Governing and Deciding Who Governs

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“Campaign finance restrictions that pursue other objectives [than eradicating quid pro quo corruption or its appearance], we have explained, impermissibly inject the Government ‘into the debate over who should govern.’ And those who govern should be the last people to help decide who should govern.”

—Chief Justice Roberts¹

Election law² is centrally about the question of who governs. Given the undeniable intuitive appeal of rules against self-dealing generally,³ it just seems obvious that self-dealing should be all the more assiduously excluded from the election-law

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² I use the phrase “election law” to refer broadly to laws governing candidate eligibility, voter eligibility, access to polling places, campaign finance, campaign communications, ballot counting procedures and standards, and so on. This broad conception often goes by the name “The Law of Democracy.” See Nathaniel Persily, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 HARV. L. REV. 649, 651 (2002) (describing “The Law of Democracy” as the field encompassing the constitutional and statutory law of “voting rights, redistricting, campaign finance, political parties, and regulation of the ballot”).

³ See Adrian Vermeule, Contra Nemo Iudex in Sua Causa: The Limits of Impartiality, 122 YALE L.J. 384, 387 (2012). Vermeule goes on to argue that, despite this intuitive appeal, the hallowed principle of nemo iudex in sua causa “amounts to little more than a banal counsel that impartiality is sometimes an important value in institutional design” and therefore that “it is never sufficient to argue that a proposed institution, or a proposed interpretation of ambiguous constitutional rules or practices, would violate the nemo iudex principle.” Id. at 389.
context. After all, if the foxes should not be left to guard the
henhouse, then they certainly should not be put in charge of
galline security policy. Chief Justice Roberts' statement in
McCutcheon v. Federal Election Commission, quoted above,
seems hard to dispute. And therein lies its insidiousness.

As a preliminary matter, it should be noted that, wherever
Roberts has gotten this standard—perhaps he has been reading
John Hart Ely?—it is not from a close reading of the
Constitution itself. After all, the Constitution makes each house
of Congress the final judge of the "Elections, Returns and
Qualifications" of its members, and it allows each house to
expel members with a two-thirds vote. A bit more removed from
immediate self-interest—but still examples of "those who
govern" helping to decide "who should govern"—would be the
congressional impeachment power and congressional authority,
under certain circumstances, to determine the winner of
presidential and vice presidential elections. And that's just

4 134 S. Ct. 1434 (2014) (plurality opinion).
6 U.S. Const. art. I, § 5, cl. 1; see also Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions 162–92 (2007) (discussing the houses' exercise of this power); id. at 55–57 (discussing the nonjusticiability of challenges to a house's judgment of the election, return, or qualification of a member). Derek Muller goes even further—too far, in my
view—in suggesting that the Clause actually forecloses any state role in judging the qualifications of congressional candidates. See Derek T. Muller, Scrutinizing Federal Electoral Qualifications, 90 Ind. L.J. 559, 593–98 (2015).
7 U.S. Const. art. I, § 5, cl. 2; see also Chafetz, supra note 6, at 207–12, 214–22 (discussing each house's power to punish its members, including by expulsion); id. at 57–59 (discussing the nonjusticiability of challenges to an expulsion).
8 U.S. Const. art. I, § 2, cl. 5; id. § 3, cl. 6–7; id. art. II, § 4. On the nonjusticiability of impeachment, see Chafetz, supra note 6, at 61–66.
9 At the very least, it is clear that, if no candidate receives a majority of the
electoral votes cast for president, then the House chooses the president (with each state
getting one vote); likewise, if no candidate receives a majority of the electoral votes cast
for vice president, then the winner is chosen by the Senate. U.S. Const. amend. XII. It is
more controversial whether Congress has a role in resolving disputes over the validity of
electoral votes. See id. ("[T]he President of the Senate shall, in the presence of the Senate
and House of Representatives, open all the certificates and the votes shall then be
counted."). The first time that such a controversy arose—the dispute over the Vermont
votes in the 1796 election —President of the Senate (and candidate for President of the
United States) John Adams appears to have given his Republican opponents an
opportunity to challenge the validity of the Vermont slate immediately after the vote
counts were announced and before Adams proclaimed himself the winner. The
Republicans passed on the opportunity. See Bruce Ackerman & David Fontana, Thomas
assuming that the category of "those who govern" is limited to members of Congress, the president, and the vice president.

And that brings us to the true danger in Roberts' claim: the premise that the Court stands outside of, and indeed above, the structures and processes of governance. In the two sentences quoted above, Roberts makes use of two distinct but interrelated rhetorical strategies to distance his own institution from the act of governing. First, his use of the first-person plural ("we have explained") posits a trans-temporal unified identity for the Court, which is implicitly contrasted with the shifts and vagaries of mere electoral politics. Second, Roberts' implicit contrasting of the Court with "those who govern" serves to suggest that the Court is somehow removed from the arena of partisan politics. This essay will interrogate both of these distancing strategies.

Part I will look at the Court's self-presentation—its "we"—by contrasting its understanding of judicial corruption in Caperton v. A.T. Massey Coal Company with its understanding of electoral corruption in Citizens United v. Federal Election Commission and McCutcheon. Part II will consider the Court's implicit claim that it does not "govern," using Bush v. Gore, Shelby County v. Holder, and election-law disputes surrounding the 2014 midterms to ask to what extent the Court is, in fact, removed from the realm of partisan politics when deciding election-law cases.

Electoral Count Act, first enacted in 1887, allows the two houses, acting separately, to resolve electoral disputes. Electoral Count Act, ch. 90, §4, 24 Stat. 373, 373–74 (1887) (codified at 3 U.S.C. §15). By 1925, Charles Tansill noted that, "At present, Congressional control [over the counting of electoral votes] is so firmly established that only a few students of the subject are interested in, or comprehend, the process of its evolution." C.C. Tansill, Congressional Control of the Electoral System, 34 YALE L.J. 511, 511 (1925). Nonetheless, John Harrison has argued that Congress has no authority to determine the validity of electoral votes—indeed, he argued that the Constitution does not vest any institution with such authority. John Harrison, Nobody for President, 16 J.L. & POL. 699 (2000). Vasan Kesavan, by contrast, argues that Congress does have such authority, although he thinks that the Electoral Count Act is constitutionally invalid on other grounds. Vasan Kesavan, Is the Electoral Count Act Unconstitutional?, 80 N.C. L. REV. 1653, 1723–29 (2002). Regardless of who has the better of these arguments, it is clear that, at least sometimes, those who govern (in Congress) will help decide who should govern (in the presidency and vice presidency).

13 133 S. Ct. 2612 (2013).
I. "WE"

_McCutcheon_ struck down the Federal Election Campaign Act of 1971's limits on the aggregate amount that a donor could contribute to all federal candidates and political committees in a given election cycle.\(^\text{14}\) These limits supervened upon the base limits—the limits on how much a donor could give to any particular candidate or committee, which were upheld in _Buckley v. Valeo\(^\text{15}\)—so that donors were prevented from giving the otherwise-legal full amount under the base limits to more than a handful of candidates.\(^\text{16}\) Roberts, writing for a plurality, argued that "the aggregate limits do little, if anything, to address" the government's "permissible objective of combatting corruption," while at the same time they "seriously restrict[ ] participation in the democratic process."\(^\text{17}\)

In the course of reaching this conclusion, Roberts made two key moves regarding the government's interest in campaign finance regulation, one older and one newer. The older move, finding its origins in _Buckley_,\(^\text{18}\) was the insistence that "preventing corruption or the appearance of corruption" is the only permissible interest that the government may pursue through such legislation.\(^\text{19}\) The newer move was Roberts' assertion that "Congress may target only a specific type of corruption—'quid pro quo' corruption . . . . [T]he Government


\(\text{\footnotesize{15}}\) Id. at 1442 ("This case does not involve any challenge to the base limits, which we have previously upheld as serving the permissible objective of combatting corruption."); see also _Buckley v. Valeo_, 424 U.S. 1, 20–35 (1976) (per curiam).

\(\text{\footnotesize{16}}\) To be precise, it was closer to two handfuls. See _McCutcheon_, 134 S. Ct. at 1448 ("To put it in the simplest terms, the aggregate limits prohibit an individual from fully contributing to the primary and general election campaigns of ten or more candidates, even if all contributions fall within the base limits Congress views as adequate to protect against corruption.").

\(\text{\footnotesize{17}}\) Id. at 1442.

\(\text{\footnotesize{18}}\) In _Buckley_, the government asserted three interests justifying the campaign finance regulations at issue: (1) that they prevented corruption and the appearance of corruption; (2) that they equalized the ability of citizens to affect electoral outcomes; and (3) that, by reducing the cost of political campaigns, they opened the political system to a wider array of candidates. _Buckley_, 424 U.S. at 25–26. The Court accepted the first of these rationales as legitimate, _id_. at 26–29, while rejecting the other two. _Id_. at 48–49, 57. See also Richard H. Pildes, _The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics_, 118 HARV. L. REV. 28, 135 (2004) ("[T]he central justification for campaign finance regulation had been limited, since _Buckley_, to regulating campaign contributions for the purpose of avoiding corruption or, more nebulously, the appearance of corruption.").

