

CITIZENS UNITED AND CONSERVATIVE JUDICIAL ACTIVISM†

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This Article analyzes the recent trend of conservative judicial activism in the Supreme Court and searches for a principled reason to explain it. The conservative majority has struck down several laws in recent years, culminating in its invalidation of an important provision of the Bipartisan Campaign Reform Act of 2002 in Citizens United v. Federal Election Commission. While judicial restraint and originalism are currently seen as conservative principles, neither principle explains these decisions.

The author argues that no principle can explain the results of these cases—rather, they can only be explained by the Justices' personal views and policy preferences. The author compares the conservative majority's pattern to that of the Warren Court, which largely invalidated laws only when footnote four in United States v. Carolene Products Co. would dictate that the Court should. Thus, neither unrestrained judicial activism nor total judicial restraint is appropriate. Instead, the author argues that a selective judicial activism guided by footnote four is the best approach. The author then concludes that the conservative majority is troubling because it is infusing its personal policy preferences into its opinions while at the same time convincing the public that it is acting in a principled manner.

The Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*¹ provides an interesting entry point for a discussion of conservative theories of constitutional interpretation. In *Citizens United*, the Court, in a five-to-four decision, held unconstitutional a key provision of the Bipartisan Campaign Reform Act of 2002 (BCRA).² The specific provision the Court invalidated limited the amount of mon-

† This Article was originally presented on March 9, 2011, as the second 2010–2011 lecture of the David C. Baum Memorial Lectures on Civil Rights and Civil Liberties at the University of Illinois College of Law.

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1. 130 S. Ct. 876 (2010).

2. Pub. L. No. 107-155, 116 Stat. 81 (2002) (containing the entirety of BCRA).

ey that corporations could spend in certain circumstances to support or oppose the election of named candidates for federal office.³ The decision raised fundamental questions about the nature and legitimacy of conservative judicial activism.

I. *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*

To understand *Citizens United*, it is first necessary to establish the constitutional context of the decision. In 1976, in *Buckley v. Valeo*,⁴ the Supreme Court struck down several provisions of the Federal Election Campaign Act of 1971.⁵ In a key part of the *Buckley* decision, the Court held that the government cannot constitutionally limit the amount individuals can spend to support or oppose the election of political candidates. The Court reasoned that because expenditure limitations “limit political expression ‘at the core of our electoral process and of the First Amendment freedoms,’” they cannot withstand First Amendment scrutiny.⁶

The question later arose whether corporations have the same First Amendment rights as individuals to spend unlimited amounts of money in the electoral process. In 1990, the Supreme Court held in *Austin v. Michigan State Chamber of Commerce*⁷ that corporations do not have the same right in this respect as individuals. In a six-to-three decision, the Court upheld a Michigan statute that limited the amount that corporations could spend to support or oppose the election of candidates for state office.⁸ The Court explained that “the unique legal and economic characteristics of corporations”—such as “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets”—enable corporations “to use ‘resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace.’”⁹ Noting that the Act was designed to deal with “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas,” the Court concluded that “the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.”¹⁰

3. 2 U.S.C. § 441b (2006). The Act also limited labor unions, but for the sake of simplicity I will refer only to corporations.

4. 424 U.S. 1 (1976) (per curiam).

5. *Id.* at 58 (invalidating 18 U.S.C. §§ 608(a), (c), (e)(1)).

6. *Id.* at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

7. 494 U.S. 652 (1990).

8. *Id.* at 659–60.

9. *Id.* at 658–59 (quoting *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

10. *Id.* at 660.

The Court adhered to this view for the next twenty years. In 2003, for example, in *McConnell v. Federal Election Commission*,¹¹ the Court upheld the same provision of the BCRA that it later invalidated in *Citizens United*. In *McConnell*, in a five-to-four decision, the Court followed *Austin* and held that the provision of the 2002 legislation that limited the amount that corporations could spend in the political process did not violate the First Amendment.¹² The Court reaffirmed that government's "power to prohibit corporations . . . from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates . . . has been firmly embedded in our law."¹³

In the seven years between *McConnell* and *Citizens United*, it became clear that the positions of the Justices on this question were fixed in stone. Beginning with *Austin*, Justices Scalia, Kennedy, and Thomas voted consistently, in dissent, to protect what they saw as the First Amendment rights of corporations, without regard to precedent, and after joining the Court in 2005 and 2006, respectively, Chief Justice Roberts and Justice Alito quickly made clear that they too were in that camp.¹⁴ As Lillian BeVier astutely observed at the time:

[D]ebate on these issues has reached an impasse. . . . [T]he chasm that separates the Justices from one another appears unbridgeable. . . . There would seem to be little if anything that could be said and little if any evidence that could be marshaled, by either side, which would stand much of a chance of persuading those on the other to reconsider their positions.¹⁵

Sure enough, in *Citizens United*, the Court, in a five-to-four decision, overruled *Austin* and *McConnell* and held that corporations, like individuals, have a First Amendment right to spend unlimited funds in order to elect or defeat particular political candidates.¹⁶ Predictably, the five Justices in the majority were Roberts, Scalia, Kennedy, Thomas, and Alito.¹⁷ The only "relevant" change in the seven years since *McConnell* was that Justice O'Connor (who had voted with the majority in *McConnell*) had been replaced by Justice Alito. In short, the substitution of Justice Alito for Justice O'Connor switched the majority on the issue.¹⁸

11. 540 U.S. 93 (2003).

12. *Id.* at 204.

13. *Id.* at 203.

14. *See, e.g.*, Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449 (2007).

15. Lillian R. BeVier, *Full of Surprises—and More to Come: Randall v. Sorrell, the First Amendment, and Campaign Finance Regulation*, 2006 SUP. CT. REV. 173, 195–96.

16. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 886 (2010).

17. *Id.*

18. Justice Roberts replaced Chief Justice Rehnquist, but because Justice Rehnquist had dissented in *McConnell*, this did not affect the vote in *Citizens United*. *See id.* (Roberts, C.J., Scalia, Kennedy, Thomas, Alito, JJ., majority opinion); *McConnell*, 540 U.S. at 114, 350 (Rehnquist, C.J., Scalia, Kennedy, Thomas, JJ., dissenting).

Justice Kennedy, who wrote the opinion of the Court in *Citizens United*, reiterated the arguments of the dissenters in the earlier cases, declaring, for example, that “[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech,”¹⁹ that even though corporations are granted special powers and prerogatives to enable them to function efficiently as economic entities, “[i]t is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights,”²⁰ that corporations should not “be treated differently under the First Amendment simply because [they] are not ‘natural persons,’”²¹ and that when the government seeks “to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought.”²² Such “thought control,” Justice Kennedy concluded, is “unlawful,” because the “First Amendment confirms the freedom to think for ourselves.”²³

II. CRITICISM OF *CITIZENS UNITED*

Citizens United has been criticized on a variety of grounds. For purposes of this Article, the most interesting criticisms suggest, not that the majority was necessarily wrong on the merits of the First Amendment issue (although the decision surely has been criticized on those grounds),²⁴ but that the conservative Justices who made up the majority behaved disingenuously in their handling of the case. At least three reasons exist for this accusation.

First, there is the issue of precedent. In theory, at least, “conservative” Justices claim to be respectful of *stare decisis*. Indeed, that is part of what it has traditionally meant to be conservative. Yet, in this instance, there were two definitive decisions of the Supreme Court in the twenty years leading up to *Citizens United*—*Austin* and *McConnell*—in which the Court had held unequivocally that government can constitutionally limit corporate political expenditures, and in which the Court had emphatically and unequivocally rejected the arguments of the dissenting Justices in those cases, arguments that, essentially unchanged, carried the day in *Citizens United*. Although the majority made a half-

19. *Citizens United*, 130 S. Ct. at 904.

20. *Id.* at 905 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)).

21. *Id.* at 900.

22. *Id.* at 908.

23. *Id.*

24. See, e.g., *id.* at 948–52 (Stevens, J., concurring in part and dissenting in part); Robert L. Kerr, *What Justice Powell and Adam Smith Could Have Told the Citizens United Majority About Other People's Money*, 9 FIRST AMEND. L. REV. 211 (2010); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365 (2010); Monica Youn, *First Amendment Fault Lines and the Citizens United Decision*, 5 HARV. L. & POL'Y REV. 135, 137–38 (2011) (arguing that the Supreme Court's approach in *Citizens United* is “profoundly at odds” with the approach underlying much campaign finance doctrine).

hearted effort to legitimize its decision to overrule those recent precedents,²⁵ the plain and simple fact is that nothing had really changed in the intervening years—except the makeup of the Court itself. Conservatives, who have long touted themselves as respectful of precedent, stability, and tradition, were therefore fair game for those critics who gleefully lambasted them for their seeming hypocrisy in overruling a line of important recent decisions, the results of which they simply did not like.²⁶

Second, there is the issue of judicial overreaching. Both Citizens United and the Solicitor General offered the Court several ways to resolve the case in favor of Citizens United without requiring the Court even to consider the continuing vitality of *Austin* and *McConnell*. These included, for example, a quite plausible statutory interpretation argument that the specific speech at issue in *Citizens United* did not even violate BCRA²⁷ and an equally credible argument that the challenged provision was unconstitutional *as applied* to Citizens United because Citizens United is a *nonprofit* corporation and thus in a very different position constitutionally in terms of need for the limitation on corporate spending than *for-profit* corporations such as Exxon Mobile, General Electric, and Pfizer.²⁸ Had the majority resolved the case in any of these alternative ways, it would not have addressed the broader and much more controversial constitutional question it did.

