CONSERVATIVE LEGAL ADVOCACY ORGANIZATIONS AND CONSTITUTIONAL CHANGE IN THE ROBERTS COURT

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INTRODUCTION

The Roberts Court has overturned major precedents and transformed constitutional doctrine on a host of issues: campaign finance, voting rights, labor, religion, guns, abortion, affirmative action, business regulation, federal agency power, and more. To explain this legal revolution, scholars and journalists typically emphasize the composition of the judiciary. They rightly observe that the conservative movement's laser focus on judicial appointments since the early 2000s vastly improved conservatives' chances of prevailing in litigation. Large swaths of doctrine shifted as justices vetted through Federalist Society and Heritage Foundation networks took control of the U.S. Supreme Court, and those shifts accelerated after they won a super majority.

But understanding this transformation also requires attention to other ingredients for constitutional change through the courts, including legal

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advocacy organizations, patrons, and networks.[1] This Essay focuses on the roles of conservative and libertarian legal advocacy organizations,[2] using campaign finance as a case study.

Part I describes how these organizations, along with allied party leaders, activists, and interest groups, have shared in the work of making constitutional law. Part II examines how conservative legal advocacy organizations have contributed to the creation of First Amendment doctrine governing money in politics. Movements for civil rights and civil liberties provided the model and some of the tools. The Essay is primarily descriptive, but it raises some normative questions, too.

I. THE ROLES OF CONSERVATIVE LEGAL ADVOCACY ORGANIZATIONS

Legal advocacy organizations have charted long-term litigation and media strategies to address policy priorities of key constituencies of the conservative coalition. Consider some of the most famous rulings by the Roberts Court: *Citizens United v. FEC*,[3] *Shelby County v. Holder*,[4] *Janus v. AFSCME*,[5] *Kennedy v. Bremerton School District*,[6] *Dobbs v. Jackson Women's Health Organization*,[7] *New York State Rifle & Pistol Ass'n v. Bruen*,[8] *West Virginia v. EPA*,[9] *Students for Fair Admissions v. President and Fellows of Harvard College*,[10] *303 Creative LLC v. Elenis*,[11] and *Loper Bright Enterprises v. Raimondo*.[12] All were products of campaigns led by

1. *See generally* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 LAW & SOC. INQUIRY 516 (2011); Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 LAW & SOC. INQUIRY 1698 (2018).

2. I hereafter use "conservative legal advocacy organizations" advisedly to refer to a broad category of organizations associated with the conservative legal movement. Their policy goals vary and sometimes conflict.

3. 558 U.S. 310 (2010) (holding that corporations have a First Amendment right to spend unlimited amounts in elections).

4. 570 U.S. 529 (2013) (ruling § 4 of the Voting Rights Act of 1965 unconstitutional).

5. 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and invalidating a requirement that public employees who do not belong to a union pay agency fees).

6. 142 S. Ct. 2407 (2022) (holding that a high school football coach had a First Amendment right to lead a prayer with students during and after games).

7. 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

8. 142 S. Ct. 2111 (2022) (finding that New York's concealed-carry gun licensing law violated the Second Amendment).

9. 142 S. Ct. 2587 (2022) (holding that the EPA lacked authority to regulate greenhouse gas emissions and establishing a new "major questions doctrine").

10. 143 S. Ct. 2141 (2023) (striking down Harvard's race-conscious admissions).

11. 143 S. Ct. 2298 (2023) (holding that the First Amendment prohibited Colorado from requiring a website designer to create a wedding website for a same sex couple).

12. 144 S. Ct. 2244 (2024) (overruling the doctrine of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), according to which the courts generally should defer to agency interpretations of statutes they are responsible for enforcing).

conservative and libertarian legal advocacy organizations, pursuing the varied policy goals of different strands of the conservative legal movement.[13]

These organizations generated legal theories and responded to signals from the justices about the types of fact patterns that might make good vehicles for reshaping law. They identified sympathetic clients, filed cases, and shepherded them through the courts. They assembled litigation coalitions and found skilled appellate advocates to handle the arguments. As they gained footholds in the doctrine, they built on them, case by case.[14]

Creating organizations to lead these litigation campaigns was part of the conservative movement's massive institution-building project of the past fifty years. Some credit for mobilizing business to invest in this strategy goes to Lewis F. Powell Jr., whose now famous memo to the U.S. Chamber of Commerce (the "Chamber") shortly before President Richard M. Nixon tapped him to serve as a Supreme Court justice called for an aggressive response to what he called a "broad attack" on the American economic system.[15] Justice Powell warned that Ralph Nader, American Civil Liberties Union (ACLU) lawyers, and liberal public interest law firms were "active exploiters of the judicial system" and an "activist-minded Supreme Court."[16] He implored business leaders to respond in kind, writing that "the judiciary may be the most important instrument for social, economic and political change." He urged the Chamber to mobilize resources to pursue "this vast area of opportunity."[17] The memo circulated widely and received an enthusiastic reception from business leaders,[18] who worked with entrepreneurial lawyers to establish dozens of legal advocacy groups—including the Pacific Legal Foundation, the Southeastern Legal Foundation, the Mid-America Legal Foundation, the Mountain States Legal Foundation, the New England Legal Foundation, and the Washington Legal Foundation.[19] In 1977, the Chamber also established an elite litigation unit, the U.S. Chamber Litigation Center, to advocate for business interests.[20]

Religious conservatives created their own legal advocacy organizations to challenge the right to abortion, prohibitions on school prayer, restrictions on government support for religious institutions, and legal protections for

13. *See generally* Southworth, *supra* note 1 (discussing the roles that lawyers and their organizations have played in the conservative turn in American constitutional law).

14. *See id.*

15. Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Com. 1 (Aug. 23, 1971) (on file with the Washington and Lee University School of Law Scholarly Commons).

16. *Id.* at 26.

17. *Id.* at 26–27.

18. *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 301–02 (2018).

19. *See generally* LEE EPSTEIN, CONSERVATIVES IN COURT (1985); KAREN O'CONNOR & LEE EPSTEIN, PUBLIC INTEREST LAW GROUPS: INSTITUTIONAL PROFILES (1989); Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law"*, 52 UCLA L. REV. 1223 (2005).

