FELIX FRANKFURTER'S REVENGE: AN ACCIDENTAL DEMOCRACY BUILT BY JUDGES

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I. INTRODUCTION

The first decade of the twenty-first century opened and closed with two bitterly contested Supreme Court decisions impacting American democracy. In *Bush v. Gore*, five members of the Court prevented Florida from completing a recount of the deciding votes in the 2000 presidential election.[1] In *Citizens United v. FEC*, a five-vote majority overturned two recent precedents and a century of practice in ruling that for-profit business corporations enjoy a First Amendment right to spend unlimited sums on the eve of an election to influence its outcome.[2]

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1. Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

2. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

Many have noted the artificially rigid nature of the electoral equality analysis in the *per curiam* opinion in *Bush v. Gore*,[3] and the majority's departure from federalism principles in depriving Florida's courts of the power to make the final decision about whether to continue the recount.[4] *Citizens United* is also vulnerable to doctrinal critique. Justice Anthony Kennedy's majority opinion never persuasively confronts the threshold question of whether for-profit business corporations are comparable to flesh-and-blood individuals for the purposes of First Amendment analysis. A century ago, in *Hale v. Henkel*, the Court faced a similar issue, ruling that corporations (and other collective entities) are not protected by the right to remain silent enjoyed by flesh and blood individuals.[5] In his dissent in *Braswell v. United States*,[6] Justice Kennedy expressed full agreement with denying Fifth Amendment self-incrimination protection to large, multi-shareholder corporations, stating:

> Our long course of decisions concerning artificial entities and the Fifth Amendment served us well. It illuminated two of the critical foundations for the constitutional guarantee against self-incrimination: *first, that it is an explicit right of a natural person, protecting the realm of human thought and expression*; second, that it is confined to governmental compulsion.[7]

In *Citizens United*, however, Justice Kennedy treats for-profit business corporations as fully-protected First Amendment speakers without fully explaining why the right to electoral speech is not also "an explicit right of a natural person, protecting the realm of human thought and expression." Justice Kennedy rests his radically differing treatment of corporations under the First and Fifth Amendments on an intuition about the differing third-party effects of

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3. *See, e.g.*, Mary Anne Case, *Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of* Bush v. Gore *as a Chapter in the History of Ideas About Law*, 70 U. CHI. L. REV. 55, 60 (2003) (criticizing the Court's insistence on rigid rules over flexible standards in determining voter intent); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1364 (2001) (criticizing the Court's disdain for the other two branches and its elevation of formal equality over democracy).

4. For a sampling of the vast literature criticizing and defending *Bush v. Gore* on federalism grounds, see generally A BADLY FLAWED ELECTION: DEBATING *BUSH V. GORE*, THE SUPREME COURT, AND AMERICAN DEMOCRACY (Ronald Dworkin ed., 2002); *BUSH V. GORE*: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002); THE UNFINISHED ELECTION OF 2000 (Jack N. Rakove ed., 2001); THE VOTE: BUSH, GORE, AND THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds., 2001). For my two-cents, *see* Burt Neuborne, *Notes for the Unpublished Supplemental Separate Opinions in* Bush v. Gore, *in* THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000 212 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002).

5. Hale v. Henkel, 201 U.S. 43, 74–75 (1906) (holding that a corporation may not claim the Fifth Amendment self-incrimination privilege).

6. 487 U.S. 99 (1988) (holding that the Fifth Amendment self-incrimination privilege may not be invoked by a corporate record custodian).

7. *Id.* at 119 (Kennedy, J., dissenting) (emphasis added). Justice Kennedy, joined by Justices William Brennan Jr., Thurgood Marshall and Antonin Scalia, dissented, arguing unsuccessfully that since the case involved a corporation owned by a single shareholder, no real difference existed between the individual shareholder and his wholly-owned corporation. *Id.* at 120.

corporate speech and corporate silence. He appears to believe that refusing to permit a corporation to exercise a Fifth Amendment right to remain silent has no effect on third-parties,[8] but that unlimited corporate electioneering on the eve of an election necessarily benefits hearers/voters.[9] For Justice Kennedy, the corporation's First Amendment right to speak is wholly derivative of the voters' need to know. Justice Kennedy never explains, however, why it is so clear that the prospect of massive infusion of one-sided corporate campaign speech on the eve of an election necessarily benefits the voting public. As the dissenters argued, it is equally plausible to fear that an uncontrolled exercise of disproportionate electoral power by an artificial entity with huge economic advantages will drown out opponents, manipulate voters, and destabilize the democratic process.[10] Given the existence of such a fundamental (and empirically non-resolvable) disagreement over whether unlimited corporate electioneering on the eve of an election benefits voters or burdens democracy, I believe that the *Citizens United* majority should have left the issue to the voters themselves who, for more than one hundred years, have sought to limit corporate electoral influence by enacting bans on corporate electioneering at the national, state, and local levels.[11]

While it is tempting to continue to pound on the two cases' doctrinal shortcomings (I'll do more pounding on *Citizens United*, *infra*),[12] doctrinal criticism, while important, almost never demonstrates definitively that a hard democracy case was wrongly decided. In both *Bush v. Gore* and *Citizens United*, for example, constitutional doctrine can plausibly be interpreted to support the majority opinion. In *Bush v. Gore*, seven Justices, including Justices David Souter and Stephen Breyer, were persuaded that unconstitutionally unequal criteria were being applied in different Florida counties to measure the validity of contested presidential ballots. Justices Souter and Breyer disagreed only with the five-Justice majority's decision to prevent Florida from seeking to continue the recount after correcting the equality violations.[13] Even the five-Justice decision to end the Florida recount, while deeply problematic as a matter of federalism, was based on a fear that unless the Court acted immediately,

8. Justice Kennedy's assumption about the lack of a third-party effect caused by denying corporations the right to remain silent may well be wrong. Once a corporation is forced to disclose potentially incriminating material, the disclosure may doom the ability of individuals implicated by the corporate disclosure to invoke their privilege effectively.

9. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 904 (2010) ("Political speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978))).

10. *See* 130 S. Ct. at 946–49; 961–77 (Stevens, J. dissenting).

11. *See infra* notes 219–230 and accompanying text for a discussion of the long-standing nature of voter concern with corporate influence over elections.

12. *See* Part IV for a fuller critique of the opinion in *Citizens United.*

13. Bush v. Gore, 531 U.S. 98, 134 (2000) (Souter, J., dissenting); *id* at 145–46 (Breyer, J., dissenting).

expiration of the congressional safe-harbor period designed to insulate state presidential electoral results from congressional challenge might result in disenfranchising the entire state, or worse.[14] While I believe that Florida should have had the final say on whether to take such a risk, and that the Court's refusal to trust Congress to act responsibly in dealing with a contested electoral college issue bordered on contempt for the democratic process, I concede that treating the issue as one for Supreme Court resolution was defensible in the special context of a presidential election with immense national and international repercussions.[15] Similarly, in *Citizens United*, First Amendment stalwarts like Floyd Abrams and the American Civil Liberties Union have applauded Justice Kennedy's opinion as a great victory for free speech.[16] Thus, while I believe that both cases got the law wrong, I cannot deny that reasonable people might differ as a matter of pure doctrine.

There is, however, a second level of critique potentially applicable, not only to the majority opinions in *Bush v. Gore* and *Citizens United*, but to the full range of judicial decisions that have shaped the contours of American democracy for the past half-century: I call it the critique of democracy, a critique that asks whether a given judicial decision supports or undermines the ability of "We the People" to govern ourselves pursuant to a robust and egalitarian democracy. Under existing constitutional ground rules, American judges, confronted by a hard constitutional case with implications for democracy, are not required—indeed, they may not even be permitted—to ask whether the outcome is good or bad for democracy. Rather, at least since the foundational case of *Baker v. Carr*,[17] they are expected to resolve the case by shoehorning it into one or another of a series of doctrinal categories like equal protection, freedom of association, or free speech, without ever asking what kind of democracy they are building. The result has been the emergence of an accidental constitutional law of democracy built by judges operating with doctrinal tunnel vision. It is, I believe, long past time to bring concern over the quality of American democracy back into the judicial equation.[18]

The 1787 Constitution rests on three ideas implicit in the constitutional structure: separation of powers, federalism and democracy. Madison's original

14. *Id.* at 110–11 (per curiam) (explaining that the deadline in the safe-harbor provisions made it impossible for Florida to complete a recount using constitutional procedures). For my description of what might have happened if the Florida recount ran beyond the safe-harbor period, see Neuborne, *supra* note 4 (noting satirically how Senator J. Strom Thurmond of South Carolina, as President *pro tem* of the Senate, might have become President).

15. *See* Neuborne, *supra* note 4, at 213–14.

16. *See* Floyd Abrams, Citizens United *and Its Critics*, 120 YALE L.J. ONLINE 77 (2010), http://yalelawjournal.org/images/pdfs/902.pdf.

17. 369 U.S. 186 (1962) (holding that allegations of gross population disparities between and among electoral districts pose a justiciable claim under the Equal Protection Clause of the Fourteenth Amendment).

18. For an innovative effort to gauge the quality of democracy in the several states, see HEATHER K. GERKEN, THE DEMOCRACY INDEX (2009).

version of the Bill of Rights presented to the House of Representatives on June 8, 1789 contained an explicit clause protecting the separation of powers.[19] Two months later, the House rejected it.[20] Despite the rejection of Madison's explicit textual authorization, however, the Supreme Court has succeeded in forging a rich constitutional doctrine defining and protecting the separation of powers.[21]

Similarly, in the absence of clear textual guidance, the Court has forged a complex judge-made constitutional law of federalism. Federalism ground rules, to put it mildly, do not jump out of the constitution's text. For example, the Founders differed over whether the Necessary and Proper Clause[22] vests the national government with implied power,[23] to say nothing of the continuing

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19. The proceedings of the House of Representatives in 1789 are chronicled in THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (Gales & Seaton eds., 1834), also called *Annals of Congress*. Citation to the original two volumes covering 1789 is complicated by the fact that two printings of the first two volumes exist, with slightly different paginations. For ease of citation, I cite to the text reproduced in DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 327 (2d ed. 2005):

> The powers delegated by the Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.

20. *Id.* at 342–43.

21. For a celebrated example of the Court's willingness to generate non-textual constitutional doctrine supportive of separation of powers, *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952) (invalidating the President's seizure of the nation's steel mills to avert a strike during the Korean War on the grounds that such an action went beyond the President's constitutionally prescribed powers). For a sampling of the vast body of Supreme Court jurisprudence enforcing the separation of powers, *see* Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S.Ct. 3138 (2010) (invalidating the double layer of insulation protecting executive branch officials from Presidential removal); Morrison v. Olson, 487 U.S. 654, 696-97 (1988) (upholding the constitutionality of independent counsel laws authorizing a judicially-appointed independent counsel with power to investigate charges of criminal wrongdoing by high-ranking government officials); Bowsher v. Synar, 478 U.S. 714, 726 (1986) (finding that Congress may not constitutionally remove officers charged with executing the laws, other than by impeachment); I.N.S. v. Chadha, 462 U.S. 919, 953-54 (1983) (finding a provision in the Immigration and Nationalization Act authorizing a one-house veto of proposed administrative action to be an unconstitutional violation of the presentment and bicameralism requirements of the U.S. Constitution); Buckley v. Valeo, 424 U.S. 1, 126 (1976) (holding that Congress may not appoint members of Federal Election Commission and other "Officers of the United States"): Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935) (holding that Congress may limit Presidential removal of federal trade commissioners); Myers v. United States, 272 U.S. 52, 176 (1926) (holding that Congress may not interfere with Presidential removal of executive branch officials like the postmaster).

22. Article 1, section 8, clause 18 of the Constitution provides:

> The Congress shall have Power. . . To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers vested by the Constitution in the Government of the United States or in any Department or Officer thereof.

U.S. CONST. art. I, § 8, cl. 18.

23. The issue initially arose in 1791 when President Washington asked the members of his cabinet for their views on whether Congress possessed the constitutional power to create the First Bank of the United States, despite the lack of an enumerated Congressional power in the Constitution to create banks or charter corporations. *See* 2 RECORDS OF THE FEDERAL CONVENTION

disputes over the meaning of the term "commerce" in the Commerce Clause.[24] And, while the Founders saw the Tenth Amendment as a protection of federalism, they differed over whether the word "expressly" should be placed into the text to negate the possibility of implied federal power.[25] Thus, whatever one can say about the Court's complex federalism jurisprudence, it is not

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OF 1787, 615-16 (Farrand ed., 1937) (debating and ultimately rejecting a motion vesting Congress with the power to charter corporations). Jefferson said "no" under the Tenth Amendment. Hamilton said "yes" under the Necessary and Proper Clause. Washington sided with Hamilton, setting a precedent for a broad reading of federal power under the Commerce Clause. The incident is described in MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI, MICHAEL W. MCCONNELL & SAMUEL L. BRAY, THE CONSTITUTION OF THE UNITED STATES: TEXT, STRUCTURE, HISTORY, AND Precedent 67-76 (2010) (setting out excerpts of the opinions of Jefferson and Hamilton).

24. For the Court's shifting approach to the degree of national regulatory power granted by the Commerce Clause, *see* Gonzales v. Raich, 545 U.S. 1 (2005) (construing the Commerce Clause to authorize a federal ban on the local cultivation and use of marijuana for medicinal purposes); United States v. Morrison, 529 U.S. 598 (2000) (holding that the Commerce Clause does not authorize Congress to create a civil cause of action against gender-based violence given inadequate evidence of a link between gender-based violence and interstate commerce); United States v. Lopez, 514 U.S. 549 (1995) (overturning a federal ban on the possession of guns in vicinity of school on the grounds that the ban was justified by inadequate Congressional evidence of effect on interstate commerce); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (holding that the "negative" commerce clause precludes state regulation of size of trucks on Iowa highways); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding ban on racial discrimination as applied to small local restaurant); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding federal ban on racial discrimination in public accommodations as within the Commerce Clause power); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding the constitutionality of a federal statute regulating wheat grown solely for domestic consumption because of the "substantial affects" of such consumption on interstate commerce); United States v. Darby, 312 U.S. 100 (1941) (holding that the Commerce Clause authorizes legislation regulating wages and hours of employees in local businesses); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that the Commerce Clause authorizes passage of National Labor Relations Act because labor conditions "affect" interstate commerce); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that the Commerce Clause does not authorize maximum hour/minimum wage rules for coal mines); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding that the Commerce Clause does not authorize imposition of mandatory price and wage controls on local poultry dealers); Railroad Retirement Board v. Alton Railroad, 295 U.S. 330 (1935) (holding that the Commerce Clause does not authorize the imposition of compulsory retirement and pension systems on interstate railroads); Hammer v. Dagenhart (The Child Labor Case), 247 U.S. 251 (1918) (holding that the commerce power does not include the power to exclude the products of child labor from interstate commerce); The Shreveport Rate Case, 234 U.S. 342 (1914) (construing the commerce power to include the power to regulate intra-state rail rates so as to prevent discrimination against interstate rail traffic); Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903) (construing the commerce power to authorize a prohibition on the interstate transportation of lottery tickets); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding that the power to regulate commerce does not include the power to directly suppress manufacturing monopolies); Gibbons v. Ogden, 22 U.S. 1 (1824) (providing a broad reading of the federal power to regulate commercial "intercourse" between the states).

25. FARBER & SHERRY, *supra* note 19, at 343 (noting that Madison rejected the idea of adding the word "expressly" to the text of the Tenth Amendment because he thought "there must necessarily be admitted powers by implication"); *id.* at 345 (noting that the House rejected the inclusion of "expressly" by a vote of thirty-two to seventeen); *id.* at 347 (noting the Senate's failure to add "expressly" to the Amendment).

compelled by a clear textual command. [26]

Given the equivalent (at least) importance of democracy to the constitutional structure, there is no reason why a body of substantive constitutional doctrine could not be forged as well that defines and protects the robust, egalitarian self-government at the structural heart of the Constitution. I recognize, of course, that "democracy," like "Our Federalism," or "separation of powers," or even "the freedom of speech," is not a self-defining idea. Like most of the luminous but abstract ideas in the Constitution, however, the concept of American democracy has an understandable core—a commitment to robust self-government by citizens exercising equal political power—that can guide judges in deciding hard constitutional cases with implications for the working of the democratic process. At a minimum, when constitutional doctrine is narrowly balanced and one outcome clearly enhances the exercise of robust egalitarian self-government, and the other clearly impedes it, preserving robust democracy should be an important tie-breaking factor in judicial decision-making.

When *Bush v. Gore* and *Citizens United* are viewed through a democracy-sensitive lens, they emerge as judicially-imposed democratic disasters. Cutting off the Florida recount prevented the democratic resolution of a presidential election and resulted in a judicially-imposed President. From a democracy standpoint, it doesn't get any worse.[27] Similarly, unleashing unlimited partisan spending by enormously wealthy for-profit corporations on the eve of an election may be good for corporations, but it threatens to increase exponentially the already excessive role played by wealth disparity in our political process. I do not believe for a minute that a rational Founder would have knowingly designed a democracy where judges pick the President, and the very rich, especially for-profit corporations, dominate electoral discourse.

I hope to explain how we got to a place where American judges routinely ignore the quality of the democracy they are building, and to demonstrate that judges, operating solely at the level of legal doctrine, have accidently developed an often profoundly dysfunctional constitutional law of democracy. I will argue that it is not too late to undo the damage. We can and should recognize that a judicially-enunciated constitutional law of democracy is more than the interplay of unrelated formal constitutional doctrines, however correct the doctrinal analyses may be on their own terms. Rather, deciding a hard democracy case (where reasonable people disagree over doctrine) should be viewed as a free-standing process designed to advance, enhance, and protect the ability of "We

26. *See e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971) (citing "Our Federalism" as the standard for determining the scope of federal judicial authority over state courts).

27. It is possible, of course, that George W. Bush would have won the Florida recount. Even if the recount went beyond the safe-harbor period, no reason exists to believe that the democratic process for resolving contested presidential elections would have misfired. The only thing that can be said with certainty about *Bush v. Gore* is that the Supreme Court prevented democracy from working. For a summary of the post-election investigation of the Florida ballots, see John Mintz & Peter Slevin, *Human Factor Was at Core of Vote Fiasco*, WASH. POST, June 1, 2001, at A1.

the People" to govern ourselves as equal and effective participants in the democratic process.

II
HOW DID WE GET HERE?

A half-century ago in *Baker v. Carr* and its progeny,[28] three iconic Supreme Court Justices—Felix Frankfurter, William Brennan, Jr., and John Marshall Harlan—carried on an extended judicial debate over the role of judges in defining and protecting American democracy. Felix Frankfurter, having spent much of his brilliant legal career opposing the exercise of substantive due process by unelected judges and having witnessed, as a member of FDR's inner circle, the Supreme Court's initially hostile response to New Deal legislation, spoke for many when he expressed serious reservations about the capacity of an unelected federal judiciary to shape a fair democracy in the absence of firm textual guidance in the Constitution.[29] Dissenting in *Baker*, Justice Frankfurter warned that we would rue the day that judges were given substantial power to set the constitutional ground rules for American democracy.[30] Where, he asked, would unelected judges functioning as armchair political scientists find the judicially manageable standards needed to guide their decisions about whether a particular legislative apportionment is consistent with democratic political theory?[31]

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28. *Baker v. Carr*, 369 U.S. 186 (1962), opened the door to judicial review of the legislative apportionment process by rejecting Justice Frankfurter's plurality holding in *Colegrove v. Green*, 328 U.S. 549 (1946), that the constitutionality of state legislative apportionment processes was a non-justiciable issue under the political question doctrine. *Baker*, 369 U.S. at 232–33. *Baker* was followed by *Gray v. Sanders*, 372 U.S. 368 (1963) (striking down Georgia's county unit system for voting in primary elections for state-wide offices), *Wesberry v. Sanders*, 376 U.S. 1 (1963) (requiring Congressional districts to be roughly equal in population in order to comply with the requirements of Art.1 sec. 2), *Reynolds v. Sims*, 377 U.S. 533 (1964) (applying the "one-person one-vote" test to both houses of the Alabama legislature), *Lucas v. 44th General Assembly of Colorado*, 377 U.S. 713 (1964) (applying the "one-person one-vote" test to the apportionment of both houses of the Colorado legislature despite statewide voter approval of alternative method of apportioning one house), and *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970) (applying the "one-person one vote" principle to ballot access laws), *summarily aff'd*, 400 U.S. 806 (1970) (6-3 decision).

29. Frankfurter replaced Benjamin Cardozo on the Supreme Court in 1938, shortly after the collapse of the Roosevelt Court-packing plan. *See* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 7–12 (2010) (describing Frankfurter's pre-appointment political activities). *See also* H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 127–37 (1981); Michael E. Parrish, *Felix Frankfurter, the Progressive Tradition, and the Warren Court*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 51 (Mark Tushnet ed., 1993). The leading modern critic of judicial review is my colleague Jeremy Waldron. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (arguing that, over time, legislatures in rights-respecting cultures will do a better job than courts in protecting fundamental rights).

30. *Baker*, 369 U.S. at 266 (Frankfurter, J, dissenting).

31. *Id.* at 287–88 (Frankfurter, J., dissenting) (arguing that courts are "not fit instruments of decision" when "standards meet for judicial judgment are lacking"). *See also Colegrove*, 328 U.S.

Justice William Brennan, Jr., in crafting the *Baker* majority, scoffed at Frankfurter's concerns. Brennan's pre-appointment experiences as a successful labor lawyer and a reforming state judge had not exposed him to a hostile federal judiciary acting with only tenuous textual authority.[32] Instead, Justice Brennan saw his colleagues on the federal bench, most of whom had been appointed during the twenty-year period of uninterrupted Democratic Party control of the White House that began in 1932 and ended in 1952, as potential agents of change, capable of extricating the nation from the evils of a political process driven by racial and religious discrimination and fearful of speech corrosive of the political and economic *status quo*.[33]

Given Justice Brennan's confidence in the capacity of federal judges to shape a fair democracy, he could have confronted Frankfurter directly in *Baker*, challenging Frankfurter's insistence that federal judges could not be trusted to shape American democracy in the absence of clear constitutional text. Brennan could have argued that either the Republican Form of Government Clause,[34] or the First Amendment,[35] provides textual support for a constitutional right to participate in the democratic process. Alternatively, Brennan could have argued that, having successfully forged non-textual constitutional protections for federalism and the separation of powers, the Court was both qualified and obligated to develop a similar jurisprudence protective of egalitarian democracy. But those approaches would have required Brennan to challenge conventional wisdom about the limits of judicial power, a risky undertaking without any assurance of success. Instead, ever the canny strategist, Brennan took the surest way to a majority in *Baker* by choosing not to confront Frankfurter directly.[36]

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at 556 (plurality opinion) (Frankfurter, J.) (holding questions of state legislative apportionment to be non-justiciable and arguing that "[c]ourts ought not to enter this political thicket").

32. Brennan was appointed to the Court by President Eisenhower in 1956. For an authorized biography of Justice Brennan, see SETH STERN & STEPHEN WERMEIL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010). *See also* KIM ISSAC EISLER, A JUSTICE FOR ALL: WILLIAM BRENNAN, JR. AND THE DECISIONS THAT SHAPED AMERICA (1993); Bernard Schwartz, *How Justice Brennan Changed America, in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 31 (E. Joshua Rosencranz & Bernard Schwartz, eds., 1997).

