Written Testimony to the U.S. Senate Judiciary Committee
Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights

Hearing on "Supreme Court Fact-Finding and the Distortion of American Democracy""

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Chairman Whitehouse, Ranking Member Kennedy, and distinguished members of the Subcommittee, thank you for this opportunity to share my thoughts on the Supreme Court's judicial process, especially as it relates to fact-finding. I actually think that the hearing title is a bit loaded: first, because the Supreme Court doesn't generally engage in fact-finding in the way trial courts do, but rather applies the law to novel facts, as any appellate court is supposed to; and second, because however much one thinks American democracy is "distorted," the Supreme Court, a reactive institution, is hardly at fault. Indeed, the court is the most respected government institution other than police and the military,[1] so hand-wringing over its role in governance—or broader questioning of its legitimacy—principally arises when the justices rule in ways that disagree with progressive orthodoxy or, more broadly, when progressives are frustrated that there's a major institution they don't control. The chairman himself filed a brief in last year's Second Amendment case admonishing the Court to "heal itself before the public demands it be restructured in order to reduce the influence of politics."[2]

On the point about fact-finding, it's uncontroversial when the Supreme Court takes facts into account to assess reliance interests and other factors that go into proper jurisprudence, depending on the appropriate standard of review and procedural posture. But then there's the distinction between "adjudicative" facts—those that "relate specifically to the activities or characteristics of the litigants, and are facts that would typically go to the jury in a jury trial"—and "legislative" facts, information about the world that helps the court decides questions of law and policy.[3] Appellate courts generally aren't supposed to perform independent investigations to develop adjudicative facts. Just last week, the Court considered when a circuit court may review matters outside the trial record to determine whether a district court's error affected a defendant's substantial rights or impacted the fairness, integrity, or public reputation of the trial.[4]

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[1] "Confidence in Institutions," Gallup, https://bit.ly/2PbeNeP (presenting longitudinal surveys of public confidence in major American institutions) (last visited Apr. 22, 2021).

[2] Brief of Senators Sheldon Whitehouse, Mazie Hirono, et al. as Amici Curiae in Support of Respondents, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), https://bit.ly/38otf9Y.

[3] Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Procedures*, 55 Harv. L. Rev. 364, 365–66 (1942).

[4] *See* Transcript of Oral Argument, *Greer v. United States* (April 20, 2021) (No. 19-8709), https://bit.ly/3xe1Ge9.

Legislative facts are different, however, because they're used to explore the practical consequences of potential rulings, to develop doctrine that goes beyond the case at hand, and just rhetorically to buttress arguments. Justice Breyer is particularly well known for his independent internet searches, but all the justices employ legislative facts, so there's no ideological or jurisprudential bias with respect to taking judicial notice of or finding authoritative support for descriptions of real-world phenomena that make legal rulings more persuasive.[5] My fellow witness Indiana Solicitor General Thomas Fisher will discuss these issues in greater detail.

But something tells me that this hearing wasn't called to survey appellate review of summary judgment determinations—which are supposed to be based on whether there are any material issues of fact in dispute—or the difference between clear-error and abuse-of-discretion review. I don't think we're here to discuss the role that case-specific facts play in evaluating whether a given lawsuit should properly be construed as challenging a statute as-applied versus facially. Nor is this an academic seminar on the proper scope of judicial notice, or how the integrity and probity of facts developed through the adversarial process (including *amicus curiae* briefs[6]) may be different from those produced by "in-house" research by the justices and their clerks. Because if that's what interests this committee, I suggest that we all yield all of our time to Prof. Allison Larsen, whose empirical work in this area, with which I've been familiarizing myself since being called to testify at this hearing, is truly ground-breaking.

Instead, this seems to be a collateral attack on certain rulings that Prof. Larsen has called "facty"—meaning legal determinations "infused with factual observations."[7] Specifically, *Shelby County v. Holder* (2013) and *Citizens United v. Federal Election Commission* (2010). As I'll discuss below, neither independent Supreme Court fact-finding, nor even legislative facts presented in *amicus* briefs, played much of a role in those controversial cases. I certainly wouldn't put them in the same category for these purposes as *Brown v. Board of Education* (1954), *Roe v. Wade* (1973), or *Grutter v. Bollinger* (2003).

But before turning to those cases, I want to briefly comment on the role of *amicus* briefs, because I know that's one of the chairman's special interests. Prof. Larsen has done significant empirical work in this area as well,[8] but my own Cato Institute is one of the biggest filers of Supreme Court *amicus* briefs, so I have plenty of "lived experience." My briefs aren't a good example of feeding the justices legislative facts or otherwise assisting with fact-finding, because we almost always make purely legal arguments. We typically make doctrinal points or expand on the parties' legal arguments rather than filing "Brandeis briefs," because, as a think tank focused on public policy, Cato has no real expertise in sociology or technology or biology. We do sometimes employ institutional or outside academic experts on economics or legal history or financial regulation, most often to counter opposing arguments in these areas.

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[5] *See* Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 Va. L. Rev. 1255, 1260–63 (2012), https://bit.ly/2RQ1bGN.

[6] *Id*. at 1257 n.12 (making the assumption that "a party's amici count as part of the adversarial process"); *id*. at 1270–71 (distinguishing legislative facts found "in-house" by a justice from those coming "from any of the party briefs or from the briefs submitted by amici curiae"); *id*. at 1291 (noting that bias is easier to spot among "dueling experts in the courtroom" or "dueling citations at the briefing process—even when facts come from amici—since these sources are all subject to counterarguments in reply briefs or at oral argument").

[7] Allison Orr Larsen, *Judging "Under Fire" and the Retreat to Facts*, 61 Wm. & Mary L. Rev. 1083, 1089 (2020), https://bit.ly/3xdBArG..

