Americans now believe the Court treats corporations more favorably than individuals.⁴ This is true even of those who identify themselves as “conservative Republicans,” who agree with this sentiment by a four to one margin.⁵ Even Linda Greenhouse, who has long resisted labeling the Justices partisan ideologues, recently wrote that she is now “finding it impossible to avoid the conclusion that the Republican-appointed majority is committed to harnessing the Supreme Court to an ideological agenda.”⁶ Other noted Court

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¹ Michael Muskal, *Gallup Poll: Confidence in Supreme Court Falls to 30 Percent*, L.A. TIMES (June 30, 2014), <http://perma.cc/6RQK-JHAU>.

² DEMOCRACY CORPS AND GREENBERG QUINLAN ROSNER RESEARCH, BROAD BI-PARTISAN CONSENSUS SUPPORTS REFORMS TO SUPREME COURT (May 2014), <http://perma.cc/SWJ6-42GQ>.

³ *Id.*

⁴ THE MELLMAN GROUP, INC., FINDINGS FROM RECENT POLLING ON THE SUPREME COURT (May 2014), <http://perma.cc/X2HA-BCXT>.

⁵ *Id.*

⁶ Linda Greenhouse, *Polar Vision*, N.Y. TIMES (May 28, 2014), <http://perma.cc/N3UF-JUTG>; see also Linda Greenhouse, *Law in the Raw*, N.Y. TIMES, (Nov. 12, 2014), <http://perma.cc/N3UF-JUTG>.

watchers like Norm Ornstein and Jeffrey Toobin have long since reached a similar conclusion.⁷

During his confirmation hearings, Chief Justice Roberts cast himself as an “umpire,” promising that he would just call “balls and strikes.”⁸ Yet a recent analysis of over two thousand cases found that his Court’s decisions have been far friendlier to conservative and business interests than those of any Court since at least 1946.⁹ As Toobin has noted, this pattern “has served the interests, and reflected the values, of the contemporary Republican Party.”¹⁰

Such activism is not the Supreme Court’s proper role. Justice Felix Frankfurter once noted that “[i]t is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court’s giving effect to its own notions of what is wise or politic.”¹¹ The conservative bloc on today’s Supreme Court has not observed “a fastidious regard for limitations on its own power,” but instead has used its power to promote an agenda. Corporate and conservative interests supported its members’ nominations; it appears, to paraphrase the old song, those judges are now “dancing with the guys that brung them.”

This is admittedly a harsh indictment of the conservative activists. The purpose of this article is to provide a bill of particulars supporting that charge—showing that the patterns to their decisions, and the strategies employed to achieve their results, suggest intentional and purposeful activism. This article will explore the means by which Chief Justice Roberts and the conservative bloc have furthered their agenda—including selective adherence to traditional conservative principles, advance strategic planning to shape policy, and a failure to promote consensus—and describe how the ends promote corporate and ideological interests at the expense of our democracy.

I. DOCTRINES OF CONVENIENCE

One clear sign of the conservative Justices’ activism is their willingness to abandon cherished doctrines when those doctrines point to unfavorable

.cc/6XWV-YJCP (“In decades of court-watching, I have struggled—sometimes it has seemed against all odds—to maintain the belief that the Supreme Court really is a court and not just a collection of politicians in robes. This past week, I’ve found myself struggling against the impulse to say two words: I surrender.”).

⁷ See, e.g., Norm Ornstein, *Is it Time to Give Term Limits to Supreme Court Justices?*, NATIONAL JOURNAL (May 2014), <http://perma.cc/P9NV-BGL7>; Jeffrey Toobin, *Court Rulings: It’s GOP v. Democrats*, CNN OPINION (June 30, 2014), <http://perma.cc/5K9H-5RLQ>.

⁸ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing before the Committee on the Judiciary United States Senate*, 109th Cong. 56 (2005).

⁹ Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013).

¹⁰ Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER (May 25, 2009), <http://perma.cc/6NLN-TXCV>.

¹¹ *Trop v. Dulles*, 356 U.S. 86, 120 (1956) (Frankfurter, J., dissenting).

results. Time after time, the conservatives of the Roberts Court have shown they hold the core conservative doctrines of originalism, judicial restraint, respect for precedent, federalism, and respect for the will of Congress as mere doctrines of convenience.¹²

The result of these departures from judicially conservative doctrine was to change the law to achieve politically conservative outcomes—outcomes that advanced the interests of corporations and the Republican Party.

A. *Originalism*

The principle of originalism, or faithfulness to the original meaning of the Constitution, became inconvenient in *District of Columbia v. Heller*.¹³ In a radical Second Amendment decision, the Court recast the very doctrine—relying on legislative history to infer, for the first time in our history, that the Second Amendment protects an individual right to keep and bear arms for self-defense.¹⁴ No less an observer than Judge Posner has noted that “[t]he true springs of the *Heller* decision must be sought elsewhere than in the majority’s declared commitment to originalism.”¹⁵ The result was the long sought dream of the National Rifle Association and the right wing: recognition of an individual right to bear arms.

The conservatives have consistently failed to take seriously the originalist principles behind the Seventh Amendment right to a civil jury, entirely ignoring its original purpose and the history on which it rests.¹⁶ Cases such as *Bell Atlantic v. Twombly*,¹⁷ *Ashcroft v. Iqbal*,¹⁸ and *AT&T Mo-*

¹² See, e.g., David Strauss, *The Death of Judicial Conservatism*, 4 DUKE J. CONST. LAW & PUB. POL’Y 1, 7 (2009); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 655 (1990).