33. For the role played by race and fear of regional failure in the Warren Court's constitutional jurisprudence, see Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. COURT. REV. 59 (2011).

34. U.S. CONST. art. IV, § 4 provides: "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." Since *Luther v. Borden*, 48 U.S. 1 (1849), the Court has refused to enforce the Republican Form of Government clause, on the grounds that questions of state governmental structure are political questions that should be decided by the people themselves. *Id.* at 47.

35. See *infra* note 205 for a discussion of the textual argument for a First Amendment right to vote.

36. Brennan would probably have lost his majority in *Baker* if he had confronted Frankfurter directly on the issue of judicial role. The Supreme Court was bitterly divided about the case. Unable to agree on a majority result after the first round of oral argument, the Justices set the case for reargument. After reargument, the Court continued to be deeply divided. Justice Whittaker, a 1957 Eisenhower appointee, became so agitated over his inability to decide the case that he suffered an apparent nervous breakdown and recused himself, resigning from the from the Court

Instead, in the intellectual equivalent of a demurrer, Brennan insisted that, even if Frankfurter were correct about the inability of judges to forge open-ended protections of democracy, the Equal Protection Clause could act as both a classic doctrinal source of judicial power and a textual check on judicial overreaching.[37] Following Brennan's lead, a majority of the Warren Court[38] invoked the Equal Protection Clause to develop the doctrinal underpinnings of a constitutional law of democracy,[39] based almost exclusively on the proposition that if one person is entitled to vote or run for office or be represented in the legislature, everyone else is entitled to an equal opportunity to participate in the democratic process, absent a very powerful reason why political inequality should be tolerated. The Court eventually labeled its emerging democracy jurisprudence "fundamental rights" strict scrutiny.[40] Since the equality argument seemed to get the job done

effective March 31, 1962. *See* Anthony Lewis Jr., *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, 36 (1997). President Kennedy appointed Byron White to replace him. Whittaker recovered, and went on to become General Counsel of General Motors and a bitter critic of the Warren Court and the civil rights movement. *See generally* Jack W. Peltason, *"Baker v. Carr" in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 67-70 (Kermit L. Hall ed., 1992). For contrasting biographies of Justice Whittaker, see Richard Lawrence Miller, *Whittaker: Struggles of a Supreme Court Justice* (2002) (providing a highly negative description of Justice Whittaker's career), and Craig Allen Smith, *Failing Justice: Charles Evans Whittaker on the Supreme Court* (2006) (attempting to promote Whittaker as a mediocre Justice and to defend him as a man).

37. Baker v. Carr, 369 U.S. 186, 228–237 (1962) (noting that while claims based on the Guaranty Clause may be nonjusticiable, those under the Equal Protection Clause can be decided by the courts).

38. Justice Frankfurter retired on August 28, 1962. He was replaced by Arthur Goldberg. With the retirements in 1962 of Justices Frankfurter and Whittaker, six Justices—Warren, Brennan, Black, Douglas, White and Goldberg—firmly supported judicial review of allegedly malapportioned legislatures. Justice Tom Clark expressed nuanced support for judicial review of legislative apportionment premised on a showing of legislative unwillingness to act. *See* Baker v. Carr 369 U.S. 186, 241 (1962) (Clark J., joining Justice Douglas' concurrence); Wesberry v. Sanders, 376 U.S. 1, 18 (1963) (Clark, J., concurring and dissenting in part); Reynolds v. Sims, 377 U.S. 537,587 (1964) (Clark, J., concurring). Justice Potter Stewart expressed lukewarm support for review aimed solely at utterly irrational apportionments. *See Baker,* 369 U.S. at 265-266 (Stewart, J., concurring); Gray v. Sanders,372 U.S. 368, 381 (1963) (Stewart, J. and Clark, JJ., concurring); *Wesberry,* 367 U.S. at 50 (Stewart, J., joining Justice Harlan's dissent on the merits); *Reynolds,* 377 U.S. at 588 (Stewart, J. concurring). Justice Harlan consistently dissented. *See Baker,* 369 U.S. at 266 (Frankfurter and Harlan, JJ., dissenting); *Gray,* 372 U.S. at 382 (Harlan J., dissenting), 382 (Frankfurter, J. dissenting); *Wesberry,* 376 U.S. at 20 (Harlan, J. dissenting); *Reynolds,*377 U.S. at 589 (Harlan, J. dissenting). The divisions between and among the Justices emerged clearly in *Lucas v. 44th General Assembly of Colorado*, 377 U.S. 713 (1964). Chief Justice Warren wrote for a six-Justice majority. Justices Stewart and Clark dissented. 377 U.S. at 744. Justice Harlan dissented, as well, in an opinion delivered in *Reynolds,* 377 U.S. at 589.

39. The full-blown equality standard was announced in Chief Justice Warren's opinion in *Reynolds v. Sims*, 377 U.S. 537, 568 (1964), requiring both houses of state legislatures to be apportioned on a one-person one-vote basis.

40. *See, e.g.,* Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (noting that "[w]e have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined" and that "the right to vote is too precious, too fundamental to be so burdened or conditioned").

effectively in the early democracy cases,[41] Justice Brennan and his allies made no effort to rescue the Republican Form of Government Clause from the political question dustbin, to ground the emerging law of democracy in the First Amendment, or to forge a freestanding nontextual constitutional law of democracy similar to existing nontextual judicial protections of federalism and the separation of powers. It was a fateful strategic decision that tied the emerging constitutional law of democracy to the vagaries of equal protection jurisprudence.[42]

The third voice in the colloquy, Justice John Marshall Harlan, weighed in after Justice Frankfurter's resignation in August 1962, continuing and deepening Frankfurter's criticism of a judicially-generated constitutional law of democracy premised solely on equality.[43] Harlan warned that things could be both formally equal and appallingly undemocratic.[44] Sadly, *Bush v. Gore* and *Citizens United* prove his point.

Almost fifty years have elapsed since Frankfurter's dire prophecy, Brennan's confident rejoinder, and Harlan's cautionary warning—time enough to assess the wisdom of each. Most importantly, after a half-century of judicial pruning of the "political thicket,"[45] we are now in a position to assess the success or failure of Justice Brennan's insistence that courts could shape a fair and effective democracy as a matter of pure equal protection doctrine without asking

41. *Baker* was quickly followed by *Gray v. Sanders*, 372 U.S. 368 (1963) (striking down Georgia's county unit system for voting in primary elections for state-wide offices),*Wesberry v. Sanders*, 376 U.S. 1 (1964) (requiring congressional apportionments to comply with the principle of one-person, one-vote), *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that one-person, one-vote applies to both houses of the Alabama State Legislature), *Lucas v. 44th Gen. Assembly of Colorado*, 377 U.S. 713 (1964) (applying the principle of one-person one-vote to apportionment of both houses of state legislature despite voter approval of alternative method of apportioning one house), *Carrington v. Rash*, 380 U.S. 89 (1965) (invalidating restriction on servicemen voting on equal protection grounds), *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (invalidating poll taxes as an unconstitutional burden on the individual right to vote), *Williams v. Rhodes*, 393 U.S. 23 (1968) (invalidating onerous restrictions on third-party ballot access), and *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (applying strict scrutiny to the denial of the right to vote in a school board election).

42. See Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1993), for the history of the *Baker* test in later cases.

43. *Reynolds*, 377 U.S. at 386–87 (Harlan, J., dissenting).

44. Justice Harlan's reported dissents do not explicitly stress the potential disconnect between strict equality and robust democracy, although the point is implicit in his reasoning. I heard him make the point explicitly and forcefully, however, during oral argument in his Bridgeport, Connecticut chambers before granting a stay in the *Socialist Workers Party* case discussed *supra,* note 28. The lower court had invalidated a New York statute governing minority party access to the ballot because it required parties to obtain an equal number of signatures (fifty) from all counties in the State regardless of their population, thus violating the one-person one-vote principle. Socialist Workers Party v. Rockefeller, 314 F. Supp. 984, 990 (S.D.N.Y. 1970). The full Court eventually vacated Justice Harlan's stay and summarily affirmed the lower court's decision to apply strict one-person one-vote analysis to laws governing ballot access. 400 U.S. 806 (1970).

45. The phrase is taken from Justice Frankfurter's plurality opinion in *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

hard questions about the quality of the resulting democracy—a process that I call "doctrine without democracy." I propose to canvass five lines of judicial authority which, taken together, shape contemporary American democracy: (1) cases defining the formally eligible electorate; (2) cases constraining (or permitting) the political majority to curtail participation by otherwise eligible voters; (3) cases shaping the formal electoral and representative processes; (4) cases preserving (or eroding) the ability of ordinary voters to challenge entrenched political power centers; and (5) cases determining the role of money in politics. While Justice Brennan's vision of an equality-driven law of democracy has been largely (if not wholly) successful in broadly defining the eligible electorate,[46] I fear that reliance on doctrine without democracy in the other four areas has resulted in the emergence of an accidental, often dysfunctional constitutional law democracy that no rational Founder would have designed.

III.
ASSESSING THE QUALITY OF OUR JUDGE-MADE DEMOCRACY

A. Defining the Eligible Electorate

Despite its justly celebrated status as the world's most successful continuous charter of democratic governance, the body of the 1787 Constitution is guilty of two embarrassing lapses: a dalliance with slavery that was not cured until ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, and an ongoing failure to provide explicit textual protection of the right to participate in the democratic process. While the Founders may have believed that the Republican Form of Government Clause would prevent a state from unduly limiting the franchise, or that the adoption of the First Amendment in 1791 established a substantive right to participate in the political process, apart from the ban on religious tests for office in Article VI,[47] the body of the Constitution fails to provide explicit textual protection of the right to vote, to run for office, or to enjoy fair political representation.

It's not that the Constitution ignores democracy. The 1787 text is an instruction manual for the establishment and maintenance of democratic governance at the national level.[48] Moreover, of the seventeen constitutional

46. *See* Part III(A), *infra*.

47. U.S. CONST. art. VI, para 3.

48. Article I, section 2 provides that members of the House of Representative shall be chosen every two years by the "[p]eople of the several States," and that "[e]lectors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2. It also provides that Representatives must be at least twenty-five years old, a citizen for at least seven years, and an inhabitant of the state being represented. *Id.* Members of the House were to be apportioned among the several states by population (excluding Indians not taxed), with slaves counting as three-fifths of a person. *Id.* Article I, section 3 provides for two Senators from each state selected by the state legislatures for six year staggered terms so that one-third of the Senate is elected every two years. U.S. CONST. art. I, § 3. Senators must be thirty years

amendments since the Bill of Rights, eleven have dealt directly with the functioning of the democratic process.[49] Of the eleven, eight have sought to expand or reinforce the franchise.[50] The text of the Constitution is, therefore,

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old, a citizen for nine years, and an inhabitant of the relevant state. *Id.* Article I, section 4 provides the states with power to set the "times, places and manner" of House and Senate elections, subject to revision by Congress. U.S. CONST. art. I, § 4. Article II, section 1 provides for a President and Vice President elected for four year terms by an Electoral College in which each state is entitled to the total of its apportioned representatives in the House and its two Senators. U.S. CONST. art. II, § 1. Congress is empowered to set a uniform date for "chusing the electors," but there is no requirement that Electors be directly elected. *Id.* In the election of 1800, only five states directly elected presidential electors. The remainder vested the power in the state legislature. *See* McPherson v. Blacker, 146 U.S. 1, 29–33 (1892) (summarizing the use of nonpopularly-elected Presidential electors through 1876, and upholding Michigan's decision to elect and apportion Michigan's Presidential electors at the Congressional district level). *McPherson* notes that the last state to choose to vest power in the state legislature to select presidential electors appears to have been South Carolina in 1860, although Nevada in 1864, Florida in 1868, and Colorado in 1876 were forced to use appointed electors because of lack of time to hold an election. *Id. See also* CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS (John L. Moore, Jon P. Preimesberger, David R. Tarr eds., 4th ed. 2001); LAWRENCE D. LONGLEY & NEAL R. PIERCE, THE ELECTORAL COLLEGE PRIMER 2000 13 (1999); Robin Kolodny *The Elections of 1824*, 23 CONGRESS & THE PRESIDENCY 139 (1996). In 2000, Republican officials in Florida threatened to resort to electors chosen by the state legislature if a recount ordered by the Florida Supreme Court resulted in the loss of electors pledged to George Bush. *See* Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. UNIV. L. REV. 535, 536, 549 (2001). The United States Supreme Court blocked the recount in *Bush v. Gore.* The President must be thirty-five years old and be a natural born citizen. U.S. CONST. art. II, § 1. Article IV, section 4 assures each state a "republican form of government." U.S. CONST. art. IV, § 4. Article V provides that no amendment can deprive a state of its "equal suffrage in the Senate." U.S. CONST. art. V. Article VI bans any religious test for office. U.S. CONST. art. VI.

49. Reacting to the election of 1800, when the process set forth in the original text of the Constitution resulted in an Electoral College tie between Thomas Jefferson and his vice presidential running-mate, Aaron Burr, the People ratified the Twelfth Amendment to provide for separate Electoral College ballots for the President and Vice President; U.S. CONST. amend. XII. Section 2 of the Fourteenth Amendment altered the apportionment formula for the House of Representatives to induce states to allow newly-freed slaves to vote. U.S. CONST. amend. XIV, § 2. The Fifteenth Amendment abolished racial criteria for voting. U.S. CONST. amend. XV. The Seventeenth Amendment provides for direct election of Senators. U.S. CONST. amend. XVII. The Nineteenth Amendment abolished gender qualification for voting. U.S. CONST. amend. XIX. The Twentieth Amendment minimizes the power of lame duck federal officials by moving the beginning of new terms from March to January. U.S. CONST. amend. XX. The Twenty-Second Amendment imposes a two-term limit on the President. U.S. CONST. amend. XXII. The Twenty-Third Amendment permits the residents of the District of Columbia to vote for President. U.S. CONST. amend. XXIII. The Twenty-Fourth Amendment abolishes poll taxes in federal elections. U.S. CONST. amend. XXIV. The Twenty-Fifth Amendment clarifies Presidential succession when the President is disabled. U.S. CONST. amend. XXV. The Twenty-Sixth Amendment lowers the voting age to eighteen in state and federal elections. U.S. CONST. amend. XXVI. Finally, the Twenty-Seventh Amendment forbids Congress from raising its compensation until the next Congress. U.S. CONST. amend. XXVII.

50. The major franchise-expanding amendments are sections 1 and 2 of the Fourteenth Amendment, and the Fifteenth, Nineteenth and Twenty-Sixth Amendments. The Seventeenth Amendment probably should also be included as a significant franchise-expanding amendment, since, by providing for the direct election of Senators, it expands the scope of the vote, if not the formal electorate. U.S. CONST. amend. XVII. Less dramatic franchise-expanding amendments are the Twentieth Amendment, which ensures that newly-elected officials take office quickly, the

fully as engaged with the idea of democracy as it is with the ideas of separation of powers and federalism. Nevertheless, despite (or perhaps because of) the Constitution's successful use of the amendment process to enhance and preserve democracy, for the first 180 years of its existence, the Supreme Court rejected efforts by disenfranchised groups to develop a general federal constitutional right to vote or to run for office.[51] The result was an incomplete democracy, rife with laws minimizing the political power of weak or despised groups, and a political system loaded with devices to cement the political power of the two major parties, incumbents, political machines, and entrenched interests.[52] While an occasional case invoked the Fourteenth or Fifteenth Amendments to invalidate a particularly blatant refusal to permit black citizens to vote,[53] no effort was made by the Supreme Court until the 1960s to develop a generally applicable constitutional right to participate in the democratic process.[54]

One of the Warren Court's signal achievements was to recognize and develop a general constitutional right to participate in the democratic process

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Twenty-Third Amendment, which enfranchises residents of the District of Columbia in presidential elections, and the Twenty-Fourth Amendment, which eliminated the use of poll taxes in federal elections. U.S. CONST. amends. XX, XXIII, XXIV.

51. *See, e.g.*, Minor v. Happersett, 88 U.S. 162 (1874) (upholding the denial of the vote to women on the grounds that the right to vote is not one of the privileges and immunities of citizenship protected by the Fourteenth Amendment).

52. For a brief sampling of the anti-democratic laws sanctioned by the Supreme Court in the nineteenth and early twentieth centuries, see the cases cited *infra*, note 54.

53. *See e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (striking down a racially exclusionary pre-primary election on Fourteenth and Fifteenth Amendment grounds); Smith v. Allwright, 321 U.S. 649 (1944) (holding that the refusal to permit an African-American plaintiff to vote in a state primary election violates the Fifteenth Amendment); United States v. Classic, 313 U.S. 299 (1941) (finding election commissioners who altered and falsely counted ballots cast in a state primary election to be guilty of depriving voters of their constitutional right to have their vote counted); Lane v. Wilson, 307 U.S. 268 (1939) (invalidating a patently discriminatory grandfather clauses on Fifteenth Amendment grounds); Nixon v. Condon, 286 U.S. 73 (1932) (finding that a Texas Democratic Party resolution prohibiting minorities from participating in primary elections constitutes "invidious discrimination" in violation of the Fourteenth Amendment); Nixon v. Herndon, 273 U.S. 536 (1927) (striking down a Texas statute forbidding minorities from voting in primary elections on Fourteenth Amendment grounds); Guinn v. United States, 238 U.S. 347 (1915) (striking down an Oklahoma grandfather clause constitutional amendment that imposed a literacy test on all voters who had been registered in the state since the adoption of the Fifteenth Amendment, on Fifteenth Amendment grounds); *Ex parte* Yarbrough, 110 U.S. 651 (1884) (holding that the act of conspiring to intimidate black voters from voting in a Congressional election is punishable as a federal crime); *Ex parte* Siebold, 100 U.S. 371 (1879) (finding state election judges guilty of ballot-stuffing punishable under federal law).

54. *See* Breedlove v. Suttles, 302 U.S. 277 (1937) (upholding the constitutionality of a state poll tax); Grovey v. Townsend, 295 U.S. 45 (1935) (upholding the exclusion of blacks from voting in party Convention and primary elections on the grounds that it involved no state action); Pope v. Williams, 193 U.S. 621 (1904) (upholding a one-year residence requirement for voting); Giles v. Teasley, 193 U.S. 146 (1904) (dismissing a challenge to discriminatory registration techniques and grandfather clauses that prevented blacks from voting); Giles v. Harris, 189 U.S. 475 (1903) (Holmes, J.) (dismissing a challenge to discriminatory state voting registration criteria that prevented blacks from voting). For criticism of *Giles v. Harris*, see Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*, 17 CONSTITUTIONAL COMMENTARY 13 (2000).

rooted in the Equal Protection Clause.[55] The Court reasoned that if one person could vote, denying such a "fundamental right" to someone else was a dramatic form of government-imposed inequality requiring a justification identical to the demanding test imposed on classifications based on race or alienage: namely, a showing that the unequal treatment is the least drastic means of advancing a compelling governmental interest.[56] It is a rare act of government that can survive such a lethal standard of review, often labeled "strict scrutiny."[57] In a ten year surge after *Baker*, the Supreme Court used fundamental rights strict scrutiny to eliminate almost every formal impediment to voting, running for office, and equal political representation that had plagued American democracy since the Founding.[58] In addition to *Baker v. Carr*'s launch of the one-person one-vote principle, five cases illustrate the breadth of the Court's effort to forge an equality-based constitutional right to participate in the democratic process. *Carrington v. Rash* invalidated a state law that prohibited soldiers stationed in Texas from voting in a state or local election, even if they professed an intent to remain in the state permanently.[59] It was no coincidence that many of the soldiers were black. *Harper v. Virginia Board of Elections*, by invalidating poll taxes in state elections, effectively swept away property qualifications for voting and holding office.[60] *Williams v. Rhodes* recognized an equality-based right to run for office as a third-party candidate.[61] *Kramer v. Union Free School District* held that all residents affected by an election had an equal right to vote in it unless the state demonstrated a compelling interest to deny them a ballot.[62] Finally, *Dunn v. Blumstein* ended the time-honored practice of using durational

55. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 370 (1964) (holding that the right to vote is fundamental and that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined").

56. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), was the first full-scale application of fundamental rights analysis to the electoral process. It resulted in the invalidation of a state poll tax that the Court found imposed an unnecessary and hence "invidious" burden on the fundamental right to vote. *Id.* at 665–66.

57. The Supreme Court's decision upholding the constitutionality of the World War II Japanese detention camps is a rare example of a judicial finding that racially discriminatory governmental action satisfies strict scrutiny. *See* Korematsu v. United States, 323 U.S. 214 (1944).

58. In addition to the cases discussed in the text, see Lubin v. Panish, 415 U.S. 709 (1974) (invalidating a substantial candidate filing fee); Bullock v. Carter, 405 U.S. 134 (1972) (same); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (invalidating a property ownership requirement to vote in general obligation bond elections); Cipriano v. City of Houma, 395 U.S. 701 (1969) (invalidating the limitation of the franchise to property owners in municipal utility bond elections). Many of the lower court cases are collected in NORMAN DORSEN, PAUL BENDER & BURT NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 867–76, 886–90 (4th ed. 1976).

59. Carrington v. Rash, 380 U.S. 89 (1965).

60. *Harper*, 383 U.S. at 666 ("[A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or the payment of any fee an electoral standard.").

61. Williams v. Rhodes, 393 U.S. 23 (1968).

62. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

residency requirements to disenfranchise newcomers.[63]

Two significant limitations on the franchise—literacy requirements and disenfranchisement after criminal conviction—survived the Warren Court's egalitarian surge. In *Lassiter v. Northampton Board of Elections*, literacy was viewed by Justice Douglas, writing for a unanimous Court, as a permissible basis on which to distinguish between voters and nonvoters.[64] Since *Lassiter* was decided several years before the Warren Court developed its fundamental rights/strict scrutiny approach to restrictions on voting, it is unclear whether the case would have been decided the same way if it had been argued in 1969, as opposed to 1959. In any event, the Supreme Court has never found it necessary to revisit *Lassiter* because the 1970 amendments to the Voting Rights Act of 1965 ban literacy tests in all state and federal elections.[65]

In *Richardson v. Ramirez*, the disenfranchisement of convicted felons survived when the majority construed Section 2 of the Fourteenth Amendment as an affirmative authorization to disenfranchise persons convicted of a "crime."[66] Enacted in 1868, Section 2 was designed to induce the states of the old Confederacy to *enfranchise* newly-freed black males by linking a state's representation in Congress to its eligible voting population, except for persons convicted of "rebellion or other crime."[67] Superseded by the Fifteenth Amendment in 1870, Section 2 never had an opportunity to function as intended. Ironically, its only practical effect has been to *disenfranchise* black males at a disproportionate rate. The "rebellion or other crime" language in Section 2 was used by nineteenth century Southern racists to disenfranchise many newly-freed black voters.[68] In the modern era, while it is possible to read the text of Section 2 narrowly to apply solely to "other crimes" committed in connection with the recent "rebellion,"[69] the *Richardson* majority read it broadly as affirmatively

63. Dunn v. Blumstein, 405 U.S. 330 (1972).

64. Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51–53 (1959) ("Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise . . . .We do not sit in judgment on the wisdom of that policy. We cannot say, however, that it is not an allowable one measured by constitutional standards.")

