William & Mary Journal of Race, Gender, and Social Justice

Volume *26 (2019-2020)*
Issue 1 *First Amendment: Marketplace Morass: Free Speech Jurisprudence and Its Interactions with Social Justice*

Article 4

November 2019

Free-Speech Formalism and Social Injustice

Stephen M. Feldman

FREE-SPEECH FORMALISM AND SOCIAL INJUSTICE

STEPHEN M. FELDMAN*

ABSTRACT

The Roberts Court has shifted constitutional law in a formalist direction. This Essay explains the Court's formalism and its causes and consequences in First Amendment free-expression cases. The thesis is that the current conservative justices' reliance on formalism intertwines with their attitudes toward public and private spheres of activity. Their attitudes toward the public-private dichotomy are, in turn, shaped by their political ideologies as well as by the contemporary practices of democratic government, which have shifted significantly over American history. Formalism contains an inherent political tilt favoring those who already wield power in the private sphere. Formalism favors the wealthy over the poor, whites over people of color, men over women, straights over LGBTQ. In a formalist legal regime, the government must efface, deny, or ignore all of the structures of power embedded in the private sphere, including racism, sexism, antisemitism, and homophobia. Thus, formalism matters, but does not determine outcomes in free-speech cases. Ultimately, what animates most of the Court's free-expression decisions, whether formalist or not, is a conservative (neoliberal) commitment to protecting the private sphere, especially the economic marketplace and wealthy economic actors, while simultaneously denigrating and weakening government.

INTRODUCTION

The Supreme Court under Chief Justices Rehnquist and Roberts has shifted constitutional law in a formalist direction.[1] Constitutional

* Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming.

1. *See* Stephen M. Feldman, *(Same) Sex, Lies, and Democracy: Tradition, Religion, and Substantive Due Process (With an Emphasis on* Obergefell v. Hodges), 24 WM. &

formalism is most obvious in equal protection cases. In *Adarand Constructors, Inc. v. Pena*, decided in 1995, the Rehnquist Court held that all race-based affirmative action programs are subject to strict scrutiny.[2] According to Justice Sandra Day O'Connor's majority opinion, the government could justify an affirmative action program only if it could prove the program was narrowly tailored to achieve a compelling government purpose.[3] O'Connor explained, however, the government might be able, in some circumstances, to adopt an affirmative action program that would pass constitutional muster.[4] Justices Antonin Scalia and Clarence Thomas both wrote concurrences arguing for a more formal concept of equal protection that would preclude the government from ever justifying affirmative action.[5] From their perspective, the Constitution mandated that the government be color-blind.[6]

The Roberts Court clarified and furthered the judicial commitment to a formal concept of equal protection. Chief Justice John Roberts' majority opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, decided in 2007, applied strict scrutiny and invalidated affirmative action programs allowing school officials to consider race when assigning students to elementary and high schools.[7] In a plurality section of his opinion, Roberts insisted that affirmative action programs and Jim Crow laws are constitutionally indistinguishable.[8] A rule is a rule. The rule of equality embodied in *Brown v. Board of Education*, Roberts explained, mandated the invalidation of the *Parents Involved* affirmative action programs.[9] "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[10]

While less obvious, the Court has also articulated a formal concept of free expression. This Essay explains the Court's formalism and its causes and consequences in First Amendment cases. The

---

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) [hereinafter Feldman, *Chief*] (discussing formalism of Rehnquist and Roberts Courts as echoing *Lochner* era).

2. 515 U.S. 200, 227 (1995).

3. *Id.*

4. *Id.* at 237–38.

5. *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).

6. *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 1 (1992) (arguing that benign racial classifications were inconsistent with the history of the Constitution).

7. 551 U.S. 701, 720–35 (2007).

8. *See id.* at 730–31 (Roberts, C.J., plurality opinion).

9. *Id.* at 745–48 (Roberts, C.J., plurality opinion).

10. *Id.* at 748 (Thomas, J., concurring) (emphasizing constitutional color-blindness).

thesis is that the current conservative justices' reliance on formalism intertwines with their attitudes toward public and private spheres of activity. Their attitudes toward the public-private dichotomy are, in turn, shaped by their political ideologies as well as by the contemporary practices of democratic government, which have shifted significantly over American history.[11] Thus, formalism matters, but does not determine outcomes in free-speech cases. Ultimately, what animates most of the Court's free-expression decisions, whether formalist or not, is a conservative (neoliberal) commitment to protecting the private sphere, especially the economic marketplace and wealthy economic actors, while simultaneously denigrating and weakening government. Part I explains legal formalism. Part II explains why the Roberts Court favors legal formalism in many constitutional cases. Part III focuses on formalism in free-expression cases. This Essay ends with a brief Conclusion.

To be clear, I treat law and politics as dynamically interacting in Supreme Court decision-making.[12] While I discuss the political causes *and* effects of the Court's constitutional decisions, I do not intend to suggest that law is the handmaiden of politics.[13] Law is neither mere window dressing nor subterfuge for political machinations.[14] But law

---

11. *See* STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 3 (2008) [hereinafter FELDMAN, FREE EXPRESSION]; STEPHEN M. FELDMAN, THE NEW ROBERTS COURT, DONALD TRUMP, AND OUR FAILING CONSTITUTION 19–62 (2017) [hereinafter FELDMAN, FAILING CONSTITUTION] (discussing founding-era conceptions of government and free expression). For a classic article linking the form and substance of legal rules in private law cases, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

12. For discussions of the dynamic interaction between law and politics, see the following articles: Stephen M. Feldman, *Nothing New Under the Sun: The Law-Politics Dynamic in Supreme Court Decision Making*, 2017 PEPP. L. REV. 44 (2018); Stephen M. Feldman, *Fighting the Tofu: Law and Politics in Scholarship and Adjudication*, 14 CARDOZO PUB. L., POL'Y & ETHICS J. 91 (2015) [hereinafter Feldman, *Tofu*]; Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics Into Mayonnaise*, 12 GEO. J. L. & PUB. POL'Y 60 (2014) [hereinafter Feldman, *Alchemy*]; 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).

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 political. Feldman, *Tofu*, *supra* note 12, at 94–95; *see* 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, 492 (2004) (lower court study concluding judge's religion is most salient factor affecting outcome of religious-freedom cases).

14. Many political scientists treat Supreme Court decision-making as being determined solely by politics. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 1 (1993). 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).

should never be understood as being separate and independent from politics.[15] In most cases, the justices sincerely interpret the relevant legal texts, but interpretation is never mechanical. The justices' political horizons always influence their interpretive understandings of the texts.[16] For this reason, the justices' legal interpretations and conclusions typically coincide with their respective political preferences.[17] This Essay, to a degree, explores the operation of the law-politics dynamic in the specific context of free-speech formalism.[18]

Given that I discuss the politics of various justices throughout this Essay, the political characterization of some of the justices will be helpful at the outset. My political characterizations of the various justices follows the normal political categories as articulated by many political scientists. Ever since the conservative Thomas replaced the liberal Thurgood Marshall in 1991, conservative blocs of justices have controlled the Rehnquist and Roberts Courts.[19] On the Rehnquist Court, the bloc of Chief Justice William Rehnquist and Justices Scalia, O'Connor, Anthony Kennedy, and Thomas often voted together and handed down conservative decisions.[20] On the Roberts Court, the

---

15. Court critics who complain about judicial activism typically suggest that the justices are being political. *E.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 2 (1990); Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?*, 34 HARV. J.L. & PUB. POL'Y 73, 74–75 (2011).

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

17. *Id.*

18. A number of legal scholars and political scientists have been exploring the law-politics dynamic in a variety of contexts. Examples include the following: 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 (Cornell W. Clayton & Howard Gillman eds., 1999); RONALD KAHN & KEN I. KERSCH, *Introduction* to THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 1 (Ronald Kahn & Ken I. Kersch eds., 2006); LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008 ix (2009). 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 (2011); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY vii (2006).

19. For rankings of Supreme Court justices based on political ideology, *see* LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES 106–16 (2013) (including comparisons with the Martin-Quinn scores (accounting for changes over time), and the Segal-Cover scores (quantifying Court nominees' perceived political ideologies at the time of appointment), and data drawn from Jeffrey Segal & Albert Cover, *Ideological Values and the Votes of Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 557–65 (1989); updated in LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005)); *see also* Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1433 (2013) (focusing on the politics of justices in relation to business-related decisions).

20. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 600 (2000) (invalidating the Violence Against Women Act); City of Boerne v. Flores, 521 U.S. 507, 509 (1997) (invalidating

bloc of Chief Justice Roberts and Justices Scalia, Thomas, Kennedy, and Samuel Alito (with Neil Gorsuch eventually replacing Scalia and Brett Kavanaugh eventually replacing Kennedy) likewise voted together to hand down conservative decisions.[21]

I. WHAT IS LEGAL FORMALISM?

Legal formalism insists that judges logically apply legal rules (and doctrines) without regard to individual parties, social context, or the consequences of potential decisions.[22] Identical rules apply to all the same. The essence of formalism is captured in the phrase, "Let them eat cake," purportedly uttered by Marie Antoinette when told that peasants had no bread.[23] She had a rule: if one lacks bread, then one should eat cake. And from her perspective, peasants and royalty were all the same. If one societal group could eat cake, then so could the other. The social fact or context revealing that peasants lacked the wealth to purchase cake was irrelevant.[24]

Legal formalism seeks a pure law. In the history of American legal thought, the first dean of Harvard Law School, C.C. Langdell, and his disciples epitomized the jurisprudential belief and commitment to formalism.[25] Teaching in university-based law schools when they initially developed after the Civil War, the Langdellians treated law as a closed system of logically connected rules and axiomatic principles that dictated judicial outcomes.[26] The legal system operated autonomously from the rest of society. According to Langdellian legal science, judges were to ignore the context of a dispute, the likely societal consequences of a decision, and considerations of

---

Religious Freedom Restoration Act of 1993); United States v. Lopez, 514 U.S. 549, 550 (1995) (invalidating the Gun-Free School Zones Act); New York v. United States, 505 U.S. 144, 149 (1992) (focusing on tenth amendment).

21. *See, e.g.*, Rucho v. Common Cause, 139 S.Ct. 2484, 2501–02 (2019) (holding that political gerrymandering, no matter how extreme, is a nonjusticiable political question); Shelby County v. Holder, 133 S. Ct. 2612, 2618 (2013) (invalidating section of Voting Rights Act); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012) (invalidating parts of Affordable Care Act).

22. "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, 8 (1983); *see id.* at 11 (describing a formal legal system as seeking "objective tests [while] avoid[ing] vague standards, or rules that required determinations of state of mind").

23. THE OXFORD DICTIONARY OF QUOTATIONS 495 (Elizabeth Knowles ed., 5th ed. 1999).

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

25. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii–ix (2d ed. 1879) (preface to 1st ed.)

26. *Id.*

justice.[27] Judges were to do one thing: logically apply the rules and principles in a mechanical fashion.[28]

Nowadays, in constitutional jurisprudence, originalists are most clearly committed to legal formalism. Most originalists demand that judges discern the ostensibly objective meaning of the constitutional text as it was understood at the time of its adoption.[29] Constitutional meaning, from this perspective, is static, fixed at the time of its ratification, regardless of changing societal contexts.[30] Scalia explained that an originalist approach is "the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures. . . . To hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it."[31] Meanwhile, Thomas adamantly insists that originalism be followed to its apparent ends, regardless of societal consequences.[32] Thus, he has concluded the Establishment Clause does not apply against state and local governments; nothing in the Constitution would prevent Wyoming, Oklahoma, or any other state from establishing an official religion.[33]

Over the years, legal formalism has been distinguished from more realist, empirical, pragmatic, and substantive approaches to judicial decision-making. For instance, early in the twentieth century, sociological jurisprudents such as Roscoe Pound denounced Langdellian legal science as "mechanical jurisprudence" for its arid and abstract formalism.[34] According to Pound, judges should sometimes perform

---

27. C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 21 (2d ed. 1880).

28. *See* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 91–105 (2000) (discussing Langdellian legal science). *But cf.*, BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 13–63 (2010) (arguing that Langdellians were not pure formalists, but acknowledging that almost all legal historians characterize them as such).

29. ROBERT H. BORK, THE TEMPTING OF AMERICA 5–6, 143–44 (1990); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOYOLA L. REV. 611, 621 (1999); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 761 (2009).

30. LAWRENCE B. SOLUM, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (2011); Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 660 (2009).

31. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (emphasis in original); *see* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

32. Am. Legion v. Am. Humanist Ass'n, No. 17-1717, slip op. at 49–55 (2019) (Thomas, J., concurring).

33. *Id.*; Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring).

34. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 620 (1908). For

social engineering, making law for the good of society.[35] In the late 1920s and early 1930s, American legal realism built on and extended the insights of sociological jurisprudence.[36] Realists criticized the Langdellians' axiomatic principles and logically deduced rules as "transcendental nonsense"—concepts with no basis in social reality.[37] "[G]eneral propositions are empty," wrote Karl Llewellyn.[38] "[R]ules *alone* . . . are worthless."[39] Rejecting formalism, realists turned to social science research to remake the legal system, grounding legal doctrines more firmly on empirical reality. According to Walter Wheeler Cook, "[o]nly empirical observation can give one postulates useful in any particular science, including legal science."[40] Hence, Felix Cohen argued that judges should decide each case by attending closely to the factual details, weighing the specific and competing interests at stake, and considering the real-world consequences that would follow from possible decisions.[41] In current constitutional jurisprudence, many scholars endorse interpretive pluralism, eclecticism, or pragmatism, or in other words, living constitutionalism.[42] From this perspective, a judge can consider a shifting variety of factors, including original meaning, the framers' intentions, practical consequences, judicial precedents, and so forth.[43] Contrary to the tenets of originalism, constitutional meaning is not static. Rather, it "evolves, changes over time, and adapts to new circumstances, without being formally amended."[44]

---

an extensive discussion of Pound and his work, see N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997).

35. Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 954–58 (1923); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 515 (1912).

36. Pound, *supra* note 34, at 609–10.

37. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935).

38. KARL N. LLEWELLYN, THE BRAMBLE BUSH 12 (1930).

39. *Id.*

40. Walter Wheeler Cook, *Law and the Modern Mind*, 31 COLUM. L. REV. 108, 113 (1931).

41. Cohen, *supra* note 37, at 839–40.

42. *E.g.*, Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1333 (1988) (defending pragmatism); Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283, 350 (2014) (defending eclecticism). "Pragmatist constitutional adjudication is eclectic and uncertain: it takes into account multiple sources, and rarely produces an unequivocal answer." DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY x (2010).

43. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (specifying "six modalities of [] argument" judges use to decide constitutional cases).

44. DAVID A. STRAUSS, THE LIVING CONSTITUTION 1 (2010); *see* ROBERT W. BENNETT, *Originalism and the Living American Constitution*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 79 (2011) (defending living constitutionalism).

Formalists reject substantive approaches to judicial decision-making as undermining the desired purity of law. Most important, formalists argue that substantive approaches invite judges to inject their political preferences or ideologies into adjudication. When sociological jurisprudents instructed judges to make law, when realists weighed the interests at stake in a case, or when living constitutionalists considered the practical consequences of a decision in society, they literally diverged from *legal* decision-making, at least according to formalists. Formalists view politics as the antithesis of law.[45] As such, politics corrupts judicial decision-making. For this reason, Scalia argued that the rule of law must be "the law of rules."[46] Politics and law must be separate and independent. Indeed, originalists insist that originalism is the only interpretive method that constrains judges *within the rule of law*.[47] That is, forms of living constitutionalism do not even qualify as forms of legal interpretation.[48] The insurmountable problem with living constitutionalism, Scalia insisted, is that it invests judges with political discretion: "[I]t is the judges who determine those [societal] needs and 'find' that changing law."[49]

In a similar vein, legal process scholars, who dominated the mid-twentieth century, emphasized the distinct processes of different government institutions.[50] According to Henry Hart, Herbert Wechsler, Alexander Bickel, and other like-minded scholars, courts and legislatures operated pursuant to processes unique to their respective goals and functions.[51] While legislatures channeled the negotiating and compromising of political interests, courts decided cases by following the process of "reasoned elaboration."[52] That is, judges needed to articulate reasons for a decision, to explain those

45. Scalia, *supra* note 31, at 1187.

46. *Id.*

47. "You can't beat somebody with nobody." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINCINNATI L. REV. 849, 855 (1989).

