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## Democratic Conditions

Barry Sullivan

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## Democratic Conditions

Barry Sullivan\*

*Two nations; between whom there is no intercourse and no sympathy; who are as ignorant of each other's habits, thoughts, and feelings, as if they were dwellers in different zones, or inhabitants of different planets; who are formed by a different breeding, are fed by a different food, are ordered by different manners, and are not governed by the same laws. . . . THE RICH AND THE POOR.*

—Benjamin Disraeli<sup>1</sup>

*With us the great divisions of society are not the rich and poor, but white and black; and all the former, the poor as well as the rich, belong to the upper class, and are respected and treated as equals, if honest and industrious; and hence have a position and pride of character of which neither poverty nor misfortune can deprive them.*

—John C. Calhoun<sup>2</sup>

*The government [the founders] devised was defective from the start, requiring several amendments, a civil war, and momentous social*

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1. BENJAMIN DISRAELI, *SYBIL OR THE TWO NATIONS* 76–77 (1845).

2. John C. Calhoun, *On the Oregon Bill* (June 27, 1848), in JOHN C. CALHOUN, *SPEECHES OF JOHN C. CALHOUN DELIVERED IN THE HOUSE OF REPRESENTATIVES AND IN THE SENATE OF THE UNITED STATES* 505–06 (Richard J. Crallé ed., 1883).

*transformation to attain the system of constitutional government, and its respect for individual freedoms and the human rights, that we hold as fundamental today.*

—Thurgood Marshall<sup>3</sup>

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#### INTRODUCTION

Americans like to boast, as Gerald R. Ford put it when he assumed the duties of the presidency on that fateful day in August 1974, that “[h]ere the people rule.”<sup>4</sup> Or, as Abraham Lincoln observed more than a century before, ours is a “government of the people, by the people, and for the people.”<sup>5</sup> But many Americans are inclined to doubt the truth of such sentiments today. Far from believing that “[h]ere the people rule,” many Americans, seemingly without regard to racial or ethnic identity or political affiliation, now feel that they have little or no voice or influence in their government. On the contrary, they believe that government is controlled by an elite of one sort or another that is indifferent to their problems and frequently hostile or indifferent to their values, commitments, and viewpoints.

In a recent study of rural America, for example, the well-known sociologist Robert Wuthnow writes that, “[w]hether Washington was ‘up there,’ ‘down there,’ or someplace else in people’s minds, it was so far

3. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

4. Gerald R. Ford, Remarks Upon Taking the Oath of Office as President at the White House (Aug. 9, 1974), <https://www.fordlibrarymuseum.gov/library/speeches/740001.asp> [<https://perma.cc/B9P6-N67H>].

5. Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), in THE LIBRARY OF AMERICA, ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859–1865, at 536 (Roy P. Basler ed., 1989).

away that the people” whom he and his research team interviewed “couldn’t understand it.”<sup>6</sup> According to Professor Wuthnow, his respondents perceived Washington to be so far away that they felt helpless.<sup>7</sup> Moreover, just as his respondents professed that they could not understand Washington, they were also pretty sure that “Washington didn’t understand them. ‘They’re just not listening to us out here.’”<sup>8</sup> Indeed, Professor Wuthnow’s respondents thought that Washington was not listening to “anybody small”—not to “the small farmer, the small-business owner, or people living in small places.”<sup>9</sup> In their view, Washington was listening only to “somebody ‘big’”—to “the big interests, big cities, big business, and big farmers. Washington itself was big, too big to get anything done, run by the big boys who only knew how to talk big. It was ‘a bunch of big-headed guys’ there with brilliant ideas that didn’t work.”<sup>10</sup>

In a similar vein, Joan Williams, a leading expert on employment law and the sociology of work, writes:

I focus on a simple message: when you leave the two-thirds of Americans without college degrees out of your vision of the good life, they notice. And when elites commit to equality for many different groups but arrogantly dismiss “the dark rigidity of fundamentalist rural America,” this is a recipe for extreme alienation among working class whites. Deriding “political correctness” becomes a way for less-privileged whites to express their fury at the snobbery of more-privileged whites. . . . [T]he hidden injuries of class now have become visible in politics so polarized that our democracy is threatened.<sup>11</sup>

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6. ROBERT WUTHNOW, *THE LEFT BEHIND: DECLINE AND RAGE IN SMALL-TOWN AMERICA* 98 (2018).

7. *Id.*

8. *Id.*

9. *Id.* at 99.

10. *Id.*; see also Eduardo Porter, *The Hard Truths of Trying to ‘Save’ the Rural Economy*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/interactive/2018/12/14/opinion/rural-america-trump-decline.html?searchResultPosition=37> [<https://perma.cc/M43F-T8FH>] (describing the inadequacy of many of the proposals put forth to reverse the economic downturn in rural America).

11. JOAN C. WILLIAMS, *WHITE WORKING CLASS: OVERCOMING CLASS CLUELESSNESS IN AMERICA* 4 (2017) (footnotes omitted); see also ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* 136–37 (2016) (“You are patiently standing in a long line leading up a hill . . . You are situated in the middle of this line, along with others who are also white, older, Christian, and predominantly male. . . . You see people *cutting in line ahead of you!* . . . As they cut in, it feels you are being moved back. How can they just do that? Who are they? Some are black. . . . Women, immigrants, refugees, public sector workers—where will it end? Your money is running through a liberal sympathy sieve you don’t control or agree with. . . . And President Obama: how did *he* rise so high?”); *id.* at 215 (“[A]s members of the right, [the older white men] had objected in principle to cutting in line, and disliked the overused word ‘victim.’ Still—and this was unsayable—they were beginning to *feel* like victims. Others had moved forward; they were the left behind. They disliked the word ‘suffer,’ but

Professor Williams adds that, “Once the elite cast the white working class out of its ambit of responsibility, the elite did what elites do. They ignored those who print their *New York Times*, make their KitchenAides, tell them at the doctor’s to undress from the waist down.”<sup>12</sup> According to Professor Williams, “[t]he professional class first stopped noticing, and then started condescending. Class cluelessness became class callousness.”<sup>13</sup>

The alienation that many feel—particularly, but not exclusively those who live in relatively homogeneous, rural communities—is directed at society as well as government, and it seems as much the product of cultural concerns as of concerns about rising economic inequality. Many believe that their values, which once were mainstream and dominant, have now been marginalized.<sup>14</sup> Political scientists Pippa Norris and Ronald Inglehart explain:

Traditional identities concerning faith, family, ethnicity, and nation, common in the mid-twentieth century, are no longer predominant in Western societies, especially among cultural elites. A tipping point has emerged where social conservatives have become increasingly resentful at finding themselves becoming minorities on the losing side of history. They may also feel that they reflect the “real” majority in America—especially if they live in isolated communities where friends, family, and neighbors share similar values, if they get much of their political information from conservative media bubbles like Fox TV and like-minded Facebook groups, and if opinion-leaders [are] willing to champion and articulate socially transgressive opinions. Politicians thereby have opportunities to mobilize social conservatives by blaming the erosion of traditional moral values on liberal elites, corrupt politicians, and the mainstream media, as well as denigrating rising out-

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they *had* suffered from wage cuts, the dream trap, and the covert dishonor of being the one group everyone thought stood unfairly ahead of the line.”); AMY GOLDSTEIN, *JANESVILLE: AN AMERICAN STORY* 291 (2017) (“Business people and economic development leaders had been urging GM to designate the plant as [permanently] closed, so that its site could be sold off and reused . . . . On that morning [when the re-designation was announced], they celebrated. Many of its former workers, however, had been hoping all this time that the plant would someday reopen. For them, the morning’s news, particularly as the U.S. auto industry was reaching record sales, was like a death knell.”).

12. WILLIAMS, *supra* note 11, at 130 (footnote omitted).

13. *Id.*

14. See, e.g., PIPPA NORRIS & RONALD INGLEHART, *CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM* 16 (2019) (“(The Interwar generation of non-college educated white men—until recently the politically and socially dominant group in Western cultures—has reached a tipping point at which their hegemonic status, power, and privilege is fading. Their values make them potential supporters for parties and leaders promising to restore national sovereignty (Make America Great Again), restrict immigration and multicultural diversity (Build a Wall), and defend traditional religious and conventional moral values . . . .”).

groups who benefit from socially liberal attitudes and policies, such as women, racial minorities, and immigrants.<sup>15</sup>

The social reality is more complex, of course, than that perceived by those whom Norris and Inglehart identify as “social conservatives.”<sup>16</sup> As Norris and Inglehart suggest, politicians often try to manipulate the “left behind”<sup>17</sup> with false assurances of being able to turn back the clock, just

15. *Id.* at 47–48 (footnotes omitted). The Supreme Court has been a special target of social conservatives since the time of Chief Justice Warren. *See, e.g.*, JOEL WILLIAM FRIEDMAN, CHAMPION OF CIVIL RIGHTS: JUDGE JOHN MINOR WISDOM 97–98 (2009) (discussing the so-called “Southern Manifesto,” in which nineteen southern Senators and nearly eighty Members of Congress condemned the Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), as a federal judicial usurpation of local authority); FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 62–63 (1978) (same); Chris Hickman, *Courting the Right: Richard Nixon’s 1968 Campaign Against the Warren Court*, 36 J. SUP. CT. HIST. 287 (2011) (discussing Nixon’s mobilization of disapproval of the Warren Court). During the 2016 presidential election campaign, the Republican presidential candidate went further than merely criticizing the Court, or promising to alter its direction, by publishing a list of conservative jurists from which he pledged to fill the Supreme Court vacancy created by the death of Justice Antonin Scalia (and kept open by Senate Majority Leader Mitch McConnell’s refusal to take up the nomination of Judge Merrick Garland). *See* CARL HULSE, CONFIRMATION BIAS: INSIDE WASHINGTON’S WAR OVER THE SUPREME COURT, FROM SCALIA’S DEATH TO JUSTICE KAVANAUGH 52 (2019) (explaining that no previous presidential candidate had published such a list); *id.* at 289–90 (suggesting that making the vacancy a central campaign issue clearly had played a crucial role in the 2016 election and, given the divergence between the popular and electoral votes, may well have been decisive).

16. The social reality may also be darker, inasmuch as it seemingly includes nostalgia for certain unhealthy social phenomena, such as the notion of a racial hierarchy. In his recent study of attitudes towards health, gun, and education policies in Tennessee, Missouri, and Kansas, respectively, Jonathan M. Metzl notes that factors such as anxieties among whites about the persistence of racial hierarchy cause them to embrace policies that are not only contrary to their material interests, but literally self-destructive. Professor Metzl writes:

Succinctly put, a host of complex anxieties prompt increasing numbers of white Americans . . . to support right-wing politicians and policies, even when these policies actually harm white Americans at growing rates. As these policy agendas spread from Southern and midwestern legislatures into the halls of Congress and the White House, ever-more white Americans are then, literally, *dying of whiteness*. This is because white America’s investment in maintaining an imagined place atop a racial hierarchy—that is, an investment in a sense of whiteness—ironically harms the aggregate well-being of US whites as a demographic group, thereby making whiteness itself a negative health indicator.

JONATHAN M. METZL, DYING OF WHITENESS: HOW THE POLITICS OF RACIAL RESENTMENT IS KILLING AMERICA’S HEARTLAND 9 (2019). In Professor Metzl’s view, “liberal Americans” have been “slow to realize” that those who support policies that are seemingly contrary to their own material self-interest do so not out of ignorance of the consequences, but “in support of larger prejudices and ideals.” *Id.* at 5–6.

17. Professor Wuthnow uses the term to describe those who live outside large urban areas and have experienced the effects of economic globalization and changing cultural values. *See* WUTHNOW, *supra* note 6, at 11–12. Interestingly, the English sociologist Robbie Shilliam notes that, from the 1840s onwards, the part-vagrant, casual and unskilled workers who lived in England’s urban slums “were given a new name—the residuum or ‘left behind.’” ROBBIE SHILLIAM, RACE AND THE UNDESERVING POOR 34 (2018). At the present time, Professor Shilliam

as they rely on “dog whistle politics” to exploit their fears and insecurities.<sup>18</sup>

The “left behind” may look with envy upon what they imagine to be the preferred position of those who allegedly “benefit from socially liberal attitudes and policies, such as women, racial minorities, and immigrants,”<sup>19</sup> but the reality of that preferred position is highly questionable, and, if it exists at all, it does so only for the fortunate few. For example, most women are not partners in large law firms, highly paid executives, or members of corporate boards; many continue to work long hours for less pay than their male counterparts;<sup>20</sup> and many suffer sexual harassment in the workplace or domestic violence at home.<sup>21</sup> At best, they work under the same difficult conditions as their male co-workers and often live paycheck to paycheck, as their male co-workers do.<sup>22</sup> Most young people of color are not the beneficiaries of affirmative action programs.<sup>23</sup> Indeed, notwithstanding the election of an African-American

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notes,

being left behind [in England] connotes a racialized socio-economic distance, that is, an advantage attached to whiteness that has relatively diminished rather than zero-sum declined. . . . [They] are not incidentally white; the diminution of the benefits that whiteness once afforded is what makes them feel left behind. The vote for Brexit must be placed within the rise and fall of the ‘white working class,’ a trajectory managed predominantly by the political elites.

*Id.* at 156 (citations omitted). On this account, the “white working class” includes only those who are ethnically English, so that European immigrants are necessarily considered “non-white.” *Id.* at 162–63.

18. See, e.g., IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 4* (2014) (describing the phrase “dog whistle politics” and its use as a “complicated phenomenon”).

19. See NORRIS & INGLEHART, *supra* note 14, at 48 (discussing how politicians can attack certain groups of people to mobilize social conservatives).

20. See, e.g., Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LIT. 789, 793–800 (2017), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jel.20160995> [<https://perma.cc/YU9H-PEAA>] (featuring statistics that illustrate the gender gap).

21. See Sharon O’Malley, *Workplace Sexual Harassment*, CQ RESEARCHER (Oct. 27, 2017), <https://library.cqpress.com/cqresearcher/document.php?id=cqresrre2017102700> [<https://perma.cc/A9NE-AGWY>] (explaining that despite the “Me Too” movement, sexual harassment persists in the workplace, especially with respect to women in low-skilled, low-wage jobs); Joan S. Meier, *Johnson’s Differentiation Theory: Is It Really Empirically Supported?*, 12 J. CHILD CUSTODY 1, 12, 23 (2015) (discussing incidence of domestic violence).

22. See generally U.S. CENSUS BUREAU, *CURRENT POPULATION SURVEY, ANNUAL SOCIAL AND ECONOMIC SUPPLEMENTS* (1968–2018).

23. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 242* (2010) (“Diversity-driven affirmative action, as described and implemented today, sends a different message. The message is that ‘some of us’ will gain inclusion. As a policy, it is blind to those who are beyond its reach, the colored faces at the bottom of the well.”); see also JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017) (discussing effects of criminal justice policies and over-incarceration on young

president and the much-trumpeted arrival of “post-racialism,”<sup>24</sup> the nation’s long history of racial prejudice and exclusion remains intact.<sup>25</sup> Racial discrimination persists in both its overt and more subtle forms,<sup>26</sup> and the effects of historical subordination and discrimination will likely shape the future, as they do the present.<sup>27</sup> Similarly, discrimination

black men).

24. William M. Carter, Jr., *The Paradox of Political Power: Post-Racialism, Equal Protection, and Democracy*, 61 EMORY L.J. 1123, 1125–28 (2012) (discussing post-racialism).

25. The Commonwealth of Virginia recently marked the four hundredth anniversary of the founding of Jamestown, which was widely celebrated as marking the beginning of democracy in America. Gregory S. Schneider, Michael E. Ruane & Laura Vozzella, *Jamestown Ceremony Marks Birth of Democracy in America; Black Va. Legislators Skip Because of Trump*, WASH. POST (July 30, 2019), [https://www.washingtonpost.com/local/virginia-politics/jamestown-ceremony-marks-birth-of-democracy-in-america-black-va-legislators-skip-because-of-trump/2019/07/30/d5db7e10-b240-11e9-8949-5f36ff92706e\\_story.html](https://www.washingtonpost.com/local/virginia-politics/jamestown-ceremony-marks-birth-of-democracy-in-america-black-va-legislators-skip-because-of-trump/2019/07/30/d5db7e10-b240-11e9-8949-5f36ff92706e_story.html) [<https://perma.cc/AV85-NWTT>]. Less than a month later, Virginia marked the four hundredth anniversary of the arrival of the first African slaves. Gregory S. Schneider, *Virginia Marks the Dawn of American Slavery in 1619 with Solemn Speeches and Songs*, WASH. POST (Aug. 24, 2019), [https://beta.washingtonpost.com/local/virginia-politics/virginia-marks-the-dawn-of-american-slavery-in-1619-with-solemn-ceremonies-speeches-songs/2019/08/24/adbc84ae-c66f-11e9-9986-1fb3e4397be4\\_story.html](https://beta.washingtonpost.com/local/virginia-politics/virginia-marks-the-dawn-of-american-slavery-in-1619-with-solemn-ceremonies-speeches-songs/2019/08/24/adbc84ae-c66f-11e9-9986-1fb3e4397be4_story.html) [<https://perma.cc/F3LV-MM7B>] (reporting that Virginia marked the four hundredth anniversary of the arrival of the first African slaves).

26. See Matthew W. Hughey, *White Backlash in the ‘Post-Racial’ United States*, 37 ETHNIC & RACIAL STUD. REV. 721, 722–28 (2014) (discussing contemporary white racial identity). Ta-Nehisi Coates has observed that:

Racism greeted Obama in both his primary and general election campaigns in 2008. Photos were circulated of him in Somali garb. Rush Limbaugh dubbed him “Barack the Magic Negro.” Roger Stone . . . claimed that Michelle Obama could be heard on tape yelling “Whitey.” Detractors circulated emails claiming that the future first lady had written a racist senior thesis while at Princeton. A fifth of all West Virginia Democratic primary voters in 2008 openly admitted that race had influenced their vote. . . . After Obama won the presidency in defiance of these racial headwinds, traffic to the white-supremacist website Stormfront increased sixfold. . . . [J]ust before the Democratic National Convention, the FBI uncovered an assassination plot hatched by white supremacists in Denver.

TA-NEHISI COATES, *WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY* 326–27 (2017). Overt displays of racism continued, not only during the campaign, but throughout both terms of the Obama presidency; as some political scientists have noted, that followed a trend that long antedated President Obama’s arrival on the scene. See, e.g., Adam M. Enders & Jamil S. Scott, *The Increasing Racialization of American Electoral Politics, 1988–2016*, 47 AM. POL. RES. 275, 276–77 (2019) (noting racist trends during campaigns and elections); Michael Tesler, *The Return of Old-Fashioned Racism to White Americans’ Partisan Preferences in the Early Obama Era*, 75 J. POL. 110 (2013) (commenting on racism directed at President Obama during his electoral campaigns and terms of office).

27. The persistent legacy of discrimination is severe, multi-faceted, and sometimes subtle. For example, the ease with which wealth is transferred (by those who have it) from one generation to another tends to perpetuate and compound the wealth gap produced by discrimination. See, e.g., Robert B. Williams, *Wealth Privilege and the Racial Wealth Gap: A Case Study in Economic Stratification*, 44 REV. BLACK POL. ECON. 303, 304 (2017) (explaining why the racial wealth gap exceeds the income gap). One example of this phenomenon relates to the unavailability of VA mortgages to African American veterans after World War II. Because of discrimination, many



against immigrants—and those thought to be immigrants—is stronger than it has been in many decades.<sup>28</sup>

Many of the points that Professors Williams and Wuthnow make about elite attitudes towards the “left behind” could also be made with respect to the seeming indifference of governing elites to the plight of the urban poor (particularly, but not exclusively people of color) who frequently lack adequate access to jobs, housing, healthcare, education, and even policing, despite the fact that those public goods may be plentiful only a few blocks away.<sup>29</sup> With respect to both of these groups, the gulf between

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African American veterans remained renters or were able to purchase homes only in less desirable neighborhoods, while many white veterans were able to buy homes in more desirable neighborhoods with government financial assistance and thereby accumulated substantial wealth for their families. As Richard Rothstein points out, “In 1948, for example, Levittown homes sold for about \$8,000, or about \$75,000 in today’s dollars. Now, properties in Levittown without major remodeling . . . sell for \$350,000 and up. White working-class families who bought those homes in 1948 have gained, over three generations, more than \$200,000 in wealth.” RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 182 (2017); see also Chenoa A. Flippen, *Racial and Ethnic Inequality in Homeownership and Housing Equity*, 42 SOC. Q. 121, 144 (2001) (citation omitted) (“Housing constitutes both the largest expenditure and the largest single asset among the vast majority of households. . . . [I]t also confers numerous tax and inflation protection benefits. . . . [and] contributes to racial and ethnic inequality in wealth accumulation more generally. . . . [W]ealth and residential inequalities both reflect and reinforce racial stratification through their influence on access to educational and occupational opportunities.”).

28. See, e.g., Joni Hersch, *Colorism Against Legal Immigrants to the United States*, 62 AM. BEHAV. SCI. 2117, 2118–19 (2018) (discrimination against immigrants has increased over the past twenty years, particularly during the past five years, and especially against immigrants of color, or those who are perceived to be immigrants of color). See also MICHAEL G. HANCHARD, *THE SPECTRE OF RACE: HOW DISCRIMINATION HAUNTS WESTERN DEMOCRACY* 213 (2018):

Ironically, contemporary anti-immigrant movements in many nation-states more accurately reflect the history of immigration policies, controls, and debates than do more liberal arguments. For example, . . . Barack Obama stated on numerous occasions the oft-cited cliché that the United States was—and is—a nation of immigrants, to which we can respond by noting that Japanese internment during World War II, the Asian Exclusion Act, and the Alien and Sedition Acts determined which racial, ethno-national, and ideological others were interpreted as potential dangers and not potential or actual citizens. It will be more accurate to restate this homily in the following way: that most states with histories of significant immigration have selectively accepted migration flows from certain parts of the world more readily than from other parts. Some immigrant groups have been more readily integrated into national societies than others.