Traditionally, conservatives have insisted that courts should resolve constitutional controversies on narrow rather than broad grounds and should avoid holding laws unconstitutional unless there is no other way to dispose of the case. In *Citizens United*, however, the conservative Justices eschewed the narrow grounds of decision that were available to them, even those suggested by Citizens United itself, and actually ordered the parties to file briefs on the much broader and more controversial question of whether *Austin* and *McConnell* should be overruled.²⁹ Because this sort of aggressive overreaching has traditionally been disdained by conservatives, the Court's performance in *Citizens United* was fair and easy game for those who condemned the majority's evident eagerness to reach out unnecessarily to pronounce the limit on corporate spending unconstitutional.

25. See *Citizens United*, 130 S. Ct. at 911–13; *id.* at 919–24 (Roberts, C.J., concurring).

26. My own view is that stare decisis is *important* to the rule of law, but that Justices should be free to overrule prior decisions if there are persuasive jurisprudential reasons for overruling. See Geoffrey R. Stone, *Precedent, The Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 71–73 (1988); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1534 (2008). In *Citizens United*, though, there were no such reasons.

27. See Brief for Appellants at 34–41, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (No. 08-205) (*Hilary: The Movie* is not the functional equivalent of express advocacy.).

28. See *id.* at 31 (arguing that, unlike for-profit corporations, nonprofit advocacy groups do not pose a danger of corruption).

29. *Citizens United v. Fed. Election Comm'n*, 129 S. Ct. 2893, 2893 (2009) (mem.).

Third, there is the question of judicial activism versus judicial restraint. This is, for me, the most intriguing facet of the decision in *Citizens United*. How should courts decide how much deference or how much scrutiny is appropriate in considering the constitutionality of government action? That is the central question of U.S. constitutional law, at least insofar as courts are concerned. In the last half-century, conservatives have derided judicial activism as illegitimate and called for a more restrained exercise of the power of judicial review. In *Citizens United*, however, the conservative majority embraced an aggressively activist approach, disregarding an effort by our nation's elected officials to bring order to what they regarded as a dangerously out-of-control electoral process.³⁰ The stakes were clearly high, and members of Congress and the President (Bush II, by the way) obviously have a high degree of expertise in such matters. Why, then, did the conservative Justices not exercise restraint and defer to the judgment of our elected leaders? This is the question to which I now turn.

III. JUDICIAL ACTIVISM VERSUS JUDICIAL RESTRAINT

It is often assumed that liberals like judicial activism and conservatives like judicial restraint. It is not so simple. For one thing, judicial activism and judicial restraint do not necessarily correlate with liberal and conservative outcomes. For example, on such questions as the constitutionality of affirmative action, regulations of commercial advertising, gun control laws, and campaign finance regulation, judicial restraint would lead to politically "liberal" results, and judicial activism would produce politically "conservative" results. Not surprisingly then, at some times in our history, judicial activism has been embraced by conservatives and criticized by liberals, and at other times, judicial activism has been embraced by liberals and criticized by conservatives.

In the early years of the twentieth century, for example, conservative Justices employed an aggressive form of judicial activism to invalidate a broad range of progressive legislation. During the *Lochner* era,³¹ which lasted for some forty years,³² the Supreme Court invoked "economic substantive due process" in the name of protecting the "liberty of contract" to invalidate more than 150 state and federal laws regulating such matters as child labor, the insurance industry, banks, minimum wages, maximum hours, the rights of labor, and the transportation indus-

30. *Citizens United*, 130 S. Ct. at 933 (Stevens, J., dissenting) ("Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress' efforts . . .").

31. *Lochner v. New York*, 198 U.S. 45 (1905).