\(\text{\footnotesize{19}}\) _McCutcheon_, 134 S. Ct. at 1450.
may not seek to limit the appearance of mere influence or access.” 20 This *quid pro quo*-only conception of corruption was the lynchpin of the plurality opinion; as Justice Breyer argued in dissent, the claim “that large aggregate contributions do not ‘give rise’ to ‘corruption’ . . . is plausible only because the plurality defines ‘corruption’ too narrowly.”21 This narrow conception of corruption had come a long way in just over a decade: it was first advanced by Justice Kennedy in dissent in *McConnell v. Federal Election Commission*22 and then (after some crucial turnover in Court personnel) made its way into the Court’s decision in *Citizens United*.23 Justice Kennedy, who wrote for the Court in *Citizens United*, quoted extensively from his own *McConnell* dissent, relying on it to reject an anti-corruption rationale for the provision of the 2002 Bipartisan Campaign Reform Act that prohibited corporations and unions from using their general treasury funds for electioneering communications. As Kennedy formulated the principle in *Citizens United*:

> When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . . . Reliance on a “generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.”24

Clearly, the Court has thrown its weight behind the notion that corruption—the only thing that campaign finance restrictions can be used to attack—means either the appearance or the

20 Id. at 1450–51.
21 Id. at 1466 (Breyer, J., dissenting).
22 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.) ("Though the majority cites common sense as the foundation for its definition of corruption, in the context of the real world only a single definition of corruption has been found to identify political corruption successfully and to distinguish good political responsiveness from bad—that is *quid pro quo*."") (internal citation omitted).
24 Id. (internal citations, including three to Kennedy's *McConnell* dissent, omitted).
actuality of *quid pro quo* interactions, "a direct exchange of an official act for money," and nothing more.

Except, of course, when it means more. *Caperton*, which was argued three weeks before *Citizens United* (and decided a little over seven months before *Citizens United*), has a rather more expansive understanding of corruption—at least, when the alleged corruption at issue is judicial. After the A.T. Massey Coal Company lost a tort suit in West Virginia, its chairman, Don Blankenship, spent huge amounts of money (almost entirely in the form of independent expenditures and contributions to a 527 organization) in support of Brent Benjamin, a candidate for the state supreme court. Benjamin narrowly won and then sat on the court as it twice (the second time on rehearing) reversed the jury verdict against Massey, both times by a three-to-two vote. The United States Supreme Court reversed the West Virginia Supreme Court, holding that Benjamin’s failure to recuse himself was a due process violation. Justice Kennedy wrote for the Court—and, indeed, he was the only justice in the majority in both *Caperton* and *Citizens United*. Kennedy noted that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal, but this is an exceptional case.” (It is worth pausing to note that Kennedy’s casual reference to independent expenditures and donations to 527 groups as a "campaign contribution" is itself in significant

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25 *McCutcheon*, 134 S. Ct. at 1441 (plurality opinion of Roberts, C.J.).
27 *Citizens United* was originally argued in the 2008 Term; it was then re-argued and decided in the 2009 Term. Compare *Caperton* v. A.T. Massey Coal Co., 556 U.S. 868 (2009), with *Citizens United*, 558 U.S. 310 (2010).
29 *Caperton*, 556 U.S. at 872–76.
30 *Id.*
31 *Id.* at 886–90.
33 *Caperton*, 556 U.S. at 884.
tension with *Citizens United*. The sheer magnitude of Blankenship's "contributions," dwarfing all other spending relating to the race, was what made this case exceptional. Kennedy concluded that, even though "there [was] no allegation of a *quid pro quo* agreement" between Blankenship and Benjamin, "there is a serious risk of actual bias... when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." Importantly, whether the "campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry." Rather, the "risk" that the spending "engendered actual bias is sufficiently substantial" that due process required Benjamin's recusal.

The root word "corrupt" is used only once in *Caperton*, and that is in a quotation from *Federalist No. 10*. And yet clearly this is a case about corruption: the "risk" of which Kennedy writes can only be the risk that Justice Benjamin will rule differently, having benefitted from the spending, than he would have had he not so benefitted. Importantly, Kennedy seeks no

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34 *Citizens United* flatly held that "independent expenditures... do not give rise to corruption or the appearance of corruption." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 357 (2010). James Sample has called attention to this passage in *Caperton* and coined the term "*Caperton* contribution" to describe "the equation of independent expenditures with contributions in the judicial elections context." James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 756 (2011). See also Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 36 n. 207 (2012) ("Justice Kennedy's opinion for the Court 'repeatedly refers to the exceptional or "extraordinary" nature' of Massey CEO Don Blankenship's 'campaign contributions.' But Blankenship had contributed only $1000, the statutory maximum, to the jurist's campaign committee. What was extraordinary was the $500,000 he spent on direct mailings, letters seeking donations from others, and advertisements, and the nearly $2.5 million he contributed to a political organization [supporting Benjamin].") (internal citations omitted).

35 *Caperton*, 556 U.S. at 886.

36 Id. at 884.

37 Id. at 885.

38 Id.

39 *Caperton*, 556 U.S. at 876 (noting "the maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'") (quoting THE FEDERALIST NO. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961)).

40 One might be tempted to read *Caperton* even more expansively, and say that the "risk" is the likelihood of *systemic* bias—that is to say, that even were we certain that
evidence of a *quid pro quo* arrangement: the sheer amount of money that Blankenship spent supporting Benjamin corrupted the process of justice to the extent that Benjamin could not sit on the case. As Laura Underkuffler has suggested, *Caperton* advances "the idea that we cannot trust—indeed, cannot afford to trust—individuals such as Benjamin to act noncorruptly, whatever assurances they give and whatever the lack of evidence of instances of quid pro quo corruption there might be."\(^\text{42}\)

In a single paragraph in *Citizens United*, Kennedy attempted to distinguish *Caperton*, insisting that, "The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. *Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned."\(^\text{43}\) This is, of course, true: *Caperton* and *Citizens United* arise in different doctrinal areas. But it also wholly elides the fact that both opinions rely heavily on conceptions of corruption, and those conceptions are very different from one another.\(^\text{44}\)

Indeed, the *Caperton* conception of corruption was again on display in the 2015 *Williams-Yulee v. Florida Bar* decision,\(^\text{45}\) which *did* involve the banning of political speech. Specifically, the Court held that a state could forbid candidates for judicial

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Justice Benjamin’s motives were pure as the driven snow, the relevant risk is that the case would have come out differently but for Blankenship’s spending because, say, Benjamin’s opponent would have won the seat. But if this were the risk that Kennedy had in mind, then the remedy is woefully inadequate. After all, “West Virginia Supreme Court minus Justice Blankenship” is a very different body than “West Virginia Supreme Court plus Justice Blankenship’s opponent.” If the risk of systemic bias gave rise to a due process violation, then the Court would have to forbid, or at least heavily regulate, judicial elections.

\(^{41}\) See *Caperton*, 556 U.S. at 886.


office from personally soliciting campaign contributions. Departing from the principle that only the prevention of *quid pro quo* corruption or its appearance could justify campaign finance restrictions, Chief Justice Roberts, for the Court, wrote that "public perception of judicial integrity is ‘a state interest of the highest order.’" Because judges are "charged with exercising strict neutrality and independence, [they] cannot supplicate campaign donors without diminishing public confidence in judicial integrity," a principle that Roberts traced back to Magna Carta. In other words, judicial integrity is compromised by a system in which donors appear to purchase influence or access—precisely the types of interaction that *Citizens United* held to be non-corrupt and therefore beyond the permissible reach of campaign finance law. The Court accordingly upheld a restriction on the electoral speech of judicial candidates that it would certainly have struck down if applied to candidates for executive or legislative office. In short, solicitation of campaign funds corrupts the judicial process—or at least creates a public appearance of corruption justifying state regulation—but it does not so corrupt executive or legislative processes.

I submit that the best explanation for the Court's differential conceptions of corruption is a return to the first-person plural, the "we" who "have explained" how "those who govern" may regulate the electoral process. "We," in the judiciary, stand apart; we must therefore hold ourselves to higher standards than mere elected politicians. The self-perception of high ethical standards can be a significant source of judges' self-esteem; the public perception of high ethical standards can be a significant source of institutional power and prestige. The Court's self-presentation as unique in this regard

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46 Id. at 1666 (quoting *Caperton*, 556 U.S. at 889); see also id. at 1667 (suggesting that "no one denies" that "public confidence in judicial integrity" is a "genuine and compelling" interest).