65. *See* Oregon v. Mitchell, 400 U.S. 112 (1970) (unanimously upholding the nationwide ban on literacy tests imposed by the Voting Rights Act Amendments of 1970, Pub. L. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. § 1973(b) (2010 Supp.)).

66. Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment" and therefore that state laws disenfranchising felons do not violate the Equal Protection Clause of the Fourteenth Amendment)

67. U.S. CONST. amend. XIV, § 2.

68. *See* Hunter v. Underwood, 471 U.S. 222 (1985) (striking down a section of the Alabama Constitution that denied the right to vote to persons who have committed a crime of "moral turpitude," because the purpose of this section, though race neutral on its face, was to disenfranchise back voters).

69. *See* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259

authorizing the disenfranchisement of convicted criminals. Today, laws in forty-eight states disenfranchise more than four million Americans (disproportionately black) who cannot vote because of a criminal conviction.[70] The 2000 presidential election almost certainly turned on Florida's success in disenfranchising one-fourth of its otherwise eligible black male voting population because of past criminal history.[71]

A third area where the Court's equality-based approach has failed to protect the right to vote involves the recognition of "special purpose" elections that limit or apportion the franchise to those who are particularly affected by an election's outcome.[72] While there is nothing intrinsically wrong with the "special purpose" concept, a majority of the Court has, unfortunately, applied it much too broadly to cover elections controlling the allocation of scarce resources like water and electricity in Western and Southwestern states.[73] Efforts to use the special

(2000) (arguing that the enactment of the Fifteenth Amendment in 1870 impliedly repealed section 2 of the Fourteenth Amendment, since the only purpose of Section 2 was the enfranchisement of male black voters); David Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303–04 (1976) (criticizing Chief Justice Rehnquist's reading of section 2 as having "little warrant in the language of the amendment or its legislative history").

70. Four states (Iowa, Florida, Virginia, and Kentucky) disenfranchise all convicted felons permanently, unless voting rights are restored pursuant to a case-by-case discretionary process. Seven states (Alabama, Arizona, Delaware, Mississippi, Nevada, Tennessee, and Wyoming) disenfranchise at least some convicted felons permanently, unless voting rights are restored on a case-by-case basis. Seventeen states (Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Washington, West Virginia, and Wisconsin) deny voting rights to prisoners, but restore voting rights once the full sentence, including parole and probation, has been served. Nebraska imposes a two-year waiting period before restoration. Five states (California, Colorado, Connecticut, New York, and South Dakota) restore voting rights upon release from prison and discharge from parole, allowing probationers to vote. Thirteen states (Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah) and the District of Columbia restore voting rights automatically upon release from prison. Only two states (Maine, and Vermont) decouple voting entirely from criminal conviction. *See* BRENNAN CENTER FOR JUSTICE, CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES, *available at* http://www.brennancenter.org/page/-/Democracy/USA%20MAP%203.23.2011.pdf (last visited June 14, 2011).

71. Efforts to use the Voting Rights Act (VRA) of 1982 to challenge the disproportionate racial impact of felon disenfranchisement laws have, thus far, been unsuccessful in a series of closely divided lower court opinions. *See* Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010) (finding the racially disparate impact of the Washington state felon disenfranchisement law a violation of § 2 of the VRA), *rev'd en banc*, 623 F.3d 990 (9th Cir. 2010); Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009) (construing §2 of the VRA to apply only to intentional denials of the right to vote, not felon disenfranchisement) (court divided 2-1); Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (en banc) (same) (en banc panel divided 8-5); Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir.) (en banc) (same), *cert. denied*, 546 U.S. 1015 (2005).

72. *See, e.g.*, Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728 (1973) (upholding the constitutionality of a California water conservation scheme that allowed only local property owners to vote in state water storage district elections on the grounds that the "special limited purpose" of the water district and the "disproportionate effect of its activities on landowners as a group" meant that the one-person, one-vote requirement need not apply).

73. *See id.;* Ball v. James, 451 U.S. 355, 371 (1981) (applying the *Salyer* principle to uphold

purpose rationale to reintroduce property ownership as a qualification to vote in local bond elections have, however, failed.[74]

Even with its three doctrinal limitations, the Warren Court's equality-based test for defining the eligible electorate undoubtedly enhanced American democracy by providing generally applicable constitutional protection for the right to vote, run for office and enjoy equal representation for the first time. If we stopped there, the story of our judge-made democracy would be a success. Using a parody of the NYU grading system, I'd give it an A-.

B. Policing the Political Majority's Power to Curtail Participation

Getting an A- in judicially defining the electorate does not assure that anyone will actually vote. The real-world quality of a judge-made democracy depends not merely on a broadly defined formal electorate, but also on how effectively courts respond to laws and regulations that impede democratic participation by vulnerable members of the formally eligible electorate. Measured by such a real-world standard, the Warren Court's equality-driven constitutional law of democracy provides effective relief against patently intentional efforts to disenfranchise otherwise eligible voters,[75] but delivers inadequate protection against (1) thinly disguised efforts to impede democratic participation;[76] (2) well-intentioned but poorly considered regulations that unnecessarily impede voting and/or running for office;[77] and (3) erroneous

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the constitutionality of an Arizona water conservation scheme that allowed only local property owners to vote for directors of the state water storage districts responsible for conserving, storing and distributing water resources in the state).

74. Hill v. Stone, 421 U.S. 289, 297 (1975) (striking down property restrictions on voting in city tax bond elections on the grounds that the subject of the elections—the disposition of city tax bonds—was a "matter of general interest" and therefore only a "compelling state interest could justify restricting participation in them on grounds other than residence, age or citizenship).

75. *See* discussion, *supra* note 53 and accompanying text.

76. See, for example, the Court's unpredictable adjudication of challenges to multi-member districts that dilute the voting power of minority voters in case such as *Rogers v. Lodge*, 458 U.S. 613 (1982) (invalidating a multi-member district), *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (upholding a multi-member district), *White v. Regester*, 412 U.S. 755 (1973) (invalidating a multi-member district) and Whitcomb v. Chavis, 403 U.S. 124 (1971) (upholding a multi-member district).

77. Requiring voter registration in advance of an election is a major contributor to low voter turnout. *See* Burt Neuborne, *Money and American Democracy*, *in* LAW AND CLASS IN AMERICA 37, 50 (Paul D. Carrington & Trina Jones eds., 2006). Voter registration was unknown in the early nineteenth century. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 151 (2000). It began in the South as a technique to disenfranchise black voters. *See* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS 45–82 (1974), and quickly spread North and West as an anti-corruption device that also minimized the political influence of immigrants. FRANCIS FOX PIVEN & RICHARD CLOWARD, WHY AMERICANS STILL DON'T VOTE 88–93 (2000). By 1929, only three states dispensed with periodic, advance voter registration. *Id* at 90–93. Today, North Dakota is unique in not requiring voter registration. Most states continue to require registration in advance of the election. Nine states (Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, Wisconsin, and Wyoming) have adopted Election Day registration for at least some elections. Steven Carbó & Brenda Wright, *The Promise and*

regulations that unnecessarily impede democratic participation based on mistaken assumptions about need or consequence.[78]

Sometimes, like the violent act of voter suppression in Ex Parte *Yarbrough*,[79] the racially-motivated gerrymander in *Gomillion v. Lightfoot*,[80] or the pretextual grandfather clauses in *Lane v. Wilson*,[81] purposeful efforts at disenfranchisement are so transparent that they jump out of the cake. The Fourteenth and/or Fifteenth Amendments make short work of such intentional efforts at disenfranchisement. Often, however, laws designed to impede electoral participation are defended as "neutral" regulations having an unintended effect on a vulnerable segment of the electorate, as in the adoption of multi-member districts designed to submerge minority voters,[82] the "cracking" of minority-controlled districts into smaller units that are then merged into districts under majority control, or the cynical imposition of onerous voter identification

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Practice of Election Day Registration, *in* AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 65, 68 (Benjamin Griffith ed., 2008). Studies suggest that the use of Election Day registration (EDR) helps boost voter turnout, at least among certain segments of the electorate. *See* MICHAEL J. HANMER, DISCOUNT VOTING: VOTER REGISTRATION REFORMS AND THEIR EFFECTS (2009) (linking EDR to increased turnouts, and noting that the failure of EDR to boost turnout dramatically often overlooks high pre-existing turnout rates in states adopting EDR). *See also* Craig Leonard Brians & Bernard Groffman, *Election Day Registration's Effect on U.S. Turnout*, 82 SOC. SCI. Q. 170 (2001) (predicting a seven percent increase in voter turnout from adoption of EDR, but no change in partisan voting); Stephen Knack & James White, *Election Day Registration and Turnout Inequality*, 22 POL. BEHAV. 29, 30 (2000) (reporting study results that provide a "strong indication that EDR adoption improves the turnout of the young relative to older persons, and of the residentially mobile relative to nonmovers, but does not improve turnout of poor voters"). However, even when a state's existing computerized registration system lends itself to Election Day registration, courts refuse to mandate the practice. *See, e.g.*, ACORN v. Bysiewicz, 413 F. Supp. 2d 119 (D. Conn. 2005) (declining to mandate Election Day registration). Most modern democracies, other than the United States, place the burden of assembling voter rolls on the state, not the aspiring voters. PIVEN & CLOWARD, *supra*, at 90. *See generally* KEYSSAR, *supra*.

78. The most obvious example is deference to assertions that onerous voter identification requirements are necessary to deter fraud, even when they can be shown to have a disproportionate impact on poor or minority voters. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (upholding Indiana's "Voter ID Law," which required persons voting in person to present government-issued photo identification); *id.* at 211–16 (Souter, J., dissenting) (describing the likely discriminatory impact of the ID laws on poor and elderly voters); Brief of Asian American Legal Defense and Education Fund as Amici Curiae in Support of Petitioners, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (Nos. 07-21, 07-25), at *11–13 (discussing the disproportionate burden the ID laws impose on minority and poor voters).

79. 110 U.S. 651 (1884) (upholding the 1870 Enforcement Act, passed to combat white supremacist violence and voter intimidation).

80. 364 U.S. 339 (1960). In *Gomillion*, the municipal boundaries of Tuskegee, Alabama, were redrawn to "an uncouth twenty-eight-sided figure" so as to exclude all of the city's black residents. *Id.* at 340.

81. 307 U.S. 268 (1939) (striking down a facially neutral grandfather clause under the Fifteenth Amendment, finding that the law in question unconstitutionally denied the franchise to black voters by exempting white voters from burdensome registration procedures).

82. *See* Whitcomb v. Chavis, 403 U.S. 124, 143–44 (1971) (describing the potentially discriminatory uses of multi-member districts but declining to find that they always violate the Fourteenth Amendment).

requirements disproportionately impacting poor or elderly voters.[83] Since the Supreme Court rejects the use of an "effects" test in Equal Protection Clause cases,[84] merely demonstrating a foreseeable disproportionate impact gets a disenfranchised voter exactly nowhere.[85] Moreover, unlike employment discrimination cases brought under Title VII, where the Court has developed an elaborate set of presumptions assisting litigants seeking to prove improper purpose,[86] in democracy cases, the Court requires disenfranchised voters to bear the burden of proving impermissible motive with no help from presumptions. The net effect is to shield many covert efforts to weaken discrete segments of the electorate from effective judicial redress.[87]

Sometimes, the negative impact of a regulation on democratic participation isn't intentional, but simply reflects inadequate consideration of (or lack of concern with) the rule's impact on prospective voters. For example, requiring voter registration substantially in advance of an election, or scheduling elections on a work day, may reflect nothing more than a lack of foresight or concern on the part of the rulemakers with the foreseeable consequences of their regulations on democratic participation. In keeping with its general equal protection jurisprudence, the Supreme Court declines to apply heightened scrutiny in cases involving the imposition of merely "negligent" as opposed to "purposeful" burdens on democratic participation. The net effect is to tolerate a nationwide level of administration of the electoral process that often borders on the incompetent.

Finally, a limitation on democratic participation is sometimes the result of an honest mistake about the need for a given electoral regulation, or a wrong guess about the regulation's consequences, as in the continuing belief by many that literacy is necessary to cast an informed ballot despite more than forty years of experience with the Voting Rights Act's ban on literacy tests. In the absence of a showing of discriminatory purpose, however, courts are unlikely to second-guess the accuracy of a state's purported justification for a regulation that impedes participation in the democratic process.[88] The net result is the

83. In the wake of the Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), thirteen states have introduced legislation requiring onerous photo identification in order to vote. All thirteen are Republican controlled. Lizette Alvarez, *Republican States Push Revisions to Voting Laws*, N.Y. TIMES, May 29, 2011, at A1.

84. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) (declining to apply heightened scrutiny to disproportionate impact cases).

85. City of Mobile v. Bolden, 446 U.S. 55 (1980) (requiring proof of discriminatory purpose under Fifteenth Amendment).

86. The complex system of presumptions designed to aid in determining whether employment decisions are improperly motivated is set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Similar presumptions are used to test for impermissible motive in jury selection. Batson v. Kentucky, 476 U.S. 79, 96–97 (1986).

87. *See infra,* notes 89–106 and accompanying text for examples of the impact of the burden of proof rules on democratic participation.

88. The majority opinion in *Crawford* demonstrates how willing courts are to accept even

persistence of a host of seemingly unnecessary restrictions on electoral activity.

The result of limiting effective judicial intervention to purposeful interferences with the right to participate in the democratic process, while placing the burden of proving improper motivation on the disenfranchised individual or group, is a judge-made law of democracy that invites cynics to disguise anti-democratic rules as legitimate regulations of the democratic process. Two examples illustrate the judge-made law in action.

One of my more pleasant summer duties over the years has been to teach occasionally in the Institute of Judicial Administration's (IJA) Appellate Judges seminar at New York University School of Law. One particularly enjoyable summer, the seminar had more minority judges than usual in attendance. The minority judges explained that they were the first black intermediate appellate judges elected in Louisiana since Reconstruction. When I asked how this could be so, they told me the story of the Supreme Court of Louisiana, an elected seven-person bench with a ten-year term. Under the Louisiana Constitution, five Supreme Court justices were elected from malapportioned single-member districts throughout the state, with white voters outnumbering blacks in each district by a substantial margin.[89] If the single-member system had been used in New Orleans, one of the districts would have been majority-black, and almost certainly would have elected Louisiana's first black Supreme Court Justice. Instead, the 1921 Louisiana Constitution provided for a multi-member district for Greater New Orleans, where the white majority could control the election of both justices.[90] The New Orleans multi-member district was retained in the 1974 Constitution.[91] Predictably, the Louisiana Supreme Court remained all-white.

How, you are probably asking, could anyone get away with such blatant racism? The answer lies in the United States Supreme Court's insistence that black voters were required to prove that the adoption and retention of a multi-member district in New Orleans was subjectively motivated by a purposeful desire to disenfranchise the black population.[92] Proving a knowing disproportionate racial effect was not enough. Proving a failure to consider the

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unsubstantiated justifications for vote restricting laws. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 226 (2008) (Souter, J., dissenting) (pointing to the lack of empirical evidence to support the government's justification that voter ID laws were necessary to prevent fraud).

89. In *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), the lower court held that the one-person one-vote principle did not apply to the election of Louisiana Supreme Court Justices. The Supreme Court summarily affirmed without opinion, 409 U.S. 1095 (1973), though Justices White, Douglas, and Marshall dissented. In 1987, the District Court dismissed Fourteenth and Fifteenth Amendment challenges to the use of the New Orleans multi-member district, finding that plaintiffs' had not demonstrated an invidious purpose. Chisom v. Edwards, 659 F. Supp. 183 (E.D. La. 1987).

90. LA. CONST. art. VII, § 9 (1921).

91. LA. CONST. art. V, § 4 (1974).

92. *See* City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (holding that state action violates the Fifteenth Amendment only if it is shown to have been motivated by a discriminatory purpose); Beer v. United States, 425 U.S. 130, 141 (1976) (interpreting the pre-1982 Voting Rights Act to require proof of discriminatory purpose).

impact on racial minorities was not enough. So, cynical Louisiana lawmakers told themselves (and everyone else) that the real reason for the New Orleans multimember Supreme Court district was to establish a unified urban constituency, and they got away with it for eighty years because it was impossible to disprove. Finally, after a series of challenges brought under the Voting Rights Act of 1982, which amended the Voting Rights Act of 1965 to establish an "effects" test in addition to the test for discriminatory purpose,[93] New Orleans was finally divided into two single-member districts in 1994.[94] Bernette Johnson, a well-qualified black woman was elected in 1994, and re-elected in 2000—no thanks to judge-made democracy rules.[95]

Some years later, I got my own taste of the Supreme Court's treatment of the relationship between motive and democracy. As I have noted, the presidential election of 2000 almost certainly turned on the disenfranchisement of a quarter of Florida's black male voting population because of past criminal history. In an effort to close the barn door after the election—or at least repair

93. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973).

94. In 1988, the Fifth Circuit held that Louisiana's continued use of a New Orleans multi-member district constituted a cognizable claim under Section 2 of the Voting Rights Act of 1982. Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988) (holding that the Voting Rights Act governs judicial elections), *cert. denied*, 488 U.S. 955 (1988). On remand, the District Court issued a preliminary injunction against use of a multi-member district in the forthcoming 1990 elections. Chisom v. Edwards, 690 F. Supp. 1524 (E.D. La. 1988). The Fifth Circuit then vacated the injunction, Chisom v. Roemer, 853 F.2d 1186 (5th Cir. 1988), and the case went to trial. The District Court found that plaintiffs had failed to establish a Voting Rights Act claim because of an allegedly inadequate showing of racially polarized voting. Chisom v. Roemer, No. 86-4057, 1989 U.S. Dist. LEXIS 10816, at *43–44 (E.D. La. Sept. 13, 1989). Plaintiffs appealed. While the appeal was pending, the Fifth Circuit, sitting *en banc*, ruled in *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), that the Voting Rights Act did not apply to judicial elections. The New Orleans litigation was then summarily dismissed without reaching the merits of the District Court's ruling. Chisom v. Roemer, 917 F.2d 187 (5th Cir. 1990). However, in *Chisom v. Roemer*, 501 U.S. 380 (1991), and *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991), the Supreme Court reversed the Fifth Circuit, ruling 6–3 that Section 2 of the Voting Rights Act applies to the election of both appellate and trial judges. On remand, the exhausted parties entered into a settlement. Chisom v. Edwards, 970 F.2d 1408 (5th Cir. 1992) (announcing settlement). The litigation was finally dismissed. Chisom v. Edwards, 975 F.2d 1092 (5th Cir. 1992). Revius O. Ortique, a black civil rights lawyer, was appointed to fill a Supreme Court vacancy in 1992, and served as Louisiana's first black Supreme Court Justice for two years until his mandatory retirement in 1994 at age seventy. Bernette J. Johnson, *Justice Revius O. Ortique: A Man for All Seasons*, 36 S.U. L. REV. 1, 2 (2008). The rest is democracy. Justice Ortique was succeeded by Justice Bernette J. Johnson, who was elected to the Louisiana Supreme Court in 1994 to fill the unexpired portion of Justice Ortique's term, and, after the electoral lines were re-drawn, re-elected in 2000 from the Seventh Judicial District in New Orleans.

95. Forgive me if I don't thank the United States Supreme Court for ruling that judicial elections are covered under the 1982 amendments to the Voting Rights Act. Prior to the 1982 amendments, the Voting Rights Act had clearly covered the election of judges. *Chisom v. Roemer*, 501 U.S. at 390 n.14. It is inconceivable to believe that the 1982 Congress intended to eliminate such an important body of pre-1982 law when it enacted a more powerful version of the 1965 Act. It is disheartening to speculate that the three-judge dissent in *Chisom v. Roemer*, 501 U.S. 380, 404–18, might today be a 5–4 majority.

the door for future elections—the Brennan Center for Justice, despite *Richardson v. Ramirez*,[96] challenged the constitutionality of Florida's felon disenfranchisement laws under the Equal Protection Clause. The case wasn't as quixotic as it might appear. Although *Richardson* had upheld the constitutionality of felon disenfranchisement, the Court had subsequently ruled in *Hunter v. Underwood* that the 1901 Alabama Constitution's purposive use of felon disenfranchisement to minimize black voting violated the Equal Protection Clause.[97] The Brennan Center argued that Florida's felon disenfranchisement laws were also purposefully aimed at disenfranchising black voters. Plaintiffs alleged that Florida's felon disenfranchisement provisions had been inserted into its 1868 Constitution in order to enable Florida to re-enter the Union by ratifying the Fourteenth Amendment,[98] while effectively limiting the voting power of newly freed black slaves.[99] One hundred years later, in 1968, Florida adopted a new state constitution. After rejecting efforts to alter the 1868 felon disenfranchisement provisions, Florida re-enacted the 1868 provisions with virtually no substantive discussion or change.[100]

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96. 418 U.S. 24, 55 (1974) (holding that "§ 1 [of the Fourteenth Amendment] . . . could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation that § 2 imposed for other forms of disenfranchisement"). *Richardson* is discussed *supra* at notes 66–71 and accompanying text.

97. 471 U.S. 222 (1985) (holding that felon disenfranchisement in the 1901 Alabama Constitution violated the Fourteenth Amendment because its purpose was to discriminate against black voters).

98. The states of the old Confederacy, with the exception of Tennessee, refused, initially, to ratify the Fourteenth Amendment. Congress responded by dissolving the post-Civil War governments of the seceded states and placing them under federal military occupation. Re-admission to the Union was premised on ratification of the Fourteenth Amendment. In 1868, the reconstituted governments of Arkansas, Florida, North Carolina, Louisiana, and South Carolina provided the five ratifications needed to reach the necessary twenty-eight states. *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 404–409 (2001) (detailing the history of the ratification of the Fourteenth Amendment). Florida was the twenty-fifth state to ratify. *See* Proclamation of Secretary of State Seward Declaring Ratification, 15 Stat. 706 (July 20, 1868) (reciting ratifying states in order). Fringe groups occasionally argue that the Fourteenth Amendment is not law because its ratification was coerced. *See, e.g.*, Bob Hardison, *The Unconstitutionality of the Fourteenth Amendment*, BAREFOOT'S WORLD (April 27, 1997) http://www.barefootsworld.net/14uncon.html. The classic study of Reconstruction is ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (1988).

99. Florida's 1868 Constitutional Convention resulted in a split between the so-called "moderates" and "Radicals" and produced two draft constitutions. The "moderate" draft contained legislative apportionment provisions and electoral rules that were concededly aimed at disenfranchising newly-freed slaves. Felon disenfranchisement provisions, which had existed in earlier Florida constitutions, were continued in the moderate draft. The "Radical" draft, which was far more open to black political involvement, omitted any felon disenfranchisement provisions. The moderate draft was adopted. *See* Richard L. Hume, *Membership in the Florida Constitutional Convention of 1868: A Case Study of Republican Factionalism in the Reconstruction South*, 51 FLA. HIST. Q. 1 (1972).

100. Johnson v. Governor of Fla., 405 F.3d 1214, 1220 (11th Cir. 2005) (noting that "[o]ne hundred years after the adoption of the 1868 Constitution, [when] Florida comprehensively revised its Constitution . . . [it] chose to maintain a criminal disenfranchisement law" and arguing that this is a decision "explicitly left to its discretion by the text of the Fourteenth Amendment").