¹³ 554 U.S. 570 (2008).

¹⁴ *Heller* involves two contesting views of originalism: Justice Scalia’s majority opinion touting the “new originalism” and Justice Stevens’s dissent a defense of the “old.” See Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 609 (2008) (“The ‘old’ originalism . . . in Justice Stevens’s dissent, sought to determine what constitutional provisions meant by examining what their drafters and ratifiers thought they meant, or intended them to mean, or something like that. . . . The new originalism [in the majority opinion] . . . seeks to determine what constitutional provisions were understood to mean by ordinary, albeit reasonably well-informed, readers of the terms at the time the terms were embedded in the Constitution.”).

¹⁵ Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC (Aug. 27, 2008), <http://perma.cc/7GH4-W9W8>.

¹⁶ With roots in twelfth-century Britain, the civil jury was brought to America by the earliest colonists and insisted upon as a basic right by Americans who chafed under British rule. As I argued in a recent article (Sheldon Whitehouse, *Restoring the Jury’s Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1249 (2014) (citing Stephan Landsman, *The Civil Jury in America: Scenes from an Underappreciated History*, 44 HASTINGS L.J. 579, 592 (1993) (footnotes omitted))), the Founders intended the civil jury to serve as an institutional check on power, and the original omission of a civil jury right from the proposed constitution triggered a firestorm of protest. In our constitutional system of government, as Alexis de Tocqueville famously noted, “The jury is above all a political institution. It should be regarded as a form of popular sovereignty.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 315 (Arthur Goldhammer Trans., Penguin Putnam Inc. 2004) (1835).

¹⁷ 550 U.S. 544 (2007).

bility v. *Concepcion*,¹⁹ which systematically undermine access to a jury, never apply an originalist lens—indeed never even reference the Seventh Amendment.²⁰

The Court also avoided any discussion of originalism in *Citizens United v. Federal Election Commission*.²¹ The *Citizens United* majority reached a result that would have astounded the Founding Fathers: unlimited corporate spending in American elections, putting corporations *de facto* on a plane of equality with human persons for purposes of political speech. At the time of the Founding, corporations were few, rare, and regarded with grave suspicion. The word “corporation” does not appear in the Constitution.²²

B. Respect for Precedent

Citizens United offers a glimpse, as well, into the conservative bloc’s disrespect for inconvenient precedent. Flying in the face of one hundred years of established law designed specifically to prevent unlimited corporate expenditures from corrupting our elections, the Court overturned recent precedents *McConnell v. Federal Election Commission*²³ and *Austin v. Michigan Chamber of Commerce*.²⁴ Such flagrant disregard for *stare decisis* prompted Justice John Paul Stevens to note in his dissent that “the only relevant thing that has changed” since those opinions was “the composition of this Court.”²⁵ With its ruling in *McCutcheon v. Federal Election Commission* four years later, the Court went further, and effectively did away with any meaningful ability of the government to regulate corporate spending—“eviscerat[ing],” in the words of Justice Breyer, the nation’s campaign finance rules.²⁶

Dismissing longstanding precedent was crucial to the Court’s result in *Heller* as well. Writing for the majority in that case, Justice Antonin Scalia opined that *United States v. Miller*,²⁷ which had informed Second Amend-

¹⁸ 556 U.S. 662 (2009).

¹⁹ 563 U.S. 321 (2011).

²⁰ In *Iqbal* and *Twombly*, the Court raised pleading burdens, thereby hindering defendants’ abilities to exercise their right to trial by jury. In *AT&T v. Concepcion*, the Court made it harder for injured Americans to band together in class actions to sue corporations, thus hindering plaintiffs’ abilities to exercise their Seventh Amendment right.

²¹ 558 U.S. 310 (2010).

²² As lawyer David Gans has argued, the failure to mention corporations in the Constitution was a deliberate one by the Founders. See, e.g., DAVID H. GANS, CAN CORPORATIONS PRAY? THE AFFORDABLE CARE ACT, THE CONTRACEPTION MANDATE, AND THE FREE EXERCISE RIGHTS OF FOR-PROFIT CORPORATIONS (2013), <http://perma.cc/YGP3-WBQE>.

²³ 540 U.S. 93 (2003) (upholding most provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), more commonly known as the McCain-Feingold Act).

²⁴ 494 U.S. 652 (1990) (holding that the Michigan Campaign Finance Act, which prohibited corporations from using treasury money to make independent expenditures in elections, did not violate the First and Fourteenth Amendments).

²⁵ *Citizens United*, 558 U.S. at 942 (Stevens, J., dissenting).

²⁶ *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1465 (2014) (Breyer, J., dissenting).

²⁷ 307 U.S. 174 (1939).

ment analysis since 1939, was not “a thorough examination” of the Amendment.²⁸

In 2013, in *American Express Co. v. Italian Colors Restaurant*, the conservative majority jettisoned the rule—developed in a long line of Supreme Court decisions²⁹—that arbitration clauses in contracts are enforceable only insofar as they permit individuals to effectively vindicate their rights.³⁰ As Justice Elena Kagan put it in her blistering dissent, the opinion was a “betrayal” of the Court’s precedents and the nation’s antitrust statutes.³¹ If the monopolist gets to use its monopoly power to insist on a contract depriving potential victims of legal recourse, Justice Kagan observed, the new rule is that “[it’s t]oo darn bad.”³²

C. Federalism

The conservatives have also abandoned their traditional solicitude for states’ rights and federalism. In their dissent in *United States v. Windsor*,³³ the conservative Justices defended the Defense of Marriage Act, an anti-federalist statute that intrudes into the traditionally state-governed realm of marriage.³⁴ In the earlier case of *Gonzales v. Carhart*, the Court held that the federal government may outlaw certain abortion-related medical procedures, even if a doctor determines that the mother’s life is in danger, effectively preempting any contrary state laws in another area traditionally left to state regulation.³⁵ Writing for the majority in *Harris v. Quinn*, Justice Samuel Alito dismissed home healthcare workers as non-“full-fledged” government employees despite the fact that Illinois had specifically designated them state workers.³⁶ In all of these areas, a true federalist would have had qualms

²⁸ *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008).