29. See generally ALEX KOTLOWITZ, *AN AMERICAN SUMMER: LOVE AND DEATH IN CHICAGO* (2019); PETER EDELMAN, *NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA* (2017); MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016); TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* (2016); WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (Vintage Books 1997) (1996); ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA* (1991); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (2d ed. 2012).

the promises that politicians make and the goods they deliver is often great and persistent.<sup>30</sup>

In a larger sense, there seems to be a disconnect between the rhetoric of constitutional democracy and its reality—what citizens believe their proper role to be and what the realities of our government and society allow them to be. That disconnect is not surprising, perhaps, in the context of a constitutional system that was designed with numerous mechanisms to protect government—particularly the federal government—from too great or too immediate a dependence on the people. That structural choice was made for the laudable purposes of promoting deliberation in government and ensuring the essential stability of government policy against the possibly shifting winds of public opinion. However, the effects of that choice are likely to be magnified—and distorted—when government and society are controlled by elites whose own experiences, outlooks, and social networks are far different from those of most citizens. That experiential, cultural, and social gulf is an obstacle to understanding, let alone crediting, the views and perspectives of others. In any event, the troubling phenomena that social scientists have identified and discussed are deeply rooted in our history and institutions.

What, then, are the conditions of democracy? It is easier, perhaps, to answer that question by identifying some of the obstacles to democratic

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30. For example, Senator Obama's presidential campaign promised "change you can believe in," but President Obama followed many of the same policies as his predecessors, effectively favoring the interests of big business over those of the working class and the poor, and there was a wide gulf between his promises and achievements. See, e.g., Robert Reich, *Why Democrats Share the Blame for the Rise of Donald Trump*, GUARDIAN (Feb. 2, 2020), <https://www.theguardian.com/commentisfree/2020/feb/01/donald-trump-impeachment-trial-state-of-the-union> [<https://perma.cc/J8G3-2GAC>] ("Democrats had occupied the White House for 16 of the 24 years before Trump's election, and in that time scored some important victories for working families . . . . But Democrats did nothing to change the vicious cycle of wealth and power that had rigged the economy for the benefit of those at the top and undermined the working class."); Keeanga-Yamahtta Taylor, *Obama's Legacy Is Hurting Democrats*, N.Y. TIMES, Feb. 8, 2020, at A27 ("But if the person who inspired an unprecedented outpouring was unable to significantly change the material reality of ordinary African-American voters, how could someone with less charisma do so? Mr. Obama of course had achievements, but there was a mismatch in the scale of what was promised and what was delivered."). But see METZL, *supra* note 16, at 8 (noting that, notwithstanding the politicians' failure to deliver significant material benefits, "[w]hite backlash politics gave certain white populations the sensation of winning, particularly by upending the gains of minorities and liberals; yet the victories came at a steep cost"). As Professor Metzl further explains, "the construction of whiteness as a castle under siege, and the policies that sustain it, comes with certain benefits—such as the ability to carry guns in public without automatically being seen as suspect. But this construction works overtime to obscure the plagues that arise from within the castle walls. Evermore guns, or ever-more tax cuts or health care system rejections, promise to make the citizenry great again or to afford protection but in reality only weaken the foundation and heighten the calculus of risk." *Id.* at 283.

government. When, for example, a democratic society is characterized by great disparities of wealth and status,<sup>31</sup> racial segregation and discrimination, inequality of opportunity (particularly with respect to education and employment), and an absence of solidarity or sense of common purpose among its citizens, the circumstances will be fraught. So too when politicians cater to the wealthy, act on the belief that fostering political polarization will work to their advantage, disregard informal conventions that ease the interactions of competing centers of governmental power, or seek short-term partisan advantage at the expense of long-term systemic values and stability. So too when regulatory bodies are captured by those they are meant to regulate, and courts make it difficult for disfavored groups or individuals to vindicate their rights. Similarly problematic is the lack of a quality educational system committed to providing everyone—regardless of race or economic status—with an appropriate foundation for citizenship and for personal growth and success; a shortage of free, unbiased, and credible news sources; and the absence of an independent judiciary committed to ensuring the integrity of the electoral process. Such circumstances breed fear, envy, loathing, exclusion, condescension, indifference, despair, and cynicism. These are not the virtues needed for representative democracy; and they will, in the end, either bring it down or so hollow it out as to make it unrecognizable.<sup>32</sup>

This Essay, which could not possibly address all of the subjects identified in the preceding paragraph, will begin by briefly considering the recent history of representative or constitutional<sup>33</sup> democracy elsewhere in the world. The second section will explore in greater detail what we mean to say when we talk about the concept of constitutional democracy.<sup>34</sup> The Essay will then consider three of the ways in which the

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31. See Taylor Telford, *Income Inequality in America Is the Highest it's Been Since Census Bureau Started Tracking It, Data Shows*, WASH. POST (Sept. 26, 2019), <https://www.washingtonpost.com/business/2019/09/26/income-inequality-america-highest-its-been-since-census-started-tracking-it-data-show/> [<https://perma.cc/V3D7-UCLP>] (describing how income inequality is at its highest since the data first began to be tracked more than fifty years ago, despite national unemployment and poverty rates being “at historic lows”).

32. See generally NADIA URBINATI, *DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE* (2014); Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69 (1959).

33. See *infra* note 42 (explaining, among other things, the meanings of “constitutional” and “representative” democracy, and noting that the two terms will be used interchangeably in this Essay).

34. At first blush, the problems that the United States faces today may not seem to be as dire or as existentially significant as those that face some other nations. On the other hand, some aspects of our Constitution (the adoption of which marked the beginning rather than the maturation of representative democracy) may make our system especially susceptible to current challenges. It would be irresponsible not to treat those challenges as indicative of work that needs to be done.

current governmental and political system may frustrate the practice of constitutional democracy in the United States today.

First, many Americans hold an unrealistic or idealized view of our democracy that prevents us from comprehending the full significance of the anti-democratic features of our constitutional system and the contribution that those features make to the problem of alienation and voicelessness. That lack of understanding handicaps efforts to preserve and strengthen our representative democracy.

Second, our idealized view of American democracy prevents us from acknowledging that one aspect of our constitutional tradition is a historical preference for defining our political community in terms that are exclusionary, rather than inclusive. That, in turn, prevents us from recognizing the strong influence that this exclusionary preference continues to exert on substantial parts of our political community. It also makes us slow to understand that we must resist the attractions of exclusion (which tempt both sides of the current political divide) if we are to promote the sense of common purpose that is essential to the practice of constitutional democracy.

Third, the minimum requirements of constitutional democracy require public confidence in the fairness of the electoral system, but the ordinary political process cannot always ensure the existence of the conditions essential to such fairness. Politicians control the electoral machinery, and they are naturally interested in maintaining that machinery in a way that works for them, rather than for the people. Moreover, when problems arise in that respect, structural constraints make it unlikely, if not virtually impossible, that the people will be able to remedy those problems without involving the courts. But the courts have now largely abdicated their responsibility for ensuring the fairness of the electoral process.

That story begins with the Supreme Court's 1946 decision in *Colegrove v. Green*.<sup>35</sup> In *Colegrove*, the Court refused to entertain a challenge to the Illinois congressional map, which made the votes in some districts worth nine times the value of those cast in other districts. The Court reasoned that the case involved a political question and that judicial intervention would disrespect the democratic process.<sup>36</sup> In later cases, the Court took a different view, namely, that such judicial interventions are both permissible and necessary. The Court recognized that neither the people nor the political branches of government have both the will and the capacity to ensure the integrity of the electoral process. More recently, however, the Court has again disclaimed the power to act against most manipulations and distortions of the electoral process. But constitutional

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35. See generally *Colegrove v. Green*, 328 U.S. 549 (1946).

36. *Id.* at 556.

democracy cannot remain viable when the people lack confidence in the integrity of the electoral process as well as the means for doing anything about it. Simply put, constitutional democracy cannot exist, let alone thrive, in the Wild West—where politics knows no law, and anything goes.

### I. THE CRISIS OF DEMOCRATIC CONSTITUTIONALISM

Just twenty years ago, at the turn of the twenty-first century, the form of government variously (and loosely) described as constitutional, deliberative, liberal, or representative democracy appeared ascendant throughout most of the world.<sup>37</sup> Indeed, with the dissolution of the Soviet Union,<sup>38</sup> the emancipation of the former Warsaw Pact nations,<sup>39</sup> and the defeat of the apartheid regime in South Africa,<sup>40</sup> this form of government not only appeared to have triumphed decisively over its competitors, it also seemed to have gained almost universal recognition as the form of government best suited to the conditions and aspirations of the contemporary world. To be sure, constitutional democracy had experienced some rough patches in the late twentieth century, not least of all in the United States, where the Vietnam War, the aborted War on Poverty, the stubborn persistence of racial prejudice and economic

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37. Although the terms are closely related, it bears emphasizing that they are not strictly synonymous and necessarily bear different meanings depending on the specific modifier. For example, the meaning of “liberal democracy” is related specifically to the primacy that “liberalism” affords to individual liberty, and the danger that all government poses to that value. A key concept of liberalism, as John Rawls has written, is that, “[e]ach person is to have an equal right to the most extensive system of equal basic liberty compatible with a similar system for all.” JOHN RAWLS, *A THEORY OF JUSTICE* 220 (rev. ed. 1999). Similarly, the term “representative democracy” tends to place emphasis on the “representative” nature of government, and, perhaps, on the translation of democratic impulse into law and policy through the mediating process of representation. On the other hand, “representation is [itself] an open-ended concept that is able to accommodate a wide range of political visions, [significantly] including long- as well as short-term political thinking.” MÓNICA BRITO VIEIRA & DAVID RUNCIMAN, *REPRESENTATION* 183 (2008). “Constitutional democracy” is associated with the existence of a written or unwritten constitution that necessarily constricts the power of government, whether that power rests entirely with the people or is delegated to their representatives. Because direct or pure democracy is not practically possible on anything but the smallest scale, and all governments today at least purport to be governed by constitutions of one form or another, the terms “constitutional democracy” and “representative democracy” will be used interchangeably in this Essay.

38. *See generally* WILLIAM TAUBMAN, *GORBACHEV: HIS LIFE AND TIMES* 500–650 (2017); WISŁA SURASKA, *HOW THE SOVIET UNION DISAPPEARED: AN ESSAY ON THE CAUSES OF DISSOLUTION* (1998).

39. *See generally* TIMOTHY GARTON ASH, *THE POLISH REVOLUTION: SOLIDARITY* (3d ed. 2002); TIMOTHY GARTON ASH, *THE MAGIC LANTERN: THE REVOLUTION OF ‘89 WITNESSED IN WARSAW, BUDAPEST, BERLIN, AND PRAGUE* (1990).

40. *See generally* ROBIN RENWICK, *THE END OF APARTHEID: DIARY OF A REVOLUTION* (2015); *AFTER APARTHEID: REINVENTING SOUTH AFRICA?* (Ian Shapiro & Kahreen Tebeau eds., 2011).

inequality, the Watergate scandal, economic stagnation, and the energy crisis, among other things, seriously eroded public confidence in the competence, trustworthiness, and responsiveness of government.<sup>41</sup> But the problems experienced by the world's oldest constitutional democracy seemingly did little to chill enthusiasm for that form of government, let alone suggest the possibility of any viable alternative. As other systems of government collapsed in the final years of the twentieth century, the constitutional democracies at least persisted, whatever their deficiencies or challenges might have been.<sup>42</sup> Indeed, the spirit and promise of constitutional democracy inspired and energized many people throughout the world.

The enthusiasm for constitutional democracy that moved the world in the final years of the twentieth century is not much in evidence today. Indeed, just as constitutional democracy seemed unequivocally triumphant in most of the world at the turn of the century,<sup>43</sup> it is equally clear that that form of government is in retreat throughout the world

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41. See, e.g., Simon Hall, *Protest Movements in the 1970s: The Long 1960s*, 43 J. CONTEMP. HIST. 655, 656–70 (2008) (discussing events in the 1960s and 1970s). Of course, Congress had responded to some of these challenges, enacting legislation such as the Freedom of Information Act, 5 U.S.C. § 552, the Ethics in Government Act, 92 Stat. 1824, and the War Powers Resolution, 50 U.S.C. §§ 1541–1548. In addition, to the extent that environmental pollution and workplace hazards had emerged as important public concerns, the government was able to take meaningful first steps towards addressing them. See Paul Sabin, *Environmental Law and the End of the New Deal Order*, 33 LAW & HIST. REV. 965, 968–75 (2015) (discussing the development of public interest environmental law); James J. Lawler & William M. Parle, *Expansion of the Public Trust Doctrine in Environmental Law: An Examination of Judicial Policy Making by State Courts*, 70 SOC. SCI. Q. 134, 138–42 (1989) (discussing the public trust doctrine).

42. It is tempting to suggest that, like Winston Churchill, these framers of new governments perceived that, “democracy is the worst form of government, except for all those other forms that have been tried.” Winston Churchill on Democracy (Nov. 11, 1947), in CHURCHILL BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS 573 (Richard M. Langworth ed., 2008). But any such observation would be unfaithful to the spirit of enthusiasm and optimism that prevailed at that time. Timothy Garton Ash recently wrote that, “The West’s mistake after 1989 was not that we celebrated what happened in Berlin, Prague, Warsaw, and Budapest as a triumph of liberal, European, and Western values. It was all of that. Our mistake was to imagine that this was now the norm, the new normal, the way history was going. . . . Thirty years on, we can see that, far from being the new normal, what happened in Europe in 1989 was a great historical exception, unique, one of a kind.” Timothy Garton Ash, *Time For a New Liberation?*, N.Y. REV. BOOKS (Oct. 24, 2019), <https://www.nybooks.com/articles/2019/10/24/time-for-new-liberation/> [https://perma.cc/77D9-UR2W].

43. Perhaps the most notable exception was China, where a pro-democracy movement was dramatically crushed in 1989. See, e.g., Marc Tracy, *In China, a Reuters Partner Blocks Articles on the Tiananmen Square Massacre*, N.Y. TIMES (June 4, 2019), <https://www.nytimes.com/2019/06/04/business/media/china-tiananmen-square-reuters-censored.html> [https://perma.cc/3UU4-JKQG] (discussing Chinese government’s suppression of information about pro-democracy demonstrations in Beijing’s Tiananmen Square in anticipation of the thirtieth anniversary of the demonstrations).

today.<sup>44</sup> That has been the case since at least the time of the Great Recession of 2008, when the effects of the United States government's lax regulation of the financial sector reverberated throughout the world.<sup>45</sup> Many forces undoubtedly were at work, but, for many, constitutional democracy seemed no match for unbridled capitalism.

The retreat from constitutional or representative democracy takes many forms. In the most extreme case, it appears as an absolute rejection, not only of representative democracy, but of politics itself. Politics is about compromise in the face of uncertainty and disagreement.<sup>46</sup> But compromise seems neither necessary nor desirable to those who deny the possibility of factual uncertainty or the legitimacy of normative disagreement. Compromise also lacks traction when the benefits seem too little, the costs seem too great, and sometimes when the matters in dispute simply seem too remote and unrelated to the challenges of one's own life.

The more specific rejection of representative democracy comes in various forms, ranging from total rejection in some countries (both by those who think that this form of government affords too much power to the people—or freedom to the individual—and by those who think it affords them too little) to its radical deformation or more subtle hollowing out in others.<sup>47</sup> Some citizens may be understandably frustrated with

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44. Russian President Vladimir Putin recently observed that, "The liberal idea has become obsolete. It has come into conflict with the interests of the overwhelming majority of the population." Lionel Barber, Henry Foy & Alex Barker, *Vladimir Putin Says Liberalism has 'Become Obsolete'*, FIN. TIMES (June 27, 2019), <https://www.ft.com/content/670039ec-98f3-11e9-9573-ee5cbb98ed36> [<https://perma.cc/6F7V-KYLV>]. One critic has suggested that the problem is modernity itself. See PANKAJ MISHRA, AGE OF ANGER: A HISTORY OF THE PRESENT 338–39 (2017) ("Human beings had been freed, in theory, from the stasis of tradition to deploy their skills, move around freely, choose their occupation, and sell to and buy from whomever they chose. But most people have found the notions of individualism and social mobility to be unrealizable in practice. . . . Enmeshed in its various dense networks, including an electronic web mediating his relationship with reality, the individual can act satisfactorily neither upon himself nor upon the world, and is reminded frequently and humiliatingly of his limited everyday consciousness and meagre individual power."). Others have written incisively about the various dimensions of this problem as it manifests itself nationally, regionally, or more or less globally. See generally WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019) (discussing the decline of constitutional democracy in Central Europe); Maciej Bernatt & Michał Ziółkowski, *Statutory Anti-Constitutionalism*, 28 WASH. INT'L. L.J. 487 (2019) (same).

45. See STEVEN A. RAMIREZ, LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW, at xi (2013) (discussing the causal factors and global effects of bank failures during the great recession).

46. See, e.g., Sandrine Baume, *What Place Should Compromise Be Given in Democracy? A Reflection on Hans Kelsen's Contribution*, 27 NÉGOCIATIONS 73 (2017) (discussing possible justifications for compromise in democracies).

47. Timothy Garton Ash has suggested that, [o]nly in Hungary . . . has the erosion of democracy gone so far that it is difficult to

governmental processes that seem too slow and incapable of getting anything done, while others may object more radically to the interposition of any obstacle that delays or qualifies the translation into law and government policy of what they take to be the majority will.<sup>48</sup> When Amazon Prime can satisfy consumer choices almost instantaneously, why should that not also be the case with political choices? When individuals can express their feelings to millions of people with a couple of keystrokes, why is it that government cannot—or will not—give immediate effect to those feelings?<sup>49</sup> What, after all, is the value of reflection, discussion, or deliberation?

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envision even the best-organized opposition party winning a national election anytime soon. Everywhere else in the region there are still regular, free, and relatively fair elections. As in America, as in Britain, as in every other imperfect democracy—and which is not imperfect?—the challenge throughout Central Europe is to find the party, the program, and the leaders to win that next election. They have our problems now.

Ash, *supra* note 42. In October 2019, however, the opposition party in Hungary managed to prevail in many local elections, notwithstanding the ruling party's control of the media. See, e.g., Benjamin Novak, *Setback for Orban as Opposition in Hungary Gains Ground in Elections*, N.Y. TIMES (Oct. 14, 2019), <https://www.nytimes.com/2019/10/14/world/europe/hungary-elections-orban.html> [<https://perma.cc/88S6-HUYA>] (“Overcoming the governing party’s nearly complete domination of the news media and the state, opposition candidates won control in 11 of Hungary’s 23 larger cities, including the capital, Budapest, compared with three in municipal elections five years ago. They also put another dent in what had seemed a few years ago to be the inexorable march in parts of Europe toward Mr. Orban’s ‘illiberal’ and harshly anti-immigrant politics.”). In Poland, by contrast, the Law and Justice party has solidified its electoral position by combining authoritarian policies with generous social programs. See Marc Santora, *In Poland, Nationalism with a Progressive Touch Wins Voters*, N.Y. TIMES (Oct. 10, 2019), <https://www.nytimes.com/2019/10/10/world/europe/poland-election-law-and-justice-party.html> [<https://perma.cc/JK6U-727L>] (“As Poles vote again this Sunday, that social welfare model lies at the heart of the success of Law and Justice. . . . Outside Poland, Law and Justice has earned harsh criticism for asserting control over the judiciary in ways some fellow European Union members say is anti-democratic, and for its antipathy toward immigration and environmental policies. . . . But within Poland, the party has succeeded not merely by playing to the conservatism of its rural and small-town base, but also by attempting to redistribute wealth, so far without the budget-busting giveaways that often accompany populism.”). But see John Henley, *Election Results Give Hope to Opposition in Poland and Hungary*, GUARDIAN (Oct. 14, 2019), <https://www.theguardian.com/world/2019/oct/14/election-results-opposition-poland-hungary> [<https://perma.cc/2BVS-WHWY>] (“A narrower-than-expected win for Poland’s ruling Law and Justice party (PiS) and a serious setback for Hungary’s governing Fidesz show eastern Europe’s illiberal nationalist parties are not entirely invincible, analysts and commentators have said.”).

48. See, e.g., ROGER EATWELL & MATTHEW GOODWIN, NATIONAL POPULISM: THE REVOLT AGAINST LIBERAL DEMOCRACY, at xi (2018) (“Some national-populist leaders . . . speak of creating a new form of ‘illiberal democracy’ that raises worrying issues about democratic rights and the demonization of immigrants. However, most national-populist voters want *more* democracy—*more* referendums and *more* empathetic and listening politicians that give *more* power to the people and less power to economic and political elites. This ‘direct’ conception of democracy differs from the ‘liberal’ one that has flourished across the West following the defeat of fascism and which . . . has gradually become more elitist in character.”).

49. As Maureen Dowd pointed out in a recent column, “Congress is not a place where you achieve radical progress—certainly not in divided government. It’s a place where you work at it



Others lack trust, often with good cause, in the competence and integrity of specific leaders or institutions.<sup>50</sup> They suspect that their leaders may be more responsive to people and entities who contribute large sums to their campaign chests than they are to those they are meant to represent.<sup>51</sup> Some profess not to know whom or what to believe, while the cynicism of others extends to virtually all leaders, news sources, and “expert knowledge.”<sup>52</sup>

The decline of faith in constitutional democracy may be linked to different factors in different countries, but there are some common complaints. It seems clear, for example, that a constitutional democracy cannot exist indefinitely—let alone flourish—when a substantial number of citizens lack trust or confidence in government. The same is true when citizens suspect that the government is being administered corruptly for the benefit of the few, believe that their interests are not being taken seriously, feel that they are not being treated as equal members of the political community, or judge that their voices are not being heard by those who are obliged to act for the benefit of all.

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and work at it and don't get everything you want.” Maureen Dowd, *Scaling Wokeback Mountain*, N.Y. TIMES (July 13, 2019), <https://www.nytimes.com/2019/07/13/opinion/sunday/scaling-wokeback-mountain.html> [<https://perma.cc/E2YN-GZ72>].