48. "It takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never congealed around an appealing and practical alternative." Barnett, *supra* note 29, at 617.

49. ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (1997).

50. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 33 (1962); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW vii (tentative ed. 1958); HENRY M. HART, JR., & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM xii (1953); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2–9 (1959).

51. For instance, the *Preface* to the first edition of Hart and Wechsler's casebook, *The Federal Courts and the Federal System*, stated: "In varying contexts we pose the issue of what courts are good for—and are not good for—seeking thus to open up the whole range of questions as to the appropriate relationship between the federal courts and other organs of federal and state government." HART & WECHSLER, *supra* note 50, at xii.

52. HART & SACKS, *supra* note 50, at 164–67.

reasons in a detailed and coherent manner, and to relate the decision to a relevant rule of law applied in a manner logically consistent with precedent.[53] In constitutional cases, reasoned elaboration translated into a requirement that judges decide pursuant to "neutral principles," which supposedly precluded judges (or justices) from using rules or principles that bore any political valence.[54] If Supreme Court justices allowed their political preferences to influence a constitutional decision, that decision would be illegitimate.[55]

II. WHY LEGAL FORMALISM NOW? THE PUBLIC-PRIVATE DICHOTOMY

Why do the conservative justices on the Roberts Court push for legal formalism?[56] The law-politics dichotomy, which undergirds formalism, manifests another dichotomy central to the American constitutional system: the separation between a private sphere and a public sphere. The private sphere is the realm of individual action and belief.[57] It is the realm of the economic marketplace and commercial intercourse, of property and contract rights, as well as other individual rights and liberties such as the right to free exercise of religion. The public sphere is the realm of government action.[58] It is where politics and democracy have sway. The private-public dichotomy is philosophically rooted in the Lockean distinction between civil society and government.[59] According to Locke, individuals leave a state of nature for civil society because life in a state of nature entails fear and uncertainty.[60] Only after forming civil society, then, do individuals consider the formation of a government.[61] Thus, from

---

53. *Id.*

54. Wechsler, *supra* note 50, at 15–35; *see* BICKEL, *supra* note 50, at 49–59 (applying Wechsler's concept of neutral principles).

55. *See* Wechsler, *supra* note 50, at 31–35 (questioning the legitimacy of Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

56. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2119–20 (2018) [hereinafter Lakier, *Antisubordinating*] (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., at 64 (forthcoming) (arguing that the current Court's First Amendment decisions are formalist).

57. Arnaud Sales, *The Private, the Public and Civil Society: Social Realms and Power Structures*, 12 INT'L POL. SCI. REV. 295, 297 (1991).

58. *See id.* at 298.

59. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 3–4, 48–49 (Thomas P. Peardon ed., 1952). For discussions of Locke's writings, see JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE (1969); ROBERT A. GOLDWIN, *John Locke*, *in* HISTORY OF POLITICAL PHILOSOPHY 476 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987).

60. According to Locke, the state of nature would not be as dangerous as Hobbes had imagined. THOMAS HOBBES, LEVIATHAN 97, 186 (C.B. Macpherson ed., 1968) (describing life in state of nature as "solitary, poore, nasty, brutish, and short.").

61. LOCKE, *supra* note 59, at 70–74, 119, 139; *see id.* at 44 (discussing civil society).

the Lockean perspective, the private sphere of individual action is separate from the public sphere of government action.

Lockean philosophy influenced the constitutional framers, but civic republicanism was at least as important during the founding era.[62] The framers, bridging these distinct ideologies, did not view individual rights as sacrosanct.[63] To the contrary, they believed the government, in accordance with republican democracy, could infringe on or narrow individual rights so long as government officials virtuously pursued the common good or general welfare rather than partial or private interests.[64] Unsurprisingly, throughout the early nineteenth century, government repeatedly reached from the public sphere into the private sphere in pursuit of the common good—even if the government laws limited individual liberty in the economic marketplace.[65] In fact, during this era, law was understood to be an instrument for "the release of [creative and economic] energy."[66] Government action was not generally considered antithetical to prosperity in the marketplace.

Nevertheless, the relationship between the public and private spheres has been anything but constant. For instance, spurred by the arguments of industrialists and corporations, the Court in the late nineteenth and early twentieth centuries interpreted the common good in accord with laissez-faire ideology.[67] The Court became more protective of the economic marketplace, limiting government

---

62. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 xi (1998).

63. J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT vii–viii; 506–52 (1975).

64. WOOD, *supra* note 62, at 46–90; *e.g.*, The Federalist No. 10 (James Madison); The Federalist No. 57 (James Madison). Those constitutional scholars who argue the framers created a libertarian system centered around a capitalist marketplace ignore half of the history. *E.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION ix, 6–7, 37–38, 43, 45, 582 (2014). To be sure, the framers cared deeply about protecting individual rights, including property rights, as demonstrated by their constitutional protections of slavery as a legal institution (most framers viewed slaves as property). FELDMAN, FAILING CONSTITUTION, *supra* note 11, at 36–46 (discussing the framers' conception of the private sphere). But the framers did not allow their concern for property rights to overcome their concern for republican democratic government. *Id.* at 46–55.

65. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE 1 (1996) (describing many examples of government acting for common good despite infringing on individual rights); *e.g.*, Commonwealth v. Rice, 50 Mass. 253, 257, 259 (1845) (upholding economic regulation); *see* FELDMAN, FREE EXPRESSION, *supra* note 11, at 26–32 (discussing judicial review under republican democracy before the Civil War).

66. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 21 (1956). "[T]he nineteenth century was prepared to treat law . . . as an instrument to be used wherever it looked as if it would be useful." *Id.* at 10.

67. Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 59–60 (1987).

reach from the public into the private sphere.[68] Not incidentally, during this time period, commonly known as the *Lochner* era, the Court typically decided cases pursuant to formalist reasoning, invalidating economic regulations without inquiring into the context or empirical effects of the laws.[69] In *Lochner v. New York*, the Court acknowledged that the state legislature, in appropriate circumstances, could regulate for the common good, but nonetheless held unconstitutional a state law limiting the hours of bakery employees.[70] The justices reasoned that the job of a baker was not "unhealthy" to "the common understanding,"[71] despite empirical evidence showing otherwise.[72] More than three decades later, in *Carter v. Carter Coal Company*, the Court invalidated the Bituminous Coal Conservation Act as beyond Congress's commerce power.[73] The *Carter* Court categorically defined mining to be "a purely local activity" while disregarding the broader effects of mining on commercial intercourse.[74] In these and similar cases, formalism facilitated the Court's efforts, in accordance with laissez-faire ideology, to protect the economic marketplace from government regulation.[75]

Pressures arising from immigration, urbanization, and industrialization, as well as the catastrophe of the Great Depression, eventually led to a transformation of democratic government in the 1930s.[76] On the one hand, republican democracy had long emphasized the virtuous pursuit of the common good, a substantive goal, while readily accepting the political exclusion of wide swaths of the population.[77] For much of American history, African Americans, women, religious

---

68. Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1196–204 (1985); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 478 (1988).

69. Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 558–59, 571 (1996).

70. 198 U.S. 45, 51, 64–65 (1905).

71. *Id.* at 59.

72. *See id.* at 67–73 (Harlan, J., dissenting) (emphasizing that the state legislature relied on empirical evidence).

73. 298 U.S. 238, 273 (1936).

74. *Id.* at 304.

75. For another example of formalist reasoning, see R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 374 (1935) (invalidating the Railroad Retirement Act as class legislation contravening the common good and thus beyond Congress's commerce power).

76. Books discussing aspects of the transformation of democracy include the following: LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919–1939 2–5 (1990); FELDMAN, FREE EXPRESSION, *supra* note 11, at 14–45, 153–208, 291–382; HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 1–3 (1993); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 6–7 (1996). Bruce Ackerman also emphasizes regime change in constitutional law. His discussions of the key decade of the 1930s are spread over two volumes. BRUCE ACKERMAN, WE THE PEOPLE (VOL. 3): THE CIVIL RIGHTS REVOLUTION (2014); BRUCE ACKERMAN, WE THE PEOPLE (VOL. 2): TRANSFORMATIONS (1998).

