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## Keynote Address: Judging the Political and Political Judging: Justice Scalia as Case Study

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KEYNOTE ADDRESS:  
JUDGING THE POLITICAL AND POLITICAL JUDGING:  
JUSTICE SCALIA AS CASE STUDY

RICHARD L. HASEN\*

INTRODUCTION

In June 2013, near the end of the Supreme Court's 2012 term, the Court decided two cases of great national significance. In one case, *United States v. Windsor*,<sup>1</sup> the Supreme Court struck down as unconstitutional a portion of the federal Defense of Marriage Act, which aimed at limiting the rights of same-sex couples under federal law. It was a ruling presaging *Obergefell v. Hodges*,<sup>2</sup> the 2015 case in which the Supreme Court recognized the right of same-sex couples to marry.

Justice Antonin Scalia dissented in *Windsor*. He protested that the Court had “no power under the Constitution to invalidate this democratically adopted legislation.”<sup>3</sup> To Justice Scalia, the majority's due process and equal protection constitutional analysis was especially wrongheaded in its failure to defer to the will of the American people, as expressed through its representatives in Congress.

Scalia's statement in *Windsor* was rich in irony, because it came only a day after he joined a Supreme Court majority in *Shelby County v. Holder*,<sup>4</sup> a case striking down a key portion of the federal Voting Rights Act. The stricken part of the Act singled out states with a history of racial discrimination in voting that had to get federal approval, or preclearance, before making

\* Chancellor's Professor of Law and Political Science, UC Irvine School of Law. This Address builds upon ideas first presented in Richard L. Hasen, *After Scalia: The Future of United States Election Law*, 17 AMERIKA HÖ 1 (Koji Higashikawa trans.2017) (Japan), and RICHARD L. HASEN, THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION (2018). It is a revised version of a Keynote Address delivered at “The Supreme Court and American Politics,” a symposium held October 17, 2017 at the Chicago-Kent College of Law. Richard L. Hasen, Keynote Address at the Chicago-Kent Law Review Symposium: The Supreme Court and American Politics (Oct. 17, 2017). Thanks to symposium participants for useful comments and suggestions.

1. 133 S. Ct. 2675, 2696 (2013).
2. 135 S. Ct. 2584, 2604–05 (2015).
3. *Windsor*, 133 S. Ct. at 2697–98 (Scalia, J., dissenting).
4. 133 S. Ct. 2612 (2013).

any changes to their voting rules, and to prove that their proposed changes would not make minority voters worse off.<sup>5</sup>

In *Shelby County*, the Court in a 5–4 decision struck down part of a law that Congress enacted in 1965 and which large bipartisan congressional majorities had repeatedly reenacted and expanded.<sup>6</sup> What’s worse, the constitutional theory relied upon by the majority—that preclearance deprived covered states of their “equal sovereignty”—was new and hardly inevitable.<sup>7</sup>

Why did Justice Scalia believe in deference to the democratic processes in one case and not the other? He gave us a clue in the *Shelby County* case’s oral argument. Justice Scalia disagreed with Solicitor General Donald Verrilli’s suggestion that Congress was entitled to make a judgment that continued racial problems justified the continuation of the preclearance part of the Act:

JUSTICE SCALIA: Well, maybe it was making that judgment, Mr. Verrilli. . . . The problem here, however, is . . . that the initial enactment of this legislation . . . in a time when the need for it was so much more abundantly clear was—in the Senate, there—it was double-digits against it. And that was only a 5-year term. Then, it is reenacted 5 years later, again for a 5-year term. Double-digits against it in the Senate. Then it was reenacted for 7 years. Single digits against it. Then enacted for 25 years, 8 Senate votes against it.

And this 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. . . .

. . . .

Even the name of it is wonderful: The Voting Rights Act. Who is going to vote against that in the future?<sup>8</sup>

In 2009, when the Court first considered the constitutionality of the 2006 Voting Rights Act renewal, Scalia also remarked at oral argument on the Senate’s 98–0 approval of the law. The Justice said: “[T]he Israeli Supreme Court, the Sanhedrin, used to have a rule that if the death penalty was pronounced unanimously, it was invalid, because there must be something

5. *Id.* at 2631.

6. *Id.* at 2635 (Ginsburg, J., dissenting).