20. *See Chamber Litigation Center: Fighting for Business in the Courts*, U.S. CHAMBER OF COM., https://www.uschamber.com/program/us-chamber-litigation-center [https://perma.cc/T7HH-CTEK] (last visited Feb. 14, 2025).

same-sex couples.[21] They also sought to expand the rights of Christians to act on their religious beliefs in the public sphere and workplace.[22] Other constituencies created organizations to bolster property rights, reduce protections for criminal defendants, invalidate affirmative action, overturn gun control laws, and attack the administrative state.[23]

Many of the first wave of conservative advocacy organizations were not particularly effective.[24] An influential report prepared by Michael Horowitz for the Sarah Scaife Foundation blamed the founders and funders of these groups for failing to understand the reasons for the success of liberal legal advocacy groups in the 1960s and 1970s.[25] Horowitz noted that liberals benefited from "a federal judiciary sympathetic to [their] purposes,"[26] and he urged conservatives to exert greater control over judicial appointments.[27] But he also emphasized the excellence and strategic vision of liberal advocacy organizations[28] and the deficiencies of the conservative groups.[29] He urged financial patrons to surrender control over the organizations' agendas in order to give their lofty mission statements greater plausibility.[30] According to Horowitz, conservative advocacy organizations needed to attract more competent and ideologically committed lawyers,[31] demonstrate a more sophisticated grasp of political institutions and the lawmaking process,[32] and select more compelling cases and clients for their litigation campaigns.[33]

Financial patrons thereafter gave conservative advocacy groups and their leaders greater independence to chart strategy under the leadership of ideologically committed advocates. These organizations moved from

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21. *See generally* HANS J. HACKER, THE CULTURE OF CONSERVATIVE CHRISTIAN LITIGATION (2005); STEVEN BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS (2002); ANDREW R. LEWIS, THE RIGHTS TURN IN CONSERVATIVE CHRISTIAN POLITICS: HOW ABORTION TRANSFORMED THE CULTURE WARS (2017).

22. *See supra* note 21.

23. ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 8–40 (2008).

24. *See* Michael Horowitz, The Public Interest Law Movement: An Analysis with Special Reference to the Role and Practices of Conservative Public Interest Law Firms (1980) (unpublished report) (on file with author).

25. *Id.* at 53–88.

26. *Id.* at 19.

27. *Id.* at 75–76 (noting "the absence of any input on the part of the conservative movement in the critical judicial selection process").

28. *Id.* at 21 ("[T]he principal basis for the success of many traditional public interest firms has been the intelligence, ambition, and, indeed, the very brilliance of their directors and staff.").

29. *Id.* at 87.

30. *Id.* at 71 (noting the conservative legal movement needed to "divest itself of the label and reality of being 'business-oriented'").

31. *Id.* at 54. Horowitz was an early supporter of the Federalist Society. He helped to build a pipeline for young members into positions in academia, major law firms, and Republican administrations. *See* SOUTHWORTH, *supra* note 23, at 28.

32. Horowitz, *supra* note 24, at 74–75.

33. *Id.* at 85 ("It is . . . critical that the conservative movement seek out and find clients other than large corporations and corporate interests . . . .").

defense to offense as conservatives built an impressive infrastructure for policy change through the courts and as Republican Presidents appointed more reliably conservative judges.[34]

Originalism—the idea that the Constitution has the meaning ascribed to it by those who drafted and ratified the original document and its amendments—provided a rationale for pursuing constitutional change through the courts without seeming to abandon the conservative movement's opposition to judicial activism. Early versions of originalism emphasized judicial restraint and served as a justification for resisting the civil rights and civil liberties decisions of the Warren Court.[35] But in the 1990s, with a conservative majority on the Court and conservative advocacy groups eager to use litigation to attack liberal laws and policies, originalism morphed from a theory of judicial restraint to one justifying active judicial review.[36] It is now part of the background "law" that helps to justify shifts in the doctrine and reversals of major precedents.

Lawyers for conservative causes have used and improved strategies developed by liberal lawyers in an era when the Supreme Court was more receptive to liberals' goals. Several attorneys whom I interviewed in the early 2000s, for a book on the conservative legal movement,[37] mentioned those debts. The founder of one particularly high-profile group said, "[W]e owe our success to the pioneering work that was done by a variety of organizations, starting most notably and obviously, of course, with the NAACP and the ACLU, through Ralph Nader. . . ."[38] The founder of a libertarian organization explained that "having a blueprint and really thinking it through before we do it and then sticking with that area of law over a long period of time" was "patterned after the NAACP Legal Defense Fund very, very consciously."[39] Another lawyer credited the liberal public interest law movement with establishing precedents that enabled his organization to scout for situations that matched the organization's agenda and then to "blatantly solicit people" to serve as plaintiffs.[40]

Some of the lawyers I interviewed twenty years ago have already accomplished much of what they originally set out to do. But the movements they serve are going strong, and their organizations are still active in the courts. As noted in Linda Greenhouse's essay on "a world transformed" by the Roberts Court, conservative advocacy organizations are "carefully cultivating cases and serving them up to justices who themselves were

34. Southworth, *supra* note 1, at 1710–12.

35. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

36. *See* ANN SOUTHWORTH, BIG MONEY UNLEASHED: THE CAMPAIGN TO DEREGULATE ELECTION SPENDING 15, 31 (2023).

37. *See* SOUTHWORTH, *supra* note 23, at 8–40.

38. *Id.* at 194.

39. *Id.*

40. *See id.* at 74; *infra* note 92 and accompanying text.

propelled to their positions of great power by those movements."[41] Meanwhile, liberal and progressive advocacy groups have assumed a more defensive posture.

II. THE CAMPAIGN TO DEREGULATE ELECTION SPENDING

This part explores the roles played by conservative advocacy groups in one highly consequential campaign. I draw here on research for my book on the campaign to deregulate election spending, including interviews with fifty-two lawyers on opposing sides ("challengers" versus "reformers") of major campaign finance cases decided by the Roberts Court.[42]

A. The Rulings

A very brief synopsis of the Supreme Court's major campaign finance rulings will suffice to set the stage for what follows—an overview of how conservative advocacy organizations (and, importantly, some liberal groups) contributed to the creation of First Amendment doctrine in this area.