32. The era is generally said to have begun with *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), and ended with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Howard J. Vogel, *The "Ordered Liberty" of Substantive Due Process and the Future of Constitutional Law As a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1481 n.45 (2007).

try.³³ Progressive critics of the *Lochner*-era jurisprudence, like Felix Frankfurter, concluded that judicial activism was presumptively illegitimate and unwarranted.³⁴ The only principled stance for a responsible Justice, he argued, was judicial restraint.³⁵ Building on the experience of the *Lochner* era, political liberals maintained that judicial activism was dangerous because it invited Justices to substitute their own personal values and preferences for those of the majority, as reflected in the outcomes of the political process.³⁶

Other critics of *Lochner*, however, took away a very different lesson. In their view, *Lochner* was wrong not because judicial activism is wrong but because *Lochner* was not an appropriate situation for judicial activism. It was this view that Chief Justice Harlan Fiske Stone set forth in 1938 in his famous footnote four in *United States v. Carolene Products Co.*³⁷ While burying the doctrine of economic substantive due process, Stone at the same time suggested that “[t]here may be narrower scope for operation of the presumption of constitutionality when legislation . . . restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” or when it discriminates “against discrete and insular minorities” in circumstances in which it is reasonable to infer that prejudice, intolerance or indifference might seriously have curtailed “the operation of those political processes ordinarily to be relied upon to protect minorities.”³⁸

This conception of *selective* judicial activism is deeply rooted in the original understanding of the essential purpose of judicial review in our system of constitutional governance. The Framers of our Constitution wrestled with the problem of how to cabin the dangers of overbearing and intolerant majorities. For example, those who initially opposed a bill of rights argued that a list of rights would serve little, if any, practical purpose, for in a self-governing society, the majority could simply disregard whatever rights might be “guaranteed” in the Constitution.³⁹ In the face of strenuous objections from the Antifederalists during the ratification debates, however, it became necessary to reconsider the issue.

On December 20, 1787, Thomas Jefferson wrote James Madison from Paris that, after reviewing the proposed Constitution, he regretted “the omission of a bill of rights.”⁴⁰ In response, Madison expressed doubt

33. See, e.g., *Adkins v. Children’s Hosp.*, 261 U.S. 525, 553 (1923) (minimum wage); *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (child labor); *Adair v. United States*, 208 U.S. 161, 179–80 (1908) (“yellow-dog contracts”); *Lochner*, 198 U.S. at 64 (maximum hours).

34. See SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 101 (2010).

35. See *id.*

36. See *id.* at 111.

37. 304 U.S. 144 (1938).

38. *Id.* at 152 n.4.

39. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in JACK N. RAKOVE, *DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS* 160, 161 (1998).

40. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in RAKOVE, *supra* note 39, at 154, 156.

that a bill of rights would “provide any check on the passions and interests of the popular majorities.”⁴¹ He maintained that “experience proves the inefficacy of a bill of rights on those occasions when its contro[l] is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State” that already had a bill of rights.⁴² In such circumstances, he asked, “What use . . . can a bill of rights serve in popular [g]overnments?”⁴³

Jefferson replied, “Your thoughts on the subject of the Declaration of rights . . . omit one [argument] which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent . . . merits great confidence for their learning [and] integrity.”⁴⁴ This exchange apparently carried some weight with Madison. On June 8, 1789, Madison proposed the Bill of Rights to the House of Representatives. At the outset, he reminded his colleagues that “the greatest danger” to liberty was found “in the body of the people, operating by the majority against the minority.”⁴⁵ Echoing Jefferson’s letter, he stated the position for judicial review, contending that if these rights are:

incorporated into the constitution, independent tribunals of justice will consider themselves . . . the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.⁴⁶

This reliance on judges, whose lifetime tenure would hopefully insulate them from the need to curry favor with the governing majority, was central to the Framers’ understanding. Alexander Hamilton, for example, strongly endorsed judicial review as obvious and uncontroversial.⁴⁷ The “independence of the judges,” he reasoned, is “requisite to guard the Constitution and the rights of individuals from the effects of those ill humours, which . . . sometimes disseminate among the people themselves”⁴⁸ Judges, he insisted, have a duty to resist invasions of constitutional rights even if they are “instigated by the major voice of the community.”⁴⁹

It was this “originalist” conception of judicial review that informed the Warren Court’s selective judicial activism. As a rule, the Warren

41. RAKOVE, *supra* note 39, at 159.

42. Letter from James Madison, *supra* note 39, at 161.

43. *Id.* at 162.

44. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *in* RAKOVE, *supra* note 39, at 165, 165.

45. 1 ANNALS OF CONG. 455 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison).

46. *Id.* at 457.

47. THE FEDERALIST NO. 78, at 236 (Alexander Hamilton) (Michael A. Genovese ed., 2009).

48. *Id.* at 238.

49. *Id.* at 238–39.