²⁹ *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266, 273–74 (2009); *Green Tree Financial Corp.–Ala. v. Randolph*, 531 U.S. 79, 92 (2000); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

³⁰ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

³¹ *Id.* at 2313 (Kagan, J., dissenting).

³² *Id.*

³³ 133 S. Ct. 2675 (2013).

³⁴ Chief Justice Roberts, Justice Scalia, and Justice Alito each authored dissenting opinions upholding the constitutionality of the relevant portion of the Defense of Marriage Act. In his dissent, Chief Justice Roberts noted that “[t]he dominant theme of the majority opinion is that the Federal Government’s intrusion into an area ‘central to state domestic relations law applicable to its residents and citizens’ is sufficiently ‘unusual’ to set off alarm bells . . . I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism.” *Id.* at 2697 (Roberts, C.J., dissenting). Among the briefs filed by *amici* in *Windsor* was one filed by the Federalism Scholars based largely on the argument that the Defense of Marriage Act represented an intrusion into states’ constitutional authority to regulate matters involving family and marital relationships. *See generally*, Brief of Federalism Scholars as *Amici Curiae* in Support of Respondent Windsor, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), <http://perma.cc/HQ8U-VMB9>.

³⁵ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

³⁶ *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

about bringing the power of federal law to bear to influence spheres traditionally left to our “laboratories of democracy,” the states.³⁷

D. Respect for Congress

Perhaps the conservatives’ most egregious violation of well-established principles involves judicial restraint—in particular, the notion that, with respect to fact finding and other areas in which the legislature enjoys institutional strength, the Court should extend reasonable deference to Congress.³⁸ From their cloistered perch, the conservative Justices consistently substitute their own policy views for those enacted into law by democratically elected officials. This phenomenon is most evident in *Shelby County v. Holder*³⁹ and *Citizens United*.⁴⁰

In *Shelby County*, the conservative justices ignored a voluminous congressional record that demonstrated the need for continued preclearance of covered jurisdictions with a history of misbehavior under the Voting Rights Act.⁴¹ The Court invalidated an act by which Congress expressly enforced the Fifteenth Amendment even though Section Two of the Amendment gives “Congress . . . power to enforce this article by appropriate legislation.”⁴² Justice Scalia even suggested during oral argument that the overwhelming bipartisan support for reauthorization of the Voting Rights Act in 2006 actually made the statute *more* suspect.⁴³

Similarly, in *Citizens United*, the conservative justices ignored hundreds of thousands of pages of findings in the Congressional Record.⁴⁴ They ignored the considered judgment of Congress on a question—the danger of corrupting influence from corporate spending in elections—where Congress has indisputably more wisdom and experience. They simply substituted their own judgment: the laughable proposition that corporate political spending can have no corrupting influence, nor even the appearance of any.

³⁷ The famous phrase, “laboratories of democracy,” derives from Justice Louis Brandeis’ 1932 commentary on the virtues of federalism. In his dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), Justice Brandeis opined that “[T]he happy incident[] of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory,” *id.* at 311.

³⁸ Cf. Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 472 (2013) (providing possible basis for the deference to Congress).

³⁹ 133 S. Ct. 2612 (2013).

⁴⁰ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 414 (2010).

⁴¹ See *Shelby Cnty.*, 133 S. Ct. at 2640–41 (Ginsburg, J., dissenting) (listing several instances from the “scores” of recent examples in the congressional record where the Voting Rights Act was needed to prevent racially discriminatory changes in the laws).

⁴² U.S. CONST. amend. XV, § 2.

⁴³ See Transcript of Oral Argument at 46–47, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 1296). While Justice Scalia’s emphasis was on the political advantage to be gained by voting in favor of the VRA, he completely failed to acknowledge the voluminous Congressional Record that had been developed to support the need for pre-clearance.

⁴⁴ *Citizens United*, 558 U.S. at 412 (Stevens, J., dissenting) (“The total record [Congress] compiled was 100,000 pages long.”).

E. Manipulation of Procedure

While not doctrine *per se*, adherence to norms of appellate procedure is another benchmark. Violating those norms in order to reach a result is a strong signal of a deliberate intent to come to that result.

Citizens United, a virtual fireworks display of judicial activism, yet again presents itself as an example. The question that originally came before the Court in *Citizens United* was simple. A non-profit organization, Citizens United, was challenging the Federal Election Commission's ruling that the McCain-Feingold law prohibited it from showing an on-demand cable video in the final thirty days before primary elections that was critical of Hillary Clinton.⁴⁵ After all the briefs were filed and oral arguments heard, however, Chief Justice Roberts scheduled a rehearing and issued new "questions presented," reframing the narrow challenge to the McCain-Feingold law as a broad question about the ability of the government to regulate corporate spending on elections.⁴⁶ This radical procedural maneuver was highly unusual, but it set up the question the conservatives wanted to answer.⁴⁷ Had the Court simply answered the question properly before it, whatever the answer, the structure of campaign finance law as we had known it would have remained essentially intact. An elemental restriction on judges is that they must take cases as they come, but in *Citizens United*, as Justice Stevens wrote in dissent, "[f]ive Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law."⁴⁸ Maneuvering the "question presented" was peculiarity one.⁴⁹

⁴⁵ *Id.* at 321.