7. See Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1209–11 (2016).

8. Transcript of Oral Argument at 46–48, *Shelby County*, 133 S. Ct. 2612 (No. 12-96), 2013 WL 6908203, at \*46–48.

wrong there.”<sup>9</sup> He asked counsel defending the law whether he really thought any incumbent would vote against extending the Act.<sup>10</sup>

The Sanhedrin remark caught the attention of *New York Times* reporter Adam Liptak, who dryly noted that: “Justice Scalia was not announcing a universal principle. Indeed, he almost certainly does not think that every unanimous legislative act is problematic. In 1986, for instance, the Senate approved Justice Scalia’s nomination to the Supreme Court by a vote of 98 to 0.”<sup>11</sup>

It was not just race where Justice Scalia saw what he considered to be “special interests” messing with the “normal political processes” and thereby obviating the need for judicial deference. Justice Scalia made this point on the question of gay rights as well.

In the 1996 case *Romer v. Evans*,<sup>12</sup> the Court struck down a voter-initiated state constitutional amendment in Colorado repealing laws barring discrimination against gays, lesbians, and bisexuals. The Court held that the amendment violated the Fourteenth Amendment’s Equal Protection Clause by denying these groups certain legal protection without rational basis.<sup>13</sup>

Justice Scalia issued a vehement dissent, rejecting the majority’s conclusion that the law was motivated by anti-gay animus. The Justice again pointed to supposed defects in the political process. He wrote, relying upon certain stereotypes about gays and lesbians, that:

The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.<sup>14</sup>

Justice Scalia’s shifting deference to democratic procedures and the political process might be no more than rhetorical flourishes, offered in opinions applying neutral principles to determine the scope of the Constitution’s Equal Protection Clause. Notes about democratic dysfunction might provide

9. Transcript of Oral Argument at 51, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 1146055, at \*51.

10. *Id.*

11. Adam Liptak, *Sidebar: On and Off the Bench, the Eminently Quotable Justice Scalia*, *N.Y. TIMES* (May 11, 2009), <http://www.nytimes.com/2009/05/12/us/12bar.html> [perma.cc/67ZJ-WE5B].

12. 517 U.S. 620, 635–36 (1996).

13. *Id.* at 626–27.

14. *Id.* at 645–46 (Scalia, J., dissenting) (citations omitted).

nothing more than what Justice Elena Kagan once referred to in a different context as “extra icing on a cake already frosted.”<sup>15</sup>

Or the shifting deference might provide a window into the Justice’s decisionmaking, explaining part of the reason for the Justice’s hostility to race-based affirmative action, voting rights cases, and gay rights legislation. Perhaps he viewed these laws as the product of a dysfunctional political process, although he never explained why some organizing for political action was more objectionable than others.

In this Address, I consider through the lens of Justice Scalia’s opinions the role that views of the political process play, at least rhetorically, in how Supreme Court Justices decide cases. I focus on Justice Scalia’s contradictory views on self-dealing and incumbency protection across a range of cases, comparing campaign finance, on the one hand, to partisan gerrymandering, voter identification laws, political patronage, and ballot access rules on the other. In this context, I argue that the defects in the political process he sometimes flagged appeared to do little work, and that his decisions are better understood by his ideological commitments to what Chicago-Kent Professor Steven Heyman calls “conservative libertarianism.”<sup>16</sup> Scalia’s views on self-dealing appeared to reflect rather than drive his legal analysis.

The discussion draws and expands upon ideas in my 2018 book, *The Justice of Contradictions: Antonin Scalia and the Politics of Disruption*.<sup>17</sup> I use Justice Scalia as an example in this Address not because he was necessarily more contradictory in his judging of the political realm than any of the other Justices, but because I have been focusing on his writings for the last few years as I worked on the book.

Part II describes Justice Scalia’s contradictory approaches on questions of self-dealing and incumbency. Part III argues that, the contradictions lined up with the Justice’s ideological and partisan commitments, and that this is hardly unique to Justice Scalia. Finally, Part IV offers three lessons to be learned from this case study for the interaction of the Court, the political branches, and election law.

15. *Yates v. United States*, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting).

16. See generally Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231 (2014).

17. RICHARD L. HASEN, *THE JUSTICE OF CONTRADICTIONS: ANTONIN SCALIA AND THE POLITICS OF DISRUPTION* (2018).

## II. JUSTICE SCALIA AND SELF-DEALING: THE CONTRADICTIONS

### *A. Campaign Finance*

I begin with a description of Justice Scalia's contradictory approach to politicians' self-dealing, starting with campaign finance.