77. FELDMAN, FREE EXPRESSION, *supra* note 11, at 23–24, 38.

minorities, and immigrants were deemed insufficiently virtuous to contribute to the common good.[78] On the other hand, pluralist democracy, emerging in the 1930s, posited more widespread participation and the legitimate pursuit of self-interest.[79] Pluralist democracy thus emphasized crucial processes, such as voting, that ostensibly allowed all citizens to voice their respective values and interests within a free and open democratic arena.[80] In the 1940s and 1950s, political theorists described pluralist democracy as the best means for accommodating "our multigroup society."[81]

During the Cold War era, political and constitutional theorists defended democracy against totalitarianism as embodied by the Soviet Union and its satellites. Totalitarian government dictated public values and goals, but pluralist democracy determined public values and goals "through the free competition of interest groups."[82] By "composing or compromising" their different values and interests,[83] the "competing groups [would] coordinate their aims in programs they can all support."[84] Legislative decisions arose from negotiation, persuasion, and the exertion of pressure through the channels of the democratic process.[85] And indeed, throughout the first decades of pluralist democracy, the normal operation of the democratic process frequently led the government to reach into the private sphere and regulate the economic marketplace (think of the New Deal).[86] Even so, the pluralist democratic emphasis on processes eventually led theorists to argue that the primary function of government was to provide a neutral framework of procedures allowing individuals and interest groups to assert their respective values and interests—whether in the public or the private sphere.[87]

---

78. *Id.* at 23–45; SANDEL, *supra* note 76, at 123–67.

79. FELDMAN, FREE EXPRESSION, *supra* note 11, at 314–16.

80. JOHN DEWEY, FREEDOM AND CULTURE 176 (1939); *see* SANDEL, *supra* note 76, at 167 (discussing transition to procedural republic or democracy).

81. WILFRED E. BINKLEY & MALCOLM C. MOOS, A GRAMMAR OF AMERICAN POLITICS 9 (1949).

82. *Id.*

83. *Id.*

84. *Id.* at 8.

85. *Id.* at 10–11. Robert Dahl developed the most comprehensive explanation of the democratic process. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2d ed. 2003); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989); ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

86. For histories of the New Deal, see ANTHONY J. BADGER, THE NEW DEAL: THE DEPRESSION YEARS, 1933–1940 (1989); COHEN, *supra* note 76; WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL (1963).

87. JOHN RAWLS, POLITICAL LIBERALISM (1996 ed.) (articulating the philosophy of political liberalism); SANDEL, *supra* note 76, at 3–24, 28, 250–73 (explaining procedural republic).

Just as the practice of republican democracy had transformed over time, particularly in response to the rise of laissez-faire ideology, the practice of pluralist democracy also transformed, particularly in response to the ideology of neoliberalism.[88] While the Cold War had prompted Americans, including American corporations, to defend democracy, then the end of the Cold War opened American democracy to neoliberal attacks from within.[89] Think of neoliberalism as laissez-faire on steroids.[90] Laissez-faire ideology celebrated the free market; neoliberalism went further by demonizing democratic government. Laissez-faire theorists maintained that the invisible hand operates through the free market to naturally generate individual satisfaction and societal good.[91] Neoliberal theorists agreed, but they added that an inverse (and perverse) invisible hand operates through democratic processes.[92] Even well-meaning elected officials inevitably lead democratic government to pursue suboptimal and often corrupt goals. Given the ostensible functionality of the marketplace and dysfunctionality of democratic government, neoliberals concluded that government reach into and regulation of the private sphere should be severely constrained, for the greater good of all.[93]

Similar to the *Lochner*-era Supreme Court, which had become more formalist in response to laissez-faire ideology, the conservative Court of the late-twentieth and early twenty-first centuries became more formalist in response to neoliberal ideology. These parallel formalist shifts are stark in congressional power cases under the Commerce Clause.[94] In the late 1930s, once the Court accepted pluralist democracy and repudiated *Lochner*-era formalism, the Court determined the scope of Congress's commerce power pursuant to a rational basis test that focused on empirical reality rather than a priori categories.[95] In practice, this doctrinal approach led the Court to defer

88. For a history of neoliberalism, see DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

89. FELDMAN, FAILING CONSTITUTION, *supra* note 11, at 130–52, 162–73; *see* JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY 237–57 (2005) (discussing end of Cold War); JAMES T. PATTERSON, RESTLESS GIANT 194–95 (2005) (same).

90. For an extensive discussion of neoliberalism, see DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS (2012).

91. Jacob Viner, *The Intellectual History of Laissez Faire*, 3 J. OF L. & ECON. 45, 61 (1960).

92. On the operation of the economic marketplace, see Milton Friedman, *Adam Smith's Relevance for 1976*, Selected Papers No. 50, at 15. About democratic government, Friedman wrote: there is an "invisible hand in politics [that] is as potent a force for harm as the invisible hand in economics is for good." *Id.* at 18.

93. *See* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 94–95 (Ronald Hamowy ed. 2011) (arguing against government planning because of the complexity of social reality).

94. U.S. CONST. art. I, § 8, cl. 3.

95. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555–56 (1985) (upholding

to the democratic process.[96] The Court refrained from imposing judicial limits on congressional power per se.[97] From the late 1930s onward, for nearly six decades, congressional power would be checked at the ballot box, not at the courthouse.[98]

Under the sway of neoliberal ideology, however, the Rehnquist Court reintroduced formalist methodology to commerce power cases in 1995.[99] In *United States v. Lopez*, the Court held that Congress had exceeded its power when it enacted the Gun-Free School Zones Act, which proscribed the possession of firearms at school.[100] Chief Justice Rehnquist wrote the majority opinion for the conservative bloc of five justices (Scalia, Thomas, Kennedy, and O'Connor joined Rehnquist's opinion).[101] He reasoned that Congress can regulate "three broad categories of activity":[102] the channels of interstate commerce, the instrumentalities of interstate commerce, and activities substantially affecting interstate commerce.[103] Rehnquist focused on the final category, substantial effects, but imbued it with a formalist twist.[104] Distinguishing between economic and noneconomic activities, Rehnquist maintained that gun possession at schools is a noneconomic enterprise that "has nothing to do with 'commerce.'"[105] Next, distinguishing between national and local concerns, Rehnquist reasoned that gun possession at schools is a local matter.[106] His terminology,

---

minimum wage and overtime requirements of Fair Labor Standards Act as applied to state employees); United States v. Carolene Products Co., 304 U.S. 144, 154 (1938) (upholding the Filled Milk Act); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 1 (1937) (upholding the National Labor Relations Act of 1935).

96. "[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause . . . is one of process rather than one of result." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554 (1985).

97. The Court, though, continued to limit the federal government in accord with other constitutional guarantees, such as free expression. *See, e.g.*, Baumgartner v. United States, 322 U.S. 665, 679–80 (1944) (holding that federal government could not denaturalize because of opinions expressed after citizenship was granted); Schneiderman v. United States, 320 U.S. 118, 160–61 (1943) (holding that federal government could not denaturalize Russian-born citizen for prior statements).

98. Between 1937 and the early 1990s, the Court upheld every challenged congressional exercise of its commerce power, with the sole exception of a single 1976 case, which the Court overruled within a decade. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985).

99. The Court began this formalist turn in a decision invalidating congressional action but focusing more on the Tenth Amendment. New York v. United States, 505 U.S. 144, 187–88 (1992).

100. 514 U.S. 549, 549 (1995).

101. *Id.* at 549.

102. *Id.* at 558.

103. *Id.* at 558–59.

104. *Id.* at 561.