50. See, e.g., JOHN J. MEARSHEIMER, WHY LEADERS LIE: THE TRUTH ABOUT LYING IN INTERNATIONAL POLITICS 8 (2011) (“[T]he incentives to cheat and lie that apply when states are dealing with each other usually do not apply to individuals within a state. Indeed, a strong case can be made that widespread lying threatens the inner life of a state.”).

51. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 470 (2010) (Stevens, J., dissenting) (citations omitted) (citing *McConnell v. FEC*, 540 U.S. 93, 144 (2003)) (“Corporate ‘domination’ of electioneering can generate the impression that corporations dominate our democracy. When citizens . . . hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders ‘call the tune’ and a reduced ‘willingness of voters to take part in democratic governance.’”). See also Paul D. Jorgensen, Geoboo Song & Michael D. Jones, *Public Support for Campaign Finance Reform: The Role of Policy Narratives, Cultural Predispositions, and Political Knowledge in Collective Policy Preference Formation*, 99 SOC. SCI. Q. 216, 229 (2018) (“It is possible, if not probable, the public has more knowledge of our campaign finance system than recognized previously, and we expect this specific knowledge to influence the persuasiveness of elite appeals and collective preference formation. For now, it is enough to argue that the continued use of well-crafted narratives, along with skyrocketing campaign spending numbers from a small subset of our society, and the agenda setting efforts of politicians will likely increase support for reform.”).

52. See, e.g., TOM NICHOLS, THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS (2017) (discussing dismissal of technical expertise). See also Barry Sullivan & Christine Kexel Chabot, *The Science of Administrative Change*, 52 CONN. L. REV. (forthcoming 2020), available at <https://ssrn.com/abstract=3335558> [<https://perma.cc/N5US-EBMW>] (discussing relationship of expert knowledge and political will in federal administrative law).

## II. CONSTITUTIONAL DEMOCRACY

What do we mean by “constitutional democracy”? At the outset, it is important to recognize that the term “constitutional democracy” is not just another word for democracy. In a pure democracy, the people rule directly and without external constraints.<sup>53</sup> In a constitutional democracy, by contrast, both the people themselves and their representatives are typically bound by at least some laws that they cannot alter at will.<sup>54</sup> As James Madison wrote in *Federalist No. 51*, “the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.”<sup>55</sup> One problem with constitutional democracy is that it joins together two separate (and at least

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53. In *Federalist No. 10*, Madison defined “pure democracy” as one in which the people rule directly:

From this view of the subject it may be concluded that a pure Democracy, by which I mean, a Society, consisting of a small number of citizens, who assemble and administer the Government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths.

THE FEDERALIST NO. 10, at 56, 61 (James Madison) (Jacob E. Cooke ed., 1961). Who counts as part of “the people,” or what qualifications exist for inclusion in “the people,” is an important threshold question for both direct and representative democracy. See *infra* notes 76, 88 and accompanying text.

54. Even in the United Kingdom, where the legislative branch is theoretically supreme, parliament must conform to certain constitutional documents and principles that constrain its lawmaking authority. See, e.g., T.R.S. Allan, *Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism*, 9 INT’L. J. CONST. L. 155 (2011) (discussing British constitutionalism); John Baker, *The Unwritten Constitution of the United Kingdom*, 15 ECCLESIASTICAL L.J. 4, 12–27 (2013) (same). In most cases, as a practical matter, the people and their representatives will not only be subject to fundamental laws that cannot be altered at will, they also will be subject to the authority of tribunals with some degree of authority to interpret and enforce those fundamental laws. For example, the Supreme Court of the United Kingdom recently declined to legitimize the executive’s prorogation of parliament. See *R. (On the Application of Miller) v. The Prime Minister*, [2019] UKSC 41 at ¶ 61 (Sept. 24, 2019) (“It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason—let alone a good reason—to advise Her Majesty to prorogue Parliament for five weeks . . . . We cannot speculate, in the absence of further evidence, upon what such reasons might have been.”). Of course, much theoretical and political controversy has attended the normative question as to what degree of authority or deference such tribunals should be afforded in a democratic society. See generally SADURSKI, *supra* note 44; STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2013); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

55. THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

partially antagonistic) concepts—constitutionalism and democracy. Walter F. Murphy has explained that “[c]onstitutional democracy . . . unites beliefs that, although the people’s freely chosen representatives should govern, those officials must respect certain substantive limitations on their authority. Like most marriages, this one constantly suffers from flawed management and flawed human nature but also from tensions between the two theories.”<sup>56</sup>

Professor Murphy has further explained:

Democracy offers one means to permit a people to live in safety and enjoy both liberty and justice. The people shall rule. As both governors and governed, they will advance the common good without oppressing themselves—or so the argument goes. Constitutionalists, however, believe that “the people” . . . are more likely to form a congeries of different groups and thus, in a majoritarian political system, are likely to be ruled by a coalition of potentially self-serving minorities. Constitutionalists are distrustful of “majority’s” benevolence toward those who are “different” from or compete against them. Lest a majority of any sort shrink “the public good” into what is good for its own members, constitutionalists offer another option: accept the necessity of government to advance and protect the welfare of society, support popular government, but install institutional checks on the authority of all rulers, even the people themselves.<sup>57</sup>

In essence, these two theories of government—democratic theory and constitutionalism—reflect markedly different worldviews. “For democratic theory, what makes governmental decisions morally binding is process: the people’s freely choosing representatives, those representatives’ debating and enacting policy and later standing for reelection, and administrators’ enforcing that policy.”<sup>58</sup> Democratic theory also prizes popular participation because it gives expression to individual autonomy and deters government violations of individual rights.<sup>59</sup> By contrast, “[c]onstitutionalists tend to be more pessimistic about human nature, fearing that people are sufficiently clever to oppress [others] without hurting themselves.”<sup>60</sup> “They are constantly concerned

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56. WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST SOCIAL ORDER 10 (2007).

57. *Id.* at 1–2.

58. Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3, 4 (Douglas Greenberg et al. eds., 1993).

59. *Id.*

60. *Id.* at 5.

with the human penchant to act selfishly and abuse power” and think that institutional and cultural checks are insufficient to protect liberty.<sup>61</sup>

Notwithstanding these conceptual contradictions, constitutional democracy has long been viewed as providing the basis for an appropriately balanced government, one in which the people do not rule directly, but through their representatives; and all are constrained by law.<sup>62</sup> As a practical matter, of course, these two elements—constitutionalism and democracy—may be blended or balanced in various ways.<sup>63</sup> The design of some constitutional democracies may grant more prominence to elements associated with constitutionalism, while others may tilt in favor of democratic elements. In some constitutional democracies, for example, the constitution particularly emphasizes the value of citizen participation in government and may even authorize citizen-initiated referenda, initiatives, and similar devices, which grant citizens some degree of direct power to make binding law themselves, without the need for intermediary action by their representatives.<sup>64</sup> At the

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61. *Id.* at 6.

62. See, e.g., Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know"*, 72 MD. L. REV. 1, 32 (2012) (“A pure democracy was thought [by the framers] to be theoretically undesirable as well as practically impossible.”).

63. Thus, as Aileen Kavanagh has written:

[F]or democratic government to exist, there must at least be an electoral mechanism in place which allows citizens to influence the choice of legislation by participating periodically in the choice of legislators. No system which debars citizens from playing a part in the decision-making process can be deemed democratic, and no conception of democracy that excludes such a role is tenable. But the exact *kind* or *degree* of participation that is desirable, is subject to debate. It is not axiomatic given the value of participation. Since there are a variety of institutional arrangements which could satisfy the participatory requirement of democracy to a greater or lesser degree, the chosen one must bear a burden of justification.

Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 LAW & PHIL. 451, 455 (2003) (footnotes omitted).

64. See, e.g., PETER SCHRAG, *PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE* (1998); THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1989); Uwe Wagschal, *Direct Democracy and Public Policymaking*, 17 J. PUB. POL'Y 223, 225–41 (2008) (discussing the impact of practices of direct democracy, such as referenda, on public policymaking); Arthur Lupia & John G. Matsusaka, *Direct Democracy: New Approaches to Old Questions*, 7 ANN. REV. POL. SCI. 463 (2004). See also CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY I* (1970) (“It is rather ironical that the idea of participation should have become so popular, particularly with students, for among political theorists and political sociologists the widely accepted theory of democracy (so widely accepted that one might call it the orthodox doctrine) is one in which the concept of participation has only the most minimal role. Indeed, not only has it a minimal role but a prominent feature of recent theories of democracy is the emphasis placed on the dangers inherent in wide popular participation in politics.”). Professor Pateman stands strongly against this “orthodoxy.”

When the problem of participation and its role in democratic theory is placed in a wider context than that provided by the contemporary theory of democracy, and the relevant empirical material is related to the theoretical issues, it becomes clear that neither the

other end of the democratic spectrum are constitutional democracies in which the role of citizens is more narrowly conceived, even being limited “to obey[ing] law and perhaps, in periodic elections, to confirm[ing] the choice of leaders whose election gives them the power to enact into law whatever policies they see fit.”<sup>65</sup> In either case, the fundamental fairness and integrity of the electoral process is a central, indispensable, non-negotiable feature of constitutional democracy. Without it, constitutional democracy is a farce and a fraud.

In most of its contemporary variations, the practice of constitutional democracy requires hard work on the part of citizens, and it carries no certain guarantee of advantageous policy outcomes.<sup>66</sup> Of course, a

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demands for more participation, nor the theory of participatory democracy itself, are based, as is so frequently claimed, on dangerous illusions or on an outmoded and unrealistic theoretical foundation. We can still have a modern, viable theory of democracy which retains the notion of participation at its heart.

*Id.* at 111. Even referenda that are not meant to produce legally binding results may be given that effect for political rather than legal reasons. See Todd L. Ely, *Government by Advice: Public Participation and Policymaking Through Advisory Ballot Measures*, 47 ST. & LOC. GOV. REV. 92, 94–97 (2015). For example, the so-called Brexit referendum was not binding on the government as a matter of law. David Allen Green, *Can the United Kingdom Government Legally Disregard a Vote for Brexit?*, FIN. TIMES (June 14, 2016), <https://www.ft.com/content/5b82031e-1056-31e1-8e0e-4e91774e27f1> [<https://perma.cc/8YZQ-RV5Z>] (“The UK government could seek to ignore such a vote; to explain it away and characterise it in terms that it has no credibility or binding effect (low turnout may be such an excuse). Or could they say it is now a matter for parliament, and then endeavor to win the parliamentary vote. Or ministers could try to re-negotiate another deal and put that to another referendum.”). But, successive prime ministers have chosen to treat it as if it were. See, e.g., *EU Referendum Outcome: PM Statement*, GOV.UK (June 24, 2016), <https://www.gov.uk/government/speeches/eu-referendum-outcome-pm-statement-24-june-2016> [<https://perma.cc/7VSP-QP6V>] (“The British people have voted to leave the European Union and their will must be respected. . . . We must now prepare for a negotiation with the European Union. . . . Now the decision has been made to leave, we need to find the best way. . . .”).

65. See ROGER COTTERRELL, *LAW’S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE* 149 (1995) (describing Max Weber’s view of bureaucratic citizenship). An interesting and recently controversial feature of English parliamentary democracy is the procedure whereby the party in power chooses a new party leader (who automatically assumes the position of prime minister) when the incumbent prime minister steps down from party leadership between elections. See, e.g., Ceylan Yeginsu, *U.K. Voters’ Frustration High as 99% Are Sideline in Prime Minister Election*, N.Y. TIMES (July 20, 2019), <https://www.nytimes.com/2019/07/20/world/europe/uk-prime-minister-vote.html> [<https://perma.cc/445Y-6WWJ>] (“‘The future of our country is going to be decided by a handful of out-of-touch toffs,’ said Chris Richardson, 21 . . . . ‘[T]he public is desperate to have its say, but instead we are being shut out further and are forced to watch this slow-motion car crash.’”). When this last occurred, the new party leader (who lacked a clear majority in the House of Commons) called for new parliamentary elections several months after becoming party leader and was rewarded with an overwhelming majority. See Mark Landler & Stephen Castle, *Conservatives Win Commanding Majority in U.K. Vote*, N.Y. TIMES (Dec. 12, 2019), <https://www.nytimes.com/2019/12/12/world/europe/uk-election-boris-johnson.html> [<https://perma.cc/PU9E-EF4V>].

66. See, e.g., NADIA URBINATI, *DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE* 20–21 (2014) (“Good outcomes, if and when they occur, are a reward for procedures, not what

constitutional democracy will not continue to exist indefinitely—and it certainly will not flourish—if it repeatedly makes bad decisions. Citizens will lose faith in their government and external foes will likely seize whatever advantage the incompetence of their adversaries affords. But the success of a constitutional democracy ultimately depends at least as much on the processes it employs to reach its decisions as on the quality of the decisions it makes.<sup>67</sup> For both reasons, however, it is critical that

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gives their normative value. . . . [O]ur contemporary societies . . . are democratic because they have free elections and the opportunity to have more than one political party competing, because they allow effective political competition and debate among diverse and competing views, and finally because elections make the elected an object of control and scrutiny.”). In any event, social psychologists and others have long recognized that a more inclusive decisional process generally produces better outcomes. See, e.g., Michael Kaufman, *Social Justice and the American Law School Today: Since We Are Made for Love*, 40 SEATTLE U. L. REV. 1187, 1222 (2017) (“Diverse individuals in a group create a higher level of collective intelligence than groups comprised of even higher achieving individuals.”); Kristin Johnson, Steven A. Ramirez & Cary Martin Shelby, *Diversifying to Mitigate Risk: Can Dodd-Frank Section 342 Help Stabilize the Financial Sector?*, 73 WASH. & LEE L. REV. 1795, 1806–07 (2016) (footnotes omitted) (“[G]roupthink, herd behavior, and affinity bias challenge group decision-making. Similarly humans naturally fall prey to confirmation bias, overconfidence, and structural bias. . . . Evidence suggests that these tendencies can be mitigated through enhanced cultural diversity.”); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 99 (2000) (footnotes omitted) (“Heterogeneous working groups offer more creative solutions to problems than homogeneous working groups. They also show greater inclination for critical thinking and are likely to avoid problems associated with ‘group think,’ where members mindlessly conform to group precepts.”).

67. Democratic governments must also be judged on the quality of their decisions and rule, as Aileen Kavanagh has argued:

But does the intrinsic importance of participation give it the special status that Waldron claims? Would a political system which fully guaranteed the right to participate, but was otherwise unjust, be justified? I believe that the answer to this question is negative. The reason for this is that the intrinsic value of participation does not compromise the central importance of what Joseph Raz calls the “instrumentalist condition of good government.”

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. . . Some political decisions involve a choice between states of affairs or actions which are morally right or wrong, better or worse, independently of what people prefer.

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. . . In the case of these decisions . . . our preferences can be evaluated on the basis of the preferred state of affairs and political decisions of this sort can be assessed in light of the morality of the states of affairs they establish or actions they authorize. The fact that decisions are taken ‘democratically’ does not preclude, or at least should not preclude, such evaluation.

.....

. . . Governments can have the authority to do that which they ought not to do. But it is not part of the reason for any government’s authority that it should pass unjust or immoral laws. The reason for their authority is that they will rule well.

Kavanagh, *supra* note 63, at 460–61, 463. As Justice Jackson observed in *Youngstown*, the framers intended to “diffuse[] power . . . to secure liberty,” but they also contemplated that “practice will integrate the dispersed powers into a workable government.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

citizens be well educated, informed, and engaged.<sup>68</sup> They must have access to accurate and relevant information and the freedom to hear and to speak.<sup>69</sup> They must feel a certain minimal degree of trust and respect, both for their representatives and for each other.<sup>70</sup> Above all, they must care enough about government—and think that government, and what government does or fails to do, is sufficiently important and consequential—to warrant investing the time and resources necessary to monitor their representatives' activities.<sup>71</sup>

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68. See, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”). See also ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 102–03 (3d ed. 2004) (“[T]he protection of public discussion . . . takes on an ever-increasing importance as the nation succeeds in so educating and informing its people that, in mind and will, they are able to think and act as self-governing citizens.”).

69. See Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 14 (1976) (“The public, as sovereign, must have all information available in order to instruct its servants, the government.”). In our time, government continues to hold back information without any legitimate justification, and the ability of the people to monitor their elected officials is thereby diminished. See, e.g., MARY GRAHAM, *PRESIDENTS’ SECRETS: THE USE AND ABUSE OF HIDDEN POWER* (2017) (discussing government secrecy and transparency); FREDERICK A.O. SCHWARZ, JR., *DEMOCRACY IN THE DARK: THE SEDUCTION OF GOVERNMENT SECRECY* (2015) (same); DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* (1998) (same). However, an equally serious threat stems from technological advances that have created both a multiplicity of information sources and an overabundance of information (much of which may be unreliable), and from market forces that threaten the sustainability of traditional, relatively neutral, and reliable news outlets. See, e.g., S. Mo Jang & Joon K. Kim, *Third Person Effects of Fake News: Fake News Regulation and Media Literacy Interventions*, 80 *COMPUTERS HUM. BEHAV.* 295, 295–302 (2018) (discussing the threat of fake news and how to respond to alleviate its effects). Although these developments obviously pose a serious threat to the practice of constitutional democracy, the government has done little to address them, as demonstrated by Congress’s dilatoriness in addressing Russian efforts to influence American elections. See, e.g., Jamelle Bouie, *Mitch McConnell, Too, Welcomes Russian Interference*, N.Y. TIMES (June 13, 2019), <https://www.nytimes.com/2019/06/13/opinion/mitch-mcconnell-russian-interference.html> [<https://perma.cc/T2P3-XECZ>] (discussing Senator Mitch McConnell apparent unwillingness to engage the problem of protecting United States elections from outside interference).

70. See, e.g., Matt Stevens, *Falling Trust in Government Makes it Harder to Solve Problems, Americans Say*, N.Y. TIMES (July 22, 2019), <https://www.nytimes.com/2019/07/22/us/politics/pew-trust-distrust-survey.html?searchResultPosition=3> [<https://perma.cc/WT6R-EGPP>] (“[T]he deep skepticism is not reserved solely for politicians, according to the survey: Almost two-thirds of respondents said they thought trust in each other had declined, too. . . . More than 90 percent . . . thought it was important to improve the level of confidence Americans have in government and in each other. And more than 80 percent thought [it] . . . was possible.”).

71. In 1792, Madison wrote that, “[t]o secure all the advantages of [a federal republic], every good citizen will be at once a centinel over the rights of the people; over the authorities of the confederal government; and over both the rights and the authorities of the intermediate governments.” James Madison, *Government*, in *THE LIBRARY OF AMERICA, JAMES MADISON: WRITINGS* 501, 502 (Jack N. Rakove ed., 1999). Richard Brookhiser has argued that Washington

In a world filled with distractions in almost endless variety, however, citizens may conjure a multitude of excuses for failing to do what real citizenship requires. In this and other ways, constitutional democracy imposes duties on citizens, and it often requires them to make sacrifices for the common good or the general welfare. As Danielle Allen has observed: “The hard truth of democracy is that some citizens are always giving things up for others. Only vigorous forms of citizenship can give a polity the resources to deal with the inevitable problem of sacrifice.”<sup>72</sup> There must be a mechanism for justly allocating those burdens. In addition, however, citizens must be well disposed toward the polity to be willing to make such sacrifices, when called upon to do so. In other words, citizens in a democracy must believe that their “ownership” of government is real, and that those who control the government are committed to acting, not for the special benefit of their families, friends, or campaign contributors, but for the benefit of all.<sup>73</sup> If citizens feel

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and Hamilton “thought the people should rule when they voted, then let the victors do their best until the next election,” but that “Madison now believed in more than popular choice. He wanted the people to be consulted continually. They would be his partners in government.” RICHARD BROOKHISER, *JAMES MADISON* 106–07 (2011).

72. DANIELLE S. ALLEN, *TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE BROWN V. BOARD OF EDUCATION* 29 (2004). Professor Allen continues: “[O]ne of the achievements of the protagonist of [Ralph] Ellison’s novel, *Invisible Man*, is to develop criteria for distinguishing legitimate from illegitimate forms of sacrifice, and also to outline a form of citizenship that helps citizens generate trust enough among themselves to manage sacrifice.” *Id.*

73. According to David Goldfield, a large part of the population was justified in entertaining something like that belief during the Great Depression and World War II and for about twenty years after the war:

What I call the commonwealth ideal defined governance in the United States during the first two decades after World War II. The ideal followed three basic principles of governance. First, government should enhance opportunities for all Americans. . . . Second, the ideal charged government with the responsibility of balancing competing interests—individuals, business and industry, and government itself—to benefit the nation. Third, the commonwealth ideal required obedience to the rule of law. . . .

The ideal worked best when citizens believed that the government kept their interests paramount. That was the case during the Great Depression and World War II. Once those crises ended, maintaining the commonwealth ideal became more difficult. Yet, for a remarkable twenty-year period following the war, the federal government did just that.

DAVID GOLDFIELD, *THE GIFTED GENERATION: WHEN GOVERNMENT WAS GOOD* 1 (2017). As Professor Goldfield readily concedes, however, not everyone would have been justified in holding that belief in 1945:

Despite [today’s] growing economic and social inequality, America today is better off than it was in 1945. Better off for women, for African Americans, for gays, and for all who share in the belief that expanding freedom for one expands freedom for all. What is missing today and has been for at least three decades is a good federal government ensuring opportunity for the greatest number as opposed to the relatively few.

*Id.* at 447. See also ROTHSTEIN, *supra* note 27, at xii–xiv (“Racial segregation in housing was not merely a project of southerners in the former slaveholding Confederacy. It was a nationwide project



alienated from their government and each other, they will not be disposed to make the sacrifices that democratic government frequently requires.

Permutations of constitutional democracy necessarily blend the two elements—constitutionalism and democracy—in differing ratios. Some now reasonably question whether the particular blend of constitutionalism and democracy embodied in our constitutional text and practice strikes the proper balance for our times and circumstances.