Although many people are familiar with the Supreme Court's controversial 2010 opinion in *Citizens United v. Federal Election Commission*,<sup>18</sup> holding that corporations have a First Amendment right to spend unlimited sums in candidate elections, the case's roots go back to dissents by Justice Scalia and Justice Kennedy in a 1990 case, *Austin v. Michigan Chamber of Commerce*.<sup>19</sup> The Court in *Austin* upheld a Michigan state campaign finance law barring business corporations from spending money from their general treasury funds on election ads.<sup>20</sup> The corporation instead could raise money and control a separate "political action committee," or "PAC."<sup>21</sup> Michigan's law exempted media corporations, like corporate-owned newspapers or television stations, providing news and commentary.<sup>22</sup> It also did not apply to limit spending by labor unions, as the parallel federal law did.<sup>23</sup>

With Justices Kennedy, O'Connor, and Scalia dissenting, the Supreme Court upheld Michigan's PAC requirement for corporate spending in elections.<sup>24</sup> In a 1976 case, *Buckley v. Valeo*,<sup>25</sup> the Court held that campaign limits could only be upheld under the First Amendment if they were aimed at preventing the appearance or actuality of "corruption," which the Court had defined as roughly akin to bribery and undue influence.<sup>26</sup> Despite this, the *Austin* Court held that Michigan's corporate spending limit law was justified to prevent what it termed a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."<sup>27</sup>

Justice Scalia tartly rejected the "antidistortion" argument. He began his dissenting opinion by flagging what he saw as censorship allowed by

18. 558 U.S. 310, 365 (2010).

19. See 494 U.S. 652 (1990).

20. *Id.* at 654–55.

21. *Id.* at 669 (Brennan, J., concurring).

22. *Id.* at 666–67 (majority opinion).

23. *Id.* at 665 n.4.

24. *Id.* at 668–69.

25. 424 U.S. 1 (1976).

26. *Id.* at 26–29.

27. *Austin*, 494 U.S. at 659–60.

Michigan's law, calling it "Orwellian," and a big focus of his dissent in *Austin* was what he viewed as the self-interest of politicians in passing these laws.<sup>28</sup>

Scalia wrote that an "incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition."<sup>29</sup> He further suggested that the reason Michigan regulated the spending of business corporations and not labor unions was because labor unions in Michigan, the state that produced many American automobiles, had considerable political power.<sup>30</sup> Union political power, too, was somewhat less legitimate in his eyes.

Justice Scalia made similar points in other campaign finance cases, emphasizing self-dealing as a reason to strike down these laws. Indeed, the role of incumbency protection took center stage in his partial dissent in the 2003 case, *McConnell v. Federal Election Commission*.<sup>31</sup> The case considered the constitutionality of the Bipartisan Campaign Reform Act of 2002, more commonly known as the McCain–Feingold law. The law reined in so-called "soft money" and "issue advocacy" which had rendered earlier federal campaign finance law mostly ineffective.<sup>32</sup> The Supreme Court in *McConnell* reaffirmed *Austin*,<sup>33</sup> seven years before the Court in *Citizens United* overruled *Austin* as well as this part of *McConnell*.<sup>34</sup>

Justice Scalia opened his partial dissent in *McConnell* by calling it a "sad day for the freedom of speech"<sup>35</sup> and raising the incumbency issue:

We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort. It forbids pre-election criticism of incumbents by corporations, even not-for-profit corporations, by use of their general funds; and forbids national-party use of "soft" money to fund "issue ads" that incumbents find so offensive.<sup>36</sup>

Justice Scalia's professed concern about incumbency and self-dealing led him to be very skeptical of campaign finance limits challenged under the First Amendment, and he almost never voted to sustain a challenged limit.

28. *Id.* at 679 (Scalia, J., dissenting).

29. *Id.* at 692.

30. *Id.*

31. *See* 540 U.S. 93 (2003).

32. *See id.* at 122–29 (discussing rise of soft money and issue advocacy).

33. *Id.* at 211.

34. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365–66 (2010).

35. *McConnell*, 540 U.S. at 248 (Scalia, J., concurring in the judgment in part and dissenting in part).

36. *Id.*

His writings suggested that the dangers of incumbency and self-dealing provided a reason for extra judicial scrutiny of laws regulating the political process.

And yet, his concern about incumbency protection and self-dealing did not extend beyond the campaign finance cases. Indeed, in four other areas, Justice Scalia either minimized the dangers of self-dealing, professed an inability of the courts to handle the problem, or even celebrated the side effects of political self-interest.

### *B. Partisan Gerrymandering*

Consider partisan gerrymandering, which is very much in the news as the Court returns to the issue this term in *Gill v. Whitford*,<sup>37</sup> the partisan gerrymandering case out of Wisconsin. It is sometimes said that gerrymandering allows legislators to choose their voters rather than the other way around. When legislators draw district lines to help themselves or their political parties, they sometimes engage in some of the rawest political self-dealing imaginable, and the question in *Whitford* is whether the Court will put the brakes on some of the most egregious activity.

