FREE-SPEECH FORMALISM IS NOT FORMAL

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ABSTRACT

Legal formalism proclaims that cases can be resolved through the logical application of abstract rules or doctrines. Courts supposedly apply formal rules in an apolitical or neutral fashion. The conservative justices on the Supreme Court have increasingly adjudicated First-Amendment claims from a formalist perspective, particularly in cases focused on the democratic process. This Essay argues that formalism is not formal. Formalism cannot deliver on its own claim to political neutrality, to deciding pursuant to pure law. Law and politics always intertwine in Supreme Court decision making. Thus, political considerations have infused not only the legal profession's widespread commitment to formalism but also, and perhaps more important, the Roberts Court's First-Amendment decisions. A focus on the recent gerrymandering decision, Rucho v. Common Cause, demonstrates how formalism influences free-speech cases without being determinative. In the conclusion, the Essay argues that court-packing might be the only viable progressive response to the conservative bloc's free-speech decisions undermining democracy.

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INTRODUCTION

Legal formalism proclaims that cases can be resolved through the logical application of abstract rules or doctrines.[1] The context and consequences of the rule application are irrelevant.[2] The specific identities of the parties to the dispute are irrelevant.[3] Courts can supposedly apply a formal rule in an apolitical or neutral fashion. In short, legal formalism is premised on the possibility of sharply separating law and politics.[4] The intrusion of politics into judicial decision-making amounts to the corruption of the judicial process.[5]

Therefore, free-speech formalism presents a problem for progressives seeking social justice.[6] The conservative justices on the Supreme Court have increasingly adjudicated First-Amendment claims from a formalist perspective,[7] particularly in cases focused on the democratic process.[8] The conservative

1. "A legal system is formal to the extent that its outcomes are dictated by demonstrative (rationally compelling) reasoning." Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 3 (1983) (emphasis omitted).

2. *See id.* at 11 (describing a formal legal system as seeking "objective tests" while avoiding "vague standards, or rules that required determinations of state of mind.").

3. *See id.*

4. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2120 (2018) [hereinafter Lakier, *Antisubordinating*] (discussing how the Court shifted toward formalism in First-Amendment cases and "rejected the idea that courts should take into account inequalities in economic and political power when interpreting the First Amendment.").

5. For a philosophical discussion of formal deductive systems, see IRVING M. COPI, SYMBOLIC LOGIC 157–64 (4th ed. 1973).

6. *See* Lakier, *Antisubordinating*, *supra* note 4, at 2119–20 (arguing that, starting in the 1970s, the Court has shifted toward formalism in First-Amendment cases); Genevieve Lakier, *The First Amendment's Real Lochner Problem*, U. CHI. L. REV. (forthcoming) (arguing that the current Court's First-Amendment decisions are formalist).

7. *See* Stephen M. Feldman, *(Same) Sex, Lies, and Democracy: Tradition, Religion, and Substantive Due Process (with an Emphasis on* Obergefell v. Hodges*)*, 24 WM. & MARY BILL RTS. J. 341, 359–67 (2015) (discussing three overlaps, including formalism, between *Lochner*-era Court and Roberts Court); Stephen M. Feldman, *Chief Justice Roberts's* Marbury *Moment: The* Affordable Care Act Case (NFIB v. Sebelius), 13 WYO. L. REV. 335, 338–46 (2013) (discussing formalism of the Rehnquist and Roberts Courts as echoing the *Lochner* era).

8. *See* STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY (2008) [hereinafter FELDMAN, FREE EXPRESSION] (discussing extensively the historical connection between free expression and democracy); STEPHEN M. FELDMAN, THE NEW

bloc controlling the Court ostensibly applies free speech as a rigid rule, though the Court's decisions typically protect the wealthy and other private-sphere actors wielding significant resources and power.[9] The justices maintain that the First Amendment must be applied the same to all, regardless of politics, social context, or societal consequences.[10] Formalism eschews any concerns with substantive equality and justice. A rule is a rule.[11] And the First Amendment is a rule. The seeming result is to legitimize numerous decisions that politically tilt toward conservatism.

My thesis is that legal formalism is not formal. In other words, formalism cannot deliver on its own claim to political neutrality, to deciding pursuant to pure law. Law and politics dynamically interact in Supreme Court decision-making.[12] Always.[13] To be clear, I do not intend to suggest that law is the

ROBERTS COURT, DONALD TRUMP, AND OUR FAILING CONSTITUTION 19–62 (2017) [hereinafter FELDMAN, FAILING CONSTITUTION] (discussing founding-era conceptions of government and free expression).

9. *See* John C. Coates IV, *Corporate Speech & The First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 240–54 (2015) (discussing the increasing proportion of corporate litigants and winners in First-Amendment cases).

10. *See* Lakier, *Antisubordinating*, *supra* note 4, at 2127.

11. Justice Scalia argued that the rule of law must be "the law of rules." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

12. *See, e.g.*, Stephen M. Feldman, *Nothing New Under the Sun: The Law-Politics Dynamic in Supreme Court Decision Making*, 2017 PEPP. L. REV. 43, 52–60 (2018) (discussing the dynamic interaction between law and politics); Stephen M. Feldman, *Fighting the Tofu: Law and Politics in Scholarship and Adjudication*, 14 CARDOZO PUB. L., POL'Y & ETHICS J. 91, 91–96 (2015) [hereinafter Feldman, *Tofu*] (suggesting that "[s]cholars . . . devote more time and energy to exploring rather than taming the relations between law and politics in adjudication"); Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics Into Mayonnaise*, 12 GEO. J. L. & PUB. POL'Y 57, 93–95 (2014) [hereinafter Feldman, *Alchemy*] (arguing that politics and the law are not distinct and separate, but rather, as institutional interpretivism reveals, "politics is at the heart of the legal interpretive process"); Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 L. & SOC. INQUIRY 89 (2005) [hereinafter Feldman, *Harmonizing*] (further discussing the intertwined relationship between law and politics in the context of how the Supreme Court makes legal decisions by applying legal rules with interpretations that "always encompasses political preferences").

13. For purposes of understanding legal interpretation, I define politics capaciously. For example, if a judge's religious, cultural, or economic background influences how he or she construes a text, then the judicial decision is not based on pure law and could be deemed

handmaiden of politics. Law is neither mere window-dressing nor subterfuge for political machinations.[14] But law should never be understood as being separate and independent from politics.[15] In most cases, the justices sincerely interpret the relevant legal texts and concomitant rules, but interpretation is never mechanical. The justices' political horizons always influence their interpretive understandings of the texts and rules.[16] For this reason, the justices' legal interpretations and conclusions typically coincide with their respective political preferences.[17] Thus, even when the Court claims to invoke and apply a formal rule, politics still plays its role.

This Article explores the operation of the law-politics dynamic in the specific context of free-speech cases.[18] Part I

political. Feldman, *Tofu*, *supra* note 12, at 94–95; *see also* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 271 (2005) (defining politics capaciously); Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004) (discussing a lower court study that concluded a judge's religion is the most salient factor affecting outcome of religious-freedom cases).

14. Many political scientists treat Supreme Court decision-making as being determined solely by politics. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993) (discussing, *inter alia*, the role of judges as policy makers and the reasons for it, as well as the political history of the Supreme Court). With regard to legal reasoning and judicial opinions, Martin Shapiro wrote: "Courts and judges always lie. Lying is the nature of the judicial activity." Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994) (discussing the paradox inherent in judicial decisions whereby judges deny that they make law, precisely as they make the law, and in doing so, have political authority, and yet deny their political authority).

15. Court critics who complain about judicial activism typically suggest the justices are being political. *E.g.*, ROBERT BORK, THE TEMPTING OF AMERICA 17 (1990) ("The opinions of the elites to which judges respond change as society changes and one elite replaces another in the ability to impress judges. Thus, judicial activism has had no single political trajectory over time."); Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?*, 34 HARV. J.L. & PUB. POL'Y 73, 74–75 (2011) (providing a definition for "[j]udicial activism in constitutional law," then noting "[b]y this definition all or nearly all Supreme Court rulings of unconstitutionality are activist.").

16. *See* Feldman, *Alchemy*, *supra* note 12, at 79–80 (explaining the concept of an interpretive horizon and the formation of horizons).

17. *See id.*

18. A number of legal scholars and political scientists have been exploring the law-politics dynamic in a variety of contexts. *See, e.g.*, LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789-2008, at ix (2009); Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 65 (Cornell W.

shows how formalism is inseparable from politics. It begins by explaining the historical appeal of formalism for legal professionals in general. Lawyers, judges, and law professors have a political stake in advocating for legal formalism. Part I then explains how formalism has an inherent political tilt that appeals especially to conservatives. Focusing on the Court's campaign finance cases, decided under the First Amendment, Part I argues that conservative (neoliberal) ideology apparently motivates some of the justices to reach results consistent with that ideology, buoying private-sphere power while minimizing public-sphere power.[19] Given the politics of free-speech formalism as discussed in Part I, Part II shows that, historically, the Court has never decided free-speech cases neutrally or apolitically. Throughout American history, the wealthy and the mainstream generally win while societal outsiders or peripheral groups generally lose First-Amendment disputes. Part III focuses on a specific and recent case, *Rucho v. Common Cause*, to demonstrate how formalism influences free-speech decisions without being determinative.[20] Plaintiffs had challenged extreme partisan gerrymandering schemes in North Carolina and Maryland as

Clayton & Howard Gillman eds., 1999); Ronald Kahn & Ken I. Kersch, *Introduction* to THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 1, 1 (Ronald Kahn & Ken I. Kersch eds., 2006). For quantitative support for the operation of a law-politics dynamic, see MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 15–16 (outlining the authors' use of "recent statistical developments" to "leverage cross-institutional and cross-time data to pin down legal and political constraints on justices" in order to develop and implement a "technique for disentangling the effect of policy preferences and legal values" in judicial decision making) (2011); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 17, 147–48 (2006) (finding after an examination of thousands of three-judge panel decisions and individual judges' votes "striking evidence of a relationship between the political party of the appointing president and judicial voting patterns" as well as evidence of frequent influence of panel composition on judicial votes, "producing both ideological dampening and ideological amplification.").