47 Id. at 1666. But see Jess Bravin, *Magna Carta's Birthday*, WALL ST. J., Nov. 10, 2014, at B5 (quoting Chief Justice Roberts, in a speech at the Library of Congress, as saying that, "If you're citing Magna Carta in a brief before the Supreme Court of the United States, or in an argument, you're in pretty bad shape . . . . We like our authorities a little more current.").

48 See *Williams-Yulee*, 135 S. Ct. at 1667, 1672 (holding that states have compelling interests in regulating judicial elections more stringently than elections to other offices); id. at 1673 (Ginsburg, J., concurring) (same).

49 I have previously made this point in the context of congressional ethics. See Josh
thus stands to redound significantly to its benefit. This judicial self-perception and self-presentation can be thought of as having three central components: the judiciary is eternal; it is passive; and it exercises maturity of judgment. By contrast, electoral politics is figured as transient, grasping, and capricious. We can see each of these components emerging from the cases already discussed.

As a preliminary matter, it is worth noting that this first-person plural deliberately masks a first-person singular: as noted above, only Justice Kennedy is in the majority in both Caperton and Citizens United (and only Chief Justice Roberts is in the majority in both Williams-Yulee and Citizens United). There is, of course, nothing necessary about a collegial court speaking univocally: the United States Supreme Court issued seriatim opinions for its first decade, and the United Kingdom Supreme Court has only recently begun moving away from the practice. An institution's own rules and practices give us the means by which to interpret that institution's behavior. In essence, by choosing to speak as a “we,” the justices call this “we” into being and make it sensible to speak of “the Court” as an entity that “says” or “decides” things. According to the justices’ own practices, the “we” of Caperton and Williams-Yulee is the same as the “we” of Citizens United.

It is this move from the individual to the super-individual level that allows the Court to present itself as eternal. Just as Theseus’ ship can maintain a stable identity even as its planks are all gradually replaced, so too can the Court, in its own self-presentation, remain the same even as its composition changes. In the McCutcheon quotation with which this essay opened,


51 In this, I am influenced by Victoria Nourse’s discussion of “rule-based decision theory.” See Victoria F. Nourse, A Decision Theory of Statutory Interpretation: Legislative History by the Rules, 122 YALE L.J. 70, 89–90 (2012).
Roberts used "we" to refer to a case decided three years earlier. But the first-person plural cuts a much wider swath: the first citation of the opinion, following the sentence, "Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption," is to *Buckley v. Valeo*, a case decided the year that John Roberts graduated from college.52 Indeed, Roberts is insistent that the unitary Court has been consistently devoted to these principles for far longer than any currently-serving justice has been on the Court:

In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. "Ingratiation and access . . . are not corruption."53

The quotation at the end of that passage (indeed, the only citation Roberts offers to substantiate his "forty years" claim) is from *Citizens United*. That passage in *Citizens United*, in turn, cites to the *McConnell* majority opinion54—which requires some creative reading, to say the least. Indeed, one of the very pages of *McConnell* cited in the passage in *Citizens United* to which the passage in *McCutcheon* refers contains the following:

[P]laintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing "undue influence on an officeholder's judgment, and the appearance of such


influence.” Many of the “deeply disturbing examples” of corruption cited by this Court in Buckley to justify [the Federal Election Campaign Act of 1971’s] contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. Even if that access did not secure actual influence, it certainly gave the “appearance of such influence.”

These two passages from McCutcheon and McConnell say diametrically opposed things, yet both are deeply invested in the notion that the decision that “we” reach today is consistent with “our cases” from the past. Indeed, so invested in this notion is the Court that the first passage above cites a decision citing the second one, without any seeming irony. Apparently, we have always been at war with the notion of access as corruption.

Of course, this trans-temporal “we” is by no means limited to election-law cases. Alison LaCroix has noted that, despite “changes in membership and doctrine,” the Court’s insistence on using the first-person plural “suppress[es] . . . multiplicity and discontinuity in favor of a posture of unitariness and continuity.” In other words, “[t]he Court’s institutional self-presentation suggests that it is immortal and therefore not temporally bound.” By contrast, consider the ways in which the concept of transience suffuses the Court’s discussion of electoral politics. It is full of unappealing “television commercials touting a candidate’s accomplishments or disparaging an opponent’s character.” (Of course, Justice Scalia suspects that, even if viewers dislike these commercials, “they detest even more hour-long campaign-debate interruptions of their favorite entertainment programming.” How fortunate for us all, then, that the Court refuses to allow its hour-long oral arguments to

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56 Cf. George Orwell, 1984, at 157 (Plume 2003) (1949) (“It was true that [Julia] regarded the whole war as a sham; but apparently she had not even noticed that the name of the enemy had changed. ‘I thought we’d always been at war with Eurasia,’ she said vaguely. It frightened him a little.”).
58 Id. at 1332.
60 McConnell, 540 U.S. at 261 (opinion of Scalia, J.).
be televised. Faddish "entertainers" like Beyoncé, Jay-Z, and Kid Rock raise money for candidates. Candidates peddle "sound bites, talking points, and scripted messages that dominate the 24-hour news cycle," even though it is "well known" that the fickle "public begins to concentrate on elections only in the weeks immediately before they are held." How different is the eternal Court, which knows nothing of Jay-Z and speaks in tomes, rather than sound bites.

Second, the Court differentiates itself through its passivity. It does not wish to involve itself in the affairs of the world, but it sometimes becomes its "unsought responsibility to resolve" the issues that it has "been forced to confront." Consider again McCutcheon, where, in response to Justice Breyer's suggestion that the Court remand for the development of an evidentiary record, the Chief Justice wrote, "We take the case as it comes to us." Of course, the Court is not always so retiring: in Citizens United, it ordered re-argument and re-briefing when it did not like how the case came to it. But the Court's rhetoric of passivity projects a Cincinnatian air, in contrast to electoral politics, which is figured as striving and grasping, and therefore dangerous. "The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech,"

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61 For the most trenchant recent critique of this practice, see Last Week Tonight with John Oliver, Last Week Tonight with John Oliver: Supreme Court (HBO), YOUTUBE (Oct. 19, 2014), available at http://www.youtube.com/watch?v=jd9prhPV2PI, archived at http://perma.cc/J76L-LR2E.

62 McCutcheon, 134 S. Ct. at 1449 & n. 5.


64 Id. at 334.


67 McCutcheon, 134 S. Ct. at 1447 n. 4.

68 Citizens United v. Fed. Election Comm'n, 557 U.S. 932 (2009); see also Citizens United, 558 U.S. at 398 (opinion of Stevens, J.) ("Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.").
writes (the apparently powerless) Justice Scalia. There is a real risk that those in power—meaning elected officials and their underlings—will not only suppress electoral speech but also use their “authority, influence, and power to threaten corporations to support the Government’s policies.” How different from the Court, which never reaches out to “supress” or “threaten,” but simply waits patiently at One First Street, taking cases as they come.

Finally, the Court presents itself as exercising maturity of judgment. In Caperton, Justice Kennedy portrayed the judicial role thus:

The judge inquires into reasons that seem to be leading to a particular result. Precedent and stare decisis and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings.

This displays a healthy amount of institutional self-regard. Perhaps, then, it is unsurprising that the justices tend to take on a tone of parental condescension, as evidenced by one of their favorite phrases: “we have explained.” Electoral politics, by

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70 Citizens United, 558 U.S. at 355.
72 Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1665 (2015) (“As we have explained, noncommercial solicitation ‘is characteristically intertwined with informative and perhaps persuasive speech.’”) (internal citation omitted); McCutcheon, 134 S. Ct. at 1441 (plurality opinion of Roberts, C.J.) (“Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government ‘into the debate over who should govern.’”) (internal citation omitted); id. at 1448 (“As the Court explained [in Buckley], the ‘overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support.’”) (internal citation omitted); id. at 1458 (“As we have explained, ‘restrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements.’”) (internal citation omitted); Citizens United, 558 U.S. at 324–25 (“As explained by the Chief Justice’s controlling opinion in WRTL, the functional-equivalent test is objective: ‘a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.’”) (internal citation omitted); id. at 345 (“The Buckley Court
contrast, is deserving of condescension and parental supervision.73 Whereas judicial speech-acts should be held to high standards—those of “logic and scholarship and experience and common sense,” in Kennedy’s words74—electoral speech is undiscriminating. It is just as likely to be false or worthless as it is to be true or valuable, so all we can do is trust to the marketplace of ideas: “Factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false.”75 There is no room in electoral politics for an authoritative voice that might “explain” how things really are. To anyone who doubts the efficiency of the unregulated marketplace of ideas,76 the justices fall back on their authority in other First Amendment contexts: “If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.”77

Say what you want about the tenets put forth in “30-second television ads,”78 at least they’re better than Nazi parades!79

The justices’ dim view of electoral politics comes through in other contexts, as well. Consider Roberts’ annual reports on the state of the federal judiciary. In 2012, he chastised the elected branches for what he perceived to be their fiscal irresponsibility:

73 In an elegant essay predating many of the cases discussed here, Rick Pildes noted that a majority of the justices appear to subscribe to a “cultural” view that electoral politics is so messy and disordered as to pose a threat to the polity itself, thereby requiring judicial supervision. Richard H. Pildes, Democracy and Disorder, 68 U. Chi. L. Rev. 695 (2001).