⁴⁶ *See id.* at 322.

⁴⁷ *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1436 (2013) (Ginsburg, J., dissenting) ("Abandoning the question we instructed the parties to brief does 'not reflect well on the processes of the Court.' . . . The Court's newly revised question, focused on predominance, phrased only after briefing was done, left respondents without an unclouded opportunity to air the issue the Court today decides against them. And by resolving a complex and fact-intensive question without the benefit of full briefing, the Court invites the error into which it has fallen.") (citing *Redrup v. New York*, 386 U.S. 767, 772 (1967) (Harlan, J., dissenting)).

⁴⁸ *Citizens United*, 558 U.S. at 398 (Stevens, J., dissenting).

⁴⁹ There is a pattern here: these same Justices have overreached and decided questions not properly before them in cases involving employment discrimination, the environment, class action certification, and pleading standards. *See, e.g., Gross v. FBL Finance Services*, 557 U.S. 167 (2009) (holding that the plaintiff must prove, by a preponderance of the evidence, that age was the "but for" cause of the adverse employment action); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (holding that the issuance of land-use permits must comply with the standards in *Nollan v. California Coastal Comm'r*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), even when the permit is denied for failure to comply with the conditions or when the condition requires monetary payment rather than a conveyance of land); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (holding that the respondents did not constitute a proper class for class action because of the variability of their circumstances); *Comcast Corp.*, 133 S. Ct. at 1426 (holding that a class of cable subscribers was improperly certified because the circuit court had declined to look beyond the pleadings and consider whether the putative class could prove class-wide damages); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (holding that under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a plausible claim for relief).

Peculiarity two was the findings of fact that the Court made in *Citizens United*. In his majority opinion, Justice Anthony Kennedy wrote that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,” and that “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”⁵⁰ One would be hard pressed to find many citizens, let alone elected officials, who would agree with those naïve propositions, particularly after witnessing subsequent elections.

Citizens United also presumed that there would be transparency and disclosure about the newly unleashed political spending. Post-*Citizens United* elections have, of course, also proved these findings incontrovertibly wrong.⁵¹ (That these same Justices, later on in *McCutcheon*, relied on these same “facts” after they were so thoroughly disproven is all the more troubling.)⁵²

Setting aside the factual flaws with the Court’s findings of fact, there is an underlying principle that appellate courts should not make findings of fact in the first place. If peculiarity two is that the findings of fact were so peculiar, peculiarity three is that they were made at all.

These peculiarities were all important to set up the Court’s decision. The obstacle to unleashing unlimited corporate election spending, as a First Amendment matter, is that the First Amendment allows regulation of elec-

⁵⁰ *Citizens United*, 558 U.S. at 357.

⁵¹ The 2010 and 2012 elections were flooded with anonymous spending. According to the Center for Responsive Politics, election expenditures from undisclosed sources in the 2012 general election topped \$310 million—a sharp increase from the corresponding figure of \$69 million in 2008. Robert Maguire, *How 2014 Is Shaping Up to be the Darkest Money Election to Date*, CTR. FOR RESPONSIVE POLITICS, OPENSECRETS BLOG (Apr. 30, 2014), <http://perma.cc/TQD5-E93N>. Through the use of shell companies, pass-through entities, and non-profit groups, including 501(c)(6) business leagues and 501(c)(4) social welfare groups (including political action committees improperly masquerading as 501(c)(4)s), the identities of donor individuals and companies remain concealed. See, e.g., Tom Hamburger and Matea Gold, *Crossroads GPS Probably Broke Election Law*, WASH. POST (Jan. 15, 2014), <http://perma.cc/4PFX-K8H2>; Federal Election Commission, First General Counsel’s Report, MUR: 6396 (Crossroads Grassroots Policy Strategies) (Nov. 21, 2012), <http://perma.cc/3Z4H-AMZD>. As Senator John McCain and I noted in the amicus brief we filed with the Supreme Court in *American Tradition Partnership, Inc. v. Bullock*, “[s]uper PACs, 501(c)(4) organizations and political campaigns are knitted into a fundraising web that allows unlimited, non-independent and anonymous (to the public) political donations for the benefit of a specific candidate.” Brief of United States Senators Sheldon Whitehouse and John McCain as Amici Curiae in Support of Respondents at 14, *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (No. 11-1179), <http://perma.cc/J3T6-ZU8K>. A 2014 study showed that, while corporation and union spending have not significantly increased since *Citizens United*, spending by 501(c) nonprofit organizations and 527 political committees has nearly doubled in states that had previously banned corporate independent expenditures. Douglas M. Spencer and Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 INDIANA L.J. 315, 347 (2014). Another study showed that business interests not only donated approximately four times more to Super PACs than labor interests, but that they also donated approximately four times more to Republican Super PACs than to Democratic Super PACs. Tilman Klumpp, Hugo M. Mialon & Michael A. Williams, *The Business of American Democracy: Citizens United, Independent Spending, and Elections* (U. Alberta Working Paper Series, 2014), <http://perma.cc/LGQ9-4R6N>.

⁵² See *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1459–60 (2014).

tion spending to protect against corruption, or the appearance of corruption. The “facts” the conservative Justices found were thus necessary to eliminate that obstacle.