### III. THE “ANTI-DEMOCRATIC” ASPECTS OF OUR CONSTITUTION AND THE PROBLEM OF VOICELESSNESS

The United States is often called the world’s oldest democracy, but that is something of a misnomer. The Constitution of 1787 antedates the great developments in representative democracy of the nineteenth century,<sup>74</sup> and it must be understood in that context. The Founders thought that a democratic government would be impracticable in so vast a territory as that which encompassed the thirteen original states, but they also thought that democracy was not normatively desirable in any event.<sup>75</sup> In the Founders’ view, the point of constitutional government was not to translate the majority’s unmediated desires immediately into law and policy, but to promote wise laws and government policies that would further the long-term needs and interests of the nation.<sup>76</sup> That was not

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of the federal government in the twentieth century, designed and implemented by its most liberal leaders. . . . [S]cores of racially explicit laws, regulations, and government practices combined to create a nationwide system of urban ghetto surrounded by white suburbs. Private discrimination also played a role, but it would have been considerably less effective had it not been embraced and reinforced by government. . . . [R]acially explicit government policies to segregate our metropolitan areas are not vestiges, were neither subtle nor intangible, and were sufficiently controlling to construct the de jure segregation that is now with us in neighborhoods and hence in schools.”)

74. See, e.g., JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (2d ed. 1861) (discussing theory of representative democracy).

75. THE FEDERALIST NO. 10, *supra* note 53, at 56, 61–65.

76. *Id.* Certainly, the Founders had no intention of creating a popular or democratic government as we understand the term. See *infra* note 92 (describing John Adams’s views on suffrage). Even the authors of England’s Great Reform Bill of 1832 had no such intention. See ANTONIA FRASER, *PERILOUS QUESTION: REFORM OR REVOLUTION? BRITAIN ON THE BRINK, 1832*, at 41 (2013) (“Yet it should be stressed that the idea of the rule of the people as such—what is now known as democracy—was anathema in [Britain in] the early nineteenth century.”). “Indeed, the very word ‘democracy’ caused a shudder at this juncture while the phrase ‘the people’ implied, generally speaking, a mob and not a very friendly mob at that.” *Id.* At the time the Great Reform Bill of 1832 was being considered, “Sir Herbert Taylor, King William’s influential private secretary, would confide to [the Prime Minister, Lord] Grey that his master ‘dreaded the Democracy [his capital letter] towards which he conceived the institutions of the country to be gradually approaching.’” *Id.* (footnote omitted). The King, who also opposed the Secret Ballot and Universal Suffrage, “even wondered whether the whole movement for Reform [of the ‘rotten boroughs’] was not ‘a specious cloak for the introduction of Republicanism.’” *Id.* at 71. See also SHILLIAM, *supra* note 17, at 1 (Even in the late nineteenth century, “Parliament’s sovereignty was ill-disposed towards the

likely to be accomplished, the Founders thought, if a majority of qualified voters (themselves a small and limited group) could make their will felt too immediately or too directly. The majority's policy preferences were likely to be too concerned with short-term interests, too susceptible to the influence of fickle fashion, and too indifferent to long-term gains. It was therefore necessary to design structures that would allow for deliberation as well as action and allow popular views to be tested and refined.

Numerous provisions of the Constitution were aimed at distancing the government from the immediate control of the people. For example, the president and vice president were not to be chosen directly by a majority vote of the people. Instead, the qualified voters in each state would choose a group of "wise men" who would form the "electoral college," the members of which would assemble in their respective states and cast their votes for president.<sup>77</sup> The candidate who garnered the greatest number of electoral votes would become the president, while the runner-up would become the vice president.<sup>78</sup> The president was given a four-year term

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sentiments of the 'people' entering the halls of Westminster in an unmediated fashion. Rather, the people's representatives had to exercise independent reason in deliberation and decision making. For right or wrong, parliamentary sovereignty has always demanded representative rather than direct democracy.").

77. See U.S. CONST. art. II, § 1, cl. 3 ("The electors shall meet in their respective states, and vote by ballot . . ."). Scholars have also shown that the creation of the electoral college was intimately connected to slavery and the relative numbers of free whites in the north and south. See, e.g., Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 U.C. DAVIS L. REV. 1081, 1087–91 (2018) (discussing that one purpose of the electoral college was to protect the political interests of slave owners in presidential elections); Paul Finkelman, *The Proslavery Origins of the Electoral College*, 23 CARDOZO L. REV. 1145 (2002). As A.V. Dicey noted long ago, the convention soon arose that the electors would vote as directed by those who chose them, rather than exercising independent discretion, as the founders contemplated. See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 28–29 (8th ed. 1915) ("Constitutional understandings have entirely changed the position of the Presidential electors. They were by the founders of the constitution intended to be what their name denotes, the persons who chose or selected the President; the chief officer, in short, of the Republic was, according to the law, to be appointed under a system of double election. The intention has failed; the 'electors' have become a mere means of voting for a particular candidate; they are no more than so many ballots cast for the Republican or the Democratic nominee."). Litigation recently resulted from the fact that several electors voted in the 2016 presidential election for candidates other than those to whom they were pledged. See *Baca v. Colo. Dep't of State*, 935 F.3d 887 (10th Cir. 2019), cert. granted sub nom., *Colo. Dep't of State v. Baca*, No. 19-518, 2020 WL 254162 (U.S. Jan. 17, 2020); *Matter of Guerra*, 193 Wash. 2d 380, 393, 441 P.3d 807, 813 (2019), cert. granted sub nom., *Chiafalo v. Washington*, No. 19-465, 2020 WL 254167 (U.S. Jan. 17, 2020); see also Trip Gabriel, *Electoral College Members Can Defy Voters' Wishes, Court Rules*, N.Y. TIMES (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/us/politics/electoral-college-faithless-electors.html> [<https://perma.cc/4UZC-GEDP>] (discussing the Tenth Circuit's decision in which the court held that Colorado had acted improperly in replacing elector who voted for a candidate other than the candidate who won the popular vote).

78. See U.S. CONST. art. II, § 1, cl. 3 ("The person having the greatest number of votes shall be the President . . . . In every case, after the choice of the President, the person having the greatest

and could be removed only by impeachment. In addition, the Framers sketched out the executive branch, the presidential office, and the precise nature of the president's relationship to the executive branch in only the most general terms, leaving the precise scope of the president's constitutional powers uncertain.<sup>79</sup> One recent president has characterized the presidential office as having "all the power of Louis XIV, only for four years at a time."<sup>80</sup>

The Constitution established the Supreme Court, but otherwise left to Congress the design of the judicial branch, subject to the requirement that judges be appointed by the president, with the advice and consent of the Senate, and that they "shall hold their offices during good behavior."<sup>81</sup> Similarly, the Framers divided the legislative power between the state and federal governments, and they further divided the federal legislative power between the House of Representatives and the Senate.<sup>82</sup> In addition, the members of the Senate were not to be elected directly by the

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number of votes of the electors shall be the Vice President."'). Almost immediately, this method of selecting the president proved unworkable, and the Constitution was amended to provide that presidential and vice-presidential candidates would stand for election as a team. *Id.* amend. XII. If there is a tie in the electoral college, the House of Representatives will decide the election. *Id.* The House of Representatives decided the election of 1824. After the Electoral College deadlocked, the House selected John Quincy Adams, despite Andrew Jackson's having apparently garnered a larger percentage of the popular vote. See generally DONALD RATCLIFFE, *THE ONE-PARTY PRESIDENTIAL CONTEST: ADAMS, JACKSON, AND 1824'S FIVE-HORSE RACE* (2015). Apart from the election of 1824, there have been four other presidential elections (1876, 1888, 2000, and 2016) in which one of the candidates gained the presidency without winning a majority of the popular vote. See Jonathan R. Cervas & Bernard Grofman, *Why Noncompetitive States Are so Important for Understanding the Outcomes of Competitive Elections: The Electoral College 1868–2016*, 173 *PUB. CHOICE* 251, 254–60 (2017) (discussing empirical analyses that show likely Electoral College outcomes).

79. CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY* 28, 88, 98 (1923) (discussing the relative absence of appropriate models at the state level, the importance of the New York and Massachusetts precedents, and the development of thinking about the length of the president's term); Gbemende Johnson, *Executive Power and Judicial Deference: Judicial Decision Making on Executive Power Challenges in the American States*, 68 *POL. RES. Q.* 128, 132–36 (2015) (discussing empirical analyses of judicial deference to executive decisions).

80. In *United States v. Nixon*, 416 U.S. 683 (1974), President Nixon apparently instructed his lawyer to argue that the president is not amenable to judicial process because he "is as powerful a monarch as Louis XIV, only for four years at a time, and is not subject to the processes of any court in the land except the court of impeachment." TIM WEINER, *ONE MAN AGAINST THE WORLD: THE TRAGEDY OF RICHARD NIXON* 337 n.94 (2015).

81. Johnson, *supra* note 79, at 134–36 (suggesting that judges are responsive to the threat of executive branch retaliation when ruling on cases about executive power).

82. See U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

people of each state, but by the members of each state's legislature.<sup>83</sup> To further ensure their independence from the people, the Constitution provided for six-year terms for Senators, and only one-third of the Senate would be elected every two years.<sup>84</sup> Only the members of the House of Representatives, who were given two-year terms, were to be elected directly by the people—or, more accurately, by that part of the people who qualified as voters.<sup>85</sup>

A critical fact about representative government in the United States, therefore, is the extent to which it sought from the beginning to restrain rather than give immediate or unmediated effect to the majority's will. That is neither surprising nor shocking because the Constitution that launched our government was based on a particular "science of government"—one that especially valued deliberative judgment and sought to protect minority rights.<sup>86</sup> In addition, the Constitution was adopted before the emergence of modern democratic government, and, in some ways, it has been adapting to the new reality and demands of democracy ever since.<sup>87</sup> At the same time, the Founders intended to create a representative government—one that would be capable, not only

83. *See id.* art. I, § 3 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . ."). The Seventeenth Amendment, which was adopted in 1913, provides for the direct election of senators. *Id.* amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .").

84. *See id.* art. I, § 3 (describing the term length and manner in which Senators were to be elected).

85. *See id.* art. I, § 2, cl. 1 (describing the manner in which members of the House are to be elected).

86. The new science of politics also recognized the inevitability of conflict and the need for conflict to be managed. *See, e.g.*, THE FEDERALIST NO. 10, *supra* note 53, at 58–60 (discussing the factions and their management). *See also* David Wootton, *Introduction, in* THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS xxix–xxxviii (David Wootton ed., 2003) (discussing the new "science of politics"); MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION 19–20 (1987) (discussing David Hume's influence on the "science of politics").

87. The Constitution has been amended several times to bring it more into line with democratic theory. As noted, Senators were originally chosen by the state legislatures, but became subject to popular election in 1913. *See* U.S. CONST. amend. XVII (describing senatorial term length and the manner of their election). In addition, the franchise has been expanded several times to prohibit the withholding of the right to vote on various specific grounds. *See id.* amend. XV (race, color, or previous condition of servitude); *id.* amend. XIX (sex); *id.* amend. XXIII (residence in District of Columbia); *id.* amend. XXIV (poll tax); *id.* amend. XXVI (age). On the other hand, the Constitution has not been amended to authorize instruments of direct democracy, such as referenda, initiatives, and the recall of elected officials—something that some state constitutions contemplate. *See, e.g.*, CAL. CONST. art. II, §§ 8–15 (providing for processes of direct democracy such as referenda and initiatives).

of making wise decisions for the benefit of all, but of properly representing “the people” and being accountable to them.<sup>88</sup>

But a major source of popular discontent with government today is the perception that government is too far removed from the people, that it is too unresponsive to the will of the people, and that the constitutional safeguards properly designed to prevent hasty or ill-conceived governmental action have, in practice, led to legislative paralysis, the aggrandizement of the executive, and a governmental system that is attentive and responsive mainly to the interests and desires of the rich and powerful. In other words, the same mechanisms that may be effective in protecting against hasty decisions or ill-conceived policies may also serve to distance the people from the government—and the government from the people. Many now believe, correctly or not, that the government of the United States is a government of the elite, by the elite, and for the elite.

#### IV. “THE PEOPLE OF THE UNITED STATES”

Any modern definition of representative democracy would necessarily begin with the principle of universal suffrage.<sup>89</sup> The political community includes all citizens, and all citizens have equal rights, including the right to an equal vote. In that sense, modern representative democracy is naturally inclusive. Consistent with their time and purpose, however, the Founders did not perceive universal suffrage to be a central or even a necessary element of the government they were designing.<sup>90</sup> Indeed,

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88. In this sense, David Epstein is correct when he emphasizes “*The Federalist’s* repeated and very emphatic insistence on a ‘strictly republican’ or ‘wholly popular’ form of government,” one in which “all officials [are] to be directly or indirectly elected by the people.” DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 5 (1984) (footnotes omitted). From the viewpoint of democratic theory, however, it is necessary to interrogate more closely the notion of “indirectly” elected officials, and, more fundamentally, the meaning of “the people.” As Robert Dahl has observed, the question who can participate in the political process is “a curiously neglected and yet absolutely crucial problem,” because, if democracy means “in some sense ‘rule by the people,’” it is essential that we know who can participate in that rule by casting his or her ballot. See ROBERT DAHL, *AFTER THE REVOLUTION?: AUTHORITY IN A GOOD SOCIETY* 59 (1970).

89. See, e.g., ROBERT A. DAHL, *ON DEMOCRACY* 78 (2d ed. 1998) (“Let me now put it this way: *Full inclusion. The citizen body in a democratically governed state must include all persons subject to the laws of that state except transients and persons proved to be incapable of caring for themselves.*”).

90. See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 23 (2000) (“Perhaps owing to the absence of some of the revolution’s most democratic leaders (including Jefferson, Paine, Samuel Adams, and Patrick Henry), there was no formal debate [at the Constitutional Convention] about the possibility of a national standard more inclusive than the laws already prevailing in the states.”). “By 1790 . . . roughly 60 to 70 percent of adult white men (and very few others) could vote.” *Id.* at 24 (footnote omitted). Relatively speaking, white adult males enjoyed broad access to the franchise in the

rather than have the Constitution set forth any specific criteria for granting the right to vote, the Founders left to the state governments the task of setting qualifications for voting, even with respect to federal

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American states:

The lengthy colonial and post-independence experience provided a sturdy foundation for the efforts that Americans now undertook in the next phase of the revolution, when the new republic was transformed into a *more democratic* republic. To be sure, at the end of the eighteenth century few Americans were ready to concede that the principles of the Declaration, much less democratic citizenship, applied to everyone. . . .

Yet always keeping in mind the huge and persistent exceptions, by the standards prevailing elsewhere in the world the extent of equality among Americans was extraordinary.

ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 22–23 (2d ed. 2003); see also CHILTON WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760–1860*, at 19 (1960) (noting that confining the vote in colonial elections to those who were “free, white, twenty-one, native-born Protestant males who were the owners of real property, appeared to be the best guarantee of the stability of the commonwealth”). Robert J. Steinfeld has shown that the situation with respect to voting in the early Republic was considerably more complicated than most commentators have appreciated, and that the move towards universal suffrage was far from linear. See Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 *STAN. L. REV.* 336 (1989). One overriding concern was the possibility of corruption that was thought to exist when persons who were not independent or self-governing were granted the franchise. In the early Republic, that concern was not abandoned, but the definition of self-governing or independent shifted to include those who were self-sufficient wage-earners as well as those who owned property. Professor Steinfeld writes:

On the one hand, republican principles continued to have an impact on the terms of the franchise, but only in modified form. The republican precept that only the self-governing should exercise political authority, for example, was not abandoned. Rather, it was recast to make use of the liberal idea that the self-governing were those who owned and disposed of themselves. The republican notion that propertylessness and lack of autonomy go hand in hand also continued to shape franchise qualifications. It persisted in the idea that property in one’s labor distinguished the independent from the dependent.

On the other hand, this nineteenth century regime of political rights can hardly be called purely liberal. Voting rights were not completely separated from social or economic status. They were divorced from property ownership, but taxpaying qualifications continued the tradition of imposing pecuniary restrictions on the franchise. . . . The tale of suffrage reform in the early American republic thus is not a story of one coherent historical formation replacing another—republican giving way to liberal—but a story of the ad hoc way in which contradictory cultural materials were cobbled together under pressure to produce a new accommodation.

*Id.* at 375. Interestingly, some of those who opposed the Fifteenth Amendment made a similar argument, suggesting that the newly emancipated slaves were not truly independent or self-governing and that they might simply vote in accord with their former masters’ directions. ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 58 (2019). The same objection was made to certain immigrants. See MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 17 (Harvard Univ. Press paperback ed. 1999) (1998) (“[R]epublicanism would favor or exclude certain peoples on the basis of their ‘fitness for self-government,’ as the phrase went, and some questionable peoples would win inclusion based upon an alchemic reaction attending Euro-American contact with peoples of color.”).

elections. Thus, the Constitution simply provides that voters in federal elections “in each State must have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”<sup>91</sup> In 1787, the states generally restricted the franchise to white male property-owners, and the Constitution did nothing to change that.<sup>92</sup> In practical terms, therefore, the Constitution of 1787 essentially ratified the exclusionary choices of the states. In that sense, the Constitution was not an inclusive or “democratic” document, and it set the stage for countless battles to be fought over who should be entitled to share in the kind of full participation in the political community that the right to vote has come to represent.<sup>93</sup> Only slowly, and often against unyielding

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91. U.S. CONST. art. I, § 2, cl. 1. In other words, if the state finds someone qualified to vote in elections for “the most numerous branch” of the state legislature, the state cannot exclude that person from voting in federal elections. In addition, the Constitution further provides that the state legislatures shall have primary responsibility for determining “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,” but with the important qualification that “Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.” *Id.* art. I, § 4, cl. 1. By contrast, the Founders were determined “to deny either branch of Congress the authority to add to or otherwise vary the membership qualifications [for Senators and Congresspersons] expressly set forth in the Constitution.” *Powell v. McCormack*, 395 U.S. 486, 532 (1969).

92. Among other things, for example, the Convention did not act favorably on Abigail Adams’s earlier plea that the Continental Congress “remember the ladies.” See Letter from Abigail Adams to John Adams (March 31, 1776), in 1 *THE FOUNDERS’ CONSTITUTION* 518 (Philip B. Kurland & Ralph Lerner eds., 1987) (asking that women be given a voice and be treated more equitably than in the past). Indeed, John Adams was unalterably opposed to any suggestion that the qualifications for voting should be liberalized. In a May 1776 letter to James Sullivan, a Massachusetts official who favored expansion of the franchise, Adams wrote that,

Depend upon it, sir, it is dangerous to open So fruitful a Source of Controversy and Altercation, as would be attempted by attempting to alter the Qualifications of Voters. There will be no End of it. New Claims will arise. Women will demand a Vote. Lads from 12 to 21 will think their Rights not enough attended to, and every Man, who has not a Farthing, will demand an equal Voice with any other in all Acts of State. It tends to confound and destroy all Distinctions, and prostrate all Ranks, to one common Levell.

Letter from John Adams to James Sullivan (May 26, 1776), in *THE FOUNDERS’ CONSTITUTION*, *supra*, at 394, 395–96. In addition, there were approximately 58,000 free people of color in the United States. Terry Bouton, *Chart: Slave, Free Black, and Slave Populations, 1780–1830*, <https://userpages.umbc.edu/~bouton/History407/SlaveStats.htm>. [https://perma.cc/MD7Q-QZYZ]. Whether they had the right to vote was also a matter of state law. See MICHAEL A. SMITH, KEVIN R. ANDERSON & CHAPMAN RACKAWAY, *STATE VOTING LAWS IN AMERICA: HISTORICAL STATUTES AND THEIR IMPLICATIONS* 26–41 (2015) (explaining that the right to vote was state-dependent and not automatic despite one’s classification as a citizen).

93. According to Eric Foner, on the eve of the Civil War, “black men enjoyed the same right to vote as their white counterparts in only five of the thirty-four states, all in New England.” FONER, *supra* note 90, at 5. In addition, “[t]he adoption of a weaker version [of the Fifteenth Amendment], restricted to eliminating racial barriers to voting, stemmed not from a limited commitment to black rights but to opposition to equality for others, especially immigrants from China and Ireland, and the conviction that a ‘simple and direct’ amendment was most likely to win ratification.” *Id.* at 105. Nonetheless, according to Wendell Phillips, Rhode Island hesitated to ratify because of the

opposition, has representative government in the United States become more inclusive over the past two centuries, and that increased inclusivity has sometimes been more theoretical than real.<sup>94</sup> As amendments to the Constitution progressively precluded the states from formally disenfranchising certain categories of people, states and localities often continued to find ways to do so as a practical matter.<sup>95</sup>

As Barbara Young Welke has suggested, “Questions of belonging rest at the heart of the modern liberal democratic state.”<sup>96</sup> The Constitution

possibility that “race” might be construed to include the Irish. *Id.* at 108.

94. See, e.g., Barry Sullivan, *Three Tiers, Exceedingly Persuasive Justifications and Undue Burdens: Searching for the Golden Mean in US Constitutional Law*, 20 EUR. J.L. REFORM 181, 216–29 (2018) (discussing limitations on voting rights).

95. See Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 881, 893–94 (2014) (discussing waves of new practical limitations on voting rights that repeatedly followed theoretical expansions of the franchise).

96. BARBARA YOUNG WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES I* (2010). Professor Welke continues:

But what does belonging mean? Who belongs? Does belonging depend on there being others who do not belong? What is their relationship to the polity? Does it matter what the basis for belonging is, what the defining characteristics of belonging are? Who decides? What does law have to do with it? The answers to these questions are critical in establishing who can make claims on the polity and who cannot; on relationships among those who live in the polity; and in making a population a people. They highlight, what I call, “borders of belonging.” Though borders of belonging have been fundamental to the human condition throughout history, they are of particular significance in the modern world and especially to the modern liberal democratic state with its assumptions of the sovereign individual, universal equality, and the authority of the rule of law.