[8] *See*, *e.g.*, Allison Orr Larsen, *The Amicus Machine*, 102 Va. L. Rev. 1901 (2016), https://bit.ly/3tIjk7G.

I. My Experience with "The *Amicus* Machine"

In all our briefs, Cato maintains an unwavering commitment to articulating for the Court how the principles of liberty through limited government and a commitment to the original public meaning of the Constitution should guide their decisions. That's our only interest, and we don't hide it. Petitioners to the Supreme Court from all over the country actively seek Cato's support—so many that we turn away a good deal due to lack of resources.

As we all recognize, *amicus* filings have exploded in recent years. For example, the constitutional challenge to the Affordable Care Act, *NFIB v. Sebelius* (2012), drew 136 *amicus* briefs. This record was short-lived, as three years later, the consolidated same-sex marriage cases, *Obergefell v. Hodges* (2015) entertained 149 *amicus* briefs.

Each year, thousands of petitions for a writ of certiorari are filed and only about 75 are granted. Among those thousands of petitions, relatively few receive support from *amici*. Many academic studies have indicated that briefs at the cert. stage have a greater impact on the Court—greater, that is, than just being another voice among the potentially dozens of briefs weighing in on the merits. Accordingly, for about the last decade, Cato has consistently filed more briefs in support of certiorari than on the merits. We have also expanded our presence in the circuit courts of appeals, as well as in state supreme courts. In those courts, which receive far fewer *amicus* briefs than the U.S. Supreme Court, we concentrate our legal firepower on upcoming issues.

Amicus briefs serve a variety of purposes. Some inform the justices about economic, historical, scientific, or sociological data. Those briefs can be useful in more esoteric cases that are difficult for even the best legal minds to understand; the justices aren't experts on everything. For a case dealing with an adjustment in banking regulations, for example, it can be helpful for those who are more familiar with banking practices to tell the Court how those changes will work in practice. Other briefs can focus on a particular legal argument that isn't fully explored in the merits briefs, or explain the scope of the problem that the Court is asked to address. For briefs supporting cert. petitions, it can be helpful to explain why a given legal issue requires the Court's attention and why taking a particular case is the best way to resolve that issue.

Some *amicus* briefs—actually a significant number of them (particularly in the highest-profile cases)—are just "me too" briefs. These filings merely restate the arguments for the main parties in different language. These are not helpful to the Court and are usually ignored.

At Cato, we actively avoid "me too" briefs. We work with the counsel for the parties we support—and their "*amicus* wranglers"—as well as other *amici*, to discuss what arguments need to be covered. To maximize efficiency and avoid redundancy, often we'll join other organizations' briefs rather than filing our own, or invite other groups to join ours. A properly coordinated array of *amicus* briefs will hit all sides of the argument, with little overlap, and provide information about the scope of the problem and the effects of possible rulings.

Despite Chairman Whitehouse's quixotic crusade against *amicus* brief funding,[9] there's nothing fishy about donations to think tanks and other nonprofit organizations involved in strategic litigation. People fund organizations that support their values and policy perspectives. It's done on the left and the right, and affects cases of constitutional, civil, and criminal law. Cato itself is funded mostly by individuals (75% in 2019) and foundations (20% in 2019).[10]

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[9] *See*, *e.g.*, "Sen. Sheldon Whitehouse Outlines Dark Money Schemes, Hidden Powers behind SCOTUS Nominee," *USA Today*, Oct. 13, 2020, https://bit.ly/38s2Esy.

[10] *See* Cato Institute 2019 Annual Report at 41, https://bit.ly/3t56wrm.

We also get a tiny bit of corporate funding (3% in 2019), which I would hazard is much less than the chairman gets from corporate PACs for his reelection campaigns.[11] In short, the attack on *amicus* briefs and their funders is misguided. It also misplaces the causation arrow as between funding and issue advocacy. Advocacy groups exist to advance all sorts of causes—and donors, both individual and corporate, fund those causes they support.

Because of effective lawyering and strategic amicus coordination, as well as a Constitution that, interpreted properly, is quite libertarian, the Supreme Court has been one of the few friends in government, relatively speaking, for advocates of individual liberty. For example, in the 2012–2013 term, the Court sided with Cato 15 times out of 18 filings, seven of them unanimously. Cato also went three-for-three that term on the Court's blockbuster, end-of-term cases: affirmative action (*Fisher v. UT-Austin I*), same-sex marriage (*Obergefell v. Hodges*), and the Voting Rights Act (*Shelby County v. Holder*). In fact, we were the only organization to support the constitutionally correct outcome in *each* of those cases. Moreover, Cato was the only organization in the entire country to have filed briefs in support of both Jim Obergefell and, five years later, Jack Phillips, the owner of the bakery in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018). The libertarian view is truly a third way not represented by either progressives or conservatives.

II. *Shelby County v. Holder*: The Court Grapples with the Meaning of "Appropriate Legislation" Under the Fifteenth Amendment[12]

The Constitution doesn't grant Congress the power to do whatever it wants regarding voting rights or election regulation, or even the prevention of racial disenfranchisement. Instead, Section 2 of the Fifteenth Amendment says that "Congress shall have power to enforce this article by appropriate legislation." What "appropriate legislation" means may be disputed by legal scholars, but four years before *Shelby County*, the Supreme Court determined that the Voting Rights Act "imposes current burdens and must be justified by current needs."[13] But regardless of how one articulates the standard, the point is that legislation passed to protect voting rights under the Fifteenth Amendment may be fully constitutional when enacted but cease to be later, at the point when the underlying conditions no longer make it "appropriate." Jurists and scholars can argue in good faith over when that point is reached, but regardless it's not fact-finding: it's an application of the law to the facts of the case. In other words, it's judging.