Disenfranchised black voters argued that merely re-enacting a state constitutional provision that (1) had originally been unconstitutionally racially motivated in 1868 and (2) continued to disproportionately disenfranchise a quarter of the state's black male voters did not launder the law's original unconstitutional taint. At a minimum, plaintiffs argued, relying on *United States v. Fordice*,[101] that Florida had the burden of demonstrating that it had re-enacted the racist 1868 provisions for a legitimate purpose in 1968 having nothing to do with disenfranchising its black male population. The black voters got nowhere.[102] Despite the burden-shifting required in *Fordice*, a Miami Federal District Court judge insisted that it was the job of the black challengers, not the State of Florida, to prove the true motive for the provision's 1968 re-enactment.[103] Since the 1968 re-enactors, most of whom were dead by the time the case was tried in 2002, had been much too shrewd to say anything about why they were re-enacting a provision that disproportionately disenfranchised so many black male voters, the black voters lost their equal protection challenge in Miami, just as black voters had originally lost in New Orleans. Despite a heroic effort by Judge Rosemary Barkett (an alumna and faculty member of the Appellate Judges seminar) to shift the burden of proof on racial motive to Florida where it belonged,[104] the en banc Eleventh Circuit reversed Judge Barkett and affirmed the District Court.[105] The Supreme Court didn't deem the

101. United States v. Fordice, 505 U.S. 717, 739 (1992) (imposing the burden on states to prove that laws reinstating a racially-motivated rule were motivated by a nonracist consideration).

102. Unlike the New Orleans judicial election cases, described *supra* note 94, the Voting Rights Act of 1982 was held to be unavailable to black citizens challenging the disproportionate racial effect of felon disenfranchisement. Johnson v. Governor of Florida, 405 F.3d 1214, 1227–34 (11th Cir. 2005), *cert. denied*, 546 U.S. 1015 (2005). The effort to challenge felon disenfranchisement under the Voting Rights Act is discussed *supra,* note 71.

103. Johnson v. Bush, 214 F. Supp. 2d 1333, 1340–41 (S.D. Fla. 2002) (granting summary judgment in favor of the State on the grounds that the *plaintiffs* had provided insufficient evidence that the re-enactment of the provision in the 1968 Constitution was motivated by a discriminatory purpose).

104. Johnson v. Governor of Florida, 353 F.3d 1287 (11th Cir. 2003) (reversing grant of summary judgment because of misallocation of burden of proof and remanding for further fact-finding).

105. 405 F.3d 1214 (11th Cir. 2005) (reinstating the District Court dismissal). Judge Phyllis Kravitch, who wrote for the *en banc* court, was skeptical about plaintiffs' claim that the 1868 felon disenfranchisement provisions were racially motivated. In contrast to the district court, which had characterized the historical evidence presented by the plaintiffs as "abundan[t]," 214 F. Supp. 2d 1338–39, Judge Kravitch characterized the plaintiff's historical case as "rely[ing] almost exclusively on a few isolated remarks." *Id.* at 1219. She also speculated that an 1872 statement by a draftsman of the 1868 constitution, asserting that he had saved Florida from being "niggerized," might have referred to other provisions in the 1868 Constitution, relating to questions of legislative apportionment and local elections, not felon disenfranchisement. *Id.* at 1219 n.10. In view of the procedural posture of the case, however, she "assumed" for the purpose of argument that the 1868 provisions had been racially motivated. 405 F.3d at 1223 (noting that, given the procedural posture of the case, which came to the court on appeal from a grant of summary judgment, the facts should be interpreted in the light most favorable to the plaintiff). The Eleventh Circuit's opinion stressed the fact that the pleadings did not allege the existence of a discriminatory purpose in 1968. *Id.* at 1220. As Judge Barkett's panel opinion had understood, though, alleging racial bias in 1968 was

case worthy of review.[106]

Contrast the judiciary's treatment of the relationship between motive and democracy in settings like New Orleans and Miami, where the political majority acted to undermine democracy, with its treatment of well-intentioned efforts by the political majority to reinforce democracy. For a century after the ratification of the Fifteenth Amendment, black citizens were the victims of systematic disenfranchisement, including legislative apportionments designed to minimize their ability to elect black representatives. When racial gerrymandering became too obvious, as in *Gomillion v. Lightfoot*, courts could deal with it as purposive discrimination.[107] Most of the time, though, racially discriminatory line-drawing operated under the judicial radar and was devastatingly effective in eliminating black representation in Congress, state legislatures and local governing bodies.[108] In the 1960s and '70s, the electoral map of Brooklyn, NY was tweaked by a sympathetic white majority in an effort to increase black representation in Congress. In *United Jewish Organizations of Williamsburg v. Carey*, the Brooklyn electoral lines were challenged as racially unfair to whites, and barely survived a fragmented Supreme Court.[109] But the handwriting was on the wall. Fifteen years later, when the white-controlled North Carolina legislature sought to draw electoral lines that would maximize the likelihood that more blacks would be elected to Congress after a century of racial exclusion, five members of the Supreme Court ruled in *Shaw v. Reno* that such a benign use of race was

not necessary. The real issue posed by the case was who should have the burden of proof on the issue of racial animus in 1968 when the 1868 evidence was so compelling, the 1968 evidence so sparse, and the racial impact in 1968 so clear. *Id.* at 1244–45 (Barkett, J., dissenting).

106. Johnson v. Bush, 546 U.S. 1015 (2005) (denying petition for writ of certiorari).

107. Gomillion v. Lightfoot, 364 U.S. 339 (1960) (striking down Alabama redistricting scheme shown to be motivated by a discriminatory, and hence unconstitutional, purpose).

108. Although blacks were elected to both the House and Senate under Reconstruction, by 1901, Congress was, once again, all-white. In 1929, Oscar Stanton de Priest became the first black in the twentieth century to be elected to Congress, representing a Chicago inner-city district. He and his successor, Arthur W. Mitchell, served as the only black members of Congress until the election of Adam Clayton Powell, Jr., in 1945, doubled the black Congressional presence. In 1968, Shirley Chisholm became the first black woman elected to Congress, from a Brooklyn district gerrymandered for the purpose. As a result of the Voting Rights Act of 1965, black representation in the House of Representatives reached double digits in 1970. In 1972, Andrew Young was elected as the first black member of Congress from the South since Reconstruction, representing an Atlanta district. The Senate remained all-white until 1967, when Edward Brooke was elected from Massachusetts. Three blacks have since held Senate seats from Illinois: Carol Mosely Braun and Barack Obama through election; Roland Burris through appointment to complete Barack Obama's term. No other state has elected a black Senator. The current Senate has no black members. *See* JENNIFER E. MANNING & COLLEEN J. SHOGAN, CONGRESSIONAL RESEARCH SERVICE, AFRICAN-AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870–2011 (2011), http://www.fas.org/sgp/crs/misc/RL30378.pdf.

109. United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) (upholding a districting scheme that divided a white, Hasidic voting district in order create a majority-black district that would maximize racial minority voting power in arguable compliance with the Voting Rights Act).

unconstitutional.[110] While the *Shaw* decision may be doctrinally defensible as a matter of equal protection jurisprudence—it imposes prophylactic strict scrutiny on a purposeful use of race—when viewed from a democracy perspective, the decision is deeply disturbing. When a political majority seeks to assist a racial minority in overcoming a pattern of historic exclusion from democratic life, banning the process may or may not be defensible Equal Protection doctrine, but it is terrible democracy. At a minimum, one is entitled to ask why the white majority needs heightened constitutional protection against itself.

So, in our judge-made democracy, purposeful efforts to suppress turnout and minimize representation will often be upheld because proof of impermissible motive is so difficult. Inadequately considered election regulations that unnecessarily suppress turnout or distort representation will be upheld under misplaced ideas about deference. But well-meaning efforts to achieve fair representation for historically-excluded racial groups will be struck down—unless reformers behave as cynically as their opponents by pretending that their decisions are not racially motivated, either.[111] At this point, Justice Frankfurter, after conferring with the shade of Justice Brandeis, would be entitled to ask whether, from the perspective of building a fair democracy, the people could possibly have done a worse job in mapping the relationship between motive and democracy. He would award the judges a C, at best.

C. The Operation of the Electoral and Representative Process

As Justice Harlan feared, our current judge-made democracy is relentlessly equal as a formal matter, but not terribly democratic. The problem starts, once again, in *Baker v. Carr* with the Court's decision to rest the constitutional law of democracy solely on the Equal Protection Clause.[112] In *Baker*, the Court was

110. 509 U.S. 630 (1993). *See also* Bush v. Vera, 517 U.S. 952 (1996) (invalidating three Texas legislative districts favoring black voters as unconstitutional because race the predominant apportionment criteria); Shaw v. Hunt, 517 U.S. 899 (1996) (invalidating intentionally created majority-black North Carolina legislative districts as violation of Fourteenth Amendment); Miller v. Johnson, 515 U.S. 900 (1995) (invalidating Georgia legislative district favoring black voters because race was the "predominant" apportionment criterion).

111. In the wake of *Shaw*, benign racial gerrymandering is often defended, with a wink and a nod, as a form of permissible political gerrymandering because blacks are such reliable Democratic voters in the South. Hunt v. Cromartie, 526 U.S. 541 (1999) (reversing summary judgment where district lines could be explained by political rather than racial gerrymandering); Easley v. Cromartie, 532 U.S. 234 (2001) (reversing District Court ruling that the district at issue in *Hunt* violated the Equal Protection Clause).

112. Baker v. Carr, 369 U.S. 186 (1962). For comment on the consequences of relying solely on the Equal Protection Clause in apportionment cases, see Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103 (2002) (arguing that *Baker* rests on a concern for the proper functioning of democracy, not merely formal equality); Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1716–21 (1999) (criticizing the use of economic market analysis in apportionment cases); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103 (2000) (criticizing the formal equality theory of *Baker*).

confronted with a Tennessee legislature that had not been reapportioned in sixty years.[113] Population shifts since 1901 allowed sparsely populated, predominantly white rural districts to elect the same number of legislative representatives as far more populous urban areas with substantial black populations.[114] The case cried out for the elaboration of a judicially-enforceable constitutional model of what it means to have fair representation in a robust, egalitarian democracy.[115] I do not suggest that it would have been easy to develop such a model.[116] But, as I have argued, it would not have been appreciably more difficult than developing a judicially enforceable model for "the freedom of speech," "Our Federalism," equality, or the separation of powers in grey areas like *Youngstown Steel*.[117] Under pressure from Justice Frankfurter, however, who insisted that judges lack the capacity to develop a constitutionally enforceable substantive right of fair representation, the Warren Court eventually relied solely on the formal equality test announced in *Reynolds v. Sims*.[118] The Court's analysis asks us to imagine two districts—District A with ten voters, and District B with a hundred voters—each electing one representative. In such a malapportioned world, a voter in District A would have a one-tenth say in who wins, while a voter in District B would have only one one-hundredth of a say. After doing the math, the Warren Court majority triumphantly announced that malapportioned election districts inevitably result in votes of unequal value.[119] It was, the Court argued, as though

113. *Baker*, 369 U.S. at 191.

114. In the period from 1901 to 1960, Tennessee's population increased from 2,020,616 to 3,567,089. Its eligible voting population increased from 487,380 men to 2,092,891 citizens. *Baker v. Carr*, 369 U.S. at 192. Voting statistics from the 1960 census revealed that "thirty-seven percent of the voters of Tennessee elect twenty of the thirty-three Senators, while forty percent of the voters elect sixty-three of the ninety-nine members of the House." *Id.* at 253 (Clark, J., concurring). *See also id.* at 254–55 (Clark, J., dissenting) (noting the "wide disparity of voting strength between the large and small counties")

115. *See* C. Herman Pritchett, *Equal Protection and the Urban Majority*, 58 AM. POL. SCI. R. 869, 869–71 (1964) (arguing that the Supreme Court's decisions on legislative districting and apportionment must be considered in the context of seeking fair representation for a predominantly black urban majority, and are a continuation of the Court's 1950s decisions on racial inequality). *See also* RICHARD C. CORTNER, THE APPORTIONMENT CASES (1970); ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968); REAPPORTIONMENT IN THE 1970S (Nelson W. Polsby ed., 1971).

116. *See generally* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967) discussing different theories and goals of representation); REPRESENTATION (J. Roland Pennock & John W. Chapman eds., 1968) (same); David Runciman, *The Paradox of Political Representation*, 15 J. POL. PHIL. 93 (2007) (grappling with the difficulties of defining and establishing appropriate evaluative rubrics for representation in democratic politics).

117. *See* Younger v. Harris, 401 U.S. 37, 44–45 (1971) (applying the principle of "Our Federalism" to determine the scope of federal court authority over state courts); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (developing a model for free speech under the First Amendment); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–40 (1952) (Jackson, J., concurring) (developing a three-part model for evaluating the constitutionality of executive action). For an effort to develop such a model for "democracy," see GERRY MACKIE, DEMOCRACY DEFENDED (2003).

118. 377 U.S. 533 (1964).

119. *Id.* at 562 (noting that "if a State should provide that the votes of citizens in one part of

voters in the rural district had ten votes each, while voters in the urban district had only one vote.[120]

The math in *Baker* and *Reynolds* was fine, and the initial outcome welcome from a democracy perspective. The Court relentlessly applied *Baker*'s one-person, one-vote analysis to achieve formal equality in legislative representation at every level of American democracy, ranging from both houses of a state legislature,[121] to local government institutions,[122] to elected school boards,[123] and to the U.S. House of Representatives.[124] While state and local representation patterns are permitted a slight population deviation if justified by legitimate local concerns,[125] districting for the U.S. Congress is held to a formal mathematical test that is even more stringent than the acceptable margin of error for counting the voters during the census.[126] If formal representational equality equals robust

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the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted").

120. The greatest maximum population deviation in the apportionment scheme at issue in *Baker* was twenty-three to one. 369 U.S. at 255 (Clark, J., concurring). In *Reynolds*, it was even larger. 377 U.S. at 545 (noting that "[p]opulation-variance ratios of up to about 41-to-1 existed in the [Alabama] Senate").

121. *Reynolds*, 377 U.S. at 586–87 (affirming the district court's invalidation of Alabama's state legislative districting scheme); Lucas v. 44th Gen. Assembly, 377 U.S. 713 (1964) (invalidating Colorado's state legislative districting scheme); Gray v. Sanders, 372 U.S. 368 (1963) (invalidating Georgia's county unit system of apportionment for state legislature).

122. Bd. of Estimate v. Morris, 489 U.S. 688 (1989) (finding the structure of New York City's Board of Estimate to be inconsistent with the Fourteenth Amendment because it granted boroughs of substantially different population size equivalent voting power to elect representatives to the Board); Avery v. Midland Cnty., 390 U.S. 474 (1968) (holding that the selection of members of the Midland County Commissioners Court from single-member districts of substantially unequal population violated the Fourteenth Amendment).

123. Hadley v. Junior Coll. Dist., 397 U.S. 50 (1970) (invalidating the selection procedures for trustees of the Junior College District of Metropolitan Kansas City on equal protection grounds because they violated the one-person one-vote principle).

124. Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (reading Article 1, section 2 as establishing an equality principle and noting that there is "no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives").

125. *See* Mahan v. Howell, 410 U.S. 315, 328–29 (1973) (upholding a plan creating a "16-odd percent" deviation in the population size of state legislative districts because it "may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions"). However, population deviations of less than ten percent have been invalidated when no real effort was made to justify them. *See, e.g.*, Cox v. Larios, 542 U.S. 947 (2004) (invalidating a Texas state redistricting plan with less than ten percent deviation because the state offered no justification for it other than the desire to maximize Democratic partisan advantage).

126. *Compare* Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969) (requiring that each state make a "good-faith effort to achieve precise mathematical equality" in drawing federal congressional districts using the "as nearly as practicable" standard), *with* Karcher v. Daggett, 462 U.S. 725, 738 (1983) (acknowledging flaws in census data but reaffirming that "the census count represents the 'best population data available'" and that "it is the only basis for good faith attempts to achieve population equality"). Courts occasionally use the extremely stringent mathematical test for Congressional apportionments as an indirect check on partisan gerrymandering. For example, in an unsuccessful effort to derail the egregious partisan gerrymandering of Pennsylvania's

democracy, the Court has certainly achieved it.[127] If the story stopped there, the courts would be entitled to an "A."

But it doesn't stop there. While the equality-driven one-person, one-vote test worked well enough in repairing the rural/urban representation problem, it has proved vulnerable to massive partisan and incumbent gerrymanders that satisfy one-person, one-vote criteria, but distort fair representation, render votes substantively unequal, and turn too many American elections into meaningless charades. It turns out that the real problem in malapportionment cases like *Baker* isn't just the highly attenuated relative mathematical voting differentials in

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Congressional delegation, a federal district court invalidated a plan because of a maximum population deviation of nineteen people in congressional districts with approximately 646,000 voters. Vieth v. Pennsylvania, 195 F. Supp. 2d 672, 675 (M.D. Pa. 2002) (three-judge court) (noting that the population deviation of nineteen people was "avoidable"). The final plan was likely to result in a congressional delegation of fourteen Republicans and five Democrats, despite the fact that only half of Pennsylvania's voters were Republicans. Vieth v. Jubelirer, 541 U.S. 267, 328 (2004) (Stevens, J., dissenting). Once the plan eliminated the miniscule deviation, it was eventually upheld by the Supreme Court. Vieth v. Pennsylvania, 241 F. Supp. 2d 478 (M.D. Pa. 2003) (three-judge court), *aff'd sub nom.* Vieth v. Jubelirer, 541 U.S. 267 (2004).

127. While majority-rule is the default position, the Court has upheld super-majority requirements in certain settings that allow forty percent of the population to veto a bond issuance or a tax increase. *See, e.g.*, Gordon v. Lance, 403 U.S. 1 (1971) (upholding a state requirement that sixty percent of voters approve any city tax increases or bond indebtedness because it did not discriminate against any identifiable class). The Court's thought process is analogous to the reasoning underlying the "special purpose" exception. *Id.* at 6 (noting that "there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue"). The principal Constitutional exception to the one-person, one-vote principle of strict representational equality is the Constitutionally-required malapportioned United States Senate, where the state of California has about the same political power as Providence, Rhode Island (I am assuming that any Senatorial candidate who carries Providence wins the statewide election.). U.S. CONST. art. I, § 3 (holding that "the Senate of the United States shall be composed of two Senators from each state"); Richard N. Rosenfeld, *What Democracy? The Case for Abolishing the United States Senate*, HARPER'S MAGAZINE, May 2004, at 35, *available at* http://www.harpers.org/archive/2004/05/0080035. Add the modern filibuster requiring sixty votes to obtain cloture, and you have a situation where forty-one Senators representing a fraction of the U.S. population can block legislation desired by fifty-nine Senators representing the overwhelming majority. The principal judge-made exception to one-person, one-vote applies to so-called "special purpose" districts, like water or irrigation districts, where the Court has permitted wide deviations from electoral and representational equality to reflect the districts' narrow purposes, and the special economic interests of the stakeholders. *See supra,* notes 72–74 and accompanying text. Elected judges have also been deemed outside the one-person, one-vote model because they do not "represent" anyone. Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three judge court), *aff'd*, 409 U.S. 1095 (1973) (upholding the election of justices of the Supreme Court of Louisiana from districts with widely varying populations). The Supreme Court Justices dissenting in *Wells* argued unsuccessfully that the principle of one-person one-vote is not primarily about representation, but equality in the relative voting power of members of the electorate, therefore rendering the malapportioned election of judges unconstitutional. 409 U.S. at 1096–97 (White, J., dissenting). Eighteen years later, in *Chisom v. Roemer*, 501 U.S. 380 (1991) and *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991), the Court finally agreed partially, ruling that judges should be deemed "representatives" within the meaning of Section 2 of the Voting Rights Act of 1982. *Chisom*, 501 U.S. at 398–99; *Houston Lawyer's Ass'n*, 501 U.S. at 425–26. *Wells* is, apparently, still good law on the Fourteenth Amendment issue. Finally, appointed collective executive bodies also fall outside the one-person, one-vote model. Sailors v. Bd. of Educ., 387 U.S. 105. 111 (1967).

different districts decried by the majority.[128] In a malapportioned congressional district with a 25,000 person population deviation, how much real-world difference is there between a vote that counts 1/625,000 and one that counts 1/650,000? Raise the mathematical deviation to twenty percent and you still do not have a real-world difference. The more important problem caused by malapportionment is the unfair pattern of legislative representation that emerges from failure to adhere to one-person, one-vote, often empowering districts with less than fifty percent of the population to control more than fifty percent of the votes in the legislature. That's not merely unequal; it's undemocratic.[129] But without a substantive theory of what it means to have fair, as opposed to equal, representation in a democracy, judges can't confront the problem effectively.

The fate of *Baker*'s one-person, one-vote test demonstrates the point. An unintended byproduct of the reapportionment cases was the full-scale redrawing of all legislative lines every ten years to keep pace with the decennial census. Politicians lost no time in exploiting such an opportunity for self-protection and partisan advantage. Before the ink was dry on one-person, one-vote, equally-apportioned election districts were being redrawn everywhere to make sure the incumbent always won,[130] and to maximize the partisan advantage of the political party controlling the apportionment process.[131] Democrats

128. Calculation of the formal mathematical deviation model has its own problems. Should the denominator consist of all persons counted by the census as being present in the district? Undocumented immigrants? Documented immigrants? Prisoners serving sentences? Children? Unregistered voters? Even if you use an all-inclusive denominator, the relative real-world efficacy of a vote will still differ from district to district depending on the varying number of voting-ineligible persons residing in the two districts. Most states use the all-inclusive model. In *Burns v. Richardson*, 384 U.S. 73 (1966), however, the Court upheld Hawaii's use of a registered voters denominator. *Id.* at 95 (requiring only that the distribution of registered voters "approximate[s] distribution of state citizens or another permissible population base). There is also the problem of the systemic undercount of minorities by the census. *See* Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 REV. LITIG. 1 (1993) (discussing the undercount problem).

129. This was the alternative rationale pressed by Justice Tom Clark in *Baker v. Carr*, 369 U.S. 186, 258–59 (Clark, J., concurring) (justifying judicial intervention because "the majority of the people of Tennessee have no 'practical opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination'").

130. For criticism of incumbent gerrymanders, see Sally Dworak–Fisher, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131 (1996) and Kristen Silverberg, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913 (1996).