74 Caperton, 556 U.S. at 883.

75 Citizens United, 558 U.S. at 355 (internal citation omitted).


77 McCutcheon, 134 S. Ct. at 1441 (plurality opinion of Roberts, C.J.).

78 Citizens United, 558 U.S. at 364.

79 Cf. THE BIG LEBOWSKI (Polygram Filmed Entertainment & Working Title Films 1998) (“[S]ay what you want about the tenets of National Socialism, Dude, at least it’s an ethos.”).
Our country faces new challenges, including the much publicized “fiscal cliff” and the longer term problem of a truly extravagant and burgeoning national debt. No one seriously doubts that the country’s fiscal ledger has gone awry. The public properly looks to its elected officials to craft a solution. We in the Judiciary stand outside the political arena, but we can continue to do our part to address the financial challenges within our sphere.80

The following year, he made the same point, drawing an even starker contrast between the responsibility of his own branch and the fecklessness of the others:

We in the Judiciary recognize what should be clear to all: The Nation needs a balanced financial ledger to remain strong at home and abroad . . . . We began our cost-containment efforts nearly a decade ago, long before the talk of fiscal cliffs and sequestration came into vogue. As I explained last year . . . .81

This short passage has it all: a contrast between the Court’s long time horizon (“nearly a decade ago”) with the transient “vogue[s]” of the elected branches; the obvious wisdom of the Court’s own approach (which “should be clear to all”); and the resigned weariness of having to “explain[ ]” it again, year after year. In a recent appearance at a law school, Roberts again explicitly chided the other branches: “They are not getting along very well these days . . . . It’s a period of real partisan rancor that, I think, impedes their ability to carry out their functions.”82

By contrast, Roberts was at pains to insist that any perception of partisanship in his own branch is inaccurate.83 Nor is Roberts

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83 See id. (“Roberts asserted strongly the court isn’t partisan, divided into Republicans and Democrats, though he conceded an intelligent lay observer of the confirmation process might come to a different conclusion.”); Jeff Zeleny, Chief Justice
alone in contrasting judicial reasonableness with electoral bull-headedness: Justice Ginsburg recently expressed to Elle the desire for "a more functional Congress."\textsuperscript{84} It is hard to read comments like these and not suspect, with Pam Karlan, that "the Justices see the political process as perhaps irredeemably flawed, [and] see the legislative process as an inferior substitute for judicial analysis."\textsuperscript{85}

More importantly, it is difficult to read these passages and not see a Court that is striving to distance itself rhetorically from the institutions of electoral politics. The differential conceptions of corruption in \textit{Caperton} and \textit{Citizens United} suggest that the courts are different from mere elected politicians—after all, why else would they need to operate under a wholly different standard of corruption? Moreover, the fact that the Court \textit{required} judges to operate under a stricter conception of corruption than it \textit{allowed} legislative and executive officials to impose upon themselves not only held the courts out as different, but also held them up as better, nobler, purer, more ermined.\textsuperscript{86} The Court's rhetorical strategies of presenting itself as eternal, passive, and exercising maturity of judgment, as opposed to the transient, grasping, and foolish

\textsuperscript{84} Karlan, \textit{supra} note 34, at 65–66 (internal footnote omitted).

\textsuperscript{85} The ermine became the symbol of Anglo-American judges because of a Renaissance myth that the creature "would rather die than soil its pristine white coat." Charles Gardner Geyh, \textit{Can the Rule of Law Survive Judicial Politics?}, 97 \textit{CORNELL L. REV.} 191, 192 (2012). Interestingly, the ermine is a kind of weasel, a creature with a rather less august connotation. See D.A. Simms, \textit{North American Weasels: Resource Utilization and Distribution}, 57 \textit{CAN. J. ZOOLOGY} 504, 504 (1979) ("Three species of weasels inhabit North America; from smallest to largest they are the least weasel (\textit{Mustela nivalis}), the ermine (\textit{M. erminea}), and the long-tailed weasel (\textit{M. frenata}).").
participants in electoral politics, serve to further distance itself from them.

II. “GOVERN”

To what end has the Court engaged in the distancing maneuvers traced in the previous Part? Put simply, and the Chief Justice’s protestations to the contrary notwithstanding, it is to enhance the justices’ role in governance. It is, of course, the fact that the judiciary is part of the mechanism of governance in nearly all substantive areas of law—whether that involves making contested decisions about whether federal diversity jurisdiction extends to suits against states by citizens of other states,87 or about whether chattel slavery must exist in all federal territories,88 or about whether schools may maintain de jure segregation,89 or about whether abortion must be permitted,90 or about whether the entirety of a state’s Medicaid funding may be conditioned on participation in an expanded Medicaid program.91 More granularly, courts engage in detailed and continuing oversight of institutions ranging from schools to prisons.92 These are all clearly governance decisions with clear ideological valences,93 and only someone with an implausibly mechanical conception of the judicial role could possibly think that judges are not governing when they make them.94

87 Chisholm v. Georgia, 2 U.S. 419 (1793).
88 Dred Scott v. Sandford, 60 U.S. 393 (1856).
94 See JUSTIN ZAREMBY, LEGAL REALISM AND AMERICAN LAW ch. 3 (2014). Note that this does not entail the extreme legal realist thesis that judges always vote their ideological preferences and then manipulate traditional legal materials to legitimate the outcome and obscure the actual ratio decidendi. It simply entails the much more modest thesis that legal texts are almost always underdeterminate, leaving at least some room for considerations extrinsic to the text. See Lawrence B. Solum, The Interpretation-Construction Distinction, 27 CONST. COMMENT. 95, 103–08 (2010).
On very rare occasion, justices themselves are even willing to admit this: in 1936, Justice Stone—dissenting, of course—wrote that “Courts are not the only agency of government that must be assumed to have capacity to govern.”95 But this reference to courts as an “agency of government,” indeed as one that “govern[s],” is highly unusual,96 and it has never been quoted since in the United States Reports. Indeed, no federal court at all has quoted that line in nearly forty years.97 Much more frequently, the Court makes every attempt to distance itself rhetorically from this conclusion. Consider again the Roberts quotation from McCutcheon with which this essay began: not only does Roberts place the Court outside of “those who govern,” he also follows the Court’s regular practice of referring to the other two branches as “the Government,” while his institution is something else—the Court.98 It is important to see through these rhetorical strategies—and all the more so in the domain of election law. For if law is necessarily a form of governance, then election-law decisions must be recursive: they are the judicial acts governing the choice of who is to govern.

Consider Bush v. Gore.99 I know, that’s a controversial invitation. Justice Scalia, to take a well-known example, tells questioners who raise the case to “get over it!”100 But it would be so much easier to get over the past if it were truly past.101 Let us

98 In a similar vein, consider Justice Scalia’s claim in McConnell that “We are governed by Congress,” and therefore that laws that limit our right to criticize members of Congress (as, Scalia argued, campaign finance regulations do) “cut[ ] to the heart of what the First Amendment is meant to protect: the right to criticize the government.” McConnell v. Fed. Election Comm’n, 540 U.S. 93, 248 (2003) (opinion of Scalia, J.).
100 See, e.g., Adam Cohen, Editorial, Has Bush v. Gore Become the Case that Must Not Be Named?, N.Y. TIMES, Aug. 15, 2006, at A18; Charles Lane, Once Again, Scalia’s the Talk of the Town, WASH. POST, Apr. 15, 2006, at A2; Margaret Talbot, Supreme Confidence, NEW YORKER, Mar. 28, 2005, at 40, 43; Jeffrey Toobin, Precedent and Prologue, NEW YORKER, Dec. 6, 2010, at 27, 27.
stipulate that we will never know what would have happened had the Supreme Court allowed the Florida recount to proceed in December 2000. It is nevertheless true that the Supreme Court's decision ensured that George W. Bush would be the forty-third president. The Court, in a very real sense, "installed a president," even if some other mechanism might subsequently have installed the same president. Indeed, as Jack Balkin and Sandy Levinson noted less than a year later, "almost all observers at the time believed" that the Florida recounts that *Bush v. Gore* halted "would [have] put Al Gore ahead." 

As Balkin and Levinson also noted (and decried), this installation ensured that Bush would have the opportunity to appoint federal judges. And during his presidential campaign, Bush had specifically mentioned Justices Scalia and Thomas as models of the ideal Supreme Court nominee. Judges picked a president who promised to nominate judges much like themselves. It would require a nearly superhuman suspension of disbelief to credit the justices' protestations that they put out of their minds the partisan implications of *Bush v. Gore*. It takes nearly as heroic an effort to believe that they never once considered the implications for their Court or for the judiciary in general of who won the presidential election.