For a long time, the Supreme Court refused to get involved in most districting and apportionment disputes, finding them to be “nonjusticiable” political questions without judicially manageable standards. Beginning in *Baker v. Carr*<sup>38</sup> in 1962, the Court allowed some challenges to districting. After cases such as *Reynolds v. Sims*,<sup>39</sup> recognizing the one person, one vote rule, Congress passed the Voting Rights Act, which protected minority voting rights in districting and other cases.<sup>40</sup> Since the 1990s, the Court has held that taking race too much into account violates the Equal Protection Clause of the United States Constitution, putting states in the position of navigating between the race-conscious requirements of the Voting Rights Act and the Court-created rule not to make race a predominant factor in redistricting.<sup>41</sup>

Even with all of these rules in place, politicians have still been able to draw districts that give partisan advantage to one side or another. For example, in ongoing litigation over congressional districts in North Carolina, the

37. 137 S. Ct. 2268 (2017) (mem.) (postponing jurisdiction and setting the case for argument).

38. 369 U.S. 186, 237 (1962).

39. 377 U.S. 533, 568 (1964).

40. See *South Carolina v. Katzenbach*, 383 U.S. 301, 315–30 (1966) (describing circumstances of the passage of the Voting Rights Act in 1965 and rejecting constitutional challenge to its preclearance provisions).

41. See *Shaw v. Reno*, 509 U.S. 630, 649 (1993). On the evolution of this claim, see Richard L. Hasen, *Racial Gerrymandering’s Questionable Revival*, 57 ALA. L. REV. 365 (2015).

Republican majority legislature recently passed a redistricting plan that creates ten safe Republican districts and three safe Democratic districts, even though the Republican–Democratic split in the state is about even. North Carolina Representative David Lewis, when asked why he drew ten of thirteen districts for Republicans in a fifty–fifty state, astonishingly replied: “because I do not believe it’s possible to draw a map with 11 Republicans and two Democrats.”<sup>42</sup>

The fight to get the Court to rein in such partisan gerrymandering so far has been unsuccessful. In a 1986 case, *Davis v. Bandemer*,<sup>43</sup> the Supreme Court agreed that partisan gerrymandering claims were justiciable. However, the *Bandemer* standard proved uncertain in theory and impossible in fact: for eighteen years after *Bandemer* there were no successful partisan gerrymandering cases.<sup>44</sup>

The Supreme Court returned to the issue in the 2004 case, *Vieth v. Jubelirer*,<sup>45</sup> involving allegations of partisan gerrymandering in the creation of congressional districts for the state of Pennsylvania. The Court divided into three groups. Justice Scalia, for four conservative Justices, took the position that *Bandemer* was wrong on the question of justiciability because there were no “judicially manageable” standards for courts to apply. He believed courts were without the power to hear such claims.<sup>46</sup> The four liberal Justices believed *Bandemer* was right that these kinds of cases are justiciable but wrong on the standard—and the dissenters set forth a variety of proposed standards to police gerrymandering.<sup>47</sup>

Justice Kennedy, writing for himself alone, stood in the middle. He agreed with the liberals that partisan gerrymandering claims are justiciable, but agreed with Justice Scalia and the other conservative Justices that each of the proposed gerrymandering standards did not separate permissible from impermissible consideration of partisanship in drawing district lines.<sup>48</sup> The result was that plaintiffs in *Vieth* lost their case but the door remained open for future challenges. We will see in *Whitford* if Justice Kennedy has changed his mind about the old standards or found a new standard, such as

42. Jim Morrill, *Common Cause Challenges Partisan Gerrymandering in NC*, CHARLOTTE OBSERVER (Aug. 5, 2016, 10:18 AM), <http://www.charlotteobserver.com/news/politics-government/election/article93903767.html> [<https://perma.cc/HZX5-WGHH>].

43. 478 U.S. 109, 143 (1986).

44. See *Vieth v. Jubelirer*, 541 U.S. 267, 278–79 (2004) (plurality opinion) (describing the lack of successful partisan gerrymandering claims under the *Bandemer* standard).

45. *Id.* at 271–72.

46. *Id.* at 305–06.

47. *Id.* at 339 (Stevens, J., dissenting); *id.* at 353 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 365 (Breyer, J., dissenting).

48. *Id.* at 306–08 (Kennedy, J., concurring in the judgment).

the “efficiency gap” standard put forward by Professor Nick Stephanopoulos and researcher Eric McGhee.<sup>49</sup>

In perhaps the most interesting aspect of Justice Scalia’s *Vieth* opinion was his admission that extreme partisan gerrymandering may well be unconstitutional even if the courts do not have the tools to police it:

Much of [Justice Stevens’s] dissent is addressed to the incompatibility of severe partisan gerrymanders with democratic principles. We do not disagree with that judgment, any more than we disagree with the judgment that it would be unconstitutional for the Senate to employ, in impeachment proceedings, procedures that are incompatible with its obligation to “try” impeachments. The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy. . . .