131. For an early warning about the emerging problem of partisan gerrymandering, see Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277 (1976). For a discussion of the impact of three decades of technological advances in mapping and computer technology, see THE REAL Y2K PROBLEM: CENSUS 2000 DATA AND REDISTRICTING TECHNOLOGY (Nathaniel Persily ed., 2000); Issacharoff, *supra* note 42, at 1695–1702. *See generally* MARK MONMONIER, BUSHMANDERS AND BULLWINKLES: HOW POLITICIANS MANIPULATE ELECTRONIC MAPS AND CENSUS DATA TO WIN ELECTIONS (2001); POLITICAL GERRYMANDERING AND THE COURTS (Bernard Grofman ed., 1990); REAPPORTIONMENT POLITICS: THE HISTORY OF REDISTRICTING IN THE 50 STATES (Leroy Hardy, Alan Heslop & Stuart Anderson eds., 1981).

gerrymandered California, Texas, and New Jersey.[132] Republicans made a mockery of fair representation in Pennsylvania, taking a swing state with a roughly fifty-fifty party affiliation split and delivering two-thirds of the state's congressional seats to the Republican Party.[133] When Republicans regained control of Texas, they did to the Democrats what the Democrats had done to them, resulting in the spectacle of Democratic legislators trying to hide out in New Mexico and Oklahoma so they could avoid being forced to vote on a Republican gerrymander.[134] In Colorado and Texas, Republicans couldn't wait for the ten year reapportionment bonanza, so they decided to re-jigger the lines every five years.[135] In New York, the major parties cut a sweetheart deal. Election districts in the lower house (the State Assembly) were rigged to assure control by Democrats, while the lines in the State Senate were drawn to assure control by Republicans. Since the politicians worshipped at the Church of Our Lady of Perpetual Reapportionment, the lines were carefully re-jiggered over the years so that in a state that swings periodically from Democratic to Republican control, Democrats controlled the Assembly and Republicans controlled the Senate for more than a half century.[136]

As the ugly spectacle unfolded, voters urged the Supreme Court to do something about excessively partisan gerrymandering. From a democracy-centered perspective, the Supreme Court's response was appalling. *Gaffney v.*

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132. Bernard Grofman, *An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering*, 21 STETSON L. REV. 783, 816 (1992); Frederick K. Lowell & Teresa A. Craigie, *California's Reapportionment Struggle: A Classic Clash Between Law and Politics*, 2 J.L. & POL. 245, 246 (1985).

133. *See* Vieth v. Jubelirer, 541 U.S. 267, 328 (2004) (Stevens, J., dissenting) (noting that the Pennsylvania districting scheme might enable Republicans, "who constitute about half of Pennsylvania's voters, to elect 13 or 14 members of the State's 19-person congressional delegation").

134. In 2003, ten Democratic Senators fled to Albuquerque, New Mexico in an effort to prevent a quorum of the Texas Senate from enacting a reapportionment bill. They eventually returned for a vote. Fifty-one Representatives then fled to Oklahoma in an ultimately unsuccessful to prevent the Texas House from voting. *See Texas House Paralyzed by Democratic Walkout,* CNN POLITICS (May 19, 2003), http://articles.cnn.com/2003-05-13/politics/texas.legislature_1_house-speaker-tom-craddick-democratic-walkout-texashouse?_s=PM:ALLPOLITICS.

135. People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (en banc) (outlawing five year reapportionment under Colorado Constitution), *cert. denied sub nom.* Colo. Gen. Assembly v. Salazar, 541 U.S. 1093 (2004) (Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, dissenting). *See also* Lance v. Coffman, 549 U.S. 437, 442 (2007) (dismissing an Art. I, § 4 challenge to the Colorado Supreme Court's *Salazar* decision on standing grounds); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 415 (2006) (upholding a Texas redistricting crafted during the decennial period).

136. After a fifty year wait, Democrats finally gained a razor-thin Senate majority, only to lose it to political maneuvering, requiring litigation over whether the Lieutenant Governor (who was appointed) could vote to break a Senate tie. *See Republicans Seize Control of State Senate,* N.Y. TIMES CITY ROOM (June 8, 2009), http://cityroom.blogs.nytimes.com/2009/06/08/revolt-could-imperil-democratic-control-of-senate/.

Cummings[137] was one of the first post-*Baker* political gerrymandering cases to reach the Court. In a so-called "spirit of 'political fairness,'" the two major parties carved up Connecticut's legislative districts to assure victory for almost all incumbents in rough proportion to the relative existing political strength of the two major parties.[138] The Court upheld the bipartisan gerrymander over Justice Brennan's dissent.[139] In *Davis v. Bandemer*,[140] the Court condemned excessive political gerrymandering as unconstitutional, but required a voter seeking judicial help to show that the gerrymander was so extreme that she had been effectively excluded from voting.[141] The politicians must have loved that approach, since political gerrymandering never makes it impossible to vote; it just makes it impossible to win. After twelve years of futility in the lower courts, during which only one political gerrymander flunked the Court's impossibly strict *Bandemer* test,[142] the Court withdrew it, only to substitute something worse. In *Vieth v. Jubelirer*,[143] the Court played a game of constitutional bait-and-switch where four Justices sought to do something about excessive political gerrymandering,[144] four Justices said that political gerrymandering was none of the judiciary's business,[145] and Justice Kennedy played the tease[146]—holding out the promise of doing something, but never going all the way.

As with the cases discussed *supra,* that dealt so poorly with the relationship between democracy and motive,[147] the Court's failure to deal effectively with political gerrymanders is ultimately traceable to the decision in *Baker* to invoke the Equal Protection Clause as the sole component of the constitutional law of democracy.[148] Deciding an equal protection case requires a baseline from which

137. 412 U.S. 735 (1973).

138. *Id.* at 752.

139. *Id.* at 772 (Brennan, J., dissenting).

140. 478 U.S. 109 (1986).

141. *See also* Badham v. Eu, 694 F. Supp. 664, 670 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989).

142. *See* Republican Party of N.C. v. Martin, 980 F.2d 943, 958 (4th Cir. 1992) (noting that the Republican Party challenge "set forth sufficient allegations of an actual discriminatory effect sufficient to state a claim of vote dilution brought about by political gerrymandering"). The case was ultimately dismissed when the political winds changed and the Republicans obtained a statewide majority in the 1994 elections. Republican Party of N.C. v. Hunt, 77 F.3d 470 (4th Cir. 1996) (unpublished table decision).

143. 541 U.S. 267 (2004). *See also* LULAC v. Perry, 548 U.S. 399 (2006) (declining on political question grounds to review Texas partisan reapportionment) .

144. 541 U.S. at 317 (Stevens, J., dissenting); *id.* at 343 (Souter J., joined by Ginsburg, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

145. *Id.* at 271 (Scalia, J., plurality opinion).

146. *Id.* at 306 (Kennedy, J., concurring) (noting, tantalizingly, that he "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases").

147. *See* discussion *supra* Part III(B).

148. Unburdened by the Equal Protection Clause, state courts have reacted somewhat more energetically to the problem of political gerrymandering. *See* Peterson v. Borst, 786 N.E.2d 668 (Ind. 2003) (rejecting a gerrymander as lacking the indicia of fairness required by the state judicial

to measure and assess the scope and legality of a deviation. In *Baker*, the baseline was mathematical equality.[149] In the "fundamental rights" cases, the baseline was the ability of others to vote or run for office. In the political gerrymandering cases, though, in the absence of a theory about what constitutes fair representation, there is no obvious baseline from which to measure the scope of a permissible deviation.[150] Lacking an obvious baseline, a majority of the Court refused in *Vieth* and *LULAC* to use the Equal Protection Clause to opine on the fairness of political gerrymanders, as long as there is mathematical equality. While the dissenters in *Vieth* strove mightily to identify a baseline, ranging from a hypothetical randomized apportionment, to an apportionment tracking past voting patterns, to a search for impermissible subjective intent,[151] it is not clear that Justice Kennedy was wrong in insisting on a better baseline before jumping into an equal protection analysis.

If, however, we were to shift the lens for analyzing political gerrymandering from equal protection to robust democracy, one dramatic fact comes into focus—the minimization, indeed, the virtual disappearance of contested elections in most politically gerrymandered states. Indeed, the very purpose of a political gerrymander is to rig the outcome of as many elections as possible. It is certainly not beyond the capacity of an American judge to hold that contested elections are an important component of a robust democracy, and that blatantly partisan gerrymandering schemes that dispense with the inconvenience of contested elections are unconstitutional. But that will not happen until we insist that deciding democracy cases not only requires engagement with equal protection doctrine, it requires engagement with democracy itself. In the end, the Supreme Court has managed to reinvent the idea of representative democracy without contested elections. The Athenians did it first. They chose their representatives, in part, by lot.[152] We, too, eschew contested elections much of the time.[153] But

code); *In re* Legislative Districting of the State, 805 A.2d 292 (Md. 2002) (invalidating an apportionment plan under the state constitution). *See also* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (outlawing a five year reapportionment under the Colorado Constitution), *cert. denied*, 541 U.S. 1093 (2004).

149. Baker v. Carr, 369 U.S. 186 (1962).

150. For academic efforts to identify a baseline, see POLITICAL GERRYMANDERING AND THE COURTS, *supra* note 131.

151. *See* Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Stevens, J. dissenting); *id.* at 343 (Souter and Ginsburg, JJ. dissenting); *id* at 355 (Breyer, J. dissenting).

152. *See* BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT, 79–94 (1997) (describing the role of lotteries in Athenian, Venetian, and Florentine democracies).

153. *See* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179 (2003) (describing the impact of incumbent protection and non-competitiveness on our political system); Ronald A. Klain, *Success Changes Nothing: The 2006 Election Results and the Undiminished Need for a Progressive Response to Political Gerrymandering*, 1 HARV. L. & POL'Y REV. 75, 81 (2007) (noting that only fifty-five of the 435 House elections in 2006 were competitive in 2006); Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121, 1123 (2007) (arguing that Congress is an institution that is "increasingly insulated from the preference of voters"). Of course,

instead of selection by lot, we empower political bosses and incumbents to choose our representatives for us. Bring back Athenian democracy.

Take a step back, and consider how the interplay between the Court's unfortunate treatment of the relationship between democracy and motive, discussed *supra,* and its equally unfortunate treatment of political gerrymandering plays out in structuring our democracy. If an alien dropped down from Mars and was asked how to deal with two sets of players in the democratic process—members of racial minorities who been subjected to more than a hundred years of discriminatory exclusion from political power, and incumbents embedded in the political power structure—a reasonable Martian might say:

> "Don't let the law help either. Leave them both alone. Now that you finally have a fairly structured democracy, everything will eventually work out for the best."

Another reasonable Martian might say:

> "Let the law help them both. We need the stability and expertise provided by experienced elected officials, and fairness calls for trying to re-construct the level of minority representation that would have existed but for past racism."

A truly wise Martian would say:

> "Let the powerful incumbent take care of herself. It's the racial minority that really needs help to balance the books on past exclusion."

But the one thing even a foolish Martian would never say is:

> "Design your democracy to lock the powerful incumbents into office, but do not give any help to the racial minority."

Want to bet on what the Supreme Court's answer has been? Do I hear Justice Frankfurter's shade fulminating in the gloom? "What's that FF?" (C-).

D. The Ability of an Ordinary Voter to Challenge Entrenched Political Power Centers

Once the Supreme Court gave up on protecting contested general elections from death-by-political-gerrymandering in cases like *Vieth* and *LULAC*,[154] the emphasis on preserving robust egalitarian democracy in electoral districts with

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as the congressional elections of 2008, and 2010 demonstrate, tidal changes in the electorate will result in significant turnover. But the insulating nature of carefully-drawn lines protecting incumbents and erecting bipartisan gerrymanders continues to render the vast bulk of congressional elections mere formalities. A tectonic shift in popular support that achieves competitive elections in twenty percent of the nation's Congressional districts is hardly a ringing victory for democracy.

154. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) (noting the narrower protection available to political, as opposed to economic, competition, and urging adopting of strict review of all purposeful political gerrymanders).

one-party dominance (either natural or contrived) shifted to the major party nominating process. If politically gerrymandered districts render the outcome of too many general elections a foregone conclusion, perhaps a modicum of democracy can be salvaged at the point where the one-party colossus chooses its nominee?

There is nothing intrinsic in the idea of democracy that requires political parties. The Founders were positively hostile to the idea of a political party, associating it with discord and faction.[155] But it turns out that you can't operate a complex democracy without political parties. By the election of 1800, proto-political parties had formed around the competing political philosophies of John Adams and Thomas Jefferson.[156] In every election since 1800, formal political parties have dominated the political landscape. In the modern era, the nature of the political party has been driven by a polity's choice of representational system. A system of proportional representation has tended to generate a large number of relatively small but ideologically coherent political parties, which often govern in an unstable coalition. A winner-take-all, first-past-the-post system like ours has tended to develop two large umbrella parties that seek a governing mandate.[157]

The internal governance structure of political parties and their methods of selecting candidates for the general election vary widely, but we know from experience how easy it is for intra-party democracy to be thwarted. For example, the structure of Marxist-Leninist parties was, and is, democratic in a formal sense. But the electoral process was, and is, structured to make it virtually impossible for rank-and-file members, to say nothing of ordinary citizens, to challenge the edicts of party leaders.[158] While the Republican and Democratic Parties are, thankfully, unburdened by Soviet-style "democratic centralism," it is often notoriously difficult for rank-and-file party members, much less ordinary citizens, to oust established political party leaders.[159] That's why we've

155. *See* THE FEDERALIST NO. 10 (James Madison) (denouncing "factions" as hostile to a democratic republic); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 506–518 (1969) (discussing political parties).

156. The classic history of American political parties is LEON D. EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD (1986). *See also* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM (1969).

157. *See* MAURICE DUVERGER, POLITICAL PARTIES (Barbara & Robert North trans., 3d ed. 1964) (arguing that proportional representation systems foster multiparty development, while plurality systems favor the development of two major parties).

158. *See* MICHAEL WALLER, DEMOCRATIC CENTRALISM: AN HISTORICAL COMMENTARY (1981) for a study of the internal governance of Marxist-Leninist parties.

159. Intra-party democracy, like union and shareholder democracy, poses a subtle challenge of balancing democratic values against the powerful need for stability and continuity in such private associations. Stable party leadership has been defended as good for democracy. *See* NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP (2008) (arguing for strong parties and defending partisan identification). I want to distinguish between stable party leadership and popular participation in the selection of a candidate who is almost certain to win the general election.

experienced so many powerful and enduring political machines, often led by legendary political bosses.[160]

It is not impossible, however, to seek to inject a jolt of democracy into the selection of candidates by a major party. The early Supreme Court precedent was promising. In the 1940s and '50s, the Court recognized that the choice of a candidate by a major political party is so integral to the general election that it should be viewed—and regulated—as part of the formal election itself.[161] In *Terry v. Adams*, for example, Texas Democrats sought to exclude black voters by allowing them to vote in the formal primary, but only after a whites-only informal group, the Texas Jaybird Association, had held an informal vote prior to the formal primary to designate a preferred candidate.[162] Despite the fact that the Republican and Democratic parties are nominally private associations with a First Amendment right to regulate their internal affairs,[163] the Court ruled in *Terry* that it was unconstitutional to exclude otherwise eligible black voters from full participation in the major party nominating processes, no matter how private the *de facto* nominating process was dressed up to appear.[164] Since, ruled the Court, the Jaybird vote was an integral part of the primary process, black voters could not be excluded from it.[165]

Terry was decided in the midst of a nationwide effort to democratize the nominating process by requiring the two major umbrella parties to implement primary elections to nominate candidates. Nineteenth century practice had typically centered the power to choose major party nominees in a convention, usually dominated by the party's leadership. Reformers in the early years of the

160. *See* THOMAS P. CLIFFORD III, THE POLITICAL MACHINE: AN AMERICAN INSTITUTION (1975); HAROLD F. GOSNELL, MACHINE POLITICS: CHICAGO MODEL (1969); JEROME MUSHKAT, TAMMANY: THE EVOLUTION OF A POLITICAL MACHINE, 1789–1865 (1971).

161. The issue was phrased in terms of whether the nominating process was "state action," subject to the Fourteenth and Fifteenth Amendments. *See* Nixon v. Herndon, 273 U.S. 536 (1927) (holding that a state statute forbidding blacks to vote in a Democratic Party primary was subject to, and a violation of, the Fourteenth Amendment); Nixon v. Condon, 286 U.S. 73 (1932) (holding that a Democratic Party Executive Committee ban on black voters in primaries was state action for purposes of the Fourteenth Amendment and striking it down as a violation of the Equal Protection Clause); Grovey v. Townsend, 295 U.S. 45, 55 (1935) (holding that resolutions passed by the Texas Democratic Party Convention did not constitute state action governed by the Fourteenth Amendment and therefore that the Party was entitled to exclude blacks from party membership and to refuse black voters primary ballots); United States v. Classic, 313 U.S. 299, 318 (1941) (holding that the right to vote in a primary election is an integral part of the right to vote in a general election); Smith v. Allwright, 321 U.S. 649, 666 (1944) (overruling *Grovey v. Townsend* when state law governs the activities of political parties).

162. *Id.* at 463.

163. Eu v. S.F. Cnty. Democratic Comm., 489 U.S. 214, 229 (1989) (invalidating a ban on leadership support for a favored candidate during a primary as an unconstitutional burden on the First Amendment rights of the party leadership).

164. Terry v. Adams, 345 U.S. 461 (1953) (invalidating, under the Fifteenth Amendment, an effort by the state Democratic party to hold a pre-primary election of private association that prohibited black voters from participating).

165. *Id.* at 469–70.

twentieth century, arguing that conventions controlled from "smoke-filled rooms"[166] invited corruption and undue influence, sought to shift the power to nominate candidates from party bosses to the electorate. The first statewide primary took place in 1899 in Minnesota.[167] Today, most states require major political parties to use some variant of a primary election to select nominees.[168] Primary elections come in ascending levels of citizen participation. A "closed" primary is confined to the members of the particular political party; a "semi-closed" primary invites independents to join with party members in selecting the nominee; an "open" primary invites all eligible voters, regardless of party affiliation, to participate in the primary; a "blanket" primary allows all eligible voters, regardless of party affiliation, to vote for the nominee of choice in any primary, as long as only one candidate per office is supported; and the "top two" nonpartisan primary is open to the entire electorate, with the two candidates receiving the highest vote totals moving on to the general election.[169]

Savvy political leaders, forced to give up on rigged conventions and smoke-filled rooms, retreated to the floor of the state legislatures, where they used their political clout to pass legislation minimizing their formal loss of the power to choose nominees. Politicians initially concentrated on minimizing the threat posed by closed primaries by freezing the eligible party electorate long before any insurgency could emerge. For example, in *Rosario v. Rockefeller*, the Court confronted a New York law that required members of the Democratic and Republican parties (including young people registering for the first time) to demonstrate ideological allegiance by enrolling in a political party eleven months in advance in order to vote in the primary.[170] Since New York City is

166. The term "smoke-filled room" as a metaphor for a decision made by party bosses dates from the selection of Warren G. Harding as the Republican nominee in 1920. With the Republican Presidential convention deadlocked, the party leadership met at the Blackstone Hotel in Chicago and selected Harding. The Associated Press described the decision as emerging from a "smoke-filled room." *See* WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 672 (2008).

167. ALAN WARE, THE AMERICAN DIRECT PRIMARY: PARTY INSTITUTIONALIZATION AND TRANSFORMATION IN THE NORTH 15 (2002).

168. *Id.* at 1. Existing laws governing the primary are critiqued in Richard H. Pildes, *The Constitutionalization of American Politics*, 118 HARV. L. REV. 29 (2004).

169. Pildes, *supra* note 168, at 103 (discussing the blanket primary). The modern innovation of "instant run-off voting" (IRV) collapses the primary and general election into a single proceeding by asking voters to rank all candidates in order of preference. If a candidate receives a majority of first place votes, she wins immediately. If no one attains a majority of first place votes, the candidate with the fewest first place votes is eliminated, and the ballots are re-tabulated by adding the second-place votes of those who had ranked the eliminated candidate first. The process is repeated until a candidate gains a majority. Adherents of IRV argue that it permits voters to support a favored candidate and elect a winner in the same election. The complexity of an IRV vote count requires that it be carried out by computer. The process of counting is, however, virtually instantaneous. *See* Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 7 (2006) (discussing IRV and its introduction in San Francisco).

170. Rosario v. Rockefeller, 410 U.S. 752, 760 (1973). I confess to bias in writing about *Rosario*. I lost the case 5–4 in the Supreme Court. It was my first Supreme Court argument. I still remember the pain of realizing that Justice White was slipping away from me in the twenty-eighth minute of my oral.

largely a one-party town, missing the Democratic primary is usually the equivalent of missing the general election. In *Rosario*, the Supreme Court majority never discussed whether an eleven month ideological waiting period for voting in a major political party primary (one that would determine the winner of the general election) was good or bad for democracy. Instead, even though the case dealt with a fundamental right to vote,[171] the five-Justice majority applied a relaxed standard of review under the Equal Protection Clause that was closer to rational basis than to strict scrutiny, Applying such a relaxed test, the majority held that New York's asserted concerns over potential inter-party raiding were a legitimate basis for requiring even new voters to sign up eleven months in advance of a primary.[172] Politicians in Mayor Daley's Illinois tried to push the envelope even further, seeking to impose a twenty-three month waiting period to vote in a closed primary. That was too much even for the Supreme Court, which invalidated it.[173]

So, in our judge-made democracy, *Dunn v. Blumstein* forbids the state from imposing any durational residence requirement on voting in a general election, but *Rosario v. Rockefeller* permits the state (acting at the behest of political bosses) to impose an eleven-month ideological waiting period on newly registered voters (or independents) seeking to vote in the major party primary election that determines the winner of the general election.[174] Only a judicial process so besotted with legal doctrine that it loses sight of the quality of the resultant democracy could generate such an absurd result.

With closed primaries neutralized by the prospect of extended ideological waiting periods, political bosses turned to the "semi-closed" primary, obtaining legislation forbidding major political parties from allowing non-members to vote in their primaries. The Court initially ruled in *Tashjian v. Republican Party of Connecticut* that the State could not forbid a major party (the GOP) from opening its primary to independents.[175] But the Court eventually gave the semi-closed primary game away in *Clingman v. Beaver* by upholding Oklahoma legislation banning a minor political party (the Greens) from inviting members of a major party to vote in its primary, effectively confining "semi-closed" primaries to long-time party members (subject to an ideological waiting period) and independents.[176]

Attention then turned to the "blanket primary," an effort to permit widespread participation in the nominating process by allowing an eligible voter

171. *Id.* at 767 (Powell, J., dissenting).

172. *Id.* at 760–61. Counsel for New York State reminded the Court that inter-party raiding had been a problem in the 1950s when the communist and anti-communist left skirmished for control of two New York State minor parties—the American Labor Party and the Liberal Party. No evidence of inter-party raiding by Democrats or Republicans was presented.

173. Kusper v. Pontikes, 414 U.S. 51, 61 (1973).

174. *Compare* Dunn v. Blumstein, 405 U.S. 330 (1972), *with Rosario*, 410 U.S. 752 (1973).