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102 Balkin & Levinson, supra note 93, at 1045.
103 *Id.* at 1049.
104 *Id.* at 1053, 1060, 1083-84, 1086, 1107.
106 See Balkin & Levinson, *supra* note 93, at 1065 ("[T]he more the Justices offer these protestations, the more unbelievable they seem. There is no reason to believe them unless one credits the notion that members of the judiciary are almost altogether different from other Americans who have succeeded in the political world and that they have no agendas of their own or any desire to leave a 'legacy' in their decisions.") (internal footnotes omitted).
107 It is regularly accepted as uncontroversial that judges consider the ideology of the president when making decisions about when to retire from the bench. Indeed, some judges do little to tamp down such considerations. See Robert Barnes, *The Question Facing Ruth Bader Ginsburg: Stay or Go?*, WASH. POST MAG., Oct. 6, 2013, at 9 ("Ginsburg understands politics but does not feel she faces a deadline to leave so that Obama, whom she admires, can choose her successor. 'I think it's going to be another Democratic president' after Obama, Ginsburg said. 'The Democrats do fine in presidential elections; their problem is they can't get out the vote in the midterm elections.'"). If we readily accept that judges think about who will nominate their
And, indeed, Bush was able to make a large number of judicial appointments. In his first term, he had no Supreme Court vacancies to fill, but he did appoint 168 district judges and 34 circuit judges.\(^{108}\) Obviously, his second term came with its own (narrow) electoral mandate; still, the two are not neatly separable: incumbency advantage is a potent force,\(^{109}\) and incumbency advantage may have applied with special vigor to the man who happened to be president on September 11, 2001.\(^{110}\) Put differently, without a first term, Bush would not have had a second one. And in that second term, he appointed two Supreme Court justices (one of whom, John Roberts, had worked as an attorney for the Bush campaign during the 2000 Florida recount\(^{111}\)), 93 district judges, and 25 circuit judges.\(^{112}\) At the time of Obama’s inauguration, Republican appointees constituted the majority of active judges on nine of the twelve regional circuit courts, while Democratic appointees had a majority on only the Ninth Circuit.\(^{113}\) As an admittedly crude measure of how successful Bush was at appointing justices like Scalia and Thomas, consider how frequently Roberts and Alito have voted with Scalia and Thomas (and with each other) in non-unanimous cases since arriving at the Court:

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\(^{109}\) See David R. Mayhew, *Incumbency Advantage in U.S. Presidential Elections: The Historical Record*, 123 POL. SCI. Q. 201 (2008); see also id. at 205-06 (citing other studies coming to the same conclusion).


<table>
<thead>
<tr>
<th>Term</th>
<th>Roberts with Scalia</th>
<th>Roberts with Thomas</th>
<th>Alito with Scalia</th>
<th>Alito with Thomas</th>
<th>Roberts with Alito</th>
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<tbody>
<tr>
<td>2005</td>
<td>78.6%</td>
<td>71.4%</td>
<td>67.9%</td>
<td>71.4%</td>
<td>88.9%</td>
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<tr>
<td>2006</td>
<td>74.5%</td>
<td>68.0%</td>
<td>63.5%</td>
<td>62.7%</td>
<td>86.3%</td>
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<tr>
<td>2007</td>
<td>67.9%</td>
<td>64.2%</td>
<td>64.2%</td>
<td>60.4%</td>
<td>75.0%</td>
</tr>
<tr>
<td>2008</td>
<td>76.3%</td>
<td>66.1%</td>
<td>72.9%</td>
<td>71.2%</td>
<td>79.7%</td>
</tr>
<tr>
<td>2009</td>
<td>58.0%</td>
<td>58.0%</td>
<td>54.4%</td>
<td>55.9%</td>
<td>73.5%</td>
</tr>
<tr>
<td>2010</td>
<td>73.2%</td>
<td>64.3%</td>
<td>57.9%</td>
<td>57.9%</td>
<td>82.1%</td>
</tr>
<tr>
<td>2011</td>
<td>71.4%</td>
<td>75.5%</td>
<td>67.3%</td>
<td>67.3%</td>
<td>77.6%</td>
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<tr>
<td>2012</td>
<td>64.6%</td>
<td>62.5%</td>
<td>40.4%</td>
<td>59.6%</td>
<td>70.2%</td>
</tr>
<tr>
<td>2013</td>
<td>54.1%</td>
<td>48.6%</td>
<td>63.9%</td>
<td>66.7%</td>
<td>50.0%</td>
</tr>
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</table>

With two exceptions (out of forty-five total pairings), these pairings are all 50 percent or above, and the median pairing records agreement in just over two-thirds of the non-unanimous cases that Term. By way of contrast, over the same period, Roberts and Justice Ginsburg agreed in non-unanimous cases between 23.7 percent and 59.4 percent of the time, and in only two of those years did they agree in half or more of non-unanimous cases. Alito and Ginsburg agreed in non-unanimous cases between 20.3 percent and 48.5 percent of the time.

123 They agreed in 23.7 percent of cases in the 2008 Term; they agreed in 59.4 percent in the 2009 Term, and they agreed in 50.0 percent in the 2005 Term. 2008 Statistics, supra note 117, at 385 tbl. I(B2); 2009 Statistics, supra note 118, at 414 tbl. I(B2); 2005 Statistics, supra note 114, at 375 tbl. I(B2).
time.\textsuperscript{124} Clearly, Bush was successful in appointing justices who would, broadly, rule in a manner similar to his identified role models.\textsuperscript{125}

The numbers given above suggest that, in cases across the board, the majority in \textit{Bush v. Gore} was able to ensure that the courts would continue to be stocked with judges who ruled as they did. In the sense in which all judicial decisions participate in governance, these judges are obviously governing, and the \textit{Bush v. Gore} majority, by installing the president who nominated the judges, was clearly playing a key role in deciding who should govern. But the recursivity goes deeper: these very judges, appointed by the president installed by the Court, would themselves shape the political process going forward.

It is no secret that the current Republican coalition is nearing the end of its life—literally. Republican voters are increasingly elderly, white, and rural, in a country that is increasingly nonwhite and urban.\textsuperscript{126} In the last six presidential appointments concluded that, “In sum, George W. Bush and his administration set out with a vision for the judiciary and firm ideas of what the President wanted his judicial legacy to be. In that respect … his successful placing on the bench two Supreme Court justices, 59 appeals courts judges, and 261 district court judges, all lifetime appointees to courts of general jurisdiction, truly constituted ‘mission accomplished.’” Goldman et al., \textit{Mission Accomplished}, supra note 112, at 286.

\textsuperscript{124} They agreed in 20.3 percent of cases in the 2008 Term, and they agreed in 48.5 percent of cases in the 2009 Term. \textit{2008 Statistics}, supra note 117, at 385 tbl. I(B2); \textit{2009 Statistics}, supra note 118, at 414 tbl. I(B2).

\textsuperscript{125} One overview of the Bush Administration’s record with regard to judicial appointments concluded that, “In sum, George W. Bush and his administration set out with a vision for the judiciary and firm ideas of what the President wanted his judicial legacy to be. In that respect … his successful placing on the bench two Supreme Court justices, 59 appeals courts judges, and 261 district court judges, all lifetime appointees to courts of general jurisdiction, truly constituted ‘mission accomplished.’” Goldman et al., \textit{Mission Accomplished}, supra note 112, at 286.

elections, a Republican has won the nationwide popular vote only once, in 2004.\textsuperscript{127} The Party's official postmortem of the 2012 election recognized the Party's growing demographic disadvantage,\textsuperscript{128} as have influential conservative commentators.\textsuperscript{129} Of course, the decline of the current Republican coalition does not mean the death of the GOP as a party. As parties have done in the past, it will adjust, adopting new issues and putting forward new standard-bearers that are more appealing to the new American demographic. This adjustment is already visible in its newfound acceptance of—or, what amounts to the same thing, its desire to change the conversation away from—gay marriage and marijuana decriminalization. But members of the outgoing Republican coalition are not prepared to be too accommodating on too much, and a number of moderate Republican incumbents have faced

\textsuperscript{127} For some reasons that the 2004 election may have been exceptional, see Abramson et al., supra note 110; Weisberg & Christenson, supra note 110; Merolla et al., supra note 110.


stiff primary challenges from more conservative candidates since 2010.\textsuperscript{130}

It is precisely that older coalition that is represented in the judiciary.\textsuperscript{131} After all, two current justices were appointed by Ronald Reagan, and a third was appointed by George H.W. Bush. It was not until after the Senate abolished the filibuster nominations in late-2013 that control of the circuit courts began switching from Republicans to Democrats. Indeed, as of the 2014 midterm elections, despite the fact that a Democrat had been president for fourteen of the last twenty-two years, Democrats still held a majority on only eight of the twelve regional circuit courts.\textsuperscript{132} Of the remaining four, two would shift partisan orientation if the active judges appointed by Reagan took senior status (which they are all eligible to do) and were replaced by Obama.\textsuperscript{133}

It should not be surprising that any political coalition will be likely to adopt positions that serve to maintain its hold on power. This is not an accusation of bad faith or conscious self-dealing; it is simply a consequence of the human tendency toward motivated reasoning—that is, reasoning that tends toward a conclusion that has been chosen for reasons extrinsic to the reasoning process itself.\textsuperscript{134}

\textsuperscript{130} To date, there have only been three major primary upsets: Joe Miller’s defeat of Senator Lisa Murkowski in the 2010 Senate primary in Alaska, Richard Mourdock’s defeat of Senator Richard Lugar in the 2012 Senate primary in Indiana, and David Brat’s defeat of House Majority Leader Eric Cantor in a 2014 House primary in Virginia. But a number of non-incumbent establishment-favored candidates have lost to conservative upstarts, and a number of centrist Republicans have suddenly developed conservative fervor. \textit{See generally} Dan Balz, \textit{Tea Party May Lose GOP Primary Battles, But Has it Won the War?}, \textit{WASH. POST}, May 6, 2014, at A12.

