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ANTICIPATORY OVERRULINGS, INVITATIONS, TIME BOMBS, AND INADVERTENCE: HOW SUPREME COURT JUSTICES MOVE THE LAW

Richard L. Hasen*

INTRODUCTION

Without doubt, the Supreme Court's most prominent decision so far under the leadership of Chief Justice John Roberts has been *Citizens United v. FEC*.¹ This 5–4 decision, striking down corporate campaign spending limits against a First Amendment challenge² and overruling two earlier Supreme Court precedents,³ has been the subject not only of sustained academic commentary and editorial criticism⁴ but also of controversial criticism from President Obama in his 2010 State of the Union speech in the presence of a number of Supreme Court Justices.⁵ Critics have condemned *Citizens United* as the decision of an “activist” Supreme Court, while supporters have cheered the

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¹ 130 S. Ct. 876 (2010).

² See *id.* at 886, 913.

³ *Id.*; accord *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled in part by Citizens United*, 130 S. Ct. 876; *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United*, 130 S. Ct. 876. The Court in *Citizens United* overruled one of the two major holdings of *McConnell* concerning spending limits on certain corporate- and labor-union-funded election advertising. *Citizens United*, 130 S. Ct. at 913. Challengers have now gone after the other major holding of *McConnell*, the portion of the case upholding the party “soft-money” limitations of the 2002 McCain–Feingold law. See *Republican Nat'l Comm. v. FEC (RNC)*, 698 F. Supp. 2d 150, 157 (D.D.C.), *aff'd mem.*, 130 S. Ct. 3544 (2010). Though *RNC* was a poor vehicle for overturning *McConnell*, “[i]f the RNC refiles its case as a straightforward facial challenge to *McConnell*'s soft money holding, I would be unsurprised if [the Court] took the case and then either overturned *McConnell* or whittled it away first, along the lines of [*FEC v. Wisconsin Right to Life, Inc. (WRTL II)*].” Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 621 n.262 (2011); see also *infra* text accompanying notes 36–40 (discussing Justice Alito's stated desire for express argument and full briefing before considering the overruling of precedent).

⁴ For articles on *Citizens United*, see Hasen, *supra* note 3, at 603–04 nn.173–77. My own views on the case appear in Hasen, *supra* note 3; Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989 (2011) [hereinafter Hasen, *Citizens United*]; and Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181 [hereinafter Hasen, *Constitutional Avoidance*].

⁵ See Adam Liptak, *A Justice Responds to Criticism from Obama*, N.Y. TIMES, Feb. 4, 2010, at A17.

Court for correcting earlier errant precedent in conflict with the First Amendment.⁶

As Barry Friedman has pointed out in a recent *Georgetown Law Journal* article, the Supreme Court does not always move the law in such a prominent fashion.⁷ Despite the *Citizens United* ruling, and maybe now more because of the public reaction to it, express overrulings of precedent are rare. The Roberts Court also has engaged in “stealth overruling.” Stealth overruling occurs when the Court does not explicitly overrule an existing precedent. Instead, it “fail[s] to extend a precedent to the conclusion mandated by its rationale,” or it “reduc[es] a precedent to nothing.”⁸ Using the example of the Roberts Court’s treatment of *Miranda v. Arizona*,⁹ Friedman demonstrates how the Court has been able to greatly reduce the precedential force of the *Miranda* case without incurring public scrutiny and criticism.¹⁰ Friedman is critical of stealth overruling on a number of grounds, most importantly because “stealth overruling obscures the path of constitutional law from public view, allowing the Court to alter constitutional meaning without public supervision.”¹¹

I leave to others the question whether the Roberts Court empirically engages in more (stealth) overruling than earlier groups of Supreme Court Justices did and, even if the Roberts Court does so, whether a higher overruling rate is grounds for condemnation.¹² Instead, the more modest aim of this brief Essay is to catalog additional tools that Supreme Court Justices can use beyond express and stealth overruling to move the law. I also explain why Justices might choose to use one, rather than another, of these tools to move the law.

⁶ Consider the recent heated debate between Floyd Abrams and Burt Neuborne in *The Nation*. Floyd Abrams & Burt Neuborne, *Debating Citizens United*, *NATION*, Jan. 31, 2011, at 19.

⁷ Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 *GEO. L.J.* 1, 3 (2010).

⁸ *Id.* at 12.

⁹ 384 U.S. 436 (1966).

¹⁰ Friedman, *supra* note 7, at 16–25.

¹¹ *Id.* at 63.

¹² The Roberts Court did not invent stealth overruling. For example, the Warren Court’s famous 1962 case of *Baker v. Carr*, 369 U.S. 186 (1962), which held reapportionment claims to be justiciable under the Constitution’s Equal Protection Clause, *id.* at 237, seems to be a stealth overruling of *Colegrove v. Green*, 328 U.S. 549 (1946), which held that such reapportionment claims are not justiciable under the Constitution’s Guarantee Clause, *id.* at 556 (plurality opinion). I do note on the condemnation point that, if existing Supreme Court precedent deviates more from the ideal point of the median Justice on the Roberts Court than precedent deviated from the ideal point of the median Justice on earlier Courts, we could see more overruling now, even if earlier groups of Justices were equally “activist” in terms of willingness to overturn precedent with which they disagreed.

In particular, I analyze four additional tools. “Anticipatory overruling” occurs when the Court does not overrule precedent but suggests its intention to do so in a future case. “Invitations” exist when one or more Justices invite (1) litigants to argue for the overruling of precedent in future cases or (2) Congress to overrule Supreme Court statutory precedent. “Time bombs” exist when Justices include within a case subtle dicta or analysis not necessary to decide it with an eye toward influencing how the Court will decide a future case. “Inadvertence” occurs when the Court changes the law without consciously attempting to do so, through attempts to restate existing law in line with the writing Justice’s values.¹³

These tools demonstrate how Justices with a long time horizon and patience sometimes can move the law both subtly (sometimes even unconsciously) and forcefully. Part I describes these four tools, using illustrations from Roberts Court cases, primarily in the election law and remedies arenas. Part II briefly compares the costs and benefits of these tools to each other and to express and stealth overruling, and notes that the tools function to send signals to different audiences: lower courts, Congress, the public, and other members of the Court.