Court gave a great deal of deference to the elected branches of government—except when such deference would effectively abdicate the responsibility the Framers had imposed upon the judiciary to serve as an essential check against the inherent dangers of democratic majoritarianism. They therefore invoked activist judicial review primarily in two situations: (1) when the governing majority systematically disregarded the interests of a historically underrepresented group (such as blacks, ethnic minorities, political dissidents, religious dissenters, and persons accused of crime); and (2) when there was a risk that a governing majority was using its authority to stifle its critics, entrench the political status quo, and/or perpetuate its own political power.

Consider, for example, *Brown v. Board of Education*, which prohibited racial segregation in public schools;⁵⁰ *Loving v. Virginia*, which invalidated laws forbidding interracial marriage;⁵¹ *Engel v. Vitale*, which prohibited school prayer;⁵² *Goldberg v. Kelly*, which guaranteed a hearing before an individual's welfare benefits could be terminated;⁵³ *Reynolds v. Sims*, which guaranteed "one person, one vote;"⁵⁴ *Miranda v. Arizona*, which gave effect to the prohibition of compelled self-incrimination;⁵⁵ *Gideon v. Wainwright*, which guaranteed all persons accused of crime the right to effective assistance of counsel;⁵⁶ *New York Times v. Sullivan*, which limited the ability of public officials to use libel actions to silence their critics;⁵⁷ and *Elfbrandt v. Russell*, which protected the First Amendment rights of members of the Communist Party.⁵⁸ Each of these decisions clearly reflected the central purpose of judicial review—to guard against the distinctive dangers of majoritarian abuse.

By definition, antimajoritarian decisions generally do not sit well with the majority. It is therefore hardly surprising that this jurisprudence excited biting criticism, especially in the political arena, where candidates curry favor with the very same majority whose "unconstitutional" political preferences were being thwarted. By the late 1960s, Richard Nixon was able to make the Court's "judicial activism" a significant issue in national politics. During his nomination acceptance speech in 1968, for example, he insisted that the Court had "gone too far" and that "we must act to restore" a proper "balance."⁵⁹ Nixon decried the activism of the Warren Court and pledged to appoint "strict constructionists" rather

50. 347 U.S. 483, 495 (1954).

51. 388 U.S. 1, 11–12 (1967).

52. 370 U.S. 421, 433 (1962).

53. 397 U.S. 254, 264 (1970).

54. 377 U.S. 533, 558 (1964).

55. 384 U.S. 436, 444–91 (1966).

56. 372 U.S. 335, 344–45 (1963).

57. 376 U.S. 254, 279–80 (1964).

58. 384 U.S. 11, 16–18 (1966).

59. Richard Nixon, Remarks on Accepting the Presidential Nomination of the Republican National Convention (Aug. 8, 1968), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=3537#axzz1ISqYWLW00>.

than “judicial activists” to the Court.⁶⁰ In the discourse of the time, a strict constructionist was a judge committed to judicial restraint. In a few short years, Nixon appointed Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist.⁶¹ Although these Justices varied over time in their adherence to “strict constructionism,” their presence soon transformed the Court, leaving the vision of the Warren Court in its wake.

IV. CONSERVATIVE CONSTITUTIONAL JURISPRUDENCE

The change in the Court’s role since 1968 has been dramatic. In the twenty-five years between 1968 and 1993, Republican presidents made *twelve* consecutive appointments to the Supreme Court.⁶² According to research by Lee Epstein, William Landes, and Richard Posner, in 1968 the average voting record of the five most liberal Justices (Marshall, Douglas, Brennan, Fortas, and Warren) in civil liberties cases was 0.195.⁶³ (This is on a scale in which .000 is the most liberal and 1.000 is the most conservative.)⁶⁴ The swing Justice was Earl Warren, whose voting record was 0.232.⁶⁵ By 1993, after twelve consecutive Republican appointments, the average voting record of the five most conservative Justices (Thomas, Rehnquist, Scalia, O’Connor, and Kennedy) was 0.758, and the swing Justice, Kennedy, had a voting record of 0.600.⁶⁶ Thus, the Court majority was nearly as conservative in 1993 as it had been liberal in 1968. Even more striking, by 1993 the “liberals” on the Court were almost as conservative as the “conservatives” on the Court in 1968.⁶⁷ The movement to the right has continued in the years since 1993, with President Bush II’s appointment of Justice Alito to succeed Justice O’Connor.⁶⁸

But what does “conservative” mean in the modern era? In Nixon’s time, the term meant a Justice committed to judicial restraint. Judicial restraint is, of course, critical to the legitimacy of constitutional law. In general, the courts must defer to the reasonable judgments of the elected branches of government. But although judicial restraint in *appropriate*

60. Sidney S. Ulmer, *Supreme Court Justices As Strict and Not-So-Strict Constructionists: Some Implications*, 8 L. & SOC’Y REV. 13, 13 (1973).