\textsuperscript{131} \textit{See} Balkin, \textit{supra} note 126, at 1196 (“President Obama faces a court dominated by the old regime . . . .”).


\textsuperscript{133} Those are the Fifth and Seventh Circuits. The Sixth and Eighth Circuits would remain Republican-controlled, even with such replacements.

\textsuperscript{134} As Dan Kahan defines it, motivated reasoning is:

the tendency of people to unconsciously process information—including empirical data, oral and written arguments, and even their own brute sensory perceptions—to promote goals or interests extrinsic to the decisionmaking task at hand. When subject to it, individuals can be unwittingly disabled from making dispassionate, open-minded, and fair judgments. Moreover, although people are poor at detecting motivated reasoning in themselves, they can
example, a recent experiment found that individuals tasked with adjudicating ballot disputes were more likely to accept challenges from co-partisans than from members of the other party. Individuals engaging in motivated reasoning do not perceive themselves to be doing so; in fact, it is one of the hallmarks of motivated reasoning that individuals “attempt to be rational and to construct a justification of their desired conclusion that would persuade a dispassionate observer . . . . In other words, they maintain an ‘illusion of objectivity.’” As motivated reasoners come to perceive that there is more at stake, the motivation to reach the desired outcome grows stronger. Members of a coalition in decline may therefore feel the strongest pull to reason toward results that maintain their hold on power.

The judicial members of that coalition have recently taken steps that—whatever the conscious motivations of the individuals involved—have the likely effect of helping to entrench Republicans in power. As the expiration of the Voting Rights Act’s section 5 preclearance provision in 2007 approached, a number of Republican elites began developing and emphasizing a critique of preclearance. Article after article followed the same ritualistic formula: praise for the 1965 Act itself (“the 20th century’s noblest and most transformative law,” as conservative columnist George Will put it) before going on to celebrate its success in enfranchising racial minorities and argue that its most vigorous provisions, especially section 5, are readily discern its effect in others, in whom it is taken to manifest bias or bad faith.


I do not mean to suggest that such criticism on the right was new in 2005; obviously, the Voting Rights Act has been contentious for its entire history, and, as Reva Siegel has pointed out, “hostility to the Voting Rights Act flourished in the [Reagan] Administration,” where a young Justice Department official named John Roberts wrote talking points against the Act. Reva B. Siegel, The Supreme Court, 2012 Term—Foreword: Equality Divided, 127 Harv. L. Rev. 1, 72–73 (2013). But it is clearly the case that elite conservative attacks on preclearance in particular picked up in both frequency and intensity as the 2007 expiration date approached.

now therefore (again, in Will’s words) “antiquarian nonsense.”\textsuperscript{139} The repeated reauthorizations of the preclearance requirement are depicted as driven by self-interested Democrats (often serving their civil-rights-activist puppetmasters) and acquiesced in by cowardly Republicans.\textsuperscript{140} As Abigail Thernstrom and Edward Blum put it:

Will the GOP truly benefit politically from its craven surrender to Jesse Jackson and other activists eager to wave the racism flag? Not a chance . . . . Opposing the civil-rights lobby requires political courage—a commodity rarely seen in Washington. Many Republicans in Congress understand the principles involved here, but aren’t willing to fight for them. Draconian federal intrusion into local elections was justified when it was the only way to enfranchise Southern blacks—but 40 years on, it’s an unconstitutional travesty.\textsuperscript{141}

Some commentators, in an effort to demonstrate that they were not motivated by partisanship, noted that the creation of majority-minority districts had actually helped Republicans\textsuperscript{142}—although it was left unexplained why opposition to majority-minority districts entailed opposition to preclearance. This basic formula was apparent in any number of articles in 2005 and 2006.\textsuperscript{143}

In mid-2006, Congress voted overwhelmingly to reauthorize section 5 of the Voting Rights Act.\textsuperscript{144} Republicans controlled both

\textsuperscript{139} Id.
\textsuperscript{140} See id.
\textsuperscript{141} Abigail Thernstrom & Edward Blum, Do the Right Thing, WALL ST. J., July 15, 2005, at A10.
\textsuperscript{142} See Will, supra note 138; Robert Robb, Strange Politics Will Stifle Debate on Voting Rights Act, ARIZ. REPUBLIC, Aug. 24, 2005, at B9.
\textsuperscript{144} Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 4, 120 Stat. 577, 580. The reauthorization was passed 390-33 in the House and 98-0 in the Senate and signed into law by President Bush.
houses of Congress and the presidency at the time. After initial expressions of anger that Republicans in Congress had been “cowed by racial demagoguery” or had “flinched from the political totem of race and voting,” the discourse shifted to a constitutional register in anticipation of judicial challenges. Responding to a particular denial of preclearance, Alabama Attorney General Troy King wrote in 2007 that the “imperialism of a federal preclearance system” implicated “[i]mportant notions of federalism and states’ rights.” Other conservative commentators explicitly urged the Supreme Court to strike down section 5. In *Northwest Austin Municipal Utility District Number One v. Holder* (NAMUDNO), the Court avoided the issue of the constitutionality of section 5, instead interpreting the Act’s provision for “bailing out” of the preclearance requirement to be applicable to the utility district at issue. Chief Justice Roberts’ decision for the Court, however, began with a lengthy discussion questioning the constitutionality of section 5, before making the constitutional-avoidance pivot. The outlines of that section will be familiar. It began with dutiful praise of the Voting Rights Act: “The historic accomplishments of the Voting Rights Act are undeniable.” But the Act’s very success, Roberts continued, may have undermined the case for its continuing viability: “These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. Past success alone, however, is not

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147 Troy King, *Feds Are Overreaching, Interfering: Ruling on Governor’s County Appointment is Not About Juan Chastang or Minority Representation Anymore*, PRESS-REG. (Mobile, Ala.), May 13, 2007, at D1.


150 Id. at 201–06.

151 Id. at 201.
adequate justification to retain the preclearance requirements . . . [T]he Act imposes current burdens and must be justified by current needs."\textsuperscript{152} This dicta seemed intended to telegraph that the Court was prepared to strike down section 5 in the future.\textsuperscript{153}

Although some conservatives were disappointed that the Court pulled back from a constitutional ruling in \textit{Namudno},\textsuperscript{154} others were emboldened by Roberts’ dicta and urged the Court to complete the task.\textsuperscript{155} And four years later in \textit{Shelby County}, the Court, with Roberts writing for the five-justice majority, struck down section 4’s coverage formula, thereby effectively gutting section 5’s preclearance requirement.\textsuperscript{156} Once again, the Court’s opinion began by praising the Act generally: “The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem.”\textsuperscript{157} But, “[n]early 50 years later, things have changed dramatically.”\textsuperscript{158} Although “[t]here is no doubt that these improvements are in large part \textit{because of the Voting Rights Act},”\textsuperscript{159} the constitutionality of the preclearance regime must be judged “in light of current conditions,” not in light of history.\textsuperscript{160} And the fact that the preclearance formula had not been updated meant that it could not be justified in light of current conditions.\textsuperscript{161}

\textsuperscript{152} Id. at 202–03.

\textsuperscript{153} On the Roberts Court’s practice of signaling its intentions in one case before striking down a law in a subsequent case, see Richard M. Re, \textit{The Doctrine of One Last Chance}, 17 \textit{GREEN BAG} 2D 173 (2014).


\textsuperscript{156} \textit{Shelby Cnty.} v. \textit{Holder}, 133 S. Ct. 2612 (2013).

\textsuperscript{157} Id. at 2618.

\textsuperscript{158} Id. at 2625.

\textsuperscript{159} Id. at 2626.