I. FOUR (MORE) WAYS JUSTICES MOVE THE LAW

Whether one accepts the “attitudinal model” of Supreme Court Justices,¹⁴ there seems to be little question that, on occasion, Justices on the Supreme Court wish to change existing law. Indeed, given the nearly complete freedom the Supreme Court has in choosing cases to review,¹⁵ perhaps the most

¹³ As will become clear, inadvertence is not a conscious tool used by Justices the way these other tools are used.

¹⁴ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). The attitudinal model says that the Supreme Court decides cases based on the “ideological attitudes and values of the justices.” *Id.* at 65.

¹⁵ See Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 20 UTAH L. REV. 433, 446 (2011). A number of election law cases still make it to the Court on direct appeal through three-judge courts. *See id.* at 455. When a case comes on appeal, the Court’s decision not to hear the case has precedential value, unlike the system that applies for denials of discretionary writs of certiorari. *See id.* at 455–56. For this reason, the Court is more likely to grant hearings from direct appeals. *See* RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 36–38 (2003) (discussing the reasons the Supreme Court’s poll tax case, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), was decided through a full opinion and not through a summary affirmance and dissent). For background on the direct-appeal process, see Douglas, *supra*, at 14–18, 23–25; Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 132 (1996).

common reason that a Justice will vote to hear a case will be to make some change in existing law.¹⁶

The strongest and most definitive way for Supreme Court Justices to move the law is through express, direct action: expressly overruling or extending precedent. But there are at least four reasons why such express action may be unavailable or undesirable in a particular case: (1) no majority of Justices may be willing to move the law in a particular direction; (2) express overruling or extension of precedent might lead to fractious 5–4 decisions, which Justices might wish to avoid for reasons of collegiality or otherwise; (3) jurisdictional or prudential concerns may lead the Court to decline to expressly overrule or extend precedent; or (4) Justices may fear public opinion or retaliation by the political branches.¹⁷ Accordingly, Justices might sometimes look to move the law in other, less direct ways.

A. *Anticipatory Overruling*

Though *Citizens United* is thus far the most famous case of the Roberts Court, it was almost the second most famous case.¹⁸ The public is scarcely aware of it, but in 2009 the Supreme Court in *Northwest Austin Municipal Utility District Number One v. Holder (NAMUDNO)* came very close to overturning a key portion of the Voting Rights Act (VRA), widely considered a crown jewel of the civil rights movement, and overruling earlier cases going back to 1966 that upheld the Act's constitutionality.¹⁹ The portion of the VRA at issue, section 5, requires jurisdictions with a history of racial discrimination in voting to seek permission, or preclearance, from the Department of Justice

¹⁶ Supreme Court Rule 10 provides a nonexhaustive list of reasons for the Court's use of a discretionary grant of a writ of certiorari to review a lower court case. *See* SUP. CT. R. 10. The rule lists the following reasons to grant certiorari: (1) conflicts among lower courts on a controlling legal question, (2) a lower court so straying from existing law that the Court's role as a supervisory court comes into play, and (3) a lower court deciding an important federal question that has not been decided by the Supreme Court. *See id.* Each of these is an occasion for the Court to change the law. *See id.* The rule concludes: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Here and throughout this discussion, I leave aside the scenario in which the Justices decide cases truly of first impression, where there is no precedent to extend or reverse.

¹⁷ On the extent to which courts respond to majoritarian pressures, see Friedman, *supra* note 7, at 33; and Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103.

¹⁸ Then again, given path dependency, perhaps the Court in *Citizens United* would not have expressly overturned precedent had it first faced a severely negative public reaction from an earlier decision striking down the Voting Rights Act (VRA).

¹⁹ 129 S. Ct. 2504, 2513 (2009).

or a D.C. court before making any changes in voting rules.²⁰ The claim made in *NAMUDNO* was that the preclearance requirement exceeded congressional powers given the lack of contemporary evidence of discrimination by the covered jurisdictions.²¹

A decision striking down section 5 would have had huge symbolic significance, likely evoking an even greater negative public reaction than the reaction to *Citizens United*. But instead of overruling the precedent and striking down the VRA, the Court engaged in a tortured statutory analysis to avoid doing so, all the while signaling that it would not be so charitable when reviewing the constitutional question in the next case.²² *NAMUDNO*, therefore, was a case of anticipatory overruling. Anticipatory overruling occurs when the Court does not overrule precedent but suggests its intention to do so in a future case.

In a surprising and relatively short opinion, the Court, in an 8–1 vote, decided *NAMUDNO* on statutory grounds, ruling that the utility district was entitled to “bail out” from coverage under the VRA, despite clear text and legislative history indicating that only jurisdictions that register voters (which the utility district did not do) were entitled to bail out.²³ The Court’s opinion, written by Chief Justice Roberts, engaged in a detailed exposition of the serious constitutional questions raised by the case.²⁴ The Court noted that “[t]he Act . . . differentiates between the States, despite our historic tradition that all the States enjoy ‘equal sovereignty.’”²⁵ It said a departure from this principle “requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”²⁶ It flagged the federalism concerns and noted the danger that “[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance.”²⁷ After noting that the coverage formula (as to which jurisdictions are covered by a preclearance requirement) is thirty-five years old and possibly outdated, the Court noted that “Congress heard warnings from supporters of extending

²⁰ See *id.* at 2509 (construing Voting Rights Act of 1965 §§ 4, 5, 42 U.S.C. §§ 1973b(a)(1), 1973c(a) (2006)).

²¹ See *id.* at 2510.

²² See Hasen, *Constitutional Avoidance*, *supra* note 4, at 220–21 (discussing the Court’s decision in great detail).

²³ *NAMUDNO*, 129 S. Ct. at 2516.

²⁴ See *id.* at 2513–16.

²⁵ *Id.* at 2512 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)).