The unusual late change to the “questions presented” was also necessary in that it prevented the development of a factual record on the new question. A factual record on that question would belie the “facts” the conservative Justices needed. (We know that from the factual records supporting the decisions that *Citizens United* overturned.) If you start at the end result, and reverse-engineer your way through the problem, each of these peculiarities becomes necessary.

The egregious fact-finding in *Citizens United*, as well as the Court’s maneuver to reframe the questions presented in that case, reek of craft, strategy, and maneuver, which is powerful evidence of an ulterior purpose to unleash corporate spending.

II. PLANNING AHEAD

Another indication of an agenda is that the Supreme Court’s conservative justices have cleverly and patiently laid the foundations in one case to erect the policy outcome they seek in later cases. In what may be seen as an “admission by accusation,” Justice Scalia pulled back the curtain in his irate dissent in *Windsor*. His accusation that the liberal Justices had included language about the “personhood and dignity” of same-sex couples as a tactic to line up broader rulings in future cases reflects a telling familiarity with this tactic.⁵³

The Court’s decision in the 2009 case *Northwest Austin Municipal Utility District No. 1 v. Holder* provides the template for the tactic. In that case, Chief Justice Roberts, writing for the majority, criticized Section IV of the Voting Rights Act and invented an expanded doctrine of the “equal sovereignty” of all states.⁵⁴ Four years later, in *Shelby County*, he relied heavily on the *Northwest Austin* “equal sovereignty” concept to strike down Section IV, gutting the key preclearance provisions of the Act.⁵⁵

Along the same lines, in his concurrence in *Citizens United*, Chief Justice Roberts articulated a new standard that if a precedent is “hotly con-

⁵³ *United States v. Windsor*, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting).

⁵⁴ *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203 (2009). As Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit put it, the principle of equal sovereignty is “a principle of constitutional law of which I had never heard—for the excellent reason that . . . there is no such principle. . . . The opinion rests on air.” Richard A. Posner, *The Voting Rights Act is about the Conservative Imagination*, SLATE (June 26, 2013), <http://perma.cc/D2ZE-EZT4>.

⁵⁵ *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622 (2013). Justice Ginsburg, in her dissenting opinion, argued that “[t]oday’s unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties.” *Id.* at 2649 (Ginsburg, J., dissenting).

tested,” it has lesser precedential value and can be replaced.⁵⁶ Since activist Republican judges can “hotly contest” whatever they please, this is a self-fulfilling tool to undermine precedent.

The Court’s decision upholding the Affordable Care Act provides additional opportunities for the conservatives’ strategic approach. Though unnecessary for the result, Chief Justice Roberts used the opportunity presented by *National Federation of Independent Business v. Sebelius*⁵⁷ to undermine Congress’s long-understood power to regulate activities under the Commerce Clause, teeing up a future case in which the Court can restrict this power. The majority opinion took aim at Congress’s power of the purse, as well. Branding it “economic dragooning,” the Court struck down the health care law’s provision calling for the withdrawal of federal funds from states refusing to take part in Medicaid expansion.⁵⁸ It is safe to expect that the new Commerce Clause limits and the new “dragooning” rule will be put to use in later cases.⁵⁹

Like sappers, the conservatives insert seemingly innocuous language into one case that can later be detonated to take down undesirable precedent.⁶⁰ The intentionality and calculation involved in such a strategy are not the mark of a neutral umpire waiting for a pitch to call balls and strikes. The stratagem provides circumstantial evidence that the conservatives are executing an agenda, not dispassionately deciding cases on their merits.

⁵⁶ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring).

⁵⁷ 132 S. Ct. 2566 (2012).

⁵⁸ *Id.* at 2574.

⁵⁹ It is beyond the scope of this article, but the tactical retreat by Chief Justice Roberts to uphold the Affordable Care Act was politically shrewd: sparing the Court further obloquy as a partisan 5-4 court; sparing the Republican-friendly insurance industry the pre-existing condition conundrum; sparing the Republican Party having to clean up the mess that striking the statute would have caused; and allowing Chief Justice Roberts to polish his personal credibility as a non-partisan—all the while burrowing long-sought conservative ideology deeply into the decision.

⁶⁰ The *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) and *Harris v. Quinn*, 134 S. Ct. 2618 (2014) decisions are the most recent to conform to the incrementalist pattern. While the Court in *Hobby Lobby* upheld the rights of specific “closely held” corporations to deny employees birth control coverage on religious grounds—thus finding, for the first time, that corporations are capable of religious beliefs—one need not stretch the imagination far to see how its logic could extend to protect private companies from a slew of additional obligations. See 134 S. Ct. at 2785. In *Harris*, the majority “narrowly” held that Medicaid-paid home health care workers covered by union contracts were excused from contributing to union coffers as “quasi-government employees,” but made only too clear its willingness to extend the ruling to all those in the public sector. See 134 S. Ct. at 2638. Labeling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), which held that states could require union membership as a condition of public employment, “somewhat of an anomaly,” the majority suggested that the longstanding precedent was at risk. *Id.* at 2627.

III. IDEOLOGY BEFORE CONSENSUS

A separate signal of the conservatives' activism is the number of 5-4 decisions in controversial cases. The conservative justices have dramatically altered the legal landscape via these bare-majority decisions, a pattern suggesting that ideology, not consensus, is their true motivation.