. . . Justice Stevens says we “er[r] in assuming that politics is ‘an ordinary and lawful motive’” in districting—but all he brings forward to contest that is the argument that an *excessive* injection of politics is *unlawful*. So it is, and so does our opinion assume.<sup>50</sup>

The discussion was an odd statement of judicial powerlessness, and it was in some tension with Justice Scalia’s acceptance within *Vieth* itself of the legitimacy of some partisan self-dealing. As Professor Michael Kang recently explained,<sup>51</sup> Justice Scalia’s opinion in *Vieth* has been most responsible for setting out the idea that taking partisanship into account in drawing district lines is “an ordinary and lawful motive”<sup>52</sup> in districting and that “partisan districting is a lawful and common practice.”<sup>53</sup> Scalia shifted the discussion to the question of *how much* of the legal activity crosses the line into unconstitutional activity, and in so doing, gave wide berth for legislators to engage in self-dealing when drawing district lines.

### C. The Voting Wars

Justice Scalia was similarly unbothered by the use of raw political power in setting the rules for voting, fights that elsewhere I’ve termed “the voting wars.”<sup>54</sup> In the period since the disputed 2000 election, Republican legislatures have passed laws generally making it harder to register and to

49. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015).

50. *Vieth*, 541 U.S. at 292–93 (plurality opinion) (citations omitted).

51. Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 363 (2017).

52. *Vieth*, 541 U.S. at 286.

53. *Id.*

54. See generally RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012).

vote, and Democratic legislatures have done the opposite, with both parties believing that such laws would give them at least a small partisan advantage.<sup>55</sup>

One of the first voting wars cases to make it to the Supreme Court was the 2008 decision in *Crawford v. Marion County Election Board*.<sup>56</sup> The issue in *Crawford* concerned the constitutionality of an Indiana law that required voters to produce an acceptable form of photographic identification in order to vote.<sup>57</sup> The state of Indiana justified its law as necessary to prevent voter fraud, but the state conceded there were no cases of impersonation fraud recorded in the state, the only kind of fraud that an identification law would prevent.<sup>58</sup> Plaintiffs' counsel had their own problems in the case, having trouble coming up with plaintiffs who did not have the right identification and had trouble getting one to satisfy the new law.<sup>59</sup>

As in *Vieth*, the Court again divided into three camps. Justice Stevens, writing for himself, Chief Justice Roberts, and Justice Kennedy, upheld the law against a facial challenge.<sup>60</sup> According to Stevens, an identification requirement imposed only a minor burden for most voters, and the law was justified on anti-fraud and public confidence grounds.<sup>61</sup> Stevens reached this opinion despite the lack of evidence the law helped on either account. He had to go back to Boss Tweed's day to find examples of the relevant kind of voter fraud.<sup>62</sup> Stevens left open the possibility of as-applied lawsuits brought by groups of voters who faced significant burdens in getting the free ID.<sup>63</sup>

Justice Scalia, writing for himself, Justice Alito, and Justice Thomas, was harsher than Stevens. He agreed the law imposed little burden on most voters and voted to uphold the law. But he believed the law could be applied against *everyone*, precluding the possibility of as-applied challenges from voters facing special burdens obtaining the right form of identification. He wrote that, "[t]he Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it

55. See generally *id.* (describing these voting wars).

56. 553 U.S. 181 (2008).

57. *Id.* at 185 (plurality opinion).

58. *Id.* at 194.

59. See *id.* at 201.

60. *Id.* at 203–04.

61. *Id.* at 195–96.

62. See *id.* at 195 nn.11–12.

63. See *id.* at 204 (rejecting only facial challenge to the law).

imposes.”<sup>64</sup> For Justice Scalia, voters such as those who were born in concentration camps and therefore lacked a birth certificate or who were too poor to afford the \$20 fee to buy a birth certificate needed to prove identity to get a so-called “free” identification card would simply be out of luck.

The Indiana voter identification law passed on a party-line vote, supported by Republican legislators and opposed by Democratic legislators.<sup>65</sup> Justice Stevens acknowledged that fact, but said that because the state also had non-partisan reasons for passing the law, partisanship was no reason to strike it down.<sup>66</sup> Justice Scalia’s opinion did not even address partisanship concerns. The Court allowed Indiana to enforce its law despite the legislators’ likely partisan motivations and without proof that the law stopped any real fraud or promoted voter confidence.