175. Tashjian v. Republican Party of Conn., 479 U.S. 208, 225 (1986).

176. Clingman v. Beaver, 544 U.S. 581, 597 (2005).

to support a preferred candidate for a given office no matter what primary the candidate's name appeared in. The California "blanket primary," enacted over the heads of party leaders by voter initiative,[177] was invalidated in *California Democratic Party v. Jones* because, in the majority's opinion, allowing voters to support any candidate they wished in more than one major party primary permitted non-party members to exercise too much influence over the selection of a major party's candidate.[178] Driven by First Amendment associational rights doctrine, the Court declared the blanket primary unconstitutional even though it was widely popular, had resulted in an upsurge in voter participation, and tended to lessen political polarization.[179]

That left the "top two" primary, which is open to the entire electorate, allowing candidates to self-identify by party if they wish, and advancing the two candidates with the highest vote totals to the general election. In *Washington State Grange v. Washington State Republican Party,*[180] the Court upheld Washington State's "top two" primary against a facial challenge by party leaders who argued that it risked allowing outsider-candidates to meddle with a party's nomination process by falsely identifying themselves as a party member.[181] The Court warned, however, that if a threat of party confusion actually developed, it might well invalidate the top-two primary, as well.[182]

The Supreme Court traveled full circle back to the nineteenth century in *New York State Board of Elections v. López Torres.*[183] when it unanimously reversed two lower courts[184] in upholding a New York statute, enacted at the behest of major party leaders, that established a rigged convention process for choosing judicial nominees for the general election.[185] The statutorily mandated

177. Cal. Democratic Party v. Jones, 530 U.S. 567, 570 (2000) ("In 1996 the citizens of California adopted by initiative Proposition 198. Promoted largely as a measure that would 'weaken' party 'hard-liners' and ease the way for 'moderate problem-solvers,' Proposition 198 changed California's partisan primary from a closed primary to a blanket primary.") (internal citations omitted).

178. *Id.* at 586. Tellingly, the blanket primary was challenged by the leadership of both major parties.

179. *Id.* at 600 (Stevens, J., dissenting).

180. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008).

181. *Id.* at 452–3 (rejecting plaintiffs' argument that the top two primary will allow voters who are not actually affiliated with a party to choose that party's nominee, "thereby violating the parties' right to choose their own standard-bearers and altering their messages"); *id.* at 458 (concluding that, on its face, the primary system "does not impose any severe burden on respondents' associational rights").

182. *Id.* at 457–58.

183. 552 U.S. 196 (2008).

184. 411 F. Supp. 2d 212 (E.D.N.Y. 2006) (enjoining use of rigged convention), *aff'd* 462 F.3d 161 (2d Cir. 2006) (unanimous decision).

185. *See* 462 F.3d at 202 (describing the rigged nature of the judicial nomination process). Both the District Court and the Second Circuit found that the rigged nature of the New York convention system made it impossible as a practical matter for voters to challenge the nominee favored by the party leader, and struck it down as a result on First Amendment grounds. *See* 411 F. Supp. 2d 212, 254 (E.D.N.Y.), *aff'd*, 462 F.3d 161 (2d Cir. 2006). The lower courts' common

convention system, which both the District Court and the Second Circuit found vested party leaders with *de facto* control over the party nomination process, delivered unilateral power to party leaders to select judicial nominees comparable to the unilateral power party leaders had exercised in nineteenth-century "smoke filled rooms." A unanimous Supreme Court upheld the rigged nominating process, ruling that neither insurgent members of the affected political parties nor dissenting judicial candidates had a constitutional basis to challenge the state's grant of plenary power to local party leaders to select the parties' judicial nominees.[186]

As with the demise of the blanket primary in *California Democratic Party v. Jones*, the gutting of the semi-closed primary in *Clingman*, and the freezing of the closed primary in *Rosario*, the *López Torres* Court justified turning the intra-party democracy clock back to the nineteenth century by insisting that its decision was compelled by the First Amendment. The two major parties, the Court reasoned, are private associations with a First Amendment right to be free from undue government interference in deciding how to choose their candidates.[187] The Court was unmoved by the fact that the rigged judicial nominating process had actually been imposed on the parties by statute, apparently believing that only the party itself, speaking through the party leadership, could challenge the state's imposition of the rigged convention system on the party.[188] Since the statute providing for rigged conventions had been enacted at the request of the party leaders, however, the prospect of a political fox complaining about being given too much power over the judicial

sense approach was perilously close to a democracy-centered jurisprudence. Previously, the Second Circuit had twice successfully used such a democracy-centered approach to force the Republican Party to permit Steve Forbes in 1996 and John McCain in 2000 to challenge the state party leaders' support of Bob Dole and George Bush, respectively. *See* Rockefeller v. Powers, 917 F. Supp. 155, 166 (E.D.N.Y.), *aff'd*, 78 F.3d 44 (2d Cir.), *cert. denied*, 517 U.S. 1203 (1996); Molinari v. Powers, 82 F. Supp. 2d 57, 78 (E.D.N.Y. 2000). *See generally* Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2199–2206 (2001) (describing the difficulty of harmonizing individual rights of party members with the associational rights of parties). In the interest of full disclosure, I argued *Rockefeller* and *Molinari* on behalf of the plaintiffs, and was one of the attorneys representing the respondent in *López Torres*.

186. 552 U.S. at 208 (reversing the lower courts on the grounds that while "States can, within limits (that is, short of violating the parties' freedom of association), discourage party monopoly—for example, by refusing to show party endorsement on the election ballot . . . the Constitution provides no authority for federal courts to prescribe such a course" and concluding that the First Amendment "creates an open marketplace where ideas, most especially political ideas, may compete without government interference. It does not call on the federal courts to manage the market by preventing too many buyers from settling upon a single product") (internal citations removed).

187. *See id.* at 203–04.

188. The standing issue is not directly addressed in the Court's opinion, although it is central to its analysis. Neither party briefed it. It was explicitly articulated as a given by Justice Scalia during the oral argument, when he noted that until the parties themselves challenged the statute, the Court would have no occasion to consider whether New York could impose the system. He then cheerfully observed that the parties had caused the statute to be enacted in the first place.

henhouse was utterly fanciful.

The Justices made almost no effort to harmonize their insistence on treating the major party nominating process as hermetically sealed private associational exercises with earlier cases like *Terry v. Adams,* which invalidated the exclusion of black voters from a *de facto* major party nominating process, notwithstanding its apparently private character.[189] The ban on California's blanket primary, the Court's lukewarm approach to Washington's "top two" primary, the Court's limitation on the semi-closed primary, and its unanimous approval of New York's rigged judicial nominating convention cast doubt on the constitutionality of all statutorily-imposed primaries, especially open primaries. If, as in *López Torres, Clingman*, *Rosario,* and *California Democratic Party v. Jones*, the Republican and Democratic parties are constitutionally protected private associations for the purposes of nominating candidates, it is hard to see why the government is entitled to force them to hold open primaries, or, indeed, any primary at all.[190]

From a democracy perspective, treating small, protest political parties as First Amendment private associations for electoral purposes makes excellent sense. Ideologically-defined minor parties need constitutional protection against takeover by ideological opponents and possible persecution by the state.[191] It is, however, democratically incoherent for the Court to treat the nomination phase of the two major umbrella parties as a private ideological playground. The major parties make virtually no ideological demands on their adherents. "Membership" in one of the two major parties is more about exercising electoral power than embracing a clear ideology.[192] As the Court recognized a half-century ago in the *White Primary* cases, voting during the major party nomination phase is an integral part of voting in the general election, especially in a politically gerrymandered world of one-party legislative districts.[193] That's why, from a democracy perspective, the Court was right in *Terry v. Adams* in requiring major parties to open their primaries to black voters; right in *Tashjian* in guaranteeing major parties the right to open their primaries to non-members; wrong in *Rosario*

189. See *supra* notes 162–65 and accompanying text.

190. For articles exploring this question, see Karl D. Cooper, *Are State-Imposed Political Party Primaries Constitutional?* 4 J.L. & POL. 343 (1987); Arthur M. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. CAL. L. REV. 213 (1984). For the mainstream argument defending the right of states to regulate party primaries, see Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1768–70 (1993).

191. *See generally* JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM (1983).

192. It has been suggested that, unlike blanket primaries, open primaries are valid because the act of voting in the primary constitutes an "affiliation" with the party. Democratic Party of U.S. v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 130 n.2 (1981) (Powell, J, dissenting). If such a tenuous bond creates a constitutionally-adequate party "affiliation," it is hard to understand why umbrella political parties have a coherent associational core capable of overcoming other efforts to democratize their nominating processes.

193. *See supra* note 161, discussing the *White Primary* cases from *Nixon v. Herndon*, 273 U.S. 536 (1927) to *Smith v. Allwright*, 321 U.S. 649 (1944).

v. Rockefeller in permitting New York to force voters to wait eleven months before qualifying to vote in a major party primary; democratically incoherent in *Clingman,* when it permitted Oklahoma to block a minor party from inviting members of the major parties to participate in its primary; and in *López Torres*, when it permitted New York, at the behest of party bosses, to vest the bosses with control over major party judicial nominations.[194]

In the end, our judge-made democracy permits major party political bosses to neutralize efforts to open the major party nominating process to as many voters as possible. Under *Rosario*, closed primaries can be neutralized by freezing the electorate almost a year before the election. Under *Clingman* and *Tashian*, semi-closed primaries can be neutralized by opening them only to independents. Under *California Democratic Party v. Jones*, blanket primaries are unconstitutional. Under *Washington Grange*, "top two" primaries operate under a constitutional shadow. Open primaries may be on constitutional life support.

Worse, the judge-made process is a one-way street. The two major parties have a constitutional right to open their primaries to independents (and probably, to each other), but, under *Clingman*, small protest parties can be stopped from inviting members of the two major parties to vote in their primaries because such an invitation might erode the power of the major party political bosses. From a democracy standpoint, it's hard to imagine anything worse.

If political gerrymandering overpowers democracy in the general election, and excessive deference to party bosses under the guise of associational freedom erodes democracy at the major party nominating stage, the only other democratic game in town is competition from third-parties or independents. Once again, the early precedents were hopeful. In the nineteenth century, a vibrant third-party political culture posed constant challenges to the major parties.[195] In 1968, in *Williams v. Rhodes*, the Supreme Court even recognized a constitutional right to ballot access for a third party that supported George Wallace for President.[196] Once again, however, the Court failed to follow through on its early promise. Instead of viewing minor parties as dissenting voices with a First Amendment right to enrich the electoral debate,[197] the Court has insisted on viewing a minor

194. *See* discussion *supra* notes 175–188 and accompanying text.

195. For a detailed description of nineteenth century electoral behavior, *see* HOFSTADTER, *supra* note 156; PAUL KLEPPNER, THE THIRD ELECTORAL SYSTEM 1853–1892: PARTIES, VOTERS AND POLITICAL CULTURES (1979). *See generally* EPSTEIN, *supra* note 156.

196. 393 U.S. 23, 32 (1968) (granting the Independence Party, pledged to George Wallace for President, access to the ballot in Ohio and invalidating the requirement that the nominating petition be signed by fifteen percent of electorate).

197. *See* RICHARD HOFSTADTER, THE AGE OF REFORM 89 (1955) (discussing the role of third parties). The closest the Court has come to endorsing a First Amendment right to participate in the democratic process is *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which struck down Ohio's early filing requirement because it found it to place an unconstitutional burden on the associational rights of independent voters. Unfortunately, the First Amendment rhetoric in *Anderson* is viewed as an aberration and is rarely cited by the Supreme Court. Indeed, almost none of the minor party

party's effort to obtain a place on the ballot as if the protest party were a genuine competitor for electoral success. Typically, both minority parties and independents are required to demonstrate a significant modicum of electoral support in order to gain a place on the ballot. Often, they must secure a significant number of signatures on nominating petitions (as much as five percent of the electorate), during a relatively short period of time (two or three weeks), long in advance of the election (often during mid-winter), from a shrinking pool of eligible voters who can sign only one nominating petition and who cannot sign at all if they want to vote in a major party primary. Existing constitutional doctrine, which invalidates "unduly burdensome" third-party ballot access regulations but permits rules requiring a showing of significant electoral support, invites major party political leaders to persuade the legislature to impose the most onerous statutory requirements possible on third-parties or independent challengers without triggering the Court's amorphous constitutional veto.[198] Much of the time, in order to satisfy such an onerous burden, a minority party must seriously deplete its limited resources just getting on the ballot, and is then unable to perform its true democratic function of articulating dissenting views to the voting public during the electoral campaign.

But the Court did not stop there. A key component of the nineteenth century culture of vibrant minor parties was the ability of a minor party to "cross-endorse" a major party candidate, giving adherents the ability to cast a "fusion" vote for the minor party's ideological position, while playing a role in who wins the election. A minor party would seek to poll a significant vote for the cross-endorsed candidate, opening the way to negotiations on assimilating its ideological positions into the major party platforms.[199] The potential bargaining leverage generated by minor party cross-endorsements was not lost on the leaders of the major parties. In the twentieth century, major party leaders

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ballot access restrictions that have been upheld by the Court in cases cited *infra,* note 198, could survive under *Anderson*'s heightened First Amendment scrutiny.

198. *See* Munro v. Socialist Workers Party, 479 U.S. 189 (1986) (affirming the right of states to significant limit the general election ballot access of third parties without having to show need); American Party of Texas v. White, 415 U.S. 767 (1974) (upholding a state law that barred voters from signing the ballot petition of an independent candidate if they had also voted in a party primary for that office); Storer v. Brown, 415 U.S. 724 (1974) (upholding a state law barring independent candidates from appearing on the ballot if they had voted in the immediately preceding major party primary and requiring independent candidates to gather the signatures of voters comprising in number at least five percent the votes cast in the preceding general election—these signatures to be gathered during a twenty-four day period ending at least sixty days before the election); Jenness v. Fortson, 403 U.S. 431 (1971) (upholding a state law requiring independent candidates to gather the signatures of five percent of total registered voters in order to have their names printed on the election ballot). These decisions are critiqued in Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167 (1991).

199. *See generally* Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287 (1980); William R. Kirschner, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUM. L. REV. 683 (1995); Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 HARV. L. REV. 1302 (1996).

persuaded state after state to outlaw cross-endorsements, essentially putting an end to the nineteenth century culture of vibrant ideologically-based minor parties.[200] In *Timmons v. Twin Cities Area New Party*, the Supreme Court upheld a cross-endorsement ban in a case where a minor party (the New Party) wished to endorse the candidate of the Democratic Party, and the candidate wished to accept the cross-endorsement.[201] The Court's majority upheld the ban because Minnesota claimed a legitimate interest in providing a simplified ballot.[202] But *Timmons* was really about preserving the duopoly power of the leaders of the two major parties.

So, in our judge-made democracy, the two major parties are autonomous private associations when it comes to avoiding democracy at the nomination stage (as in *California Democratic Party v. Jones* or *López Torres*), but morph into protected wards of the state when a minor party threatens their duopoly power by inviting major party members to vote in a minor party primary (as in *Clingman*), or by cross-endorsing a major party candidate (as in *Timmons*).

Finally, in *Burdick v. Takushi*, the Court rejected the last democratic gasp of an alienated voter—the right to cast a write-in protest ballot.[203] The plaintiff in *Burdick* argued that if a voter wishes to express contempt for the existing candidates (or for the electoral system itself) by casting a sarcastic write-in ballot for Donald Duck, no conceivable government interest should stand in the way.[204] In what may be the Court's worst democracy decision, the majority in *Burdick* upheld Hawaii's refusal to permit write-in ballots, rejecting the claim that voting is an act of political expression. Instead, the court insisted that casting a ballot is nothing more than an instrumental means of choosing a public official.[205] Some instrumental choice! Under current constitutional ground rules: (1) the general election is often meaningless because it has been politically gerrymandered into a sure thing; (2) the major party nomination process is often rigged in favor of the party leaders' choice of candidate; (3) major party insurgents can be barred from contesting the general election either as independents, or minor party candidates; (4) minor parties can be prevented from inviting members of major

200. *See* Celia Curtis, *Cross Endorsements by Political Parties: A "Very Pretty Jungle?"*, 29 PACE L. REV. 765 (2009) (describing the history of cross endorsements in New York State).

201. 520 U.S. 351, 354 (1997).

202. *Id.* at 364.

203. 504 U.S. 428 (1992). Only four states—Hawaii, Nevada, South Dakota, and Oklahoma—completely forbid write-in ballots, although many forbid write-ins in particular settings. Few states actually tabulate write-in ballots. *See* David Perney, *The Dimensions of the Right to Vote: The Write-In Vote, Donald Duck, and Voting Booth Speech Written-Off*, 58 MO. L. REV. 945, 955–56 (1993).

204. *Burdick*, 504 U.S. at 437–38.

205. *Id.* at 445 (Kennedy, J., dissenting) ("As the majority points out, the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression."). In refusing to acknowledge a First Amendment component in voting, the Court brushed aside powerful academic critiques. *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 59–61 (1970); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 39–40 (1960).

parties from participating in the choice of a minor party candidate; (5) even when they can meet onerous ballot access requirements, minor parties often have no resources left to campaign; (6) in most states, minor parties cannot cross-endorse a major party candidate; and (7) you're not even assured the right to cast a symbolic protest vote. (C-, at best).

E. Funding the Democratic Process

In evaluating the line of judicial authority setting the link between democracy and motive,[206] I argued that the Court's decisions set the dial at just about the worst possible place for democracy by tolerating cynical or foolish laws limiting participation in the democratic process, while banning well-intentioned efforts to make democracy work more fairly.

In the political gerrymandering cases,[207] I argued that the Court over-enforces a dry equality-based formalism, and stands by while partisans of the two major parties cement incumbents into office, over-weight the votes of the partisan majority, and turn contested elections into an endangered species.

In the electoral administration cases,[208] I argued that the Court tolerates a level of incompetence and negligence in administering the electoral process that unnecessarily depresses turnout and results in the loss of thousands of ballots in most elections.

In the major party duopoly cases,[209] I argued that the Court has largely surrendered control of the nominating process to the entrenched political leaders of the two major parties, has made it unnecessarily difficult for minor parties or insurgents to challenge the major parties' hegemony, and has even refused to recognize a right to cast a protest vote.

It is, however, in the campaign finance cases that the Supreme Court has achieved a truly dysfunctional democratic nadir. The Founders said nothing about how democracy was to be financed. They appear to have assumed that political office would be the province of wealthy amateurs like themselves who would self-finance a genteel electoral process.[210] The relatively low-tech nature of communication in the late eighteenth and early nineteenth centuries placed a premium on campaign sweat equity, with events like debates, mass parades, and

206. *See supra,* notes 86–111 and accompanying text.

207. *See supra,* notes 112–152 and accompanying text.

208. *See supra,* notes 170–174 and accompanying text.

209. *See supra,* notes 175–205 and accompanying text.

210. The founding generation had its share of campaign finance quarrels, often involving candidates buying drinks for voters at the polls, which often doubled as the local tavern. Elections during the early nineteenth century were rowdy affairs, often using *viva voce* or show-of-hands voting. The secret ballot and the Australian ballot (listing only officially recognized candidates) were still in the future. *See* Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. Rev. 1 (2011) (describing late nineteenth century electoral practice).

political demonstrations dominating electoral campaigns.[211] Beginning with Andrew Jackson's introduction of the spoils system in 1828,[212] campaign funding relied increasingly on "voluntary" contributions of time or money from incumbent patronage employees anxious about their jobs, or from prospective job-seekers who hoped to become patronage employees.[213] The flow of patronage funding was diminished by legislation like the Naval Appropriations Bill of 1867, which prohibited the solicitation of Navy Yard employees;[214] the Pendleton Act of 1883, which provided job security for many federal employees;[215] the Hatch Act, which sought to shield federal employees from fund-raising pressure;[216] and a series of "little Hatch Acts"[217] designed to provide similar protection to state employees. Eventually, the Supreme Court all but eliminated contributions from patronage employees as a significant source of campaign funding by holding most patronage hiring and firing unconstitutional.[218] Unfortunately, the Court did not specify an alternative source of funding.

As patronage-based funding dried up, the role of the wealthy private contributor was necessarily enhanced. Concern over political spending by wealthy for-profit corporations dates from the election of 1832, when the Second Bank of the United States was alleged to have spent substantial sums in an unsuccessful effort to prevent the re-election of Andrew Jackson.[219] Corporate political spending also played a significant role in Pennsylvania politics in the 1850s, where it was raised to a fine art by Simon Cameron, who was later forced

211. *See generally* ROBERT J. DINKEN, CAMPAIGNING IN AMERICA: A HISTORY OF ELECTION PRACTICE (1989).

212. While Andrew Jackson did not invent the idea of rewarding supporters with government jobs, he aggressively championed the idea of "rotation in office" to prevent government officials from becoming an entrenched bureaucracy. *See* JON MEACHUM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE (2009).

213. For a description of patronage as a campaign financing technique, see Richard L. Hasen, *An Enriched Economic model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence*, 14 CARDOZO L. REV. 1311 (1993).

214. Naval Appropriations Act, ch. 172, 14 Stat. 489, 492 (1867).

215. Pendleton Civil Service Reform Act, ch. 27, 22 Stat. 403 (1883).

216. *See* United States Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973) (upholding the constitutionality of § 9a of the Hatch Act, prohibiting federal employees from taking an active role in political campaigns); United Public Workers of America v. Mitchell, 330 U.S. 75 (1949) (same).

217. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973) (upholding Oklahoma's mini-Hatch act).

218. *See* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 673 (1996); O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 714–15 (1996); Rutan v. Republican Party of Ill., 497 U.S. 62, 65 (1990); Branti v. Finkel, 445 U.S. 507, 519–20 (1980); Elrod v. Burns, 427 U.S. 347, 373 (1976).

219. For a fuller description of the conduct of the Bank at this time, *see* RALPH C.H. CATTERALL, THE SECOND BANK OF THE UNITED STATES 243–84 (1903). For information about the operation of Jackson's patronage system, *see* JON MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 56–57 (2009); SEAN WILENTZ, ANDREW JACKSON 56–59 (2005).

to resign as Lincoln's first Secretary of War amidst allegations of corruption.[220] During the Gilded Age, [221] concerns arose that the existence of an extremely wealthy elite was allowing money to play a disproportionate role in political campaigns. For example, President Grant's 1872 campaign was bankrolled by a relatively small group of wealthy financiers led by Cornelius Vanderbilt and Jay Cooke, one of whom is estimated to have underwritten twenty-five percent of the campaign's cost.[222] Nineteenth century concern over money and politics peaked in the Presidential election of 1896 when Mark Hanna, McKinley's campaign manager, raised the then-unheard of sum of $3.5 million[223] from profit-making corporations to outspend William Jennings Bryan five to one[224] and defeat him for the Presidency by a popular vote of 7,102,246 to 6,492,555.[225] The closeness of the election, coupled with the significant disparity in campaign spending, triggered calls for reform. In 1905, President Theodore Roosevelt, stung by criticism over large campaign contributions from the railroad magnate, E.H. Harriman, called for campaign finance reform.[226] The result was the Tillman Act

220. *See* DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 403–05 (2005).

221. Mark Twain invented the phrase "Gilded Age" to describe unbridled materialism, rampant greed, widespread corruption, and control of politics by the rich, especially corporations. *See* MARK TWAIN & CHARLES DUDLEY WARNER, THE GILDED AGE: A TALE OF TO-DAY (1873). Sound familiar? *See also* ANTHONY TROLLOPE, THE WAY WE LIVE NOW (1875), *discussed in* Burt Neuborne, Annual Address to the American Trollope Society: Trollope and Democracy (2008) (copy on file).

222. See GUIDE TO U.S. ELECTIONS I (5th ed. 2005). For a detailed study of the corruption present in the 1872 Grant Administration, *see* MARK WAHLGREN, THE ERA OF GOOD STEALINGS (1993)(describing widespread corruption during the decade from 1868-1877).