As a historical analog, the activist Court of the *Lochner v. New York*⁶¹ era was notorious for issuing 5-4 decisions that articulated a radical vision of substantive due process shielding corporations from child labor laws and other employee protections.⁶² The Roberts Court has followed a similar path. Whether inventing an individual right to possess firearms,⁶³ gutting campaign finance⁶⁴ and voting rights laws,⁶⁵ weakening protections against employment discrimination,⁶⁶ or recognizing a for-profit company's right to exercise religion,⁶⁷ the conservative bloc has prioritized achieving its desired outcome, even if by bare majority, to seeking to achieve consensus. This pattern stands in stark contrast both to Chief Justice Roberts's stated goal of seeking unanimity and to the example of Chief Justice Earl Warren's efforts to achieve unanimity in landmark cases such as *Brown v. Board of Education*.⁶⁸

Commentators have been quick to remark on the rare unanimity characterizing the Supreme Court's most recent term.⁶⁹ While the 2014 set of cases

⁶¹ 198 U.S. 45 (1905).

⁶² See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down federal minimum wage legislation for women and children as an unconstitutional infringement of liberty of contract); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that Congressional regulation of intrastate child labor was unconstitutional because Congress has no power under the Commerce Clause to regulate purely in-state labor conditions); *Adams v. Tanner*, 244 U.S. 590 (1917) (holding that the Washington state law prohibiting employment agencies from charging fees to people seeking work was unconstitutional because it breached due process protections of liberty and property).

⁶³ See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁶⁴ See e.g. generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).

⁶⁵ See generally *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

⁶⁶ See generally *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009).

⁶⁷ See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

⁶⁸ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 303, 424-25 (2005) (Chief Justice Roberts responded, with regard to Chairman Specter's question on consensus on the Supreme Court, that the "Chief Justice has a particular obligation to try to achieve consensus consistent with everyone's individual oath to uphold the Constitution, and that would certainly be a priority for me if I were confirmed." Chief Justice Roberts on Chief Justice Warren's efforts to achieve unanimity in *Brown*: "[Chief Justice Warren] appreciated the impact that the decision in *Brown* would have, and he appreciated that the impact would be far more beneficial and favorable and far more effectively implemented with the unanimous Court, the Court speaking with one voice, than a splintered Court. . . . It's the type of collegial discussion that judges and Justices have to engage in of the importance of what the Court was doing, and an appreciation of its impact on real people and real lives.").

⁶⁹ See, e.g., Richard Wolf, *At the Supreme Court, an Uptick in Unanimity*, USA TODAY (June 22, 2014), <http://perma.cc/P3H8-S7GS>; see also Nina Totenberg, *Rare Unanimity in Supreme Court Term, with Plenty of Fireworks*, NPR (July 6, 2014), <http://www.npr.org/2014/07/>

did feature an unusual number of unanimous decisions, the agreement in results belies serious ideological divides.⁷⁰ An illustrative case is *National Labor Relations Board v. Noel Canning*, in which the Supreme Court unanimously voted to curb the president's authority to make "recess" appointments.⁷¹ Despite agreeing on the ultimate result in the specific case—that President Obama's "pro forma" appointments were invalid—the justices split 5-4 with regard to the definition of "recess" and the executive's overall power.⁷²

It is also worth noting that the Court decided fewer politically divisive cases in the 2014 term than during the previous year.⁷³ Approximately ten percent of the Court's docket was made up of patent cases, and all ten resulted in unanimous decisions.⁷⁴ Only thirty-six percent of the Supreme Court cases last term involved liberty and rights, as opposed to fifty seven percent in the previous three terms.⁷⁵ Even in the unusually unanimous 2014 term, the voting still split down familiar 5-4 lines when it came to topics such as campaign financing,⁷⁶ contraception,⁷⁷ public prayer,⁷⁸ and union clout.⁷⁹ The justices remain polarized on the highly consequential cases⁸⁰ and the 2014 Term is the exception that proves the rule.

IV. CORPORATIONS BEFORE DEMOCRACY

The price of the Supreme Court's activist conservative agenda is high not just in the losses suffered by disfavored parties and the tipping of substantive law and civil procedure to favor corporate defendants. That actually may be the least of it. The price is also high in eroding the foundations of

06/329235293/rare-unanimity-in-supreme-court-term-with-plenty-of-fireworks, <http://perma.cc/A55D-H7GD>.

⁷⁰ Lee Epstein, William M. Landes & Richard A. Posner, *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NW. U. L. REV. 699, 712 (2012).

⁷¹ *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014).

⁷² Justice Breyer, writing for himself and Justices Ginsburg, Sotomayor, and Kagan, held that the president can make temporary appointments even during brief adjournments. *Id.* at 2562. Justice Scalia, writing for himself and the remaining Justices, articulated instead a strict rule holding that the president can only make recess appointments in the brief annual gap between formal year-long "sessions" and that he can only fill vacancies that also arise during that very brief time period (usually a matter of minutes or hours). *See id.* at 2615–17 (Scalia, J., concurring).

⁷³ Adam Liptak, *Compromise at the Supreme Court Veils Its Rifts*, N.Y. TIMES (July 1, 2014), <http://perma.cc/ECK2-JRKE>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434 (2014).

⁷⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

⁷⁸ *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

⁷⁹ *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

⁸⁰ Geoffrey Stone, *The Behavior of Supreme Court Justices When Their Behavior Counts the Most*, AMERICAN CONSTITUTION SOC'Y, Sept. 2013, at 5, <http://perma.cc/9UN4-AV46>. Stone determined the "most consequential cases" are those that are most relevant to the Justices' individual policy preferences.

our civil society—undermining the integrity of elections, eliminating protections for access to the ballot box, and weakening the civil jury.