*Id.* From the beginning, and throughout “America’s long nineteenth century,” Professor Welke argues, the concept of personhood, and thus of citizenship and the nation, was that of the able, white male, and “[t]he mobilization of law in defense of the able white male republic fostered a culture of identity politics that would define the twentieth century.” *Id.* at 141. According to Professor Welke, “Part of the value of borders of belonging as a conceptual tool is its power to expose instances in which belonging for some is achieved through the subordination or exclusion of others.” *Id.* at 5. “However much we may want to believe in the progressive narrative of personhood and citizenship that has long been a part of America’s national myth, it is hard to deny the work of privilege and subjection—borders of belonging—in the building and work of the modern American state.” *Id.* at 152. More generally, Michael Hanchard posits a “first-order relationship between democracy and *political* inequality.” HANCHARD, *supra* note 28, at 14. Professor Hanchard writes:

While most students of contemporary and ancient democratic experiments have focused on an *ethos* of democracy, [my] concern here is to explore the *ethnos* of ancient and contemporary democracies, the manner in which the practice of a democratic politics, in most instances, has combined inclusionary and exclusionary regimes and value judgments regarding the prospects of citizenship for differentiated populations.

*Id.* According to Professor Hanchard, “What makes democratic politics unique is not the absence of political inequality, but the dynamic interaction between democratic and antidemocratic politics in the same polity—the systematic accrual of political privileges among certain groups at the expense of other less privileged groups.” *Id.* at 74. See also NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 79 (1995) (“White supremacy was not a flaw in American democracy but part of its definition, and the development of democracy in the Jacksonian period cannot be understood without reference to white supremacy.”).



purports to speak on behalf of “the people of the United States.”<sup>97</sup> But who are “the people of the United States”? The text of the Constitution does not define who “the people” are. Presumably, they are members of the political community, but in what way? And what relationship does membership in the political community have to voting? Clearly, the Founders’ definition of “the people” or “the political community” must have included white women and children, but they were not generally entitled to vote, so it must have included at least some individuals who lacked the right to vote.<sup>98</sup> It may be instructive in this respect to recall that two separate constitutional amendments—the Fourteenth and the Fifteenth Amendments—were required to grant citizenship and the right to vote to those who were emancipated by the Thirteenth Amendment. As Eric Foner has suggested, “putting birthright citizenship into [the Fourteenth Amendment] represented a dramatic repudiation of the powerful tradition of equating citizenship with whiteness, a doctrine built into the naturalization process from the outset and constitutionalized by the Supreme Court in *Dred Scott*.”<sup>99</sup> But the Fifteenth Amendment was

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97. William Treanor has recently pointed out that the Convention’s Committee of Style significantly altered the language of the draft initially approved by the Convention, which purported to speak on behalf of “[w]e the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia,” so that the Preamble now purports to speak on behalf of “[w]e the people of the United States.” William M. Treanor, *Framer’s Intent: Gouverneur Morris, the Committee of Style, and the Creation of the Federal Constitution* 78 (Scholarship @ Georgetown, Working Paper, Feb. 5, 2019), available at <https://scholarship.law.georgetown.edu/facpub/2163> [<https://perma.cc/ZG9X-L3YW>]. As Dean Treanor notes, “[t]he changes in the Preamble reframed the document, converting it from a document establishing a confederation without overarching purpose, to a document creating a nation animated by powerful goals.” *Id.*

98. See WELKE, *supra* note 96, at 69–70 (“The border of belonging was never just a matter of the distinction between those who could claim citizenship and those who could not. White women and disabled persons, male and female, were citizens from the beginning of the new republic. . . . Yet none of these groups enjoyed full membership in the nation.”). “With each successive expansion of suffrage—first to white men and then to African American men—the link between suffrage and citizenship became more fully established; the inequity of the denial of suffrage to women became increasingly hard to bear.” *Id.* at 101. Chief Justice Waite discussed the relationship of citizenship and suffrage in *Minor v. Happersett*, 88 U.S. 162 (1875). In that case, the Court unanimously rejected a Missouri woman’s argument that she was entitled to vote, holding that United States citizenship had never carried the right to vote with it, that the right to vote could not therefore be a right that was protected by the privileges and immunities clause of the Fourteenth Amendment, and that state constitutions and laws that “commit that important trust to men alone are not necessarily void.” *Id.* at 178. More generally, Eric Foner has observed that, “[s]lavery shaped the definition of citizenship before the Civil War, giving it a powerful racial dimension. A nation, in Benedict Anderson’s celebrated phrase, is more than a political entity—it is ‘an imagined political community,’ whose borders are as much intellectual as geographic. Slavery rendered blacks all but invisible to those imagining the American community.” FONER, *supra* note 90, at 2–3.

99. FONER, *supra* note 90, at 71. That tradition dated back to the earliest days of the republic.

required to prohibit the denial of the right to vote “on account of race, color, or previous condition of servitude.”<sup>100</sup> In any event, the text of the Constitution does not itself define who “the people” are. Even today we seem to struggle over who is included in the “political community” and what is meant by “the people of the United States.”<sup>101</sup>

In *Federalist No. 1*, Alexander Hamilton emphasized what he deemed to be the singular importance of the nascent American experiment in self-government. Hamilton observed that the people of the United States had been granted an unprecedented opportunity to try their collective hand at designing a new form of government for themselves, along logical and scientific lines, and without the oversight or interference of any superior power.<sup>102</sup> The opportunity was great, and so too were the stakes. If the

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“[T]he nation’s first Naturalization Law, passed in 1790, limiting naturalization to ‘free, white persons,’ and the steadfast resistance to anything more than the symbolic amendment of the law in the wake of the American Civil War, testified to the assumption that the United States was in fact and was determined to remain a white nation.” WELKE, *supra* note 96, at 35. So was the Federal Militia Act of 1792, which limited service in the militia to “free able-bodied white male citizens of the respective states.” *Id.* With respect to the Fourteenth Amendment, Professor Foner further notes that,

[t]he last-minute addition of a definition of American citizenship constitutionalized the principle that virtually every person born in the country is a citizen, regardless of the race, national origin, or the political affiliation or legal status of one’s parents. . . .  
 . . . [B]irthright citizenship . . . remains an eloquent statement about the nature of American society, a powerful force for assimilation of the children of immigrants, and a repudiation of a long history of racism.

*Id.* See also MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* 12 (2018) (“Citizenship had a piecemeal quality in antebellum America, defined only as needed. . . . White women and children were said to be citizens, though most agreed that their rights should be determined as much by age or sex as by their status. Paupers, the infirm, the feeble, and the insane represented a litany of conditions that functioned to compromise access to rights for those otherwise deemed citizens. From time to time, free people of color even held in hand affirmations of their citizenship.”).

100. U.S. CONST. amend. XV. Some supported placing a guarantee of universal manhood suffrage in the Fourteenth Amendment, but that failed. See, e.g., FONER, *supra* note 90, at 80–92.

101. Jordon B. Barkalow, *Changing Patterns of Obligation and the Emergence of Individualism in American Political Thought*, 57 POL. RES. Q. 491, 492–93 (2004). See also SHILLIAM, *supra* note 17, at 1–2 (2018) (noting the Brexit supporters’ rhetorical reliance on “the will of the people,” notwithstanding the closeness of the vote, and asking “who is morally worthy to count as ‘the people’”).

102. Hamilton wrote that,

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions, on accident and force.

THE FEDERALIST NO. 1, at 3 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton further noted that,

If there, be any truth in the remark, the crisis, at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the

people of the United States were successful in this project, the benefits would flow to all humankind. If, on the other hand, the people of the United States were not successful in this venture, their failure would be the misfortune of all. It is a sobering thought, of course, and one that well sets the stage, both for *The Federalist's* further account of the new science of politics and for our understanding of the relevance of the American project to those that followed.

At the outset, however, a question naturally arises. Montesquieu, whose work was admired by the founding generation, thought that “the government most conformable to nature is that which best agrees with the humour and disposition of the people in whose favour it is established,” and that, for that reason, it would “be a great chance [or fortuity] if [the laws] of one nation suit another.”<sup>103</sup> Who, then, were “the people” upon whom this singularly important responsibility was to fall? Who were “the people” of the United States?

Although Hamilton says a great deal by way of introduction in *Federalist No. 1*, he makes no effort to define “the people of the United States,” describe their composition, or identify the criteria for membership in that body in any detail.<sup>104</sup> As noted, the question is also

part we shall act, may, in this view, deserve to be considered as the general misfortune of mankind.

*Id.* In more recent times, many additional “societies of men [and women]” have been afforded the opportunity to prove that “good government” can be established “from reflection and choice,” rather than by “accident and force.” And it has fallen to those societies also to prove that such a government can be rooted in the concept of deliberative or constitutional democracy. That was particularly the case in the years following the Second World and the emancipation of former European colonies, and once again in the years that followed the break-up of the former Soviet Union and the emancipation of the former Warsaw Pact nations. See, e.g., Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism”*, 2000 WIS. L. REV. 597 (discussing the place of the United States Constitution in the context of global constitutionalism).

103. MONTESQUIEU, 1 *THE SPIRIT OF THE LAWS* ch.3 (David Wallace Carrithers ed., 1977). In a similar vein, Justice Joseph Story attributed John Locke’s lack of success in drafting a constitution for the Carolinas to his ignorance of the manners and customs of the people who lived there:

Perhaps in the annals of the world there is not to be found a more wholesome lesson of the utter folly of all efforts to establish forms of governments upon mere theory; and of the dangers of legislation without consulting the habits, manners, feelings, and opinions of the people upon which they are to operate.

JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 58 (abr. ed. 1833).

104. Hamilton does mention some of “the people,” namely those whose interests constitute some of the “most formidable . . . obstacles” to the adoption of the Constitution, namely,

[A] certain class of men in every State [who] resist all changes which may hazard a diminution of the power, emolument and consequence of the offices they hold under the State-establishments—and the perverted ambition of another class of men, who will either hope to aggrandize themselves by the confusions of their country, or will flatter themselves with fairer prospects of elevation from the subdivision of the empire into

left open by the text of the Constitution, which purports to speak on behalf of “We, the people of the United States,”<sup>105</sup> but does not formally define the term.<sup>106</sup> John Jay makes a valiant effort to fill the gap in *Federalist No. 2*, but his effort is, if anything, less satisfying than Hamilton’s silence. In *Federalist No. 2*, Jay first discusses the geographical circumstances that he deems auspicious with respect to the successful accomplishment of this bold experiment in government-making, specifically mentioning the contiguity of the territory of the United States, the fertility of the land, the variety of soils and production, the abundance of water resources, and, finally, the large number of navigable waterways suitable for commerce.<sup>107</sup>

According to Jay, the United States was well-suited to the challenge of designing a new form of government for a second reason, namely, the homogeneity of its people. In that regard, Jay writes:

With equal pleasure, I have as often taken notice that Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same

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several partial confederacies, than from its union under one government.

THE FEDERALIST NO. 1, *supra* note 102, at 4.

105. U.S. CONST. pmbl.

106. In *McCulloch v. Maryland*, 17 U.S. 318, 403 (1819), Chief Justice Marshall had occasion to consider the process whereby the people had ratified the Constitution, but he had no occasion to consider how membership in “the people” was conferred. *See id.*

The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might “be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.” This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectually, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have assembled. No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

The question of membership in the political community was addressed in *Scott v. Sandford*, 60 U.S. 393, 411 (1857) (“[The slave trade and fugitive slave] clauses in the Constitution point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.”). *See id.* at 572–73 (Curtis, J., dissenting) (“At the time of the adoption of the Constitution . . . all free native-born inhabitants of . . . New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves were not only citizens of those states, but such of them as had the other necessary qualifications of electors, on equal terms with other citizens.”).

107. THE FEDERALIST NO. 2, at 9 (John Jay) (Jacob E. Cooke ed., 1961).

language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side-by-side throughout a long and bloody war, have nobly established liberty and independence.<sup>108</sup>

Jay continues, noting that the people of the United States are united by the strongest ties:

This country and this people seem to have been made for each other, and it appears as if it was the design of Providence, that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.<sup>109</sup>

Finally, Jay asserts that these strong ties encompass “all orders and denominations of men among us. To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection.”<sup>110</sup> Excluded altogether from Jay’s description, of course, were approximately seven hundred thousand people of African descent—a not insubstantial omission, given that the total population of the United States was about 3.8 million at the time.<sup>111</sup> Nor was the omission accidental. Most of those

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108. *Id.* Interestingly, the Articles of Confederation had provided a special mechanism for Canada to join the United States, which would have immediately produced a state of affairs somewhat at odds with Jay’s description. See ARTICLES OF CONFEDERATION of 1771, art. XI (“Canada acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.”). Later, with the conclusion of the Mexican-American War and the ratification of the Treaty of Guadalupe Hidalgo in 1848, the United States acquired a substantial number of Mexican-Americans who obviously were not “descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, [or] very similar in their manners and customs . . .” THE FEDERALIST NO. 2, *supra* note 107, at 9. See also WELKE, *supra* note 96, at 70 (discussing incorporation of Mexican-Americans).

109. THE FEDERALIST NO. 2, *supra* note 108.

110. *Id.*

111. See generally U.S. DEP’T COMM., HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, CHART: SLAVE, FREE BLACK, AND SLAVE POPULATIONS, 1780–1830 (Sept. 1975), available at <https://www.census.gov/history/pdf/histstats-colonial-1970.pdf> [<https://perma.cc/PA7A-3YEJ>]. The 1790 census counted 694,207 slaves and 58,660 free persons of color. Slaves accounted for approximately 36 percent of the total population, while free persons of color accounted for approximately 3 percent. *Id.* See also Gordon S. Wood, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 394–99 (2009) (noting that free people of color were not assured of equal treatment). Different issues related to the situation of Native Americans, both as members of sovereign tribes and as individuals. See, e.g., U.S. CONST. art. I, § 2, cl. 3 (excluding from enumeration “Indians not taxed”). Angela R. Riley has noted that the Indian tribes, which had been involved in many wars with the colonists, were seen as “military opponents, not wholly unlike foreign powers,” and that they “were largely excluded from the foundational processes that contributed to the country’s formation; they were not party to the Constitutional

seven hundred thousand people were slaves, and even those who were free did not generally enjoy “full equality before the law.”<sup>112</sup> The extent of their rights depended on the state in which they resided, but they were not favorites of the law at either the state or federal level. When Congress passed the first Naturalization Act in 1790, for example, it specifically limited the possibility of acquiring citizenship through naturalization to foreign-born “white persons.”<sup>113</sup>

The obvious point of Jay’s argument was to persuade his readers as to both the feasibility and the need for a federal form of government and, thus, the need to adopt the Constitution. He therefore emphasizes those factors that counsel unity over those that might weigh in favor of the several state sovereignties going their separate ways. But the people were considerably less homogeneous than Jay’s account might suggest. The people of the small states had interests separate and distinct from those of the large states; those who lived by farming and husbandry had interests different from those engaged in shipping and commerce; those who farmed in the north had interests different from those who farmed in the south; and the interests of creditors were directly opposed to those who owed them money. And the nation was profoundly divided, not only on the issue of slavery, but also according to wealth.<sup>114</sup>

A major theme of *The Federalist*, of course, was the capacity of the federal system to attend to the problem of diverse interests and beliefs. Madison recognized the inevitability of conflicting interests and opinions

Convention and were never formally brought within the federal framework.” Angela R. Riley, *Native Nations and the Constitution: An Inquiry into Extra-Constitutionality*, 130 HARV. L. REV. F. 173, 179–180 (2017). But Gregory Ablavsky notes that the executive’s efforts to clarify the constitutional status of Native Americans “dominated early federal governance, particularly [during] the Washington Administration . . . when the United States entered into major treaties and land purchases with Native nations, fought a lengthy and costly Indian war, and sought to end endemic cycles of frontier violence.” Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1018–19 (2015). Professor Ablavsky elsewhere notes that,

[U]sing Indians to justify the power of the new national state came with a cost: it elevated conquest of Indians to a constitutional principle. Although few Federalists were rabid Indian-haters of the sort common on the frontier, they had sold the Constitution by promising to use federal power against Indians rather than, as Madison had anticipated, to restrain states.

George Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1008 (2014) (footnote omitted). Moreover, “The history of national violence against Indians that followed ratification fulfilled the Hamiltonian vision, as the dispossession and settlement of western lands became one of the central projects of the new federal state.” *Id.*

112. FONER, *supra* note 90, at 4. As Professor Foner notes, “[t]heir situation was anomalous—one jurist referred to free blacks as ‘quasi-citizens.’” *Id.*

113. *Id.*

114. See, e.g., SEAN CONDON, SHAYS’S REBELLION: AUTHORITY AND DISTRESS IN POST-REVOLUTIONARY AMERICA (2015); DAVID P. SZATMARY, SHAY’S REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980).

in *Federalist No. 10*, for example, and he argued in favor of the Constitution on the ground that a republican federal government would be more efficient in controlling the effects of such divisions.<sup>115</sup> He made the same argument at the Constitutional Convention, where he emphasized class interests and differences based on wealth and poverty:

It ought finally to occur to a people deliberating on a Govt. for themselves, that . . . the major interest might under sudden impulses be tempted to commit injustice on the minority. In all civilized Countries the people fall into different classes havg. [sic] a real or supposed difference of interests. There will be creditors & debtors, farmers, merchts. [sic] & manufacturers. There will be particularly the distinction of rich & poor. It was true as had been observd. [sic] (by Mr. Pinkney) we had not among us those hereditary distinctions, of rank which were a great source of the contests in the ancient Govts. as well as the modern States of Europe, nor those extremes of wealth or poverty which characterize the latter. We cannot . . . be regarded . . . as one homogeneous mass, in which everything that affects a part will affect in the same manner the whole. In framing a system which we wish to last for ages, we shd. [sic] not lose sight of the changes which ages will produce. An increase of population will of necessity increase the proportion of those who will labour [sic] under all the hardships of life, & secretly sigh for a more equal distribution of its blessings. They may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this Country, but symptoms of a leveling spirit, as we have understood, have sufficiently appeared in a certain quarters to give notice of the future danger.<sup>116</sup>

Speaking soon after Madison had finished, Alexander Hamilton likewise emphasized the persistence of economic inequality and the divergent interests of rich and poor. He reportedly said that,

It was certainly true that nothing like an equality of property existed: that an inequality would exist as long as liberty existed, and that it would unavoidably result from that very liberty itself. This inequality

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115. The Articles of Confederation had not succeeded in creating a workable frame of government, let alone in resolving these differences. One aim of the founding generation was to establish a workable government, notwithstanding these divisions, by creating a limited government in which power would be diffused. See Keith Dougherty & Justin Moeller, *Constitutional Change and American Pivotal Politics*, 40 AM. POL. RES. 1092, 1097–1102 (2012) (analyzing the impact of size and power on governmental gridlock).

116. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 422–23 (Max Farrand ed., rev. ed. 1937) (detailing the proceedings of June 26, 1787).

of property constituted the great & fundamental distinction in Society.<sup>117</sup>

The extent to which Jay rests his argument on common descent and the profound homogeneity of “the people” is telling. Presumably, Jay thought that the degree of racial, religious, and cultural homogeneity that he attributed to “the people,” together with the wealth of natural resources that the new nation enjoyed, would provide a particularly solid basis on which a “republican” form of government could be established and prosper. That was Jay’s argument in *Federalist No. 2*. But he took a somewhat more nuanced view in *Chisholm v. Georgia*,<sup>118</sup> as H. Jefferson Powell has suggested.<sup>119</sup>

In *Chisholm*, Chief Justice Jay held that Georgia could not invoke the “feudal” principle of sovereign immunity because sovereignty had

117. *Id.* at 424. In a somewhat different vein, George Washington would later emphasize another aspect of American diversity, namely, that of religion, as he did in his well-known letter of August 18, 1790 to the Hebrew Congregation of Newport, Rhode Island. See Letter from George Washington to the Hebrew Congregation of Newport (Aug. 18, 1790), available at <https://founders.archives.gov/documents/Washington/05-06-02-0135> [https://perma.cc/M6J3-KE7H] (“The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.”). Madison was also mindful of factions founded on grounds other than economic interests. In a letter to Thomas Jefferson, dated October 18, 1787, he wrote:

There will be rich and poor; creditors and debtors; a landed interest, a monied interest, a manufacturing interest. These classes may again be subdivided according to the different productions of different situations & soils, & according to different branches of commerce, & of manufactures. In addition to these natural distinctions, artificial ones will be founded, on accidental differences in political, religious or other opinions, or an attachment to the persons of leading individuals. However erroneous or ridiculous these grounds of dissention and faction may appear to the enlightened Statesman, . . . the bulk of mankind . . . will continue to view them in a different light.

Letter from James Madison to Thomas Jefferson (Oct. 18, 1787), in THE LIBRARY OF AMERICA, *supra* note 71, at 142, 150. In his letter to Jefferson, which was written shortly before the publication of *Federalist No. 10*, Madison also debunks the idea that a homogeneous society can be counted on to alleviate the effects of faction:

Those who contend for a simple Democracy, or a pure republic, actuated by the sense of the majority, and operating within narrow limits, assume or suppose a case which is altogether fictitious. They found their reasoning on the idea, that the people composing the Society, enjoy not only an equality of political rights, but that they all have precisely the same interests, and the same feelings in every respect. . . . We know however that no Society ever did or can consist of so homogeneous a mass of Citizens.

*Id.* at 149–50.

118. *Chisholm v. Georgia*, 2 U.S. 419, 470–71 (1793).

119. H. Jefferson Powell, *The United States as an Idea: Constitutional Reflections*, 49 LOY. U. CHI. L.J. 705, 711 (2018).