And so it shouldn't be surprising that *Shelby County* eased out what was supposed to be a temporary provision enacted in 1965 to provide federal oversight of state elections based on that era's racial disparities. While politicians and pundits irresponsibly liken the ruling to sanctioning fire hoses, dogs, night riders, and all-white primaries, it actually shows the strength of voting protections. The Court simply found that the Section 4(b) "coverage formula" for jurisdictions

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[11] "Sen. Sheldon Whitehouse—Campaign Finance Summary," OpenSecrets.org, https://bit.ly/3btZu9y (showing that PAC contributions—not all of which are corporate—constitute 21.41% of funds raised between 2015 and 2020).

[12] This section is based on Ilya Shapiro, *Shelby County and the Vindication of Martin Luther King's Dream*, 8 NYU J. L. & Liberty 182 (Fall 2013), https://bit.ly/3sy8CiE.

[13] *Northwest Austin Mun. Util. Dist. No. 1 v. Holder (NAMUDNO),* 557 U.S. 193, 203 (2009). Justice Thomas dissented in part, because he would've gone further than Chief Justice Roberts's opinion for the Court, but that doesn't affect his agreement with this general statement about how to justify voting-rights legislation under the Fifteenth Amendment. Indeed, Justice Thomas would've invalidated Section 5 then and there for failing that test. *Id*. at 212 (Thomas, J., concurring in the judgment in part and dissenting in part).

subject to Section 5 preclearance was unconstitutional because it was based on 40-year-old data, such that covered jurisdictions no longer corresponded to incidence of racial discrimination in voting. Had Congress updated Section 4(b) when it renewed Section 5 in 2006, the Court would've had a harder time finding the coverage formula outdated. But it didn't, so its legal conclusion is hard to argue with, regardless of inflammatory disingenuousness to the contrary.

After all, when the coverage formula was enacted, Mississippi was "a state sweltering with the heat of oppression,"[14] but by the time *Shelby County* came down it had the best ratio of black-voter turnout to white-voter turnout.[15] And the Magnolia State was and remains one of a number of states where voter-registration rates are higher for blacks than for whites. Indeed, covered states led (and continue to lead) the nation in government officials who are racial minorities, including those elected statewide.[16]

In other words, just as the Court was correct in 1966 to approve, as a matter of law, the constitutional deviation that preclearance represents as an "uncommon" remedy to the "exceptional conditions" in the Jim Crow South,[17] it was correct in 2013 to restore, on the basis of legal findings, the constitutional order. While Justice Ruth Bader Ginsburg in dissent compared ending preclearance to "throwing away your umbrella in a rainstorm because you are not getting wet,"[18] it's actually more like stopping chemotherapy when the cancer (of Jim Crow) is eradicated. As Justice Clarence Thomas wrote in another voting rights case four years earlier, disabling preclearance "represents a fulfillment of the Fifteenth Amendment's promise of full enfranchisement and honors the success achieved by the VRA."[19] Instead, progressive elites focus on a decision that, far from removing protections for racial minorities' voting rights—the key Voting Rights Act provision (Section 2), which facilitates suits against discriminatory state actions, remains very much in effect—declared an end to the state of emergency that existed when those rights actually were systematically threatened.

To put a finer point on it, the way that Chief Justice John Roberts began his opinion in *Shelby County* shows what was really at stake in the case, and that this ruling was firmly grounded in law, rather than "Supreme Court fact-finding." Although this preamble doesn't explicitly state what the Court's ultimate ruling is, it provides the key to the case and gives you all you really need to know about the modern Voting Rights Act—save one bit that I'll explain shortly after. To make this easier, I've divided Roberts's introduction into the logical points that he sequentially makes and then paraphrased them.

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[14] Martin Luther King, Jr., "I Have a Dream," Speech at the March on Washington, Aug. 28, 1963, https://n.pr/3sDly6Q.

[15] *See* Ilya Shapiro, "Voting Rights in Massachusetts and Mississippi," *Cato at Liberty* (Mar. 6, 2013, 1:55 PM), https://bit.ly/3dDEWwf.

[16] For example, Thurbert Baker served as attorney general of Georgia from 1997 to 2011, having initially been appointed by Gov. Zell Miller and then winning three elections; Wallace Jefferson became the first black justice (2001) and chief justice (2004) of the Texas Supreme Court through appointments by Gov. Rick Perry, and was elected to a full term as chief justice in 2008. In the U.S. Senate, meanwhile, Ted Cruz and Marco Rubio were elected to represent Texas and Florida, respectively, with Tim Scott also going on to win two state-wide elections in South Carolina after having initially been appointed to his seat.

[17] *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

[18] *Shelby County v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

[19] *NAMUDNO*, 557 U.S. at 229 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

Point 1:

> The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty.[20]

Translation: The Voting Rights Act provisions at issue here are really, really unusual, outside the normal constitutional framework, and require some sort of extraordinary factual basis to support their constitutionality.

Point 2:

> This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U. S. 301, 309 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." *Id*., at 334.[21]

Translation: The really bad things going on in the Jim Crow South justified the Sections 4-5 constitutional deviation.

Point 3:

> Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years. *See* Voting Rights Act of 1965, § 4(a), 79 Stat. 438.
>
> Nearly 50 years later, they are still in effect; indeed, they have been made more stringent, and are now scheduled to last until 2031.[22]

Translation: These were supposed to be temporary measures, so it's notable that they're still in effect nearly 50 years later and are due to continue for nearly 30 more years; Jim Crow must still be roaming the land.

Point 4:

> There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, "the racial gap in voter registration and turnout [was] lower in the States originally covered by § 5 than it [was] nationwide." *Northwest Austin Municipal*

[20] *Shelby County*, 570 U.S. at 535.

[21] *Id*.