²⁶ *Id.*

²⁷ *Id.*

§ 5 that the evidence in the record did not address ‘systematic differences between the covered and the non-covered areas of the United States.’²⁸

Following this discussion and raising serious doubts about section 5’s constitutionality, the opinion stated, “[W]e are keenly mindful of our institutional role. We fully appreciate that judging the constitutionality of an Act of Congress is ‘the gravest and most delicate duty that this Court is called on to perform.’”²⁹ The Court then offered a superficial textual analysis of the bailout question, concluding, without any reasonable basis, that the utility district was entitled to bail out,³⁰ thereby avoiding striking down the VRA and overruling earlier precedent.³¹ At the end of the day, the Supreme Court in *NAMUDNO* let section 5 of the VRA stand, while signaling strongly that next time around section 5 would not survive constitutional scrutiny in its current form.

The Court’s use of anticipatory overruling is notable not only for its expansive use of the constitutional-avoidance doctrine to avoid a controversial decision but also for its subtle signaling of unconstitutionality, which contrasts with the Court’s more explicit past use of anticipatory overrulings.³² For example, in the 1982 case of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court held that the Bankruptcy Act of 1978 was unconstitutional because it conferred Article III judicial powers on non-Article III bankruptcy judges.³³ But the Court stayed its own ruling to give Congress “an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of bankruptcy laws.”³⁴ In more recent years, given the direction of the Court’s retroactivity jurisprudence, the Court has backed off such express anticipatory overrulings.

²⁸ *Id.* (quoting *The Continuing Need for Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 (2006) (statement of Richard H. Pildes, Sudler Family Professor of Constitutional Law, New York University School of Law)) (internal quotation mark omitted).

²⁹ *Id.* at 2513 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

³⁰ *Id.* at 2513–14; accord Hasen, *Constitutional Avoidance*, *supra* note 4, at 204–06.

³¹ Though the Court could have said it was merely distinguishing earlier cases holding that Congress acted within its powers in passing the preclearance provisions of the VRA, the public likely would not understand the distinction and view a decision striking down the VRA as an overruling of precedent.

³² See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 651–63 (4th ed. 2007).

³³ 458 U.S. 50, 87 (1982) (plurality opinion).

³⁴ *Id.* at 88; accord ESKRIDGE, JR. ET AL., *supra* note 32, at 653–54.

B. *Invitations*

Invitations exist when one or more Justices invite (1) litigants to argue for the overruling or extension of precedent in future cases or (2) Congress to overrule Supreme Court statutory precedent. Here I briefly describe the Roberts Court cases in each category.

In 2007, before *Citizens United*, the Supreme Court decided *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*.³⁵ Like *Citizens United*, *WRTL II* raised questions about the constitutionality of limits on corporate spending in elections.³⁶ I have described the complex facts of the case elsewhere.³⁷ Here, it is enough to note that the Court held that a McCain–Feingold provision limiting corporate-funded, election-related television ads could not be applied to an ad mentioning U.S. Senate candidate Russ Feingold and his position on the filibustering of judicial nominees.³⁸ Notably, the Court produced no majority opinion. In a concurrence joined by Justices Kennedy and Thomas, Justice Scalia took the position that the challenged provision was unconstitutional as applied to *any* corporate spending.³⁹ Justice Scalia contended that *McConnell* and *Austin* should be overruled,⁴⁰ a position the Court adopted three years later in *Citizens United*.⁴¹

Chief Justice Roberts, joined by Justice Alito, wrote a narrower (and therefore controlling) opinion that did not reach the question of whether *McConnell* and *Austin* should be overruled.⁴² He instead concluded that the only corporate-funded advertisements that the law could bar constitutionally were those that were the “functional equivalent of express advocacy,” and he read “functional equivalency” very narrowly.⁴³ Applying this new test, the

³⁵ 551 U.S. 449 (2007).

³⁶ *Id.* at 457.

³⁷ See Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1076–80 (2008).

³⁸ *WRTL II*, 551 U.S. at 476 (plurality opinion); *id.* at 503–04 (Scalia, J., concurring in part and concurring in the judgment) (construing Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (codified at 2 U.S.C. § 441b (2006))).

³⁹ See *id.* at 492–93.

⁴⁰ See *id.* at 490, 499–504.

⁴¹ 130 S. Ct. 876, 913 (2010).

⁴² *WRTL II*, 551 U.S. at 476, 480–81 (plurality opinion). Justice Scalia was quite critical of the limited nature of the controlling opinion, stating, “This faux judicial restraint is judicial obfuscation.” *Id.* at 499 n.7 (Scalia, J., concurring in part and concurring in the judgment). Professor Friedman criticized the controlling opinion as an example of stealth overruling. Friedman, *supra* note 7, at 11–12.

⁴³ See *WRTL II*, 551 U.S. at 455–82 (plurality opinion).

controlling opinion held that the ad was not the “functional equivalent” of express advocacy against Senator Feingold: it did not mention Senator Feingold’s character or fitness for office and had no other clear indicia of the functional equivalent of express advocacy.⁴⁴

Despite joining the Chief Justice’s controlling opinion, Justice Alito also issued a separate single-paragraph concurrence:

I join the principal opinion because I conclude (1) that § 203 of the Bipartisan Campaign Reform Act of 2002, as applied, cannot constitutionally ban any advertisement that may reasonably be interpreted as anything other than an appeal to vote for or against a candidate, (2) that the ads at issue here may reasonably be interpreted as something other than such an appeal, and (3) that because § 203 is unconstitutional as applied to the advertisements before us, it is unnecessary to go further and decide whether § 203 is unconstitutional on its face. If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in *McConnell v. Federal Election Comm’n*, that § 203 is facially constitutional.⁴⁵

Note that Justice Alito went out of his way to flag something everyone already knows: the courts are always open to an argument that old precedent should be overruled. But by emphasizing the fact that “presumably” an individual chilled by the Court’s ruling would argue for overruling *McConnell* in a future case, he appeared to invite litigants to raise such a challenge.

Bill Araiza flags a similar, if subtler, example of Chief Justice Roberts’ use of an invitation in a recent Sixth Amendment case.⁴⁶ In *Rothgery v. Gillespie County*, the Chief Justice joined Justice Souter’s majority opinion, but then separately described Justice Thomas’s dissent as “compelling,” concluding that “[a] sufficient case has not been made for revisiting those precedents, and accordingly I join in the Court’s opinion.”⁴⁷ A careful reader would understand the Chief Justice to be inviting someone to make a forthright

⁴⁴ *Id.* at 470, 480–81.