“devolved on the people” at the time of the Revolution and no longer resided in the government.<sup>120</sup> Thus, according to Chief Justice Jay, the people “are truly the sovereigns of the country, but . . . sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.”<sup>121</sup> Interestingly, even in *Chisholm*, Chief Justice Jay did not quite know how to describe the status of the “African slaves among us,” let alone that of the many free people of color in the United States. But he obviously knew that those he described as equal citizens and “joint tenants in the sovereignty” were not all “descended from the same ancestors, speaking the same language, professing the same religion.”<sup>122</sup>

Professor Powell has observed that, for Jay, “the language of ‘sovereignty’ must be linked inextricably to a particular idea of ‘equality,’” that is, “the political dignity and moral claims of each individual who belongs to the political community.”<sup>123</sup> All citizens being equal in terms of their civil rights, no citizen can be inferior to another, and “[t]he purpose of government therefore lies in ‘the preservation of . . . the equal sovereignty, and the equal right’ of each individual who is part of the people.”<sup>124</sup> Finally, Professor Powell observes that the judgment in favor of *Chisholm* reflects Jay’s understanding of equality, namely, that, “intrinsic to the very idea of the United States is this political community’s promise . . . that each one’s claims matter, that no one is beyond the protection of the nation’s institutions, that our compact is to govern ourselves in such manner that we lose sight of no individual, even in situations of public tension and concern.”<sup>125</sup> When viewed from

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120. *Chisholm*, 2 U.S. at 471.

121. *Id.* at 471–72. Professor Powell specifically discusses the clause pertaining to “the African slaves among us,” noting that Jay was “a leading member of the New York emancipation movement and as governor signed into law the bill providing for the gradual abolition of slavery.” Powell, *supra* note 119, at 713. Quoting Jay, Professor Powell writes:

“I wish to see all unjust and all unnecessary discriminations everywhere abolished,” Jay once wrote, “and that the time may soon come when all our inhabitants of every color and denomination shall be free and equal partakers of our political liberty.” But soon is not now, and Jay recognized that race-based human chattel slavery made a mockery of the idea of the United States as the “land of equal liberty,” where there should be no inferiors. Unless and until ‘all [the] inhabitants’ of the United States are “free and equal” in dignity and respect, on Jay’s understanding the nation betrays its own meaning by giving way to the feudal notion that there are those among us who are not our equals.

*Id.*

122. *Chisholm*, 2 U.S. at 472; THE FEDERALIST NO. 2 (John Jay).

123. Powell, *supra* note 119, at 711.

124. *Id.* at 712.

125. *Id.* at 712.

this perspective, the political community is necessarily inclusive and its unity cannot be made to depend on the happenstance of ethnic, religious, or cultural homogeneity. Its inclusivity derives directly from the sovereignty of its members.

Jay ultimately looked forward to a time when “all our inhabitants of every color and denomination shall be free and equal partakers of our political liberty.”<sup>126</sup> But Jay’s 1787 description of the United States reflects a radically less inclusive understanding of what it means to be an American—the kind of understanding that has provided inspiration over the centuries to those who would make unwelcome whomever spoke a different language, had different manners and customs, worshipped in a different way, or simply looked different.<sup>127</sup> In times of crisis, the nation has often come together in exceptional demonstrations of common purpose. At other times, however, it has failed to act in that spirit of common purpose and respect for the common good that is the cornerstone of a democratic society. The spirit of exclusion has always provided some Americans with a rationale for disrespecting others. Over the course of our history, people have been discriminated against—and sometimes demonized—because of their race or ethnic identity, their poverty, their disabilities and infirmities, their regional backgrounds, their cultures and ways of speaking, their religion or lack of religious belief, their gender or sexual orientations, and their status as immigrants.

## V. AN EQUAL VOICE IN THE POLITICAL PROCESS

Finally, equal access to the franchise and public confidence in the integrity of the electoral system are indispensable to the practice of constitutional democracy, but the political process cannot always ensure that confidence in the fairness of the electoral process will be justified. Politicians are primarily responsible for maintaining our electoral machinery, and their primary interest is not in the fairness of elections.

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126. *Id.* at 713 (quoting Jake Sudderth, *Jay and Slavery*, THE PAPERS OF JOHN JAY (2002) <http://www.columbia.edu/cu/libraries/inside/dev/jay/JaySlavery.html> [https://perma.cc/N3ED-RJNF]).

127. *See generally* ROBERT L. FLEEGLER, *ELLIS ISLAND NATION: IMMIGRATION POLICY AND AMERICAN IDENTITY IN THE TWENTIETH CENTURY* (2013) (discussing American immigration policy in the twentieth century); KATIE OXX, *THE NATIVIST MOVEMENT IN AMERICA: RELIGIOUS CONFLICT IN THE NINETEENTH CENTURY* (2013) (discussing anti-Catholic violence in nineteenth century America); LIPING ZHU, *THE ROAD TO CHINESE EXCLUSION: THE DENVER RIOT, 1880 ELECTION, AND RISE OF THE WEST* (2013) (discussing the anti-Chinese movement in the West). *See also* Jacey Fortin, ‘*Huddled Masses*’ in *Statue of Liberty Poem Are Europeans*, *Trump Official Says*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/14/us/cuccinelli-statue-liberty-poem.html?searchResultPosition=1> [https://perma.cc/73KQ-XQ5N] (detailing the Trump Administration official’s exclusionary interpretation of Lazarus poem on Statue of Liberty).

What interests them the most is winning elections and gaining or maintaining control of the machinery of government. In that regard, politicians are mainly concerned with what works for them, and not necessarily with what works for the people. At the same time, structural constraints make it virtually impossible for the people to prevent electoral unfairness without judicial intervention.<sup>128</sup> In recent years, however, the courts have not only abdicated that responsibility, they have affirmatively assisted the politicians in their search for additional ways to manipulate the electoral system. This strikes at the heart of constitutional democracy.

As previously noted, neither the Constitution of 1787 nor the Bill of Rights specifically guarantees the right to vote in federal elections. From the beginning, the right to vote in federal elections depended on having the right to vote in state elections, and that remains the case today.<sup>129</sup> On the other hand, the Constitution specifically prohibits the states from denying the right to vote in federal elections to citizens who are qualified to vote in elections for the most numerous branch of the state legislature.<sup>130</sup> In addition, several constitutional amendments have limited the states' power to discriminate against potential voters, at least as a formal matter, on certain specific grounds: "on account of race, color,

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128. See, e.g., Michael Wines, *In the War Against Gerrymandering, An Army of Voters Meets A Dug-in Foe*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/us/gerrymandering-redistricting-wisconsin.html> [<https://perma.cc/VKQ7-BVUV>] (discussing the effects on currently gerrymandered districts of a recent Supreme Court decision); Elizabeth Kolbert, *Drawing the Line: How Redistricting Turned America From Blue to Red*, NEW YORKER (June 20, 2016), [https://www.newyorker.com/magazine/2016/06/27/ratfcked-the-influence-of-redistricting?mbid=social\\_twitter](https://www.newyorker.com/magazine/2016/06/27/ratfcked-the-influence-of-redistricting?mbid=social_twitter) [<https://perma.cc/4NGA-PSZP>] (discussing the effects of gerrymandering).

129. The police power grants to state officials the power to determine the qualifications for voting in state elections, and the constitutional text grants them the same power with respect to federal elections. See U.S. CONST. art. I, § 2, cl. 1 ("[T]he Electors [in federal elections] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

130. *Id.*

or previous condition of servitude;”<sup>131</sup> “on account of sex;”<sup>132</sup> “by reason of failure to pay any poll tax, or other tax;”<sup>133</sup> and “on account of age” for those “eighteen years of age or older.”<sup>134</sup> Supreme Court jurisprudence (particularly cases decided by the Warren Court) has imposed further limitations on the states, including such requirements as that which mandates that electoral districts be drawn in such a way as to encompass populations of substantially the same size.<sup>135</sup>

The canonical account of this history takes the form of “a triumphant narrative about voting and citizenship,” which emphasizes the progressive legal expansion of the franchise over time.<sup>136</sup> But “the

131. U.S. CONST. amend. XV. The Fifteenth Amendment prohibited state officials from using “race, color, or previous condition of servitude” to exclude people from the franchise, but it did not prohibit the use of tests and taxes to accomplish the same result. *See, e.g., Louisiana v. United States*, 380 U.S. 145 (1965) (invalidating the “understanding” test); *Guinn v. United States*, 238 U.S. 347 (1915) (invalidating the “grandfather clause”); *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963) (three-judge court) (invalidating the “interpretation” test), *aff’d*, 380 U.S. 145 (1965); Barry Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History*, 60 TUL. L. REV. 314, 325–38 (1985) (discussing three-judge district court’s detailed history of the disenfranchisement of African-Americans in Louisiana in *United States v. Louisiana*). The history of racial discrimination in jury selection proceeded along parallel lines. In *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court held that the Constitution prohibited any race-based exclusion from jury service, but specifically left open the possibility that persons of color could be excluded by other, theoretically “race-neutral” tests.

132. U.S. CONST. amend. XIX. *See, e.g., ELAINE WEISS, THE WOMAN’S HOUR: THE GREAT FIGHT TO WIN THE VOTE 1* (2018) (detailing efforts to secure ratification of the Nineteenth Amendment in Tennessee). Many states granted women the right to vote prior to the adoption of the Nineteenth Amendment. *See CORRINE M. MCCONNAUGHY, THE WOMAN’S SUFFRAGE MOVEMENT IN AMERICA: A REASSESSMENT 2* (2013) (“When the U.S. Constitution was finally amended, more than half of the states already had adopted measures giving women voting rights in at least some statewide elections, and fully three-fourths of the states had instituted some form of voting rights for women.”).

133. U.S. CONST. amend. XXIV. As one judge at the epicenter of the civil rights struggle wrote in 1967, “[U]ntil Congress adopted the Civil Rights Act of 1964 and the Voting Rights Act of 1965, statutes with teeth, Congress and the executive had not acted affirmatively to enforce these rights of national citizenship.” John Minor Wisdom, *The Frictionmaking, Exacerbating Role of Federal Courts*, 21 SW. L.J. 411, 424 (1967). Instead, the political branches had left the enforcement of these rights “to the judiciary, the branch of government least able to carry out enforcement in a reasonable time and on a national scale.” *Id.* In 1965, as Judge Wisdom noted, Congress passed Voting Rights Act of 1965, 79 Stat. 437, which remains in effect and currently provides in relevant part that,

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of [certain other] guarantees.

Voting Rights Act of 1965, § 2 (codified as amended at 52 U.S.C. §§ 10301–10314). In recent years, the Supreme Court has seriously limited the force of this statute. *See infra* pp. 603–07.

134. U.S. CONST. amend. XXVI.

135. Some of these cases are discussed below. *See infra* pp. 603–07.

136. *See Sullivan, supra* note 94, at 217 (discussing limitations on voting rights).

historical truth is,” as Atiba R. Ellis has observed, “that legal expansions of the franchise invariably have been followed by the invention of new barriers to its exercise.”<sup>137</sup> As Professor Ellis has also noted, “[v]arious arguments and beliefs advocating the exclusion of ‘unworthy’ voters have regularly existed over time.”<sup>138</sup> Moreover, “those arguments and beliefs have regularly been used by those in power to justify the exclusion from the franchise, either legally or practically, of those thought to be their political adversaries.”<sup>139</sup>

As early as 1886, the Supreme Court recognized the critical importance of the right to vote in a constitutional democracy, observing that “the political franchise of voting” is rightly “regarded as a fundamental political right because preservative of all rights.”<sup>140</sup> Unlike other fundamental rights, however, the exercise of the franchise requires the intensive, affirmative involvement of the state. The very point of voting is to have some voice in the governance of the state, and the right to vote has no meaning apart from the existence and good order of the state. Among other things, the state must establish electoral districts and draw their respective boundaries; establish qualifications for candidates and political parties who wish to contest elections; design ballots and determine the order in which candidates and issues will appear on the ballot; set the times and places for voting; organize polling places; hire and train officials to monitor elections; and prescribe qualifications for voting, procedures for registering to vote, and the means whereby potential voters may establish their entitlement to vote in a particular place at a particular time.

In other words, the right to vote is neither self-defining nor self-enforcing. On the contrary, the state wields a massive amount of power with respect to the franchise, regulating every aspect of the electoral process and determining, in effect, whether the “fundamental right” to vote actually affords a meaningful opportunity to participate in the political community. Nonetheless, the Supreme Court has long

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137. Ellis, *supra* note 95, at 883.

138. *Id.* Professor Ellis has further suggested that “the meme of voter fraud represents the latest round of America’s evolution from an exclusion-based republic to an inclusive republic supporting full participation of all citizens.” *Id.*

139. Sullivan, *supra* note 94, at 217. See also ALAN WOLFE, *THE POLITICS OF PETULANCE: AMERICA IN AN AGE OF IMMATURETY* 88 (2018) (“Both the Republican Party and a significant group of conservative pundits view the threat to democracy in quantitative terms. Too many people vote, they believe, even if they do not say so explicitly, and the solution is to make it more difficult for them to do so. Proponents of a classic conservative vision of government by the proper few, these restrictionists are fully aware that the history of democracy is the history of the extension of the franchise, and they want that history to stop.”).

140. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

approached issues relating to the franchise as political problems to be solved by the political process, even when they involved the rights of a racial minority that lacked any meaningful voice or influence in the political process. An early manifestation of this approach is *Giles v. Harris*, in which Justice Holmes observed that, if “the great mass of the white population intends to keep the blacks from voting,” only the state or “the legislative and political department” of the federal government can grant “relief from [that] great political wrong.”<sup>141</sup> In other words, the righting of this “great political wrong” was no business of the courts.

### A. *The Colegrove Era*

Although the Court eventually took a different view in cases in which limitations on voting were undeniably linked to racial discrimination, the deferential approach that Justice Holmes articulated in *Giles* would otherwise define the Court’s role in this area for many years.<sup>142</sup> In 1946, for example, in *Colegrove v. Green*,<sup>143</sup> a closely divided Court affirmed the dismissal of a challenge to Illinois’ congressional districts on justiciability grounds.<sup>144</sup> The *Colegrove* decision is noteworthy because of the conviction with which a plurality of the Court articulated a principle of judicial non-interference in the electoral process—regardless of the extent to which the democratic process might have been corrupted. The gist of the *Colegrove* complaint was that Illinois, despite significant population shifts, had failed for decades to reapportion its congressional districts, which therefore lacked approximate equality of population and compactness of territory.<sup>145</sup> As things stood, a vote in one Illinois

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141. *Giles v. Harris*, 189 U.S. 475, 488 (1903).

142. On several occasions during the first half of the twentieth century, the Court struck down laws designed to prevent African Americans from voting in primary elections. *See generally* *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Herndon*, 273 U.S. 536 (1927). As a general matter, however, the Court adhered to the approach that Justice Holmes suggested in *Giles*.

143. *Colegrove v. Green*, 328 U.S. 549 (1946).

144. *Id.* at 565–66.

145. *Id.* at 550–51. Perhaps for obvious reasons, Justice Frankfurter gave little attention in his plurality opinion to the plaintiffs’ undisputed factual allegations. Justice Black filled in the detail in his dissenting opinion:

The complaint alleges the following facts essential to the position I take: Appellants, citizens and voters of Illinois, live in congressional election districts, the respective populations of which range from 612,000 to 914,000. Twenty other congressional districts have populations that range from 112,116 to 385,207. In seven of these districts the population is below 200,000. The Illinois Legislature established these districts in 1901 on the basis of the Census of 1900. The Federal Census of 1910, of 1920, of 1930, and of 1940, each showed a growth of population in Illinois and a substantial shift in the distribution of population among the districts established in 1901. . . . [A]ttempts to have State Legislature reapportion congressional election districts so as more nearly to

congressional district was worth nine times what it was worth in another district.<sup>146</sup> But the Court thought that it could do nothing to cure this democratic deficit. In the plurality's view, any judicial intervention would disrespect the democratic process.

Justice Frankfurter, who announced the judgment of the Court,<sup>147</sup> thought that the requested relief was "beyond [the Court's] competence to grant" because the issue presented was "of a peculiarly political nature and therefore not meet for judicial determination."<sup>148</sup> He also implicitly rejected the gist of plaintiffs' substantive complaint, namely, that their constitutional rights were violated because their votes had less value than those cast in less populous electoral districts.<sup>149</sup> He did so on the ground that "[t]he basis for this suit is not a private wrong, but a wrong suffered by Illinois as a polity."<sup>150</sup> Justice Frankfurter characterized the case as an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of

equalize their population have been unsuccessful. A contributing cause of this situation, according to appellants, is the fact that the State Legislature is chosen on the basis of state election districts inequitably apportioned in a way similar to that of the 1901 congressional election districts. The implication is that the issues of state and congressional apportionment are thus so interdependent that it is to the interest of state legislators to perpetuate the inequitable apportionment of both state and congressional election districts. Prior to this proceeding, a series of suits had been brought in the state courts challenging the State's local and federal apportionment system. In all these cases, the Supreme Court of the State had denied effective relief.

*Id.* at 566–67 (Black, J., dissenting).

146. *Id.* at 569.

147. Justices Reed and Burton concurred in Justice Frankfurter's opinion. *Id.* at 550 (Reed, J., concurring). Justice Rutledge concurred only in the judgment, *id.* at 564 (Rutledge, J., concurring), and Justice Black dissented, joined by Justices Douglas and Murphy. *Id.* at 566, 574 (Black, J., dissenting). Justice Jackson did not participate in the decision. *Id.* at 556. Justice Frankfurter made clear that the question presented was not one that the courts could or should decide. He thought the district court was "clearly right" in dismissing the complaint based on *Wood v. Broom*, 287 U.S. 1 (1932), which held that the Reapportionment Act of 1929 "has no requirements 'as to the compactness, contiguity and equality in population districts,'" but he "also agree[d] with the four Justices . . . [in *Wood*] who [thought] the bill . . . should be dismissed for want of equity." *Id.* at 551 (plurality opinion). As Justice Black pointed out, however, the plaintiffs also alleged constitutional violations, claiming that their "right to have their vote counted is abridged unless that vote is given approximately equal weight to that of other citizens." *Id.* at 567–68. (Black, J., dissenting)

148. *Id.* at 552 (plurality opinion).

149. Justice Black observed:

No one would deny that the equal protection clause would . . . prohibit a law that would expressly give certain citizens a half vote and others a full vote. The probable effect of the 1901 State Apportionment Act will be that certain citizens, and among them the appellants, will, in some instances, have votes only one-ninth as effective in choosing representatives to Congress as the votes of other citizens. Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit.

*Id.* at 569 (Black, J., dissenting).

150. *Id.* at 552 (plurality opinion).

the nation. Because the Illinois legislature has failed to revise its . . . districts in order to reflect great changes, during more than a generation, we are asked to do this, as it were, for Illinois.<sup>151</sup>

Based on that characterization, Justice Frankfurter reasoned that re-mapping the state to create fair congressional districts was beyond the capacity of the courts, and that the most that any court could do in these circumstances would be to issue a declaration that the electoral system was invalid.<sup>152</sup> If the court did that, and the Illinois legislature then chose not to redistrict, members of Congress would have to be chosen on a statewide basis, contrary to Congress's statutorily expressed preference for single-member districts.<sup>153</sup>

In other words, Justice Frankfurter thought that the Court should not engage the constitutional issues presented in *Colegrove*, because, *if* the Court found the districts unconstitutional, and *if* the Illinois legislature then chose not to act in response to that determination, Illinois would have to conduct its congressional elections on an at-large basis, which would be contrary to Congress's expressed preference for single-member districts.<sup>154</sup> Justice Frankfurter's concern is somewhat mystifying because the potential enforcement problem he flagged seems nothing if not routine.<sup>155</sup> If the Illinois statute is unconstitutional, the Court's duty

151. *Id.*

152. *Id.* at 553.

153. *Id.*

154. *Id.*

155. Justice Frankfurter, obviously wishing to make a broad statement about the justiciability of such challenges, did not rely on the particular circumstances of the case, including the short time available to prepare for the next election. Justice Rutledge, however, noted that fact in his concurrence:

The shortness of the time remaining makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek. To force them to share in an election at large might bring greater equality of voting right. It would also deprive them and all other Illinois citizens of representation by districts which the prevailing policy of Congress commands.

*Id.* at 565–66 (plurality opinion). Although Justice Rutledge concurred only in the judgment, the remainder of his opinion suggested some degree of agreement with Justice Frankfurter's overall approach:

If the constitutional provisions on which appellants rely give them the substantive rights they urge, other provisions qualify those rights . . . by vesting large measures of control in the political subdivisions of the Government and the state. There is not, and could not be, except abstractly, a right of absolute equality in voting. At best, there could be only a rough approximation. And there is obviously considerable latitude for the bodies vested with those powers to exercise their judgment concerning how best to attain this, in full consistency with the Constitution.

*Id.* at 566. Like Justice Frankfurter, however, he did not choose to answer Justice Black's point that the vote of some Illinois voters was worth nine times the vote of others. *See id.* at 569 (Black, J., dissenting).



is to say so, and it will be up to Illinois to take whatever corrective action is necessary.

More illuminating, perhaps, is Justice Frankfurter's broader policy justification, namely, that the Court traditionally has "held aloof from" controversies (like this one) that "bring courts into active and immediate relations with party contests."<sup>156</sup> According to Justice Frankfurter, "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people. And it is no less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law."<sup>157</sup> In other words, it would be an affront to democracy for the Court to insist that Illinois alter an electoral system in which one citizen's vote was worth nine times what another citizen's vote is worth.

Justice Frankfurter was unmoved by the *Colegrove* plaintiffs' argument that the case involved "grave evils" and matters of "public morality"<sup>158</sup> for the additional reason that Congress was authorized to intervene if it wished to do so:

The . . . Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress.<sup>159</sup>

Concluding his opinion, Justice Frankfurter again asserted that, notwithstanding the seriousness of the claims, history showed that such matters—"embroiled," as they were, "in politics, in the sense of party contests and party interests"—were for the political branches to

156. *Id.* at 553–54 (plurality opinion). Justice Black responded to this point:

It is true that voting is a part of elections, and that elections are 'political.' But, as this Court [has] said . . . it is a mere 'play upon words' to refer to a controversy such as this as 'political' in the sense that courts have nothing to do with protecting and vindicating the right of a voter to cast an effective ballot.