The Supreme Court's first major decision on the topic, *Buckley v. Valeo*,[43] involved a challenge to election reform legislation adopted in the wake of the Watergate scandal.[44] The Court found that the statute raised free speech issues, but it did not invalidate the entire statute.[45] Instead, it struck down the legislation's limits on independent campaign expenditures and upheld the statute's individual contribution limits, finding that they served a governmental interest in combating corruption or the appearance of corruption.[46] The *Buckley* Court also upheld disclosure requirements and public funding of presidential elections.[47]

For years after *Buckley*, the Supreme Court upheld campaign finance regulations that could be construed as fighting corruption. In *Austin v. Michigan Chamber of Commerce*,[48] for example, the Court rejected a challenge to a state statute prohibiting corporations from using corporate treasury funds in candidate elections for state office.[49] And in *McConnell v.*

41. Linda Greenhouse, *Look at What John Roberts and His Court Have Wrought over 18 Years*, N.Y. TIMES (July 9, 2023), https://www.nytimes.com/2023/07/09/opinion/supreme-court-conservative-agenda.html [https://perma.cc/6UTV-2EZG].

42. *See* SOUTHWORTH, *supra* note 36. I use the term "challengers" throughout the book to refer to those who seek to defeat and overturn campaign finance laws, and I use "reformers" to describe those who defend campaign finance regulations. Opponents of campaign finance regulations are skeptical about the purposes and effects of these laws, but they nevertheless frequently use the label "reformer," sometimes in scare quotes, to refer to their adversaries. *See id.* at 7.

43. 424 U.S. 1 (1976).

44. *Id.*

45. *See id.* at 58–59, 143.

46. *See id.* at 58–59.

47. *See id.* at 84, 108–09.

48. 494 U.S. 652 (1990).

49. *See id.* at 654–55 (reviewing MICH. COMP. LAWS § 169.254(1) (1979)).

FEC,[50] the Supreme Court upheld most of the Bipartisan Campaign Reform Act of 2002[51] (BCRA or "McCain-Feingold"), the first major campaign finance reform legislation enacted since the 1970s.

However, in the years since John G. Roberts Jr. replaced William H. Rehnquist as chief justice and Samuel A. Alito Jr. replaced Sandra Day O'Connor as an associate justice, the Supreme Court has invalidated or severely limited nearly every campaign finance regulation it has considered. The most famous of these rulings, *Citizens United v. FEC*, held that corporations and unions have a First Amendment right to spend unlimited amounts of money in federal elections.[52] The Court also narrowed the definition of corruption, finding that the only type of concern that can justify regulation is quid pro quo corruption—trading money for political favors; the government may not target the special access and influence that major donors enjoy.[53] The U.S. Court of Appeals for the D.C. Circuit relied on *Citizens United* to hold that contributions to super political action committees ("super PACs") cannot be limited.[54]

B. The Roles of Conservative Advocacy Organizations

The justices obviously were the most important players in this constitutional lawmaking process. The conservative legal movement's replacement of liberals and "squishy" Republicans with reliable supporters of its policy goals goes a long way toward explaining how campaign finance doctrine has changed since the mid-2000s. But other essential participants in the process were the attorneys who devised the legal theories, the advocacy groups that brought the cases, the funders, and the networks through which these actors coordinated strategy and held the Supreme Court accountable. The remainder of this part offers a simplified retelling of the story of the previous section, nudging the justices to the background and highlighting the roles of conservative legal advocacy organizations and their patrons.

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50. 540 U.S. 93 (2003).

51. Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C.).

52. Citizens United v. FEC, 558 U.S. 310 (2010). Other Roberts Court decisions invalidating campaign finance laws include *Davis v. FEC*, 554 U.S. 724 (2008) (striking down the "Millionaire's Amendment" to the Bipartisan Campaign Reform Act); *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011) (invalidating a provision of Arizona's public financing law); *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. 516 (2012) (finding unconstitutional a century-old Montana law prohibiting corporations from making expenditures supporting or opposing candidates); *McCutcheon v. FEC*, 572 U.S. 185 (2014) (holding that aggregate limits on contributions an individual could give to candidates and political committees in an election cycle violated the First Amendment); and *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022) (striking down a provision by which no more than $250,000 in campaign contributions collected after an election could be used to repay a candidate's loans to his own campaign).

53. *See generally Citizens United*, 558 U.S. 310; *McCutcheon*, 572 U.S. 185.

54. *See* SpeechNow.org v. FEC, 599 F.3d. 686 (D.C. Cir. 2010) (en banc).

The conservative legal movement was still just getting started at the time of *Buckley*. The lead plaintiff was New York Senator James L. Buckley (brother of William F. Buckley Jr., editor of the *National Review*), who had been elected as a Conservative Party candidate in 1970.[55] The challengers relied on First Amendment theories developed by Yale Law School Professor Ralph K. Winter Jr. and his student, John R. Bolton, in pamphlets published by the American Enterprise Institute (AEI) in the early 1970s.[56] Charles and David Koch (the "Koch Brothers") and other wealthy individuals provided some of the funding.[57] Solicitor General Robert H. Bork offered only a weak defense of the challenged legislation.[58]

Conservative advocacy organizations featured prominently in the next major campaign finance case decided by the Supreme Court, *First National Bank of Boston v. Bellotti*.[59] In *Bellotti*, a bank challenged a Massachusetts law that restricted corporate treasury spending on ballot measures.[60] Amicus briefs supporting the bank's position came from the U.S. Chamber of Commerce, industry groups, and several new conservative advocacy organizations—the Pacific Legal Foundation, Northeastern Legal Foundation, and Mid-America Legal Foundation.[61] Justice Powell cobbled together a 5-4 ruling that the restriction was unconstitutional, relying on a theory about the interests of "listeners" advanced in the amicus briefs.[62] *Bellotti* later served as a key precedent for the ruling in *Citizens United*.[63]

Opponents of regulation experienced a setback in *Austin*, a challenge by the Michigan Chamber of Commerce (the "Michigan Chamber") to a

55. *See* SOUTHWORTH, *supra* note 36, at 39. The ACLU joined in the challenge, as did the Libertarian Party, the American Conservative Union, the Conservative Party of New York State, the Mississippi Republican Party, the Conservative Victory Fund, and the then-print conservative newspaper *Human Events*. *See id.*

56. *See* Ralph K. Winter, Jr., *Money, Politics and the First Amendment*, *in* CAMPAIGN FINANCES: TWO VIEWS OF THE POLITICAL AND CONSTITUTIONAL IMPLICATIONS 44 (1971); RALPH K. WINTER, JR. & JOHN R. BOLTON, CAMPAIGN FINANCE AND POLITICAL FREEDOM (1973). Professor Winter was an adviser, along with Robert Bork, of the first chapter of the Federalist Society at Yale. Bolton served as U.S. Ambassador to the United Nations from 2005 to 2006 and as President Donald J. Trump's national security adviser from 2018 to 2019.