⁴⁵ *Id.* at 482–83 (Alito, J., concurring) (citations omitted).

⁴⁶ See William D. Araiza, *Playing Well with Others—but Still Winning: Chief Justice Roberts, Precedent, and the Possibilities of a Multi-Member Court* 4–6 (Brooklyn Law Sch. Legal Studies Research Papers Working Paper Series, Research Paper No. 220, 2011), available at <http://ssrn.com/abstract=1758001>.

⁴⁷ 128 S. Ct. 2578, 2592 (2008) (Roberts, C.J., concurring).

attack on those precedents in a future case.⁴⁸ If not, what would be the point of the separate concurrence?

Despite Justice Alito's invitation in *WRTL II*, he also has consistently expressed the belief that courts should overrule precedent only when there is an explicit request, full briefing, and oral argument on the question. In *Randall v. Sorrell*, a case challenging a number of Vermont's campaign finance laws, Justice Alito again filed a very short concurrence to a controlling (nonmajority) opinion.⁴⁹ There, he noted that a party arguing for the overruling of a portion of *Buckley v. Valeo*⁵⁰ had made the overruling argument only briefly in its ninety-nine pages of briefing.⁵¹ He concluded that "[w]hether or not a case can be made for reexamining *Buckley* in whole or in part, what matters is that respondents do not do so here, and so I think it unnecessary to reach the issue."⁵²

Justice Alito made a similar point in his majority opinion last term in *NASA v. Nelson*.⁵³ There, the Court declined to decide whether the Constitution contains a right to "informational privacy."⁵⁴ Instead, the Court assumed the right existed for the sake of argument and then held that the right, if it existed, was not violated in this particular case. Over Justice Scalia's strong concurrence urging that the Court decide the constitutional question,⁵⁵ Justice Alito responded that "[i]t is undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties and in which potential *amici* had little notice that the matter might be decided."⁵⁶

Justice Alito's desire to invite full briefing when overruling precedent is a possibility was likely on display in *Citizens United* itself. The Court first deferred deciding the case after it was argued in March 2009. Instead, the Court issued an order in June 2009 setting the case for supplemental briefing and reargument on the express question of whether *Austin* and *McConnell*

⁴⁸ See Araiza, *supra* note 46, at 6 ("[The Chief Justice's] strategy invites future litigants to suggest cabining that precedent, thus isolating and ultimately undermining it.").

⁴⁹ 548 U.S. 230, 263–64 (2006) (Alito, J., concurring in part and concurring in the judgment).

⁵⁰ 424 U.S. 1 (1976) (per curiam).

⁵¹ *Randall*, 548 U.S. at 264 (Alito, J., concurring in part and concurring in the judgment).

⁵² *Id.*

⁵³ 131 S. Ct. 746 (2011).

⁵⁴ *Id.* at 756–57.

⁵⁵ *Id.* at 767–69 (Scalia, J., concurring).

⁵⁶ *Id.* at 756 n.10 (majority opinion).

should be overruled.⁵⁷ The Court ultimately overruled those cases in an opinion issued in January 2010.

While Justice Alito seems to be inviting litigants to argue forthrightly for the overruling of precedent when appropriate, Justice Ginsburg has directed her invitations to Congress. In a recent lecture on the value of dissenting opinions, Justice Ginsburg discussed the Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,⁵⁸ noting that "[a]nother genre of dissent aims to attract immediate public attention and, thereby, to propel legislative change."⁵⁹ In *Ledbetter*, the plaintiff, Lilly Ledbetter, filed an action under Title VII alleging pay discrepancies because of her sex.⁶⁰ Justice Ginsburg commented:

A fit example, perhaps, is the dissent I summarized from the bench in 2007 in Lilly Ledbetter's case. Ledbetter worked as an area manager at a Goodyear tire plant in Alabama; in 1997, she was the only woman Goodyear employed in such a post. Her starting salary (in 1979) was in line with the salaries of men performing similar work. But over time, her pay slipped. By the end of 1997, there was a fifteen to forty percent disparity between Ledbetter's pay and the salaries of her fifteen male counterparts. A federal jury found it "more likely than not that [Goodyear] paid [Ledbetter] a[n] unequal salary because of her sex." The Supreme Court nullified that verdict, holding that Ledbetter filed her claim too late.

It was incumbent on Ledbetter, the Court said, to file charges of discrimination each time Goodyear failed to increase her salary commensurate with the salaries of her male peers. Any annual pay decision not contested promptly (within 180 days), the Court ruled, became grandfathered, beyond the province of Title VII (our principal law prohibiting employment discrimination) ever to repair.

The Court's ruling, I observed for the four dissenters, ignored real-world employment practices that Title VII was meant to govern: "Sue early on," the majority counseled, when it is uncertain whether discrimination accounts for the pay disparity you are beginning to experience, and when you may not know that men are receiving more

⁵⁷ See *Citizens United v. FEC*, 129 S. Ct. 2893 (2009). For the procedural history of the case, see Hasen, *Constitutional Avoidance*, *supra* note 4, at 182, 206–13. Justice Alito's attitude likely explains why he and Chief Justice Roberts did not join Justices Kennedy, Scalia, and Thomas in voting to hear the challenge to the soft-money provisions of McCain–Feingold. See Hasen, *supra* note 3, at 621 n.262.

⁵⁸ 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

⁵⁹ Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 6 (2010).

⁶⁰ See *Ledbetter*, 550 U.S. at 621–22.

for the same work. (Of course, you would likely lose such a premature, less-than-fully-baked challenge.) If you sue only when the pay disparity becomes steady and large enough to enable you to mount a winnable case, you will be cut off at the Court's threshold for suing too late. That situation, I urged, could not be what Congress intended when, in Title VII, it outlawed discrimination based on race, color, religion, sex, or national origin in our Nation's workplaces. "[T]he ball is in Congress's court," I wrote, "to correct [the Supreme] Court's parsimonious reading of Title VII."