105. *Id.*

106. *Lopez*, 514 U.S. at 567–68.

dividing "what is truly national and what is truly local,"[107] resembled *Lochner*-era formalist language separating "a purely federal matter"[108] from "a matter purely local in its character."[109] By parsing congressional power pursuant to these formalist categories, the Court concluded that Congress had exceeded its commerce power.[110]

The Roberts Court followed *Lopez* and extended its formalist reasoning in *National Federation of Independent Business v. Sebelius*, which invalidated part of the Affordable Care Act (ACA).[111] The ACA's individual mandate required most Americans to maintain "minimum essential" health insurance coverage.[112] Individuals failing to comply with the mandate were required to pay a "penalty" to the Internal Revenue Service.[113] When determining whether Congress had exceeded its commerce power in enacting the individual mandate, Roberts's opinion applied the *Lopez* doctrine while also articulating and applying two new formalist categories.[114] First, distinguishing action from inaction, Roberts reasoned that Congress can regulate activity but not inactivity pursuant to the Commerce Clause.[115] The individual mandate forced individuals to buy health insurance even when they did not want to do so.[116] Congress had therefore overstepped its commerce power, Roberts concluded, because the mandate compelled inactive individuals to enter or become active in the health insurance market.[117] Second, distinguishing regulation from creation, Roberts reasoned that Congress can regulate but not create commerce.[118] With the individual mandate, Roberts maintained, Congress exceeded its power by attempting to create commercial activity where none previously existed.[119]

Why do conservative justices prefer formalism over more realist or substantive approaches to judicial decision-making? The answer

---

107. *Id.*
108. Hammer v. Dagenhart, 247 U.S. 251, 274 (1918).
109. *Id.* at 276.
110. *Lopez*, 514 U.S. at 567–68.
111. 132 S. Ct. 2566, 2608 (2012).
112. 26 U.S.C. § 5000A(a) (2012).
113. 26 U.S.C. §§ 5000A(c), (g)(1) (2012).
114. Feldman, *Chief*, *supra* note 1, at 342–43.
115. *Id.*
116. *Sebelius*, 132 S. Ct. at 2586–87.
117. *Id.* The other conservative justices (the joint dissenters) completely agreed with Roberts on this point, even though they did not join his opinion. *Id.* at 2644, 2648–49.
118. *Id.* at 2586.
119. Again, the other conservative justices completely agreed with Roberts on this point. *Id.* at 2644, 2647. Roberts nonetheless upheld the individual mandate pursuant to Congress's taxing power. *Id.* at 2599–600. Roberts followed similar formalist reasoning in concluding that Congress had surpassed its spending power in the ACA provisions expanding the Medicaid program. *Id.* at 2602–04.

lies in the connection between legal reasoning and political ideology. To understand this connection, it helps to emphasize the difference between formal and substantive equality.[120] Government pursuit of substantive equality requires an inquiry into and recognition of the degree to which people can actually exercise power. For instance, to what degree does economic wealth affect or determine the exercise of power in the private and public spheres? To what degree does a history of subjugation affect or determine the exercise of power in the private and public spheres? Substantive equality emphasizes the importance of social context in evaluating equality.[121] Consequently, the government can pursue substantive equality in two general ways—both contingent on the Court allowing democratic government to exercise sufficient regulatory power over the private sphere. First, the government can seek to redistribute wealth, power, or both within the private sphere. For instance, the government can raise tax rates on the wealthy. Or the government can set a minimum wage rather than allowing employers to pay employees as little as the market will bear. Second, the government can inhibit the exercise of private power in the public sphere. For example, the government can limit how much individuals and corporations can spend on or contribute to political campaigns. Thus, even if the wealthy continue to exercise excessive power in the private sphere, their public-sphere power can be constrained.[122]

Legal formalism helps conservative justices impede such government attempts to attain substantive equality. More specifically, formal equality insists the government must treat all people the same under the law.[123] Formal equality assumes (or pretends) that all are the same regardless of wealth, regardless of histories of subjugation, regardless of social contexts that, in reality, influence the degree of power people can exercise in the private and public spheres. Formal equality precludes the precise inquiries into the exercise of power that the pursuit of substantive equality requires.

In short, formalism contains an inherent political tilt favoring those who already wield power in the private sphere. Formalism

---

120. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1473 (2004) (discussing two types of equality); *see supra* notes 1–10 and accompanying text (discussing Supreme Court affirmative action decisions).

121. Lakier, *Antisubordinating*, *supra* note 56, at 2122–23 (discussing formal and substantive equality).

122. ROBIN WEST, *The Missing Jurisprudence of the Legislated Constitution*, *in* THE CONSTITUTION IN 2020, at 79 (Jack M. Balkin & Reva B. Siegel eds., 2009) (arguing that legislatures should pursue substantive rather than merely formal equality).

123. Paul Gowder, *Equal Law in an Unequal World*, 99 IOWA L. REV. 1021, 1024 (2014) (discussing the relationship between formal and substantive equality).

favors the wealthy over the poor, whites over people of color, men over women, straights over LGBTQ. In a formalist legal regime, the government must efface, deny, or ignore all of the structures of power embedded in the private sphere, including racism, sexism, antisemitism, and homophobia.[124] To illustrate, those with greater wealth naturally wield greater power in the private sphere. Walmart executives exercise power over Walmart cashiers, not vice versa.[125] And if left unimpeded, the wealthy can transform their private sphere power into greater public sphere muscle. Empirical research unsurprisingly demonstrates that government officials pay more attention to wealthy donors than to the poor.[126] If Congress were to enact a law that adjusts the relationship between the private and public spheres—for instance, a campaign finance law that limits spending—then Congress would be, in effect, pursuing substantive equality. But a Court enforcing formal equality could readily invalidate any such government pursuit of substantive equality. A campaign finance law limiting spending does not treat the wealthy the same as the poor. Such a law ostensibly imposes greater restraints on the wealthy (since they could afford to spend more) and therefore violates formal equality. By reaching such a conclusion, though, the Court would allow the wealthy (and whites, and men, and straights, and so on) to continue exercising their private sphere power in both the private and public spheres.[127]

Thus, in accord with neoliberal ideology, the conservative justices have persistently used formalist reasoning to narrow government power and to protect the private sphere, especially marketplace actors and transactions.[128] *Lopez* and *Sebelius* might be among the most notorious examples, but there are many others.[129] Going beyond

---

124. *See* Lakier, *Antisubordinating*, *supra* note 56, 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 (2017) (praising and criticizing Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015)).

125. Steven Greenhouse, *How Walmart Persuades Its Workers Not to Unionize*, THE ATLANTIC (June 8, 2015), https://www.theatlantic.com/business/archive/2015/06/how-walmart-convinces-its-employees-not-to-unionize/395051 [https://perma.cc/5EFJ-5YDT]; *see, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (refusing class certification against Walmart despite alleged widespread sexual discrimination in pay and promotions).

126. LARRY M. BARTELS, UNEQUAL DEMOCRACY 2–3, 285–86 (2008).

127. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 754–55 (2011) (invalidating law providing public funding to equalize campaign spending).

128. *See* Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC (Aug. 23, 2012), https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism [https://perma.cc/F3SM-24DC] (arguing that Scalia's textual originalism was politically conservative).

129. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (invalidating state law limiting

these patent judicial limitations of the congressional commerce power, the Court has expressed deep skepticism about the capability of Congress to act rationally—a skepticism that again resonates with the neoliberal distrust of democratic government.[130] The Rehnquist Court began displaying such skepticism in *Lopez* and other congressional power cases.[131] The Court, for instance, started questioning whether Congress had made sufficient findings of fact to support its legislative actions.[132] In these cases, the conservative justices showed no respect for congressional expertise in the legislative realm. Instead, the Court suggested that Congress needed to deliberate more extensively, making more precise findings that might help the legislators avoid egregious error.[133]

The Roberts Court conservatives have continued to press for congressional findings. Most significant, in *Shelby County v. Holder*, a five-to-four decision, the Court invalidated a provision of the Voting Rights Act, passed pursuant to Congress's power under the Fifteenth Amendment.[134] The coverage provision of the Act specified which jurisdictions needed special government approval or preclearance before they could change their voting laws.[135] The Court, in an opinion by Roberts, acknowledged that the coverage provision was sensible

---

marketing use of consumers' pharmaceutical data); United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act); City of Boerne v. Flores, 521 U.S. 527 (1997) (invalidating Religious Freedom Restoration Act of 1993); *see* FELDMAN, FAILING CONSTITUTION, *supra* note 11, at 173–86 (discussing numerous cases where Roberts Court protected economic marketplace and actors).

130. In accord with neoliberalism, public choice theorists apply economic analysis to public decision-making to show that majority voting, as in democracy, is frequently an irrational means for making group decisions. According to public choice, when the government legislates, the legislative decisions do not rest on a rational calculation of costs and benefits. They arise instead from interest group machinations. DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 1–11, 38–61 (1991); *see* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 1 (1982) (arguing social choice theory calls democracy into question).