61. THOMAS R. HENSLEY ET AL., *THE REHNQUIST COURT: JUSTICES, RULINGS, AND LEGACY* 146 (2006).

62. Supreme Court Historical Soc’y, *Supreme Court Nominations, 1789 to 2010*, <http://www.supremecourthistory.org/html/SupremeCourtAppointments.htm> (last visited Jan. 29, 2011).

63. E-mail from Lee Epstein, Professor, Gould Sch. of Law, Univ. of S. Ca., to Zachary Johns, Executive Editor, Univ. of Ill. Law Review (Sept. 22, 2011, 05:18 PM CDT) (on file with author).

64. *Id.*

65. *Id.*

66. *Id.*

67. The four conservatives in 1968 (Harlan, White, Stewart, and Black) had an average voting record of 0.521, whereas the four liberals in 1993 (Stevens, Souter, Blackmun, and White) had an average voting record of 0.436. See Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 402–03.

68. See *id.* at 401–02.

circumstances is essential, its sweeping, reflexive invocation would abdicate a fundamental responsibility that the Framers themselves entrusted to the judiciary and would therefore undermine a critical element of the U.S. constitutional system. It is no more appropriate for judges to refuse to enforce the Constitution against intolerant or overreaching majorities than it is for the President to refuse to defend the nation against enemy invasion.

Perhaps recognizing that a theory of unbounded judicial restraint is constitutionally irresponsible, political conservatives next came up with the modern theory of “originalism.” First popularized in the 1980s, originalism as promoted by Robert Bork, Antonin Scalia, and Clarence Thomas presumes that courts should exercise judicial restraint unless the “original meaning” of the text mandates an activist approach.⁶⁹ Under this theory, for example, it is appropriate for courts to invoke the equal protection clause to invalidate laws that deny African Americans the right to serve on juries but not to invalidate laws that deny women that same right because that was not the “original meaning” of the equal protection clause.⁷⁰

Originalism, however, is fundamentally flawed. First, because those who enacted the broad foundational provisions of our Constitution often did not have any precise and agreed-upon understanding of the specific meaning of “freedom of speech,”⁷¹ “due process of law,”⁷² “regulate Commerce . . . among the several States,”⁷³ “privileges or immunities,”⁷⁴ or “equal protection of the laws,”⁷⁵ it is difficult if not impossible to know with any certainty what they did or did not think about concrete constitutional issues. As a consequence, judges purporting to engage in originalist analysis too often project onto the Framers their own personal and political preferences. The result is an unprincipled and often patently disingenuous jurisprudence. There is no evidence, for example, for the claims advanced by originalists that the original meaning of the equal protection clause prohibited affirmative action or that the original meaning of the First Amendment guaranteed corporations a constitutional right to spend unlimited amounts of money to dominate the election of

69. See, e.g., ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1–4 (2011); Antonin Scalia, *Foreword*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 43, 43–45 (Steven G. Calabresi ed., 2007).

70. See Robert H. Bork, Judge, *Speech at the University of San Diego Law School* (Nov. 18, 1985), in ORIGINALISM, *supra* note 69, at 83, 88–89 (arguing that an interpretation of the equal protection clause stating that it guarantees black equality and no more is an appropriate one).

71. See Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 908 (2009) (observing that the meaning of freedom of speech can be debated even among originalists).

72. See BENNETT & SOLUM, *supra* note 69, at 144.

73. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) (stating a disagreement with other scholars over the original meaning of the commerce clause).

74. See BENNETT & SOLUM, *supra* note 69, at 22.

75. See *id.* at 144.

public officials. Both of these claims, however, are central to today's conservative constitutional agenda.

The second problem with originalism is even more disqualifying, for it reveals the theory to be internally incoherent. Originalism asserts that those who crafted and ratified our Constitution intended the meaning and effect of their handiwork to be limited to the specific understandings of their time. But this view erroneously attributes to the Framers a narrow-mindedness and short-sightedness that belies their true spirit. In fact, the Framers were visionaries. They were not timid men. As Justice Louis Brandeis observed more than eighty years ago, the Framers believed "courage to be the secret of liberty."⁷⁶ The conservative version of originalism ignores that those who framed our Constitution were men of the Enlightenment who were steeped in a common-law tradition that presumed that just as reason, observation, and experience permit us to gain greater insight over time into questions of biology, physics, economics, and human nature, so too would they enable us to learn more over time about the content and meaning of the principles they enshrined in our Constitution. Indeed, the notion that any particular moment's understanding of the meaning of the Constitution's broad and open-ended provisions should be locked into place and taken as constitutionally definitive would have seemed completely wrong-headed to the Framers, who held a much bolder and more confident understanding of their own achievements and aspirations.⁷⁷