[22] *Id*.

> *Util. Dist. No. One v. Holder*, 557 U. S. 193, 203-204(2009). Since that time, Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent. See Dept. of Commerce, Census Bureau, Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States (Nov. 2012) (Table 4b).[23]

Translation: Actually no, and indeed there doesn't seem to be *any* evidence that racial minorities, or at least blacks, are systematically disadvantaged versus whites in terms of the right to vote—certainly not in Section 5-covered jurisdictions.

Point 5:

> At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs." *Northwest Austin*, 557 U. S., at 203.[24]

Translation: Racial discrimination in voting hasn't been fully eradicated, of course, but does it really still exist in the same widespread, systemic way such that all those extra-constitutional measures—and the burdens they put on our federal structure—are still justified? After all, we've said repeatedly that remedies need to match wrongs.

Shelby County thus becomes rather easy to understand: the Court had to restore the constitutional order—the *status quo* that existed before the temporary Sections 4 and 5—because, at the very least, there's no correlation between the coverage formula and racial discrimination in voting.[25]

In other words, the following *factual* questions were completely irrelevant to the case: Does racial discrimination still exist? Does racial discrimination in voting still exist? Is racial discrimination in voting more common in Section 5-covered jurisdictions than elsewhere?

Even if the answer to all those questions was yes—which it was to the first two but not the third—that wouldn't have been enough to uphold the preclearance regime. Instead, the only question that mattered is whether the "exceptional conditions" and "unique circumstances" of the Jim Crow South still existed such that an "uncommon exercise of congressional power" is still constitutionally justified—to again quote the 1966 ruling that approved Section 5 as an emergency measure.[26]

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[23] *Id*.

[24] *Id*. at 536.

[25] Justice Ginsburg's dissent goes much more to the question of who gets to decide whether the facts on the ground justify continued application of Section 5, Congress or the courts. *Shelby County*, 570 U.S. at 559. (Ginsburg, J., dissenting). As a proponent of judicial review and engagement, I see the role of judges as saying what the law is rather than avoiding such rulings—but that debate is beyond the scope of this essay. *See generally* Clark Neily, *Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government* (2013).

[26] *Katzenbach*, 383 U.S. at 334.

The answer to that question must be no—and it doesn't take any "fact-finding" to get there. At the very least, political conditions had changed such that the 40-year-old voting data on which Section 4(b) relied was subjecting a seemingly random collection of states and localities to onerous burdens and unusual federal oversight. As Chief Justice Roberts wrote for the Court the last time it looked at this law, the "historic accomplishments of the Voting Rights Act are undeniable," but the modern uses of Section 5 "raise[] serious constitutional concerns."[27]

Yet Congress renewed Section 5 without updating the Section 4(b) formula, and it ignored the Court's warning that "the Act imposes current burdens and must be justified by current needs."[28] Accordingly, it should've come as no surprise that the chief justice noted that "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[29]

For example, on the measures originally used to determine Section 5 coverage—racial disparities in voting and voter registration—Massachusetts is the worst offender, while Mississippi is our national model.[30] As Chief Justice Roberts explained in *Shelby County*, even if one views the thousands of pages of congressional record related to the 2006 reauthorization in their best light, "no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time."[31]

Moreover—and this was the extra bit I alluded to earlier—it's Section 2, the nationwide ban on racial discrimination in voting, that is the core of the Voting Rights Act, and it remains untouched.[32] Section 2 provides for both federal prosecution and private lawsuits, and allows prevailing parties to be reimbursed attorney and expert fees. As I described in the run-up to oral argument in *Shelby County*, there was no indication that Section 2 is inadequate.[33]

Sections 4 and 5, meanwhile, were supposed to supplement Section 2—and they succeeded brilliantly, overcoming "the conditions that originally justified these measures."[34] Of course, the Court really should've gone further, as Justice Thomas pointed out in his concurring opinion.[35] The Court's explanation of Section 4(b)'s anachronism applies equally to Section 5.

In practice, however, Congress has been and will continue to be hard-pressed to enact any new coverage formula, not simply due to political realities, but because the "extraordinary problem"—the "insidious and pervasive evil" of "grandfather clauses, property qualifications, 'good character' tests," and other "discriminatory devices"[36]—that justified a departure from the

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[27] *NAMUDNO*, 557 U.S. at 201, 204.

[28] *Id*. at 203.

[29] *Shelby County*, 570 U.S. at 535.

[30] Transcript of Oral Argument at 32, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

[31] *Shelby County*, 570 U.S. 554 (quoting *Katzenbach*, 383 U.S. at 308, 315, 331; *NAMUDNO*, 557 U.S. at 201).

[32] Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

[33] Ilya Shapiro, "*Shelby County v. Holder*: Section 5 of the Voting Rights Act Conflicts with Section 2, Which Provides the Proper Remedy for Racial Discrimination in Voting," *SCOTUSblog*, Feb. 14, 2013, https://bit.ly/2QdIlt2.

[34] *Shelby County*, 570 U.S. at 535.

[35] *Id*. at 557 (Thomas, J., concurring).

[36] *Katzenbach*, 383 U.S. at 309–14 (using these phrases to describe the Jim Crow South's evasion of laws and judicial decrees protecting voting rights).

normal constitutional order is, thankfully, gone. Bringing us full circle, then, Chief Justice Roberts concluded his opinion on that point: "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[37]

Shelby County thus underlined that Jim Crow is dead.[38] Yet our political leaders are acting as if the last 50 years never happened. They declared that *Shelby County* reversed the gains that have been made and enabled "voter suppression"—when actually it's a belated recognition that times have changed and that widespread, official racial discrimination in voting has disappeared. Attorney General Eric Holder vowed to use "every tool" at his disposal to continue federal control, including joining a lawsuit against Texas's redistricting plan and filing his own against several states' voter-identification laws.[39] But the Justice Department's lawsuits proved the Supreme Court's wisdom. They showed that plenty of laws exist to combat racial discrimination in voting, and it's the effectiveness of those laws that have obviated Section 5 (and its coverage formula).