*Id.* at 572–73 (Black, J., dissenting).

157. *Id.* at 553–54 (plurality opinion).

158. *Id.* at 554.

159. *Id.* Article I, Section 4, Clause 1 of the Constitution grants state legislatures the power to prescribe the "Times, places, and Manner of holding Elections" for Members of Congress, but it reserves to Congress the power to "alter or amend" those regulations. U.S. CONST. art I, § 4, cl. 1. Congress had previously enacted requirements with respect to contiguous territory, compactness, and equality of population, but those provisions were no longer in effect at the time of *Colegrove*. See *Colegrove*, 328 U.S. at 555 (explaining that the 1929 Reinforcement Act dropped those previous requirements). Ironically, Justice Frankfurter attached to his opinion an appendix that showed how widespread was the problem of disparities in apportionment, and, thus, how great and systematic had been the House's disregard of its constitutional obligation. *Id.* at 557.

decide.<sup>160</sup> Indeed, “the most glaring disparities have prevailed as to the contours and the population of districts” in the past, but “[i]t never occurred to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion.”<sup>161</sup> Thus,

[t]o sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. . . . The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion. . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.<sup>162</sup>

In dissent, Justice Black pointed out that the problem seemed incapable of resolution by the political process. The Illinois legislature, which was similarly malapportioned, was unwilling to act, as was Illinois’ elected judiciary.<sup>163</sup>

### B. *The Warren and Burger Courts*

The Supreme Court shifted gears in the early 1960s. The Court seemed to manifest a new understanding of the importance of fairness in elections, a new appreciation for the many ways in which the electoral process can be manipulated for personal and partisan advantage, and a recognition that only the judiciary—particularly the unelected federal judiciary—is capable of ensuring the fairness of the electoral process. Thus, the Court began to act consistent with the understanding that the courts have a special responsibility for safeguarding the integrity of the democratic process.<sup>164</sup>

160. *Id.* at 554.

161. *Id.* at 555.

162. *Id.* at 556.

163. *Id.* at 567–69 (Black, J., dissenting).

164. In its efforts to safeguard the right to vote, the Court relied on several different constitutional provisions. More generally, the Court’s approach seems rooted in concerns similar to those that Justice Stone expressed in *Carolene Products*, at least insofar as circumstances may exist that may interfere with the ordinary operation of the democratic process. See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny. . . . Nor need we enquire into whether similar considerations enter into the review of statutes directed at particular

In 1960, in *Gomillion v. Lightfoot*,<sup>165</sup> the Court invalidated a twenty-eight-sided municipal boundary that excluded virtually all African-Americans (and virtually no whites) from participation in the relevant political community. Notably, the Court rejected the defendants' contention that the controversy involved a non-justiciable political question.<sup>166</sup> In an opinion by Justice Frankfurter, the Court gave short shrift to the defendants' reliance on *Colegrove*. That case was distinguishable, according to Justice Frankfurter, because it did not involve allegations of racial discrimination in violation of the Fifteenth Amendment. In *Gomillion*, on the other hand, the plaintiffs alleged that the municipality's action was based on racial animus.<sup>167</sup>

Two years later, in *Baker v. Carr*,<sup>168</sup> the Court determined that state general assembly districts should be roughly equal in population,<sup>169</sup> and that challenges to the apportionment of districts were not barred by the political question doctrine.<sup>170</sup> In 1964, in *Wesberry v. Sanders*, the Court

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religious . . . or national, . . . or racial minorities [or] whether prejudice against discrete and insular minorities may be a special condition . . . call[ing] for a . . . more searching judicial inquiry.

*Id.*

165. *Gomillion v. Lightfoot*, 346 U.S. 339 (1960).

166. The Court reversed the decision of the court of appeals, which had affirmed the district court's determination that it lacked the "power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama." *Id.* at 340-41. The Supreme Court reversed, noting that the complaint alleged a violation of the Fifteenth Amendment, and that, "if proven, [these allegations] would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering." *Id.* at 341. The Court therefore observed that, "[i]t is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens." *Id.* at 342.

167. In *Gomillion*, Justice Frankfurter wrote that, "[t]he [*Colegrove*] complaint rested upon the disparity of population between the different districts which rendered the effectiveness of each individual's vote in some districts far less than in others. This disparity came to pass solely through shifts in population between 1901, when Illinois organized its congressional districts, and 1946, when the complaint was lodged. During this entire period elections were held under the districting scheme devised in 1901. The Court affirmed the dismissal of the complaint on the ground that it presented a subject not meet for adjudication. The decisive facts in this case . . . are wholly different from the considerations found controlling in *Colegrove*." *Id.* at 346. In other words, the allegations of racial discrimination in violation of the Fifteenth Amendment placed this case within the line of cases that included *Smith v. Allwright*, 321 U.S. 649 (1944), and *Nixon v. Herndon*, 273 U.S. 536 (1927). See *supra* note 142 (noting that the Court had departed from *Giles* in cases involving racial discrimination).

168. *Baker v. Carr*, 369 U.S. 186, 192-94 (1962). In *Baker v. Carr*, the Tennessee general assembly districts had not been reapportioned since 1901 (despite a decennial reapportionment provision in the Tennessee Constitution), and some districts had populations ten times the size of others. *Id.* at 192-94.

169. *Id.* at 207-09.

170. In *Baker*, the Court effectively overruled the portion of *Colegrove* holding that the political

held that congressional districts should be apportioned so that “as nearly as practicable one man’s vote in a congressional election is to be worth as much as another’s.”<sup>171</sup> In his opinion for the Court, Justice Black reviewed the debates concerning the creation of the House of Representatives and concluded, with respect to congressional elections, that,

It is not surprising that our Court has held that [Article I] gives persons qualified to vote a constitutional right to vote and to have their votes counted. . . . No right is more precious in a free country than that of having a voice in the election of those who make the laws under which . . . we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.<sup>172</sup>

Also in 1964, the Court decided *Reynolds v. Sims*, a case involving the apportionment of both chambers of the Georgia state legislature.<sup>173</sup> The Court held “that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”<sup>174</sup> Likewise, in *Carrington v. Rash*, the Court invalidated a Texas statute that treated military personnel as residents of the state from which they had joined the service, thus precluding them from becoming Texas voters, without regard to the length of time they had lived in Texas or any intent they might have had to stay there permanently.<sup>175</sup>

In 1966, in *Harper v. Virginia State Board of Elections*, the Court struck down the Virginia poll tax, holding that “a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or the payment of any fee an electoral standard.”<sup>176</sup> The Court further noted that “wealth or fee-paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”<sup>177</sup>

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question doctrine barred challenges to apportionment decisions. *Baker*, 369 U.S. at 206.

171. *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

172. *Id.* at 17–18.

173. *Reynolds v. Sims*, 377 U.S. 533 (1964).

174. *Id.* at 568.

175. *Carrington v. Rash*, 380 U.S. 89, 96–97 (1965).

176. *Harper v. Va. State Bd. of Elecs.*, 383 U.S. 663, 666 (1966).

177. *Id.* at 670. In reaching that conclusion, the Court overruled its decision in *Breedlove v. Suttles*, 302 U.S. 377 (1937), which had upheld the constitutionality of provisions that conditioned voting on the payment of a fee. *See id.* at 669. In addition, the Court distinguished *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959), which upheld the constitutionality of a literacy test on the ground that the ability to read and write “has some relation to standards designed to promote intelligent use of the ballot.” *Id.* at 665–66.

In the years following *Harper*, the Court decided a number of cases in which the states had attempted to restrict the franchise with respect to specific units of government or governmental purposes.<sup>178</sup> Perhaps the most significant was *Dunn v. Blumstein*,<sup>179</sup> in which the Court invoked the Equal Protection Clause of the Fourteenth Amendment to invalidate certain Tennessee residency provisions that required individuals to have lived in the state for a year and in a particular county for three months to qualify as voters.<sup>180</sup> In an opinion by Justice Marshall, the Court found that the Tennessee residency requirements implicated two fundamental rights, namely, the right to vote and the right to travel. Because “such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote,” a state “may not burden the right to travel in this way” unless it can demonstrate “a compelling state interest.”<sup>181</sup> In *Dunn*, the Court ultimately found that the state had failed to make that showing.<sup>182</sup>

These cases from the 1960s and the early 1970s reflect the Court’s sustained rejection of Justice Frankfurter’s non-interventionist approach in *Colegrove* and a recognition that cool paeans to democracy are no substitute for the judicial action necessary to protect the democratic process. The Court’s jurisprudence from that period prompted John Hart Ely to write that

Sometimes the voting cases, the malapportionment cases in particular, are praised on the ground that they took care of a problem that legislatures had refused to do anything about. That is true, but it is a

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178. In *Kramer v. Union Free School District No 15*, 395 U.S. 621 (1969), for example, the Court invalidated a New York statute that limited the franchise in certain school district elections to those who (a) rented or owned real property within the school district, (b) were the spouses of a property owner or lessor, and (3) the parent or guardian of a child attending a public school in the district. Similarly, in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court struck down a Louisiana statute that conditioned the right to vote with respect to bond issues on the ownership of real property, and the Court held in *Evans v. Cornman*, 398 U.S. 419 (1970), that Maryland could not deny the right to vote in state elections to persons who lived within the boundaries of the National Institutes of Health, which is a federal enclave. Echoing *Yick Wo*, the *Evans* Court emphasize that the right to vote was uniquely precious inasmuch as it is “protective of all fundamental rights and privileges.” *Evans*, 398 U.S. at 422.

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

180. *Id.* at 359–60.

181. *Id.* at 342.

182. The Court noted that, “[i]t may well be true that new residents as a group know less about state and local issues than older residents; and it is surely true that durational residence requirements will exclude some people from voting who are totally uninformed about election matters.” *Id.* at 359–60. Further, the Court stated: “But as devices to limit the franchise to knowledgeable residents, the conclusive presumptions of durational residence requirements are much too crude. They exclude too many people who should not, and need not, be excluded. They represent a requirement of knowledge unfairly imposed on only some citizens.” *Id.* at 360.

dangerously incomplete account. There are many things legislatures “haven’t done anything about” that should be left in precisely that condition. A more complete account of the voting cases is that they involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obviously vested interest in the status quo.<sup>183</sup>

Professor Ely continued, quoting from Chief Justice Warren’s 1969 opinion for the Court in *Kramer v. Union Free School District No. 15*:

The presumption of constitutionality and the approval given ‘rational’ classifications in other types of enactments are based on an assumption that institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge to this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.<sup>184</sup>

Nowhere has Chief Justice Warren’s observation proved more accurate than in the area of decennial redistricting, where incumbents effectively have been empowered to choose their constituents, and the majority party is free to draw district lines to maximize its political influence for the decade to come.

### C. *The Roberts Court*

More recently, the Supreme Court’s jurisprudence with respect to the franchise has moved in a different direction,<sup>185</sup> one that seems more in line with *Giles* and *Colegrove* than with *Gomillion* and *Baker*. In fact, the current Court’s approach is more extreme than *Colegrove* because the Court has not only declined to intervene when overreaching majorities have used their authority to set electoral rules entrenching their own dominance, it has invalidated legislation on those rare occasions when the political process has actually produced democracy-enforcing legislation. In other words, the Court has moved on from Justice Frankfurter’s non-intervention principle to what former Solicitor General and Harvard Law School Professor Charles Fried has recently identified

183. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 117 (1980).

184. *Id.* (quoting *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 627–28 (1969)).

185. *See, e.g.*, STEPHEN E. GOTTLIEB, *UNFIT FOR DEMOCRACY: THE ROBERTS COURT AND THE BREAKDOWN OF AMERICAN POLITICS* 119 (2016) (“The Court is often described as undemocratic because the justices are not elected. But the Burger, Rehnquist, and Roberts Courts have been increasingly undemocratic in a different way—their decisions have been dismissive of malapportionment, gerrymandering, miscounting, and other ways to minimize the voting rights of qualified voters.”).

as “a long-term, shrewdly played but persistent program to get the law out of anything to do with elections.”<sup>186</sup>

Even a brief account of the Court’s recent jurisprudence shows that Professor Fried’s characterization is well-considered. In 2008, in *Crawford v. Marion County Election Board*, the Court upheld the constitutionality of an Indiana law requiring persons who wished to vote in person at polling places (but not in nursing homes or by absentee ballot) to present a special, government-issued photo identification card.<sup>187</sup> Previously, such voters had only been required to verify their identities by signing a “poll book,” which would be checked against signatures on file. The state justified the new requirement as a measure needed to combat the evil of voter fraud, but, as Justice Stevens conceded in the lead opinion for the majority, “[t]he record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.”<sup>188</sup> Nor was there any evidence presented to show that the law would solve that phantom problem.<sup>189</sup> What the evidence did show was that the Indiana law would effectively disenfranchise tens of thousands of voters who lacked a valid form of photo ID, and who, incidentally, tended disproportionately to be poor, members of minority groups, and likely Democratic voters.<sup>190</sup>

In dissent, Justice Souter noted that the Indiana statute “threaten[ed] to impose nontrivial burdens on the voting rights of tens of thousands of the State’s citizens . . . and a significant percentage of those individuals are likely to be deterred from voting.”<sup>191</sup> In Justice Souter’s view,

[A] state may not burden the right to vote merely by invoking abstract interests, be they legitimate . . . or even compelling, but must make a particular factual showing that threats to its interests outweigh the particular impediment it has imposed. The State has made no such

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186. Nina Totenberg, *Fear and Loathing at the Supreme Court—What is Chief Justice John Roberts Up To?*, NPR (July 8, 2019), <https://www.npr.org/2019/07/08/738930098/fear-and-loathing-at-the-supreme-court-what-is-chief-justice-john-roberts-up-to> (interviewing Charles Fried, Harvard Law School professor, Reagan Administration Solicitor General, and former Justice of the Massachusetts Supreme Judicial Court). Alluding to Chief Justice Roberts’s confirmation testimony, Professor Fried further noted that, “There’s no doubt there’s an agenda here. . . . This is not balls and strikes.” *Id.* Totenberg summarized parts of the interview that were not aired: “Fried catalogs Roberts’ decisions in this regard. He wrote the court’s 5-4 decision striking down the Voting Rights Act, a law passed and reenacted repeatedly by large and bipartisan congressional majorities. He wrote or participated in a series of decisions striking down longstanding and newer limits on campaign contributions.” *Id.*

187. *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 181–82 (2008).

188. *Id.* at 194.

189. *Id.* at 195.

190. *Id.* at 186–89.

191. *Id.* at 209 (Souter, J., dissenting).

justification here, and as to some aspects of its law, it has hardly even tried.<sup>192</sup>

In 2010, in *Citizens United v. Federal Election Commission*, the Court declared certain federal campaign finance limitations imposed by the Bipartisan Campaign Reform (McCain-Feingold) Act of 2002<sup>193</sup> to be unconstitutional on their face.<sup>194</sup> The case arose when Citizens United, a nonprofit corporation, developed a highly partisan, ninety-minute “documentary” movie entitled *Hillary: The Movie*, in connection with the 2008 presidential election. The movie presented Senator Clinton and her husband, former President Bill Clinton, in a very negative light. Citizens United wished to advertise the movie, and release it for on-demand viewing, in the thirty-day period preceding the last 2008 Democratic primary contest.<sup>195</sup> Because Citizens United anticipated that its planned advertising campaign and release of the movie during the run-up to the last Democratic primary contest might run afoul of the Federal Election Campaign Act, it brought an action for declaratory and injunctive relief against the Federal Election Commission.<sup>196</sup> The case was initially heard by a three-judge district court, which held in favor of the Commission, and Citizens United appealed to the Supreme Court.<sup>197</sup>

Although Citizens United had initially mounted only an “as applied” challenge to the statute, the Supreme Court ultimately held that the statute was facially unconstitutional because it violated the First Amendment rights of corporations.<sup>198</sup> The case was noteworthy for several reasons. To begin with, the Court decided, after hearing oral argument, that Citizens United’s framing of its claim as an “as applied” constitutional claim was too narrow. Therefore, the Court ordered additional briefing and re-argument on broader grounds. Setting the case for re-argument ultimately allowed the Court to overrule prior case law that Citizens United had not challenged and to strike down the relevant statutory

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192. *Id.* In *Crawford*, the Supreme Court affirmed a divided decision of the Seventh Circuit. See *Crawford v. Marion Cty. Elec. Bd.*, 472 F.3d 949 (7th Cir. 2007). Judge Posner, who wrote the majority opinion in the court of appeals, later conceded that the case was wrongly decided. See RICHARD A. POSNER, REFLECTIONS ON JUDGING 85 (2013) (noting that his decision was wrong).

193. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at scattered sections of 2 and 47 U.S.C.).

194. *Citizens United v. FEC*, 557 U.S. 932 (2009). The Court decided the case in what was substantially a 5-4 decision.

195. *Id.* at 887-88.

196. *Id.* at 888.

197. *Id.* at 887-88.

198. *Id.* at 917.



provision as unconstitutional on its face, rather than “as applied,” as Citizens United had urged.<sup>199</sup>

Most important, *Citizens United* represented the triumph of Justice Kennedy’s peculiar understanding of representative politics, one in which “[f]avoritism and influence” are deemed to be unavoidable, and the government’s only legitimate constitutional interest in regulating campaign finance is the prevention of quid pro quo corruption.<sup>200</sup> “It is well understood,” Justice Kennedy wrote, “that a substantial and legitimate reason, if not the only reason, to cast a vote for, or make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.”<sup>201</sup> Not surprisingly, this is an approach that the Court previously had rejected as a “crabbed view of corruption” and one that failed to reflect “the realities of political

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199. See, e.g., Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CON. LAW 161, 175–83 (2011) (detailing history of Supreme Court’s consideration of the case). Ironically, Justice Kennedy described the Court’s task in the formulaic language the Court typically uses: “In this case we are asked to reconsider *Austin* and, in effect, *McConnell*.” *Citizens United*, 557 U.S. at 311 (Kennedy, J.). Of course, the question the Court answered was one that the Court asked itself. As Justice Stevens stated in his partial dissent, “[e]ssentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.” *Id.* at 398 (Stevens, J., concurring in part and dissenting in part). Expanding the case in this way allowed the Court to rule broadly that, “[t]he Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether,” *id.* at 416 (Kennedy, J.), and to hold that its previous decision in *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), should be overruled, because the Court was wrong in *Austin* to think that “political speech may be banned based on the speaker’s corporate identity.” *Citizens United*, 557 U.S. at 319. Contrary to the majority opinion, Justice Stevens pointed out that “the real question in this case concerns how, not if, the appellant may finance its electioneering.” *Id.* at 415 (Stevens, J., concurring in part and dissenting in part). Further, Justice Stevens observed:

Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote Hillary: The Movie wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast Hillary at any time other than the 30 days before the last primary election. Neither Citizens United’s nor any other corporation’s speech has been “banned.” All that the parties dispute is whether Citizens United had the right to use the funds in its general treasury to pay broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case.

*Id.* at 393–94.

200. *Id.* at 359.

201. *Id.*

fundraising.”<sup>202</sup> Eric Berger has convincingly described the significance of the Court’s switch:

The Court’s vision of representative democracy, then, accepts rent seeking and speech supporting it as inevitable features of our governmental system. On this view, Congress’s evidence that campaign contributions “corrupt,” established only what Justice Kennedy deemed inherent in our governmental system. Many businesses and other interest groups contribute to political candidates precisely because they hope that those candidates, if elected, will pass laws favorable to those contributors. Far from lamenting this state of affairs, the Court accepted it as inevitable. Accordingly, no congressional findings short of quid pro quo could justify regulations that so substantially impinged on campaign contributors’ First Amendment rights.<sup>203</sup>

In other words, “pay to play” is the American way. Justice Stevens took a different view. In his partial dissent, Justice Stevens recognized that limiting the permissible scope of campaign finance regulation to quid pro quo corruption could not possibly serve the public interest in fair elections, let alone promote public confidence in the electoral process. According to Justice Stevens, “[t]he majority cavalierly ignores Congress’ factual findings and its constitutional judgment: It acknowledges the validity of the interest in preventing corruption, but it effectively discounts the value of that interest to zero.”<sup>204</sup> Justice Stevens further observed that,

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202. Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 249 (2010) (quoting *McCannell v. FEC*, 540 U.S. 93, 152 (2003)); see also Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585–86 (2011) (arguing that *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), represents an essentially incoherent set of compromises, the most significant being that which permits the government to limit campaign contributions,” but not “spending . . . due to a lack of evidence that independent spending could corrupt candidates,” and that “the Court’s campaign finance jurisprudence has swung like a pendulum toward and away from deference, as Court personnel changed and Justices (occasionally) voted inconsistently.”). In his early report on the Roberts Court, Michael Kang noted that it was proving to be much less deferential to the government on campaign finance regulation than the Rehnquist Court had been. Kang, *supra*, at 248.

203. Eric Berger, *When Facts Don’t Matter*, 2017 BYU L. REV. 525, 563 (2018). According to Michael Kang, “[t]aken to its logical extreme, Justice Kennedy’s view of corruption may limit campaign finance restrictions to not much beyond the regulation of contributions to candidates and officeholders. Only candidates and officeholders possess access to government power that gives rise to the risk of quid pro quo exchange.” Kang, *supra* note 202, at 250.

Even more intriguing are the implications of *Citizens United*’s deeper reasoning for the regulation of contributions as a general matter, whatever their source. . . . [T]he Court may be skeptical about a risk of quid pro quo corruption inherent in a contribution to someone other than a candidate or officeholder, at least when those funds are not later used to make a contribution to a candidate or officeholder.

*Id.* at 251.

204. *Citizens United*, 557 U.S. at 463 (Stevens, J., concurring in part and dissenting in part).