Citizens United allowed unlimited corporate money to drown out ordinary citizens' voices. The baleful effects of the resulting massive, anonymous, and negative attack ad spending are evident. The benefit to corporate and conservative interests was immediate: in the 2012 election cycle, Super PACs and other nonprofit organizations unleashed by *Citizens United* spent upwards of \$600 million.⁸¹ The Center for Responsive Politics estimates that sixty-nine percent of this spending was by conservative groups, twenty-eight percent by liberal groups, and the remainder by other organizations.⁸² Republican presidential nominee Mitt Romney reaped the greatest benefit of the new flow of cash: of the \$450 million in outside spending dedicated to the presidential candidates, Romney received approximately \$350 million, while President Obama received an estimated \$100 million.⁸³

Striking down Section IV of the Voting Rights Act, *Shelby County* removed the key mechanism for protecting access to the ballot in jurisdictions with long histories of discriminating against minority voters. One result was the almost immediate enactment of a raft of voter-identification laws, cuts to early voting, bans on same-day registration, and voter-roll purges. Voter suppression of the kind freed up by *Shelby County* works virtually exclusively in favor of Republicans.⁸⁴

Decisions that raise pleading standards,⁸⁵ that shunt cases to corporate-funded arbitration,⁸⁶ that make it harder to proceed as a class,⁸⁷ and that

⁸¹ Adam Lioz & Blair Bowie, *Election Spending 2012: Post-Election Analysis of Federal Election Commission Data*, DEMOS.ORG (Nov. 9, 2012), <http://perma.cc/S7H3-2ZDF>.

⁸² Michael Beckel & Russ Choma, *Super PACs, Nonprofits Favored Romney Over Obama: Citizens United Decision Helped Romney Neutralize Obama's Fundraising Advantage*, CTR. FOR RESPONSIVE POLITICS, OPENSECRETS BLOG (Oct. 30, 2012), <http://perma.cc/94FX-KUKZ>.

⁸³ *Id.*; See also Andrew Mayersohn, *Four Years After Citizens United: The Fallout*, CTR. FOR RESPONSIVE POLITICS, OPENSECRETS BLOG (Jan. 21, 2014), <http://perma.cc/NT9D-NW9N>.

⁸⁴ Voter suppression favoring Republicans occurs in several ways. With regard to voter identification laws, the suppression operates on two levels: first, groups such as lower income and minority voters tend to vote for Democratic candidates but are less likely to possess the requisite identification documents; second, in some states the selection of acceptable forms of identification is itself biased toward Republican voters (Texas, for instance, accepts gun permits as valid identification but not student identification cards even if issued by state universities). See WENDY R. WEISER & LAWRENCE NORDEN, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY, *VOTING LAW CHANGES IN 2012* (2011), available at <http://perma.cc/S4Q4-UG9S>. With respect to early voting, the previously popular bipartisan reform—born of the 2000 election debacle in Florida—fell out of favor with Republicans after the 2008 election, when President Obama used it successfully to mobilize less reliable voting constituencies, including African-Americans and Hispanics. See *id.*

⁸⁵ See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁸⁶ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁸⁷ See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013); *AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011) (holding that mandatory arbitration clauses can deprive consumers of access to class action litigation).

restrict juries' discretion over damages⁸⁸ all undermine the intended political function of the civil jury in our American system of government and, in doing so, benefit corporate interests.⁸⁹ While the Supreme Court has shown great solicitude for conservative constitutional claims—discovering an individual right to own firearms, as discussed above, or the right of corporations to influence elections—it has entirely ignored the significant constitutional principles behind the Seventh Amendment, without the faintest originalist whisper.

V. WHERE ALL THE MANEUVERING LEADS

Through all these indicia of activism runs a common thread. The activism of the Roberts Court is not simply motivated by isolated and disconnected, but benign, misunderstanding about the world in which we live. The unmistakable pattern of the conservative justices' decisions serves as evidence of a deliberate and purposeful activism—an activism aimed at promoting a particular agenda. The clear beneficiaries of this agenda are corporate and conservative interests, which are winning in the Supreme Court at an unprecedented rate. And when they win, who loses? Employees, consumers, communities, and other injured Americans, who can no longer count on the highest court in the land to vindicate their rights.

Corporate and conservative interest groups have worked diligently over the years to achieve this favored status and to turn the law to their ends. The U.S. Chamber of Commerce has engaged in a forty-year campaign to change the law through litigation, famously kicked off by later-Supreme Court Justice Lewis Powell's 1971 memo calling for a concerted effort by the corporate community, led by the Chamber, to turn the legal system to corporate

⁸⁸ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008) (holding that any punitive damages greater than the compensatory damage award would make damages too unpredictable).