For example, Section 2 of the Voting Rights Act grants both private parties and the federal government the right to go after state practices that constitute "a denial or abridgment of voting rights."[40] It empowers citizens to challenge specific instances of discrimination and allows them to recover from defendants the costs of their lawsuits. Section 3, meanwhile, gives courts the power to order federal supervision—including Section 5-style preclearance—over jurisdictions that have engaged in deliberate discrimination that violates voting rights and are likely to continue this conduct in the absence of that extreme remedy.[41]

The only difference from the Section 5 regime is that the federal government now actually has to *prove* the existence of discrimination. Indeed, it's axiomatic that plaintiffs in civil rights cases have to prove discrimination with regard to federal protections in our education, employment, housing, lending, and public accommodations laws, for example, even if one can quibble with whether and how those laws go after disparate "impact" rather than mere disparate treatment.[42] That's just the way law works in the United States: having to prove liability (for racial discrimination or otherwise) in civil suits is equivalent to having to prove guilt in criminal prosecutions—and the evidentiary standard is easier to meet in the former. Voting-rights cases where plaintiffs can meet that standard undermine the claim that the Supreme Court made it impossible to enforce voting rights. In cases where they can't, isn't that a good thing?

Of course, progressives believe that voter-identification laws (and related ballot-integrity tweaks) are themselves evidence of discriminatory conduct. But there's no evidence that such laws keep anyone from voting. Indeed, voter ID more generally is hugely popular, including

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[37] *Shelby County*, 570 U.S. 557.

[38] *See generally* Hans A. von Spakovsky, "The Voting Rights Act After the Supreme Court's Decision in *Shelby County*," Testimony Before the H. Comm. on the Judiciary, Subcomm. on the Constitution, July 18, 2013, https://herit.ag/3n6PIhP.

[39] *See* Adam Liptak & Charlie Savage, "U.S. Asks Court to Limit Texas on Ballot Rules," *N.Y. Times*, July 26, 2013, at A1; Josh Gerstein, "DOJ Challenges North Carolina Voter ID Law," *Politico*, Sept. 30, 2013, https://politi.co/3tICHh0.

[40] Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965).

[41] Id. at § 3.

[42] *See generally* Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008-2009 Cato Sup. Ct. Rev. 53 (2009), https://bit.ly/3dLbTXJ.

56% of Democrats and 69% of African Americans. [43] And majorities of all racial groups—64% of whites, 59% of blacks, and 58% of other minorities—reject the claim that voter ID laws discriminate against certain voters.[44] Indeed, many democratic countries require voter ID of some form, including Canada, France, Germany, India, Israel, Italy, Sweden, and Switzerland.

To top it off, the bipartisan 2005 Commission on Federal Election Reform, led by Jimmy Carter and James Baker, recommended voter ID as one of many common-sense reforms to promote election integrity.[45] As the Supreme Court explained five years before *Shelby County*, in a 6-3 decision written by the liberal Justice John Paul Stevens, such requirements are constitutional so long as the state doesn't unduly burden the ability to get an ID. [46] And anyway, a recent National Bureau of Economic Research study found that these provisions have "no negative effect on registration or turnout," either overall or for any race, gender, or age group.[47]

In any event, we can continue debating whether *Shelby County* was correctly decided—in my mind, Congress made it an easy case when it declined to update the coverage formula—but it neither represents improper Supreme Court fact-finding nor a distortion of American democracy.

III. *Citizens United v. FEC*: The Court Applies the First Amendment to Restrictions on Political Speech[48]

Citizens United is an even less fact-dependent case than *Shelby County*, because it didn't involve the constitutionality of a law that was at one point constitutional—because of the need to address extraordinary circumstances—but gradually lost its constitutional justification when the underlying circumstances changed. The case didn't turn on the amount of money donated to political candidates or parties, or whether corporations and unions had been increasing their election-related spending. The question it asked was important, but simple and entirely a legal one: does the First Amendment allow the government to restrict independent political speech that's paid for by an organization rather than individuals?

Although some argue that *Citizens United* relied on a factual finding that independent organizational spending doesn't corrupt politics,[49] Justice Kennedy's majority opinion makes clear that it's grounded in legal reasoning. To wit, the only constitutional justification for restricting political speech is to prevent *quid pro quo* corruption or the appearance thereof:

> When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected

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[43] Kerry Picket, "Voter ID Rules Popular Among Public: Polls," *Washington Examiner*, Apr. 2, 2021, https://washex.am/3au5BJQ.

[44] "Election Integrity: 62% Don't Think Voter ID Laws Discriminate," *Rasmussen Reports*, Apr. 13, 2021, https://bit.ly/32A1S9n.

[45] *Building Confidence in U.S. Elections*, Report of the Comm'n on Federal Election Reform (Sept. 2005), https://bit.ly/3ei8a36.

[46] *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

[47] Enrico Cantoni & Vincent Pons, "Strict ID Laws Don't Stop Voters: Evidence From a U.S. Nationwide Panel, 2008-2018, Nat'l Bur. Econ. Res. (Feb. 2019), https://bit.ly/2ROQlRr..

[48] This section is based on Ilya Shapiro, *Stephen Colbert Is Right to Lampoon Our Campaign Finance System (And So Can You!)*, 4 St. Thomas J.L. & Pub. Pol'y 317 (Spring 2012), https://bit.ly/32qMI6b.