223. *See* HERBERT CROLY, MARCUS ALONZO HANNA: HIS LIFE AND WORK 220 (1912); WILLIAM T. HORNER, OHIO'S KINGMAKER: MARK HANNA, MAN AND MYTH 199 (2010). Today's equivalent would be more than $3 billion. Hanna is reputed to have assessed banks and corporations according to their profitability.

224. Croly, *supra* note 223, at 325. *See* JACK BEATTY, AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA 1865–1900 (2007)

225. The electoral vote was 271 to 176. *See Historical Election Results: Electoral College Box Scores 1789–1996*, U.S. ELECTORAL COLLEGE (last visited, June 16, 2011), http://www.archives.gov/federal-register/electoral-college/scores.html.

226. During the 1904 election, Roosevelt's Democratic opponent, Judge Alton J. Parker, charged that Roosevelt was receiving large campaign contributions from wealthy financiers and large corporations. Stung by the allegations, Roosevelt called for Congressional reform in both his 1905 and 1906 messages to Congress. The incident is described in EDMUND MORRIS, THEODORE REX 170, 357–63 (2001) (describing Roosevelt's personal request to E.H. Harriman for contributions from Wall Street, and Parker's charges). Morris reports in his notes to pp. 357–63 that Roosevelt raised $2,195,000 for his 1904 campaign, about seventy percent from corporations, much of it in the final weeks of the campaign. The financing of the 1904 campaign is discussed at length in *Campaign Contributions, Testimony Before a Subcommittee of the [Senate] Committee on Privileges and Elections*, 62nd Cong., 2nd Sess. (Washington, D.C. 1913). See also James O. Wheaton, The "Genius and the Jurist": The Presidential Campaign of *1904* (Ph.D. diss. Stanford University 1964) (describing and criticizing financing of 1904 campaign). Roosevelt's 1905 message stated:

> All contributions by corporations to any political committee *or for any political purpose* should be forbidden by law; directors should not be permitted to use the stockholders'

of 1907, which banned corporate contributions to federal candidates.[227] Related legislation in 1910 and 1911 provided for disclosure of campaign contributions.[228] In 1925, the Federal Corrupt Practices Act was amended to impose ceilings on individual contributions to federal candidates.[229] In 1947, the Taft-Hartley Act extended the ban on corporate campaign contributions to labor unions.[230] In 1974, in the wake of ugly financial scandals during the Nixon administration, efforts to enact comprehensive legislation regulating the role of money in American political campaigns gained political momentum. Instead of a genuine reform bill, though, Congress delivered a blueprint for purging money from elections that just happened to coincide with the best interests of incumbents.

Under the 1974 Act, election spending by Presidential candidates was capped at two-thirds of the amount spent in 1972 by George McGovern in the worst Presidential loss of the twentieth century.[231] Campaign contributions were limited to $1,000.[232] Independent election spending was capped at less than the cost of a quarter-page advertisement in the New York Times.[233] In short, under Congress's "reform" agenda, it became illegal to spend enough money to oust an incumbent. The bill also had a public funding scheme for Presidential elections that tilted strongly towards the two major parties.[234]

In *Buckley v. Valeo*, a team of ACLU lawyers challenged the so-called reform statute,[235] focusing on its unrealistically low spending and contribution ceilings, and on the unfairness of using discriminatory public subsidies to cement the hegemony of the two major parties.[236] The challenge to

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money for such purposes . . . .

Theodore Roosevelt, Message to Congress (Dec. 5, 1905) (emphasis added), *available at* http://www.infoplease.com/t/hist/state-of-the-union/117.html.

227. Tillman Act, ch. 420, 34 Stat. 864 (1907). It seems reasonably clear to me that Congress, consistent with Teddy Roosevelt's message, intended to ban corporate spending "for any political purpose." The idea of a bright-line distinction between contributions and independent expenditures did not enter our discourse until *Buckley v. Valeo*, 424 U.S. 1 (1976), discussed *infra,* notes 235–355 and accompanying text.

228. Publicity Act, ch. 392, 36 Stat. 822 (1910); Publicity Act Amendments, ch. 33, 37 Stat. 25 (1911).

229. Federal Corrupt Practices Act, 43 Stat. 1070 (1925). The Act was superseded in 1971 by passage of the Federal Election Campaign Act, Public L. 92–225, 86 Stat. 3, which was in turn significantly amended by the Federal Election Campaign Act Amendments of 1974, Public L. 93-443, 88 Stat. 126. The text of the 1974 Act is set out in an appendix to the opinion in *Buckley v. Valeo*, 424 U.S. 1, 189 (1976).

230. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159–60 (codified as amended at 2 U.S.C. § 441b (2006)).

231. 88 Stat. 1263 (1974).

232. 18 U.S.C. § 608(b) (set out in *Buckley,* 424 U.S. at 189).

233. 18 U.S.C. § 608(e) (set out in *Buckley,* 424 U.S. at 193).

234. 26 U.S.C. § 9006 (set out in *Buckley,* 424 U.S. 200–16).

235. In the interests of full disclosure, I signed the ACLU brief in *Buckley.*

236. *Id.* at 8, 11.

discriminatory public subsidies failed,[237] but the Supreme Court struck down the expenditure and spending limit provisions,[238] while upholding the $1,000 limit on contributions,[239] and the disclosure rules.[240] The *Buckley per curiam* opinion, which set the constitutional ground rules for all future efforts to regulate the relationship between money and democracy, rests on four fiercely contested rulings—each of which may be doctrinally wrong. Taken together, they are a democratic disaster.

First, the *Buckley* Court reversed the D.C. Circuit's ruling that spending money to influence an election is a mixture of speech and conduct entitled to a somewhat lesser degree of First Amendment protection than "pure speech."[241] The D.C. Circuit had relied on earlier Supreme Court cases, like the unanimous opinion in *United States v. O'Brien* (involving the prosecution of draft card burners), which had held that when speech and conduct are closely linked, the government may regulate the conduct as long as the regulation is no broader than necessary, and is not intended to suppress a controversial viewpoint.[242] Instead, the *Buckley* Court insisted that the spending of money to influence the outcome of an election is an exercise in "pure speech" protected by "exacting scrutiny applicable to limitations on core First Amendment rights of political expression."[243] In other words, after *Buckley*, government efforts to place limits on massive campaign spending must be shown to be the least drastic means of advancing a "compelling" governmental interest.[244]

Second, the *Buckley* Court held that preventing undue concentrations of political and electoral power is not a sufficiently compelling governmental interest to justify limits on massive campaign spending by extremely wealthy candidates and their extremely wealthy supporters.[245] As with its failure to follow the *O'Brien* precedent, the *Buckley* Court appeared to ignore precedent upholding efforts to prevent undue concentrations of power over mass

237. *Id.* at 93–108.

238. *Id.* at 39–59 (invalidating the expenditure and spending limits).

239. *Id.* at 23–38 (upholding the $1,000 contribution limit).

240. *Id.* at 60–84 (upholding disclosure rules).

241. *Id.* at 16, *rev'g* 519 F.2d 821, 840 (D.C. Cir. 1975).

242. United States v. O'Brien, 391 U.S. 367, 376–77 (1968). There was nothing intrinsically wrong with the legal standard announced in *O'Brien* to deal with speech "brigaded" with conduct. Unfortunately, the *O'Brien* Court turned a blind eye to the statute's obvious purpose, which was to suppress an effective means of expressing opposition to the Vietnam War. Justice Douglas joined the *O'Brien* Court's unfortunate First Amendment analysis, but dissented on the ground that the military draft violated the Thirteenth Amendment. 391 U.S. at 389–91 (Douglas, J., dissenting).

243. *Id.* at 44–45. Justice Stevens did not participate in *Buckley*. In later years, he made it clear that he viewed campaign spending as mixed speech and conduct, triggering a lesser standard of First Amendment protection. Nina Totenberg, *Justice Stevens: An Open Mind on a Changed Court*, NPR (Nov. 4, 2004), http//www.npr.org/templates/story/story/php?story Id=130198344. *See* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976) (arguing that spending large sums of money is not pure speech).

244. 424 U.S. at 15–19.

245. 424 U.S. at 48–49.

communications.[246] For example, the Court had consistently upheld the application of antitrust laws to newspapers and broadcasters to prevent the emergence of undue concentrations of power over the flow of information.[247] Beginning in 1953, the FCC had imposed limits on the number and size of broadcast outlets owned by a single person.[248] Two years after *Buckley*, the Court upheld long-standing FCC provisions limiting the cross-ownership of newspapers and radio and TV stations in the same market.[249] Under *Buckley*, however, subsidizing weak electoral voices, not limiting overly strong ones, became the government's only option in seeking to prevent massive concentrations of economic power from eroding the commitment to egalitarian democracy.[250]

Third, the *Buckley* Court ruled that while an "independent expenditure" (spending money to influence an election without coordinating the spending with a candidate) is virtually immune from government regulation under the First Amendment, it held that "campaign contributions" (giving money to a candidate, or coordinating spending with the candidate) may be restricted as to size and source.[251] The Court reasoned that an independent expenditure is a direct exercise of free speech, while a campaign contribution merely enables a third-person (the candidate) to speak.[252] Such a razor-thin distinction overlooks the fact that a campaign contribution is a quintessential act of political association, entitled to full First Amendment protection. The *Buckley* Court didn't even try to explain why First Amendment associational freedom insulates political parties from efforts to democratize their nominating processes, but does not similarly protect someone wishing to contribute money to the political party or its candidate.

Finally, the *Buckley* Court ruled that preventing "corruption" is a

246. *See* Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997) (upholding "must carry" rules designed to avoid "chokehold[s]"); Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994) (distinguishing between over-the air and cable broadcasting, but upholding regulation of "chokeholds" on access to cable transmission); Red Lion Broad Co. v. FCC, 395 U.S. 367 (1969) (unanimously upholding the "fairness doctrine" that required licensed stations to provide coverage of all sides of public issues); Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (applying antitrust laws to a monopoly newspaper that refused to accept advertising from persons who advertised on a competing radio station); Associated Press v. United States, 326 U.S. 1 (1945) (applying antitrust laws to institutional press); National Broad. Co. v. United States, 319 U.S. 190 (1943) (upholding FCC regulations of broadcast licensing designed to prevent monopoly control of the radio by the major networks).

247. *See, e.g., Associated Press*, 326 U.S. at 1; *Lorain Journal Co.*, 342 U.S. at 143.

248. *See* Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, 18 F.C.C.2d 288, 292, 295 (1953).

249. FCC v. National Citizens Comm. for Broad., 436 U.S. 775 (1978).

250. *See Buckley*, 424 U.S. at 49 n.55 (rejecting the possibility that "the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society").

251. *Id.* at 12–59.

252. *Id.*

compelling governmental interest that justifies limiting the size and source of a "campaign contribution" to a candidate, but does not justify limiting massive "independent expenditures" supporting or opposing the same candidate.[253] Reasoning that independent expenditures occur without the prior communication or coordination needed to agree on a *quid pro quo*,[254] the *Buckley* Court ruled that independent expenditures do not pose a risk of electoral corruption. The Court simply ignored the inevitable sense of fear, obligation and gratitude generated by huge independent political expenditures supporting or opposing a candidate, to say nothing of the hope (or fear) that such independent expenditures will be repeated (or avoided) in future elections. Ironically, when judicial elections are at stake, the Court has recognized the potentially corrupting nature of massive independent expenditures.[255]

In the years since *Buckley,* the Court has adhered to the four contested rulings by upholding state and federal limits on the size of campaign contributions in order to prevent corruption,[256] upholding the discriminatory presidential public financing scheme despite its unfair treatment of minority parties,[257] and upholding broad disclosure rules involving both campaign

253. *Id.* at 23–38.

254. *Id.* at 47.

255. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) (holding that a judge's failure to recuse himself from a case involving a contributor who had contributed $3 million to his judicial election campaign created a sufficiently serious risk of bias to violate the Due Process Clause of the U.S. Constitution).

256. In the years since *Buckley*, the Court has consistently upheld restrictions on the size and source of campaign contributions, except when the contribution ceiling is set so low as to starve the political process of the funds needed to carry on a robust campaign. *See, e.g.*, California Medical Ass'n v. FCC, 453 U.S. 182 (1981) (upholding the $5,000 limit on campaign contributions to political action committees (PACs) imposed by the Federal Election Campaign Act of 1971 (FECA)); Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000) (upholding state law limiting the size of campaign contributions to state political candidates); Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) (upholding the limits imposed by FECA on coordinated expenditures by candidate's political party); Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003) (upholding the federal ban on corporate campaign contributions to federal candidates). *But see* Fed. Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480 (1985) (striking down federal law imposing a $1,000 limit on contributions from PACs to publicly financed candidates); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (invalidating a federal law imposing a $250 ceiling on campaign contributions as unreasonably low); Randall v. Sorrell, 548 U.S. 230 (2006) (invalidating a Vermont law limiting campaign contributions because the limits imposed were unreasonably low).

257. Only two significant cases involving public funding of campaigns have reached the Supreme Court in the years since *Buckley*. In *Davis v. FEC*, 554 U.S. 724 (2008), the Court struck down the so-called "millionaires amendment" that allowed an opponent of a wealthy self-funded candidate to seek and receive much larger campaign contributions than the wealthy self-funded candidate. The Court held that candidates may not be subjected to discriminatory rules governing the raising of campaign funds solely on the basis of their personal wealth. *Id.* at 744. In *McComish v. Bennett*, 131 S. Ct. 644 (2010) (discussed *infra,* notes 260–66), the Court heard arguments about the constitutionality of an Arizona program designed to provide publicly funded candidates with matching funds to keep pace with a privately-funded candidate's fund-raising. As of writing, no decision has been handed down in the case, but, in light of the stay and the less than encouraging

contributions and independent expenditures,[258] while striking down Congress's effort to place ceilings on electoral spending by candidates, campaigns, and independent players supporting or opposing the candidate.[259]

Buckley left us, therefore, with a crazy quilt campaign finance system that no legislator had supported, and that no rational Founder would have established. In the campaign finance world that *Buckley* built, no ceiling can be placed on the demand for campaign cash, but limits can be imposed on campaign contributions, an important source of supply. Without a ceiling on campaign spending, candidates find themselves trapped in a classic arms control spiral under which they are unable to stop raising campaign money because they fear being outspent by an opponent, but are forced to raise the needed money in relatively small campaign contributions from a limited circle of contributors subject to a statutory maximum on the amount each can contribute. The net result is a world of unlimited campaign demand, and limited contribution supply—a classic invitation to black-market lawlessness. In effect, the Supreme Court has managed to replicate, at the heart of the democratic process, our failed national drug strategy of ignoring demand while seeking to control supply.

In the political world *Buckley* made, wealthy ideologues and ideological interest groups formally unconnected to any candidate exercise unprecedented electoral power because their massive independent campaign spending receives greater constitutional protection than spending by traditional campaign contributors, or the candidate's own political party. What's worse, the massive ideological spending can now be channeled through organizations falling outside the *Buckley* disclosure rules, making it impossible to track its source. And, into this already deeply dysfunctional campaign world, *Citizens United* has now

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oral argument, the Court appears poised to strike the program down.

258. The post-*Buckley* Court has consistently upheld disclosure rules against First Amendment challenge. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 914 (2010) (upholding the disclosure provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA)); Doe v. Reed, 130 S.Ct. 2811, 2818 (2010) (upholding the facial validity of a state law allowing the public disclosure of signatories of referendum petitions). The ingenuity of politicians has, however, permitted the emergence of loopholes that block disclosure of many independent expenditures, especially by corporations. An effort to plug the corporate disclosure loophole was blocked in the Senate by a Republican filibuster on a cloture vote of 57–41. *See Keeping Politics in the Shadows,* N.Y. TIMES, July 28, 2010, at A22; *Disclose Act—Cloture Fails*, HERITAGE FOUNDATION: THE FOUNDRY (July 27, 2010), http://blog.heritage.org/2010/07/27/disclose-act-%E2%80%93-cloture-fails/.

259. In the years since *Buckley*, the Court has invalidated every effort to place a cap on campaign expenditures, whether by a candidate or by independents. *See* Fed. Election Comm'n v. Massachusetts Citizens for Life (MCFL), 479 U.S. 238 (1986) (invalidating FECA ban on independent expenditures by non-profit corporations); Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604 (1996) (invalidating FECA limits on independent expenditure made by political parties prior to the selection of their candidate); Randall v. Sorrell, 548 U.S. 230 (2006) (invalidating Vermont's effort to impose expenditure limits on campaigns); *Citizens United*, 130 S. Ct. 876 (2010) (overturning *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990) and *McConnell v. Federal Elections Comm'n*, 540 U.S. 93 (2003) to invalidate federal law, banning independent campaign expenditures by for-profit corporations in the thirty or sixty days prior to an election).

parachuted the vast trove of corporate wealth, vesting for-profit corporations with First Amendment rights to pour unlimited amounts into a campaign on the eve of an election without public disclosure.

Most recently, the Court has even poured cold water on the effort to develop a viable system for publicly funding campaign spending.[260] The *Buckley* Court had upheld the constitutionality of government campaign funding, but had insisted that any campaign subsidy program be voluntary.[261] In return for voluntary subsidies, the *Buckley* Court recognized that candidates may be required to limit total campaign spending.[262] If both candidates opt for public financing, the system works fine. But if only one candidate accepts the spending limits that usually go with public campaign subsidies, that candidate risks being badly outspent by a privately-funded opponent whose spending is constitutionally immune from regulation. Faced with the prospect of such a potentially lethal spending imbalance, many candidates reluctantly decline to participate in public funding programs. In order to induce candidates to participate, several states and localities turned to "matching triggers," funneling additional campaign subsidies to a publicly-funded candidate to keep up with the spending of privately-funded opponents.[263] Lower courts divided over whether the provision of "matching" campaign subsidies triggered by an opponent's private fundraising success imposes an unconstitutional penalty on the privately-funded candidate.[264] In *Arizona Free Enterprise Club's Freedom Club PAC v.*

260. McComish v. Bennett, 130 S. Ct. 3408 (2010) (staying distribution of matching funds to candidates participating in Arizona's public financing system), *cert. granted*, 131 S. Ct. 644 (2010).

261. Buckley v. Valeo, 424 U.S. 1, 108 (1975).

262. *Id.* at 95.

263. A matching fund approach to campaign subsidies in one or more statewide elections has been adopted by Arizona, Florida, Maine, Nebraska, New Mexico, North Carolina and Wisconsin. *See* ARIZ. REV. STAT. § 16-952 (2009); FLA. STAT. § 106.34 (2009); ME. REV. STAT. TIT. 21-A, § 1122(1) (WEST 2010); NEB. REV. STAT. §§ 32-1604, 1606 (2010); N.M. STAT. ANN. §1-19A-2(D) (WEST 2010); N.C. GEN. STAT. §§163-278.62(12), (18), 67(A)(2) (2010); WIS. STAT. ANN. §§ 11.511(2)(-(3), 11.513(2) (WEST 2009). *See* Charter of the City of Albuquerque, ART. XVI, § 12 (2009), *available at* http://www.amlegal.com/albuquerque_nm/; CHAPEL HILL, N.C., GEN. ORDINANCES OF THE TOWN§ 2-95(a) (2010), *available at* http//www.ci.chapel-hill.nc/us/index.aspx?page=115; NEW HAVEN, CONN., CODE OF GENERAL ORDINANCES § 2-822(2) (2010).

264. Maine's matching funds program was upheld in *Daggett v. Comm'n on Governmental Ethics and Elections Practices*, 205 F.3d 445 (1st Cir. 2000). North Carolina's program was upheld in *N.C. Right to Life Comm'n Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 437–38 (4th Cir. 2008). Arizona's plan was upheld by the Ninth Circuit and is currently under Supreme Court review. McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010) *cert. granted*, 131 S. Ct. 644 (2010). Minnesota's program was invalidated in *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), and abandoned. Florida's matching funds program was enjoined in *Scott v. Roberts*, 612 F.3d 1279, 1282 (11th Cir. 2010). Connecticut's matching funds program was invalidated in *Green Party of Conn. v. Garfield*, 616 F3d 213 (2d Cir. 2010), and was subsequently repealed. *See also* Davis v. Fed. Election Comm'n, 554 U.S. 724, 744 (2008) (invalidating the so-called "Millionaire's Amendment" which dramatically raised the ceiling on campaign contributions to a candidate opposed by a wealthy, self-financed candidate). While the precise 5–4 holding of *Davis* dealt with the unconstitutionality of imposing different fundraising regimes on similarly situated

Bennett, Chief Justice Roberts, writing for five justices, invalidated the use of matching funds, ruling that the prospect of a government match for each dollar of private spending unconstitutionally burdened and deterred the speech of privately funded candidates.[265] Justice Kagan, writing for the four dissenters, rejected the idea that subsidizing a reply to a wealthy candidate constituted a cognizable First Amendment injury, as long as the subsidies were available to all points of view—but she was one vote short.[266]

Significantly, however, the Court's majority concentrated on the close causal relationship between a private speaker's decision to spend campaign money and the government's match, leaving open forms of public campaign financing that do not display such a close causal relationship. With the invalidation of the matching fund concept, public financing efforts are restricted, as a practical matter, to the matching of small private contributions, often by a multiple match, a technique that has been used effectively in New York City;[267] fixed subsidies pegged high enough to anticipate significant private fundraising by an opponent; or subsidy programs where the recipients' contribution and spending cap is waived if an opponent raises substantial private funds.

Tell the truth. If you had tried, could you have developed a worse way to finance a robust, egalitarian democracy? If the answer is "yes," you may be a candidate for the next Supreme Court vacancy. D minus, please consider withdrawing from the program!

IV.
CAN ANYTHING BE DONE?

The first thing that can be done is to overrule *Citizens United.* The decision isn't just terrible democracy; it's bad law.[268] Justice Kennedy's undoubtedly well-meaning majority opinion is an exercise in question-begging, an undisciplined mixture of reverence for precedent when it suits him, and a willingness to jettison precedent when it gets in his way. As I have noted, *supra*, Justice Kennedy begins his majority opinion in *Citizens United* by putting the First Amendment rabbit into the hat when he assumes that the case involves the constitutionality of treating two categories of similarly-situated speakers—

candidates solely on the basis of wealth, *id.* at 741, the challengers in *McComish* read the opinion as dooming all efforts to link campaign subsidies to the success of an opponent's fundraising.

265. 131 S. Ct. 2806, 2813 (2011).

266. *Id.* at 2830.

267. *See* ANGELA MIGALLY & SUSAN LISS, BRENNAN CENTER FOR JUSTICE, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE (2011), *available at* http://www.brennancenter.org/content/resource/small_donor_matching_funds_the_nyc_election_experience/.

268. The Court is capable of correcting its mistakes when it gets an issue wrong at the core of our political culture. *See, e.g.*, West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1944), *rev'g* Minersville School District v. Gobitis, 310 U.S. 586 (1940) (holding that school children may not be forced to salute flag in violation of their conscience).

corporate and non-corporate—differently.[269] Justice Kennedy notes, correctly, that since a government decision to treat comparable speakers differently is often driven by hostility to the disfavored speaker's message or status, classic First Amendment doctrine requires a very powerful justification before allowing the government to treat similarly-situated speakers differently.[270] But he then simply ignores the fact that the central legal issue in *Citizens United* is whether for-profit business corporations and human beings are similarly-situated First Amendment speakers in the first place.