#### *D. Political Patronage and Ballot Access*

This part concludes with two more quick examples illustrating that Justice Scalia sometimes not only tolerated political self-dealing; he had actually praised it. In *Rutan v. Republican Party of Illinois*,<sup>67</sup> the Court held patronage hiring, firing, transferring, and promoting of non-policymaking employees violates the First Amendment. After this 1990 case, the state of Illinois could no longer fire an administrative assistant or security guard for not belonging to the governor’s political party or paying party dues. The Court held that premising non-policymaking government jobs on political loyalty punished voters for their views protected by the First Amendment.

Justice Scalia dissented and thought it was a good idea to give a governor the power to hire, fire, promote, and demote employees based solely on partisan affiliation. He believed that patronage-based employment promoted strong political parties by generating loyalty and party funds. Scalia found this party interest to be important enough to override employees’ First Amendment rights to be protected from punishment for failing to join—or belonging to another—political party. He wrote in dissent:

It may well be that the Good Government Leagues of America were right, and that Plunkitt, James Michael Curley, and their ilk were wrong; but that is not entirely certain. As the merit principle has been extended and its effects increasingly felt; as the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines have faded

64. *Id.* at 205 (Scalia, J., concurring in the judgment).

65. *Id.* at 203 n.21 (plurality opinion).

66. *Id.* at 203–04.

67. 497 U.S. 62, 79 (1990).

into history; we find that political leaders at all levels increasingly complain of the helplessness of elected government, unprotected by “party discipline,” before the demands of small and cohesive interest groups.<sup>68</sup>

And then there was *New York State Board of Elections vs. Lopez Torres*.<sup>69</sup> That 2008 case concerned a constitutional challenge to the means by which certain New York trial court judges were nominated by parties and placed on the general election ballot. The record showed that party insiders controlled the nomination process, and demanded some political patronage in exchange for political support. Party nominees were virtually guaranteed election—Democrats in some parts of New York and Republicans in others.<sup>70</sup> It was possible to qualify for the ballot without being a party nominee by collecting petition signatures, but those candidates inevitably lost.<sup>71</sup>

The Supreme Court unanimously rejected the challenge to New York’s party nomination process for judges, but the Justices offered different reasons for reaching this result. Justice Scalia wrote a broad majority opinion, which went much further than necessary to decide the case. He wrote that the Constitution contained no guarantee of a “fair shot” to win an election.<sup>72</sup> Going even further, he noted that, “[p]arty conventions, with their attendant ‘smoke-filled rooms’ and domination by party leaders, have long been an accepted manner of selecting party candidates.”<sup>73</sup> It is hard to think of more self-dealing than the smoke-filled room, but Justice Scalia in *Lopez Torres* seems to look back on it nostalgically.

Say what you will about Justice Scalia’s decisions in the partisan gerrymandering, voting wars, political patronage, and ballot access decisions. But it is hard to say they express great concern about the dangers of incumbency and self-dealing, much less that they suggest reasons for striking down a democratically-enacted law.

### III. EXPLAINING THE DIVERGENCE

What explains Justice Scalia’s near obsession with incumbency protection in the campaign finance cases and his acceptance, or even embrace, of self-dealing in other cases? It is not simply that the campaign finance cases involve the First Amendment—that’s true too of the patronage cases and

68. *Id.* at 93 (Scalia, J., dissenting).

69. 552 U.S. 196 (2008).

70. *Id.* at 201, 205.

71. *Id.* at 202 (“In [the Second Circuit’s] view, because ‘one-party rule’ prevailed within New York’s judicial districts, a candidate had a constitutional right to gain access to the party’s convention, notwithstanding her ability to get on the general-election ballot by petition signatures.”).

72. *Id.* at 205–06.

73. *Id.* at 206.

some of the other cases as well. Why does limiting six-figure donations by wealthy individuals, corporations, and labor unions smack of self-dealing while it is unobjectionable to fire the state janitor who refuses to sign up with the governor's political party and pay party dues?

It appears that Justice Scalia's decisions in these cases, like his decisions in cases across many areas of constitutional and statutory law, reflect his conservative-libertarian impulses. In the First Amendment context, Professor Heyman describes a conservative-libertarian jurisprudential approach which advocates invalidating "laws or policies that in their view threatened to subordinate individual liberty to liberal or progressive goals such as political reform, racial and sexual equality, gay rights, secularism, unionization, and anti-smoking efforts."<sup>74</sup> Justice Scalia was firmly in this camp.