[49] *See*, *e.g.*, Allison Orr Larsen, *Factual Precedents*, 162 U. Pa. L. Rev. 59, 63 (2013), https://bit.ly/3sJBsNb.

> officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.[50]

In other words, *Citizens United* was correctly decided because political speech should be free regardless of the nature of the speaker: People don't lose their rights when they get together and associate, whether it be in unions, advocacy groups, private clubs, commercial enterprises, or any other form.[51] But the ruling did create the odd situation whereby independent political speech is unbridled for the most part while candidates and parties are heavily regulated. And so, if you look at who really gained for practical purposes from *Citizens United*, it's non-profits and advocacy groups and independent speakers of various kinds, be it the Heritage Foundation, the Sierra Club, the ACLU, the NRA—or at least the political advocacy arms of such tax-exempt groups—small business associations, or trade groups. The losers, meanwhile, are political parties and candidates because they, in relative terms, now have less money and less control over their message. That's not necessarily a bad thing—parties aren't privileged under the Constitution—but it does create a weird dynamic.

But anyway, debating campaign-finance policy is beside the point, because *Citizens United* didn't involve a policy judgment, let alone motivated fact-finding to support such a judgment. And it doesn't stand for half of what many people think it does. Take for example President Obama's famous statement at the 2010 State of the Union, that the case "reversed a century of law that I believe will open the floodgates of special interests—including foreign corporations—to spend without limit in our elections."[52] In that sentence, the former constitutional law professor stated four errors of constitutional law.

First, *Citizens United* didn't overturn a century of law; it overturned 20 years at most. Obama was referring to the Tillman Act of 1907, which prohibited direct corporate donations to candidates and parties. *Citizens United* didn't touch that issue. Instead, the overturned precedent was *Austin v. Michigan Chamber of Commerce*, a 1990 case that, for the first time ever or since, sanctioned a regulation of political speech based on something other than corruption or the appearance thereof.[53]

Second, as far as opening the floodgates to special interests goes, it depends on how you define those terms. Ten years later, there isn't much indication that there's a change in kind, a

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[50] *Citizens United v. FEC*, 558 U.S. 310, 361 (2010).

[51] *See* Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. Marshall L. Rev. 701, 707–08 (2011), https://bit.ly/3xkdSdh.

[52] "Remarks by the President in State of the Union Address," Off. of Press Sec'y (Jan. 27, 2010), https://bit.ly/3dBsa1d.

[53] *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 655 (1990). For a further critique of the president's factual assertion on this point, see Ilya Shapiro & Nicholas Mosvick, *Stare Decisis After Citizens United: When Can Courts Overturn Precedent*, 16 Nexus: Chap.'s J.L. & Pol'y 121, 125–26 (2011), https://bit.ly/2PgzVAx.

geometric increase—as opposed to growing at a standard rate, more or less constant with GDP and inflation—in spending by corporations or even independent advocacy groups (though there may be by unions). There are certainly now people running Super PACs who would otherwise be supporting candidates in other ways—as bundlers or directors of regular PACs—but Super PACs aren't a function of *Citizens United* (as I'll get to shortly). It's just unclear that any "floodgates" have been opened or what these special interests are that didn't exist before.

Third, the rights of foreigners—corporate or natural persons—is another issue about which *Citizens United* said nothing. Indeed, two years later, the Supreme Court summarily upheld the restrictions on foreign spending in U.S. political campaigns.[54]

Fourth and finally, there's the charge that spending on elections now has no limits. Well that might be true in the context of independent political speech, but it's certainly not for candidates and parties—whose spending was not at issue in *Citizens United*—nor for donors to candidates and parties. *Citizens United* didn't rule on either individual or corporate contributions to candidates. What it did was to remove the limits on independent associative expenditures.

These are some very basic points that even people who agree with *Citizens United* often misperceive. The most important thing about the case was the Supreme Court's definitive ruling that the only acceptable rationale for limiting speech and enacting various other campaign finance regulations was corruption and the appearance of corruption. By overruling *Austin*, *Citizens United* made it clear that "equalizing voices" is not a constitutionally adequate justification for limiting independent spending. You can disagree with that legal analysis, but it's not based on some inappropriate fact-finding.

Moving past President Obama's four errors and related and misapprehensions about *Citizens United*, there's a more serious critique of the case that needs to be addressed. Striking down the law, the argument goes, disrespects *stare decisis*, a prudential doctrine that says that reliance interests sometimes dictate that an incorrect legal ruling be maintained, because the social cost of fixing it may be greater than the benefit. *Stare decisis* encourages deference to past decisions to promote predictable and consistent development of the law, cultivate reliance on judicial decisions, and contribute to the integrity of the judicial process.

I've co-authored an article on this subject, the upshot of which is that, much less than disrespecting *stare decisis*, *Citizens United* vindicates it.[55] That is, *stare decisis* isn't a forever-binding principle that prohibits courts from ever overturning precedent but rather a way to ensure that courts factor in reliance interests. In the Supreme Court's words, "*Stare decisis* is not an inexorable command nor a mechanical formula of adherence to the latest decision."[56] Think about it: if *stare decisis* meant what those who criticize *Citizens United* want it to mean, then *Plessy v. Ferguson* could never have yielded to *Brown v. Board of Education* and *Bowers v. Hardwick* could have never have yielded to *Lawrence v. Texas*. Those earlier decisions—upholding state laws regarding racial segregation and homosexual activity, respectively—would still be good law. The Court will, after all, get the law wrong on occasion, but it expresses no commitment to its own integrity if it rigidly refuses to retreat in the face of persuasive logic. That would be a sign of closed-mindedness, not a wise jurisprudence of legal fidelity. So the question is, how do we apply *stare decisis*? When to overturn old precedent and when to let it be?

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[54] *Bluman v. FEC*, 565 U.S. 1104 (2012).