[T]he majority declares by fiat that the appearance of undue influence by high-spending corporations ‘will not cause the electorate to lose faith in our democracy.’ . . . The electorate itself has consistently indicated otherwise, both in opinion polls . . . and in laws its representatives have passed, and our colleagues have no basis for elevating their own optimism into a tenet of constitutional law.<sup>205</sup>

In 2013, in *Shelby County v. Holder*, the Court once again struck down an important legislative initiative aimed at increasing the fairness of elections.<sup>206</sup> In *Shelby County*, the Court invalidated a central feature of the Voting Rights Act of 1965, which Congress enacted to address entrenched racial discrimination in voting, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”<sup>207</sup> Section 5 of the Act contains a “preclearance” procedure that requires certain states and local governments to obtain a determination from the Attorney General or a three-judge district court that proposed changes to their voting laws or practices would not “deny or abridge the right to vote on account of race, color, or membership in a language minority group.”<sup>208</sup> Section 4(b) contains the coverage formula for determining which states and local governments are subject to preclearance under Section 5.<sup>209</sup>

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205. *Id.* at 458 n.64. Justice Stevens further noted that, “While American democracy is imperfect, few outside the majority of this Court would have thought that its flaws included a dearth of corporate money in politics.” *Id.* at 458. As Richard Pildes has observed, Justice Stevens’s sense of the electorate proved correct in the aftermath of *Citizens United*, when polling showed that 80 percent of Americans opposed the decision, while 65 percent strongly opposed it. Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 111–12; Berger, *supra* note 203, at 525 n.351.

206. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013). The Court struck down Section 4(b) by a 5–4 vote.

207. *Id.* at 535 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)). The Court upheld the constitutionality of the Act by an 8–1 vote in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Justice Black, the sole dissenter, argued that Congress had exceeded its constitutional authority by adopting the preclearance provision. By preventing “some of the States” from adopting state laws or constitutional amendments “without first being compelled to beg federal authorities to approve their policies,” Justice Black thought that the preclearance provision “so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.” *Katzenbach*, 383 U.S. at 353 (Black, J., concurring).

208. *Shelby County*, 570 U.S. at 537.

209. *Id.* at 538. The formula covers jurisdictions that, as of November 1964, November 1968, or November 1972, maintained a prohibited “test or device” as a condition of voting or registering to vote and had a voting-age population of which less than 50 percent either were registered to vote or actually voted in that year’s presidential election. *Id.* at 537–38. The Act was re-enacted, as amended, in 1970, 1975, 1982, and 2006. *See id.* at 537–39. The Court upheld the constitutionality of the 1970 re-enactment in *Georgia v. United States*, 411 U.S. 526, 535 (1973). The 1975 re-enactment was upheld in *City of Rome v. United States*, 446 U.S. 156, 187 (1980), and the 1982 re-enactment was upheld in *Lopez v. Monterey Cty.*, 525 U.S. 266, 287 (1999). The

In *Shelby County*, the Court granted certiorari to decide whether Congress's 2006 reauthorization of Section 5—together with the existing Section 4(b) coverage formula—exceeded Congress's authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.<sup>210</sup> President George W. Bush signed the 2006 reauthorization after it was passed by overwhelming bipartisan majorities in both Houses.<sup>211</sup> Chief Justice Roberts, joined by Justices Kennedy, Scalia, Thomas, and Alito, held that Section 4(b) exceeded Congress's power to enforce the Fourteenth and Fifteenth Amendments.<sup>212</sup> The Chief Justice reasoned that the coverage formula violated federalism and the "equal sovereignty of the states" because its differential treatment of the states is "based on 40 year-old facts" and is not responsive to current needs.<sup>213</sup> The Court further noted that the country "has changed" since the coverage formula was last modified in 1975—in large part because of the effectiveness of the Act—"and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."<sup>214</sup> The Court did not find Section 5 to be unconstitutional, but the invalidation of Section 4(b) rendered Section 5 inoperative.

Justice Ginsburg dissented in an opinion joined by Justices Breyer, Sotomayor, and Kagan. Justice Ginsburg wrote:

In the Court's view, the very success of §5 of the Voting Rights Act demands its dormancy. Congress was of another mind. Recognizing

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constitutionality of the 2006 re-enactment was challenged in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 201 (2009), but the Court did not reach that issue.

210. *Shelby County*, 570 U.S. at 555–57.

211. Justice Ginsburg described the process in her dissenting opinion:

In May 2006, the bills . . . were introduced in both Houses. . . . The House held further hearings of considerable length, as did the Senate . . . . In mid-July, the House . . . passed the reauthorization by a vote of 390 yeas to 33 nays. . . . The bill was read and debated in the Senate, where it passed by a vote of 98 to 0. . . . President Bush signed it a week later, . . . recognizing the need for "further work . . . in the fight against injustice," and calling the reauthorization "an example of our continued commitment to a united America where every person is valued and treated with dignity and respect.

*Id.* at 564–65 (Ginsburg, J., dissenting). In addition, she noted that,

The record supporting the 2006 reauthorization . . . was described by the Chairman of the House Judiciary Committee as 'one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27 1/2 years' he had served in the House.

*Id.* at 593 (Ginsburg, J., dissenting).

212. Justice Thomas would have found Section 5 to be unconstitutional as well. *Id.* at 557 (Thomas, J., concurring).

213. *Id.* at 556–57.

214. *Id.* at 557.

that large progress has been made, Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, §5 remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments “by appropriate legislation.” With overwhelming support in both Houses, Congress concluded that, for two prime reasons, §5 should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress’ province to make and should elicit this Court’s unstinting approbation.<sup>215</sup>

Justice Ginsburg acknowledged that Congress’s enforcement authority was not without limits, but she pointedly reminded the Court that its role was also limited. Justice Ginsburg observed that the Court’s proper role was not to substitute its judgment for that of Congress, but only “to determine whether the legislative record sufficed to show that ‘Congress could rationally have determined that [its chosen] provisions were appropriate methods.’”<sup>216</sup> Justice Ginsburg thought that Congress had met that test. She recalled the many unsuccessful efforts to combat discrimination in the electoral process, repeated the majority’s acknowledgement that “no one doubts” that discrimination in voting still exists,<sup>217</sup> and emphasized that the Voting Rights Act had “worked to combat voting discrimination where other remedies had been tried and failed.”<sup>218</sup> She also emphasized that the preclearance requirement applicable to those “regions of the country with the most aggravated records of rank discrimination against minority voting rights” had been particularly effective.<sup>219</sup>

But just as new forms of discrimination had constantly appeared before the enactment of the Voting Rights Act, they had begun to appear again. Justice Ginsburg wrote:

Second-generation barriers come in various forms. One of the blockages is racial gerrymandering, the redrawing of legislative districts in an “effort to segregate the races for purposes of voting.” . . . Another is adoption of a system of at-large voting in lieu of district-by-district voting in a city with a sizable black minority. By switching to at-large voting, the overall majority could control the election of each city council member, effectively eliminating the potency of the

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215. *Id.* at 559–60 (Ginsburg, J., dissenting).

216. *Id.* at 570 (quoting *City of Rome v. United States*, 446 U.S. 156, 176–77 (1980)).

217. *Id.* at 560.

218. *Id.*

219. *Id.*

minority's votes. . . . A similar effect could be achieved if the city engaged in discriminatory annexation by incorporating majority-white areas into city limits. . . . Whatever the device employed, this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot.<sup>220</sup>

Quoting from a House report on the bill, Justice Ginsburg observed that, “[d]iscrimination today is more subtle than the visible methods used in 1965,” but “the effect and results are the same, namely a diminishing of the minority community’s ability to fully participate in the electoral process and to elect their preferred candidates.”<sup>221</sup> Significantly, Justice Ginsburg also called attention to several recent instances in which “covered jurisdictions” had attempted to enact new barriers to voting, but had failed in those efforts because of the preclearance provision.<sup>222</sup>

Finally, in 2019, in *Rucho v. Common Cause*, the Court decided by a 5-4 vote that challenges to extreme partisan gerrymanders are non-justiciable.<sup>223</sup> Speaking through Chief Justice Roberts, the Court acknowledged that “the [Maryland and North Carolina] districting plans at issue here are highly partisan, by any measure.”<sup>224</sup> According to the Chief Justice, however, the question for the Court was “whether there is an ‘appropriate role for the Federal judiciary’ in remedying the problem of partisan gerrymandering—whether such claims are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere.”<sup>225</sup> The Court chose the second alternative.

Among other things, the Court noted the difficulty of adjudicating partisan gerrymanders.<sup>226</sup> The Court first observed that, “[a]ny standard for resolving such claims must be grounded in a ‘limited and precise rationale’ and be ‘clear, manageable, and politically neutral,’” because “[t]he opportunity to control the drawing of electoral boundaries through the legislative process is a critical and traditional part of politics.”<sup>227</sup> But

220. *Id.* at 563–64.

221. *Id.* (quoting H. R. REP. NO. 109-478, at 6 (2006)).

222. *Id.* at 579–80. From that fact one might infer that, absent the preclearance provision, covered jurisdictions might enact many more barriers to voting, and that has indeed been the case. See generally, CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018) (detailing effects of *Shelby County* decision).

223. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497–98 (2019).

224. *Id.* at 2491.

225. *Id.* at 2494 (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1926–37 (2018)).

226. Among other things, the Court stated that partisan gerrymanders have proved “far more difficult to adjudicate” than racial gerrymanders. *Id.* at 2497.

227. *Id.* at 2498 (quoting *Davis v. Bandemer*, 478 U.S. 109, 145 (1986)).

“the question [in partisan gerrymandering cases] is one of degree: How to ‘provid[e] a standard for deciding how much partisan dominance is too much.’”<sup>228</sup> To act without a clear standard “would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.”<sup>229</sup> Among other things, the Court suggested, the courts would have to choose among “different versions of fairness,” which “poses basic questions that are political, not legal.”<sup>230</sup>

In language reminiscent of Justice Frankfurter’s opinion in *Colegrove*, Chief Justice Roberts wrote: “Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is ‘incompatible with democratic principles,’ . . . does not mean that the solution lies with the federal judiciary.”<sup>231</sup> Also like Justice Frankfurter, the Chief Justice contended that the absence of a federal remedy did not mean that nothing could be done about partisan gerrymanders. He therefore pointed to other possible (if highly implausible) solutions to the problem: “Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void.”<sup>232</sup> In support of his contention concerning the availability of other remedies, he noted that one state supreme court had intervened in such a case, that three states had either created multi-member redistricting commissions or created the position of state demographer to draw district lines, and that a handful of states had enacted redistricting criteria, as either a statutory or constitutional matter.<sup>233</sup> In addition, the Constitution grants Congress some degree of legislative authority with respect to the matter of congressional districts, and it is possible that Congress might choose to exercise that authority in the future, although it has not chosen to do so in the past.<sup>234</sup>

Justice Kagan dissented in an exceptionally hard-hitting opinion joined by Justices Ginsburg, Breyer, and Sotomayor. She summarized the reasons for her dissent in the opening paragraphs of her opinion, which warrant close attention. She first focuses on the Court’s invocation of the political question doctrine and on the singular importance of the constitutional values that the Court refuses to vindicate:

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228. *Id.* (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006)).

229. *Id.* (citing *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004)).

230. *Id.* at 2500.

231. *Id.* at 2506 (quoting *Ariz. State Legislature v. AIRC*, 135 S. Ct. 2652, 2586 (2015)).

232. *Id.* at 2507.

233. *Id.* In her dissent, Justice Kagan points out that these alternatives have generally met with little success. *Id.* at 2524 (Kagan, J., dissenting). See also *infra* text accompanying notes 243–46.

234. *Id.* at 2508.

For the first time ever, the Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In doing so, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.<sup>235</sup>

After reiterating the importance of the right to vote, and describing the effects that extreme partisan gerrymanders have on the political process, Justice Kagan proceeds to show, contrary to the majority's account, that finding a remedy for extreme partisan gerrymandering was not beyond the ken or capacity of the courts:

And checking them is not beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms.<sup>236</sup>

Later in the opinion, Justice Kagan notes that the majority apparently agrees that extreme partisan gerrymanders violate the Constitution

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235. *Id.* at 2509 (Kagan, J., dissenting). As Justice Black did in *Colegrove*, Justice Kagan emphasizes the facts of the case in a way that the majority did not. *See id.* at 2509–12, 2517–19. Justice Kagan states: “As I relate what happened in those two States, ask yourself: Is this how American democracy is supposed to work?” *Id.* at 2509. She also notes that advancements in computer technology have made gerrymanders “far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides,” and that gerrymanders will only become more effective as time goes by. *Id.* at 2513. According to Justice Kagan, the courts below “did not gaze into crystal balls, as the majority tries to suggest.” *Id.* at 2519. “They looked at the evidence—at the facts about how these districts operated—and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.” *Id.*

236. *Id.* at 2509.



because otherwise the question of judicially manageable standards, which it emphasizes in its opinion, would not have come up.<sup>237</sup> She observes that,

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. . . . [T]he majority declares that it can do nothing . . . because it has searched high and low and cannot find a workable legal standard to apply.<sup>238</sup>

Justice Kagan dismisses the majority's inability to identify a reliable standard for appraising extreme political gerrymanders: "But in throwing up its hands, the majority misses something under its nose: What it says can't be done has been done."<sup>239</sup> According to Justice Kagan, the majority "throws a bevy of question marks on the page," but "it never tries to analyze the serious question presented here—whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight."<sup>240</sup> She then proceeds to show that the standard developed below does indeed allow for neutral and manageable oversight.<sup>241</sup> Moreover, the courts would not be overwhelmed—and the sky certainly would not fall—if partisan gerrymanders were held to be justiciable, because the context in which such cases would be litigated would be entirely different: legislators would stop bragging about their feats, plaintiffs would be put to their proofs, and only the most egregious maps would be set aside.<sup>242</sup>

Finally, Justice Kagan noted that the majority was disingenuous in proclaiming that the ordinary political process could solve the problem. "Those harms arise," she observed, "because politicians want to stay in office. No one can look to them for effective relief."<sup>243</sup> Moreover, the majority's easy confidence that the problem could be solved, if not by politicians, by the people directly, was also misplaced. To start with, "[f]ewer than half the states offer voters an opportunity to put initiatives to direct vote."<sup>244</sup> Nor are state courts likely to fill the void. Like the state

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237. *Id.* at 2515.

238. *Id.*

239. *Id.* at 2516.

240. *Id.* at 2519–20.

241. *Id.* at 2519–22.

242. *Id.* at 2522–23.

243. *Id.* at 2523.

244. *Id.* at 2524. Such efforts have met with little success. Moreover, the majority's current invocation of independent commissions as a solution is strained, to say the least. As Justice Kagan observed, the Justices who now point to independent commissions as the solution to the problem

court judges who declined to deal with the “rotten boroughs” involved in *Colegrove*, many state court judges are elected (and subject to re-election). Not surprisingly, they may be even more reluctant than unelected, life-tenured federal judges to grasp the nettle. They may also lack an appropriate body of jurisprudence on which to draw.<sup>245</sup> But the problem remains. Among other things, “partisan gerrymandering has ‘sounded the death-knell of bi-partisanship,’ creating a legislative environment that is ‘toxic’ and ‘tribal.’”<sup>246</sup>

In *Giles* and *Colegrove*, the Court emphasized its own limitations and commended the political process as a remedy for gross manipulations of the political process. The Court decreed that these problems were for the people to remedy, but the Constitution and other factors made it difficult, and probably impossible, for the people to do so. Beginning with *Gomillion* and *Baker*, the Court recognized that there are some situations in which the political process cannot police itself, and that the courts have a special responsibility for protecting the democratic process in such circumstances. More recently, however, the Supreme Court has declined to act on that understanding and has at least implicitly repudiated that role. The practices that the Court has either upheld or found immune to judicial remedy, together with the limits it has imposed upon the political branches, fundamentally distort the electoral process and compromise the very concept of democratic representation. They are also certain to further erode public confidence in our governmental institutions.

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previously took the position that such commissions were unconstitutional:

The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other nonpartisan actors. . . . Some Members of the majority, of course, once [only four years ago] thought such initiatives unconstitutional.

*Id.*

245. Of course, that is not to say that state courts will never rise to the challenge. Indeed, within months of the Supreme Court’s decision in *Rucho*, a three-judge panel of the North Carolina Superior Court, in a unanimous decision, invalidated the North Carolina legislative redistricting plan because of partisan gerrymandering. See *Common Cause v. David R. Lewis*, No. 18 CVS 014001 (N.C. Super. Ct., Sept. 3, 2019), available at <http://www.commoncause.org/north-carolina/wp-content/uploads/sites/22/2019/09/Common-Cause-v.-Lewis-trial-court-decision-9.3.19.pdf> [<https://perma.cc/XB95-VLCK>]. See also Amber Phillips, *Why Democrats’ Big Gerrymandering Win in North Carolina Matters*, WASH. POST (Sept. 4, 2019), <https://www.washingtonpost.com/politics/2019/09/04/how-democrats-win-north-carolinas-redistricting-battle-could-reverberate/> [<https://perma.cc/WW7W-4YRZ>] (commenting on North Carolina court’s decision). But the obstacles are substantial.

246. *Rucho v. Common Cause*, 139 S. Ct. at 2525 (citing Brief for Amici Curiae Bipartisan Group of 65 Current and Former State Legislators in Support of Appellees at 6, 25, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16–1161)).

## CONCLUSION

Towards the end of *Federalist No. 51*, Madison observes that, “[j]ustice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit.”<sup>247</sup> Those words are worth recalling as we conclude this reflection on constitutional democracy and the fraught politics of our time. What, after all, are the conditions of constitutional democracy? To start, we know that constitutional democracy requires shared sacrifice and hard work, but, as Danielle Allen reminds us, it also requires “a form of citizenship that helps citizens generate trust enough among themselves to manage sacrifice.”<sup>248</sup> That trust is in short supply today.

Joan Williams and Robert Wuthnow tell us that one group of our fellow citizens, the “left behind,” feel helpless and alienated from democratic politics. Far from having trust in their fellow citizens or our democratic institutions, the “left behind” express fury at what they deem to be the cluelessness and snobbery of the ruling elites.<sup>249</sup> Of course, expressions of fury are not conducive to the sense of common purpose or respect for the common good that the practice of constitutional democracy requires. But it is not just the travails of those who have been called the “left behind” that warrant our attention in this respect. Members of other groups—those who have been the traditional objects of discrimination by the majority—continue to feel the disadvantages and effects of past discrimination. They also experience present discrimination, in both its overt and subtle forms, as well as neglect—while being suspected, ironically, of being the special favorites of the ruling elites. That, too, breeds alienation and despair.

All of these factors feed into a toxic politics of fear and resentment that politicians are able to exploit for their own advantage. The situation is exacerbated by the fact that politicians—including, but not only, those who seek power through the politics of fear and resentment—often promise much and deliver little. That gap between promise and performance further undermines the trust needed for democratic politics and contributes to a climate of cynicism about the possibilities of constitutional democracy.<sup>250</sup> For these reasons, we can say that the current political climate is rife with fear, distrust, envy, loathing, exclusion, condescension, indifference, despair, and cynicism. These are

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247. THE FEDERALIST NO. 51, at 352 (James Madison) (Jacob E. Cooke ed., 1961).

248. DANIELLE ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE *BROWN V. BOARD OF EDUCATION* 29 (2004).

249. See, e.g., WILLIAMS, *supra* note 11, at 4 (“Deriding ‘political correctness’ becomes a way for less-privileged whites to express their fury at the snobbery of more-privileged whites.”).

250. For some, of course, the lack of delivery on promises may be inconsequential. See METZL, *supra* note 16, at 8.

not the virtues needed for the successful practice of constitutional democracy, but they may well be the necessary consequences of living in a society characterized by great disparities of wealth and status; racial segregation and other forms of discrimination; inequality of opportunity (particularly with respect to education and employment); inadequate access to reliable sources of news and information; the presence of leaders who cynically exploit political polarization for their own advantage; and the absence of a sense of mutual respect and common purpose among citizens.

Constitutional democracy is not a form of government that thrives in barren soil. As we have seen, there are many conditions necessary for constitutional democracy to flourish, not the least of which are an independent and unbiased press and a well-educated, well-informed, alert, and committed electorate. Much more could be said about all of these necessary conditions of democracy, but this Essay has paid particular attention to three of them.

First, as our reading of *Federalist No. 2* shows, a belief in the importance of social homogeneity has been a central—and not very helpful—part of our national story from the beginning. We can see, therefore, that while our current official narrative is one of inclusion, rather than exclusion, that narrative stands in tension with our history, which bespeaks, at best, only a grudging acceptance of those who are in one way or another unlike ourselves. A preference for exclusion runs deep. If we are to be more truly inclusive—and that is indeed necessary to the success of our constitutional democracy—we must be more honest with ourselves about the depth of that yearning for sameness and the need to suppress it.

Second, the conventional myth of American democracy is too simplistic to be helpful in providing a basis for doing what we need to do to strengthen our system of constitutional democracy. The myth fails to appreciate the anti-democratic features of our governmental system, and the contribution they make to the problem of voicelessness. We need to appreciate the tension that necessarily exists in the concept of constitutional democracy by virtue of the differences between constitutionalism and democracy. We can improve our system of government only if we are mindful of that complexity and open to the possibility that we may need to adjust the balance between these two elements.

Finally, constitutional democracy simply cannot continue to exist—and it certainly cannot flourish—unless the electoral process is fair, and the people have confidence in its fairness. That is not the case currently because politicians have successfully gamed many aspects of the electoral system for their own advantage. In the final analysis, the courts,

and only the courts, have a fair prospect of being able to remedy that problem, at least on a large-scale or nationwide basis, but they are no longer willing to try. Indeed, the courts have not only looked the other way when the politicians have gamed the system for their own benefit, in contravention of the common good, the courts have squelched democracy-enhancing legislation on those rare occasions when politicians have actually managed to enact it. As we have shown, the courts once saw clearly their special institutional responsibility for safeguarding our democratic institutions, and it is essential that they regain that earlier understanding. There is much work to be done on a variety of fronts, but these are a few important concerns that must be addressed if our representative democracy is to be preserved and strengthened. Justice is not merely the end of government; it is also a necessary condition of constitutional democracy.