\textsuperscript{160} \textit{Shelby Cnty.}, 133 S. Ct. at 2627.

\textsuperscript{161} Id. at 2627–30.
But a puzzle remains: if the elimination of preclearance truly was the conservative movement position, then how do we explain the fact that the 2006 reauthorization was overwhelmingly passed by two Republican-controlled chambers and then signed into law by a Republican president? Justice Scalia has a theory for us, which he offered during oral arguments in *Shelby County*:

[T]his last enactment, not a single vote in the Senate against it. And the House is pretty much the same. Now, I don’t think that’s attributable to the fact that it is so much clearer now that we need this. I think it is attributable, very likely attributable, to a phenomenon that is called perpetuation of racial entitlement. It’s been written about. Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes.

I don’t think there is anything to be gained by any Senator to vote against continuation of this act. And I am fairly confident it will be reenacted in perpetuity unless—unless a court can say it does not comport with the Constitution . . . .

That’s the—that’s the concern that those of us who—who have some questions about this statute have. It’s—it’s a concern that this is not the kind of a question you can leave to Congress . . . . [T]hey are going to lose votes if they do not reenact the Voting Rights Act.

Even the name of it is wonderful: The Voting Rights Act. Who is going to vote against that in the future?²₁⁶²

This is a radical claim, indeed. So far from asserting that the Court does not govern, Scalia argues in effect that the Court *must* govern in this sphere, because members of Congress cannot vote the way that they would like to.²₁⁶³ The very fact of

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²₁⁶₃ In this regard, Scalia seems to be taking as an invitation Mark Graber’s observation that “mainstream politicians may facilitate judicial policymaking in part because they have good reason to believe that the courts will announce those policies they privately favor but cannot openly endorse without endangering their political
near-unanimity is reason for the greatest suspicion: surely, Republicans wanted to vote against the renewal, but they were unable to do so, which clearly points toward some sort of democratic malfunction, justifying judicial intervention. Of course, the reason that Republicans were unable to vote the way that (Scalia presumes that) they wanted to is because “they are going to lose votes if they do.” Democratic responsiveness is presented as democratic malfunction. Judicial governance is justified, then, not by the fact that Congress cannot do so, but rather by the fact that the people themselves are incapable of responsible self-government. We are, apparently, too in thrall to racial entitlement. Accordingly, the Court stepped in and effectively eliminated preclearance, thereby significantly altering the process of determining who should govern.

In *Shelby County*, the position for which a number of conservative elites had been strenuously advocating for nearly a decade was thus brought to fruition by a five-to-four majority of the Court, with two members of the majority being justices who were appointed by the president who was installed by the Court in *Bush v. Gore*. But the recursivity goes deeper: *Shelby County* itself will significantly affect future elections in ways that make Republican control of Congress and the presidency more likely. Between 2010 and 2014, twenty-two states made it harder for citizens to vote (these include laws tightening voter identification requirements, laws making it harder to register to vote, laws limiting the availability of early voting, and laws making it harder for convicted felons to have their right to vote restored). Of those twenty-two states, fifteen had Republican majorities in both houses of the state legislature (or, in the case of Nebraska, the only house of the state legislature) plus a Republican governor; two had Republican majorities in both houses of the state legislature and overrode the veto of a Democratic governor; two involved unilateral action by a Republican governor; and one (Mississippi) involved a statewide referendum in a Republican-dominated state. Only in Illinois,

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165 *Id.* at 2 & n. 4.
Rhode Island, and West Virginia was the process driven by Democrats.166

A number of those changes occurred in states that had previously been subject to preclearance. In the immediate aftermath of Shelby County, Texas and South Carolina moved to implement photo ID laws that had previously been refused preclearance; Mississippi moved to implement a photo ID law that had been bottled up in the preclearance process; Alabama moved to implement a photo ID law that passed in 2011 but had never even been submitted for preclearance; and North Carolina passed a sweeping law imposing a photo ID requirement, cutting back on early voting, and reducing the voter-registration window.167 Virginia passed a strict photo ID law three months before Shelby County that was never precleared but has now been implemented.168 Given the partisan makeup of the state governments that created these impositions on the right to vote, it should be no surprise that these provisions are most likely to affect groups that tend to vote Democratic.169 Indeed, this is the

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166 The numbers add up to twenty-three because Florida implemented some changes through legislation and some by unilateral action of a Republican governor. Id. at 2 n. 4.


169 See Richard L. Hasen, Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere, 127 HARV. L. REV. F. 58, 63 (2014) (“Judged through a partisan lens then, North Carolina’s law is just the latest Republican attempt to skew the electorate at least moderately to gain electoral advantage.”); Nicholas O. Stephanopoulos, The South After Shelby County, 2013 SUP. CT. REV. 55, 60 (“Republicans’ political incentives point unambiguously toward the enactment of additional franchise restrictions. Not surprisingly, in the brief period that has elapsed since Shelby County was decided, officials in Alabama, Florida, Mississippi, North Carolina, Texas, and Virginia already have announced their intention to pass or implement photo ID laws and other similar measures.”); Steven Yaccino & Lizette Alvarez, New G.O.P. Bid to Limit Voting in Swing States, N.Y. TIMES, Mar. 30, 2014, at A1 (“Those most affected by the restrictions are minorities and the urban poor, who tend to vote Democratic.”).

Indeed, the only significant claim that provisions restricting the vote will not redound to the Republicans’ benefit sounds in backlash: Democratic voters most likely to be disfranchised by such laws will be outraged and undertake the extra effort now required to vote precisely because they understand these new restrictions to be aimed at disempowering them. See Anthony J. Gaughan, Has the South Changed? Shelby County and the Expansion of the Voter ID Battlefield, 19 TEX. J. C.L. & C.R. 109, 134–36 (2013). This raises an important point about all political action: results are never certain, and
official litigation position of at least one state: in response to the Department of Justice’s allegation that its redistricting plan was racially discriminatory, Texas recently argued that, “[i]n 2011, both houses of the Texas Legislature were controlled by large Republican majorities, and their redistricting decisions were designed to increase the Republican Party’s electoral prospects at the expense of the Democrats.”

Of the six states where preclearance was formerly required that have passed voting restrictions since *Shelby County*, two, North Carolina and Virginia, are swing states, where small changes in the composition of the electorate could determine state-wide elections—including, of course, determining who gets the state’s electoral college votes and whom the state sends to the Senate, which, in turn, determines who nominates and confirms judges. And every state has at least some competitive legislative districts and local elections, where such changes would also be pivotal—including elections to state legislatures, many of which will draw new district lines after the 2020 census, thus playing a role in determining who governs even further into the future. (Before *Shelby County*, redistricting plans in covered jurisdictions would have required preclearance.)

Of course, section 5 of the Voting Rights Act is not the only game in town. Now the states that were formerly subject to preclearance face the same legal landscape as the states that were not—and many of those twenty-two states that enacted barriers to voting had never been subject to section 5. But here, too, *Bush v. Gore* continues to ramify. Consider the fate of North Carolina’s sweeping new election law: a federal district judge, appointed by George W. Bush, denied a motion for a preliminary injunction against the new voting restrictions.

A Fourth Circuit panel, consisting of one Clinton appointee and two Obama appointees, partially reversed, enjoining enforcement of the law’s elimination of same-day registration and its unintended consequences abound. But even if the backlash thesis is correct—and the evidence for it, thus far, is only anecdotal and circumstantial—it serves to reinforce, rather than undermine, the partisan valence of the initial decision to implement voting restrictions. After all, the backlash, if it exists, is against precisely that valence.

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prohibition on counting ballots cast in the wrong precinct, but affirming the district court’s denial of an injunction on other provisions of the law. The Supreme Court, with two Democratic appointees dissenting, stayed the decision pending appeal, thereby reinstating all of the provisions of the North Carolina law in time for the 2014 election, which featured a closely fought Senate race, among other things. The Republican candidate, Thom Tillis, narrowly won the Senate race. Or consider Texas’s new photo ID law: in October 2014, an Obama-appointed federal judge struck down the law, finding that it violated both the Constitution and the Voting Rights Act. Three days later, a panel of the Fifth Circuit, comprised of two George W. Bush appointees and one Obama appointee, stayed the district court’s decision pending appeal. The Supreme Court denied a motion to vacate the stay, with three of the four Democratic appointees dissenting. In Ohio, a Clinton-appointed district judge enjoined enforcement of a new statute and regulations curtailing early voting. A panel of the Sixth Circuit, consisting of one Carter appointee (!) and two Clinton appointees, denied a motion to stay the decision pending appeal and subsequently affirmed the district court’s decision. The Supreme Court, with all four Democratic appointees dissenting, stayed the district court’s order granting the preliminary injunction, thus allowing the reduction in early voting.