131. *Morrison*, 529 U.S. at 627 (invalidating the Violence Against Women Act); *Flores*, 521 U.S. at 536 (invalidating Religious Freedom Restoration Act of 1993); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (invalidating the Gun-Free School Zones Act).

132. *Morrison*, 529 U.S. at 614–15; *Flores*, 521 U.S. at 530–31; *Lopez*, 514 U.S. at 563.

133. *Flores*, 521 U.S. at 530; *Lopez*, 514 U.S. at 562–63; *see Morrison*, 529 U.S. at 615 (acknowledging congressional findings but dismissing them as inadequate). This judicial request for congressional findings reinstituted another dormant doctrinal mechanism from the *Lochner* era. *E.g.*, Hill v. Wallace, 259 U.S. 44, 68–69 (1922) (invalidating statute partly because Congress had failed to find specific facts showing that the regulated activity burdened interstate commerce); *see* Bd. of Trade v. Olsen, 262 U.S. 1, 31–33, 37–38 (1923) (upholding statute similar to the one invalidated in *Hill* partly because Congress made sufficient findings); A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 356 (2001) (describing "rigorous review of the legislative record" as characteristic of pre-1937 Supreme Court decision-making).

134. 133 S. Ct. 2612, 2631 (2013).

135. § 4(b), 79 Stat. 438.

in 1965, when Congress first enacted the statute.[136] Congress, though, had reauthorized the Act several times over the years,[137] and the Court concluded that the coverage provision did not fit the nation's current circumstances.[138] "Coverage today is based on decades-old data and eradicated practices."[139]

Yet, Justice Ruth Bader Ginsburg's *Shelby County* dissent pointed to extensive and detailed congressional findings.[140]

> Congress determined, based on a voluminous record, that the scourge of [voting] discrimination was not yet extirpated . . . . With overwhelming support in both Houses, Congress concluded that, for two prime reasons, [the Act] should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress' province to make and should elicit this Court's unstinting approbation.[141]

Ginsburg's dissent highlighted the conservative majority's disdain for Congress and its democratic processes.[142] The Court did not merely ask Congress to make more specific findings. Rather, the Court demanded that Congress make different findings.[143] In short, the conservative justices might not have been satisfied by any congressional findings, given that the justices apparently did not approve of the substance of Congress's action. And in fact, as Ginsburg feared, the Court's invalidation of the preclearance provision prompted an outburst of discriminatory attacks on the democratic process.[144] In recent

---

136. *Shelby County*, 133 S. Ct. at 2617.

137. *Id.* at 2620–21.

138. *Id.* at 2628 ("In 1965, the States could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics. Congress based its coverage formula on that distinction. Today the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.").

139. *Id.* at 2627. Robert's opinion suggested that Congress left the Court with no choice but to invalidate the statutory provision. The Court had sidestepped a similar constitutional challenge to the Act several years earlier and had encouraged Congress to update the coverage formula. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009). "Its failure to act leaves us today with no choice but to declare [the provision] unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County*, 133 S. Ct. at 2631. "Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions." *Id.*

140. *Id.* at 2635–36, 2642–43 (Ginsburg, J., dissenting).

141. *Id.* at 2632–33 (Ginsburg, J., dissenting).

142. *Id.* at 2644 (Ginsburg, J., dissenting).

143. *Id.* at 2642–44.

144. CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 148–54 (2016) (on the ramifications of *Shelby County*); JONATHAN BRATER ET AL.,

years, more than twenty-one states have enacted laws restricting suffrage.[145] Of course, a neoliberal Court is unlikely to worry about the democratic process because the justices do not respect democracy as a form of societal decision-making.[146] Once again, by weakening democratic government, the justices enhanced the power of those individuals and entities already brandishing significant resources and power in the private sphere.[147]

III. FREE-SPEECH FORMALISM

As revealed, the current politics of constitutional formalism immobilizes democratic government while enhancing private-sphere powers. The inequities of the private sphere are allowed to deepen and spread across both the private and public spheres. Free-speech formalism is one specific illustration of this broader constitutional strategy. As such, free-speech formalism works hand-in-hand with the politics of formalism in general.[148]

Free-speech formalism is most obvious in the Court's campaign finance decisions. In these cases, the conservative justices interpret the First Amendment as a formal rule imposing absolute protections of expression—expression ostensibly manifested by spending on political campaigns.[149] The most renowned (or infamous) of these cases is *Citizens United v. Federal Election Commission*, decided in 2010.[150] In a five-to-four decision, the conservative bloc invalidated provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) that imposed limits on corporate (and union) spending for political campaign

---

PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1–4 (Brennan Center for Justice ed., 2018) (detailing statistics on purging of voters since the Court decided *Shelby County*).

145. ZACHARY ROTH, THE GREAT SUPPRESSION: VOTING RIGHTS, CORPORATE CASH, AND THE CONSERVATIVE ASSAULT ON DEMOCRACY 21–25 (2016) (on the Republican attack on democracy).

146. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (holding that political gerrymandering, no matter how extreme, is a nonjusticiable political question).

147. Legal formalism has additional political salience for lawyers, judges, and law professors apart from the results in adjudication. By supposedly identifying a legal realm separate and independent from a political realm, professionally accredited lawyers, judges, and law professors justify for themselves an important niche in society and the economic marketplace. Stephen M. Feldman, *The Politics of the Law-Politics Dichotomy*, 33 BYU J. PUB. L. 15, 23–27 (2019); Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. LEGAL EDUC. 471, 474–80 (2004).

148. *See* Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2219 (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).

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

150. *Id.*

advertisements.[151] The Court's majority opinion, written by Justice Kennedy, began by articulating two first-amendment premises.[152] First, reiterating a 1976 decision, Kennedy stated that spending on political campaigns constitutes speech.[153] Second, reiterating a 1978 decision, the Court stated that free-speech protections extend to corporations.[154] With those premises in hand, Kennedy moved to a pillar of his reasoning, the self-governance rationale: free expression is a prerequisite for democratic self-government.[155] Thus, according to the Court: "Speech 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."[156] Free expression must be absolutely protected because democracy cannot exist without it.[157]

The *Citizens United* Court, that is, maintained that the First Amendment must be enforced as a formal and rigid rule, regardless of context or effects.[158] Thus, Kennedy explained the limitation on corporate campaign expenditures in the most alarming terms: "The censorship we now confront is vast in its reach."[159] Because restrictions on corporate political expression destroy "liberty,"[160] the government must satisfy strict scrutiny, proving that the regulation is necessary (or narrowly tailored) to achieve a compelling purpose.[161] Nevertheless, Congress had relied on extensive evidence showing that corporate spending corrupted democracy.[162] In fact, social science

---

151. 2 U.S.C.A. § 441(b)(a)–(b); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; *Citizens United*, 558 U.S. at 336–41; *see Citizens United*, 558 U.S. at 319–22 (discussing statutory restrictions).

152. *Citizens United*, 558 U.S. at 336–42.

153. *Id.* at 336–41 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

154. *Id.* at 340–42 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978)).

155. *E.g.*, Thornhill v. Alabama, 310 U.S. 88, 95–96 (1940); ALEXANDER MEIKLEJOHN, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT 18, 26 (1948); Harry Kalven, Jr., *The New York Times Case*, 1964 SUP. CT. REV. 191, 208.

156. *Citizens United*, 558 U.S. at 339.

157. *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).

158. 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." *Citizens United*, 558 U.S. at 354 (quoting New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008)).

159. *Id.* at 354.

160. *Id.* at 354 (quoting THE FEDERALIST NO. 10, at 130 (James Madison) (B. Wright ed., 1961)).

161. *Id.* at 340.