For these reasons, the conservative doctrine of "originalism" has been largely discredited as a serious method of constitutional interpretation. This is not to say, however, that the views of the Framers are irrelevant. To the contrary, their values, concerns, and purposes, as reflected in the text of the Constitution must inform and guide the process of constitutional interpretation but in a principled and realistic manner. They must be considered as the Framers themselves understood them—as a set of general principles and aspirations, rather than as a collection of specific and short-sighted "rules." To be true to the Framers' Constitution, we must strive faithfully to implement the Framers' often far-sighted goals in an ever-changing society. That is central to any theory of principled constitutionalism.

V. CONSERVATIVE ACTIVISM

This brings me back to *Citizens United*. If conservative Justices adhered to either their judicial restraint or originalist conceptions of judicial review, they would surely have upheld the law at issue in *Citizens United*. Certainly, under an approach embracing judicial restraint and

76. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

77. See BENNETT & SOLUM, *supra* note 69, at 124–25 (stating that those who wrote the provisions of the Constitution could not imagine some issues we have faced).

deference to the elected branches of government, the Court would have had to uphold the challenged provisions of BCRA. Only by invoking a high degree of judicial scrutiny and aggressively second-guessing the judgments of Congress and the President could the conservative Justices justify their position in *Citizens United*. Similarly, any Justice attempting seriously to employ an originalist analysis in *Citizens United* would also have had to uphold the legislation. There is no credible reason to believe that the Framers of the First Amendment understood the Amendment as guaranteeing a right of for-profit corporations to spend unlimited amounts of money in order to shape the outcomes of the U.S. political process.⁷⁸

How, then, could the five conservative Justices have invalidated the challenged law in *Citizens United*? The answer, of course, is simple. John Roberts, Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito are committed neither to judicial restraint nor to originalism. Rather, like the liberal Justices of the Warren Court, they employ a form of *selective* judicial activism. It seems clear, though, that these Justices would have joined few, if any, of the Warren Court decisions I listed earlier. But despite the conservative rhetoric about “strict constructionism,” “originalism,” “judicial restraint,” and “call[ing] balls and strikes,”⁷⁹ the current conservative Justices are just as activist as their liberal predecessors—but in a wholly different set of cases.

In a series of aggressively activist decisions, the current conservative Justices have held unconstitutional affirmative action programs,⁸⁰ gun control regulations,⁸¹ limitations on the authority of corporations to spend at will in the political process,⁸² restrictions on commercial advertising,⁸³ laws prohibiting groups like the Boy Scouts from discriminating on the basis of sexual orientation,⁸⁴ the environment, violence against women, age discrimination, federal legislation regulating guns,⁸⁵ and policies of the state of Florida relating to the outcome of the 2000 presidential election.⁸⁶

78. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 949–52 (2010) (Stevens, J., concurring in part and dissenting in part).

79. *Hearings on the Nomination of John G. Roberts to Be Chief Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Nominee to be C.J., U.S. Supreme Court).

80. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007).

81. *McDonald v. Chicago*, 130 S. Ct. 3020, 3050 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

82. *Citizens United*, 130 S. Ct. at 900, 917.

83. See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 375–77 (2002).

84. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000).

85. See *Solid Waste Agency of N. Cook Cnty. v. U.S. Army of Eng'rs*, 531 U.S. 159, 162, 173–74 (2001) (environment); *United States v. Morrison*, 529 U.S. 598, 601–02, 627 (2000) (violence against women); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67, 91–92 (2000) (age discrimination); *Printz v. United States*, 521 U.S. 898, 935 (1997) (guns).

86. *Bush v. Gore*, 531 U.S. 98, 111 (2000).

The challenge is to figure out what theory of judicial review or constitutional interpretation drives this particular form of activism. Although one can readily discern the specific conception of judicial review that undergirds the Warren Court's judicial activism, which was clearly rooted in the concerns of Jefferson, Madison, and Hamilton about majoritarian dysfunction, no similar principle or constitutional methodology explains the jurisprudence of contemporary conservative judicial activists. To understand the Warren Court's use of judicial activism, all one needs to do is to look at the *results* and then ask, "Why these cases and not others?" The answer, as we have seen, is quickly apparent. But if one attempts the same inquiry about the decisions of the current conservative Justices, no principled explanation emerges for their version of selective activism. Rather, to paraphrase Justice Frankfurter's critique of an earlier generation's judicial activism, the selective activism of the current conservative majority seems to be born out of "their prejudices and their respective pasts and self-conscious desires."⁸⁷ The point, in other words, is that judicial activism itself is neither inherently good nor inherently bad. It is a legitimate and essential method of constitutional interpretation—when used in *appropriate* circumstances.