[55] Shapiro & Mosvick, *Stare Decisis After Citizens United*, *supra* note 53.

[56] *Payne v. Tennessee*, 510 U.S. 808, 828 (1991).

The Supreme Court has identified a set of factors relevant to *stare decisis* analysis: (1) the area of law that's at issue; (2) workability; (3) antiquity; and, as I've stressed, (4) reliance interests. A few of these have some "facty" aspects because, again, the Court is applying a prudential doctrine that by definition requires case-specific adjudication.

First, the Court had little incentive to sustain the kind of "leveling the playing field" justifications for political-speech restrictions that were put in play by *Austin v. Michigan Chamber of Commerce* and reinforced by *McConnell v. FEC*[57] because this was a constitutional (First Amendment) issue. While *stare decisis* is strong with respect to the common law cases or statutes—judicial rulings in these areas can be reversed by legislation—courts cannot give as much deference to constitutional decisions because those are much harder to change non-judicially: you need a constitutional amendment. So when Citizens United came before the Court and questioned its interpretation of the First Amendment, the strength of *stare decisis* was already at its lowest ebb—but not because of any new facts.

Second, with respect to workability, well, the system wasn't doing well. It was (hypothetically) banning books. It was hard for the FEC to implement and a lot turned on subjective interpretations of various magic words like "electioneering communications." It wasn't clear to major actors what the real rules of the game were, and all of these cases from *McConnell* to *Wisconsin Right to Life*[58] to *FEC v. Davis*[59] to *Citizens United* showed that there was a natural progression undoing the unworkable aspects of the regime that the McCain-Feingold campaign-finance law had put in. The Court knew all this; it didn't have to find it out in the course of deciding *Citizens United*.

Third, antiquity. In *Austin*—which, again, was decided in 1990, not 1900—the Court recognized a unique state interest in guarding against corporations' unduly influencing elections by making election-related expenditures from their general accounts (rather than PACs or other segregated funds). So it upheld a law under an equality rationale to eliminate so-called distortions caused by corporate spending. That's the first and only time that the Court endorsed something other than a "corruption or appearance of corruption rationale," and it wasn't even clear if that's what it were doing because *Austin* was facially inconsistent with existing case law. That is, the Court had resolved in both *Buckley v. Valeo* and *First National Bank v. Bellotti* that not only no compelling state interest existed in limiting independent corporate expenditures, but also that the government could not limit any persons—defined to include corporations—from making independent expenditures. [60]

While *Austin* would eventually be reinforced by *McConnell*, the years between *McConnell* and *Citizens United* saw a series of cases that eroded *Austin*'s holding with respect to corporate political speech. In *Wisconsin Right to Life*, the Court held that the state interest in addressing the coercive and distortive effect of immense aggregations of wealth could not be extended to "genuine" issue ads.[61] The following year, in *Davis*, the Court struck down the so-called Millionaire's Amendment to McCain-Feingold, which relaxed campaign-finance restrictions for opponents of self-funded candidates, because it burdened those "millionaire"

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[57] *McConnell v. FEC*, 540 U.S. 93 (2003).

[58] *FEC v. Wis. Right to Life, Inc. (WRTL II),* 551 U.S. 449 (2007).

[59] *Davis v. FEC*, 554 U.S. 724 (2008).

[60] *Buckley v. Valeo*, 424 U.S. 1 (1976); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

[61] *WRTL II*, 551 U.S. at 471.

candidates' First Amendment right to spend money on political speech.[62] *Davis* didn't grapple with *Austin* directly, but it did revitalize *Buckley*'s holding that a restriction on *expenditures* wasn't justified by the government's concern in preventing corruption. It also rejected the government's argument that the expenditure cap should be upheld on the ground that it equalizes the relative resources of the candidates.[63] *Davis* thus reinvigorated *Buckley*'s point that the government's ability to restrict the speech of some to enhance the relative voice of others—"leveling the playing field"—is incompatible with the First Amendment. And so, the legal rule overturned by *Citizens United* didn't possess the force of antiquity. Indeed, even the precedent that been in place for 20 years had slowly been eroded in subsequent cases. It was *Austin* itself that turned out to be a departure from precedent.

That conclusion segues nicely into the final factor, reliance interests. Chief Justice Roberts said it best in his *Citizens United* concurrence, which focused on *stare decisis*: "When fidelity to any particular precedent does more to damage this constitutional ideal [the rule of law] than to advance it, we must be more willing to depart from that precedent."[64] "Abrogating the errant precedent, rather than reaffirming and extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects."[65] Of course, in *Citizens United*, it wasn't even clear there was any precedent or *stare decisis* value to rely upon. During re-argument, then-Solicitor General Elena Kagan abandoned the equalizing-speech claim—the distortion-by-corporate-voices issue—that had been *Austin*'s rationale, in favor of an argument regarding shareholder interests and a different kind of *quid pro quo* corruption. How is a court supposed to apply *stare decisis* or credit reliance on an interest that the government defending it has abandoned? The government's new argument may or may not have been meritorious, but there was quite literally no reliance value here—and thus no weighing of competing factual arguments as to the scope and significance of that reliance. As the Cato Institute pointed out in our second *Citizens United* brief, "no one is relying on having less freedom of speech."[66]

Again, we can debate whether *Citizens United* was correctly decided and whether political speech should be curtailed for reasons other than the prevention of *quid pro quo* corruption, but it didn't involve Supreme Court fact-finding. And while I agree that our campaign-finance regime distorts American democracy, the original sin here is *Buckley v. Valeo* and its creation of a contribution/expenditure distinction for purposes of First Amendment analysis—plus its rewriting of the law to create an unworkable system that Congress and the Court have been grappling with ever since.