19. *See* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION 94–95 (Ronald Hamowy ed. 2011) (giving the classic libertarian-neoliberal argument against government planning because of the complexity of social reality).

20. *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (involving challenges to partisan gerrymandering schemes as constitutional violations).

violating free speech and other constitutional guarantees.[21] The conservative bloc invoked a formal rule, the political question doctrine, that in one fell swoop defeated all of the constitutional claims, including the First-Amendment claims.[22] Yet, *Rucho* unwittingly underscores the irony of formalism, as the justices relied on a patently manipulable rule—the political question doctrine—to reject the free-speech claims as being too politically manipulable for courts to resolve.[23]

The conclusion underscores that while free-speech formalism is problematic for progressives seeking social justice, the eradication of formalism would not necessarily produce progressive judicial outcomes. Because formalism is not truly formal, that is, formalism does not deliver on its own promise to be apolitical, the elimination of formalism would not necessarily produce any specific results. After all, the antithesis of formalism—realist or pragmatic decision making—would also be intertwined with politics (albeit perhaps more openly so than formalist decision making). In short, so long as a conservative bloc controls the Supreme Court, the Court will continue to hand down conservative free-speech decisions, regardless of whether the justices invoke formalist rules. From this perspective, packing the Court might be the only progressive response that would shift the politics of First-Amendment decisions. Many commentators abhor the idea of court-packing, worrying that it would undermine the institution of the Court as a court of *law*.[24] Yet the conservative Court currently threatens the institution of American democracy. Arguments for tinkering

21. *Id.* at 2491.

22. *Id.* at 2506–07.

23. *See id.* at 2508 ("In this rare circumstance, that means our duty is to say 'this is not law.'").

24. JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 276–78 (2010); Matt Ford, *The Weak Case for Packing the Supreme Court*, THE NEW REPUBLIC (Mar. 12, 2019), https://newrepublic.com/article/153286/weak-case-packing-supreme-court.

with First Amendment doctrine and theory are unlikely to remedy this crisis.[25]

This Article categorizes the Roberts Court justices according to their political ideologies or preferences. These categorizations follow the normal political identifications of the justices as articulated by many political scientists.[26] A conservative bloc of justices has controlled the Court throughout John Roberts's tenure as Chief Justice.[27] Initially, the bloc of Roberts and Justices Antonin Scalia, Clarence Thomas, Anthony Kennedy, and Samuel Alito frequently voted together to hand down conservative decisions.[28] With Neil Gorsuch replacing Scalia and Brett Kavanaugh replacing Kennedy, a conservative bloc continues to control the Court.[29]

I. CONSERVATIVE JUSTICES AND FREE-SPEECH FORMALISM

Political reasons help explain the appeal of legal formalism to conservative justices. The first section in this Part traces historical links between legal formalism and the

25. *See e.g.*, FELDMAN, FAILING CONSTITUTION, *supra* note 8, at 199–257 (discussing the current threats to American democratic-capitalism).

26. *See, e.g.*, LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES 106–16 (2013) (listing and explaining rankings of Supreme Court justices based on political ideology including Martin-Quinn scores (accounting for changes over time) and Segal-Cover scores (quantifying Court nominees' perceived political ideologies at the time of appointment)); Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1431–32 (2013) (focusing on the politics of justices in relation to business-related decisions).

27. On the Rehnquist Court, before Roberts became Chief Justice, the bloc of Chief Justice William Rehnquist and Justices Antonin Scalia, Sandra Day O'Connor, Anthony Kennedy, and Clarence Thomas often voted together and handed down conservative decisions. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act of 1993); United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act); New York v. United States, 505 U.S. 144 (1992) (focusing on Tenth Amendment).

28. *See, e.g.*, Shelby County v. Holder, 570 U.S. 529 (2013) (invalidating section of Voting Rights Act); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (invalidating parts of Affordable Care Act).

29. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (holding that political gerrymandering, no matter how extreme, is a nonjusticiable political question); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (holding that public display of a thirty-two foot Christian cross does not violate the Establishment Clause).

professionalization of law. The second section explains why the conservative justices on the Roberts Court have invoked formalist rules in First-Amendment campaign finance cases.

A. *Professionalization and Formal Law: A History*

In general, lawyers, judges, and law professors have a professional stake in legal formalism. Formalism asserts the distinctiveness of law. In other words, individuals trained to specialize in law—lawyers, judges, and law professors—have an interest in claiming that their specialized training is important (contributing some good to society), is too arcane for laypersons to understand, and is financially valuable in a marketplace economy. There are at least three periods in American history where this professional stake in formalism has played a significant role in the development of the legal profession.

The first key period arose during the early national era. The Framers cared about the separation of government powers, including the separation of judicial and legislative roles, because they obviously organized the Constitution around such roles: Article I focused on the legislative powers, Article II on executive powers, and Article III on judicial powers.[30] Yet, there was much overlap among the articles (thus, checks and balances) as well as significant ambiguities, especially in Articles II and III. For instance, Article III mentions "one supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish."[31] The constitutional text leaves unclear the nature of the lower federal courts while simultaneously vesting power in Congress to specify that nature.

Despite the Framers' rough separation of powers, the distinctiveness of judicial and legislative functions remained

30. *See* U.S. CONST. art. I (focusing on Congress); U.S. CONST. art. II (focusing on presidential powers); U.S. CONST. art. III (focusing on the judiciary).

31. U.S. CONST. art. III, § 1.

fuzzy during the early national years. Judges sometimes acted in overtly partisan political ways—for example, occasionally revealing their partisan political views during grand jury charges.[32] Meanwhile state legislatures sometimes performed judicial functions such as the reviewing of court decisions, as in the early Supreme Court constitutional case *Calder v. Bull*, which arose when the Connecticut state legislature overturned a state probate court decision.[33]

Such overlapping legislative and judicial functions created potential conflicts between legislatures and courts. In the late 1790s and early 1800s, political rancor between the proto-parties of the Federalists and Republicans crystallized these conflicts.[34] For instance, Federalist Supreme Court Justice Samuel Chase was notoriously partisan while conducting several Sedition Act trials of Republicans in 1800 and then purportedly denigrated Republican President Thomas Jefferson during an 1803 grand jury charge.[35] In retribution, the Republican-controlled House of Representatives impeached Chase, though the Senate failed to convict him.[36] With such conflicts providing the background, the courts developed the power of judicial review as ostensibly distinctive from partisan politics.[37] Courts solidified and strengthened judicial

32. *See* 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL 1801–1815, at 222 (1981).

33. *See* 3 U.S. (3 Dall.) 386 (1798). Justice Iredell observed that the legislature had been regularly exercising a "superintending power" over the state courts. *Id.* at 398 (Iredell, J., dissenting).

34. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 696–700 (1993) (describing Federalist and Republican conflict in Pennsylvania in 1799); JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC 8–9 (1993) (describing political division of the 1790s).

35. ELKINS & MCKITRICK, *supra* note 34, at 699; James Haw, *Chase, Samuel*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 103 (2009); *see* FELDMAN, FREE EXPRESSION, *supra* note 8, at 70–100 (explaining the Sedition Act controversy).

36. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 114–15 (1973); BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 57–58 (1993).

37. On the developing concept of judicial review, see SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990); William Michael Treanor, *Judicial Review Before*

power by carving out and deeming certain political issues as legal issues.[38] Courts decided such legal issues supposedly pursuant to the technical terms of formal legal rules and rights—think of contract and property rights—while the political values and assumptions underlying the specific right typically remained obscure.[39] Meanwhile, judges appeared to limit their own (judicial) powers by avoiding explicit partisan pronouncements, deemed appropriate for legislatures (and executives).[40] Chief Justice John Marshall, especially with his opinion in *Marbury v. Madison*,[41] played a key role in this development of judicial power, emphasizing formal law in opposition to politics.[42]

The next key period in the development of legal formalism followed the Civil War.[43] During this time of industrialization, professions in general "came of age."[44] More specifically,

Marbury, 58 STAN. L. REV. 455 (2005); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787 (1999).

38. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 190 (1990).

39. *Id.* at 188–99.

40. *Id.*

41. *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803) ("The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.").

42. *See* BAILEY & MALTZMAN, *supra* note 18, at 95 (discussing how the Federalist-Republican political conflict led to *Marbury*); NEDELSKY, *supra* note 38, at 198 ("When an issue is designated as law, it is insulated not only from the clashes of politics, but from the attention of public debate.").

43. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 460 (Ann Finlayson ed. 1988) (observing that "no aspect of life remained unaffected" by the Civil War and its aftermath).

44. MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 104 (1977). Many writers agree that there is no one way to define a profession. *See* Nathan O. Hatch, *Introduction: The Professions in a Democratic Culture*, *in* THE PROFESSIONS IN AMERICAN HISTORY 1, 1–2 (Nathan O. Hatch ed. 1988) ("First, a profession is generally considered to be an occupation based on a definable body of organized knowledge, an expertise that derives from extensive academic training. Professional training and universities are tightly linked in

professionalization in law practice advanced rapidly.[45] An elite corps of lawyers emerged to service the burgeoning industries and large corporations, and these elite practitioners spurred the creation of "city and state bar associations, capped in 1878 by the American Bar Association."[46] While these organizations purportedly aimed "to institute stricter standards of admission to the bar and to curb what they saw as unprofessional behavior,"[47] they also enabled accredited members of the profession to gain social status and monopolize a segment of the economic marketplace.[48]

an institutional setting that certifies quality and competence. Second, a profession at some level involves a moral commitment of service to the public that goes beyond the test of the market or the desire for profit. The ideal of most professions, at least, is that the accepted measure of success is not merely financial gain but some larger purpose, whether it be the well being of the public, the advancement of science, the care of the infirm, or the maintaining of justice. . . . The professional person, it has been said, does not work in order to be paid but is paid in order to work. A third criteria involves the relative independence or autonomy of professional life. In the modern world professional organizations are generally granted the right as a separate entity in society to regulate their own affairs and define their own standards. Recognized for a given expertise, the professional is free to choose clients, set hours and fees, define ethical norms, and establish certain 'gatekeeping' functions—such as determining entrance criteria and standards for professional behavior. In other words, professionals are granted something of a monopoly over the exercise of their work. For most professions, legal recognition is granted through forms of licensure and certification."); *see also* Laurence Veysey, *Higher Education as a Profession: Changes and Continuities*, *in* THE PROFESSIONS IN AMERICAN HISTORY, *supra*, at 15, 15–17.

45. *See* Maxwell H. Bloomfield, *Law: The Development of a Profession*, *in* THE PROFESSIONS IN AMERICAN HISTORY, *supra* note 44, at 33, 43.

46. LARSON, *supra* note 44, at 167. For a more detailed historical discussion of the founding of the ABA, see John A. Matzko, *"The Best Men of the Bar": The Founding of the American Bar Association*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 75, 75–96 (Gerard W. Gawalt ed. 1984) [hereinafter THE NEW HIGH PRIESTS].

47. LARSON, *supra* note 44, at 167. "'Uphold[ing] the honor of the profession' was the euphemism for raising standards of legal education and admission to the bar, one of the primary motivations for founding the ABA." Matzko, *supra* note 46, at 88.

48. *See* ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS 2 (1988). ("[A] fundamental fact of professional life [is] interprofessional competition. Control of knowledge and its application means dominating outsiders who attack that control."); LARSON, *supra* note 44, at xvi ("My intention is to examine here how the occupations that we call professions organized themselves to attain market power. I see professionalization as the process by which producers of special services sought to constitute and control a market for their expertise. Because marketable expertise is a crucial element in the structure of modern inequality, professionalization appears also as a collective assertion of special social status and as a collective process of upward social mobility.").

Like other postbellum developing professions, law benefitted from forging ties with the new universities also developing in those decades.[49] Unlike antebellum colleges, these universities emphasized service and research.[50] The universities and their faculty were generally expected to serve "in a utilitarian fashion"[51] the "emerging industrial technological society."[52] Yet, service often intertwined with research, "the pursuit of truth . . . for its own sake."[53] Significantly, many researchers cloaked themselves with the authoritativeness of science by claiming to discover objective truths through the use of formalist methods, focusing on axiomatic principles and logically ordered and coherent systems.[54]

Law legitimized itself as a profession by joining these new universities.[55] Charles Eliot, the President of Harvard, selected Christopher Columbus Langdell for the law school faculty in 1869.[56] One year later, Langdell became dean and began to implement in the law school Eliot's vision of a scientific

49. ABBOTT, *supra* note 48, at 56–57 (showing that university education typically provides a profession with "legitimation, research, and instruction").

50. *Id.* at 12, 58; Veysey, *supra* note 44, at 19, 27–29. The old colleges focused on the liberal arts, the classics, and teaching "mental discipline" as well as "piety and strength of character." LAWRENCE R. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY 9 (1965).

51. Veysey, *supra* note 44, at 19.

52. GEORGE M. MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF 155 (1994) ("The professionalization of the universities was part of the much larger process of differentiation and specialization necessary for industrial and commercial advance."); *see* Veysey, *supra* note 44, at 12 (discussing the practicality of the new universities).

53. Veysey, *supra* note 44, at 18.

54. George M. Marsden writes that the "collapse of older theologies" led postbellum researchers to display a "passion for order, systematizing, efficiency, scientific principle, [and] personal discipline." MARSDEN, *supra* note 52, at 187. On the importance of scientific authoritativeness and objectivity, see PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 16, 31 (1988); DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 62 (1991).

55. "Academic knowledge legitimizes professional work by clarifying its foundations and tracing them to major cultural values." ABBOTT, *supra* note 48, at 54. "Academic professionals demonstrate the rigor, the clarity, and the scientifically logical character of professional work, thereby legitimating that work in the context of larger values." *Id*.

56. *See* JOHN HAYS GARDINER, HARVARD 75 (1914).

university discipline.[57] "If law be not a science," Langdell said, "a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices it."[58] Furthermore, the Langdellian conception of scientific law corresponded closely with the contemporary general view of science dominant within the universities.[59] Langdellian legal scientists treated law as a closed system of logically connected rules and axiomatic principles that dictated judicial outcomes.[60] From the Langdellian perspective, the legal system operated autonomously from the rest of society.[61] Judges were to ignore the context of a dispute, the likely societal consequences of a decision, and considerations of justice.[62] Judges were to do one thing: logically apply the rules and principles in a mechanical fashion.[63]

By urging this formalist approach to law, Langdellians promoted professionalization for not only law professors but also lawyers and judges. Presenting the law as an arcane yet

57. *See* C.C. Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 121, 123 (1887).

58. *Id.*; *see also* WILLIAM R. JOHNSON, SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES 103 (1978). Not everyone agreed with Langdell's conclusion that law schools did, in fact, belong in universities. Thorstein Veblen stated that "[t]he law school belongs in the modern university no more than a school of fencing or dancing." Laura Kalman, *Bleak House*, 84 GEO. L.J. 2245, 2256 (1996) (reviewing JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995)) (quoting Thorstein Veblen).

59. WILLIAM R. JOHNSON, SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES 103 (1978).

60. C.C. Langdell, *Preface to the First Edition* of A SELECTION OF CASES ON THE LAW OF CONTRACTS, viii–ix (C.C. Langdell, ed., 2d ed. 1879).

61. Bloomfield, *supra* note 45, at 43.

62. C.C. LANGDELL, SUMMARY OF THE LAW OF CONTRACTS 20–21 (2d ed. 1880).

63. *See* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 83–105 (2000) (discussing Langdellian legal science). *But cf.*, BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 13–66 (2010) (arguing that Langdellians were not pure formalists while acknowledging that almost all legal historians characterize them as such). For examples of scholarship by Langdellian legal scientists, see JOSEPH BEALE, 1 A TREATISE ON THE CONFLICT OF LAWS (1916); SAMUEL WILLISTON, THE LAW OF CONTRACTS (1920); William A. Keener, *Preface* to A SELECTION OF CASES ON THE LAW OF QUASI-CONTRACTS iii (William A. Keener ed., 1888); William A. Keener, *Methods of Legal Education (Part II)*, 1 YALE L.J. 143 (1892).

perfectly rational system of principles and rules, Langdellians implied that only lawyers and judges trained in university-affiliated law schools could truly understand the law. "Brandishing their view of the 'scientific' nature of law as a justification for their power," writes the historian Gerard W. Gawalt, "lawyers became the new high priests of an increasingly legalistic, industrial society."[64] Thus, in the industrializing and urbanizing society of late-nineteenth and early-twentieth century America, law professors, lawyers, and judges fulfilled necessary functions—and they were seemingly the only (professional) individuals able of performing those functions.[65]

The third key period in the development of legal formalism was the 1930s and 1940s, when the practices and theory of American democratic government dramatically transformed. From the framing through the 1920s, American government was republican democratic.[66] Republican democracy revolved around two substantive principles: civic virtue and the common good.[67] During the republican democratic era, virtuous citizens and officials supposedly pursued the common good rather than their own partial or private interests.[68] Republican democratic theory thus facilitated the

64. Gerard W. Gawalt, *Introduction* to THE NEW HIGH PRIESTS, *supra* note 46, vii, vii (Gerard W. Gawalt ed., 1984).

65. Gawalt explains how industrialization, the rise of corporate law practice, and the Langdellian method of legal education reinforced each other:

[T]he national law schools [such as Harvard, Michigan, and Yale] fit in better with the national scope of modern America and with the national vision of large corporate law firms whose clients and cases were regional and national in character rather than local. As a result, large corporate law firms found graduates of law schools who were trained in the broad perspective of scientific law rather than the narrow, local vocational aspects of legal practice to be better suited to their clients and their legal problems.

Gerard W. Gawalt, *The Impact of Industrialization on the Legal Profession in Massachusetts, 1870-1900*, in THE NEW HIGH PRIESTS, *supra* note 46, at 97, 107.

66. *See* FELDMAN, FREE EXPRESSION, *supra* note 8, at 14–290.

67. *See id.* at 22.

68. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 59 (1969); *see also* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE (1996) (describing many examples

exclusion of numerous societal groups from the democratic polity: any individuals and groups considered non-virtuous could be excluded.[69] With this significant limit on political participation, republican democracy flourished within the confines of the rural and agrarian nineteenth-century America.[70] As the nation turned into the twentieth century , however, industrialization, urbanization, immigration, and ultimately the Great Depression weakened the republican democratic regime until it was supplanted in the 1930s.[71] The new regime, pluralist democracy, emphasized widespread participation in the legitimate pursuit of self-interest.[72] According to pluralist democratic theory, the government no longer mandated the pursuit of any particular substantive goal—the common good. Instead, the government provided a process or procedural framework that ostensibly allowed all individuals and societal groups to press their diverse interests and values in the democratic arena.[73]

This transition in democratic practices and theory significantly affected judicial review and, in so doing, invigorated legal formalism. During the republican democratic era, courts typically exercised the power of judicial review by confirming that challenged government actions promoted the

from the nineteenth century of government acting for common good despite infringing on individual rights).

69. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 318 (1996).

70. *Id.* at 123–67; FELDMAN, FREE EXPRESSION, *supra* note 8, at 14–45.

71. FELDMAN, FREE EXPRESSION, *supra* note 8, at 166–97. Republican democratic society struggled to represent the "common good" as new factions emerged and grew in size, such as corporate capitalist interests, in American politics in response to industrialization and the resulting immigration boom. *Id.*

72. *See* LIZABETH COHEN, MAKING A NEW DEAL 254–57, 362–66 (2d ed. 2008) (discussing the transformation of ethnic urbanites into active participants on the national political stage).

73. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 67–71 (1956) (discussing requisite conditions for maximizing the input of voting interests in politics at the electoral and interelection stage); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989) [hereinafter DEMOCRACY AND ITS CRITICS]; WILFRED E. BRINKLEY & MALCOLM C. MOOS, A GRAMMAR OF AMERICAN POLITICS 9 (1949) ("The high function of the legislature is to translate social ideas, influences, and pressures into public policies . . . .").

common good, rather than partial or private interests.[74] But pluralist democracy repudiated the common good as the substantive goal of government action, so courts could no longer focus the exercise of judicial review on the distinction between the common good and partial or private interests. Because pluralist democracy stressed participatory processes, courts too began to emphasize democratic processes. In pluralist democratic judicial review, one key judicial function became the policing of the democratic process.[75] According to pluralist democratic theory, all individuals and groups must be able to assert their respective political interests and values in the democratic arena. By ensuring such full participation, courts protect the pluralist democratic process. In other words, courts exercise the power of judicial review by articulating and upholding legal rights—such as voting and free expression—that structure a procedural framework for the interest-group battles and political compromises central to pluralist democracy.[76] From this perspective, the judicial function is purely legal. Courts protect the legal framework facilitating political debate and compromise but do not themselves enunciate political goals and values.[77] Consequently, commentators might worry about the countermajoritarian difficulty—unelected judges overturning the decisions of elected representatives of the people[78]—but the courtsostensibly remain justified in exercising the power of

74. *See* FELDMAN, FREE EXPRESSION, *supra* note 8, at 26-32, 197-208 (discussing republican democratic judicial review).

75. JOHN H. ELY, DEMOCRACY AND DISTRUST (1980).

76. West Virginia State Board of Ed. v. Barnette, 319 U.S. 624, 642 (1943); DEMOCRACY AND ITS CRITICS, *supra* note 73, at 109–11, 169–75.

77. ELY, *supra* note 75, at 105–34; *see* JOHN RAWLS, POLITICAL LIBERALISM (1996 ed.) (articulating the philosophy of political liberalism); SANDEL, *supra* note 69, at 28 (emphasizing demands for government neutrality).

78. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962) (discussing countermajoritarian difficulty); Learned Hand, *The Contribution of an Independent Judiciary to Civilization* (1942), *reprinted in* THE SPIRIT OF LIBERTY 118 (Irving Dilliard ed., 1959 ed.) (arguing for judicial restraint).

judicial review because judges interpret and apply law separate from politics.[79]

B. *The Political Tilt of Free-Speech Formalism*

The prior section explains why legal professionals generally share an interest in promoting the concept of formal law and the concomitant law-politics dichotomy. Quite simply, a sharp distinction between formal law and politics has a political payoff. Lawyers, judges, and law professors trace, justify, and protect a realm of power—specifically legal-judicial power—by distinguishing that realm from politics.[80] Supposedly, within the legal-judicial realm only legal professionals are trained and equipped with sufficient knowledge to understand and resolve *legal* issues and disputes.[81] The lay public might be empowered to debate political issues, vote, and otherwise participate in democracy, but they are ill-equipped to understand, discuss, and resolve legal issues.

In constitutional jurisprudence, however, legal formalism has an inherent political tilt that appeals especially to conservative judges and justices.[82] For example, in equal protection cases the Court has used formalist reasoning to invalidate race-based affirmative action programs. In *Adarand Constructors, Inc. v. Pena*, decided in 1995, the Rehnquist Court held that all affirmative action programs are subject to strict scrutiny.[83] The government could justify an affirmative action program only if it could prove the program was narrowly tailored to achieve a compelling government purpose.[84] Justice

79. *See* ELY, *supra* note 75, at 73–179 (arguing for the Court to exercise a limited judicial review).

80. *See supra* Section I.A (demonstrating how formalism is inseparable from politics).

81. *See supra* Section I.A.

82. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (classic article linking the form and substance of legal rules in private law cases).

83. 515 U.S. 200, 235 (1995).

84. *Id*. at 227.

Sandra Day O'Connor's majority opinion acknowledged, though, that the government might be able, in some circumstances, to satisfy this rigorous judicial standard.[85]

Government affirmative action programs might occasionally be constitutional. In separate concurrences, however, Justices Antonin Scalia and Clarence Thomas both argued for a more formal concept of equal protection that would preclude the government from ever justifying affirmative action.[86] From their perspective, the Constitution mandated that the government be colorblind.[87] In 2007, Chief Justice John Roberts's majority opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* applied strict scrutiny and invalidated affirmative action programs allowing school officials to consider race when assigning students to elementary and high schools.[88] In the plurality section of his opinion, Roberts maintained that affirmative action programs and Jim Crow laws are constitutionally indistinguishable: the principle of equality embodied in *Brown v. Board of Education* mandated the invalidation of the *Parents Involved* affirmative action programs.[89] As Chief Justice Roberts famously stated, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[90]

The Court in numerous cases has also articulated a formal concept of free expression. The landmark 2010 campaign-finance decision, *Citizens United v. Federal Election Commission*, provides one example.[91] With a five-to-four vote, the

85. *Id.* at 237 ("When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.").

86. *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 241 (Thomas, J., concurring in part and concurring in the judgment).

87. ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992) (arguing that benign racial classifications were inconsistent with the history of the Constitution).

88. 551 U.S. 701, 720–35 (2007).

89. *Id.* at 745–48 (plurality opinion).

90. *Id.* at 748.

91. 558 U.S. 310 (2010).

conservative bloc of justices invalidated provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) that imposed limits on corporate (and union) spending for political campaign advertisements.[92] The crux of the Court's majority opinion was its invocation of the self-governance rationale,[93] which links the strong constitutional protection of expression to democratic government.[94] According to this theory, free expression is necessary to allow diverse groups and individuals to contribute their views in the pluralist democratic arena.[95] If government officials interfere with the pluralist process, if they dictate or control public debates, then they skew the democratic outcomes and undermine the consent of the governed.[96] As explained by the *Citizens United* Court, "[s]peech is an essential mechanism of democracy . . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."[97] In other words, political speech and writing must be absolutely protected because democracy cannot exist without it.[98]

When Congress enacted the BCRA, it compiled and relied on findings showing that corporate campaign spending

92. *Id.* at 319 ("The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.").

93. *Id.* at 339.

94. Frederick Schauer, *Free Speech and the Argument from Democracy*, *in* LIBERAL DEMOCRACY 241, 250–51 (J. Roland Pennock & John W. Chapman, eds., 1983) (Nomos XXV).

95. *See* FELDMAN, FAILING CONSTITUTION, *supra* note 8, at 119.

96. The need to protect political expression arises from "the structure and functioning of our political system as a whole," ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 18 (1948), or in other words, it "springs from the necessities of the program of self-government." *Id.* at 26.

97. 558 U.S. at 339.

98. *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech In Twentieth-Century America*, 95 MICH. L. REV. 299, 300–01 (1996) (emphasizing the development of free speech as a constitutional lodestar); *c.f.* RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY 58–69 (2018) (addressing neoliberal arguments against regulating hate speech by highlighting how racist speech is not *political* speech).

corrupted democracy.[99] Bolstering the congressional findings, extensive social science research shows that excessive spending—corporate or otherwise—can corrupt or distort democracy.[100] Nevertheless, the *Citizens United* Court, emphasizing the self-governance rationale, reasoned that the First Amendment must be enforced as a formal and rigid rule, regardless of context or effects.[101] The Court denounced the statutory limits on corporate campaign expenditures as "censorship . . . vast in its reach," rendering irrelevant the empirical evidence of political corruption.[102] From the Court's perspective, Congress was destroying "liberty" rather than protecting the integrity of democratic government.[103]

The political consequences of the *Citizens United* decision were predictable and clear. The amount of money flowing into political campaigns exploded.[104] In this era of exorbitant income and wealth inequality, the unfettered ability of corporations and wealthy individuals to influence elections and government threatens to undermine the faith citizens have in democracy.[105] Yet, the Court has continued to apply formalist reasoning in subsequent First Amendment decisions

99. *See* Brief of Amici Curiae Hachette Book Group, Inc. and HarperCollins Publishers L.L.C. in Support of Neither Party on Supplemental Questions, at 13–14, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205) (emphasizing congressional findings); McConnell v. FEC, 540 U.S. 93, 207 (2003) (discussing congressional findings).

100. Larry M. Bartels et al., *Inequality and American Governance*, *in* INEQUALITY AND AMERICAN DEMOCRACY 88, 113–17 (Lawrence R. Jacobs & Theda Skocpol eds., 2005).

101. The Court reasoned that the government needed to satisfy strict scrutiny. 558 U.S. at 340. The Court also invoked the marketplace of ideas (or search-for-truth) rationale: The Court reasoned that restrictions on corporate campaign expenditures interfere "with the 'open marketplace' of ideas protected by the First Amendment." *Id*. at 354 (quoting N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008)).