More generally, Justice Scalia generally opposed extensive regulation of politics by the courts and expressed dissatisfaction with such interference, except when it came to limiting the role of money in politics or protecting voting rights. Sometimes partisanship was worth screaming about; at other times it was lawful, inevitable, and even a vital tool of democracy. It was his fundamental conservatism, which seemed to drive both this jurisprudence and his views of when the political process was failing to reach fair results.<sup>75</sup>

#### IV. THREE LESSONS

Before turning to three lessons from this examination of Justice Scalia's views of self-dealing, it is worth emphasizing that Justice Scalia is not unique in letting his ideological views color his jurisprudence. Consider Justice Breyer, for example, who was on the opposite side from Justice Scalia in most of the cases I have discussed. Justice Breyer was much more attuned to partisan self-dealing in the context of gerrymandering<sup>76</sup> and voting wars<sup>77</sup> than in the campaign finance context. Indeed, when it came to campaign finance, Justice Breyer was perhaps the greatest proponent on the Court that campaign finance laws deserve deference because of the special "expertise" of elected officials in the means of campaigns (though he did acknowledge a need to be wary of dangers of incumbency protection).<sup>78</sup> Justice Breyer

74. Heyman, *supra* note 16, at 298.

75. See HASEN, *supra* note 17, ch. 6 (describing Justice Scalia's views in cases involving democracy and governance).

76. See *Vieth v. Jubelirer*, 541 U.S. 267, 355–56 (2004) (Breyer, J., dissenting).

77. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 237–38 (Breyer, J., dissenting).

78. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., dissenting) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments—at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective

afforded no deference to the expertise of officials when they passed redistricting plans or passed voter identification laws.

What lessons can we learn from this look at Justice Scalia's views of incumbency and self-dealing?

*Lesson # 1: When All Else Fails, Lower Your Expectations.* Back in 2000, my mentor Dan Lowenstein wrote a book chapter entitled, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*.<sup>79</sup> Lowenstein's main point was that overaggressive judicial review in election law cases would simply empower the courts, which had no overarching theory of appropriate political competition, to say how the political process should be regulated. That point is certainly true, but I would go further: the problem is not just that there is a lack of coherence on issues like self-dealing on a multimember court with shifting constituencies. It is that the Justices themselves are not internally consistent, and they are driven at least in part by their ideology. These ideologies, however, increasingly line up with partisanship.

This means that consistency and adherence to precedent will have only limited value in predicting how the Supreme Court will choose or not choose to regulate politics. For a decade, American election law turned on what Justice O'Connor had for breakfast. First, the Justice supported corporate spending limits in campaigns, then she opposed them, then supported them again against First Amendment challenge.<sup>80</sup> Since Justice O'Connor's retirement it has been Justice Kennedy in the middle, and then if he retires, Chief Justice Roberts. We might as well have the parties argue *Gill v. Whitford* just to Justice Kennedy, and give the rest of the Justices a day off.

Political scientist Anthony Downs's admonition to focus on the median voter<sup>81</sup> has the greatest currency on the Supreme Court, and these Justices are swing Justices precisely because their ideology is cross-cutting or tempered by pragmatism. That was less true with Justices like Justice Scalia, or Justice Breyer.

electoral challenge."); see also *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion) (examining whether Vermont's low contribution limits "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage").

79. Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 245–66 (David K. Ryden ed., 2000).

80. Justice O'Connor concurred in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), which embraced the antidistortion rationale that later became a holding in the *Austin* case. She dissented in *Austin* but concurred in *McConnell v. Federal Election Commission* reaffirming *Austin*.

81. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 7 (1957).

*Lesson # 2. The Supreme Court Is a Political Court.* As we saw, when it came to self-dealing and regulation of the political process, Justice Scalia decided cases in line with his ideology, an ideology which, as I argue more broadly in *The Justice of Contradictions*, lines up with a neo-Trumpian populist, nationalist, conservative, libertarian ideology. Sometimes, and for some Justices, pragmatism trumps ideology.

That Justices are ideological is nothing new, and this too is not confined to conservative Justices. Just think of Justice William Brennan, who was pretty strongly liberal, tempering his liberalism to get to five votes when necessary. What is new and different is the lining up of ideology and party affiliation. Since the retirement of Justice Stevens, all the Supreme Court Justices generally considered liberal were nominated by Democratic presidents and all the Justices considered conservative were nominated by Republican presidents.

I do not mean to suggest that the Justices are, to use Professor Justin Levitt's useful term, "tribal partisans."<sup>82</sup> Such partisans "may favor public action purely because the policy in question is perceived to benefit those with a shared partisan affiliation, or because the policy in question is perceived to injure partisan opponents, wholly divorced from—or stronger yet, contrary to—the policymaker's conception of the policy's other merits."<sup>83</sup>

Few close observers of the Court view the Justices as tribal partisans. They generally are not voting in a particular way to help out their own party (although the votes and reasoning of the controversial 2000 case *Bush v. Gore*,<sup>84</sup> ending the presidential recount in Florida, pushes against these notions). Rather, it is that these Justices were chosen for nomination because their jurisprudential views line up with the interests and ideology of each party.