162. *Id.* at 452 (Stevens, J., concurring in part and dissenting in part); *see* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 207 (2003) (discussing congressional findings); *e.g.*, 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. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205) (emphasizing congressional findings).

research shows that excessive spending, whether corporate or otherwise, can corrupt or distort democracy.[163] The Court brushed aside this empirical evidence by narrowing the definition of corruption so dramatically that anything short of a bribe or the appearance of a bribe would be permissible.[164]

The Court bolstered its formalist protection of corporate spending, as political expression, by invoking the constitutional framers and original meaning. From James Madison and *Federalist, Number 10*,[165] Kennedy concluded that "[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations."[166] But this conclusion was so ahistorical as to be patently false. The framers' generation did not conceptualize corporations in a way that would even resemble the profit-driven multinational behemoths that dominate the twenty-first-century marketplace.[167] During the early decades of nationhood, corporations could be formed only when legislatures specially chartered them—general incorporation laws did not exist—and legislatures rarely granted such special state charters.[168] Moreover, legislatures almost never granted corporate charters to businesses that focused solely on profit-making. Instead, pursuant to a lingering premodern mercantilist outlook, states would charter corporations that promoted the common good by performing a function useful to the public, such as the building of infrastructure, including roads, bridges, and canals.[169]

Although the Court's conclusion about the framing was ahistorical, the Court's constitutional protection of corporate expression harmonized closely with the conservative bloc's neoliberal ideology.[170] While the Court tied its reasoning to the self-governance rationale and the democratic process, decisions such as *Lopez* and *Shelby*

---

163. LARRY M. BARTELS ET AL., *Inequality and American Governance*, *in* INEQUALITY AND AMERICAN DEMOCRACY 88, 113–17 (Lawrence R. Jacobs & Theda Skocpol eds., 2005).

164. *Citizens United*, 558 U.S. at 356–60.

165. *Id.* at 354–55 (quoting THE FEDERALIST NO. 10 (James Madison) (B. Wright ed., 1961)).

166. *Id.* at 353.

167. On the size and operation of corporations today, see JOEL BAKAN, THE CORPORATION (2004); JEFFRY A. FRIEDEN, GLOBAL CAPITALISM (2006).

168. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 179–81 (2d ed. 1985) (giving examples of corporate charters from early nineteenth century); *see id.* at 194–96 (discussing introduction of general incorporation laws).

169. JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970, at 14–17 (1970) (discussing corporations in early national years); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 53–55 (1993) (discussing the limitation that corporations were to pursue the common good).

170. Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2166–67 (2018).

County, which constrained government power and questioned congressional deliberations, underscore that the conservative justices are not truly committed to protecting or bolstering democratic government. But the Court is committed to protecting private-sphere economic power and the extension of that power into the public sphere. From that perspective, the *Citizens United* decision seemed totally predictable. And in subsequent campaign finance cases, the Roberts Court continued using formalist reasoning to protect economic power in the public sphere.[171] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* arose when the state of 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.[172] Publicly and privately financed candidates therefore could spend roughly the same amounts on their respective campaigns. In a five-to-four decision, the conservative bloc held that this campaign finance scheme violated the First Amendment.[173] The Court reasoned that the flexible public financing system imposed a "penalty" by diminishing the privately financed candidate's expression.[174] In dissent, Justice Kagan argued that the financing scheme, when viewed in context, was the opposite of a penalty. The public financing, she wrote, "subsidizes and so produces *more* political speech."[175] But the conservative majority insisted on applying a formal rule: Any regulation of campaign financing constituted an unconstitutional burden on free speech.[176] "[E]ven 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."[177] The Court's formalist approach to free speech mandated that an individual be allowed to translate private-sphere wealth into political power. The First Amendment, as interpreted by the Court, prohibited the government from attempting to correct for that economic skewing of political power; for instance, by providing equal funding to the less wealthy.

In *American Tradition Partnership, Inc. v. Bullock*, the Court invalidated a Montana statute providing that a "corporation may not make . . . an expenditure in connection with a candidate or a political

171. *See* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 727–28 (2011).
172. *Id.*
173. *Id.*
174. *Id.* at 736.
175. *Id.* at 763 (Kagan, J., dissenting) (emphasis in original).
176. *Id.* at 741.
177. *Bennett*, 564 U.S. at 7741.

committee that supports or opposes a candidate or a political party."[178] The Montana Supreme Court had upheld this statute in the face of a First Amendment challenge that relied on *Citizens United*.[179] The Montana Court reasoned that the specific history in the state—of corporate corruption of democracy—supported the state's claim that the regulation was narrowly tailored to achieve a compelling purpose.[180] In another five-to-four decision, the U.S. Supreme Court reversed the Montana Court.[181] The conservative bloc reasoned that "[t]here can be no serious doubt" that *Citizens United* controlled and precluded the state from even attempting to demonstrate that its factual situation was unique.[182] The *Citizens United* prohibition on campaign finance restrictions must be applied regardless of context or effects.[183] In a subsequent campaign finance case, Justice Thomas, concurring in the judgment, explicitly defended a formal free-speech rule prohibiting any restriction on campaign financing.[184] According to Thomas, 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.'"[185]

To be clear, the Roberts Court's formalism does not always result in the judicial protection of free expression. To the contrary,

178. 132 S. Ct. 2490, 2491 (2012) (quoting Mont. Code Ann. § 13-35-227(1) (2011)).

179. *Id.*

180. *Id.* at 2491–92 (Breyer, J., dissenting) (discussing W. Tradition P'ship v. Att'y Gen., 363 Mont. 220 (2011)).

181. *Id.* at 2491.

182. *Id.*

183. *Citizens United*, in theory, applied equally to corporations and unions. But *Knox v. Service 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 nonmembers to opt out of the fee. 132 S. Ct. 2277, 2277 (2012). The conservative bloc held that even if the union had provided an opt-out for the nonmembers, it would have been insufficient to satisfy the First Amendment. *Id.* at 2289. 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. Am. Fed'n of State, Cty., & Mun. Emps., 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).

184. McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 228 (2014) (Thomas, J., concurring in the judgment).

185. *Id.* (Thomas, J., concurring in the judgment) (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. Town of Gilbert, 135 S. Ct. 2218, 2224 (2015); *see* 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 [https://perma.cc/Q88L-6H62] (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. *Reed*, 135 S. Ct. at 2234, 2238–39.

sometimes a formal rule ostensibly leads the Court to defeat a free-speech claim.[186] *Pleasant Grove City v. Summum*, which raised a religious expression issue, provides an example.[187] The city of Pleasant Grove displayed in a public park several privately donated monuments, including one showing the Ten Commandments, contributed years earlier by the Fraternal Order of Eagles.[188] Summum, a minority religious group, offered to donate a monument showing its Seven Aphorisms.[189] The city refused to accept the monument.[190] The case resembled several Rehnquist Court decisions that had held public school properties to be public forums open for Christian organizations.[191] In one such case, *Rosenberger v. Rectors and Visitors of the University of Virginia*, the Court held that the First Amendment required a public university to fund an overtly religious student newspaper.[192] Such public forum decisions seemed to mandate that Pleasant Grove display the Summum monument in its public park, a traditional public forum.[193] But the Court invoked a formal rule that completely excused 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."[194] 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."[195]

---

186. 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.*, Rucho v. Common Cause, 139 S.Ct. 2484, 2487 (2019) (invoking the political question doctrine to defeat First Amendment and other constitutional challenges to gerrymandering schemes); Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) (invoking the state action doctrine to defeat free-speech claim).

187. 555 U.S. 460, 464 (2009).

188. *Id.* at 464–65.

189. *Id.* at 465.

190. *Id.* at 465–66.

191. The Court has deemed property such as the streets and parks, open for public speaking from time immemorial, to be a public forum. In the public forum, the First Amendment prohibits the government from restricting speech based on its content unless the government satisfies strict scrutiny. On other governmental property, however, the government can impose any reasonable restrictions on expression. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

192. 515 U.S. 819, 845–46 (1995). For similar cases, see Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

193. *See* Perry Educ. Ass'n, 460 U.S. at 45 (noting that streets and parks had been public forums since time immemorial).