102. *Id.* at 354–55. The Court narrowed the definition of corruption so dramatically that anything short of a bribe or the appearance of a bribe would be permissible. *See id.* at 356–60.

103. *Id.* at 354 (quoting The Federalist No. 10, at 130 (James Madison) (Benjamin F. Wright ed., 1961)).

104. *See* FELDMAN, FAILING CONSTITUTION, *supra* note 8, at 180–81 (describing the effects of *Citizens United*).

105. *See id.* at 204–15 (explaining the consequences of income and wealth inequality for democratic government). *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014).

invalidating campaign finance restrictions. For instance, *American Tradition Partnership, Inc. v. Bullock* held unconstitutional a Montana statute providing that a "corporation may not make . . . an expenditure in connection with a candidate or a political committee that supports or opposes a candidate or a political party."[106] The Montana Supreme Court had upheld this statute in the face of a First Amendment challenge because of a specific history of corporate-engineered corruption in the Montana democratic process.[107] Once again, with another five-to-four vote, the U.S. Supreme Court's conservative bloc found a free speech violation. Reasoning that "[t]here can be no serious doubt" that *Citizens United* controlled, the Court prevented the state from even attempting to demonstrate that its particular factual situation needed regulation.[108] *Citizens United*, it seemed, had created an iron-clad rule prohibiting campaign finance restrictions, regardless of context or effects.[109]

In another case, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, Arizona created a campaign-finance "matching funds scheme": a candidate for state office who accepted public financing would receive additional funds if a privately financed opponent spent more than the publicly financed candidate's initial allocation.[110] As Justice Elena Kagan

106. 567 U.S. 516, 516 (2012) (quoting MONT. CODE ANN. §13-35-227(1) (2011)).

107. *See id.* at 516; *see also id.* at 517 (Breyer, J., dissenting) (discussing Western Tradition Partnership v. Att'y Gen., 271 P.3d 1 (Mont. 2011)).

108. *Id*. at 516–517 (majority opinion).

109. *Citizens United*, in theory, applied equally to corporations and unions. But *Knox v. Serv. Emps. Int'l Union* considered whether a public employee union imposing a special assessment fee to support political advocacy had satisfied free-speech requirements when it failed to allow non-members to opt out of the fee. 567 U.S. 298, 303–05 (2012). The conservative bloc held that even if the union had provided an opt-out for the non-members, it would have been insufficient to satisfy the First Amendment. *Id.* at 313–15 After this case, then, union efforts to raise money for political campaigns would face obstacles beyond those faced by corporations. To compound problems facing unions, *Janus v. AFSCME, Council 31* held that workers cannot be forced to pay union fees related solely to collective bargaining representation even though the workers benefit from the representation. 138 S. Ct. 2448, 2459–60 (2018).

110. 564 U.S. 721, 727–29 (2011).

emphasized in dissent, this public financing system would roughly equalize the amounts available for publicly and privately financed candidates.[111] It did not limit or restrict political expression. If anything, she wrote, it "subsidizes and so produces *more* political speech."[112] Nevertheless, in another five-to-four decision, the conservative bloc in effect applied its formal First Amendment rule prohibiting campaign finance restrictions.[113] Asserting that the public financing scheme imposed a "penalty" on privately financed candidates,[114] the Court reasoned: "even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups."[115] And in another case Justice Thomas explicitly defended the formal rule by linking it to the self-governance rationale.[116] He maintained that all campaign spending, whether contributions or expenditures, constitutes "[p]olitical speech [that] is 'the primary object of First Amendment protection' and 'the lifeblood of a self-governing people.'"[117]

Thus, in these campaign-finance First Amendment cases, the conservative bloc of justices professes to articulate and follow a formal rule derived from the Free Speech Clause. In

111. *See id.* at 762, 783–85 (Kagan, J., dissenting).

112. *Id.* at 763.

113. *Id.* at 737 (majority opinion).

114. *Id.*

115. *Id.* at 741.

116. McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 228–32 (2014) (Thomas, J., concurring).

117. *Id.* at 228 (Thomas, J., concurring) (quoting Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465–66 (2001) (Thomas, J., dissenting)). Thomas has also written a majority opinion that appeared to narrow the concept of content neutrality while holding that all content-based restrictions must be subject to strict scrutiny. Reed v. Gilbert, 135 S. Ct. 2218, 2232 (2015); *see also* Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), https://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html (discussing potential reach of the Court's decision). The various concurrences in that case called into question, however, whether the Court would truly follow such a rigid rule.

accordance with formalism, the justices do not acknowledge any consideration of political ideology or societal consequences. Yet the consistent result in these decisions is to protect and bolster the wealthy as they seek to use their private-sphere resources to influence elections and exert control over government (in the public sphere). To put it in different words, the conservative justices have been interpreting the First Amendment according to conservative (neoliberal) ideology, which celebrates the economic marketplace while denigrating democratic government.[118] The Court's purported concern with self-governance, as expressed in *Citizens United* and its progeny, appears to be no more than a pretext for protecting private-sphere power. In numerous other cases involving democratic participation and decision making, the conservative bloc has repeatedly demonstrated disdain for democracy. The Court has questioned congressional deliberations and findings,[119] invalidated congressional actions,[120] and weakened protections for voting rights.[121]

118. DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS (rev. ed. 2012) (discussing neoliberalism); *see* FELDMAN, FAILING CONSTITUTION, *supra* note 8, at 159–96 (discussing the increasing influence of neoliberalism, including on the Court); Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2166–70 (2018) (linking the Court's free-speech decisions to neoliberalism). On the operation of the economic marketplace, see MILTON FRIEDMAN, Adam Smith's Relevance for 1976, *in* SELECTED PAPERS 50 at 1, 15, 18 (Univ. of Chi. Booth Sch. of Bus., Selected Papers Series 50, 1976) (arguing that an "invisible hand in politics is as potent a force for harm as the invisible hand in economics is for good.").

119. *E.g.*, Shelby County v. Holder, 570 U.S. 529, 550–53 (2013) (questioning congressional findings); City of Boerne v. Flores, 521 U.S. 527, 529–32 (1997) (same).

120. *E.g.*, *Shelby County*, 570 U.S. at 536 (invalidating section of the Voting Rights Act); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588–89 (2012) (invalidating parts of the Affordable Care Act).

121. *E.g.*, *Shelby Cty.*, 570 U.S. at 536 (invalidating section of the Voting Rights Act). The Court also invalidates state legislative actions. *E.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 679–80 (2011) (invalidating state law restricting the sale of medical data).

II. INSIDERS AND OUTSIDERS AND FREE SPEECH

Formalism does not always lead the Roberts Court to judicially protect free expression. The Court sometimes invokes a formal rule that defeats a free speech claim.[122] For example, in *Pleasant Grove City v. Summum*, First Amendment public forum doctrine appeared to mandate that a city display in its public park a religious monument donated by Summum, a minority religious group.[123] In prior cases, the Court had relied on public forum doctrine to force governments to accommodate overt Christian organizations and messages.[124] The *Summum* Court nonetheless invoked a formal rule that completely absolved the government from First-Amendment strictures: "[T]he placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause."[125] In other words, under the Court's government speech doctrine, the display of the Summum monument "is not a form of expression to which [public] forum analysis applies."[126]

122. The formal rule defeating the free-speech claim might be derived from the First Amendment itself but might instead be derived from some other source. *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019) (invoking the state action doctrine to defeat free-speech claim).

123. 555 U.S. 460, 481 (2009).

124. *E.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (finding a school violated a club's free speech rights when it denied the club access to a public forum because the club was religious); Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (finding a university violated students' free speech rights when it refused to compensate a religious publication); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (finding a school district's rule of prohibiting religious organization meetings in schools violated the First Amendment). The Court has deemed property such as the streets and parks, open for public speaking from time immemorial, to be a public forum. *Lamb's Chapel*, 508 U.S. at 391. In the public forum, the First Amendment prohibits the government from restricting speech based on its content unless the government satisfies strict scrutiny. *Id.* at 394–95. On other governmental property, however, the government may impose any reasonable restrictions on expression. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

125. *Summum*, 555 U.S. at 464.

126. *Id*. at 464, 467 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

The *Summum* dissent complained that the Court's government speech rule, fully and automatically excusing the city of First-Amendment responsibilities, was only "recently minted."[127] Given this, the *Summum* result, not requiring government accommodation of a minority religion, seems politically problematic, especially when compared with the Court's prior First-Amendment decisions requiring accommodations of mainstream Christianity. And in fact, the history of free expression suggests that while the wealthy and mainstream usually win free-speech disputes, marginalized outsiders usually lose—regardless of whether the Court is supposedly applying formalist doctrine or not, and regardless of whether the dispute arose during the republican democratic or pluralist democratic era.[128]

For example, the 1960s was one of the Court's most speech-protective eras.[129] Even so, the Court refused to recognize a right to protest during that decade, though such political expression resonated with the self-governance rationale. In *Adderley v. Florida*, decided in 1966, 200 college students marched from their school to a jail to protest the arrest of other students for protesting racial segregation.[130] The Court upheld the convictions of the protesters for trespassing on jail premises,[131] with a majority opinion written by Justice Hugo

127. *Id*. at 481 (Stevens, J., concurring).

128. JOHN PALFREY, SAFE SPACES, BRAVE SPACES: DIVERSITY AND FREE EXPRESSION IN EDUCATION 14 (2017) ("[T]he right to free expression has been a tool of empowered people, not those who have been marginalized."); Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 L. & SOC. INQUIRY 309, 310–11 (2002) ("[T]he outliers in American politics were more often than not the victims than the beneficiaries" of the Court's decisions.). For criticisms of the Court's hate speech decisions, see Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989); Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431.