⁸⁹ See Sheldon Whitehouse, *Restoring the Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241 (2014); Sheldon Whitehouse, Opening Remarks, 162 U. PA. L. REV. 1517 (2014). Before a jury, mighty corporations must stand equal to simple citizens—and they are not amused. As Blackstone wrote, “[t]he most powerful individual in the state will be cautious of committing any flagrant invasion of another’s right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men.” 3 WILLIAM BLACKSTONE, COMMENTARIES *380. The civil jury’s very function, he noted, is that “it prevents the encroachments of the more powerful and wealthy citizens.” *Id.* Corporations, now the most powerful and wealthy entities in the state, loathe and fear civil juries as the one institution of government they cannot bring to heel. For big corporations, the difference between the jury and other institutions of government is stark: tampering with the executive and legislative branches through lobbying, campaign spending, and other devices is their constant occupation; tampering with a jury is a crime.

advantage.⁹⁰ Explicit in that plan was the importance of an “activist-minded Supreme Court.”⁹¹

Simultaneously, the broader conservative movement built a sophisticated legal infrastructure in the form of The Federalist Society and other conservative legal organizations. These efforts paid off, and the Chamber of Commerce is now prevailing before the Supreme Court at a remarkable rate. According to the Constitutional Accountability Center, between 2006 and 2013, the Roberts Court supported the Chamber’s position sixty-nine percent of the time—compared to fifty-six percent of the time during the Rehnquist Court and forty-three percent of the time during the Burger Court.⁹² This impressive “win” rate is itself an understatement. An aggressive, confident Chamber files cases where it expects a win will move the law in its direction; its “losses,” thus, can mean no more than a return to the status quo—an opportunity loss but no harm done.

A recent study co-authored by the conservative Seventh Circuit Judge Richard Posner found not only that the Roberts Court was more favorable to business interests than its predecessors, but that all five members of the “conservative bloc” were among the top ten most business-friendly judges in the last sixty-five years—with Chief Justice Roberts number one and Justice Alito number two.⁹³

The Chamber and corporate interests are winning on a broad range of issues. They are winning on employment discrimination, where the Roberts Court overturned jury verdicts in both age discrimination and gender discrimination cases in *Gross v. FBL Services*,⁹⁴ and *Ledbetter v. Goodyear Tire & Rubber Co.*,⁹⁵ respectively. They have won heightened pleading standards in the *Iqbal*⁹⁶ and *Twombly*⁹⁷ decisions. They have won rulings pushing disputes into corporate-favored arbitration, as in *Rent-A-Center, West, Inc. v. Jackson*.⁹⁸ They have won rulings making it harder for injured Americans to band together to press cases of large-scale wrongdoing, such as in *Wal-Mart*

⁹⁰ See Memorandum from Lewis Powell, Attack on American Free Enterprise System, to Eugene Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce (Aug. 23, 1971), <http://perma.cc/7J3D-R92Q>.

⁹¹ *Id.* at 26.

⁹² Tom Donnelly, *The U.S. Chamber of Commerce Continues Its Winning Ways*, CONSTITUTIONAL ACCOUNTABILITY CTR. (June 30, 2014), <http://perma.cc/D6VL-UB8Y>; *Open for Business: Tracking the Chamber of Commerce’s Supreme Court Success Rate from the Burger Court through the Rehnquist Court and into the Roberts Court*, CONSTITUTIONAL ACCOUNTABILITY CTR. (Dec. 2010), <http://perma.cc/C52D-MKGH>.

⁹³ See Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1471 (2013).

⁹⁴ 557 U.S. 167 (2009).

⁹⁵ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (holding that employers cannot be sued for pay discrimination based on sex or gender under Title VII of the Civil Rights Act of 1964 if the discrimination occurred more than 180 days before the victim initiated the discrimination claim).

⁹⁶ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁹⁷ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁹⁸ 561 U.S. 63 (2010).

*v. Dukes*⁹⁹ and *AT&T v. Concepcion*.¹⁰⁰ And, of course, with *Citizens United*, the Roberts Court even granted corporations (including, de facto, foreign corporations) the right to unlimited spending in our elections.¹⁰¹

These victories have continued into the most recent Supreme Court terms with yet more 5-4 decisions in favor of corporate interests. These decisions include *Vance v. Ball State University*,¹⁰² in which the Court made it more difficult for workers to hold their employers accountable for harassment in the workplace under the 1964 Civil Rights Act, *Mutual Pharmaceutical Co. v. Bartlett*,¹⁰³ in which the Court made it harder for consumers who experience serious side effects from medications to sue drug companies, and *Comcast v. Behrend*,¹⁰⁴ where the Court made it even harder for consumers to bring class actions. They include *Hobby Lobby*,¹⁰⁵ where the Court put the religious rights of corporate entities over the rights of those entities' employees, and *Harris*,¹⁰⁶ in which the Court dealt a significant blow to the political and economic clout of unions.

It is highly improbable that corporate interests have prevailed in decision after decision by mere happenstance.

VI. A COURT ON A MISSION

The evidence of the Roberts Court conservative bloc's corporate and partisan agenda is profound. The conservative justices have repeatedly planted ideological mines in one case to be detonated in later cases. They have used procedural strategy to set up decisions they wanted to reach. These decisions recurrently overlapped with Republican political goals and ideology. Finally, the conservatives' selective concern for different constitutional amendments, theories of adjudication, and traditional appellate constraints show that they are engaging openly in judicial activism. In doing so, they are putting at risk the public confidence upon which the Court depends.

The justices are shielded by a long-standing convention that presumes decisions—even unpopular decisions—are made on the merits, and not in pursuit of an ulterior political purpose or agenda. History shows it is not impossible for the Court to have a political agenda: business interests in the *Lochner* era and slavery interests in the *Plessy* era are two examples. The harsh question this article raises is whether, on this evidence, the present Court is still entitled to that presumption.

⁹⁹ 131 S. Ct. 2541 (2011).

¹⁰⁰ 131 S. Ct. 1740 (2011).

¹⁰¹ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362 (2010).

¹⁰² 133 S. Ct. 2434 (2013).

¹⁰³ 133 S. Ct. 2466 (2013).

¹⁰⁴ 133 S. Ct. 1426, 1436 (2013).

¹⁰⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

¹⁰⁶ *Harris v. Quinn*, 134 S. Ct. 2618 (2014).