Congress responded within days of the Court's decision. Bills were introduced in the House and Senate to amend Title VII to make it plain that each paycheck a woman in Ledbetter's situation received renewed the discrimination and restarted the time within which suit could be brought. Early in 2009, Congress passed the Lilly Ledbetter Fair Pay Act, and President Obama signed the corrective measure as one of his first actions after taking office.⁶¹

Justice Ginsburg's invitation in *Ledbetter* was clear to Congress. If Congress believed the Court got the statute wrong, "the ball [wa]s in Congress's court."⁶² And Congress took the ball and ran with it.

C. *Time Bombs*

Justices are sometimes more subtle than they are with invitations. I became familiar with the "time bombs" concept from Seth Stern and Steve Wermiel's fascinating 2010 biography of Justice Brennan.⁶³ Discussing Justice O'Connor's reluctance to join one of Justice Brennan's opinions, the authors wrote, "O'Connor had taken to heart [Justice] Powell's warnings that Brennan planted 'time bombs' in his opinions. She had learned to watch for those seemingly offhand, throwaway phrases that he exploited in later cases."⁶⁴

Unlike anticipatory overrulings and invitations, time bombs are more difficult to detect. How is one to know whether a Justice (or her clerk) has

⁶¹ Ginsburg, *supra* note 59, at 6–7 (first, second, third, fourth, and sixth alterations in original) (footnotes omitted).

⁶² *Ledbetter*, 550 U.S. at 661 (Ginsburg, J., dissenting).

⁶³ SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010).

⁶⁴ *Id.* at 493. I do not deal here with a different type of "time bomb" where a Court majority uses very broad language to decide a narrow, relatively unimportant issue, leaving open the possibility of applying that broad language more radically in an important future case. Arguably that description applies to the Court's 5–4 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010). See Richard H. Pildes, *Free Enterprise Fund, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL'Y 1 (2010).

consciously planted something for a future case? Alternatively, how is one to know whether a statement, citation, or dictum is merely inadvertent? There will rarely be a smoking gun, not even in a Justice's files that are released years after a decision, indicating a Justice's intentions, and therefore, one needs to go on suspicions.

Consider, for example, a recent controversy over an obscure *see* citation in a 2008 campaign-finance case and its relevance to a recently decided Supreme Court decision. In *Davis v. FEC*,⁶⁵ the Supreme Court, relying on *Buckley*'s rejection of the equality rationale for campaign-finance spending limits,⁶⁶ struck down a provision of the McCain–Feingold campaign-finance law giving U.S. House candidates the right to collect increased individual contributions for their campaigns when they faced a self-financed opponent spending large sums.⁶⁷

The controversy stemmed from the following passage in Alito's majority opinion in *Davis*:

Section 319(a) requires a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations. Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite § 319(a), but they must shoulder a special and potentially significant burden if they make that choice. See *Day v. Holahan*, 34 F.3d 1356, 1359–1360 (CA8 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures); Brief for Appellee 29 (conceding that “[§]319 does impose some consequences on a candidate's choice to self-finance beyond certain amounts”).⁶⁸

In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, the Supreme Court considered the constitutionality of an Arizona public-financing law that gave participating candidates the right to additional public funding when facing large spending from a nonparticipating opponent or an independent expenditure effort.⁶⁹ The Ninth Circuit had held that Arizona's matching-fund

⁶⁵ 128 S. Ct. 2759, 2773 (2008).

⁶⁶ *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (per curiam).

⁶⁷ *Davis*, 128 S. Ct. at 2774.

⁶⁸ *Id.* at 2771–72 (alteration in original).

⁶⁹ 131 S. Ct. 2806, 2813 (2011).

provision did not violate the First Amendment under *Davis*.⁷⁰ The Ninth Circuit's conclusion⁷¹ was contrary to the Eighth Circuit *Day v. Holahan* case⁷² cited by the Supreme Court in *Davis*.⁷³

The Supreme Court reversed the Ninth Circuit decision, striking down the Arizona extra-matching-funds provision. In so doing, the Court not only cited *Day* once again but also referenced the fact that the Court had earlier cited *Day* in *Davis* for the proposition that these *matching* systems raise constitutional problems:

[S]ee also *Day v. Holahan*, 34 F.3d 1356, 1360 (C.A.8 1994) (it is “clear” that matching funds provisions infringe on “protected speech because of the chilling effect” they have “on the political speech of the person or group making the [triggering] expenditure” (cited in *Davis, supra*, at 739, 128 S.Ct. 2759)). The dissent's disagreement is little more than disagreement with *Davis*.⁷⁴

As presented in *Bennett*, the Court had all but resolved this issue in *Davis* and signaled that resolution through its citation to *Day*.

Intentionality is the remaining question. Was Justice Alito planting a time bomb so that the Court could later refer back to this citation from *Davis* as support for a ruling in *Bennett* striking down the Arizona matching-fund system? While we likely will never know his true intentions, it is certainly possible that this was what Justice Alito or a clerk had in mind in including the reference to the *Day* case in *Davis*.⁷⁵

⁷⁰ *McComish v. Bennett*, 611 F.3d 510 (9th Cir. 2010), *rev'd sub nom. Ariz. Free Enter.*, 131 S. Ct. 2806.

⁷¹ *See id.* at 523 n.9 (stating that the citation of *Day* in *Davis* was for a limited proposition and did not create a precedent).

⁷² 34 F.3d 1356 (8th Cir. 1994).

⁷³ *Davis*, 128 S. Ct. at 2772.

⁷⁴ *Bennett*, 131 S. Ct. at 2824 (second alteration in original).