129. FELDMAN, FAILING CONSTITUTION, *supra* note 8, at 138–40; SCHWARTZ, *supra* note 36, at 282–83.

130. Adderley v. Florida, 385 U.S. 39, 44–45 (1966).

131. *Id.* at 47–48.

Black, renowned as a free-speech absolutist.[132] In prior opinions, Black had emphasized that, to him, the First Amendment mandated a formal rule prohibiting all government restrictions of expression; the government should never be allowed to justify restrictions by showing that its interests outweighed free-speech interests.[133] Free speech, from this perspective, was inviolable and could not be overcome through some balancing test.[134] Nevertheless, in *Adderley* Black reasoned that the state could apply its general trespass law to punish the protesters' *conduct*—despite their political message.[135] Justice William Douglas dissented, emphasizing that in protest cases the government usually claims to apply some general criminal law proscribing trespass, breach of the peace, or the like.[136] And the government usually claims that the message is irrelevant to the prosecution.[137] In fact, given the political nature of the defendants' expression in *Adderley*, the jailhouse appeared to be the perfect location for the protest.[138]

In another case from the 1960s, the Court upheld the punishment of Vietnam War protesters.[139] After opponents of the war and the draft began burning their draft cards in symbolic protest, Congress amended the Selective Service Act to prohibit the knowing destruction or mutilation of draft cards.[140] In the House of Representatives, congressmen denounced the protesters while unequivocally proclaiming the legislative goal to be "a straightforward clear answer to those

132. SCHWARTZ, *supra* note 36, at 283; Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 275 (2009).

133. *E.g.*, Konigsberg v. State Bar of California, 366 U.S. 36, 60–71 (1961) (Black, J., dissenting).

134. *Id.* at 61–75.

135. *Adderley*, 385 U.S. at 46–48.

136. *Id*. at 56 (Douglas, J., dissenting).

137. *Id.*

138. *Id*. at 49–50, 54.

139. *See* United States v. O'Brien, 391 U.S. 367, 369–70 (1968).

140. Universal Military Training and Service Act, 50 U.S.C. § 3811(b)(3) (2019).

who would make a mockery of our efforts in South Vietnam."[141] In *United States v. O'Brien*, decided in 1968, the Court affirmed the convictions of O'Brien and three companions for violating the amended Act.[142] O'Brien claimed the prosecution violated the First Amendment because he had burned his draft card to protest the war and "to influence others to adopt his antiwar beliefs."[143] In a seven-to-one decision, Chief Justice Earl Warren wrote the majority opinion, joined by the free-speech absolutist Justice Black.[144] With a rhetorical move resonating with Black's *Adderley* opinion, Warren rejected the free-speech claim by insisting that O'Brien's conviction was "limited to the noncommunicative aspect of O'Brien's conduct."[145] In other words, the government had punished O'Brien because he had burned his draft card, not because he had expressed his political views.[146]

To be sure, the Court does not always reject the free-speech claims of outsiders, but the Court is most likely to accept such claims when the outsiders' interests overlap with those of the mainstream or wealthy. For instance, *Martin v. City of Struthers*, decided in 1943, invalidated an ordinance proscribing door-to-door distributions of written materials as applied to a Jehovah's Witness.[147] In concluding that the ordinance violated the First Amendment, Black's majority opinion stressed that the Witnesses' method of disseminating information, going door-to-door, resonated with mainstream practices.

> The widespread use of this method of communication by many groups espousing

141. 111 CONG. REC., H19,871 (daily ed. Aug. 10, 1965) (statement of Sen. Rivers).

142. 391 U.S. 367, 386 (1968).

143. *Id.* at 370.

144. *See id.* at 367.

145. *Id.* at 381–82.

146. The Court also refused to inquire into congressional motives or purposes. *Id.* at 382–83.

147. 319 U.S. 141, 149 (1943).

> various causes attests its major importance. . . . Many of our most widely established religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house. Of, [sic] course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support . . . .[148]

Moreover, the Court viewed this case, arising in the midst of World War II, as an opportunity to underscore the difference between Nazi fascism, and American democracy—declaring that "[f]reedom to distribute information . . . is so clearly vital to the preservation of a free society that . . . it must be fully preserved."[149] From the Court's perspective, that is, the protection of outsider interests in this case corresponded with the wider national interests of wartime. Justice Murphy's concurrence, joined by Justices Douglas and Rutledge, further emphasized this point: "Repression has no place in this country. It is our proud achievement to have demonstrated that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion through the fullest possible measure of freedom of conscience and thought."[150]

In another World War II era Jehovah's Witness case, *Murdock v. Pennsylvania*, the Court invalidated an ordinance requiring individuals to pay a license fee before they could

148. *Id.* at 145–46.

149. *Id.* at 146–47.

150. *Id.* at 150 (Murphy, J., concurring); *accord* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) (contrasting the United States with its "present totalitarian enemies").

distribute literature and solicit contributions.[151] Justice Douglas's majority opinion suggested that the expressive activities of outsider or peripheral groups, such as the Witnesses, were more likely to be constitutionally protected when they harmonized with predominant interests, values, and practices.[152] Specifically, as Douglas explained, "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of [Christian] evangelism."[153]

Outsiders are not only likely to lose free-speech cases unless they show their interests overlapping with the mainstream: they also frequently find themselves the targets of expression that the Court deems constitutionally protected. In many cases celebrated for ringing judicial proclamations about the importance of free expression, the expression that the Court deemed to be constitutionally protected attacked racial or religious minorities. To be sure, in these cases the constitutionally protected speaker often is also a member of an oppressed or widely disliked minority—a fact that not only feeds the narrative of the Court protecting outsiders but also obscures the crucial targets of the protected expression.[154] For

151. 319 U.S. 105, 117 (1943).

152. *Id.* at 108–10.

153. *Id.* at 110; *accord* Derrick A. Bell, Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (explaining the interest-convergence thesis); Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. COLLOQUY 248 (2012) (same). For a discussion of the claims of religious minorities vis-à-vis the religious mainstream, see Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222 (2003).

154. The case from the 1970s involving a planned neo-Nazi march through Skokie, Illinois, which had a large Jewish population, Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), is a classic and oft-cited example of this phenomenon. *See, e.g.*, Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. STATE L.J. 1249, 1252 (1995). The case is often discussed as a test case for the protection of expression that we hate. *E.g.*, Edward L. Rubin, *Nazis, Skokie, and the First Amendment as Virtue*, 74 CALIF. L. REV. 233 (1986) (arguing that the First Amendment should protect the neo-Nazi speech); White, *supra* note 98, at 364 (discussing *Collin*). The case is unusual, however, because discussions typically accentuate that the neo-Nazis chose Skokie for their march precisely because of the Jewish population. *See, e.g.*, LEE C. BOLLINGER, THE TOLERANT SOCIETY 13 (1986);

example, in another Jehovah's Witness case, *Cantwell v. Connecticut*, decided in 1940, the Court held that a conviction for breach of the peace violated free expression even though the defendant had "incensed" passing pedestrians.[155] The pedestrians were Roman Catholics, and Cantwell's speech specifically attacked the Catholic Church.[156] In 1949, in *Terminiello v. Chicago*, the Court concluded that the conviction of a Catholic priest for disorderly conduct violated the First Amendment.[157] The defendant's speech, however, amounted to an antisemitic diatribe claiming that Jewish doctors had performed atrocities on Germans.[158] The defendant asked the audience, "Do you wonder they were persecuted in other countries . . .?"[159] He then declared that "we want them to go back where they came from."[160] Audience members were moved to exclaim, "'Kill the Jews,' 'Dirty kikes,'" and "'the Jews are all killers, murderers. If we don't kill them first, they will kill us.'"[161]

One final example will suffice. In the 1969 landmark decision, *Brandenburg v. Ohio*, the Court articulated its most speech-protective standard ever for determining when subversive advocacy or, more generally, speech inciting unlawful conduct, would be outside of First-Amendment protections and therefore punishable.[162] Under the *Brandenburg*

Mark A. Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto*, 28 DEPAUL L. REV 259, 261 (1979).

155. 310 U.S. 296, 303 (1940).

156. *Id.* at 302–03, 309. At that time in Supreme Court history, there was a single Supreme Court seat informally designated as the Catholic seat. DAVID M. O'BRIEN, STORM CENTER 49–50 (5th ed. 2000); *see* SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 853–54, 1006-07 (1972) (describing anti-Catholicism in America).

157. 337 U.S. 1, 6 (1949).

158. *See id.* at 20–22 (Jackson, J., dissenting).

159. *Id.* at 20.

160. *Id.* at 21.

161. *Id.* at 22; *see* Near v. Minnesota, 283 U.S. 697, 703–04 (1931) (protecting the publication of antisemitic articles).

162. 395 U.S. 444, 447–48 (1969); *see* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 522–23 (2004) (discussing how the *Brandenburg* Court revisited prior decisions on

test, such expression is constitutionally protected unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[163] The Court concluded, pursuant to this doctrine, that the conviction of the defendant for criminal syndicalism violated the First Amendment.[164] But the defendant was a Ku Klux Klan (KKK) leader who had spewed racist hate speech condemning African Americans and Jews.[165] He threatened that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[166]

III. THE ROBERTS COURT, FREE SPEECH, AND FORMALISM

Free-speech formalism matters in First Amendment cases. Formal rules facilitate conservative decisions that favor those who already wield power in the private sphere. The formalist free speech opinion in *Citizens United* favors the wealthy over the poor.[167] The formalist equal protection opinions invalidating race-based affirmative action programs favor whites over people of color. In short, the government in a formalist legal regime must efface, deny, or ignore all of the structures of power embedded in the private sphere, including racism, sexism, antisemitism, and homophobia.[168]

"subversive advocacy"); THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 66–69 (3d ed. 1997) (describing *Brandenburg* as a landmark case).