194. Pleasant Grove City v. Summun, 555 U.S. 460, 464 (2009).

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

This decision illustrates how the Court can invoke formal rules to protect individuals and societal groups already possessing private-sphere resources and power—such as mainstream Christian religions or the wealthy—while the Court can simultaneously invoke formal rules that allow the continued suppression and subjugation of individuals and groups lacking private-sphere resources and power—such as the poor, racial minorities, and religious minorities. Whereas the Court in previous cases had forced the government to bolster the spread of mainstream Christian messages and values,[196] the *Summum* Court relied on a "recently minted" government speech rule to avoid similarly buoying nontraditional or minority religious messages and values.[197] The Roberts Court has invoked a variety of formal rules to preclude extending First Amendment protections to other peripheral groups and their members.[198] For instance, *Manhattan Community Access Corporation v. Halleck*, decided in 2019, involved two producers of public access programming, DeeDee Halleck and Jesus Papoleto Melendez, who made a film protesting public access TV's alleged neglect of East Harlem, a neighborhood in Manhattan, New York City.[199] New York City had contracted with the Manhattan Community Access Corporation (MNN) to run its public access television channels, and MNN aired the Halleck and Melendez film.[200] But when some viewers complained, MNN suspended the two producers from further access to its TV facilities.[201] Halleck and Melendez sued, claiming that MNN had violated their free-speech rights by denying them access based on the content of their expression.[202] The Court applied an ostensible formal rule, the state action doctrine, and held that MNN was not subject to First Amendment limitations because it was a private rather than a government actor.[203] The conservative bloc emphasized the importance of the public-private dichotomy, particularly as it relates to the protection of private property rights and "a robust sphere of individual liberty."[204] They even paraphrased a quotation often attributed

196. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 103, 107 (2001); Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 825–26, 832, 845–46 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 386–87, 396–97 (1993).

197. *Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring).

198. *See* Manhattan Cty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

199. *Id.* at 1927.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1928, 1934. Justice Sotomayor, dissenting, persuasively argued that MNN functioned as a state actor in this case. *Halleck*, 139 S. Ct. at 1934 (Sotomayor, J., dissenting).

204. *Id.* at 1934; *see id.* at 1930–31 (emphasizing private sphere).

to a conservative radio host, Dennis Prager: "It is sometimes said that the bigger the government, the smaller the individual."[205]

CONCLUSION

The Roberts Court is not firmly committed to protecting free expression. In numerous cases, the Court has found expression to be outside of First Amendment guarantees.[206] Moreover, the Court is not firmly committed to applying formal rules in free-expression cases. To be sure, as demonstrated above, the Court has purported to articulate and apply formal rules in numerous First Amendment decisions. Yet, just as surely, the Court has decided numerous free-expression cases where it would be difficult to characterize the opinion as formalist.[207] What unifies most of these decisions, whether formalist or not, is a conservative (neoliberal) commitment to protecting the private sphere, especially the economic marketplace and economic actors—particularly those wealthy actors already wielding economic power. Which parties have lost free-speech cases during the Roberts Court era? Public employee unions,[208] prisoners,[209] high school students,[210] government employees,[211] and those seeking an

205. *Id.* at 1934. Prager has said: "The bigger the government, the smaller the citizen." *Quotes*, JEFFERSON REVIEW, https://www.jeffersonreview.com/quotes/m-p [https://perma.cc/6H5N-BHCF] (last visited Nov. 4, 2019).

206. Holder v. Humanitarian Law Project, 561 U.S. 1, 7–8 (2010) (upholding punishment of speech that might provide material support to foreign terrorist organizations, even without proof of likely harm); Morse v. Frederick, 551 U.S. 393, 397 (2007) (upholding punishment of high school student for displaying banner stating "BONG HiTS 4 JESUS"); Beard v. Banks, 548 U.S. 521, 524–25 (2006) (severely limiting prisoner access to written materials and photographs); Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 724 (2011) (noting that, overall, the Roberts Court has a "dismal record" in free-speech cases); David Kairys, *The Contradictory Messages of Rehnquist-Roberts Era Speech Law: Liberty and Justice for Some*, 2013 U. ILL. L. REV. 195, 195–96 (discussing Rehnquist and Roberts Courts' inconsistencies in free-expression cases).

207. *E.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (holding that state law restricting data mining in the pharmaceutical industry violates free speech); *Morse*, 551 U.S. at 396–97 (upholding punishment of high school student for displaying banner stating "BONG HiTS 4 JESUS").

208. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2459–60, 2466 (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. Service Emps. Int'l Union , 132 S. Ct. 2277, 2284, 2295–96 (2012) (holding that public employee union could not impose a special assessment fee to support political advocacy even if union members could opt out).

209. *Beard*, 548 U.S. at 524–25 (severely limiting prisoner access to written materials and photographs).

210. *Morse*, 551 U.S. at 396–97 (upholding punishment of high school student for displaying banner stating "BONG HiTS 4 JESUS").

211. Borough of Duryea v. Guarnieri, 564 U.S. 379, 382–92 (2011) (limiting government employee's First Amendment right to petition the government); Garcetti v. Ceballos,

equal voice in democracy.[212] In every instance, the party wielding greater power has won the case. Moreover, in numerous cases, the Roberts Court has further followed neoliberal ideology by denigrating and weakening democratic government.

In sum, legal formalism in general and free-speech formalism in particular matter.[213] Yet, because of the dynamic interaction of law and politics in Supreme Court decision-making, one should not overstate the importance of formalism. Perhaps more so than any other case, *Sorrell v. IMS Health Inc.* illustrates the unpredictable and dynamic intersection of formalism and politics in free-speech decisions.[214] When pharmacies process prescriptions, they routinely record information such as the prescribing doctor, the patient, and the dosage.[215] IMS Health Inc. and other data mining businesses buy this information, analyze it, and sell or lease their reports to pharmaceutical manufacturers.[216] Subsequently, pharmaceutical salespersons, armed with this information, market their drugs more effectively to doctors.[217] A Vermont statute prohibited pharmacies from selling this information so as to protect the privacy of patients and doctors and to improve public health.[218] When the Court adjudicated the constitutionality of this legislation in *Sorrell*, the progressive

---

547 U.S. 410, 413–26 (2006) (limiting free-speech rights of government employees by distinguishing between speech as a citizen and speech as an employee).

212. *E.g.*, Rucho v. Common Cause, 139 S.Ct. 2484, 2487 (holding that constitutionality of extreme political gerrymandering was nonjusticiable political question); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–19 (2010) (invalidating restrictions on corporate campaign spending).

213. One way that formalism matters—and a way I have not discussed in this Essay—arises from the potential impact that Supreme Court decisions and doctrines have on the lower courts. *E.g.*, Florida *ex rel.* Att'y Gen. v. U.S. Dept. of Health and Human Servs., 648 F.3d 1235, 1328 (11th Cir. 2011) (invalidating individual mandate in Affordable Care Act); Passaic Daily News v. NLRB, 736 F.2d 1543, 1546–49 (D.C. Cir. 1984) (relying on an arguably formalist Supreme Court rule to find that newspaper-employer did not need to reinstate a columnist-employee who lost privileges because of union activities); Jian Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433, 436–37, 443 (S.D.N.Y. 2014) (relying on an arguably formalist Supreme Court rule to conclude that Chinese company operating an Internet search engine had a First Amendment right to make editorial judgments); *see* Lakier, *Antisubordinating*, *supra* note 56, at 2148–49 & nn.165, 167 (discussing effect of formalist rule relating to editorial freedom). Yet, the law-politics dynamic also affects the interpretation and application of legal rules in the lower courts. In other words, lower courts do not apply a pure law bereft of politics. For discussions of the influence of law and ideology in lower court decision-making, see FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS (2007); BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 125–31 (2010).

214. Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011).

215. *Id.* at 558.

216. *Id.*

217. *Id.*

218. *Id.* at 558–59. The law would protect public health by encouraging doctors to prescribe drugs in their patients' best interests rather than because of effective pharmaceutical marketing. *Id.* at 572.

dissenters were the ones arguing for a more formalist approach. They characterized the statute as a police power regulation of the economic marketplace.[219] As such, they reasoned that it did not trigger First Amendment protections at all.[220] From this perspective, the Court did not even need to discuss free speech. The majority reasoned, though, that the free-speech clause not only applied but also required "heightened judicial scrutiny."[221] Pursuant to this standard, the Court invalidated the statute.[222] In short, the Court interpreted data mining to be constitutionally protected expression rather than marketplace activity, and in doing so, the Court extended First Amendment protections over the marketplace and its economic actors.[223] Ultimately, then, the neoliberal Court rejected the application of a formalist rule in *Sorrell* but nonetheless protected private-sphere power as embodied in pharmaceutical corporations.

219. *Sorrell*, 564 U.S. at 596 (Breyer, J., dissenting).
220. *Id.* at 580–81 (Breyer, J., dissenting).
221. *Id.* at 563–64.
222. *Id.* at 580.
223. *Id.* at 557.