In Wisconsin, where Republican Governor (and possible 2016 presidential candidate) Scott Walker was locked in a tough reelection battle, a Clinton-appointed district judge enjoined

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172 League of Women Voters of N. Carolina v. N. Carolina, 769 F.3d 224 (4th Cir. 2014).
176 Veasey v. Perry, 769 F.3d 890 (5th Cir. 2014).
179 Ohio State Conf. of the NAACP v. Husted, 769 F.3d 385 (6th Cir. 2014) (denying stay pending appeal); Ohio State Conf. of the NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014) (affirming the injunction).
181 For discussions of the national implications and importance of the 2014 Wisconsin gubernatorial race, see Noam Scheiber, Scott Walker’s Race for Governor Could Shape U.S. Politics for Years to Come, NEW REPUBLIC ONLINE, Aug. 25, 2014,
enforcement of the state’s 2011 photo ID law.182 A Seventh Circuit panel consisting of one Reagan appointee and two George W. Bush appointees stayed the district court’s order pending appeal183 and then reversed the district court a few weeks later.184 Judge Posner requested rehearing en banc; the request was denied by an equally divided court, and all five judges voting to deny rehearing were appointed by Republican presidents.185 Here, the Wisconsin story departs somewhat from the others: the Supreme Court, with three Republican appointees dissenting, vacated the Seventh Circuit’s order and restored the district court’s injunction pending appeal.186 (Walker was, nevertheless, reelected.187) It is possible that Chief Justice Roberts and Justice Kennedy were troubled by allowing the Seventh Circuit’s decision to go into effect so close to the election188—although, of course, this does not explain why the Court upheld the Fifth Circuit’s stay of the Texas district court’s opinion. Whatever the reason for the particular outcome in the Wisconsin case, court decisions allowed new restrictions on voting to proceed in three of these four states (North Carolina, Texas, and Ohio) in ways that certainly were perceived to be, and likely were, beneficial to Republicans. And the party of the appointing president turns out to be an excellent (although not perfect) predictor of how judges voted in these cases. Judges appointed by the president installed by the Court in Bush v. Gore thus not only eliminated preclearance under the Voting


183 Frank v. Walker, 766 F.3d 755 (7th Cir. 2014).
184 Frank v. Walker, 768 F.3d 744 (7th Cir. 2014).
185 Frank v. Walker, 769 F.3d 494, 498 (7th Cir. 2014).
Rights Act, they also allowed a number of new voting restrictions to affect the 2014 midterm elections.\textsuperscript{189}

After the midterm elections were over, the Supreme Court denied \textit{certiorari} in the Wisconsin case,\textsuperscript{190} allowing the Seventh Circuit panel’s decision upholding the photo ID requirement to stand. That requirement will accordingly be in effect for the 2016 elections in Wisconsin. The Court also denied \textit{certiorari} in the North Carolina case,\textsuperscript{191} which will have the effect of maintaining the Fourth Circuit’s partial injunction while the district court conducts a trial. Because that trial is expected to conclude long before the 2016 election, the Fourth Circuit’s injunction is unlikely to affect that election.\textsuperscript{192} In the Texas case, a Fifth Circuit panel consisting of one Clinton appointee, one George W. Bush appointee, and one Obama appointee affirmed the district court’s conclusion that the photo ID law violated the Voting Rights Act;\textsuperscript{193} Texas has petitioned for rehearing \textit{en banc}.\textsuperscript{194} And the Ohio case ended in a settlement.\textsuperscript{195} Meanwhile, a number of Republican-dominated state legislatures are pushing new voting restrictions in advance of the 2016 elections.\textsuperscript{196}

Although parties are, clearly, central to this analysis, my point is not meant to be a partisan one. Democrats, too, have developed ideological positions that serve their partisan interests, and they, too, have pushed these interests through the courts. Obviously, in the cases described above, the Democrats’


\textsuperscript{190} Frank v. Walker, 135 S. Ct. 1551 (2015).


\textsuperscript{193} Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015).


votes were just as predictable on a partisan basis as the Republicans. Likewise, Democratic judges are predictable opponents of felon-disfranchisement laws, a position that would redound to their party's electoral benefit. If the analysis above seems partisan, that is only because the Democrats have not controlled the federal judiciary in recent history: Democratic presidents have appointed only four justices since 1967, and certainly at no point since Justice Rehnquist, the last of Richard Nixon's four appointments, was confirmed in December 1971 would anyone say that Democrats had a working majority on the Court. At whatever point that changes, then the governance engaged in by the Court may come to have a different partisan valence.

Bush v. Gore, then, was not so much a radical anomaly as it was a particularly salient instance of a continuously occurring phenomenon: those who govern were playing a central role in helping to decide who should govern. Judges are part of the system of governance, enmeshed in its partisan interactions, and when they decide election-law cases, this subset of governors is playing an integral role in deciding who should govern. Bush v. Gore may present the unedifying spectacle of justices voting in ways that are inconsistent with their broader ideological outlooks so as to further their partisan interests, but the prevalence of motivated reasoning should lead us to be wary of so sharp a distinction between ideology and partisan interests, especially in the recursive domain of election law.

197 Cf. Yaccino & Alvarez, supra note 169 ("As the battle over voting laws escalates, Democrats are intensifying their own efforts to make voting more accessible. Richard L. Hasen, an election law expert at the University of California, Irvine, said Democrats had their own partisan agendas for doing so since an expanded electorate would benefit mostly Democrats. 'It's not just out of the goodness of their own hearts they are doing this,' he said.").


200 See Balkin & Levinson, supra note 93, at 1084–85 (making this claim).

201 Dan Kahan has suggested that the differential treatment of voter ID laws by
Whatever other ideological functions it served—and I do not doubt that there are others—the development of a conservative critique of preclearance likely served Republican electoral ends. The precise effects of *Shelby County* and various other election-law decisions may be harder to pin down than *Bush v. Gore*, and this wispy veil of ignorance may make those decisions more palatable, more law-like, but their influence on deciding who governs is both real and broadly traceable.

**CONCLUSION**

One can certainly understand why the justices are so invested in denying that they govern. If it were to be admitted, then they would have to face questions about their warrant for doing so. The warrant for members of Congress and the president is that they were elected within the last two, four, or six years, and if they wish to keep serving, they will have to face the discipline of the ballot box again soon. But Justice Scalia was confirmed to the Supreme Court the week that Berlin's "Take My Breath Away" (the love theme written for the movie *Top Gun*) topped the pop charts, and he need never face any sort of democratic disciplining mechanism again. Given the "trend in government that has developed in recent centuries, called democracy," he and his colleagues may well be wary of inquiry into the warrant by which they govern.

The justices' rhetoric well serves that wariness. Their self-presentation—their "we"—makes them out to be wholly different from elected politicians. Where politicians are transient and fickle, "we" are stable and eternal; where they are

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Democratic and Republican judges is a result of culturally motivated reasoning rather than conscious partisan motivation. Dan M. Kahan, "Ideology in" or "Cultural Cognition of" Judging: What Difference Does it Make?, 92 MARQ. L. REV. 413 (2009). This seems plausible to me, as well, but it does not change the predictable partisan valence of these decisions.

202 Except, of course, for second-term presidents. See U.S. CONST. amend. XXII.


grasping and voracious, "we" are passive and contemplative; and where they are headstrong and foolish, "we" are mature and wise. The Court thereby stands apart, but also above, as by holding judges to a higher, more pristine conception of corruption than it applies to elected politicians. In case that is not rhetorical distance enough, the justices also more pointedly claim that they do not "govern." The government governs, and the Court is at pains to make clear that it is not the government.

But, of course, by any reasonable understanding of the words, the courts both govern and play a crucial role in deciding who governs. Courts govern all the time, simply because that is what it is to make decisions that control the actions and interactions of others. But the nature of election law is such as to give governance in that field a recursive quality: Reagan picks judges who pick George W. Bush, who picks judges who pick the rules governing the elections of future pickers-of-judges. Of course, it is nowhere near that simple—many more actors are involved, and there are many more constraints on all of the actors involved. Governance is always shared, and it is never free-form. But it is no less governance for that.

There are good reasons to have courts involved, to some degree, in the process of governance. But the extent of their role in governance can only sensibly be debated once we have acknowledged that they are, in fact, governing. Roberts' claim that "those who govern should be the last people to help decide who should govern" was a statement made in the service of judicial power: other institutions' motives, he was telling us, are suspect. Trust in the Court—the eternal, passive, wise, uncorrupt Court—to resolve these hard matters for you. Failure to see through these rhetorical distancing strategies tends towards passive acceptance of such claims. We ought to be more skeptical of our governors than that.

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205 See 6 OXFORD ENGLISH DICTIONARY 709 (2d ed. 1989) (defining "govern" as "[t]o rule with authority, esp. with the authority of a sovereign; to direct and control the actions and affairs of (a people, a state or its members), whether despotically or constitutionally; to rule or regulate the affairs of (a body of men, corporation)."

206 See CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY, supra note 49, at ch. 2 (arguing that courts are one component of a thick and normatively appealing conception of representation).