163. 395 U.S. at 447.

164. *Id.* at 448–49.

165. *See id.* at 445–47.

166. *Id.* at 446.

167. Citizens United v. FEC, 558 U.S. 310 (2010).

168. *See* Lakier, *Antisubordinating*, *supra* note 4, at 2138–39 (arguing that the Court's formalism causes an emphasis on private power). I agree with much of Lakier's arguments about free-speech formalism, but from my perspective, she attributes too much causal power to legal doctrine and theory without accounting for the dynamic interaction between law and politics. *See* Stephen M. Feldman, *Missing the Point of the Past (and the Present) of Free Expression*, 89 TEMPLE L. REV. ONLINE 55–56 (2017) (praising and criticizing Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015)).

Although formalism matters in free speech cases, more is at play in such cases than whether the Court articulates and applies a formalist rule. As the prior section shows, free speech cases are similar to other constitutional cases: the "haves" usually come out ahead while societal outsiders typically lose.[169] As political scientists have shown in empirical studies, the Court rarely protects outsiders from majoritarian overreaching.[170] In the words of Robert Dahl, "it would appear to be somewhat naive to assume that the Supreme Court either would or could play the role of Galahad."[171] Instead, the Court typically acts as an integral "part of the dominant national alliance."[172] That is, in most cases, the Court decides in harmony with the interests and values of that dominant political alliance or regime.[173]

The Roberts Court's free expression cases generally fit this regimist description of Supreme Court decision-making. In case after case, the party already wielding greater power, usually in both the public and private spheres, ultimately wins. Under the Roberts Court, the losers in free-speech cases have included prisoners,[174] public employee unions,[175]

169. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (discussing advantages of wealth and power in litigation); *see* Donald R. Songer et al., *Do the "Haves" Come Out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925–1988*, 33 L. & SOC'Y REV. 811, 813 (1999) (empirical research showing that victory in litigation depends more on access to resources than on formal legal arguments).

170. Songer et al., *supra* note 169, at 813.

171. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284 (1957). *But see* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 42–45 (2007) (discussing criticisms of Dahl's regimist thesis).

172. Dahl, *supra* note 171, at 293.

173. *Id*. ("As an element in the political leadership of the dominant alliance, the Court of course supports the major policies of the alliance."); *see* Terri Peretti, *Constructing the State Action Doctrine 1940-1990*, 35 Law & Soc. Inquiry 273, 275 (2010) (describing the regimist approach). For an application of the regimist approach to *Brown v. Board of Education*, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

174. *E.g.*, Beard v. Banks, 548 U.S. 521, 525–26 (2006) (severely limiting prisoner access to written materials and photographs).

government employees,[176] high school students,[177] and those seeking an equal voice in democratic government.[178] Sometimes the Court's majority opinion might be categorized as formalist, sometimes not. Sometimes the Court might invoke a formal rule to protect the powerful (think of *Citizens United*), but sometimes the Court invokes a formal rule to deny protection to the disempowered (think of *Summum*).[179]

Either way, the Court's articulation and application of the formal rule ostensibly legitimizes its decision as legal rather than political. As members of the legal profession, the justices aim to justify their own power by describing Court decisions as purely legal and therefore as politically neutral, as bereft of political ideology or concern—even if the haves continue winning and outsiders continue losing. The irony is that the

175. *E.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460–61 (2018) (holding that workers cannot be forced to pay union fees related solely to collective bargaining representation even though the workers benefit from the representation); Knox v. SEIU, Local 1000, 567 U.S. 298, 320–321 (2012) (holding that a public employee union could not impose a special assessment fee to support political advocacy even if union members could opt out).

176. *E.g.*, Borough of Duryea v. Guarnieri, 564 U.S. 379, 382–83 (2011) (limiting government employee's First-Amendment right to petition the government); Garcetti v. Ceballos, 547 U.S. 410, 426 (2006) (limiting free-speech rights of government employees by distinguishing between speech as a citizen and speech as an employee).

177. *E.g.*, Morse v. Frederick, 551 U.S. 393, 396–97 (2007) (upholding punishment of high school student for displaying banner stating "BONG HiTS 4 JESUS").

178. *E.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (holding the constitutionality of extreme political gerrymandering to be a nonjusticiable political question); Citizens United v. FEC, 558 U.S. 310, 396–97 (2010) (invalidating restrictions on corporate campaign spending).

179. In *Manhattan Cmty. Access Corp. v. Halleck*, Halleck and Melendez, producers of public access programming, claimed that Manhattan Community Access Corporation ("MNN") violated their free-speech rights by denying them use of public access TV facilities based on the content of their expression. 139 S. Ct. 1921, 1927 (2019). New York City had contracted with MNN to run the City's public access TV channels, and after MNN ran a Halleck and Melendez film protesting public access TV's alleged neglect of East Harlem, it suspended the producers from further access because of viewer complaints. *Id.* at 1927. The Court's conservative bloc rejected the First Amendment claim based on an ostensible formal rule—the state action doctrine. *Id.* at 1928–33. Emphasizing "a robust sphere of individual liberty," the Court held that MNN was not subject to constitutional limitations because it was a private rather than a government actor. *Id*. at 1928, 1933. In dissent, Justice Sotomayor persuasively argued that MNN functioned as a state actor in this case. *Id*. at 1934–45 (Sotomayor, J., dissenting).

justices enhance their political power by denying their political power. One can readily see this irony operating in constitutional jurisprudence. Originalists have gained the political upper-hand by insisting that originalism is the only apolitical method of constitutional interpretation.[180] Thus, one of the most conservative justices since World War II, Antonin Scalia, consistently decided cases according to his political ideology, while insisting that his commitment to originalism rendered his judicial decisions apolitical—even though his judicial opinions often disregarded originalist sources.[181]

This irony was on full display in the Court's recently decided gerrymandering case, *Rucho v. Common Cause*, another five-to-four decision.[182] With Chief Justice Roberts writing for the conservative bloc, the Court refused to invalidate congressional district lines in two states, North Carolina and Maryland, despite extreme partisan gerrymandering.[183] The challengers had raised numerous constitutional issues, including First-Amendment free-expression claims.[184] In fact, the district courts held for the challengers in both the North Carolina and Maryland cases based partly on the First-Amendment claims.[185] The gist of these claims was that the

180. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006) (arguing that originalism is a conservative political practice); Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUDIES IN AM. POL. DEV. 61, 75–79 (2009) (arguing that, in the 1980s, Edwin Meese's Department of Justice purposefully sought to advocate for originalism as a means of advancing a political agenda).

181. Stephen M. Feldman, *Justice Scalia and the Originalist Fallacy*, *in* THE CONSERVATIVE REVOLUTION OF ANTONIN SCALIA 189 (Howard Schweber & David A. Schultz eds., 2018); Jamal Greene, *The Age of Scalia*, 130 HARV. L. REV. 144, 155–57, 183–84 (2016); Benjamin Morris, *How Scalia Became the Most Influential Conservative Jurist Since the New Deal*, FIVETHIRTYEIGHT (Feb. 14, 2016, 3:09 PM) https://fivethirtyeight.com/features/how-scalia-became-the-most-influential-conservative-jurist-since-the-new-deal/.

182. *See* 139 S. Ct. 2484 (2019) (resolving two consolidated lower court cases).

183. The Court acknowledged "[t]he districting plans at issue here are highly partisan, by any measure." *Id*. at 2491.

184. *Id*. ("The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution.").

185. *Id*. at 2492–93.

state legislature, in the control of one political party, in effect penalized voters who had expressed support for the other party.[186]

The Court resolved *Rucho* by ostensibly applying a formal rule: the political question doctrine. The premise of the political question doctrine is the law-politics dichotomy: the Court can supposedly apply formal legal rules neutrally without regard to politics, context, or consequences. Pursuant to the political question doctrine, as the Court explained, a constitutional issue is nonjusticiable unless the Constitution provides "limited and precise standards that are clear, manageable, and politically neutral."[187] In this case (and any other partisan gerrymandering cases), the Court concluded that it could not find any such rule or standard to determine the constitutionality of partisan gerrymanders.[188] And specifically with regard to the free expression claims, the Court reasoned that the First Amendment provided "no 'clear' and 'manageable' way of distinguishing permissible from impermissible partisan motivation [in gerrymandering]."[189] From this vantage, if the Court had attempted to resolve these gerrymandering disputes in accordance with the First Amendment or other constitutional provisions, the Court "'would risk assuming political, not legal, responsibility.'"[190]

Consequently, the Court concluded that the rule of the political question doctrine defeated the First Amendment (and other constitutional) challenges to gerrymandering regardless of the consequences. For instance, the Court did not deny that extreme gerrymandering contravenes constitutional principles.[191] In dissent, Justice Kagan declared: "For the first

186. *See id*. at 2504.

187. *Id*. at 2500.

188. *Id*. at 2506–07.

189. *Id*. at 2505.

190. *Id*. at 2498 (*quoting* Vieth v. Jubelirer, 541 U.S. 267, 307 (Kennedy, J., concurring)).

191. The Court asserts, however, that "there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue." *Id*. at 2504. But the

time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities."[192] Most important, the Court disregarded the potential danger partisan gerrymandering poses to democratic government by exacerbating political polarization,[193] undermining "free and fair elections,"[194] and allowing government officials to entrench their own power by choosing their voters rather than vice versa.[195] In the words of Kagan, "the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people."[196]

The irony of *Rucho* is embedded in the Court's invocation of the political question doctrine as a categorical or formal bar to the First Amendment and other constitutional challenges. The purported reason for relying on the political question doctrine was that neither the First Amendment nor the other relevant constitutional provisions provided sufficiently clear and precise legal rules or standards for judicial decision. Yet the political question doctrine is itself notoriously malleable: it does not provide a clear and precise rule or standard for its

Court never analyzed the First Amendment claims because it reasoned that the rule of the political question doctrine precluded judicial consideration of the claims. *Id*. at 2505.