By refusing to strike down the Federal Election Campaign Act altogether, just excising its expenditure limits, the Court produced a system where candidates face an unlimited demand for campaign funds but a tapered supply. They have to spend all their time fundraising, which is another complaint people have about our current system, right? Candidates spend all their time fundraising instead of legislating. Some would say that's a feature not a bug—because the government that governs least, govern best—but nevertheless these unbalanced rules have inflated both the value of individual campaign contributions and the priority of fundraising.

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[62] *Davis*, 554 U.S. at 738.

[63] *Id.* at 741–742.

[64] *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring).

[65] *Id.* at 379.

[66] Supp. Br. for Cato Institute as Amicus Curiae Supporting Appellant at 24, *Citizens United v. FEC*, 558 U.S. 310 (2010) (No. 08-205).

Moreover, the regulations have gradually pushed the flow of money away from candidates and parties toward advocacy groups unaccountable to the public. Ironically, this dynamic undermines campaign-finance reformers' main goal, politicians' accountability to voters.

The *Buckley* Court recognized that its actions would irreparably undercut reform efforts—the justices weren't naïve—but sustained the legislation nonetheless. Chief Justice Burger admitted that the Court's decision did "violence to the intent of Congress" and questioned whether the remaining "residue" left a workable program.[67] Still, he left a dog's breakfast of campaign-finance rules that have led to a lurching series of Supreme Court decisions that is approaching but not quite yet reversing *Buckley*.

We see, therefore, that campaign regulation, trying to manage the flow of political speech, is a graveyard of well-intentioned plans. These reformist ideals always go awry in practice because political money is a moving target that, like water, has to go somewhere. If it's not to candidates, it'll be to parties, and if not there, then to independent groups. If it's not to PACs, it will be Super PACs or unincorporated individuals acting together. Because what the government does matters to people and people want to speak about the issues that concern them. Indeed, to the extent that "money in politics" is a problem, the solution isn't to try to reduce the money—which we've seen is impossible—but to reduce the scope of political activity the money tries to influence. Shrink the size of government and its intrusions in people's lives and you'll shrink the amount people will spend trying to get their piece of the pie or, more likely, trying to avert ruinous public policies.

And even if you're concerned about the millions of dollars seemingly wasted on electioneering—though Americans spend more annually on chewing gum and holiday candy,[68] and nobody would make or broadcast those negative ads everyone complains about if they weren't effective—the problem is not with your big corporate players. Instead, it's groups composed of many individuals and smaller players who now get to speak. They can't compete with the big boys on K Street—they can't afford the same lawyers and lobbyists—but they're sure going to make the public aware of Congress's shenanigans. So even if we accept "leveling the playing field" as a proper basis for campaign finance regulation, *Citizens United*'s freeing up of associative speech does level that playing field in many ways.

In sum, we're left with a system that's of unbalanced, unstable, and unworkable—and we haven't seen the last of campaign finance cases before the Court or attempts at legislative reforms. But *Citizens United* has little to do with it, and nothing to do with fact-finding.[69]

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[67] *Buckley*, 424 U.S. at 235–36.

[68] *See*, *e.g.*, George Will's regular column on the subject. George F. Will, "America Has Shingles. A Divided Congress Could be the Cure," *Wash. Post*, Nov. 7, 2018, https://bit.ly/3awlrDT (campaign spending for the 2017-18 cycle was about what Americans spend every two years on Halloween candy); George F. Will, "The Stakes on Tuesday," *Wash. Post*, Oct. 31, 2014, https://bit.ly/32xBFZc (election spending for the 2013-14 cycle was less than half of what they spent in October 2014 for Halloween); George F. Will, "States are Cracking Down on Political Speech with Burdensome Laws," *Wash. Post*, Feb. 3, 2012 (presidential campaign spending roughly the same as what Americans spend on Easter candy), https://wapo.st/3v0N4Nk; George F. Will, "A Campaign-Finance Bill That Doesn't Pass Muster," *Wash. Post*, Apr. 27, 2011, (Obama may raise $1 billion in private contributions for the 2012 campaign, about half of what Americans spend on Easter candy annually), https://wapo.st/3auu9CG; George F. Will, "The Democratic Vision of Big Brother," *Wash. Post*, Oct. 17, 2010 (total election spending for every U.S. office during two-year cycle is less than Americans spend on candy in two Halloween seasons), https://wapo.st/3tRwnnv.

[69] In 2011, the Montana Supreme Court tried to make *Citizens United* into a fact-dependent case, citing the state's unique history of corporate influence on elections as justification for restrictions on independent corporate political speech. *Western Tradition P'ship v. Att'y Gen.*, 271 P.3d 1, 13 (Mont. 2011). The U.S. Supreme Court was having

Conclusion

There may be very real problems with jurists' doing their own fact-finding, in the sense of conducting in-chambers research outside the adversarial system: problems of confirmation bias, misunderstanding of complex scientific or technical fields, or even digital-algorithm-related "filter bubbles" that show different search results to different people. But these issues with "in-house" fact-finding are very different from anything related to *amicus* briefs—and they also don't seem to have any ideological salience, or correlation to justices considered to be on the "left," "right," or "middle" of the Supreme Court. Studying the issue is worth this subcommittee's time, but associating it with the politicized debates over *Shelby County* and *Citizens United*, or polemics about the state of our democracy, detracts from that project.

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none of that, concluding in a *per curiam* opinion that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." *Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 516–17 (2012) (per curiam). Four justices dissented from that opinion—an unusual occurrence, because per curiams are exceedingly rarely 5-4—mainly to argue that Montana's factual record called for reconsidering *Citizens United*. *Id*. at 518 (Breyer, J., dissenting) ("Were the matter up to me, I would vote to grant the petition for certiorari in order to reconsider Citizens United or, at least, its application in this case.").