⁷⁵ Here is another recent example of a possible time bomb. The Supreme Court decided *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), while a controversial voter-identification case was pending before the Court. Rick L. Hasen, *About Face: The Roberts Court Sets the Stage for Shrinking Voting Rights, Putting Poor and Minority Voters Especially in Danger*, FINDLAW (Mar. 26, 2008), http://writ.news.findlaw.com/commentary/20080326_hasen.html. A key holding of *Washington State Grange* was that courts should favor as-applied over facial challenges in election law cases. *See Wash. State Grange*, 552 U.S. at 458. When the case was decided, I suggested that Chief Justice Roberts “may be looking further ahead, to one of the most controversial cases of the term: *Crawford v. Marion County*, the Indiana voter identification law case. . . . The rule the Court has laid down now may not bode well for the Indiana voter ID law challengers.” Hasen, *supra*. Sure enough, in *Crawford*, the Court relied upon *Washington State Grange* in applying the rules as to as-applied challenges. *Crawford v. Marion Cnty. Election Bd.*, 128 S. Ct. 1610, 1621–22 (2008) (plurality opinion).

D. Inadvertence

Inadvertence occurs when the Court changes the law without consciously attempting to do so, through attempts to restate existing law in line with the writing Justice's values. Of course, it is possible that some of these misstatements of the law are intentional—either on the part of a Justice or Justices, or a clerk—as a surreptitious means of shifting the law without alerting the other Justices of the shift.⁷⁶ But the issue of such devious motivation is very difficult to prove,⁷⁷ and it is enough for my purposes to treat all cases of legal misstatements as those of inadvertence.

Consider the Supreme Court's recent treatment of the standards for issuing permanent injunctions. In *eBay Inc. v. MercExchange L.L.C.*, the Supreme Court reversed a “‘general rule,’ [of the United States Court of Appeals for the Federal Circuit] unique to patent disputes, ‘that a permanent injunction will issue once infringement and validity have been adjudged.’”⁷⁸ Unremarkably, the Supreme Court, in an opinion by Justice Thomas, held that the question of the issuance of a permanent injunction must be judged on a case-by-case basis through the application of judicial discretion.⁷⁹ It rejected the Federal Circuit's special rule for patent injunctions.⁸⁰ The surprise in the case came in the Court's statement of the “well-established principles” applicable to the issuance of permanent injunctions:

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decision to grant or deny permanent injunctive relief is an act of

⁷⁶ Douglas Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636, 670 (1979) (“It reads as though the Court were unaware of any case after *Douglas*, but the Court could have deliberately created that impression.”).

⁷⁷ See *id.* at 669–79 (providing detailed analysis to determine possible Supreme Court Justices' motivations in ignoring relevant precedent in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and concluding that the reason for ignoring precedent was likely inadvertence).

⁷⁸ 547 U.S. 388, 393–94 (2006).

⁷⁹ See *id.* at 391.

⁸⁰ See *id.* at 393–94.

equitable discretion by the district court, reviewable on appeal for abuse of discretion.⁸¹

A major problem with the Supreme Court's recitation of this supposedly "well-established" four-part test is that the test did not exist before. Professor Doug Rendleman explained that "[r]emedies specialists had never heard of the four-point test."⁸² There was a familiar four-part test for the issuance of *preliminary* injunctions, but it was not this same test.⁸³ The test for preliminary injunctions, which looks in part at future likelihood of success on the merits, "make[s] no sense as applied to *permanent* injunctions."⁸⁴

So how did this new test come into being in *eBay*? Professor Laycock explains what appears to be Justice Thomas's inadvertence:

eBay and many of its amici, and the U.S. Solicitor General, who was supporting MercExchange, all referred to some version of four traditional considerations relevant to injunctive relief. They did not all cite the same four factors, and none of the lead briefs offered anything so flat footed as the Court's formulation. The Court appears to have mostly taken its four-part test from the district court, which took it from one earlier district court opinion; putting irreparable injury in the past tense appears to have been an innovation by Justice Thomas or one of his clerks. And because the opinion gives no hint how any of the four parts of the test apply to the facts of the case, its abstract pronouncement has no real content. The case was litigated by an all-star cast of Supreme Court lawyers, but none of them consulted a remedies specialist.⁸⁵

But Court inadvertence takes on a life of its own.⁸⁶ The *eBay* test has now been cited and applied by numerous lower courts,⁸⁷ and the Court recently reaffirmed it as the "traditional four-factor test" last term in *Monsanto Co. v.*

⁸¹ *Id.* at 391 (citations omitted).

⁸² Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 76 n.71 (2007); accord DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES: CASES AND MATERIALS 273 (8th ed. 2011).

⁸³ Rendleman, *supra* note 82, at 76 n.71.

⁸⁴ See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 426 (4th ed. 2010) (emphasis added). The test also suffers from other problems, such as that the first and second elements appear to be asking the same question. *Id.* at 426–27.

⁸⁵ *Id.* at 427.

⁸⁶ See *id.* ("There was no such test before, but there is now.").

⁸⁷ See *id.* ("By early May 2010, *eBay* had been cited more than 4,100 times.").

Geertson Seed Farms.⁸⁸ “And once again the Court appeared oblivious to any difference between permanent and preliminary injunctions.”⁸⁹

In the *eBay* and *Monsanto* cases, the law moved significantly through apparent inadvertence. The term “inadvertence” might suggest some randomness, but I expect inadvertent mistakes to more systematically reflect the value judgments of the Justice drafting the opinion. The causal mechanism for such a bias is straightforward: an error in stating existing law (or inadvertent change of law) in a draft opinion is less likely to capture the attention of a Justice reviewing a draft opinion if the error is in line with what the Justice expects the law to be.

The *eBay* case provides a nice example of the nonrandomness of inadvertence. In applying the (new) four-part test, the Court’s analysis in *Monsanto* increased the burdens on plaintiffs seeking permanent injunctions.⁹⁰ Before *eBay*, the common understanding was that it was up to a defendant to raise the question of the public interest as a kind of affirmative defense if the defendant believed the injunction sought by the plaintiff did not serve the public interest.⁹¹ Under the new test, however, the *plaintiff* must demonstrate that the public interest “would not be *disserved*” by a permanent injunction.⁹² As Professor Laycock asks: “Might this mean that benefits to the public interest cannot count in favor of issuing the injunction, but that harm to the public interest is an absolute reason not to issue it? Did Justice Thomas choose that phrasing deliberately in *eBay*, or might it be inadvertent?”⁹³ Whatever Justice Thomas intended, he has certainly written or signed onto a number of opinions in recent years that make it harder for plaintiffs to obtain an injunction and easier for defendants to seek modifications of injunctions that ease the burden on defendants.⁹⁴ His inadvertence appears to line up with his values.