57. *See* SOUTHWORTH, *supra* note 36, at 42–43.

58. *See id.* at 40.

59. 435 U.S. 765 (1978).

60. *Id.* (reviewing 1975 Mass. Acts 120–21).

61. *See* Brief of the Chamber of Commerce of the United States of America as Amici Curiae Supporting Appellants, *Bellotti*, 435 U.S. 765 (No. 76-1172), 1977 WL 189653 (emphasizing the value to society in having "all points of view, including those of incorporated enterprises, be presented to the public on this important matter"); Brief of Northeastern Legal Foundation and Mid-America Legal Foundation as Amici Curiae Supporting Appellants, *Bellotti*, 435 U.S. 765 (No. 76-1172), 1977 WL 189654 (citing cases indicating that the Court "recognized that the First Amendment serves to protect both the speaker's right to speak and the listener's right to hear"); Brief of Pacific Legal Foundation as Amici Curiae Supporting Petitioners, *Bellotti*, 435 U.S. 765 (No. 76-1172), 1977 WL 189658 ("Free speech limitations, such as those imposed by the Massachusetts statute, not only curtail the rights of the plaintiffs who wish to be heard but also limit the public's right to receive information; a right which has been accorded the strongest legal protection.").

62. *See supra* note 61.

63. *See* 558 U.S. 310, 346–47 (2010).

Michigan statute prohibiting corporations from using corporate treasury funds for independent expenditures in support of or in opposition to candidates in elections for state office.[64] The Michigan Chamber's position received amicus support from several trade associations, conservative legal advocacy organizations, and the ACLU.[65] The Supreme Court upheld the statute,[66] but Justices Antonin Scalia and Anthony M. Kennedy filed passionate dissents, signaling to opponents of campaign finance regulation their eagerness to reverse course.[67]

The effort gathered steam in the 1990s and early 2000s, as challengers invested in expertise, strategic case selection, and evocative rhetoric. They established specialized groups, recruited ideologically committed lawyers, and introduced and reworked ideas to unite disparate groups and constituencies—or at least the lawyers for these groups and constituencies—around the idea that regulating campaign spending amounts to censoring political expression. Advocates found appealing plaintiffs for their cases and organized amici support and complementary media strategies. They tapped into populist mistrust of elites, framing the effort as a fight on behalf of the "little guy's" right to engage in free speech. They were attentive to signals from the justices. The Federalist Society's Free Speech and Election Law Practice Group served as a site for cultivating arguments and coordinating strategy. The ACLU and labor groups offered partial support for some of these challenges.[68]

Social conservatives were not among the early opponents of campaign finance reform. Indeed, some of their organizations supported the legislation challenged in *Buckley*.[69] But abortion opponents, along with gun rights groups and other interest groups aligned with the Republican Party's populist elements, later joined the fight as they tangled with regulators over their attempts to use general treasury funds to influence elections.[70] At first, some

64. *See* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (reviewing MICH. COMP. LAWS § 169.254(1) (1979)).

65. *See* Brief of the Washington Legal Foundation and the Allied Educational Foundation as Amici Curiae Supporting Appellee, *Austin*, 494 U.S. 652 (No. 88-1569), 1989 WL 1126843; Brief for the Center for Public Interest Law as Amici Curiae Supporting Appellee, *Austin*, 494 U.S. 652 (No. 88-1569), 1989 WL 1126839; Brief of the American Civil Liberties Union as Amici Curiae Supporting Appellee, *Austin*, 494 U.S. 652 (No. 88-1569), 1989 WL 1126847; Brief of the American Medical Association, the National Association of Realtors, and the American Insurance Association as Amici Curiae Supporting Appellee, *Austin*, 494 U.S. 652 (No. 88-1569), 1989 WL 1126842.

66. *See Austin*, 494 U.S. at 655.

67. *Id.* at 679, 681 (Scalia, J., dissenting) (characterizing the regulation as an "Orwellian . . . restriction"); *id.* at 696 (Kennedy, J., dissenting) (calling Michigan's law "repugnant to the First Amendment" and in conflict with "its central guarantee, the freedom to speak in the electoral process").

68. *See* SOUTHWORTH, *supra* note 36, at 27–70. The ACLU has long opposed restrictions on independent campaign expenditures, but it has supported public funding and disclosure requirements. For an overview of the ACLU's role in this campaign, see SOUTHWORTH, *supra* note 36, at 115–19, 125–26, 189–90, and for more on labor groups' roles, see *id.* at 122–23, 173–74.

69. *See* LEWIS, *supra* note 21, at 36–37.

70. *See* SOUTHWORTH, *supra* note 36, at 46–47.

of these groups sought to distinguish between the speech rights of ideologically driven nonprofit entities and for-profit corporations, and the Supreme Court approved such a distinction in a case brought by pro-life advocates.[71] But the murky boundaries of the category of corporations receiving special treatment,[72] along with concerns about maintaining Republican Party leaders' support for gun rights and efforts to overturn *Roe v. Wade*,[73] eventually led some of these groups to join in a broader assault on all campaign finance regulation.[74]

Even before President George W. Bush (reluctantly) signed the BCRA into law in 2002, Senate Republican leader Mitch McConnell had assembled an impressive team of lawyers to challenge its constitutionality.[75] The Supreme Court upheld most of the legislation in *McConnell*,[76] but that was the last major loss for opponents of campaign finance regulation. After Justice Alito and Chief Justice Roberts joined the Court in 2006, a renewed assault yielded victory after victory.[77]

These rulings, along with dysfunction at the Federal Election Commission, have resulted in an explosion of election spending by big money players, much of it "dark," meaning that donor identities are undisclosed or difficult to track.[78] As one interviewed lawyer explained, "the campaign finance structure that was put into place in the early 1970s is coming unglued . . . . [W]e're watching a slow-motion collapse without any real clear idea of what's going [to] be put in its place, if anything."[79] The 2024 presidential race saw unprecedented levels of outside spending by super PACs funded by megadonors and dark money groups.[80]

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71. *See, e.g.*, Brief for the Appellee, FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) (No. 85-701), 1986 WL 727495, at *41 (emphasizing that campaign expenditures by ideological corporations on issues of concern to their members do not "constitute the injection into the political process of vast wealth accumulated for other purposes"); Brief of National Rifle Association as Amici Curiae Supporting Appellant at 2, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205) ("[T]he voluntary donation box of a nonprofit organization must be distinguished from the cash register of a business when it comes to regulating political expression.").