Consider the early signals from the newest Justice, Neil Gorsuch, and where he is likely to end up on these disputed issues. He looks to be deeply conservative on many issues, such as the question of gay rights, with perhaps an independent streak on criminal procedure matters, much like Justice Scalia.<sup>85</sup> I have every belief Justice Gorsuch is not voting in a generally conservative way because he is a Republican or because he wants to help the

82. Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1798 (2014).

83. *Id.*

84. 531 U.S. 98 (2000); HASEN, *supra* note 54, at 11–40 (describing events leading up to *Bush v. Gore*, and analyzing case).

85. Richard L. Hasen, *Gorsuch is the New Scalia, Just as Trump Promised*, L.A. TIMES (Jun. 27, 2017, 3:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-hasen-gorsuch-scalia-20170627-story.html> [<https://perma.cc/W5LU-G75B>].

Republican party. Rather, he was chosen for this position by a Republican President and Senate because of how he votes.

This confluence of ideology and party has two important implications for the Supreme Court and American politics. First, if all the Democratic-appointed Justices on the Court vote the same way in campaign finance, voting rights and gerrymandering cases and all the Republican-appointed Justices vote the other way, election law cases will become even more politicized than they have been. No more Justice Stevenses, Souters, or Whites crossing party lines. Litigants too are then more likely to frame their disputes in partisan and ideological terms.

Second, and just as importantly, the public and other political branches will begin to see the Court as a more partisan institution, and less sophisticated individuals will believe, and cynical politicians across the aisle will push the argument, that these Justices are in fact engaged in tribal partisanship.

*Lesson # 3: The Political Branches Will Respond Politically to a Political Court.* In era of hyperpartisanship, and with the realignment I have described on the Supreme Court, the politics of the Court will influence how the President and Senate view the Court's work and in turn that view will influence the Court's future composition.

This new sharp division—not just ideological but between parties—goes beyond election law to issues such as abortion rights, gun rights, race, and congressional power, and it explains why we have seen the erosion of norms over judicial nomination, filibusters and super majority rules, including the blockade of Merrick Garland,<sup>86</sup> Senate majority leader Harry Reid's blowing up of the filibuster for judicial nominations aside from the Supreme Court,<sup>87</sup> Senate majority leader Mitch McConnell's blowing up of the filibuster for Supreme Court nominations and the party line confirmation of Justice Gorsuch,<sup>88</sup> and soon the demise of the "blue slip" for federal appeals court nominations.<sup>89</sup> The stakes are starker and the lines are more clearly

86. HASEN, *supra* note 17, at 169–70 (describing Garland nomination's failure).

87. Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminates Most Filibusters on Nominations*, WASH. POST (Nov. 21, 2013), [https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c\\_story.html](https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html) [<https://perma.cc/V7NT-LL9M>].

88. Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/XGC8-F65E>].

89. Carl Hulse, *Trump and McConnell See Way to Make Conservatives Happy*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/us/politics/trump-mcconnell-judicial-nominees.html> [<https://perma.cc/8JUJ-YVQD>] ("Mr. McConnell has also made clear his interest in eliminating the so-

drawn, making compromise on judicial nominations less likely. When Democrats come back into power, it is possible that we will see new attempts to pack the Court to restore a partisan advantage.

In sum, we in the United States now face a difficult confluence of two factors. First, the Supreme Court of the United States has great power over the rules and structure of American elections, from money in politics, to legislative districts, to voting rights and the basic question of who gets to exercise the franchise and how they may do so. Second, the Justices on the Court have different views on constitutional questions about these election rules, views which increasingly line up not only with the ideology of the Justices but also with their apparent partisan affiliations.

Before long, if not already, voters likely will think of the Justices in more partisan terms, and of the Supreme Court as a Democratic Party or Republican Party-dominated institution. This will be especially true if the Justices are inconsistent in applying concepts across cases, as Justice Scalia was (and other Justices are) when it came to the dangers of incumbency protection and partisanship. Incumbency protection was enough to doom campaign finance laws but not partisan gerrymandering or biased election administration.

The convergence of a Court with great power over election rules and an increasing partisan divide between the liberal and conservative over how to resolve election cases means that there will be stress on both the United States electoral system and the legitimacy of the Supreme Court, as election rules shift along with Supreme Court majorities, and as it becomes harder for the public to avoid seeing Justices as making political, rather than legal, decisions. It is a dangerous combination for American democracy.

called blue slip, one last arcane procedural tool that Democrats have used to slow nominees in the Judiciary Committee. If he is successful in ending that Senate tradition, which gives a senator the right to block a judicial nominee in his or her state, it could greatly accelerate the entire process.”).