⁸⁸ 130 S. Ct. 2743, 2757 (2010).

⁸⁹ DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 26 (2011 Teachers’ Update).

⁹⁰ See 130 S. Ct. at 2757 (“It is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test set out above.”).

⁹¹ See LAYCOCK, *supra* note 84, at 426–27.

⁹² *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388, 391 (2006).

⁹³ LAYCOCK, *supra* note 89, at 4.

⁹⁴ See, e.g., *Monsanto*, 130 S. Ct. 2743; see also *Horne v. Flores*, 129 S. Ct. 2579, 2593 (2009) (“The party seeking relief bears the burden of establishing that changed circumstances warrant relief, but once a party carries this burden, a court abuses its discretion ‘when it refuses to modify an injunction or consent decree in light of such changes.’” (citation omitted) (quoting *Agostini v. Felton*, 521 U.S. 203, 215 (1997))); *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 375–76 (2008) (“Issuing a preliminary injunction based only

II. COMPARING THE WAYS JUSTICES MOVE THE LAW

Part I demonstrated that Justices have more ways to move the law besides express and stealth overruling. I now turn to the question *when* Justices may wish to use anticipatory overrulings, invitations, or time bombs. I put aside the scenario in which a Justice decides to use the tool of inadvertence—itsself a logical impossibility.

Anticipatory overrulings can be aimed at either Congress or the public. By giving advanced warning or suggestion as to what a Court is going to do in a future case, the Court can give Congress (or another legislative body, in an appropriate case) a chance to make a change in law to forestall overruling. In the case of the VRA issue in *NAMUDNO*, for example, election law scholars have read the Court's decision as implicitly urging Congress to change aspects of the Act so that the Court would not strike down the law as unconstitutional.⁹⁵

Justices might aim anticipatory overrulings at the public as well. Elsewhere, I have contrasted the Court's use of the constitutional-avoidance doctrine in *NAMUDNO* with its use of an "anti-avoidance canon" to reach out and decide the constitutional issue in *Citizens United*.⁹⁶ One possible explanation for the different treatment in the two cases is that the Court had already given signals to the public before *Citizens United* in cases like *WRTL II*

on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.").

⁹⁵ See, e.g., Heather Gerken, *Gerken: Can Congress Take a Hint?*, ELECTION L. BLOG (June 23, 2009, 8:15 AM), <http://electionlawblog.org/archives/013911.html> ("The real worry for supporters of Section 5 is the possibility that the Court's liberals thought that sending a crystal clear, united message to Congress was Section 5's best hope. That is, the four Justices on the Court may have been as convinced as many commentators are that Section 5 will fall when the case returns, and they were hoping that a unanimous opinion would light a fire under Congress. To me, the fact that the four liberal Justices joined the opinion represents a pretty big hint that Congress needs to act. The question is whether Congress can take the hint."); Richard H. Pildes, *A Warning to Congress*, N.Y. TIMES ROOM FOR DEBATE BLOG (June 23, 2009, 11:30 AM), <http://roomfordebate.blogs.nytimes.com/2009/06/22/the-battle-not-the-war-on-voting-rights/#richard> ("Congress might conclude that it would be wise to update the act rather than remaining silent and leaving the next word to an obviously skeptical court."). For an alternative reading of *NAMUDNO* as the product of strategic compromise among conservative and liberal justices, see Joshua A. Douglas, *The Voting Rights Act Through the Justices' Eyes: NAMUDNO and Beyond*, 88 TEX. L. REV. SEE ALSO 1, 19–23 (2009), <http://www.texasrev.com/sites/default/files/seealso/vol88/pdf/88TexasLRevSeeAlso1.pdf>.

⁹⁶ See Hasen, *Constitutional Avoidance*, *supra* note 4 (concluding that the different use of the doctrine of constitutional avoidance in the two cases is the result of selective employment of the doctrine).

that it was poised to strike down corporate-spending limits.⁹⁷ In contrast, the Court had not sent any signals to the public that the VRA was in danger of being struck down. Although I flagged that possibility as far back as 2005,⁹⁸ the issue was really not on the public's radar screen until *NAMUDNO*. If the Court comes back in a later case and strikes down the VRA, *NAMUDNO* would have served as a warning to the public, and perhaps the warning, coupled with congressional inaction after the warning, could serve to blunt public criticism of the Court that could follow after such a controversial ruling.

Invitations to litigants, such as the invitations issued by Justice Alito, may signal to a litigant that now is a good time to ask for the overturning of precedent. Although the Court cannot pick which cases come up for possible review, invitations to litigants may make it more likely for a Justice to shape the Court's docket. This may be especially true in challenges to federal campaign-finance laws, which, thanks to special jurisdictional provisions, often come to the Court on direct appeal, making it more likely that the Court will hear the case on the merits.

It is also no coincidence that Justice Ginsburg, a frequent liberal dissenter in 5–4 cases on a conservative Court, is inviting Congress to overturn the Court in statutory cases (rather than inviting litigants to bring more cases). Justice Ginsburg is less likely than Justice Alito to get her preferences approved by the current Supreme Court, and so it is unsurprising that she is signaling Congress when there is an especially worthy Court statutory decision for Congress to consider overruling.

Time bombs, because of their subtlety, work differently. They are aimed at stacking the deck, or boxing in the Justices, in future cases in which related issues arise. They are meant to be subtle enough to avoid attracting the attention of other Justices who may disagree with the future use of the language included in the Court's opinion. That the Supreme Court in the *Bennett* case ultimately relied upon the oblique citation of *Day* in *Davis* as authority for reversing the Ninth Circuit is some evidence that Justice Alito's potential time bomb paid off. Time bombs also may serve to diffuse public opposition to controversial rulings. A ruling that appears to follow from earlier precedent, as opposed to breaking from precedent, is apt to be less

⁹⁷ Hasen, *supra* note 37, at 1069 (“However, the Court dropped an important footnote suggesting corporate spending limits in *candidate* elections might be permissible to prevent corruption of candidates.”).