72. *See Mass. Citizens for Life*, 479 U.S. at 263–65 (holding that the FECA's prohibition on the use of corporate treasury funds for expenditures on federal elections was unconstitutional as applied to nonprofit issue-oriented corporations that do not accept contributions from business corporations or labor unions).

73. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

74. *See* SOUTHWORTH, *supra* note 36, at 99–115.

75. *See* MITCH MCCONNELL, THE LONG GAME: A MEMOIR 150 (2016).

76. *See* 540 U.S. 93, 224, 233, 246 (2003).

77. *See* SOUTHWORTH, *supra* note 36, at 156.

78. *See Dark Money Basics: What Is Dark Money?*, OPEN SECRETS, https://www.opensecrets.org/dark-money/basics [https://perma.cc/E8Y4-MCY9] (last visited Feb. 14, 2025).

79. SOUTHWORTH, *supra* note 36, at 95 (first alteration in original).

80. *See* Anna Massoglia, *Outside Spending on 2024 Elections Shatters Records, Fueled by Billion-Dollar 'Dark Money' Infusion*, OPEN SECRETS (Nov. 5, 2024), https://www.opensecrets.org/news/2024/11/outside-spending-on-2024-elections-shatters-records-fueled-by-billion-dollar-dark-money-infusion/ [https://perma.cc/6EYT-72YE].

C. Borrowing Liberal and Progressive Law Reform Tools

Many of the organizations leading the fight against campaign finance regulation claim the mantle of civil liberties and/or public interest law even if they do not use those labels in their names or mission statements. The James Madison Center for Free Speech, whose leader, James Bopp Jr., filed most of the lawsuits,[81] describes its goal as resisting those who

> are seeking to use government to suppress the right of citizens and citizen groups to participate in our democratic process by limiting their right to speak out about the actions of public officeholders and the position of candidates on issues and by limiting the right of citizens to join together to make their voices heard.[82]

Another specialized group, the Institute for Free Speech, "seek[s] to promote and defend American citizens' First Amendment political speech rights."[83] The Institute for Justice, which won the D.C. Circuit ruling regarding super PACs,[84] tries to "end widespread abuses of government power and secure the constitutional rights that allow all Americans to pursue their dreams."[85] The Goldwater Institute, which brought a successful challenge to Arizona's system for funding elections,[86] proclaims a commitment to "empowering all Americans to live freer, happier lives."[87] The mission of the Cato Institute, which overturned Alaska's campaign contribution limits,[88] is "to keep the principles, ideas, and moral case for liberty alive for future generations, while moving public policy in the direction of individual liberty, limited government, free markets, and peace."[89]

These advocacy groups and their allies have pursued an incremental litigation strategy modeled on the NAACP's strategy for dismantling racial segregation. A lawyer for one such organization outlined the general approach:

> You take the low hanging fruit. You build your precedent. You go to the next one, you take the next lowest hanging fruit, you build your

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81. The many major cases filed by the group's leader, James Bopp Jr., include *FEC v. Beaumont*, 539 U.S. 146 (2003); *Randall v. Sorrell*, 548 U.S. 230 (2006); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 499 (2007); *Citizens United v. FEC*, 558 U.S. 310 (2010); *American Tradition Partnership v. Bullock*, 567 U.S. 516 (2012); and *McCutcheon v. FEC*, 572 U.S. 185 (2014).

82. *Mission Statement*, JAMES MADISON CTR. FOR FREE SPEECH, https://www.jamesmadisoncenter.org/about/mission.html [https://perma.cc/X6VR-HEEJ] (last visited Feb. 14, 2025).

83. *About Us*, INST. FOR FREE SPEECH, https://www.ifs.org/about-us/ [https://perma.cc/FVD2-WS7W] (last visited Feb. 14, 2025).

84. *See* SpeechNow.org v. FEC, 599 F.3d. 686 (D.C. Cir. 2010) (en banc). The Institute for Justice also represented one of the petitioners in *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011).

85. *About Us*, INST. FOR JUST., https://ij.org/about-us/ [https://perma.cc/H6EA-EFBZ] (last visited Feb. 14, 2025).

86. *See* Ariz. Free Enter. Club's Freedom PAC v. Bennett, 564 U.S. 721, 728 (2011).

87. *Our Story: About the Goldwater Institute*, GOLDWATER INST., https://www.goldwaterinstitute.org/about/ [https://perma.cc/RCZ8-RMX3] (last visited Feb. 14, 2025).

88. *See* Thompson v. Hebdon, 140 S. Ct. 348 (2019).

89. *See About*, CATO INST., https://www.cato.org/about [https://perma.cc/7W8V-3ADQ] (last visited Feb. 14, 2025).

> precedent. . . . That's what we needed to do—a series of small cases, small steps, where we can point out to the Court, 'Look, this can't be right under the First Amendment,' and then just keep building it.[90]

Another lawyer described his group's strategy similarly:

> [The organization] is always trying to find some issue that they can make actual practical incremental progress on . . . . You don't go to the Court and say, 'Strike down all the bad laws at once.' It's just not going to happen. Litigation and legal change, at least in the courts, is incremental change.[91]

These organizations have also made good use of precedents won in connection with civil rights and civil liberties struggles. For example, they benefitted from the Warren Court's ruling that tactics used by the NAACP and the ACLU to find clients and bring test cases were protected by the First Amendment.[92] These holdings cleared the way for strategic litigation campaigns built around carefully selected cases and clients. Some opponents of regulation invoked doctrines developed in the 1950s to protect the NAACP from having to disclose its membership lists, repurposing those precedents to attack campaign finance disclosure requirements.[93] In *Citizens United*, for example, the Alliance Defending Freedom, the Cato Institute, the Institute for Free Speech, the National Rifle Association, and the Pacific Legal Foundation cited *NAACP v. Alabama ex rel. Patterson*[94] in their arguments against the required disclosure of the names and addresses of those who contribute $1,000 or more to further electioneering communications.[95] The Roberts Court rejected these arguments in *Citizens United*.[96] But opponents of regulation later prevailed in a challenge by two conservative legal advocacy groups to a California disclosure requirement for charitable nonprofits that seek to raise funds in the state; the Supreme Court ruled that California's donor disclosure requirement violated the First Amendment.[97]

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90. SOUTHWORTH, *supra* note 36, at 63.