192. *Id*. at 2509 (Kagan, J., dissenting).

193. *See id*.

194. *Id*. at 2525.

195. *See id*. at 2512.

196. *Id*. at 2509. Partisan gerrymandering is often difficult to distinguish from racial gerrymandering; nevertheless, the Roberts Court has previously allowed other discriminatory gerrymandering schemes to stand. Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018) (lower court held that gerrymandered districting scheme violated equal protection and First Amendment, but Supreme Court reversed for lack of standing); Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833, 1841 (2018) (upholding, in a statutory decision, aggressive state program for purging individuals from voter rolls); *cf.* North Carolina v. Covington, 138 S. Ct. 2548, 2552 (2018) (summarily affirming in part and reversing in part District Court order for redrawing legislative districts because of racial gerrymandering); Benisek v. Lamone, 138 S. Ct. 1942, 1945 (2018) (affirming lower court order denying a preliminary injunction in a political gerrymandering case). In *Husted*, Justice Sotomayor wrote in dissent: "It is unsurprising in light of the history of such purge programs that numerous amici report that the [state] Supplemental Process has disproportionately affected minority, low-income, disabled, and veteran voters." 138 S. Ct. at 1864 (Sotomayor, J., dissenting).

own application.[197] If anything, the Court invokes the political question rule when it harmonizes with the political preferences of a majority of the justices. And the result in *Rucho* resonated strongly with the politics of the conservative bloc. While both Republicans and Democrats engage in gerrymandering, Republicans have done so more egregiously and frequently.[198] At this point in time, gerrymandering benefits Republicans far more than Democrats. Even in the *Rucho* case, the two instances of gerrymandering—Republicans in North Carolina and Democrats in Maryland—were hardly equivalent. For example, in North Carolina in 2012, after the implementation of a gerrymandered districting plan, "Republican candidates won 9 of the State's 13 seats in the U.S. House of Representatives, although they received only 49% of the statewide vote."[199] After a district court invalidated that districting plan, the Republican-controlled state legislature asked Dr. Thomas Hofeller, a Republican districting specialist, to help craft a gerrymandering scheme

197. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 137 (5th ed. 2015); *see* Martin H. Redish, *Judicial Review and the 'Political Question'*, 79 NW. U. L. REV. 1031, 1031 (1984).

198. Sam Wang, *Gerrymanders, Part 1: Busting the Both-Sides-Do-It Myth*, PRINCETON ELECTION CONSORTIUM (Dec. 30, 2012), http://election.princeton.edu/2012/12/30/gerrymanders-part-1-busting-the-both-sides-do-it-myth/ (emphasizing asymmetric gerrymandering); Associated Press, *Analysis: Partisan Gerrymandering Has Benefited Republicans More than Democrats*, BUSINESS INSIDER (June 25, 2017) https://www.businessinsider.com/partisan-gerrymandering-has-benefited-republicans-more-than-democrats-2017-6; Zack Beauchamp, *The Supreme Court, Gerrymandering, and the Republican Turn Against Democracy*, VOX (June 27, 2019) https://www.vox.com/policy-and-politics/2019/6/27/18761166/supreme-court-gerrymandering-republicans-democracy ("While Republicans and Democrats both gerrymander, there is no doubt that Republicans do it more and more shamelessly."). Political scientists Thomas E. Mann and Norman J. Ornstein emphasize that, in general, Republicans have been breaking traditional norms of democracy far more often and egregiously than Democrats have done. THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS (2012); *accord* CHEMERINSKY, *supra* note 197, at 143–47 (focusing on gerrymandering); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018) (arguing that constitutional hardball has been asymmetric, with the Republicans pushing more strongly against traditional norms); Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1298–306 (2016) (examining factors that affect the amount of gerrymandering).

199. *Rucho*, 139 S. Ct. at 2509–10 (Kagan, J., dissenting).

equally effective in protecting Republican power.[200] When the Republican co-chair of the state Assembly's redistricting committee presented the newly proposed plan, he "explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did 'not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats.'"[201] Meanwhile, in Democratic-controlled Maryland, the legislature was just as purposeful in its effort to gerrymander, but the result was to flip one congressional district from the Republican to the Democratic side.[202]

The truth is, though, that Supreme Court decision making is always partly political. The failure of the political question doctrine to provide a formal rule that the Court can apply neutrally and apolitically is not unique to the political question doctrine. Despite the claims of formalism, law and politics always intertwine in legal interpretation and Supreme Court adjudication.[203] The political question doctrine, however, provides a patent example of a legal rule or doctrine that interweaves with political ideology when interpreted and applied.[204] Nevertheless, the flimsiness of the political question doctrine as a formal rule did not stop the conservative bloc in

200. *Id*. at 2510. Yes, this is the same Thomas Hofeller who recommended the addition of a citizenship question to the census in order to increase Republican political power. Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019) https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html; *see* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2575 (2019) (holding that the Department of Commerce did not adequately justify the addition of a citizenship question to the census).

201. *Rucho*, 139 S. Ct. at 2491.

202. *Id*. at 2493; *id*. at 2510–11 (Kagan, J., dissenting).

203. *See* Feldman, *Alchemy*, *supra* note 12, at 78–83 (discussing the law-politics dynamic in legal interpretation); Feldman, *Harmonizing*, *supra* note 12, at 99–116 (further discussing the la-politics dynamic in legal interpretation). For further discussions of interpretation, see Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 CONTEMP. POL. THEORY 296, 299–315 (2005); Stephen M. Feldman, *Made For Each Other: The Interdependence of Deconstruction and Philosophical Hermeneutics*, 26 PHIL. & SOC. CRITICISM 51, 53–63 (2000).

204. *See* Redish, *supra* note 197, at 1031–35 (discussing the history and application of the political question doctrine).

Rucho from invoking it to bar categorically all constitutional challenges to partisan gerrymandering.[205]

CONCLUSION

In the 1830s, Alexis de Tocqueville recognized that outsiders in America risked social and legal punishments if they expressed their views.[206] Individuals were free to speak or write only if they remained roughly within the broad mainstream of culture and opinion.[207] Penalties were severe for those who ventured outside those parameters.[208] "In America the majority raises formidable barriers around the liberty of opinion," Tocqueville wrote.[209] "[W]ithin these barriers an author may write what he pleases, but woe to him if he goes beyond them."[210] The same remains true today: despite the Roberts Court's frequent invocations of formal rules in free expression cases, the formal rules only ostensibly apply the same to everyone regardless of context or consequences.

As shown in this Article, formalism is not formal. Formalism promises apolitical judicial decision making, but it does not and cannot deliver on its promises. Law and politics always dynamically interact in Supreme Court adjudication. The conservative bloc of justices readily interprets and applies formal rules to achieve conservative results, further empowering those who already possess extensive resources and power in the private sphere. But even when the Court does not invoke a formal rule, it is still likely to reach the conservative result. Formalism facilitates conservative judicial decisions, but it is not the entire game.

205. *Rucho*, 139 S. Ct. at 2506–07 (majority opinion).

206. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 264 (Phillips Bradley ed., Henry Reeve trans., Francis Bowen rev., Vintage Books 2d ed. 1990) (originally published in French; the first volume in 1835 and the second in 1840).

207. *See id.*

208. *See id.*

209. *Id.*

210. *Id.*

So, what can progressives do? Pack the Court.[211] The typical criticism of court-packing is that it will undermine the Court's status as an apolitical institution that decides cases pursuant to the rule of law. But that institutional status has always been a myth. To be sure, nowadays the myth of formalism—of the law-politics dichotomy—might be more obvious because of the nation's deeply polarized politics. Conservative and progressive politics are seemingly more separated than ever before, with the possible exception of the Civil-War era. Thus, today, many Supreme Court decisions might be easily categorized as falling on either the conservative or progressive side of the political chasm. Regardless, the promise of formalism has always been mythical. Whatever happens in the 2020 elections, the Court is likely to impede or repudiate the future implementation of a progressive agenda in light of the justices' current political alignment. If progressives respond with theoretical or doctrinal arguments—for example, arguing for the Court to adopt more realist or pragmatic rules in First Amendment campaign finance cases—the Court is likely to reject the progressive positions. And even if the Court were to adopt more realist or pragmatic doctrinal standards, the conservative bloc would still likely interpret and apply such standards to reach conservative results.

If one is nonetheless worried about retaining the Court as a legal rather than a political institution, one should remember what is at stake beyond the Court's reputation.[212] As discussed, many First Amendment cases now go to the heart of democratic government, whether it be campaign-financing or

211. *See* Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2231 (2018) (arguing that free speech, partly because of its history, cannot become systematically progressive, even if progressives can occasionally wield it to help achieve their goals).

212. To be clear, I am not advocating that the Court be converted into a purely political institution, like Congress. Rather, even if the Democrats were to add a couple of new justices, the Court should continue to decide cases pursuant to the law-politics dynamic, as it has always done. *See* Feldman, *Alchemy*, *supra* note 12, at 93–95 (discussing the ramifications of acknowledging the law-politics dynamic for Supreme Court decision making).

gerrymandering. If the conservative bloc continues to control the Court for the foreseeable future, the nation will likely continue to diverge further and further from democratic principles.[213] The conservative justices are "weaponizing the First Amendment," in the words of Justice Elena Kagan, thrusting it like a "sword" against democratic action.[214] Packing the Court might be the only viable solution.

213. *See* STEVEN LEVITISKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) (arguing that democracies can die gradually).

214. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).