⁹⁸ See Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177 (2005).

controversial. This is true even if the Court is merely following dicta or an off-handed comment in an earlier case. But time bombs have a disadvantage: they are easier to ignore or dismiss than the more direct means of influencing how the Court decides cases.

All of these tools send signals to the lower courts. While lower courts do not have authority to ignore binding Supreme Court authority, lower courts can interpret cases in ways that are equivalent to overruling or use procedural devices, such as standing, to reach results in line with what the judges predict to be current Supreme Court majority preference.⁹⁹

The following chart demonstrates the audience, as well as the potential costs and benefits, for the various tools by which Justices seek to move the law.

⁹⁹ On this point, see Chad Westerland et al., *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891 (2010).

Tool	Primary Audience	Costs	Benefits
Express overruling or extension of precedent	Future Supreme Court, lower courts, Congress, litigants, and the public	Potential public and scholarly criticism	Clear change in law binding on all parties
Stealth overruling	Lower courts and litigants	Greater uncertainty than express overruling and criticism that the Court is hiding its actions	Changes law without incurring public criticism
Anticipatory overruling	Congress and the public	Leaves law in place that is at odds with the Court's majority preferences and creates greater uncertainty than express or stealth overruling	Can avoid confrontation with political branches and the public, and can prepare the public for an eventual change in law
Invitation (to litigants)	Litigants	Less direct than express, stealth, or anticipatory overruling; and leaves the law in place	Helps shape issues on the Court's docket and influences the direction of the law
Invitation (to Congress)	Congress	Puts matters in the hands of Congress, not the Court, and is less direct than other tools	Provides an additional way for a Justice in the minority on the Court to direct change in law
Time Bomb	Future Supreme Court and possibly lower courts	Less direct than express, stealth, or anticipatory overruling; and could be ignored by a future Court	Can "fly under the radar" and affect changes in law over the long term, and can bind other Justices without requiring actual agreement on substance
Inadvertence	Future Supreme Court and lower courts	Not an express tool (occurs by accident) and can move the law in unintended ways	Can "fly under the radar" and affect changes in law over the long term, and can bind other Justices without requiring actual agreement on substance

CONCLUSION

Supreme Court Justices have more tools at their disposal to change the law than first appears. Beyond express overruling or extension of precedent, and even beyond stealth overruling, Justices can move the law in many ways, including through anticipatory overrulings, invitations, time bombs, and inadvertence. But the various tools for moving the law come with their own costs and benefits, and are aimed at different audiences. Not all tools are appropriate in each circumstance.

Perhaps the most significant part of this analysis is the demonstration that the Court can move the law even when Justices do not intend to do so. The *eBay* example shows the importance for lawyers and law professors to keep up on cases in their fields and to offer amicus help aimed solely at assisting the Court in avoiding inadvertent major changes in the law. Whatever one thinks of the various devices Justices may use to move the law, the law should move only when the Justices want the law to move.¹⁰⁰

¹⁰⁰ As this Article went to press, two new Supreme Court actions once again demonstrated the tools that Justices may use to move the law. In *Kiobel v. Royal Dutch Petroleum Co.*, a case concerning corporate liability under the Alien Tort Statute, the Court issued an order a few days after oral argument asking for the parties to brief a broader question about the extraterritorial reach of the statute. 132 S. Ct. 1738 (2012); see also Adam Liptak, *Supreme Court Seeks Clarification on Jurisdiction in a Human Rights Case*, N.Y. TIMES, Mar. 6, 2012, at A15. I suggested that this reargument order is consistent with Justice Alito's views, explained in this Article, that precedent should not be overturned or expanded without full briefing or argument. Rick Hasen, *Fingerprints of Justice Alito All over Kiobel Reargument Order: Citizens United Déjà Vu*, ELECTION L. BLOG (Mar. 6, 2012, 7:57 AM), <http://electionlawblog.org/?p=31067>.

In *American Tradition Partnership v. Bullock*, the Supreme Court temporarily stayed a Montana Supreme Court decision that held that the U.S. Supreme Court's decision in *Citizens United* did not prevent Montana from enacting a ban on corporate spending in candidate elections. *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 1307 (2012). The order was to last until the Court acted on a petition for writ of certiorari in the case. Justice Ginsburg, joined by Justice Breyer, issued the following statement with respect to the granting of the stay:

Montana's experience, and experience elsewhere since this Court's decision in *Citizens United v. FEC*, make it exceedingly difficult to maintain that independent expenditures by corporations 'do not give rise to corruption or the appearance of corruption.' A petition for writ of certiorari will give the Court an opportunity to consider whether, in light of the huge sums currently deployed to buy candidates' allegiance, *Citizens United* should continue to hold sway. Because lower courts are bound to follow this Court's decision until they are withdrawn or modified, however, I vote to grant the stay.

Id. at 1307–08.

Court watcher Tom Goldstein viewed Justice Ginsburg's statement as an invitation for amici to file briefs at the certiorari stage of the case. Tom Goldstein, *The Supreme Court, Citizens United II, and the November Election [Updated]*, SCOTUSBLOG (Feb. 18, 2012, 8:49 PM), <http://www.scotusblog.com/2012/02/the-supreme-court-citizens-united-ii-and-the-november-election/>. I viewed this statement as Justice Ginsburg

signaling her opportunity to “speak truth to power.” Richard L. Hasen, *Occupy the Super PACs*, SLATE (Feb. 20, 2012, 7:15 AM), http://www.slate.com/articles/news_and_politics/politics/2012/02/justice_ruth_bader_ginsburg_is_ready_to_speak_out_on_the_danger_of_super_pacs_.html. At the end of the Supreme Court’s Term, the Court summarily reversed the Montana Supreme Court, with Justice Breyer writing a dissent for himself and Justices Ginsburg, Kagan, and Sotomayor arguing that the Court should have taken the case to reconsider *Citizens United*. *Am. Tradition P’ship v. Bullock*, 80 U.S.L.W. 3701 (2012) (per curiam).