91. *Id.* (first alteration in original).

92. *See* NAACP v. Button, 371 U.S. 415, 428–29 (1963) (finding that the NAACP's client solicitation activities constituted "modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit"); *In re* Primus, 436 U.S. 412, 433–34 (1978) (finding that the First Amendment protected solicitations by an ACLU-affiliated lawyer who offered to represent a client without charge).

93. *See* NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449 (1958).

94. 357 U.S. 449 (1958).

95. *See, e.g.*, Brief of Alliance Defense Fund as Amici Curiae Supporting Appellant at 14, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205) ("An integral part of the freedom of speech and association is the right of the speaker to maintain his or her anonymity." (citing NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 462 (1958))). "An electioneering communication is any broadcast, cable or satellite communication that refers to a clearly identified federal candidate" and "is publicly distributed within 30 days of a primary or 60 days of a general election." *Making Electioneering Communications*, FEC, https://www.fec.gov/help-candidates-and-committees/other-filers/making-electioneering-communications/ [https://perma.cc/Z3EZ-2JMN] (last visited Feb. 14, 2025).

96. 558 U.S. at 366–67.

97. *See* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021). The petitioners were Americans for Prosperity Foundation, a Koch-sponsored political organization, and the Thomas More Law Center, a Christian advocacy group.

Reformers fear that this decision will make it harder to defend campaign finance disclosure rules and easier for nonprofit groups to exercise influence over elections and elected officials without revealing the identities of the big money donors who are pulling the strings.[98]

Leaders of this campaign portrayed themselves as inheritors of a law-reform tradition pioneered by civil rights and civil liberties lawyers. But that model of constitutional change attracted substantial criticism during the years of the Warren and Burger Courts, mostly, but not exclusively, from the political right. Critics argued that unelected judges and activist lawyers were proclaiming rights not found in the Constitution, using illegitimate methods of interpretation and reasoning. Others questioned whether the advocates who brought the cases truly represented the clients and constituencies on whose behalf they claimed to speak, whether ideological commitments led them to disregard their clients' preferences, and whether they should be permitted to make law affecting people not adequately represented in the litigation. Harvard Law Professor Derrick Bell famously disapproved of the conduct of some NAACP lawyers, asserting that the lawyers' "single-minded commitment" to maximum school desegregation led them to ignore the wishes of some black parents who placed a higher priority on improving educational opportunities for their children.[99] Scholars raised similar questions about lawyer accountability to clients and affected constituencies in campaigns for abortion rights and marriage equality.[100]

Today, liberals and progressives are more often the ones raising concerns about the legitimacy of constitutional lawmaking through the federal courts. Many of the reformers I interviewed portrayed themselves as almost powerless witnesses to the dismantling of campaign finance regulation by activist lawyers and justices.[101] They questioned the accountability of some of the leaders of this campaign, asserting that these groups actually serve the goals of wealthy individuals and business corporations rather than the regular people they claim to represent.[102] The effect, reformers say, is to give moneyed interests freer rein to deploy their wealth to shape election outcomes and to use the leverage they gain through candidates' reliance on their donations to win influence over policymaking at the expense of ordinary individuals.[103]

The interviewed challengers betrayed no doubts about the legitimacy of the process or their roles in it, but some rumbling within the conservative

98. *See* SOUTHWORTH, *supra* note 36, at 202–03.

99. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 516 (1976).

100. *See* Kevin C. McMunigal, *Of Causes and Clients: Two Tales of* Roe v. Wade, 47 HASTINGS L.J. 779, 819 (1996); Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1700 (2017).

101. *See* SOUTHWORTH, *supra* note 36, at 179.

102. *See id.*

103. *See id.*

legal movement suggests that broader internal critiques might still be coming.[104]

D. Making Constitutional Law

The complex history of campaign finance regulation makes it easy to miss just how much the doctrine and discourse have changed over the past fifty years. The argument that campaign spending amounts to speech protected by the First Amendment was quite novel in the 1970s, but it is now deeply entrenched in constitutional law. The per curiam *Buckley* opinion identified important First Amendment implications of limiting contributions and expenditures, but it did not equate money with speech.[105] During the oral argument, Justice Potter Stewart stated that "money is speech and speech is money,"[106] but the phrase "money is speech" appeared just once in the *Buckley* opinions—in Justice Byron R. White's partially *dissenting* opinion.[107] Although the Roberts Court does not now say that money *is* speech, some reformers maintain that this shorthand roughly describes how political spending operates in the Court's analysis of campaign finance laws—that there is, in effect, a strong presumption against regulation.[108] Moreover, censorship rhetoric has become much more pervasive in the majority opinions.[109] The same is true of the briefs.[110] Although few

104. *See* Jeannie Suk Gersen, *The Conservative Who Wants to Bring Down the Supreme Court*, NEW YORKER (Jan. 5, 2023), https://www.newyorker.com/news/annals-of-inquiry/the-conservative-who-wants-to-bring-down-the-supreme-court [https://perma.cc/8M3J-EN77] (profile of Jonathan Mitchell, a pro-life advocate whose mission is to undermine the Court as the final authority on the meaning of the Constitution; he believes that conservatives did not deserve to win *Citizens United* or *Shelby County*).

105. Nor did the government's main brief. *See* Brief for the Attorney General and the Federal Election Commission at 47–48, Buckley v. Valeo, 424 U.S. 1 (1976) (Nos. 75-436 and 75-437), 1975 WL 171459 ("We cannot too often stress that the legislation . . . is concerned with *money*, not speech. That is not the same thing . . . . Many campaign expenditures are unrelated to speech and there are still ways of communicating that do not involve spending. But, more important, what is regulated is one of the means for communication, not speech itself. There is no censorship whatever: the candidate and his supporters may say what they like.").