The privileged status of the for-profit business corporation as an artificial, state-created legal entity blessed with unlimited life, limited-liability, highly favorable techniques of acquiring, accumulating, and retaining vast wealth through economic transactions having nothing to do with politics, and animated by one, and only one, purpose—making money in the relatively short-term, raises important philosophical questions about whether corporations and human speakers (who, unlike corporations, are burdened by the certainty of death, the specter of personal bankruptcy, substantial income taxes, and a conscience that sometimes gets in the way of the unremitting pursuit of short-term self-interest) are even in the same First Amendment ballpark.

Justice Kennedy's opinion begs that crucial question by simply assuming that for-profit business corporations and individual speakers are constitutionally indistinguishable from a First Amendment perspective. As I have noted, *supra*, he ignores the fact that one hundred years ago, confronted by a similar philosophical question, the Court ruled that for-profit business corporations are sufficiently different from human beings to fall outside the protection of the Fifth Amendment's right to remain silent.[271] That's still the law.[272] Justice Kennedy explicitly affirmed the Fifth Amendment difference between human beings and large for-profit corporations in his dissent in *Braswell v. United States*.[273] The *Citizens United* majority never persuasively confronts the issue of why the First Amendment's free speech clause should not also be deemed a "right of a natural person, protecting the realm of human thought and expression."

In fairness, Justice Kennedy asserts in *Citizens United* that voters (as

269. 130 S. Ct. 876, 884 (2010).

270. *Id. See* Rosenberger v. Rector, 515 U.S. 819 (1995) (striking down the University of Virginia's policy of paying printing fees for student groups but denying payment for the same fees for a Christian student newspaper as a denial of the students' right to free speech); Ark. Writers' Project v. Ragland, 481 U.S. 221 (1987) (holding that an Arkansas sales tax scheme that taxes general interest magazines but exempts newspapers and religious, professional, trade, and sports journals violates the First Amendment's freedom of the press guarantee); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983) (invalidating the differential taxation of newspapers).

271. Hale v. Henkel, 201 U.S. 43 (1906).

272. Braswell v. United States, 487 U.S. 99 (1988).

273. *Id.* at 119 (Kennedy, J., dissenting). *See also* discussion *supra* notes 6–7 and accompanying text.

hearers) are benefitted by granting First Amendment protection to the electoral speech of for-profit corporations because speech, from any source, enriches the political debate.[274] But, if *Citizens United* rests primarily, or even solely, on the alleged benefits to voters generated by unlimited corporate electioneering immediately before an election, surely the majority was obliged to confront the counter-argument that unlimited corporate electioneering immediately before an election threatens to overwhelm opposing messages to the detriment of a fully-informed electorate.[275] It is no answer to point to the decision to treat corporations as "persons" for the purposes of section 1 of the Fourteenth Amendment in connection with efforts to deprive them of property or otherwise interfere with their economic operations.[276] Since the very purpose of inventing the for-profit business corporation was to unleash its economic potential, it makes sense to vest corporations with constitutional protection against improper economic regulation. It is, however, a huge—and unsupported—jump to vest corporations with non-economic constitutional protections that flow from our respect for human dignity. Robots have no souls. Neither do for-profit business corporations. Vesting robots or corporations with constitutional rights premised on human dignity is legal fiction run amok. At the rate the Court is going, soon you'll be able to be adopted by a corporation. Maybe even marry one. Until then, though, you'll just have to settle for being ruled by them.[277]

Nor is it persuasive to argue that since certain for-profit corporations, like newspapers, enjoy First Amendment protection for their speech activities, all other for-profit corporations, like banks and oil companies, must also be vested with full First Amendment protection to speak. The constitutional protection afforded to corporations or individuals engaged in the business of speech—whether it involves publishing a newspaper, owning a radio or television station, producing a movie or a television program, or running an Internet outlet—derives from the explicit textual protection afforded to the "press" by the First Amendment, and from the important institutional role played by a free press in a democracy.[278] The business of operating a "press" (in the Founders' time, a printing press) is the only economic activity explicitly protected by the

274. *Citizens United*, 130 S. Ct. at 907 (explaining that limiting the speech of for–profit corporations would mean that "the electorate has been deprived of information, knowledge, and opinion vital to its function").

275. *See id.* at 973 (Stevens, J., dissenting).

276. *See* Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886) (holding that corporations are "persons" within meaning of Fourteenth Amendment's protection of property).

277. I've used a ruder word in less dignified settings. *See* Burt Neuborne, *Corporations Aren't People*, THE NATION, Jan. 31, 2011, at 20–22, *available at* http://www.thenation.com/article/157720/debating-citizens-united?page=0,1.

278. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, *or of the press*; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.") (emphasis added).

Constitution.[279] It would, I believe, be a serious mistake to leverage the functional protection of "the freedom of the press" into a general First Amendment protection of massive corporate campaign expenditures on the eve of an election. I concede, of course, that it is not an easy task to decide when a given speaker is entitled to heightened "press" protection.[280] But the contrary position collapses the press clause into the speech clause, rendering one of the six textual pillars of the First Amendment superfluous. Efforts to give meaning to the press clause by arguing that the speech clause was intended to protect oral communications (slander), while the press clause was intended to protect written communications (libel), ignore James Madison's June 8, 1789 presentation to the House of Representatives of the first draft of the First Amendment. Madison's June 8 draft grants explicit "speech" protection to oral and written speech, and then goes on to grant explicit protection to the "press."[281] That's where the *New York Times'* heightened speech protection comes from.

Finally, the fact that the Court had previously recognized a First Amendment right to commercial speech (which is often disseminated by corporations) not only fails to support a general right of corporate free speech, it cuts strongly against it. Commercial free speech is avowedly designed to maximize the economic efficiency of the market.[282] As such, it is closely linked with the other constitutional protections afforded corporations in order to permit them to fulfill their economic mandate. Precisely because corporations lack the dignitary status of human beings, commercial speech may be regulated in ways that would never be permitted in the first class speech compartment—most importantly on grounds of its falsity or misleading nature.[283] If similar criteria

279. *See, e.g.*, Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633 (1975) ("Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.").

280. *E.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring) ("The very task of including some entities within the 'institutional press' while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country.") On the other hand, we decide who is a member of the press when we disburse press credentials, set postal rates, decide who gets preferential tax status.

281. Madison's June 8 draft of what became the First Amendment provided:

> The people shall not be deprived of their right to speak, to write or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

FARBER & SHERRY, *supra* note 19, at 325.

282. Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976) (holding, in part, that commercial speech is "indispensible" insofar as it informs consumers in a free enterprise society).

283. *See* Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5 (1989); Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437 (1980).

were imposed on corporate (or any other) political advertising, very little would survive.

Having begged the central legal question of whether a for-profit business corporation is comparable to a human being for the purposes of First Amendment analysis, Justice Kennedy then relies on *stare decisis* to reject the two major justifications for treating for-profit business corporations and human beings differently as electoral speakers. Confronted by an argument that the vast, artificially generated pool of economic resources controlled by for-profit corporations risks overwhelming the capacity of most flesh-and-blood opponents to contest elections, Justice Kennedy, instead of responding to the argument on its merits, cites to precedent holding that a First Amendment resource imbalance (between two human speakers) may never be corrected by silencing the overly-strong speaker, but must always seek to strengthen the weak voice.[284] While *Buckley v. Valeo* held this principle applicable to electoral resource differentials between and among human beings,[285] *Austin v. Michigan State Chamber of Commerce* had held the general principle inapplicable to the massive electoral resource imbalance that separates individuals from for-profit business corporations on the eve of an election.[286] Justice Kennedy's appeal to *Buckley* as precedent is, therefore, hardly an adequate basis to reject out of hand the resource imbalance justification for treating corporations differently from human beings in electoral contexts. If anything, precedent in *Austin* tilted the other way. At a minimum, the issue had never been confronted in the context of electoral speech by massively wealthy for-profit corporations. Indeed, the record was devoid of factual material on the question.

Justice Kennedy then goes on to reject the argument that fear of electoral corruption would justify treating corporate political speakers with massive resources and a mandate to maximize short-term profits differently from human beings. Once again, he invokes precedent, observing that *Buckley* had held that independent expenditures do not create a substantial risk of corruption because the donor does not confer with the candidate in advance.[287] But in the only context the current justices really know anything about—judging—the Court (including Justice Kennedy) rejected the wafer-thin distinction between contributions and independent expenditures as a potential source of corruption. In *Caperton v. A.T. Massey Coal Co.*, the Court required a justice of the West Virginia Supreme Court to step aside in a case where one of the litigants had independently expended $3 million in support of the judge's election.[288] Justice Kennedy recognized in *Caperton* that a judge's gratitude for past independent

284. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

285. 424 U.S. 1, 48–51 (1976).

286. 494 U.S. 652 (1990) (upholding a ban on corporate independent expenditures on the eve of a local election).

287. *Citizens United*, 130 at 908–09 (citing Buckley v. Valeo, 424 U.S. 1, 23, 39 n.45 (19) (1976)).

288. 129 S. Ct. 2252 (2009).

favors, and hope for future ones, created an unacceptably high risk of judicial bias.[289] Why elected judges are vulnerable to such "corruption," but elected legislative and executive officials are absolutely immune is a mystery known only to the Court's majority. Thus, while the *Buckley* precedent weighed against the corruption argument, the precedent had been seriously eroded in *Caperton*, and had never even been considered in the economically-charged atmosphere of huge for-profit corporations.

Having twice relied heavily on the precedential value of *Buckley*, a 1976 precedent arguably weakened by later cases like *Austin* and *Caperton*, Justice Kennedy then dramatically switches *stare decisis* gears and overrules both *Austin*, which had upheld a ban on pre-election spending by for-profit corporations,[290] and *McConnell v. FEC*, a case directly on point decided in 2003, which had upheld the federal statute at issue in *Citizens United*.[291] It's a master class on how precedent can be binding and non-binding at the same time.

The doctrinal critique of the Kennedy opinion does not stop with its question-begging First Amendment analysis and its arbitrary and inconsistent approach to precedent. Ignoring canons of judicial restraint dating from Justice Brandeis,[292] the *Citizens United* opinion is far broader than necessary to decide the actual case or controversy before the Court, and considerably broader than any remedy the litigants sought. The case involved a one-hour video hatchet job on Hillary Clinton entitled *Hillary: The Movie*, a purported documentary produced by Citizens United, a right-wing, nonprofit group that had received trace amounts of funding (less than one percent) from for-profit corporations. According to the sparse record, no for-profit corporation had played a role in the video's genesis or production. Citizens United distributed the video by making it available on cable television free of charge, but only if a prospective viewer took the affirmative step of downloading it. When the Federal Election Commission (FEC) made no effort to regulate the video's distribution, Citizens United, anxious to provoke a test case, waived a red flag in front of the government bull, demanding a promise from the FEC that no action would be taken against the organization for its distribution of the video. The government foolishly took the bait. Advised, no doubt, by General Custer, the FEC refused to concede that the video could not be regulated, and the game was on.

It's hard to count the ways the FEC was wrong in seeking to regulate the

289. *Id.* at 2263–64.

290. 494 U.S. 652 (1990)

291. 540 U.S. 93 (2003). Unfortunately, Justice Kennedy's arbitrary and inconsistent approach to precedent in *Citizens United* was made easier for him because the United States, in defense of the statute, failed to assert either the overbalancing or corruption arguments, choosing to stand or fall on a far weaker claim about corporate governance that, as Justice Kennedy noted, might justify regulation of corporate electioneering, but not its prohibition. *Citizens United*, 130 S. Ct. at 911.

292. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–46 (1936) (Brandeis, J., concurring) (noting that the Court should restrict its decisions to actual cases and controversies and refrain from issuing advisory opinions).

video, and the numerous narrower grounds for decision that were available to the Court.[293] Most importantly, it was necessary for a viewer to take the affirmative step of downloading the video in order to view it, the functional equivalent of taking a book off a library shelf. Whether approached as a matter of defining the term "electioneering communication" in the governing statute, or as a freestanding First Amendment defense, the necessity for active collaboration by a hearer/viewer should have ended the government's effort to censor the video before it began. The Solicitor General's office mishandled this issue at the first oral argument in *Citizens United*, asserting in answer to the Justices' questioning that Congress would be constitutionally empowered to ban the dissemination of books produced with corporate funding during the period immediately before a covered election. That's just wrong. Once a hearer affirmatively evinces a desire to receive an electoral message—by downloading a video or acquiring a book (no matter whom the message is from)—the government's regulatory power is at its lowest ebb.[294]

Two additional dispositive statutory issues were ignored. The ban on disseminating electioneering communications funded by for-profit corporations was applicable in the thirty days preceding a covered election—in this case a state Democratic presidential primary—only if 50,000 eligible voters in that election were likely to view or hear it on an electronic media. How likely was it that more than 50,000 persons eligible to vote in a state Democratic presidential primary would have affirmatively elected to download a one hour hatchet job on Hillary Clinton during the thirty days before the primary? Moreover, since the corporate funding amounted to less than one percent, Circuit precedent had already recognized an implied statutory exemption for electioneering communications bearing merely trace amounts of corporate funding.[295] Finally, even if, despite the canon of constitutional avoidance, the statute was deemed applicable, the Supreme Court had already carved out a First Amendment safe harbor (the *Massachusetts Citizens for Life*, or *MCFL,* exemption) for electoral communications by grassroots non-profit groups like Citizens United with only *de minimis* for-profit corporate funding.[296]

As Justice Stevens caustically pointed out, the *Citizens Union* majority simply leapfrogged the numerous narrower grounds for decision in order to

293. *See* 130 S. Ct. at 931 (Stevens, J., dissenting).

294. *Compare* Lamont v. Postmaster General, 381 U.S. 301 (1965) (holding that the First Amendment protects the willing receipt of "political propaganda" in the mail from a foreign government), *with* Rowan v. Post Office Dep't, 397 U.S. 728 (1970) (holding that the refusal to deliver material to unwilling recipients does not violate the First Amendment).

295. *See* Colorado Right to Life Comm'n v. Coffman, 498 F.3d 1137, 1148–1151 (10th Cir. 2007) (listing cases recognizing the implicit *de minimis* exception).

296. *See* Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238 (1986) (noting that the purposes of restricting corporate speech—namely preventing an unfair political advantage to groups whose aim is to amass wealth—is absent in the context of an organization formed to disseminate political ideas rather than amass capital).

overrule two precedents and decide the case in the broadest possible way.[297] Given its self-propelled, gratuitous nature, I believe that much, if not all, of *Citizens United* is dicta—good law as long as five votes support it, but not worthy of the *stare decisis* respect accorded to a case's holding.

Overruling *Citizens United* is only a first step. The path not taken in the Court's democracy cases has led us to Felix Frankfurter's revenge: an accidental democracy built by judges who never ask themselves what kind of democracy they are building. Sometimes, as in *Baker v. Carr* and *Bush v. Gore*, American courts approach a hard democracy case as an exercise in equality;[298] sometimes, as in *Buckley* and *López Torres*, as an exercise in autonomy,[299] but almost never as an exercise in democracy. A half-century after *Baker*, voter turnout in presidential elections still hovers at sixty percent or less, at forty percent in mid-term elections, and much lower in most state and local elections;[300] voting turnout is still disproportionately skewed to the wealthy and better educated;[301] most election districts are gerrymandered to assure that the partisan incumbent wins;[302] both major parties routinely manipulate the districting process for partisan gain;[303] the two major parties often run a duopoly where entrenched political bosses select the candidates;[304] minor parties cannot effectively challenge the major parties' hegemony;[305] and the very rich, now including for-profit business corporations, own the democratic process lock, stock, and barrel.[306]

It doesn't have to be this way. The Supreme Court is fully capable of committing to the model of robust, egalitarian self-government latent in the Constitution, and forging a law of democracy worthy of the Founders. Indeed, that law is hiding in plain sight in many of the vigorous dissents that have

297. 130 S. Ct. at 936–38 (Stevens, J., dissenting).

298. Bush v. Gore, 531 U.S. 98 (2000) (construing the manner in which Florida votes were being counted to constitute an equal protection violation).

299. N.Y. State Bd of Elections v. López Torres, 552 U.S. 196 (2008) (recognizing political parties' autonomy right to choose the candidate selection procedures they desire); Buckley v. Valeo, 424 U.S. 1 (1976) (recognizing an autonomy right to spend unlimited sums on election).

300. *See Voter* Turnout, UNITED STATES ELECTION PROJECT, http://elections.gmu.edu/voter_turnout.htm (last visited June 16, 2011).

301. *See* Neuborne, *supra* note 77, at 38–42.

302. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735 (1973) (upholding a bipartisan gerrymander that protected incumbents).

303. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267 (2004) (upholding a gerrymander that gave Republicans two-thirds of the house seats even though they only constituted roughly half of the population in the state).

304. *See, e.g.*, N.Y. State Bd of Elections v. López Torres, 552 U.S. 196 (2008) (upholding a convention process that vests *de facto* nominating power over judicial candidates in political party officials).

305. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (upholding a ban on cross-endorsement by minor parties).

306. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (striking down limitations on corporate political spending).

accompanied the Court's most dysfunctional democracy cases.[307] The Court started down the right in *Anderson v. Celebrezze* when it invoked the First Amendment to strike down Ohio's early filing requirement because the burden imposed on smaller parties was deemed likely to inhibit the quality and diversity of political debate,[308] only to retreat in later cases from seeking to develop a functional law of democracy.

The Court could start by recognizing that the First Amendment's text was intended to be democracy's best friend; not its enemy. The six luminous textual ideas in the First Amendment—no establishment of religion; free exercise of religion; freedom of speech; freedom of the press; freedom of assembly; and freedom to petition for redress of grievances—are carefully organized on an "inside/out axis," beginning in the interior precincts of the human conscience with Establishment and Free Exercise, and proceeding in concentric circles of increasingly public interaction through the Speech, Press, and Assembly Clauses, culminating in the Petition Clause with formal interaction with the State. Such a careful inside/out order of the ideas may have been random, but I doubt it. The First Amendment's text is a blueprint for a functioning democracy,[309] setting out the Founders' vision of the half-life of a democratic

307. Glimpses of a constitutional regime more supportive of robust, egalitarian democracy can be found in: Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 929 (2010) (Stevens, Ginsburg, Breyer, and Sotomayor, J., concurring in part and dissenting in part); Davis v. Fed. Election Comm'n, 554 U.S. 724, 749 (2008) (Stevens, Souter, Ginsburg, and Breyer, J., dissenting); Randall v. Sorrell, 548 U.S. 230 281 (2006) (Stevens Ginsburg, and Souter, J., dissenting); Clingman v. Beaver, 544 U.S. 581, 608 (2005) (Stevens, Ginsburg, and Souter, J., dissenting); Vieth v. Jubilirer, 541 U.S. 267, 317, 343, 355 (2004) (Stevens, Ginsburg, Souter and Breyer, J., dissenting); Bush v. Gore, 531 U.S. 98, 129, 135, 144 (2000), (Stevens, Ginsburg, Souter, and Breyer, J., dissenting); Cal. Dem. Party v. Jones, 530 U.S. 567, 590 (2000) (Stevens, Ginsburg, J., dissenting); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 370, 372 (1997) (Stevens, Ginsburg, and Souter, J., dissenting); Shaw v. Reno, 509 U.S. 630, 658, 679 (1993) (White, Blackmun, Stevens, and Souter, J., dissenting); Burdick v. Takushi, 504 U.S. 428, 442 (1992) (Kennedy, Blackmun, and Stevens, J., dissenting); Munro v. Socialist Workers Party, 479 U.S. 189, 200 (1986) (Marshall and Brennan, J., dissenting); Ball v. James, 451 U.S. 355, 374 (1981) (White, Brennan, Marshall, and Blackmun, J., dissenting); City of Mobile v. Bolden, 446 U.S. 55, 94, 103 (1980) (White, Brennan, and Marshall, J., dissenting); Richardson v. Ramirez, 418 U.S. 24, 56, 72–86 (1974) (Marshall and Brennan, J., dissenting); Storer v. Brown, 415 U.S. 724, 755 (1974) (Brennan, Douglas, and Marshall, J., dissenting); Gaffney v. Cummings, 412 U.S. 735, 772 (1973) (Brennan, Douglas, and Marshall, J., dissenting); Rosario v. Rockefeller, 410 U.S. 752, 763 (1973) (Powell, Douglas, Brennan, and Marshall J., dissenting).

308. 460 U.S. 780, 794 (1983) (noting that "by limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, . . . restrictions [like the Ohio early filing deadline] threaten to reduce diversity and competition in the marketplace of ideas" and that "[h]istorically, political figures outside the two major parties have been fertile sources of new ideas and new programs" and concluding that "[i]n short, the primary values protected by the First Amendment, 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'—are [best] served when election campaigns are not monopolized by the existing political parties") (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

309. *See* Burt Neuborne, *"The House Was Quiet and the World Was Calm. The Reader Became the Book,"* 57 VAND. L. REV. 2007, 2024 (2004) ("The formal order of the First Amendment draws a road map of democracy for us, from the genesis of an idea in the mind of a

idea, beginning in the recesses of the human (not corporate) mind, proceeding through increasingly public stages of communication and interaction with fellow citizens through the speech, press, and assembly clauses, and culminating in an effort in the petition clause to turn the idea into law.[310] It borders on the tragic that the First Amendment, designed by the Founders to be democracy's best friend, has been turned by the Court into its enemy in so many settings.

Our legally-imposed system of voter registration and ballot access operates effectively to screen out the very poor and uneducated. Our legally-imposed system of party autonomy at the nomination stage and partisan apportionment at the electoral stage places enormous political power in the hands of political elites. Our legally-imposed limits on minority parties perpetuate a two-party duopoly. Our legally-imposed approach to laws impeding participation in the democratic process vests considerable power in the political majority to maintain the *status quo*. Finally, our legally-imposed system of campaign financing assures that political discourse will be dominated by the very wealthy. It could be argued, of course, that the constitutionalized version of democracy that has emerged from the Supreme Court over the last half-century is preferable to the more robust, egalitarian version that I believe is latent in the constitutional text. In many ways, it resembles Joseph Schumpeter's vision of a democracy of the elites.[311] Perhaps a democracy of the elites is all that can—or should—be drawn from the constitutional text. But that is a question worth debating; not one to be swept under some doctrinal rug.

V.
CONCLUSION

Whether a principled constitutional vision of a robust and egalitarian of democracy takes the form of a rejuvenated equal protection approach that applies genuinely strict scrutiny to unequal apportionment of political power (as opposed to the watered-down test in *Rosario*), or a jurisprudence resting on either the Guarantee Clause or the First Amendment that imposes a similarly substantial burden of justification on laws limiting participation in the democratic process (as in *Anderson v. Celebreeze*), or on a non-textual approach similar to the Court's federalism and separation of powers jurisprudence, American judges possess the tools needed to protect robust, egalitarian democracy if only they will confront the issue directly, and use them.

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free citizen, to its initial communication to others, to mass dissemination of the idea, to collective action in advancement of the idea, to formal enshrinement of the idea in law.").

310. *See id.* at 2022–24.

311. *See Part IV: Socialism and Democracy*, *in* JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 232 (3d. ed. 1950) (predicting that democracy would evolve by allowing elites to resolve divisive political issues with controlled input from the masses).