VI. CONCLUSION

Where, then, does that leave us? Is there any way for courts to interpret the vague and open-ended provisions of the Constitution in a principled and sensible manner? As I have suggested, the central question should focus on when courts should give deference to the elected branches of government and when they should be more skeptical of the outcomes of the majoritarian political process. It is only by answering that question that we can begin to come to some coherent and principled theory of constitutional law.

The best answer to this question, or at least a really good first answer, was offered by the Court in *Carolene Products*. In footnote four, the Court rightly identified the primary circumstances in which judicial activism (by which I mean a muscular interpretation and application of the Constitution) is most appropriate.⁸⁸ As the Framers understood, we most need the judiciary to intervene when there is a serious risk of majoritarian dysfunction—when there is a systematic danger that the majoritarian political process has gone awry and when there is therefore a need for some independent tribunal to step in and seriously questions the judgments of the political branches. As we have seen, in *Carolene Products*, the Court identified two such circumstances—when there is a risk of

87. Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71, 105.

88. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

political capture and when the majority disadvantages citizens who have traditionally been given the short end of the stick in the political process.⁸⁹ And as we have seen, the judicial activism of the Warren Court largely mirrored these two concerns.⁹⁰

What, though, of the current conservative majority? Conservative Justices and politicians repeat endlessly that, in the interpretation and application of the Constitution, they are strict constructionists who apply rather than invent the law. They are originalists. They are judicially restrained. They just call balls and strikes. But as we have seen, *Citizens United*, and a host of other similarly activist decisions in recent years, cannot be explained or justified with any of these clichés. What, then, is going on in these cases?

To answer that question, we need to step back and do the same thing with the Rehnquist and Roberts Courts that I suggested earlier about the Warren Court. That is, we should look at the outcomes and identify those cases in which the conservative Justices tend to be judicially restrained and deferential and those in which they take an activist approach. If we do that, we discover two obvious patterns. First, the conservative Justices have generally been very deferential in cases in which minorities (whether African Americans, Hispanics, gays and lesbians, women, religious minorities, or persons accused of crime) challenge the constitutionality of government action that disadvantages them.⁹¹ But these are precisely the cases in which activist judicial scrutiny is most appropriate. Second, as we have seen, these same Justices have generally been most active in protecting the interests of corporations, commercial advertisers, gun owners, whites challenging affirmative action programs, the Boy Scouts when they claim a First Amendment right to exclude gay scoutmasters, and George W. Bush in the 2000 presidential election.⁹²

These patterns cannot plausibly be explained by considerations of either judicial restraint or originalism. Moreover, they are patterns that cannot be explained in any principled manner. These results can only be explained as the product of personal and ideological preferences about such matters as guns, corporations, gays, commercial activity, religion, and George W. Bush. This is, to say the least, a worrisome state of af-

89. *Id.*

90. See *supra* Part III (discussing the Warren Court).

91. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1972–73 (2011) (Justices Roberts, Scalia, Thomas, Kennedy, and Alito voting to uphold a state law disadvantaging illegal immigrants); *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259–60, 2265 (2010) (Justices Roberts, Scalia, Kennedy, Thomas, and Alito voting to narrow *Miranda* rights); *Salazar v. Buono*, 130 S. Ct. 1803, 1818, 1824 (2010) (Justices Roberts, Scalia, Kennedy, Thomas, and Alito voting to uphold the installation of a cross on public property over the objections of members of minority religions); *Gonzales v. Carhart*, 550 U.S. 124, 130, 168 (2007) (Justices Roberts, Scalia, Kennedy, Thomas, and Alito voting to narrow a woman's right to abortion); *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (Justices Rehnquist, Scalia, and Thomas dissenting from a decision protecting the rights of gays and lesbians); *United States v. Virginia*, 518 U.S. 515, 566–67 (1996) (Scalia, J., dissenting) (Justice Scalia dissenting from a decision protecting the equal protection rights of women).

92. See cases cited *supra* notes 80–86.

fairs because at the same time that conservatives have managed to hoodwink the American people into believing that they are being principled, restrained, and originalist, they are in fact importing their own idiosyncratic values and beliefs into constitutional law in an aggressive and unprincipled manner.⁹³

93. Having said this, I should add that, in my view, strict scrutiny was appropriate in *Citizens United* because BCRA posed a significant risk of capture by those in control of the political process, at least by possibly protecting the interests of incumbents.