106. Transcript of Oral Argument at 67, *Buckley*, 424 U.S. 1 (Nos. 75-436 and 75-437).

107. Justice White rejected the argument "that money is speech and that limiting the flow of money to the speaker violates the First Amendment," finding that it "proves entirely too much" because the same logic would make unconstitutional many other current laws that impose costs on communicative activities. *Buckley*, 424 U.S. at 262 (White, J., dissenting).

108. *See, e.g.*, SOUTHWORTH, *supra* note 36, at 159 (asserting that the "whole idea that money is speech . . . *has* been kind of the guiding star for the Supreme Court . . . that money is speech and that that's the end of the analysis" (quoting one of several reformers)).

109. "Censor," "ban," "suppress," "silence," and "chill" appeared just a handful of times in *Buckley*, but they appeared ninety times in Justice Kennedy's majority opinion and Justice Scalia's concurrence in *Citizen United*. *See* SOUTHWORTH, *supra* note 36, at 132–33. Justice Stevens's dissenting opinion in *Citizens United* complained about "the majority's incessant talk of a 'ban.'" 558 U.S. 310, 419 (2010) (Stevens, J., dissenting). He noted that "[n]either *Austin* nor *McConnell* held or implied that corporations may be silenced; the FEC is not a 'censor'; and in the years since these cases were decided, corporations have continued to play a major role in the national dialogue." *Id.*

110. *See* SOUTHWORTH, *supra* note 36, at 134 (figures showing the use of those words in party and amicus briefs in four major cases).

opponents of campaign finance regulation assert that money "is" speech,[111] it has become more common since *Buckley* for opponents of campaign finance regulation to suggest that any regulation of political spending amounts to censorship.[112]

One interviewed reformer explained how the discourse has evolved to make regulation seem more problematic. He asserted that "the debate early on" was "much more of this is money a *proxy* for speech thing . . . [a]nd then conservatives were making a little headway, but not that much headway."[113] Over time, he explained, opponents of regulation became much more successful in reframing the issue—"that it's not just a question of money; it's a question of our ability to criticize, our ability to speak out."[114] This shift, he believed, helped challengers gain momentum because it shaped how "people perceive things."[115] Implicit in this lawyer's observation is a theory about constitutional change in this area—that the censorship theme has reverberated in the briefs, judicial opinions, and media accounts, accumulating legitimacy and new extensions along the way.

A similar interactive process contributed to *Citizens United*'s holding that corporations have a First Amendment right to engage in unlimited election spending. Amicus briefs by conservative legal advocacy groups in *Bellotti* had argued that the government could not distinguish business corporations from other types of "speakers" when it came to the regulation of political speech on ballot measures.[116] Justice Powell's majority opinion in *Bellotti*

111. *But see* Transcript of Oral Argument at 14, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) (No. 76-1172) (statement by Francis Fox) ("[M]oney is speech."); Brief of Rodney A. Smith as Amicus Curiae Supporting Appellants at 23, McConnell v. FEC, 540 U.S. 93 (2003) (No. 02-1674), 2003 WL 21649648 ("If in politics money is speech, then the question looms large: How can government, in a free society, abridge its collection and disbursement without, at the same time, destroying the rights of citizens to govern themselves?"); Brief of the Cato Institute as Amicus Curiae Supporting Appellants at 3, McCutcheon v. FEC, 572 U.S. 185 (2014) (No. 12-536) ("Since money is speech, contribution limits effectively allow speech but only up to a government-approved amount.").

112. *See, e.g.*, Brief of the Wyoming Liberty Group as Amici Curiae Supporting Petitioners at 12, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011) (No. 10-239) ("Arizona's 'Clean Elections' system is a carefully marketed government censorship program of the most odious form."); Brief for Appellants the National Rifle Association et al., *McConnell*, 540 U.S. 93 (No. 02-1675), 2003 WL 21649660, at *45 ("An eighteenth century British colonial censor armed only with the Stamp Act would salivate at the prospect of wielding the speech-licensing power that Title II [of the BCRA] confers on the broadcast media.").

113. SOUTHWORTH, *supra* note 36, at 159.

114. *Id.*

115. *Id.*

116. *See* Brief of Northeastern Legal Foundation and Mid-America Legal Foundation, *supra* note 61, at *6 ("There is no constitutional basis for treating corporate organizations as worthy of lesser protection than other associational groups or individuals."); Brief of Pacific Legal Foundation, *supra* note 61, at *2 ("By restricting the political expression of business corporations, which constitute an important sector of the community, the people of Massachusetts will be deprived of a full debate on issues of public interest and . . . their constitutionally recognized right to receive information will be violated."); Brief of Associated Industries of Massachusetts, Inc. and Others as Amicus Curiae, *Bellotti*, 435 U.S. 765 (No. 76-1172), 1977 WL 189655, at *20 n.25 ("Given the interest of the audience in the information communicated, *Virginia Citizens Consumer Council*, by what alchemy does a

embraced and extended that rationale, stating that "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. . . . The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . ."[117] In *Austin*, opponents of regulation used Justice Powell's language to attack restrictions on corporate expenditures in candidate elections.[118] The *Austin* majority rejected that argument, but Justice Scalia's strongly worded dissent asserted that treating corporations ("associations of persons") differently from individuals amounted to impermissible discrimination on the basis of the speaker's identity, and he characterized the restriction as an odious example of government "censorship."[119] In *Citizens United*, conservative advocacy groups used the "speaker identity" argument as a basis for overruling *Austin*.[120] Justice Kennedy's majority opinion found that "the Government cannot restrict political speech based on the speaker's corporate identity."[121]

Originalism never fit the goals of this campaign particularly well. As then Professor Robert Bork noted in a 1971 law journal article that is widely recognized as laying a foundation for originalism, "the framers seem to have had no coherent theory of free speech and appear not to have been overly

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constitutionally impermissle [sic] interest suddenly become transformed into a constitutionally permissible one simply because the identity of the speaker changes from 'individuals or groups' to a corporation—a specialized form of group association."). These briefs cited the Supreme Court's decision in a case brought by consumer advocate Alan B. Morrison challenging a state prohibition on pharmacists' dissemination of drug price information. *See, e.g.*, Brief of Pacific Legal Foundation, *supra* note 61, at *7 ("Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both." (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976))).

117. *Bellotti*, 435 U.S. at 777.

118. *See, e.g.*, Brief of the Washington Legal Foundation and the Allied Educational Foundation, *supra* note 65; Brief of Appellee, Austin v. Mich. State Chamber of Com., 494 U.S. 652 (1990) (No. 88-1569), 1988 WL 1025581, at *8 (quoting Justice Powell's "[i]f the speakers here were not corporations" language).

119. *Austin*, 494 U.S. at 679–80 (1990) (Scalia, J., dissenting); *see also id.* at 699 (Kennedy, J., dissenting) ("[T]he Act discriminates on the basis of the speaker's identity. . . . Our precedents condemn this censorship.").

120. *See* Brief of Fidelis Center for Law and Policy and Catholicvote.com as Amici Curiae Supporting Appellant at 4, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205); Brief of the Institute for Justice as Amici Curiae Supporting Appellant at 16, *Citizens United*, 558 U.S. 310 (No. 08-205) ("It is fundamental that the government cannot regulate speech based on either its content or the identity of the speaker."); Brief of Judicial Watch, Inc. as Amici Curiae Supporting Appellant at 12, *Citizens United*, 558 U.S. 310 (No. 08-205) ("The Court recognized that any such attempt by a legislature to regulate who can speak is fraught with peril to First Amendment freedom of speech . . . ."); Brief of American Justice Partnership and Let Freedom Ring as Amici Curiae Supporting Appellant at 20, *Citizens United*, 558 U.S. 310 (No. 08-205) ("In *Austin*, the Court stepped onto (if not through) constitutionally thin ice by endorsing the notion that restrictions on free speech can and should vary depending upon the identity of the speaker.").

121. *Citizens United*, 558 U.S. at 346.

concerned with the subject."[122] With some exceptions,[123] the challengers and their allies on the Court have not rooted their claims in originalist arguments. Indeed, Justice John Paul Stevens' dissent in *Citizens United* derided the majority's "perfunctory attempt" to ground its holding in originalist reasoning,[124] and reform advocates have offered some originalist claims of their own, arguing that the framers feared the influence of concentrated private power and wealth and would have approved of measures necessary to prevent corruption of the political process and limitations on election spending by business corporations.[125] Those arguments have not (yet) persuaded the Court's conservatives.

It is difficult to know just how much conservative legal advocacy groups actually influenced the doctrine and discourse, but there is good reason to believe that they have contributed to what Professor Jack M. Balkin calls the "judicial construction" of the Constitution—here, the judicial construction of the First Amendment.[126] We know that specialized legal advocacy organizations brought many of the cases through which the doctrine developed, and we can see some evidence of their impact in the justices' citations to briefs.[127] Lawyers on both sides of this campaign identified striking features of the major cases—particular facts, client characteristics, and issues presented—that made them attractive vehicles for shaping doctrine.[128] It also seems likely that these groups may have indirectly influenced the outcomes through their complementary media strategies, which characterized campaign finance restrictions as infringements on ordinary Americans' free speech rights.[129]

CONCLUSION

The Roberts Court has rewritten federal law on myriad major policy issues. The past several terms have been especially noteworthy, making the Supreme

122. Bork, *supra* note 35, at 22.

123. *See, e.g.*, Brief of Center for Constitutional Jurisprudence as Amici Curiae Supporting Appellant at 2, *Citizens United*, 558 U.S. 310 (No. 08-205) (asserting that although "[u]nequal distribution of wealth, concentration of media power, and negative campaigning" had existed since the founding of the republic, there was "no evidence that the First Amendment was originally understood to authorize Congress to prohibit speech related to an election based on any of these factors").

124. *Citizens United*, 558 U.S. at 426 (Stevens, J., dissenting) ("To the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position.").

125. *See, e.g.*, Brief of Professor Lawrence Lessig as Amici Curiae Supporting Appellee, McCutcheon v. FEC, 572 U.S. 185 (2014) (No. 12-536).

126. Jack M. Balkin, *Constitutional Interpretation and Change in the United States: The Official and the Unofficial*, JUS POLITICUM, June 2015, at 8.

127. *See, e.g.*, *Citizens United*, 558 U.S. at 335, 354, 370 (citing briefs of the Wyoming Liberty Group, Chamber of Commerce, and Institute for Justice and Alliance Defense Fund).

128. *See* SOUTHWORTH, *supra* note 36, at 73–84 (on facts of the challenge in *Citizens United*), 87–93 (on Shaun McCutcheon's appeal as a client for the challenge in *McCutcheon v. FEC*), 202–03 (on the background of the joint challenge by the Koch brothers' Americans for Prosperity Foundation and the Thomas More Law Center in *Americans for Prosperity Foundation v. Bonta*).

129. *See id.* at 63–64.

Court's activism a central issue in the 2024 election. But the justices received plenty of help from other players, including conservative legal advocacy organizations. In the context of campaign finance, these groups worked with the Roberts Court to embed once novel legal theories in constitutional law. The resulting doctrine is seriously out of step with public opinion; Americans across party lines believe that elected officials are too dependent on major donors and that addressing the role of money in elections should be a top policy priority.[130] Some campaign finance reform advocates hope to enlist concerned citizens of all political stripes in efforts to undo the construction of First Amendment law described in this Essay.[131] In the short term, however, the Roberts Court's campaign finance rulings have discouraged legislators from responding to Americans' concerns about the influence of money in elections. As we evaluate the processes that delivered this constitutional transformation, and others like it, we should look not only to the justices but also to their partners in constitutional lawmaking.

130. *See Economy Remains the Public's Top Policy Priority; COVID-19 Concerns Decline Again*, PEW RSCH. CTR. (Feb. 6, 2023), https://www.pewresearch.org/politics/2023/02/06/economy-remains-the-publics-top-policy-priority-covid-19-concerns-decline-again/ [https://perma.cc/HL2T-GVSW] (showing that reducing the influence of money in politics was among Americans' highest policy priorities and that there was little difference between Democrats and Republicans on this issue).

131. *See, e.g.*, *Against SuperPACs: Our Plan to Get SuperPAC Money Out of Politics*, EQUAL CITIZENS, https://equalcitizens.us/against-super-pacs/ [https://perma.cc/Z9RB-HC6P] (last visited Feb. 14, 2025); *Our Plan to Pass and Ratify the For Our Freedom Constitutional Amendment*, AM. PROMISE, https://americanpromise.net/our-plan/ [https://perma.cc/CXL3-GM9X] (last visited Feb. 14, 2025).